THE CONCERN OVER DISCOVERY

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I. INTRODUCTION

"Have you understood the questions I have asked you? Do you want to change any of the answers you have given? Thank you, that's all the questions I have." These have become the sweetest words known to the ears of a trial attorney engaged in civil litigation. They signal the conclusion of another discovery deposition that has most likely been lengthy, tedious, costly to the litigants and marred by at least one heated exchange between counsel.

Presently, discovery dominates the civil trial practice. It absorbs the majority of the attorney's time, and as a result draws heavily upon the client's financial resources. Leaders of the bar have charged that the expanded use of discovery[1] has been the most significant cause of the rising costs of civil litigation.[2] Unfortunately, the public has tended to identify these increased costs with the monetary needs of attorneys rather than with the quality of the legal services rendered.[3] In an apparent response to these and similar problems, the Iowa Supreme Court recently appointed a special committee to study spiraling litigation expenses.[4] In addition, studies have been made and rule changes recommended indicating a nationwide concern over discovery.[5] With these concerns in mind, it appears to be an opportune time to re-

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1. This author prefers to refer to it as "expanded use" of discovery rather than "abuse" of discovery. The expanded use is by both plaintiff and defense attorneys. One judge believes this is due to lack of economic incentives for lawyers to curtail discovery. Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 223 (1979). However, this author believes the expanded use results more from the fact that the rules permit extensive discovery, and if it is not pursued and an unfavorable result obtains, the trial lawyer may be faced with a charge of legal malpractice. If he is defending for an insurance carrier with inadequate limits to cover the claim and an excess judgment results, the carrier may be charged with bad faith for failing to pursue the discovery.

2. *See, e.g.*, Stanley, *President's Page*, 62 A.B.A.J. 1375 (1976).

The [then] president of the ABA stated that "[w]e [attorneys] depose and discover forever, with the end result that the lawsuit is tried twice — and at enormous expense." *Id.*

3. Jack Anderson, newspaper columnist, opined that "[t]he legal processes have become encumbered with procedural rigmarole — unnecessary routines that are designed more to enrich the lawyers than to serve the public . . . ." Chi. Daily News, June 23, 1977. *See also* Pollack, *supra* note 1, at 219, where the author states:

> A recent column in the Wall Street Journal reported a speech by the Chairman of the New York Stock Exchange in which he facetiously told members of the New York State Bar Association that some of their firms ought to go public, and "offer investors a chance to invest in the litigation boom" that has made corporate legal practice "one of the nations liveliest and most consistent growth industries."

Id.

4. Resolution of the Iowa Supreme Court, filed Sept. 18, 1978. An Order of the Iowa Supreme Court was issued Dec. 1, 1978, appointing committee members and outlining the scope of their duties. Former Chief Justice C. Edwin Moore was named chairman of the committee.

5. *See* SECTION ON LITIGATION, AMERICAN BAR ASS'N, REPORT OF THE SPECIAL COMM. FOR THE

examine the historical purpose and use of discovery in the light of present day complaints. This Article, concentrating on Iowa law, will discuss and propose realistic changes that will hopefully enhance, without frustrating, the past progress made under the rules of civil procedure relating to discovery.

II. The Past

The present scope of discovery in Iowa covers any matter not privileged which is relevant to the subject matter of the pending litigation.[6] Despite this broad definition of the scope of discovery, the drafters of both the Iowa and the Federal Rules of Civil Procedure felt it necessary to specifically point out that a matter is discoverable "whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . .", and that "[i]t is not ground for objection that the information sought will be inadmissible at the trial . . ."[7] The fact that the above special care was taken to emphasize the broad scope of discovery underscores the radical changes that have taken place in the purpose and scope of discovery since its genesis in the common law.

At common law, parties to an action were incompetent as witnesses.[8] Thus, if the opposing party was the only source of evidence necessary to prove a claim or defense, the crucial evidence was unavailable. To avoid this unfair result, there developed in the common law equity courts a bill of discovery. The equitable bill permitted a party to obtain evidence in the exclusive possession or control of another party, but *only* to the extent it was necessary to enable the party seeking the bill to prove his own claim or defense.[9] Thus, discovery was born out of necessity, and was not originally intended to aid a litigant in learning about an adversary's case.[10]

In Iowa, the common law rule of the incompetency of parties as witnesses

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Study of Discovery Abuse (1977) [hereinafter cited as ABA Discovery Abuse Report]; Committee of Rules of Practice and Procedure, Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, *reprinted in* 77 F.R.D. 613 (1978) [hereinafter cited as Proposed Amendments]; Committee of Rules of Practice and Procedure, Judicial Conference of the United States, Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, *reprinted in Foreward* to 99 S. Ct., 588 F.2d, 461 F. Supp. (1979) [hereinafter cited as Revised Proposed Amendments].

6. Iowa R. Civ. P. 122(a).

7. *Id;* Fed. R. Civ. P. 26(b)(1).

8. *See* G. Hazard & F. James, Civil Procedure 171-75 (2nd ed. 1977); McCash, *The Evolution Of The Doctrine Of Discovery And Its Present Status In The State of Iowa*, 20 Iowa L. Rev. 68 (1934). The rationale behind the common law rule that parties to an action were incompetent as witnesses was that a party's personal stake in the outