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PROPORTIONALITY'S CULTURAL FOUNDATION

Jordan M. Singer*

TABLE OF CONTENTS

Introduction
I. The Cultural Foundation of Proportionality
   A. Disproportionate Discovery in Context: Observations from Easy Cases
   B. A Cultural Model of Civil Litigation
      1. Civil Litigation's Core Values
      2. The Critical Role of Attorney Discretion
      3. Behavioral Manifestations of Attorney Discretion
         i. Early Thinking About Discovery
         ii. Learning from Litigation Experience
         iii. Cooperation and Professionalism
      4. Excessive Discovery in the Cultural Model
      5. Abusive Discovery in the Cultural Model

II. The Disconnect Between the Federal Rules and the Litigation Culture
   A. The Mistaken Emphasis on Attorney Discretion
   B. The Practical Limitations of Judicial Discretion
   C. The Chasm Between Rule-Based Limits and Cultural Values
      1. Presumptive Limits on Discovery Tools
      2. Mandatory Initial Disclosures

III. Reclaiming and Reinforcing Guided Attorney Discretion
   A. Rules and Culture in Conversation
   B. Combating Excessive Discovery
      1. Legal Education
      2. Practice Area Protocols

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C. Combating Grossly Excessive or Abusive Discovery: The Discovery Matrix

Conclusion

INTRODUCTION

The notion that pretrial discovery should be “proportional” to the specific needs of each case is once again at the forefront of civil litigation. Drawing on widespread concerns that excessive discovery can saddle litigants with extraordinary cost and burden, several respected legal organizations have recently called for discovery to be expressly limited by application of a proportionality principle.¹ Courts, too, have increasingly wrangled with the best way to control the excesses of modern discovery,² pleading with parties to act “responsibly” by narrowly tailoring the type, sequence, and volume of discovery in a manner appropriate to their particular case.³ Many scholars have likewise lent their support to proportionality-based discovery restrictions.⁴ And the proportionality standard has

¹. Among those advancing this position is my former organization, the Institute for the Advancement of the American Legal System at the University of Denver (IAALS). See AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 7 (rev. 2009) [hereinafter ACTL/IAALS FINAL REPORT] (“Proportionality should be the most important principle applied to all discovery.”). IAALS and the ACTL are but two of many organizations dedicated to a proportionality regime. See The Sedona Conference Commentary on Proportionality in Electronic Discovery, 11 SEDONA CONF. J. 289, 291 (2010); see also, e.g., LAWYERS FOR CIVIL JUSTICE ET AL., RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE, AND MEANINGFUL AMENDMENTS TO THE KEY RULES OF CIVIL PROCEDURE 30–31 (2010); SPECIAL COMMITTEE OF THE ABA SECTION OF LITIG., CIVIL PROCEDURE IN THE 21ST CENTURY: SOME PROPOSALS 3 (2010) [hereinafter 2010 ABA REPORT].

². Most notably, the Supreme Court recently discussed the impact of discovery costs in Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 558–59 (2007). For detailed analyses at the district court level, see, for example, Hopson v. Mayor and City Council of Balt., 232 F.R.D. 228, 244 (D. Md. 2005); Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 317–24 (S.D.N.Y. 2003).


even caught on in other common law countries.\(^5\) Everywhere, it seems, proportionality is the watchword of the day.

Despite this widespread support, the promise of "proportional" discovery in every civil case is as far away as ever. The legal community cannot even develop a clear and consistent definition of the key term.\(^6\) Rather, "proportionality" has taken on an "I know it when I see it" quality,\(^7\) subsuming a variety of interrelated, immeasurable, and seemingly contradictory relationships between the volume, cost, burden, or potential value of discovery on the one hand, and the amount in controversy, resources of the parties, importance of the issues, importance of requested discovery, and/or "needs of the case" on the other. Even among experienced judges and lawyers, one can never be sure whether "disproportionate" discovery means the same thing to different people—and even if it does, there is no clear way to communicate that meaning to those who lack significant practice experience.

More importantly, efforts to control the cost and volume of discovery by rule have largely failed. In the early 1980s, a consensus emerged that "disproportionate" discovery (however the term was understood) was caused by the abuse of attorney discretion.\(^8\) In light of this consensus, rulemakers have repeatedly amended the Federal Rules of Civil Procedure to reduce attorney control and increase judicial

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\(^6\) See, e.g., ACTLIAALS FINAL REPORT, supra note 1, at 10 ("Efforts to limit discovery must begin with definition of the type of discovery that is permissible, but it is difficult, if not impossible, to write that definition in a way that will satisfy everyone or that will work in all cases.").

\(^7\) Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

\(^8\) See infra Part I.A.
control over the discovery process. These amendments, however, have had virtually no impact on problematic levels of discovery. The percentage of federal civil cases that experience particularly expensive or voluminous discovery has barely changed over the last half-century, and contemporary attorneys are unconvinced that the amendments, taken together, have meaningfully improved the problems of discovery abuse. Perhaps most telling, the very people who championed discovery rules designed to curb attorney discretion in the first place have reluctantly concluded that such rules “produced only a ripple in the case law” and have “been largely ignored” by attorneys and judges alike.

Faced with this discouraging evidence, the modern impulse has been to redouble existing efforts. Judges today are urged to become even more involved in discovery, substituting their discretion for that of attorneys at earlier and more frequent stages of the discovery process. In addition, some commentators have proposed even more stringent rules to further restrict attorney control over the use of specific discovery tools.

Unfortunately, these additional limitations on attorney discretion are unlikely to work. In practice, limiting attorney discretion has proven to be both a vastly underinclusive solution to the problem of disproportionate discovery (in that tighter restrictions historically have not reduced instances of excessive discovery) and a vastly overinclusive one (in that the great majority of civil cases do not need such restrictions to keep discovery under control). After nearly thirty years of trying to achieve proportionality by restricting attorney discretion during the discovery process, it is time to conclude that our focus has been misplaced.

This Article offers an entirely different approach to the problem of disproportionate discovery, by viewing the

9. See infra note 18 and accompanying text.
10. See, e.g., ACTL/IAALS FINAL REPORT, supra note 1, at 10.
13. See, e.g., Carroll, supra note 4, at 461.
14. See, e.g., ACTL/IAALS FINAL REPORT, supra note 1, at 8–12; 2010 ABA REPORT, supra note 1, at 13–14.
problem through the lens of legal culture. Specifically, I argue that disproportionate discovery is caused not by abuse of attorney discretion, but by a breakdown of the core values and cultural norms that typically animate civil litigation in the United States. Faith in core values such as access to justice, adjudication on the merits, efficiency, and predictability ordinarily motivates lawyers to tailor the scope and volume of their discovery requests appropriately without judicial intervention. It is when these values are not strongly held that two forms of disproportionate discovery emerge. Excessive discovery stems from an inadequate commitment to the culture's core values, leading to sloppy or unfocused behavior during the discovery process. Abusive discovery arises from a commitment to an entirely different set of values (such as intimidation, stonewalling, and exploitation of economic differences) that are anathema to the ordinary civil litigation culture.

Attorney discretion does have a role to play in excessive and abusive discovery, but not the one the Federal Rules contemplate. Discretion is merely the mechanism by which an attorney's fidelity to core values is converted into concrete behavior. When attorneys strongly believe in the core values of civil litigation, their exercise of discretion results in focused queries and cooperative behavior that work to streamline the discovery process. By contrast, when attorneys do not strongly believe in the culture's core values, their exercise of discretion results in uncooperative behavior and poorly focused discovery requests.

Understanding the relationship between faith in core values, attorney discretion, and attorney behavior helps explain why proportionality cannot be achieved simply by restricting attorney discretion during the discovery process. The exercise of discretion is essential to the discovery process, regardless of whether the discovery is ultimately focused or excessive. Limiting discretion in all cases may constrain the handful of attorneys who are prone to excessive or abusive discovery practices but, much more significantly, it also constrains the vast majority of attorneys who act thoughtfully and ethically. Restricting discretion universally, in short, is too blunt a tool. It may stop some excessive or abusive discovery, but it badly hampers the ability of attorneys to engage in efficient discovery as well.
Attorneys and judges have internalized this conclusion, and accordingly employ the proportionality provisions of the Federal Rules of Civil Procedure infrequently and without rigor or enthusiasm. Their mindset will not permit them to institutionalize limits on attorney discretion that ultimately hurt their ability to foster efficient and predictable results. Contrary to common perception, then, it is not simply that counsel and the courts choose not to employ the proportionality rules on a regular basis; it is that collectively they are culturally incapable of doing so.

This Article explores the cultural foundation of proportionality, and the consequences of that foundation, as follows. Part I develops a cultural model of proportionality, which describes the core values of the litigation culture that ordinarily work to keep discovery under control, and identifies broad attorney discretion as the primary mechanism for translating those values into constructive and cooperative attorney behavior. Within this framework, I explain why instances of excessive and abusive discovery should not be viewed as a problem with the mere exercise of attorney discretion. Rather, excessive discovery should be seen as resulting from an erosion of faith in civil litigation’s core values, and abusive discovery as resulting from a wholesale rejection of those values. Part II demonstrates why the existing Federal Rules of Civil Procedure unwittingly undermine the prevailing cultural ethos by identifying attorney discretion, rather than the lack of faith in core values, as the culprit when discovery becomes excessive or abusive. Part III proposes a different set of protocols and practices more in line with the prevailing cultural model, which is designed to steer would-be “disproportionate discoverers” back into the mainstream.

I. THE CULTURAL FOUNDATION OF PROPORTIONALITY

A. Disproportionate Discovery in Context: Observations from Easy Cases

Civil rulemakers have traditionally focused their attention on cases that experience particularly costly or voluminous discovery. This is perfectly understandable. Discovery requests that go far beyond the reasonable needs of a case unnecessarily increase the cost of litigation, prolong
the discovery process, and raise the likelihood of discovery motion practice. Of even greater concern, some instances of disproportionate discovery contribute to costs and delays so prohibitive that it forces one or more parties to settle for reasons unrelated to the merits of the case. Cases with extraordinary levels of discovery also carry vivid anecdotal value, as attorneys and clients share stories about multi-week depositions, million-dollar invoices for restoring electronically stored information, and similar horrors years after they originally took place.

Yet the fact remains that cases with disproportionate discovery are rare. Empirical studies stretching back to the mid-1960s have consistently concluded that discovery is extensive or burdensome only in a small percentage of civil cases, and that in many civil cases, perhaps even a majority, no discovery takes place at all. Even traditionally complex

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18. See PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 28–29 tbl.9 (Federal Judicial Center 1978) (stating that about 52% of cases in a Federal Judicial Center study had no recorded discovery requests); WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 162–81 (Russell Sage Found., 1968) (describing the 1965 Columbia Field Study's conclusions that "very high" discovery costs were unusual and concentrated in a minority of high-stakes cases); JAMES S. KAKALIK ET AL., DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA 27 (1998) (no lawyer work hours on discovery were reported in 38% of cases in a RAND study); EMERY G. LEE III & THOMAS E. WILLGING, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY
cases have, on average, fewer discovery events and fewer discovery disputes than might otherwise be thought. For example, antitrust cases are widely acknowledged to be among the most discovery-intensive case types and the ones most prone to abuse and discovery disputes. Yet a study of antitrust cases in five judicial districts in the 1980s found no evidence of interrogatories, document requests, or deposition notices issued by the plaintiff or the defendant in approximately half of the cases. A 2009 study of civil dockets in eight federal district courts found an average of only 1.12 motions on disputed discovery per antitrust case, 0.66 motions per patent case, and 0.22 motions per securities case. These motions were filed at higher rates than in other

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case types, but the absolute numbers were still quite low.\(^2\) Either discovery events are not occurring with great frequency in these cases, or the proffered requests and responses are not egregious enough to generate disputes that require the court's attention.

These two fundamental characteristics of cases with disproportionate discovery—rarity and severity—frequently combine to hamper meaningful discussion about proportionality. In one camp, attorneys who have directly experienced excessive or abusive discovery argue that more stringent proportionality measures are needed, and that even a rare occurrence of excess is too much.\(^3\) In the other camp, empiricists maintain that the problem is more or less restricted to a small number of cases, and that changes to the Federal Rules are unnecessary.\(^4\) The result has been a stalemate, in which practitioners with a bad discovery experience are told that the problem is not common enough to raise general concerns, and empiricists are told that their aggregate numbers do not adequately reflect the disruptive effect of disproportionate discovery in real cases.

One way to break this longstanding stalemate is to shift the frame of reference and focus instead on the vast majority of civil cases that do not experience disproportionate discovery. These "easy" cases offer valuable lessons about the way attorneys naturally control the level of discovery to keep it within accepted bounds. Under the current Federal Rules, a party could demand ten depositions, promulgate twenty-five interrogatories, and require the production of thousands, or even millions, of documents without running afoul of any particular rule or judicial edict. Yet these outer bounds of discovery volume are rarely encountered; there is "something in the soil" of civil litigation culture that ordinarily causes attorneys to self-limit their discovery requests.\(^5\)

\(^2\) See id. at 97 app. D.
\(^3\) See, e.g., ACTL/IAALS FINAL REPORT, supra note 1, at 7.
\(^5\) PATRICIA NELSON LIMERICK, SOMETHING IN THE SOIL: LEGACIES AND RECKONINGS IN THE NEW WEST 28 (W.W. Norton & Co. 2001) ("[The American] West has had a very full life as an abstraction, an ideal, and a dream. And yet the West is also actual, material, and substantial."). The same can be said for...
Understanding the cases in which discovery is not a problem may be the key to controlling cases in which discovery is, or could become, a problem.

The easy cases are particularly valuable because they can be found in every case type, every court, and every era. Indeed, easy cases made up the majority of civil cases long before the Federal Rules were amended to restrict attorney discretion over the timing and volume of discovery tools, suggesting convincingly that rules alone are not responsible for attorney self-control in the conduct of discovery.26 By examining the easy cases, one can identify the characteristics of the civil litigation culture that naturally foster proportional discovery, as well as the conditions in which those characteristics evaporate.

Deriving insights from easy cases begins with identifying observable attorney behaviors that are associated with controlled discovery. Three such behaviors are readily apparent.27 First, attorneys in cases with “proportional” discovery begin thinking comprehensively about the evidentiary needs of the case at a very early stage in the litigation. They formulate thoughtful discovery plans, organize the sequencing of discovery to hone in on the most promising information, and draft narrowly focused discovery requests that cut to the heart of the dispute. Second, these attorneys refer to past experience with similar case types to determine the most productive discovery tools for the instant case. Far from reinventing the wheel, they rely on lessons learned in previous cases to seek out information efficiently. Finally, attorneys regard cooperation with opposing counsel during the discovery phase to be in their own interest. They see no inconsistency between cooperative and professional relationships with opposing counsel on the one hand, and zealous advocacy for their client on the other. They focus their attention on the substantive application of the law in the case, not on procedural gamesmanship.

These behaviors share two important characteristics. First, they occur naturally in easy cases, meaning that

26. See CONNOLLY ET AL., supra note 18, at 28–29; GLASER, supra note 18, at 162–81; Brazil, supra note 18, at 229–30.

27. For further discussion on these behaviors, see infra Part I.B.3.
lawyers engage in such activities without being required to do so by rule or judicial fiat. Second, all three behaviors are designed to move the case toward a substantive result (whether settlement or final adjudication) in a predictable, efficient and fair way. This is no accident. Fairness, efficiency, predictability, and related ideals are the core values of American civil litigation—values that are fundamental to the operation of the American civil justice system as we know it. For attorneys, resolutions that are fair, efficient and predictable are a matter of professional self-interest, as well as the bedrock of justice and the rule of law. The relative scarcity of cases with excessive or abusive discovery might well be attributed to the faith that most attorneys place in the importance of these core values, and the way in which they ordinarily employ their discretion during the discovery process to promote those values.

The cultural path from the core values of American civil litigation to the behavioral manifestations that keep discovery in check has not been explored before. The remainder of this part sets out a detailed but still preliminary sketch of how it works, with a particular focus on the role of attorney discretion in encouraging and preserving fair, efficient, and predictable processes. Understanding the relationship between proportionality, core values, and attorney discretion in easy cases lays the groundwork for identifying the causes of excessive or abusive discovery, and developing methods to restore the proper balance.

B. A Cultural Model of Civil Litigation

1. Civil Litigation's Core Values

The concept of "legal culture" "refers to patterns of interpretation and behavioural routines regarding law."28 It is, in other words, a set of reasonable expectations about how, when, and under what circumstances the law will be interpreted and applied, and a set of observable behaviors that reflect those expectations. Lawrence M. Friedman, whose groundbreaking work in this area is particularly extensive, has offered a somewhat more detailed definition of

legal culture as the prevailing "legal consciousness—attitudes, values, beliefs, and expectations about the law and the legal system" within a community. Lynn LoPucki captures the idea with a pithier phrase: legal culture is "the law in lawyers' heads."

Although its precise structure and dimensions remain subject to debate, certain generally agreed upon characteristics of legal culture can be defined with confidence. Any culture, legal cultures included, is animated by one or more core values or beliefs. As one set of scholars explains, "each culture possesses a number of basic characteristics which are essential for the transmission and maintenance of that culture; these core values identify a given culture." Core values provide participants in the culture with collective baseline expectations about how they are to behave and how their community is to function, and continued participation in the culture requires acceptance of and adherence to those values. J.J. Smolicz, a noted scholar of education and culture, has explained that "[c]ore values can be regarded as forming one of the most fundamental components of a group's culture. They generally represent the heartland of the group's ideological system and act as identifying values which are symbolic of the group and its membership."

31. The concept of legal culture has been, at times, elusive and controversial. It has been complicated by its extensive use in the comparative law context, where legal culture abuts other cultural phenomena such as language, religion, and national identity. For a rich example of the extent of the debate, see generally COMPARING LEGAL CULTURES passim (David Nelken ed., Dartmouth 1997) (containing a series of essays seeking to clarify—and sometimes complicate—the meaning of legal culture through comparative studies).
32. See, e.g., Condon, supra note 28, at 353; Roger Cotterrell, Conscientious Objection to Assigned Work Tasks: A Comment on Relations of Law and Culture, 31 COMP. LAB. L. & POL’Y J. 511, 512 (2010) (“Culture can be thought of as a complex aggregate of many elements—[including] shared beliefs and ultimate values.”); James L. Gibson & Gregory A. Caldeira, The Legal Cultures of Europe, 30 LAW & SOC’Y REV. 55, 56 (1996) (conceiving of legal cultures as a "broad syndrome of values").
34. JERZY JAROSLAW SMOLICZ, J.J. SMOLICZ ON EDUCATION AND CULTURE
Core values are “superordinate to all other beliefs,” individual or otherwise, in the culture. They provide the fundamental framework for the culture’s operation. Core values often take the form of language, religion, or family structure, but core values need not be religious, moral, or even expressly ethical, as long as they represent shared expectations of common purpose. Moreover, some core values may take precedence over others. As Smolicz notes, “[i]n considering the nature of core values in a particular culture it is important to remember that more than one core value may be involved, and that it may be possible to establish a relative hierarchy of importance among them.”

Core values are so fundamental to a culture’s identity that they must be accepted on their own terms. One who rejects a culture’s core values, or accepts them only superficially, may be excluded from the group or feel unable to continue as a member. For example, one who believes strongly in a pantheon of gods cannot meaningfully be a member of a culture whose dominant core value is monotheism. Similarly, it is hard to imagine anyone successfully participating in the broad culture of American dispute resolution without maintaining at least an abstract belief in the values that animate that culture—“liberty, individualism, egalitarianism, populism, and anti-statism; in sum, . . . the ‘competitive individualism’ so highly valued in America.” Lip service to core values is not enough. An attorney who, for instance, wholly rejects egalitarianism or who attempts to redefine the term in a manner contrary to general notions of human equality will not be accepted into the broader American legal culture for very long. Such individuals are cultural outliers; they may interact with the dominant culture and even embrace some of its mannerisms and terminology, but are not part of the culture’s constituency.

35. NINA JACOB, INTERCULTURAL MANAGEMENT 107 (Kogan Page Limited 2003) (discussing core values in the context of multinational corporations).
36. See SMOLICZ, supra note 34, at 106–12.
37. Id. at 106.
38. Id.
The broader legal culture may be parsed into a variety of related and overlapping subcultures. Professor Friedman argues that "[e]very community has a legal culture," and it is indeed possible to identify several distinct subcultures within the broader American legal culture—each characterized by their members' professional position, area of practice, or geographic location. Friedman, for example, notes that "[o]ne particularly important subculture is the legal culture of 'insiders,' that is, the judges and lawyers who work inside the legal system itself." One might divide this "insider" culture even further to separate out different subcultures for legal practitioners, judges, and court staff, each with slightly differing emphasis depending on the participants' role in the legal process. Similarly, one can identify different practice area subcultures for, among others, civil litigation, criminal justice, alternative dispute resolution and transactional law, separated from each other

41. Id.
42. On the sub-culture for legal practitioners, see, for example, Executive Committee of the Association of the Bar of the City of New York, Statement of Position on Multidisciplinary Practice, 54 RECORD ASS'N B. CITY N.Y. 585, 596 (1999) (identifying the core values of "independence of judgment, loyalty to the client, preservation of confidences, competence, avoiding improper solicitation, and support for pro bono activities and improving the legal system"); see also Bruce A. Green, The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate, 84 MINN. L. REV. 1115, 1117 (2000) (alluding to the same core values). The core values are "independence of judgment, loyalty to the client, preservation of confidences, competence, avoiding improper solicitation, and support for pro bono activities and improving the legal system." Id.
44. See, e.g., W. Warren H. Binford et al., Seeking Best Practices Among Intermediate Courts of Appeal: A Nascent Journey, 9 J. APP. PRAC. & PROCESS 37, 113 (2007) ("The culture and collegiality existing between judges and court staff presumably plays a significant role in they way a given court operates . . . ."); Carolyn Shapiro, The Law Clerk Proxy Wars: Secrecy, Accountability, and Ideology in the Supreme Court, 37 FLA. ST. U. L. REV. 101, 128 (2009) (describing the culture of Supreme Court law clerks as leading them "to be unduly stingy with their certiorari grant recommendations.").
45. On the sub-culture of mediation, see, for example, Beryl Blaustone, The Conflicts of Diversity, Justice, and Peace in the Theories of Dispute Resolution: A Myth: Bridge Makers Who Face the Great Mystery, 25 U. TOL. L. REV. 253, 258 (1994) (identifying as core values the promotion of individual self-actualization, responsibility for one's actions, empowerment of the individual to decide what
by different rules and procedures, procedural expectations, and points of emphasis. Further, the local legal culture (and with it, expectations about the timing, goals, and mechanisms of legal processes) may differ among geographic locations.\footnote{46} Each of these subcultures remains committed to the values of the broader legal culture, but may emphasize these values or train individual behavior somewhat differently.

Our focus here is the subculture of American civil litigation, whose membership consists of attorneys, judges, litigants and others who are repeat participants in the American civil litigation process and accordingly have some sort of investment (professional, financial, emotional, or otherwise) in its successful functioning. Participants in this subculture will almost always also be participants in the broader American legal culture,\footnote{47} and likely are members of other legal subcultures as well.\footnote{48} What makes civil litigation a distinct subculture is the way it embraces and prioritizes the core values of the broader American legal culture in a manner different from any other subculture in the American legal system.\footnote{49}

Civil litigation’s selection and prioritization of core values is unique. Broader values like liberty and populism are sharpened in the subculture of civil litigation into core values such as access to justice,\footnote{50} pursuing justice,\footnote{51} notice,\footnote{52} zealous


\footnote{47} Exceptions may include foreign litigants whose connections to the United States as a whole, and specifically its civil justice system, are limited and infrequent.

\footnote{48} Legal subcultures are not exclusive, and any participant in the American legal system may be at once a member of several different, overlapping subcultures. A judge on the Texas Court of Criminal Appeals, for example, may influence and be influenced by the respective subcultures of the judiciary, the criminal justice bar, and the local legal culture of the Texas state courts.

\footnote{49} Prioritization of core values occurs in all subcultures, not just those within the American legal subculture. For example, Smolicz describes the importance of the Italian language as a core value of the Italian culture, but notes that “among rural Southern Italians at least, the importance of the family as a cultural value may even transcend that of language.” \textit{SMOLICZ, supra} note 34, at 106.

\footnote{50} John L. Carroll, \textit{Value-Based Deaning}, 40 U. TOL. L. REV. 327, 329
advocacy,\textsuperscript{53} litigant participation,\textsuperscript{54} adjudication on the merits,\textsuperscript{55} efficiency,\textsuperscript{56} predictability,\textsuperscript{57} and the rule of law,\textsuperscript{58} among others. These values are closely intertwined. They reflect a fundamental commitment to a fair and efficient resolution of each case on the merits, after adequate participation in a process with a well-defined set of rules and norms. Collectively, these values also help explain why "proportionality" has resisted concrete definition. Members of the civil litigation subculture use "proportionality" as a shorthand for pretrial discovery that adheres to the culture's core values—that is, discovery that advances a case efficiently and predictably toward a resolution on the merits. Just as terms like "freedom" and "equality" are difficult to define in the abstract yet imbued with cultural meaning, so too is "proportionality." It is a single term that reflects a rich and nuanced web of values.

\textsuperscript{51} Friedson, \textit{supra} note 50, at 500; \textit{see also} Karen H. Rothenberg, \textit{Recalibrating the Moral Compass: Expanding "Thinking Like a Lawyer" into "Thinking Like a Leader,"} 40 U. TOL. L. REV. 411, 416 (2009).

\textsuperscript{52} A. Benjamin Spencer, \textit{Understanding Pleading Doctrine}, 108 MICH. L. REV. 1, 18-21 (2009).


\textsuperscript{56} Spencer, \textit{supra} note 52, at 18, 21-23 (discussing efficiency as a core value in the context of pleading); \textit{see also} John H. Langbein, \textit{The German Advantage in Civil Procedure}, 52 U. CHI. L. REV. 823, 825, 846-47 (1985) (arguing that increased judicial control of the fact-gathering process would "eliminate" wasted time and money).

\textsuperscript{57} See Peter Marguilies, \textit{After Marek, the Deluge: Harmonizing the Interaction Under Rule 68 of Statutes that Do and Do Not Classify Attorneys' Fees as "Costs,"} 73 IOWA L. REV. 413, 427 (1988).

\textsuperscript{58} Carroll, \textit{supra} note 50, at 329 (quoting Tommy Wells, the President of American Bar Association).
2. The Critical Role of Attorney Discretion

The core values that give life to a culture are necessarily abstract, and must be given effect through concrete behavior. It is not enough to say, for example, "Be predictable"; participants in the civil justice system must work to foster predictability in every case. In the civil litigation subculture, the mechanism that converts core values into like-minded behavior is the thoughtful use of attorney discretion. Based on their training, experience, and understanding of the law and the players in the civil justice system, attorneys are afforded broad leeway to develop and maintain a litigation strategy that best serves the interests of their clients. Because each case presents different facts, players, evidentiary hurdles, client expectations, and strategies, civil litigation's core values are best served by providing attorneys with wide latitude to act as they see fit.

To better understand the relationship between the core values of civil litigation and the use of attorney discretion to promote and nourish those values, consider an analogy to commercial air travel. Regardless of one's role in the "culture" of air travel—be it an airline executive, member of the flight crew, airplane mechanic, airport screener, gate agent, or passenger—the overarching goal (one might say, "core value") of every commercial flight is to safely transport everyone aboard the flight to the expected destination. There are subsidiary values at work, to be sure—taking off and landing on schedule, making sure all luggage arrives with the passengers, having planes available for the next flight, keeping prices competitive while still allowing airlines to be profitable, building customer loyalty, etc.—but each of these values is secondary to the paramount value of safe travel.

If safe travel is the goal, the discretion of trained and experienced human pilots in flying the plane is the mechanism to reach that goal. We rely on pilots to maneuver the plane away from dangerous objects and weather; to take off and land safely and smoothly; and to communicate with control towers, each other, and the flight crew about the status of the flight. In doing so, we allow pilots considerable discretion in how they operate the plane: they may turn in a different direction to avoid an accident, require passengers to remain seated, delay a takeoff, or land in an unexpected location if concerned about weather conditions or an on-board
emergency, and so on. Because pilots are granted a good deal of discretion, we run the risk that a wayward pilot may threaten a plane's safety, but we accept the general exercise of pilot discretion because no other option better increases the likelihood of achieving safe travel for all travelers.

The parallel argument applies to attorneys and the civil justice system. We are willing to allow wide attorney discretion in conducting pretrial activities because such discretion is the best mechanism we have to promote the ultimate goals (the core values) of a predictable, efficient, and fair resolution on the merits. By contrast, restricting attorney discretion in the pretrial phase makes it harder to promote litigation's core values, because the very people in the best position to nourish those values have less freedom to do so. While unfettered attorney discretion surely carries certain risks and consequences, core values are optimally encouraged when such discretion is more or less freely exercised.

3. Behavioral Manifestations of Attorney Discretion

During the discovery process, attorney discretion translates faith in core values into tangible forms of attorney behavior. Such forms of behavior are accepted as ordinary, responsible, even necessary displays of attorney discretion in furtherance of those values, though they are rarely thought of expressly in those terms. To return to our airplane analogy, common pilot behavior such as periodic checks of the instrument panel, communicating with the control tower, and raising and lowering the airplane's landing gear would be considered typical manifestations of pilot discretion in furtherance of the ultimate goal of safe travel.

In the context of discovery, attorneys likewise typically act in ways that promote civil litigation's core values. As noted earlier, three types of behavior are particularly apparent: (1) early, systematic thinking about the discovery needed to directly address disputed issues; (2) drawing upon the litigation experience of oneself and others (both generally and with respect to the specific type of case); and (3) responding to the internal and external incentives to cooperate with opposing counsel.\(^59\) The following subparts

\(^{59}\) See supra text accompanying note 27.
explain more fully how these behaviors ordinarily operate during the discovery process to keep the scope and volume of discovery at acceptable levels. While these behaviors originate from a cultural demand for predictability, fairness and efficiency, they are naturally self-reinforcing: for each new generation of lawyers, the more the behaviors are used, the more common and accepted they become.

i. Early Thinking About Discovery

The initial factor contributing to the promotion of civil litigation's core values is counsel's willingness to think about a case's specific evidentiary needs from the earliest stages of litigation. As Judge Patrick Higgenbotham has explained, this behavior requires the attorney to "start at the end"—i.e., to expressly consider what information will be necessary for a closing argument at trial, and focus discovery on collecting that information.60 His advice for judges who supervise discovery contains an excellent explanation of how the process should work:

I deployed as a district judge a technique I was taught as a young trial lawyer: Write the charge early and outline the closing argument you would like to make. In major securities and antitrust litigation I insisted that counsel at a very early stage develop the jury questions and a draft charge. At first they were puzzled but they came to see that it offered a guy wire to tie to a destination to which all, including the tiers of underlings on the case, were to be snapped. It is a non too subtle [sic] device for constructing a benchmark for relevance otherwise absent in discovery and to give confidence to decisions to not chase every rabbit.61

Many lawyers will naturally include these types of considerations as part of their initial case assessment, and with good reason: identifying and narrowing issues early on directly promotes case resolutions that are faster, cheaper, and more closely tied to the substantive merits of the dispute. Moreover, even among attorneys who might otherwise choose

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61. Id. (quoting E-mail from Patrick E. Higginbotham, Judge, U.S. Court of Appeals, Fifth Circuit, to Royal Furgeson, Judge, U.S. Dist. Court, W. Dist. of Tex. (May 16, 2008)).
to push a full discovery analysis to a later date, developments in the past decade are making early discovery assessment a more regularly occurring phenomenon. For example, the rapid growth of electronically stored information and the 2006 amendments to the Federal Rules of Civil Procedure designed to address that growth have underscored to many business entities the need to commence litigation holds from the moment a lawsuit appears likely. The process used to develop a litigation hold can serve as an initial template for thinking about broader discovery needs in the case. The bottom line is, cases will not be taken on unless they can be done affordably, and a responsible attorney will plan out anticipated discovery as part of developing a larger case strategy and developing a budget.

**ii. Learning from Litigation Experience**

A second form of attorney behavior designed to control discovery is drawing lessons from practice experience. Over the course of their careers, attorneys are likely to become increasingly efficient at conducting discovery in any type of case. This is partially due to trial and error; after dozens of cases (and likely many fewer), an astute lawyer will determine what types of information proved to be most helpful for prevailing on summary judgment or trial, or negotiating settlements. Experience will also help a lawyer ascertain which forms of discovery are most cost-effective for a particular case type. Even negative experiences are useful:


63. Much has been written on the 2006 e-discovery amendments. For a good overview, see Lee H. Rosenthal, A Few Thoughts on Electronic Discovery After December 1, 2006, 116 Yale L.J. Pocket Part 167, 167 (2006).


65. What is "affordable" varies from case to case and client to client, but nearly all attorneys have a cutoff point at which it does not make economic sense to proceed with the representation. See ACTL/IAALS Interim Report, supra note 15, at A-6 ("[N]early 81% of [respondents] report[ed] that their firms turn away cases when it is not cost-effective to handle them.").

66. No pun intended; lawyers who actually participate in a civil trial are, sadly, a dying breed. For the latest statistics on the decline of civil trials, see Marc Galanter & Angela Frozena, "A Grin Without a Cat:" Civil Trials in the Federal Court 1-3 (May 1, 2010) (unpublished manuscript) (on file with author).
the collection in one’s memory of those cases where discovery was pursued too zealously—to the dissatisfaction of the judge, client, or opposing counsel—is a powerful motivation.

Experience also promotes predictability in initial case assessment. Initial case assessment considers the expected value of the case, which, even in a rough form, can assist the party and counsel in anticipating the amount of a monetary award, setting parameters for settlement negotiations, and constructing a litigation budget. It can also set boundaries for the amount of money a party is willing to spend on discovery. No rational party will spend more than he or she believes the case to be worth, and many will opt for settlement once a certain percentage of the anticipated case value has been reached. Experienced attorneys tend to understand more clearly the value of the case from an early stage, and can craft a reasonable discovery plan and discovery budget accordingly.

Direct personal experience (or access to lessons from another’s experience) with particular case types is also helpful in controlling discovery for two reasons. First, attorneys are more likely to interact with a smaller subset of the bar in their area of specialty, and therefore have less of an incentive to jeopardize their professional and personal relationships within that bar by demanding excessive discovery or engaging in abusive practices. Second, specialized substantive knowledge increases the likelihood that an attorney will better understand critical aspects of the case from an early stage, including the value of the case; the likelihood of resolution by settlement, dispositive motion, or trial; what issues are really in dispute; what facts need to be marshaled to prove the case; and what discovery methods will produce that information in the most efficient and expedient

67. See Mary G. Manetti, Controlling Outside Counsel Costs, in Managing a Corporation’s Law Department, at 117 (PLI Commercial Law & Practice, Course Handbook Series No. 481, 1988).
69. For an extensive discussion of the case evaluation process, see Donald R. Philbin, Jr., The One Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation, 13 HARV. NEGOT. L. REV. 249 (2008).
Beyond superior knowledge, the more experienced litigator is also more motivated to make the discovery process crisper, cheaper, and more efficient. Trials are more challenging and professionally rewarding than depositions or document reviews. The travel often associated with discovery becomes less exciting than it was when the attorney was just starting out. Clients are more likely to return, and refer others, to an attorney whom they feel is cost-effective. There are simply better ways to spend one’s time. Discovery accordingly becomes a necessary evil to the experienced lawyer, a process to be completed thoroughly but quickly so the real substance of the case can be addressed.

iii. Cooperation and Professionalism

The third behavioral factor that contributes to controlled levels of discovery in a case is counsel’s willingness to approach discovery cooperatively, or at least without aggression. It is true that the adversarial system fosters a number of cultural conditions and institutional pressures that work to hinder discovery cooperation. Applying equal and opposite pressure, however, is the self-interest of the parties to collect and organize information in the most cost-effective and efficient manner possible. Indeed, in a 2009 study of

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72. At the 2010 Civil Litigation Conference, Houston attorney Stephen Susman described a series of pretrial agreements that he tries to reach with opposing counsel in every case. See Stephen D. Susman, Pretrial Agreements with Opposing Counsel (unpublished conference material) (on file with author). As a nod to the wisdom of experience, the first proposed agreement requires the lead lawyers in the case—not junior associates—to try to resolve every discovery dispute by telephone. Id.


closed civil cases by the Federal Judicial Center, 63.8% of
plaintiffs’ attorneys and 61% of defense attorneys agreed that
the parties in their cases “were able to reduce the cost and
burden [of the named case] of discovery through
coopera2. Only 11.3% and 12.3%, respectively, disagreed
with that statement.8 Likewise, at least 95% of respondents
in recent, separate surveys of the American College of Trial
Lawyers, American Bar Association Section of Litigation, and
National Employment Lawyers Association agreed that when
opposing counsel are “collaborative and professional”
throughout the litigation process, the results are less costly to
the client.9

Cooperation may be more common where counsel know
each other (even if they do not like each other), and can also
manifest where the clients know each other. For instance, in
arbitration settings where parties have an existing
relationship, the parties tend to agree to eliminate or reduce
the amount of allowable discovery that will take place.8
Similarly, repeated interaction between the same lawyers or
law firms on the same type of case cues each side into the
type of information that the other side is likely to seek and
likely to have available. For example, in the 1970s and 1980s
hundreds of cases were filed against manufacturers of the
prescription drug diethylstilbestrol (DES) on behalf of women
who alleged birth defects resulting from their mothers’ use of
the drug while pregnant.9 DES was a generic drug during

submitted to the court in connection with a dispute . . . . Moreover, cooperation
fosters goodwill and an amicable environment, which could lead to a speedier
resolution—through settlement or otherwise—with lower costs than
antagonistic interactions.”).  
75. LEE & WILLGING, supra note 18, at 30–31 & fig.17.
76. Id. at 30.
77. See ABA SECTION OF LITIGATION, ABA SECTION OF LITIGATION MEMBER
SURVEY: DETAILED REPORT 3 (2009) [hereinafter ABA LITIGATION SECTION
SURVEY] (95% of respondents agreeing or strongly agreeing); REBECCA M.
HAMBURG & MATTHEW C. KOSKI, NAT'L EMP'T LAWYERS ASSOC., SUMMARY OF
RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS, FALL
2009, 13, 42 (2010) [hereinafter NELA SURVEY] (98% of respondents agreeing or
strongly agreeing).
78. Sarah Rudolph Cole, Arbitration and State Action, 2005 BYU L. REV. 1,
40 n.186 (2005).
79. See Donald G. Gifford & Paolo Pasicolan, Market Share Liability Beyond
DES Cases: The Solution to the Causation Dilemma in Lead Paint Litigation?,
58 S.C. L. REV. 115, 117 (2006); Naomi Sheiner, Comment, DES and a Proposed
the time when liability allegedly attached, and many of the cases turned on the plaintiff's ability to prove that a specific defendant manufactured the DES allegedly taken by the plaintiff's mother. Because the key evidentiary issue was well known from the outset of the case, attorneys for both the plaintiffs and the defendant drug manufacturers were able to tailor discovery to focus on this issue. Even if the first few cases might have involved some extraneous discovery, repetition of the same general allegations in many subsequently filed cases quickly brought the most fruitful and efficient lines of discovery into focus. Regular interaction between counsel also reduces the incentive to engage in abusive practices due to the risk that the opposing attorney will respond in kind at the next available opportunity.

4. Excessive Discovery in the Cultural Model

When the core values of civil litigation are strongly held, attorneys exercise their discretion to select the forms and timing of discovery that best promote predictability, efficiency, and fairness. When those values are not strongly held, however, attorney behavior is less likely to reflect their influence. Indeed, the three most commonly observed behaviors that contribute to concerns about proportionality—requesting unnecessarily voluminous or redundant discovery, promulgating overbroad or poorly focused requests, and refusal to cooperate with opposing counsel—can all be explained by the erosion or insufficient development of faith in civil litigation's core values. As explained by the cultural model, excessive discovery is neither an arbitrary occurrence nor an inevitable result of unrestrained attorney discretion. Rather, it is a conspicuous symptom of an attorney's failure to

80. Sheiner, supra note 79, at 972–73. In a handful of states, most notably California and New York, the courts instead developed a “market share liability” approach to DES cases, under which liability was apportioned across all DES manufacturers according to their respective shares of the DES market at the time liability attached. See Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989). Most states, however, retained the traditional requirement that DES plaintiffs identify the manufacturer whose DES proximately caused their injuries.

81. Setear, supra note 70, at 617–20 (discussing the additional incentives to abuse discovery as the size of the bar and individual law firms grow, and law firms expand to a national practice, as these developments make sustained interaction with another lawyer less likely).
embrace fully one or more widely held core values.

Consider the overuse of discovery tools. Particularly in larger law firms, written discovery is left to younger attorneys with varying levels of guidance from more senior lawyers. The relative inexperience of newer attorneys is, unfortunately, often associated with a weaker appreciation of predictability and efficiency in civil litigation, and a concomitant aggressiveness in the discovery realm. Junior attorneys are simply more prone to attack discovery issues with a combination of professional zeal and professional ignorance that leads to excess.\(^8\)

The problem is initially one of education. Most law school courses that touch on civil litigation spend relatively little time on discovery,\(^8\) even though many new litigators will work almost exclusively on discovery for months or years after their initial hire, and even though studies suggest that up to 90% of a case's costs stem from the discovery process.\(^4\) Instead, coursework dances around the mechanics of discovery. Civil procedure classes discuss it in future tense ("you will conduct depositions or answer interrogatories") while evidence and trial advocacy classes discuss it in past tense ("the following facts and documents came out in discovery").\(^8\) Rarely is a law student afforded the opportunity to contemplate the nature of a specific case, what facts are needed to prove his or her position(s), and how those facts might be obtained most efficiently and effectively through the discovery process.\(^6\) As a result, most young

\(^{82}\) See, e.g., Douglas N. Frenkel et al., Bringing Legal Realism to the Study of Ethics and Professionalism, 67 FORDHAM L. REV. 697, 706 (1998); Roger A. Hanson & David B. Rottman, United States: So Many States, So Many Reforms, 20 JUST. SYS. J. 121, 125 (1999).

\(^{83}\) See Edward D. Cavanagh, Pretrial Discovery in the Law School Curriculum: An Analysis and a Suggested Approach, 38 J. LEGAL EDUC. 401, 401 (1988) ("The topics of pretrial discovery and professional responsibility in the conduct of discovery are given short shrift in many law school classrooms."); DAVID I.C. THOMSON, LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE 53 (LexisNexis 2010) (discussing how law schools have failed to prepare their graduates for the skills necessary to conduct electronic discovery).


\(^{85}\) See DAVID I.C. THOMSON, SKILLS & VALUES: DISCOVERY PRACTICE vii (LexisNexis 2010) (noting that while trial practice classes "no doubt teach useful and important skills," they do not adequately build discovery skills).

\(^{86}\) Some first-year civil procedure casebooks are doing a better job of
lawyers are unprepared to undertake the work that, at least initially, will take up the vast majority of their time. The lack of a solid educational foundation breeds conditions for excessive discovery when it combines with the caution and nervousness of inexperience. It is difficult for a young lawyer to admit that he or she is not comfortable thinking through what discovery is needed, and the safe bet is to be overly aggressive with requests and overly defensive with responses. One can much more easily rationalize to a client or senior partner that one asked for too much, or offered too little, than the alternative scenario that one gave up or failed to request the “smoking gun.” This approach is often supported, albeit unintentionally, by more experienced attorney mentors. As one commentator has described:

The only distinct cultural artifact produced and valued by litigators is the “war story,” an oral epic in which tribal elders recount, for the edification of junior associates, the heroic deeds they performed and the smashing victories they obtained during pretrial discovery in cases which including practice exercises on the application of discovery devices to specific fact patterns. See, e.g., Stephen N. Subrin et al., Civil Procedure: Doctrine, Practice, and Context 373, 385–86 (3d ed. Aspen Publishers 2008).

87. See Edward H. Cooper, Discovery Cost Allocation: Comment on Cooter and Rubinfield, 23 J. Legal Stud. 465, 466 (1994) (“It seems fair to assert that much discovery is conducted by people who are not trial litigators. They have little sense of the realistic needs of trial, nor the manageable possibilities of trial.”). One might also add today that much discovery is conducted by people with limited sense of the realistic needs for settlement discussions or motion practice as well.

88. See Frank F. Flegal, Discovery Abuse: Causes, Effects, and Reform, 3 Rev. Litig. 1, 26 (1982).


90. See id. at 322 (quoting a law firm associate as saying, “if the document’s bad for your case, the last thing you want to do is hand it over to the other side. So if there’s a way . . . any way of holding it back, you do it. You’re not going to make the partners or clients very happy if you turn it over without a fight” (ellipsis in original)).
ultimately were settled . . . . Younger lawyers, convinced that their future careers may hinge on how tough they seem while conducting discovery, may conclude that it is more important to look and sound ferocious than to act cooperatively, even if all that huffing and puffing does not help (and sometimes harms) their cases.\footnote{Charles Yablon, \textit{Stupid Lawyer Tricks: An Essay on Discovery Abuse}, 96 COLUM. L. REV. 1618, 1639 (1996) (citations omitted); see also Flegal, \textit{supra} note 88, at 26; Daniel J. Pope & Helen Whately Pope, \textit{"Take Care of Each Other,"} 63 DEF. COUNS. J. 270, 271 (1996) ("What young lawyers see and hear the most about today are the litigators who practice ‘Rambo law’ and ‘hardball discovery.’")} 

It does not follow that every young lawyer will fail to think about discovery in a meaningful way from the outset of the case; perhaps those who enter solo practice or seek out a more experienced and willing mentor in their firms are in a better position to contemplate exactly what facts should be ascertained, and how, from the very beginning. Neither does it follow that every experienced litigator will act thoughtfully when it comes to discovery. But while individual attorneys vary in their approach to the right amount of discovery, the relatively few cases in which discovery spins out of control suggests that for most experienced attorneys, the knowledge gained over years of practice provides a relatively clear, if unstated, guideline.

For some lawyers, regardless of experience, the lure of hourly billing also erodes faith in core values such as fairness, efficiency, and predictability. Short of personal ethics or the demands of a watchful client, there is little to prevent lawyers who bill by the hour from adopting a leisurely pace: each additional hour of discovery translates into higher profits for the firm and higher hours (necessary to reap bonuses) for associates.\footnote{See Flegal, \textit{supra} note 88, at 34–36 (quoting address by Ronald Olsen).}  Even when a partner writes off some of an associate’s time before billing the client, rarely is the time discounted for purposes of meeting minimum billable hour requirements. Law firm associates therefore have a weak incentive to keep billable hours down. For some less scrupulous associates, the same system actively encourages \textit{padding} billable hours.\footnote{See \textit{id.} at 35–36.}

Overbroad or poorly focused discovery requests are also explained by the erosion or underdevelopment of an
appropriate emphasis on resolving a case on its individual merits. One major contributor to this form of erosion is word processing technology. In developing discovery requests, it has become all too easy to pull up an existing set of requests from a previous case of the same type, and loosely tailor it for the instant litigation.\textsuperscript{94} Word processing software allows the changes (sometimes amounting to no more than substituting a caption)\textsuperscript{95} to be made within minutes. Responses are similarly form in nature. A set of responses to document requests, for example, might begin with a long set of impressive but meaningless “General Objections” culled entirely from a prior document; followed by “specific objections” to each request that largely mirror the “General Objections”; and only then by the promise that subject to the forgoing objections, responsive documents, if any, will be produced at a later date.\textsuperscript{96} At no stage in the exchange has any thought been put into what the case is really about, or what specific facts are needed to prove a claim or affirmative defense.\textsuperscript{97} Again, while most lawyers will tailor requests to


\textsuperscript{95} See Kilgarin & Jackson, supra note 94.

\textsuperscript{96} Some courts are finally beginning to clamp down on the “general objection” phenomenon. See, e.g., Andrew A. Rainer & Janet L. Sanders, \textit{New Standing Order: Hello Standard Definitions, Goodbye General Objections}, 53 \textit{BOS. B.J.}, Mar.–Apr. 2009, at 6 (describing a new standing order requiring the elimination of general objections in cases filed in Massachusetts’s Suffolk Superior Court).

\textsuperscript{97} One judge directly took on the problem of canned discovery requests in an era when word processing was still in its infancy, although his words still ring true today, in SCM Societa Commerciale S.P.A. v. Indus. & Commercial Research Corp., 72 F.R.D. 110, 113 n.5 (N.D. Tex. 1976) (“I have seen defendants served with hundreds of irrelevant canned questions that have been cut and pasted together by a paralegal or other staff assistant. In many cases the numbers were not consecutive. If the plaintiff’s lawyer is not willing to take the time to prepare questions to fit his case the defendant and his attorney should not be compelled to answer them. I do not mean that form questions are \textit{per se} inappropriate. However, if used at all, the form or canned questions must be used selectively, must be germane to the case, must be prepared by a lawyer or under his direction, must be a reasonable number given the nature of the case, and must be consecutively numbered. If I am convinced that a lawyer has breached this standard or has in any way acted unreasonably I will deny the
the needs of the case, technology allows lazy or inexperienced attorneys to slide by.

Because the sloppiness that contributes to excessive discovery stems from an insubstantial commitment to civil litigation's core values rather than a wholesale rejection of those values, the problem is at least theoretically curable. No lawyer enters the profession with dreams of cutting and pasting document requests, or becoming embroiled in a discovery dispute. Attorneys are pushed that direction by stress, inexperience, and boredom. Restoring faith in the values that attract bright attorneys to litigation in the first place can help control discovery and give greater satisfaction to attorneys and their clients.

5. Abusive Discovery in the Cultural Model

Like excessive discovery, abusive discovery is associated with attorney behavior that is uncooperative and poorly focused on the case's salient issues, as well as discovery requests that are unnecessarily voluminous, complex, or burdensome. Also like excessive discovery, the behaviors that lead to abusive discovery are a reflection of the attorney's level of faith in his or her culture's core values, brought to life through the attorney's exercise of discretion. With respect to those core values, however, there is a critical qualitative difference. Whereas the excessive discoverer generally subscribes to the core values of the dominant civil litigation subculture, albeit in a weakened and erosive fashion, the abusive discoverer favors an altogether different set of values. The abusive discoverer, for example, may value the exploitation of the parties' economic imbalance over resolution on the merits, psychological intimidation of parties over litigant participation, or stonewalling over efficiency and predictability. Inasmuch as they reject or radically reinterpret the core values of the prevailing civil litigation culture, abusive discoverers cannot be considered members of that culture. Rather, they must be viewed as cultural outliers.

The distinction between excessive discovery and abusive discovery is important, and suggests different solutions to the problems of each. Excessive discovery is best addressed by
shoring up faith in civil litigation's core values. Excessive discoverers share the values of the ordinary civil litigation culture in a weak or underdeveloped way, and it should therefore be possible to change their behavior by strengthening their commitment to those values. The greater an appreciation an attorney has for values such as access to justice, fairness, predictability and resolution on the merits, the more likely he will use his discretion to act in a manner that promotes those values. Abusive discovery, by contrast, is best addressed at the level of attorney behavior. Since abusive discoverers do not subscribe to the core values of the ordinary civil litigation culture, it is far less likely that they will respond to efforts to promote those values. Rather, the behavior that reflects the abusive discoverer's alternate values must be contained, preferably in a way that does not simultaneously hinder the typically efficient workings of the ordinary civil litigation culture.

Regrettably, the current proportionality rules target neither core values nor attorney behavior, but rather the exercise of attorney discretion that binds them together. The results have been bleak. Not only have the current rules failed to lower instances of excessive and abusive discovery, but they have also made it more difficult for the vast majority of attorneys to conduct discovery in line with civil litigation's core values.

II. THE DISCONNECT BETWEEN THE FEDERAL RULES AND THE LITIGATION CULTURE

The cultural model of discovery set forth in Part I posits that the volume and nature of discovery in civil cases are controlled primarily by attorneys' fidelity to deeply held core values. Attorney discretion is the mechanism for converting this fidelity into concrete behavior. Where faith in the core values of civil litigation is present, attorneys exercise their discretion to seek discovery that is narrowly tailored to the dispute, and otherwise act cooperatively. Where that faith is lacking, however, the exercise of discretion manifests itself in the promulgation of disproportionate discovery requests, noncooperation, and other abusive practices.

Unfortunately, previous efforts to control discovery through rulemaking have not taken the full cultural model into account. Rulemakers have simply stopped their analysis
too soon. In examining cases with disproportionate discovery, they have correctly recognized a relationship between uncooperative or inefficient attorney behavior and the exercise of attorney discretion, but have failed to take the necessary next step and tie such behavior back to its real source: the lack of fidelity to the culture’s core values. The product of this view has been a series of civil rules that specifically restrict the exercise of attorney discretion during the discovery process. But because attorney discretion is not the true cause of excessive or abusive discovery, the rules have proven to be largely ineffective. Moreover, because attorney discretion is a necessary conduit for attorneys to express core values, restricting that discretion by rule actually harms the vast majority of attorneys who rely on broad discretion to keep discovery efficient, predictable, and focused.

Once more, the airline analogy may be helpful. Both the cultural model and the federal rulemaking model would consider the failure to completely lower a plane’s landing gear to be pilot error—that is, abuse of pilot discretion. But the cultural model would go farther, associating the error with the pilot’s failure to internalize the “core value” of safe landings. Based on this conclusion, the cultural model would call for better pilot training and on-board reminders to pilots to fully lower the gear. It would, however, leave the actual process and timing of lowering the landing gear in the hands of the pilot, because the ultimate goal of landing the plane safely is maximized when an experienced human pilot is at the helm, and the exercise of pilot discretion is necessary to achieve that goal. By contrast, the rulemaking model would seek to limit the pilot’s discretion when coming in for a landing, perhaps by mandating that an onboard computer lower the landing gear. This may solve the specific problem of pilot error, but it could actually increase the risk of an unsafe landing because it removes the pilot’s ability to substitute her judgment for that of the computer should an emergency arise as the plane is about to land.

The increased risk of an unfair, inefficient, or unpredictable pretrial process resulting from the reduction of attorney discretion parallels the increased risk of unsafe landings when a computer is substituted for a human pilot in the lowering of airplane landing gear. In this Part, I examine
the history of federal rulemaking with respect to combating disproportionate discovery, describe how attorney discretion became the bogeyman for rulemakers, and explain why the current federal discovery rules unwittingly undermine the cultural values that ordinarily promote proportional discovery. This analysis is not meant to criticize the intentions of the Federal Advisory Committee on Civil Rules or the Standing Committee on Rules of Practice and Procedure—who by all measures have recommended the current rules in good faith and with a great deal of thoughtfulness—but rather to identify why the rulemaking measures of the past thirty years have failed to reduce instances of (and concerns about) disproportionate discovery, and to set the stage in Part III for a more promising cultural approach.

A. The Mistaken Emphasis on Attorney Discretion

Attorney behavior is a direct manifestation of civil litigation's core values, but attorney discretion is not. Discretion is value-neutral; it is simply the medium through which values are translated into concrete behavior. Through the exercise of discretion, an attorney's commitment to values such as fairness, efficiency and predictability is converted into focused discovery requests and cooperation with opposing counsel. Similarly, through the exercise of discretion, an attorney's weak or faltering commitment to these core values is converted into behavior that prolongs the discovery process and increases time, cost, volume, and contentiousness. Attorney discretion, then, is necessary to give life to the core values of civil litigation, but discretion itself deserves neither praise when those values are fostered nor scorn when they are not.

Unfortunately, for the past thirty years, most commentators and federal rulemakers have concluded that attorney discretion is indeed the proper point of focus. One early commentator summarized the predicament by stating that abuse of discretion was an unavoidable outgrowth of client representation:

Like other rational individuals, the attorney employed by a litigant as his agent presumably attempts to maximize his own utility. Because an attorney gains some benefits from discovery that do not accrue to his client, and
particularly because the attorney incurs few of the costs of
discovery, the litigant's employment of an attorney to
serve as his agent in litigation creates additional incentives for excessive discovery.\textsuperscript{98}

Later commentators would make the same point, arguing
that "[d]iscovery use and abuse is . . . bound tightly to the
broad discretion given attorneys during the discovery process
and the powerful client obligation"\textsuperscript{99} and that "[t]he ultimate answer to discovery abuse lies in addressing the basic cause:
Absence of judicial oversight has meant that lawyers have the
incentive and opportunity to use the rules for their own
interest rather than to live by the spirit of the rules."\textsuperscript{100}

To be fair, most commentators and rulemakers did not so
brazenly assert that the exercise of attorney discretion had
failed. But the widespread support in the late 1970s and
early 1980s for increased judicial discretion over the discovery
process sent the identical signal. The balance of attorney
discretion and judicial discretion is essentially a zero-sum
game: either the attorney determines whether and what
discovery should go forward, or the judge does. Efforts to
increase judicial discretion in the discovery realm, then, were
equivalent to efforts to reduce attorney discretion. And once
unleashed, those efforts quickly snowballed. As early as
1976, in the wake of the National Conference on the Causes of
Popular Dissatisfaction with the Administration of Justice
(the "Pound Conference"), the American Bar Association
issued a report suggesting that "a prime and personal
responsibility of the trial judge" should be the oversight of the
discovery rules,\textsuperscript{101} and that "[discovery] abuse cannot be
eliminated unless the judge insists on defining the issues
before extensive discovery is permitted."\textsuperscript{102} Wayne Brazil—
then a law professor, later a federal magistrate judge—went
even further in a 1978 article, arguing for at least "sparing[]"


\textsuperscript{99} Jeffrey J. Mayer, Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rules 26 and 37 of the Federal Rules of

\textsuperscript{100} Nathan M. Crystal, Limitations on Zealous Representation in an Adversarial System, 32 WAKE FOREST L. REV. 671, 730 (1997).


\textsuperscript{102} Id.
use of a much expanded role for judges in the discovery process, including the ability of the court to pose its own oral and written questions to witnesses and parties, request documents and admissions of fact, and participate directly in depositions.\(^{103}\)

Increased judicial involvement in discovery drew support from many commentators who had the ears of rulemakers. Even those who were skeptical of the burdens that greater judicial discretion would put on individual judges stated that something had to be done. Frank Flegal and Steven Umin, respectively a Reporter to and a member of the ABA Section of Litigation's Special Committee of the Study of Discovery Abuse, argued in 1981 that:

Abuses of the discovery process will not be brought under control simply by clarifying the limits of allowable discovery and requiring sober evaluation of each discovery request or objection signed by an attorney against those limits. Judges are needed. They have always been needed. The important question is when and where to apply the judicial resource to the best benefit and at an affordable cost.\(^ {104}\)

The next year, Judge William Schwartzer—a leading advocate of increased judicial involvement—argued that the foundational assumptions of the discovery system, and the respective roles of attorneys and judges, should be reassessed:

Instead of thinking of discovery as a way for the lawyers to collect as much information as the judge will permit, and of pretrial as a separate phase at which some fraction of that information is organized for use of trial, we should start thinking from the outset about what sort of case will be tried and what sort of information will be needed to try it.

\[\ldots\]

\textit{Obviously this is not a self-executing process that can be left to lawyers. It requires the active involvement of the judge from the earliest stages of the lawsuit.} The judge will not run the discovery program, but he will be there to provide guidance and to set limits of time, place, subject matter, and the like as may be appropriate in light of the

\(^{103}\) Brazil, supra note 73, at 1357.

issues, even when the attorneys themselves may not be inclined to request them. Guidance of the discovery process will not be supplied, as it is now supplied, by rulings on discovery disputes. Instead, the judge, in consultation with the lawyers, will define, both formally and informally, the scope of the litigation, the issues to be litigated, and the scope of discovery. 105

By 1983, support for limiting attorney discretion in favor of judicial discretion coalesced into a new Federal Rule of Civil Procedure 26(b)(1). This so-called “proportionality” rule provided that:

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c). 106

The Advisory Committee’s stated rationale for the new rule was to “guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.” 107 The key was to use the judge as a discovery gatekeeper. As Arthur Miller, the Reporter to the Advisory Committee, explained:

There is only one way to reduce redundancy and disproportionality, and that way is through the federal judiciary. Nobody would accept a pure dollar test in determining disproportionality. So it falls to the judge to limit if you find redundancy, if you find there has been

ample opportunity earlier, or if you find disproportionality.108

Miller's comments illustrate an important aspect of the Advisory Committee's thoughts on proportionality. Although a Special Committee of the American Bar Association had explicitly acknowledged just three years earlier that in most cases excessive discovery was not a problem109—leading to the logical inference that disproportionate discovery is capable of being prevented in most cases by counsel without any court involvement—suddenly the "only one way to reduce redundancy and disproportionality [was] through the federal judiciary."110 Although attorneys had traditionally enjoyed a great deal of freedom to fashion discovery for their individual cases, from 1983 onward, whether discovery was proportional was for a judge to decide.

B. The Practical Limitations of Judicial Discretion

Initially, many commentators joined the chorus of praise for the judiciary's new discretionary powers. Judge Schwartz er explained that each judge should apply the guidance in the new provisions "to promote efficiency and economy in discovery; he may question and discuss with counsel whether a deposition is really necessary, whether there are better ways of obtaining certain information, such as by voluntary exchange, or whether document production can be limited or streamlined."111 The early enthusiasm for the changes, however, proved to be overstated. The 1983 proportionality provisions (codified today in Rule 26(b)(2)(C)) have not been employed with any real frequency. As one group of commentators noted, the "paucity of reported cases" citing to or applying the rule demands the conclusion that "the amendment itself seems to have created only a ripple in the caselaw."112 Other commentators have offered less charitable assessments, concluding that Rule 26(b)(2)(C) has

110. MILLER, supra note 108, at 32.
111. The Judge's Role in Discovery, supra note 105, at 123.
112. WRIGHT ET AL., supra note 11, § 2008.1.
been "ineffective,"113 "seldom used,"114 and "ignored"115 by the courts. Even federal judges, the most obvious beneficiaries of the 1983 proportionality provisions, have acknowledged that they very rarely invoke Rule 26(b)(2)(C) on their own.116 Professor Miller himself lamented years later that the provisions have "all been largely ignored."117

The provisions of Rule 26(b)(2)(C) failed to gain widespread currency in large part because they disregard the importance of attorney discretion in preserving and promoting civil litigation's core values. To illustrate this point cleanly, I shall focus on one core value in particular: procedural predictability. Predictability is at the heart of civil litigation culture, and its deep interconnection with the other core values of civil litigation make it representative of the cultural ethos as a whole.118 Moreover, the importance of

117. Transcript of the "Alumni" Panel on Discovery Reform, supra note 12, at 815.
118. Essential to the rule of law, for example, is the enforcement of "substantive rights through neutral, predictable, and largely transparent procedures . . . ." Wayne D. Brazil, Rights and Resolution in Mediation: Our Responsibility to Debate the Reach of Our Responsibility, DISPUTE RESOLUTION MAGAZINE, Summer 2010 at 9. Similarly, an essential dimension of access to justice is relative certainty regarding the costs (and time and money) that a litigant is expected to incur; without this certainty, a litigant may be afraid to proceed to a judicially sponsored resolution. See, e.g., Chris Tollefson, Costs and the Public Interest Litigant: Okanagan Indian Band and Beyond, 19 CAN. J. ADMIN. L. & PRAC. 39, 60 (2006) (noting the importance of knowing potential cost liability at an early stage of public interest litigation). Fair notice, too, relies on a predictable process: one commentator has referred to notice and predictability as "two interrelated values." David L. Shapiro, Continuity and Change in Statutory Interpretation, 67 N.Y.U. L. REV. 921, 943 (1992). Put simply, each of these values requires predictability to reach its full expression. Access to justice, notice, or the rule of law which is not predictable is nothing at
predictability in the context of litigation has long been recognized. Jurists as philosophically disparate as Judge Jerome Frank119 and Justice Antonin Scalia120 have emphasized the value of predictability to attorneys—both in counseling their clients as to the line between lawful and unlawful behavior, and in educating clients about what to expect during the litigation process. Like many professionals, attorneys are valued in society in large part for their ability to anticipate certain processes and outcomes with reasonable accuracy. Put more bluntly, no one would hire a lawyer who confessed that he had no idea how the case might proceed or what the final result will likely be.121

When compared to the normally stabilizing role of attorney discretion in the realm of pretrial discovery, the judicial discretion envisioned by Rule 26(b)(2)(C) upsets predictability in three different ways. The first problem is one of strategic uncertainty: should a conscientious attorney even risk raising a proportionality issue with the court? It is no secret that judges greatly dislike proportionality disputes (and discovery disputes generally). They can be time consuming, especially if many requests must be individually reviewed, and resolving them may naturally feel less pressing to a judge than her criminal docket or the resolution of dispositive civil motions.122 District judges may try to alleviate some of the burden by assigning discovery disputes to magistrate judges, but the time that must be spent sorting

all. Id.

119. See Jerome Frank, What Courts Do in Fact, 26 ILL. L. REV. 645, 646 (1931). Judge Frank, of course, was an intellectual leader of the Legal Realist movement and a chief progenitor of the idea that judicial decisions were not straightforward or predictable in many cases, but the fundamental point that attorneys highly value predictability remains a baseline of his argument.


121. Jonathan Molot illustrates this point with a useful example of a one-time plaintiff consulting his or her lawyer about the likelihood of success at trial. See Jonathan T. Molot, Litigation Finance: A Market Solution to a Procedural Problem, 99 GEO. L.J. 65, 69–70 (2010). The lawyer counsels the client to build expectations about the damage award based not on the highest possible amount but rather on a review of similarly-situated cases. Id.

through the efficacy of discovery requests takes away from their equally important tasks, such as mediation of civil cases. Further, judges commonly express frustration that the parties cannot resolve discovery issues on their own. An attorney might therefore decline to raise a proportionality issue with the court, although warranted, if doing so risks damaging the attorney’s long-term credibility with the judge.

A second problem is that even if a judge is willing and able to take on a proportionality dispute, an unavoidable information gap hampers the predictability of his decision. Even the most thoughtful and well-meaning judge does not have as much information as the parties and their counsel on the particular importance of a piece of requested discovery. Attorneys have the relative luxury of being more familiar with the facts and strategy of a case than the judge, and are privy to work product and confidential client information that typically would not be shared with the court. Inasmuch as a judge is almost always working with less information than counsel, an attorney’s ability to predict the outcome of the judge’s proportionality determination may suffer.

Beyond strategic uncertainty and the judicial information gap, there is a third problem: the structure of the proportionality rule itself contributes to unpredictability in the judge’s ultimate ruling. The proportionality test in Rule

123. See Patrick E. Longan, Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators, 73 Neb. L. Rev. 712, 751 (1994) (suggesting that magistrate judges might have more time for mediation if initial disclosures helped alleviate discovery disputes).

124. See, e.g., Stephen G. Easton & Franklin D. Romines II, Dealing with Draft Dodgers: Automatic Production of Drafts of Expert Witness Reports, 22 Rev. Litig. 355, 394 n.163 (2003); Furgeson, supra note 60, at 821 (confessing that early in his judicial tenure, “[e]very time lawyers came before me with a discovery dispute, no matter how legitimate and no matter how hard they had worked to resolve it, I barked at them for bothering me. I treated each and every disagreement as a big pain in my backside.”). See, e.g., The Judge’s Role in Discovery, supra note 105, at 139 (comments of Jerold Solovy) (noting that the attorney who raises a discovery issue “will not receive a friendly welcome from the court because the court does not really want to be bothered”).


126. See Bone, supra note 125, at 1990.
26(b)(2)(C)(iii) offers up five different factors for judicial consideration—"the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues"—without any explicit guidance as to whether or how those factors should be evaluated or weighted. On top of this, various other discovery rules and related Advisory Committee notes have subsequently introduced their own factors for consideration when determining whether permissible discovery should be expanded or shrunken back. These changes gave judges the ability to tailor discovery to individual cases, but simultaneously eroded the parties' ability to predict ahead of time the amount and volume of discovery that would be allowed. With such little guidance, judges asked to make proportionality decisions are essentially engaging in improvisation. Even if each decision is the product of careful consideration, its predictive value for future decisions is suspect at best.

Given the complexity of Rule 26(b)(2)(C), it is perhaps unsurprising that many judges have condensed the proportionality factors into a more straightforward, albeit equally unpredictable, weighing of benefits and burdens. At a conference in 1982 to discuss the proposed new proportionality provision, several judges "indicated that they had already been applying a rough sort of cost-benefit analysis to discovery requests." It appears that even after

128. Robert Bone makes this point more generally with respect to many of the Federal Rules. See Bone, supra note 125, at 1969; see also The Judge's Role in Discovery, supra note 105, at 184 (comment of Charles Halpern).
129. See, e.g., FED. R. CIV. P. 30 advisory committee's note, 2000 Amend. (d) (listing a "variety of factors" that the court "might consider" in determining whether to extend the time for a deposition).
132. The Judge's Role in Discovery, supra note 105, at 103; see also Richard L. Marcus, Discovery Containment Redux, 39 B.C. L. REV. 747, 773 (1998) ("The concept of proportionality was already intrinsic to Rule 26 before 1983.").
the new factors for consideration—amount in controversy among them—were introduced in 1983, most proportionality analyses continued to follow the rather mechanistic balancing of perceived benefits and burdens. Indeed, many discovery opinions have simply collapsed the explicit proportionality factors into the question of “whether the burden or expense of the proposed discovery outweighs its likely benefit”—without analysis or even recognition of the specific factors.\textsuperscript{133} Perhaps the benefit/burden test feels more comfortable to the judiciary, and more in step with the traditional role of the judge as removed from the details of the case until trial, or at least summary judgment. The more complex balancing test introduced in 1983, by contrast, was conspicuously tied to a more active (and perhaps less comfortable) judicial role, and was accordingly neglected.\textsuperscript{134}

The unpredictability of individualized proportionality determinations has real consequences for parties and counsel. One judge’s consideration of the need for ten additional interrogatories may yield a result quite different from another judge’s consideration of the same question.\textsuperscript{135} Moreover, judicial determinations at the discovery stage will impact the parties’ decision-making with respect to summary judgment, trial, and settlement negotiations going forward, and the judge must account for these effects as well.\textsuperscript{136} Of course, there is little appellate guidance since so much falls within the realm of judicial discretion. As a result, both parties and judges may find themselves wondering what will be the next step. One attorney summed up the situation by arguing that discovery “rules don’t help because trial courts operate with almost unfettered discretion and appeals are


\textsuperscript{134} See Transcript of the “Alumni” Panel on Discovery Reform, supra note 12, at 828 (quoting Arthur Miller) (“[Judicial case] management as a matter of doctrine was not recognized in the Federal Rules of Civil Procedure until 1983 when Rule 16 was amended . . . and said to the district judges, ‘management is part of your job description.’”).

\textsuperscript{135} See, e.g., The Judge’s Role in Discovery, supra note 105, at 103.

\textsuperscript{136} See Bone, supra note 125, at 1979–80.
almost nonexistent . . .". As a result, "[l]itigators cannot predict how a court will treat discovery. No uniformity exists between courts or even within a particular district among the judges, and the trial courts receive no guidance from the courts of appeal on how to deal with discovery issues."138

Ultimately, using a judge to control discovery on a case-by-case basis is a clumsy approach. No matter how talented the judge, determinations about the proper use of discovery and specific discovery tools in any particular case are better left to the attorneys on the case, who are more familiar with the facts and needs of the case, and who are directly responsible to their clients.139 There is too much the judge never knows about the case that impacts discovery decisions—including investigations that appeared fruitful but later dried up, information subject to the attorney-client privilege, and counsel’s litigation strategies.140 Further, even if attorneys were not clearly the best focal point for using and controlling discovery, the exercise of judicial discretion to monitor and control individual discovery requests is not a particularly good use of judicial energy.141

The dilemmas posed by direct judicial involvement in discovery have proven too much even for some judges. At the National Conference on Discovery Reform in 1982, Judge Walter Jay Skinner commented:

As to the new role of the judge in discovery, some doubt has been expressed as to whether the judges will be able to do a good job in fine-tuning the discovery. In my view, it is perfectly clear that they will not. There is no way that a judge can take a file with three folders and a set of interrogatories numbering 367 and in any practical way determine which of those 367 interrogatories are appropriate for all the materials in those three folders. As

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138. Id.
139. See supra note 70, at 626–27. Attorneys may from time to time embrace discovery limits to give them protection against malpractice claims by overzealous clients who assert that not enough discovery was conducted, see, for example, Praxair, Inc. v. Hinshaw & Culbertson, No. 97 C 3079, 2000 WL 283968, at *3–4 (N.D. Ill. Mar. 10, 2000), but even then limits are better set at the beginning of the case rather than as part of a review of individual requests under Rule 26(b)(2)(C)(iii).
140. See Bone, supra note 125, at 1990; Allen & Guy, supra note 125, at 29.
141. See Bone, supra note 125, at 1990–95.
a result, when the judge becomes involved in that aspect of discovery, the results will probably be rather crude and not as good as the lawyers could do themselves.\(^\text{142}\)

Even Judge Schwartzer, a leading advocate of discovery reform and judicial involvement in limiting discovery, expressed concerns about whether judges should be substituting their judgment for that of trial counsel: "Who, after all, is running the case? Who has the responsibility for the client's welfare, and who must shoulder the blame for defeat?"\(^\text{143}\)

Beyond the difficult application of the rule, the 1983 amendments to Rule 26(b) continue to hamper procedural predictability because they do not require, or even necessarily encourage, courts and parties to think about proportionality in a comprehensive way. As discussed above, attorney fealty to predictability in the ordinary civil litigation culture typically manifests itself in comprehensive thinking about the case's specific discovery needs from an early stage of the litigation, as well as consulting lessons drawn from past experience with similar case types. These behaviors treat individual discovery requests as part of a larger enterprise in the collection of potentially useful evidence. The language of the Rule 26(b)(2)(C) proportionality test, however, invited courts to focus instead on discrete discovery requests, by considering whether specific, disputed discovery tools, presented individually, were disproportionate for a case. Many courts took that invitation.\(^\text{144}\) Nothing in the rule specifically requires a judge to think about the case as a whole in making his or her determination, and nothing in those provisions explicitly suggests that the same broad thinking should be required of the parties. This is a notable and rather stunning omission given that the proportionality provisions were inserted at the same time that the initial pretrial conference was given an expanded role in mapping out discovery in a case.\(^\text{145}\) Some judges have used the

\(^{142}\) *The Judge's Role in Discovery*, supra note 105, at 195–96.

\(^{143}\) Id. at 120.


\(^{145}\) See FED. R. CIV. P. 16(b) (1983).
proportionality provisions to develop an early framework at the initial pretrial conference for guiding discovery generally, but Rule 26(b)(2)(C)(iii) itself primarily contemplates that the balancing test will be conducted in response to a motion by the parties during the discovery phase.

With so many practical weaknesses, the promise of the 1983 amendments had dimmed by the end of the 1980s, and grumbling about disproportionate discovery returned. One commentator noted that the judges’ perceptions of their role in controlling discovery were very different from the original assumptions and wishes of the Advisory Committee when it came to working to keep discovery proportional: “[L]awyers do not do it, . . . [district] judges cannot do it, and magistrates hate to do it. So nobody is doing it.” On the fiftieth anniversary of the Federal Rules of Civil Procedure, one attorney lamented that Rule 26(b)(2)(C) was “an extremely valuable suggestion to the courts, but it has proved too subtle to do the job. The scalpel having been attempted unsuccessfually, it is now time for the axe.”

C. The Chasm Between Rule-Based Limits and Cultural Values

1. Presumptive Limits on Discovery Tools

Perhaps because the expansion of judicial discretion did not provide the promised remedy for disproportionate discovery, additional restrictions on attorney discretion followed the 1983 amendments. In 1993, the Federal Rules of Civil Procedure were amended to impose presumptive limits on the use of interrogatories (25 per party) and depositions (10 per side). After an initial period during which district

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146. See Transcript of “Alumni” Panel on Discovery Reform, supra note 12, at 834 (comments of Wayne Brazil).
147. The Judge’s Role in Discovery, supra note 105, at 200 (comment of Steven Umin). But see Lee H. Rosenthal, From Rules of Procedure to How Lawyers Litigate: ‘Twixt the Cup and the Lip, 87 DENV. U. L. REV. 227, 234–35 (2010) (suggesting that the ineffectiveness of Rule 26(b)(2)(C) was due to “the habits of party management [which] proved resistant to the encouragement of judicial control”).

courts could opt out of the limitation requirements, the presumptive limits on interrogatories and depositions were made mandatory in 2000, at which time rulemakers also imposed a presumptive time limit of seven hours per deposition.151

Contemporaneous commentary offers two justifications for these presumptive limits. First, commentators argued that such limits would gently constrain the parties and keep them focused on the most important issues in the case. As Stephen Subrin argued:

[Numeric limits] force lawyers . . . to focus their attention on the facts supporting the elements of the strongest causes of action and elements of the most promising defenses. Numeric limits and limits of time also provide constraint on the process without ordinarily requiring the delay, expense, and court time required to resolve disputes over such concepts as “what is a fact” (as opposed to evidence or conclusions) and whether “facts” have been sufficiently pleaded.152

As a second justification, the Advisory Committee noted that if the presumptive limits did not automatically invoke an issue-narrowing process, the judge would be in a clear position to limit interrogatories and depositions under the Rule 26(b)(2) proportionality test.153 Collectively, then, the presumptive limits were intended to prevent runaway discovery by explicitly flagging the danger of extraneous discovery for both the parties and the court.

Unfortunately, like Rule 26(b)(2)(C), presumptive limits have had only a nominal impact on preventing excessive or abusive discovery. Although the limits purport to educate attorneys about useful, focused discovery behavior, nowhere do they explicitly connect that behavior to the core values that ordinarily foster it. Presumptive limits merely set an arbitrary cap on depositions and interrogatories without inculcating the values that make that cap meaningful. They

151. FED. R. CIV. P. 30(d).
arguably even undermine those values. As one commentator noted, "[b]y making the process of acquiring information from other parties more difficult and costly, [interrogatory limits] restrict even further the flow of information to the trier of fact, . . . increase the probability of surprise at trial, and . . . reduce the likelihood of fair judgments and settlements."\(^{154}\)

In practice, presumptive limits also have the dubious distinction of constraining conscientious attorneys while providing virtually no meaningful restraint on would-be discovery abusers. From the perspective of an attorney who has internalized civil litigation's core values, presumptive limits are an inconvenience. In the rare case in which the attorney determines that an investigation legitimately warrants more than ten depositions or twenty-five interrogatories, she must seek approval from the court or opposing counsel, justifying the need without divulging client secrets or case strategy. Of course, seeking recourse to the court under Rule 26(b)(2)(C) raises the ongoing specter of unpredictability, and further undermines a key core value.

At the same time, those who do not fully embrace civil litigation's core values easily sidestep the rule-based discovery caps. First, because presumptive limits only set a ceiling on the use of interrogatories and depositions, it is easy enough for an enterprising discovery abuser to employ other discovery tools that are not similarly restricted. In fact, courts themselves have on occasion encouraged parties to move on to another discovery tool once presumptive limits have been reached.\(^{155}\) Further, while presumptive limits on interrogatories and depositions may have made more sense in the 1980s and 1990s, when those discovery tools were significant contributors to cost and delay, they are much less powerful tools in this era, where the bulk of time and cost in a complex case might stem from the restoration, review and production of electronically stored information.\(^{156}\) Indeed,

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154. Brazil, supra note 73, at 1336.
156. See Institute for the Advancement of the American Legal System, Electronic Discovery: A View from the Front Lines 5 (2008) (noting that "the costs of processing, reviewing, culling and producing 1 GB of data [are generally] between $5,000 and $7,000"—meaning the typical "midsize
now that Rule 33(d) permits a party responding to interrogatories to refer to documents in lieu of a separate answer, interrogatories have declined in relative value, while the discovery of documents and electronically stored information under Rule 34 has taken on even more importance.\footnote{157}

A second problem is that both the rules implementing discovery tool limits\footnote{158} and advocates of such limits\footnote{159} stress that the limits must be presumptive only, and the Advisory Committee seems to have struggled with how seriously the presumption should be taken. The Committee noted, for example, that “[t]he presumptive duration [of a deposition] may be extended, or otherwise altered, by agreement”\footnote{160} and that “[i]t is expected that in most instances the parties and the witness will make reasonable accommodations to avoid the need for resort to the court.”\footnote{161} Some courts have even questioned whether the presumptive limits should be followed at all. In one recent case, the court openly chided a party for holding firm to the seven-hour limit in Rule 30(d) before granting a second day of deposition for a witness.\footnote{162}

Party accommodation in these circumstances would make sense if it really prevented the need for a resort to the court. In practice, however, disputes over interrogatory and deposition limits do arise, leaving the judge with a distasteful choice: either exercise her discretion and undertake a full proportionality review to determine whether additional

\footnotetext{157. See Amy Luria and John E. Clabby, An Expense Out of Control: Rule 33 Interrogatories After the Advent of Initial Disclosures and Two Proposals for Change, 9 CHAP. L. REV. 29 (2005).}

\footnotetext{158. See FED. R. CIV. P. 26(b)(2).}

\footnotetext{159. See, e.g., Paul D. Carrington, Renovating Discovery, 49 ALA. L. REV. 51, 64 (1997); Subrin, supra note 152, at 97.}

\footnotetext{160. FED. R. CIV. P. 30 advisory committee’s note, 2000 Amend. (d).}

\footnotetext{161. Id. Similar commentary governs the Advisory Committee’s notes on presumptive limits on interrogatories. See FED. R. CIV. P. 33 advisory committee’s note, 1993 Amend. (a) (“As with the number of depositions authorized by Rule 30, leave to serve additional interrogatories is to be allowed when consistent with Rule 26(b)(2).”).}

\footnotetext{162. See Ricoh Co., Ltd. v. Quanta Storage, Inc., No. 06-C-462-C, 2007 WL 5404935, *2 (W.D. Wis. Jun. 1, 2007) (“[T]he attorneys just don’t get it. It is incomprehensible to this court that the plaintiff in a multinational high-tech patent lawsuit flat-out refused to make one of its pivotal experts available for more than seven hours of deposition based solely on the presumptive limit of Rule 30(d).”).}
depositions or interrogatories should be allowed (which may require a detailed analysis of the value of both the discovery that has already been taken and each new proposed interrogatory or deposition or effectively forfeit her discretion by granting or denying the additional discovery without a detailed review. The first option requires the judge to be familiar not only with the facts of the case, but with the details of the requesting party’s strategy, a task which falls somewhere between the impractical and the impossible. The second option renders judicial control virtually meaningless, relegating it to nothing more than an inconvenient hurdle for the requesting party.

Ultimately, the limits on interrogatories and depositions are at once under- and over-inclusive, establishing frustrating obstacles for the majority of attorneys already dedicated to civil litigation’s core values, and offering no substantial hurdles to the minority of attorneys who have not internalized those values. In this respect, they represent no meaningful advance over the flawed application of Rule 26(b)(2)(C).

2. Mandatory Initial Disclosures

Marching in temporal lockstep with presumptive discovery limits is another, more modest, restriction, on attorney discretion: the requirement that parties in most civil cases exchange certain “initial disclosures” at or within fourteen days after the parties’ Rule 26(f) discovery conference. Like other limits on attorney discretion, initial disclosures had their intellectual genesis in the late 1970s. They too spent a decade on the back burner before being introduced into Federal Rule of Civil Procedure 26(a) in 1993. After several years as an optional requirement, initial disclosures were made mandatory in all federal district

165. See Bone, supra note 125, at 2009.
166. FED. R. CIV. P. 26(a)(1)(C).
While not as overtly restrictive as Rule 26(b)(2)(C) or presumptive limits, mandatory initial disclosures nonetheless constrain attorney discretion by requiring the exchange of certain information even though the timing, content, or form of that exchange might not be maximally beneficial to counsel and the parties.

Like presumptive limits, initial disclosures were introduced with the good faith intention of encouraging the type of attorney behavior that normally leads to proportional discovery. Two of the earliest and strongest proponents of mandatory initial disclosure, Wayne Brazil and Judge William Schwartzer, advocated for the practice as part of creating a "fundamental shift" in the adversarial nature of discovery. One commentator later observed, "it is clear that their ultimate objective was to completely overturn the adversary relationship during the pretrial stage, transforming the process into a cooperative, truth-seeking relationship between the plaintiff, the defendant, and the court." Judge Schwartzer himself expressed the hope that initial disclosures would "reduce the burdensome and unproductive adversariness that now often characterizes discovery." Initial disclosures were also intended to promote issue-narrowing behavior by providing early information to each party that otherwise would have to be uncovered through other discovery tools. Proponents expected that "unambiguous disclosure requirements[] would surely decrease the need for judicial oversight" and would "enable parties to target discovery more effectively."

Unfortunately, initial disclosures have been as ineffective as presumptive limits and judicial discretion in lowering the instances and effects of disproportionate discovery. In a Federal Judicial Center survey of attorneys in 1997, nearly

171. Id. at 212.
174. Id. at 764.
half the respondents indicated that initial disclosures had no effect on overall litigation expenses or the amount of discovery in their cases.176 Further, sixty-two percent of respondents felt that initial disclosures had no effect on the number of discovery disputes.177 A Rand Corporation study published in 1998, and reviewing cases filed during a "comparison district" period in 1992–1993,178 concluded that there was generally "no significant statistical difference in attorney work hours between cases where early disclosures were" mandated and those with no such requirement.179 This conclusion held regardless of case type or complexity, and regardless of whether total attorney work hours, or work hours dedicated solely to discovery, were measured.180 An independent study in 2000 similarly found that initial disclosures had no significant effect on a case's time to disposition181 or trial rate.182 Moreover, attorneys on both sides of the “v.” have expressed their belief that the system does not work. Recent surveys suggest that only about one-third of lawyers with federal practice experience, whether self-identifying as primarily representing plaintiffs, primarily representing defendants, or representing a mix of clients, feel that Rule 26(a)(1) disclosures work well.183

Viewed through a cultural lens, it is not hard to see why initial disclosures have not met the high hopes of their progenitors. Disclosures were intended to focus attorneys on narrowing disputed issues and encouraging cooperation—behaviors well in line with the civil litigation's core values.

176. WILLGING ET AL., supra note 18, at 26 tbl.17.
177. Id.
178. JAMES K. KAKALIK ET AL., IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS 27 (RAND 1996). As part of the Civil Justice Reform Act of 1990, Congress designated ten “pilot” district courts and ten “comparison” district courts. Id. Pilot districts were required to develop cost and delay reduction plans that adopted six case management principles set forth in the Act, while comparison districts were unrestricted as long as some kind of plan was developed. Id.
180. See id. at 48–50.
182. Id. at 257–62.
183. See ABA LITIGATION SECTION SURVEY, supra note 77, at 55–59; ACTL/IAALS INTERIM REPORT, supra note 15, at A-3; NELA SURVEY, supra note 77, at 15.
However, nothing in the text of Rule 26(a)(1) or the actual practice of exchanging initial disclosures directly promotes those values. Accordingly, attorneys can go through the motions of exchanging initial disclosures without gaining any appreciation for the values they represent. Ultimately, attorneys prone to either excessive or abusive discovery can fully satisfy the strictures of Rule 26(a)(1) without increasing the likelihood of cooperation or comprehensive discovery thinking as the discovery process moves forward. Like a criminal who says “please” and “thank you” while robbing a store at gunpoint, an abusive attorney can follow the standards of politesse in Rule 26(a)(1) while mocking the mores from which those standards arise.

Even worse, mandatory initial disclosures may unintentionally undermine the core values of efficiency and predictability by discouraging early comprehensive thinking about discovery. The demand for transsubstantivity creates the lowest common denominator of initial disclosures: the rules only require the production of information that is likely to be available in every case, regardless of its nature or complexity. But for complex cases—the very cases in which excessive or abusive discovery are particularly feared—Rule 26(a)(1)’s categories of mandated information are woefully underinclusive. Under a plain reading of the rule, a plaintiff in a patent infringement case would not have to turn over the patent’s prosecution history, and a plaintiff in a personal injury case would not have to disclose her medical records, even though in both case types such information is typically central to the case, and in any event will be among the first documents requested by the opposing party. In other words, significant additional discovery is still necessary because Rule 26(a)(1) does not mandate disclosure of the full range of expected, relevant information. At the same time, mandatory initial disclosures can be overinclusive—because many cases need little or no discovery, yet the parties will still face the imposition of time and cost to meet the requirements of Rule 26(a)(1). Our transsubstantive approach compares unfavorably to that of the United Kingdom, where “pre-action protocols” have been developed for each practice area that specify the detailed information unique to the case type that

184. See Huang, supra note 170, at 221.
must be voluntarily exchanged by the parties.\textsuperscript{185}

Ultimately, all attempts to create “proportional”
discovery by rule over the past three decades have struggled
because they do not directly implicate the core values of civil
litigation culture. A better regime would promote those core
values, both by reminding attorneys directly about the
importance of those values, and by supporting and reinforcing
the forms of attorney behavior that reflect those values. Such
a regime would also recognize the essential importance of
attorney discretion as a means of realizing a fair, efficient,
and predictable process. The systemic response to attorneys
prone to disproportionate discovery should not be to remove
or reduce their discretion, but rather to guide that discretion
back toward the realization of prevailing cultural values. The
next Part offers a preliminary sketch of a possible guided
attorney discretion regime.

III. RECLAIMING AND REINFORCING GUIDED ATTORNEY
DISCRETION

A. Rules and Culture in Conversation

The current rule-based limitations on the use of discovery
tools unintentionally undermine the core values of the civil
litigation culture by removing ordinary norms of guided
attorney discretion and replacing them with fixed rules and
judicial discretion. It is therefore unsurprising that the
current rules are largely disliked and underutilized in
practice. This does not mean, however, that there is no place
at all for rules, formal procedures, or even (limited) judicial
discretion in the discovery process. Rather, whatever rules,
procedures and discretion are employed must be consistent
with the prevailing civil litigation culture, and should
reinforce cultural norms and core values at every opportunity.

This conclusion may be controversial to some. Thomas
Main, for example, has openly fretted about the
“overwhelming” nature of the problem that the cultural

\textsuperscript{185} See, e.g., Pre-Action Protocol for Personal Injury Claims, MINISTRY OF
JUSTICE, app. B (Apr. 2007) (setting out “standard disclosure lists” for personal
www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_pic.htm#IDA230E
C. All of the current UK pre-action protocols may be accessed at http://www.
justice.gov.uk/civil/procrules_fin/menus/protocol.htm.
approach poses for proceduralists:

If we acknowledge the influence of non-formal rules of procedure, apparently we must develop a culture that nurtures the environment and all of its attendant non-formal factors so that the rule is more likely to be "followed." Hence, the overwhelming question is whether to engage in a relationship with a field of procedure that transcends the superficial. I am not sure that I want to. I am not sure that I can. I am not sure whether I must.186

Notwithstanding this candid reluctance, rulemakers and scholars alike are no doubt obligated, at minimum, to understand the impact of cultural currents on the application of procedural rules. Indeed, the current proportionality rules are a textbook example of a regime whose failure to "transcend the superficial"187 has resulted in a system that is frequently ineffective and largely ignored.

The cultural model suggests a better approach. First, it is important to develop a variety of solutions tailored to the different causes of disproportionate discovery. Excessive discovery is caused by the erosion or underdevelopment of the core values of the ordinary civil litigation culture, and is best addressed by developing rules and procedures that renew and strengthen faith in those values. This renewal can be accomplished in part by directly educating attorneys about the importance of the core values and by promoting the attorney behaviors that naturally flow from these values, such as cooperation, learning from experience, and comprehensive thinking about the case's discovery needs. The combination of directly emphasizing core values and habituating attorneys to behaviors that reflect these values stems from the cultural model's conclusion that excessive discovery is merely a straying from previously embraced core values, and is essentially curable through proper guidance.

The same cannot be said for grossly excessive or abusive discovery, which require a more heavy-handed approach. Grossly excessive discovery reflects an extraordinary erosion of an attorney's faith in civil litigation's core values, an erosion that may not be cured easily through education or behavioral guidance. Abusive discovery reflects a strong

187. Id.
affinity for an altogether different, more malevolent, set of core values, and may be similarly resistant to gentle efforts to refresh attorneys’ familiarity with the prevailing culture’s core values. Perhaps some abusive discoverers might be persuaded to change their worldview through programs that emphasize values such as resolution on the merits, fairness, and predictability, but this is unlikely to work with everyone—any more than programs to emphasize the existence of a single deity would be effective in converting all polytheists to a monotheistic culture. Instead, preventative measures must be taken to dilute or eliminate the impact of the abusive discoverer’s behavior during the pretrial process.

In addition, any cultural solution to disproportionate discovery must preserve attorney discretion as much as possible, because limiting discretion weakens the ability of conscientious attorneys to engage in discovery behavior consistent with civil litigation’s core values. This means that both rules and protocols designed to prevent excessive discovery (by reinforcing core values) and rules and protocols designed to prevent abusive discovery (by constraining unacceptable behavior) must accomplish their goals without hindering the freedom of most attorneys to manage their cases in a manner consistent with cultural norms.

The parts that follow offer expanded descriptions of possible cultural solutions. Subpart B describes the benefits of legal education and specialized “practice area” protocols designed to steer would-be excessive discoverers back to civil litigation’s core values. Subpart C introduces the discovery matrix, a new proposal for restraining the behavior that leads to grossly excessive or abusive discovery while simultaneously permitting the broad exercise of attorney discretion in the discovery process.

B. Combating Excessive Discovery

1. Legal Education

One direct method of combating excessive discovery is to directly (re)emphasize to law students and practicing lawyers the importance of core values such as predictability, efficiency, fairness, access to justice, and adjudication on the merits. Legal education plays an important role both in inculcating these values, and in providing concrete examples
of how they are expressed. This approach would reiterate in the classroom, clinical experiences, and continuing legal education courses both that a predictable, fair, and efficient process is desirable, and that certain attorney behaviors tend to promote those values.

To this end, greater pedagogical emphasis must be placed on thinking about the broad discovery needs of each case—and that emphasis must come from law schools, law firms, and judges alike. Law schools must provide additional opportunities to students to encounter the mechanics of discovery in the context of running a specific case, either through fictional scenarios presented in the classroom or through clinical work. In a first year civil procedure course, for example, students might examine the pleadings in a tort or contract case to develop a discovery plan that sets out the elements of proof, the evidence needed to satisfy those elements, and the most efficient approach to unearth that evidence through discovery. The plan might also consider the most systematic approach to discovery for that case: which discovery tools should be used first, to gain foundational information? In what order should depositions be scheduled? How can requests for redundant or tangential information be avoided?

Beyond law school, the legal community shares the responsibility for training younger and less experienced lawyers about how to think about discovery. This may take the form of continuing legal education classes, informal lectures, or attorney mentoring. Some commentators have expressed concern that preaching limitations on discovery short of those permitted by the rules—including changing the timing of discovery through mandatory initial disclosures—

188. This has been tried in some law schools. See, e.g., Lloyd C. Anderson & Charles E. Kirkwood, Teaching Civil Procedure with the Aid of Local Tort Litigation, 37 J. LEGAL EDUC. 215, 222 (1987) (describing a program at the University of Akron Law School in which students, among other things, must develop a discovery strategy based on the limited information initially provided to them as plaintiffs' or defense counsel); Elizabeth N. Schneider, Rethinking the Teaching of Civil Procedure, 37 J. LEGAL EDUC. 41, 43–44 (1987) (explaining a program at Brooklyn Law School in which students interview a client, draft a complaint, draft a discovery plan, and draft a summary judgment motion).

189. The Model Rules of Professional Conduct require a supervising lawyer to make reasonable efforts to ensure that a lawyer under his or her supervision complies with the Rules of Professional Conduct. See MODEL RULES OF PROF'L CONDUCT R. 5.1(b) (2010).
undermines the adversarial process. Nothing about developing a focused and efficient discovery plan, however, discounts an attorney's ability to represent his client zealously. Quite the opposite: carefully tailored discovery will save the client time and money, allow counsel to focus more intently on the core issues in the case and the evidence necessary to prove or disprove a claim, and ingratiate counsel with the judge. Reiterating the importance of efficient discovery as a lawyering skill from the first semester of law school, and onward throughout an attorney's career, is an important first step to creating the cultural conditions in which excessive discovery does not occur.

2. Practice Area Protocols

A second approach to combating excessive discovery is to provide practicing attorneys with tools that make it easier for them to behave consistent with civil litigation's core values. For example, attorneys who have extensive experience with a specific type of case might develop "practice area protocols," which would set out common forms and topics of discovery for that particular case type. Such protocols would be designed to help attorneys focus their discovery requests on materials and information that are most likely to get to the heart of the dispute.

This idea has already been implemented in some federal jurisdictions. In the Northern District of Illinois, for instance, the local patent bar worked with the court to develop a list of materials and information that should be exchanged automatically at the outset of discovery in a patent infringement action, at the same time that ordinary initial disclosures are exchanged under Rule 26(a)(1). These materials include documents that are likely to be requested automatically by experienced patent counsel in any


infringement case—documents such as the patent's file wrapper, inventor's notebooks, a list of allegedly infringing products, advertisements for sale of corresponding inventions, and documents in the defendant's possession such as engineering drawings, pertinent advertising, and sales data for the accused products. Other specialty bars—such as medical malpractice, employment discrimination, construction defect, and the like—might similarly develop a list of immediately exchangeable documents tailored to the case type. Sensitive or confidential information listed in any protocol could be subject to an automatic protective order, to be issued by the court after all parties have filed an appearance.

A similar approach has proven effective in the United Kingdom. As part of the Woolf reforms of the late 1990s, England and Wales now require the putative parties to exchange certain types of information before a complaint can be filed in particular case types. To date, specialized protocols have been developed for construction and engineering disputes, defamation claims, personal injury claims, resolution of clinical disputes, professional negligence, judicial review, disease and illness claims, housing disrepair cases, and certain landlord/tenant possession claims. While the timing of these "pre-action protocols" is obviously different than in the practice area protocols proposed here, the effect of educating and focusing attorneys is largely the same.

The potential benefit to practice area protocols is that they effectuate a rough transfer of collective experience and expertise to attorneys (and perhaps judges) who are inexperienced or relatively unfamiliar with a particular subject matter. Treatises and legal research can provide any competent practitioner with sufficient information on the elements of a claim, statutory requirements, and judicial


193. Id.

194. See Burbank & Subrin, supra note 4, at 412. Professors Burbank and Subrin "would permit judges to compel or adjust the limitations in the protocol as necessary or appropriate for a particular case." Id. I would not advocate for such an unnecessary introduction of judicial discretion where attorneys are better positioned to develop meaningful protocols.
interpretations. In some jurisdictions, court-approved model discovery requests are even available. But much less information is available on the specifics of procedural strategy, or how an attorney might go about tailoring discovery to get at the specific elements of a claim in the most efficient and cost-effective manner.

Practice area protocols would also help focus thinking about the discovery needs in a case. Unlike the current initial disclosures required under Rule 26(a)(1), whose need for transsubstantive application substantially dilutes their value, practice area protocols would emphasize the type of information that is most likely to be useful in narrowing the issues for a specific case type. A party receiving information from the opposing side under a practice area protocol would therefore be in a stronger position to drill down on the truly necessary discovery going forward.

C. Combating Grossly Excessive or Abusive Discovery: The Discovery Matrix

Both legal education and practice area protocols present attorneys with information and procedural options designed to revitalize appreciation for the core values of civil litigation. These measures may well be sufficient to combat excessive discovery in many cases. In instances of grossly excessive or abusive discovery, however, such guidance is less likely to do the trick. It is simply not practical to shore up core values when those values are held very weakly or not at all. Rather, more stringent measures must be taken to counter the effects of abusive behavior during the discovery process.

Such measures should not target the exercise of attorney discretion. This is the most important lesson of the cultural model. Limiting attorney discretion has not reduced actual instances of grossly excessive or abusive discovery, and at the same time has hurt conscientious attorneys’ ability to engage

195. See ABA, CIVIL DISCOVERY STANDARDS 13 (1999) (advocating for the development of form interrogatories “that presumptively will be deemed appropriate form of inquiry”); see, e.g., MD. CODE ANN. CIV. PROC. § 2-421 (LexisNexis 2008).

196. Some attorneys have developed in-house protocols for certain case types, see THOMAS E. WILLGING & EMERY G. LEE III, IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 23 (Federal Judicial Center 2010), but these are not necessarily shared beyond the walls of a particular law firm.
in discovery consistent with the litigation culture’s core values. Accordingly, a cultural approach to grossly excessive and abusive discovery must find a way to restrict the volume and cost of discovery in a given case without simultaneously restricting the ability of attorneys to conduct discovery in the manner they see fit.

As explained below, I believe the proper approach is to establish a set of clear boundaries for acceptable discovery for a given case, and provide a meaningful penalty for exceeding those boundaries by shifting all further response costs to the requesting party. Within the permitted boundaries, however, an attorney would be allowed to exercise broad discretion as to the type, scope, and order of her discovery requests. In other words, attorneys would be able to request discovery in whatever form they like until the established limit was reached, at which point they would face the significant disincentive of having to pay for any future requested discovery.

The idea of cost-shifting is not new, but it has not yet gained traction among rulemakers. Currently, the bulk of the financial cost of discovery requests is borne by the responding party except in the most unusual of circumstances. Professors Robert Cooter and Daniel Rubinfield, however, have proposed a cost-shifting mechanism to counter some of the consequences of discovery abuse. The mechanism envisions a “switching point” up to which each party pays its own compliance costs, and beyond which the requesting party bears all further reasonable compliance costs. The switching point could be set in any of a number of ways: it could trigger as soon as discretionary

199. Cooter & Rubinfield, Reforming, supra note 198, at 71.
200. Id. at 72–73.
201. Id. at 75.
discovery (i.e., that not required by Rule 26(a)(1)) is requested; after a presumptive limit is reached; based on the court's calculation of average values for similar cases in the past; or by statute.\textsuperscript{202} Cooter and Rubinfield explain that their cost-shifting rule would generally make the requesting party bear the cost of marginal discovery, eliminating the incentives for abuse.\textsuperscript{203} The proposal would also make the requesting party bear enough of its compliance costs to equalize them, thereby reducing distortions in settlement bargaining.\textsuperscript{204}

Cooter and Rubinfield's approach is beautiful theory, although its real-world application is considerably more difficult.\textsuperscript{205} Under the current Federal Rules regime, it is tough to determine where the switching point would occur in any given case; even if that were possible, it would pose a significant drain on judicial resources to make such individualized determinations. Still, the notion of a switching point at which discovery costs are shifted to the requesting party bears careful consideration as a potential guiderail for attorneys who are prone to grossly excessive or abusive discovery. Unlike presumptive limits or judicial intervention, a switching point allows parties the freedom to pursue any form of discovery in any order, leaving the decisions about how best to conduct discovery in the hands of those most familiar with the facts and strategy of the case.

The switching point would be most viable and valuable if it were established at the outset of the case. Parties would then be free to conduct discovery in whatever manner they saw fit until the switching point was reached, at which stage the costs of responding would automatically shift to the requesting party. Cost-shifting under this process would not be treated as a punitive sanction and would not carry the negative stigma of a sanction; it would simply be a consequence of the choice to engage in far-ranging discovery.\textsuperscript{206} As an added benefit, removing cost-shifting from

\textsuperscript{202} Id. at 72–73.
\textsuperscript{203} Id. at 75.
\textsuperscript{204} Id.
\textsuperscript{205} For critiques of the proposal, see Cooper, supra note 87 at 465; see Bruce L. Hay, Civil Discovery: Its Effects and Optimal Scope, 23 J. LEGAL STUD. 481, 481–83 (1994).
the pantheon of "sanctions" would likely encourage judges to apply actual punitive sanctions more frequently and more forcefully to discovery behavior that is truly abusive.\footnote{207}

Only somewhat tongue-in-cheek, I call this cost-shifting proposal the "Mongolian barbecue" approach to discovery. Casual restaurants branding themselves as Mongolian barbecue establishments became popular in the United States about fifteen years ago. The restaurant concept is simple: patrons purchase a bowl of a certain size and are invited to fill it with an array of different uncooked foods—noodles, meats, seafood, vegetables, spices and sauces.\footnote{208} They then hand the bowl to a chef, who cooks the food items together on a massive grill. Patrons may fill the bowl with whatever items they like in whatever proportion; the only rule is that they can only fill as much as the bowl will hold.\footnote{209}

Modern discovery should work the same way. Parties should be allotted a fixed amount of allowable discovery at the outset of the case, which they may "fill" in any manner they choose. They may elect not to fill to the allotted amount, but they may not overfill. When the maximum level is reached, they may obtain more discovery only by paying for it. Judges would still retain the ability to issue protective orders to prevent other types of abusive discovery practices.

Measuring the volume of discovery under the "Mongolian barbecue" approach could be accomplished in several ways. As one option, the court could set an actual monetary cap on the amount of allowable discovery, and require the parties to include in their discovery responses an invoice detailing how much money was spent in responding. The invoice would reflect attorney time, production costs, and travel costs. The requesting party would then be able to track exactly how

\footnote{207. See id. at 247. Rule 26(g) and Rule 37 allow the trial judge to sanction a party or counsel for misbehavior in connection with discovery. FED. R. CIV. P. 26(g)(3); FED. R. CIV. P. 37(b). Sanctions, however, are rarely granted except in the most extreme instances of abusive behavior. See, e.g., Qualcomm, Inc. v. Broadcom Corp., No. 05-CV-1958-B, 2008 WL 66932, *7–9 (S.D. Cal. Jan. 7, 2008). Removing excessive requests from the ambit of the sanction rules would send a signal to judges and counsel alike that intentional discovery abuse will be treated differently and sanctioned accordingly.}


\footnote{209. Id.}
much was left in its "account" under the court-set cap. If a
responding party determined that it could not complete a
request without triggering the cost-shifting level, it would be
required to report this fact to the requesting party, who could
then revise the discovery request downward or elect to begin
paying the amount that exceeds the cap.
Calculating the actual amount spent on discovery would
not be prohibitively difficult. Attorneys already track, or
have the ability to track, the amount of time they spend on a
case, including discovery matters, usually in six-minute
increments. Detailed invoices are frequently attached to
requests for attorney fees filed with the court, and in any
event would have to be presented to opposing counsel once
cost-shifting occurred. Nevertheless, some might object to the
transfer of client billing information to opposing counsel
during ordinary stages of discovery. Another option therefore
would be to assign each form of discovery request a point
value, and cap discovery at a certain point threshold. When
the cap is exceeded, cost-shifting would automatically kick in.
For example, individual interrogatories or any sub-parts
might be assigned one point each, each hour of deposition two
points, and each document request two points. The court
might set a cap of, say, 100 points for a case of moderate
complexity and with a moderate amount in controversy;
parties would then be free to use their 100 points on 100
interrogatories, fifty hours of deposition, fifty requests for
production, or any combination thereof.
What remains is a meaningful way for the court to set
the cap. Here the absence of a clear, universal, textual
definition of "proportionality" (however the term is
understood as a cultural matter) looms large. If
proportionality were defined with reference to objective,
measurable criteria, the court would be able to set the outer
limits of "proportional" discovery in any civil case in a manner
that was universally understood and accepted. Moreover, a
consistent and recognized definition of proportionality would
allow the court to treat like cases alike in setting the cap, and
would provide attorneys with reasonable expectations about
where the cap would be set.
I therefore propose that "proportional" discovery should
be defined and understood in the Federal Rules in monetary
terms as a percentage of a civil case's stated amount in
controversy, adjusted to account for the nature of suit and complexity of the case. In practice, the judge would make a proportionality determination in consultation with the parties at the initial pretrial conference, by consulting a standardized discovery matrix. The Y-axis of the matrix would contain all possible case types by federal cause code, a fairly granular breakdown based on the specific statutory provision or common law basis for court jurisdiction. The X-axis of the matrix would reflect the complexity of the case, as determined by the judge and the parties based on criteria such as number of claims, number of parties, and nature of the claims. The “complexity” breakdown itself need not be elaborate; it might simply differentiate between simple, standard, and complex cases in the same manner that many courts already sort actions for purposes of differentiated case management.

Within each box in the resulting grid would be two numbers: a percentage and a dollar value. If the complaint sought monetary damages, the amount of allowable discovery that a party could spend prior to triggering automatic cost-shifting would be the appropriate percentage from the grid multiplied by the amount in controversy. If no money damages were sought (for example, if the claimant sought injunctive relief or specific performance), the absolute dollar value in the grid would be the trigger point for cost-shifting.

An illustration may help. Imagine a product liability action in which the personal representatives of a factory worker who died of liver cancer sue fifteen manufacturers who provided vinyl chloride monomer (VCM) to the factory, alleging that the worker was exposed to VCM at his job and

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210. The matrix proposal discussed here was inspired by the idea of discovery vouchers, first advocated, I believe, by Judges James K. Bredar, Paul Grimm, and J. Frederick Motz of the U.S. District Court for the District of Maryland. I am indebted to Judge Bredar in particular for his willingness to share the voucher idea with me.

211. See, e.g., Thomas H. Douthat, A Comparative Analysis of Efforts to Improve Judicial Efficiency and Reduce Delay at the Local and State Level, 77 REV. JUR. U.P.R. 931, 941 (2008).

212. One commentator criticizes the notion of tying a proportionality determination primarily to the amount in controversy because “monetizing of what is ‘at stake’ is not so easy where the issue is not breach of contract but constitutional or statutory civil rights.” Carroll, supra note 4, at 465. The absolute dollar value in the matrix is designed to alleviate such concerns by establishing a fair and predictable default value based on information drawn from thousands of prior similar cases.
that the manufacturers failed in their duty to warn the worker and those similarly situated that such exposure could cause liver cancer.\textsuperscript{213} The complaint alleges that the exposure took place primarily during the 1950s and 1960s, and that the decedent's carcinoma was diagnosed in 2000.\textsuperscript{214} The plaintiffs seek monetary damages of $1,000,000. A hypothetical discovery matrix might provide:

<table>
<thead>
<tr>
<th>CAUSE</th>
<th>SIMPLE</th>
<th>STANDARD</th>
<th>COMPLEX</th>
</tr>
</thead>
<tbody>
<tr>
<td>28:1332 (Diversity: Product Liability)</td>
<td>3%</td>
<td>5%</td>
<td>10%</td>
</tr>
<tr>
<td></td>
<td>$30,000</td>
<td>$50,000</td>
<td>$100,000</td>
</tr>
</tbody>
</table>

In consultation with the parties, the judge determines that this case should be considered complex because of the number of named defendants and the fact that the alleged activity occurred many decades in the past, making fact witnesses and relevant documents potentially harder to locate. Each side would accordingly be allowed to spend up to $100,000, or 10% of the total amount in controversy, before cost-shifting occurred. Note that the rule applies to each side in the case, not each party; plaintiffs will have to be judicious about what documents and interrogatory responses they demand from each defendant, and defendants will have to work collectively to choose appropriate deponents.

The numbers in this example—both the percentages and dollar amounts—are offered for illustration only. The most reasonable and effective figures for each box on the grid should be determined by judges and lawyers with extensive experience in each case type before the matrix is put into formal use, and the numbers should be regularly revisited to account for the effects of substantive and procedural law.

One can imagine several objections to cost-shifting generally and the matrix proposal specifically, but none of these objections is fatal. First is the concern that a plaintiff or counterclaimant will artificially inflate the amount in controversy in order to secure more discovery under the

\textsuperscript{213} VCM was used in the manufacture of the plastic polyvinyl chloride (PVC). See Taylor v. Am. Chemistry Council, 576 F.3d 16, 21 (1st Cir. 2009). This hypothetical is based in part on the Taylor case. Id. at 21–22.  
\textsuperscript{214} See id. at 22–23.
PROPORTIONAL DISCOVERY

matrix. More discovery for one party, however, means more discovery for both, so unless there is a significant imbalance of information between the parties, inflating the amount in controversy is the pretrial equivalent of mutual assured destruction. Where information imbalances do exist, for example in some civil rights or employment claims, the matrix could be set to provide each side with a different cap on discovery. If the matrix itself does not dissuade a party from misrepresenting the amount in controversy, Rule 11\textsuperscript{215} and the relevant Codes of Professional Conduct\textsuperscript{216} should. Second, and more serious, is the objection that a party might artificially inflate the amount it spends in responding to discovery requests, in order to use up the requesting party’s “account” and hasten automatic cost-shifting. However, this objection too can be addressed through early management—either by using a uniform point system (such as the one described above) for discovery tasks, or by allowing the court to set out at the Rule 16 conference or as part of a standard case management order the maximum amounts of time that may be billed for any discovery event, or the reasonable market value of attorney services associated with specific discovery tasks.\textsuperscript{217}

If used properly and consistently, the matrix approach would provide a relatively predictable and efficient method of focusing discovery. Attorneys who would not naturally think about a case’s full discovery needs from the outset of the action would be more likely to do so because their clients would bear the brunt of cost-shifting if discovery got out of hand. The matrix would still allow a party or counsel to use any mix of discovery methods, and over time attorneys might become conditioned to reasonable limits on discovery, and would be more likely to internalize the need for a comprehensive discovery strategy.

\textsuperscript{215} FED. R. CIV. P. 11(b)(3) (stating that by signing a pleading or motion, an attorney certifies to the court that “the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for investigation or discovery”).

\textsuperscript{216} E.g., \textsc{Model Rules of Prof'L Conduct} R. 3.3(a)(1) (2010) (“A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”).

\textsuperscript{217} See Redish & McNamara, supra note 197, at 812–22 (discussing cost-shifting based on reasonable market value).
The matrix also has significant advantages over the current proportionality rules. It provides discovery boundaries that are tailored to the needs of the case, and then allows attorneys to exercise broad discretion within those boundaries. Those boundaries are determined in consultation with the judge at the start of discovery, based on prioritized criteria, and provide a clear, predictable ceiling for discovery activity. Unlike presumptive rules, which are both over- and under-inclusive, matrix boundaries are fixed at an agreed-upon point ahead of time. And attorney discretion makes it more likely that a discovery request will advance the case directly.

Most importantly, the matrix parallels the natural operation of the civil litigation culture. Attorney discretion is ordinarily bounded by cultural norms that promote the desire for an efficient and predictable resolution of each case on the merits, but attorneys operate freely within those bounds. The amount in controversy and complexity of the case often dictate whether a discovery tool will be used by creating an unspoken, but understood, ceiling.

By contrast, the current rules offer unpredictable and ineffective boundaries. Presumptive limits leave open the possibility of even greater discovery, and the exercise of judicial discretion is hampered by limited guidance. Rather than encouraging the most well-informed people to make good decisions based on clear boundaries and thoughtful guidance, the current system encourages lesser-informed people to make decisions based on no boundaries and murky guidance.

CONCLUSION

It is no small irony that the current proportionality rules take a wholly disproportionate approach to containing pretrial discovery. In an effort to address a severe problem posed by a fraction of civil litigators, rulemakers have limited the discretion of all attorneys, and have consequently hurt the ability of most attorneys to resolve their cases in the most efficient, fair, and predictable manner possible. Excessive and abusive discovery must be addressed in a meaningful and serious way, but restricting attorney discretion has proven to be the wrong method.

We would do better to openly account for cultural effects on rulemaking, and seek out solutions to excessive and
abusive discovery that fit the prevailing cultural ethos. I have attempted to initiate that discussion here. Of course, I do not mean to hold out any of my proposals as a panacea. Each proposal—particularly practice area protocols and the discovery matrix—would require further research and careful development before implementation. And, of course, they would require buy-in from the key players in the civil justice system. The challenge of implementing these proposals, however, should not deter their fair consideration. Even more importantly, debate over the details of any specific proposal should not cloud the larger point that rules and procedures are more likely to be used successfully if they correspond to existing cultural norms. The proposed discovery matrix would allow greater exercise of attorney discretion in discovery matters, and is a closer approximation to the cultural patterns that ordinarily keep discovery under control than are the existing rule-based proportionality limitations. If the matrix as proposed is not the ideal fit, let us keep looking for a better model—but in any event a model that is consistent with, and likely to reinforce, the core values that define American civil litigation as we know it.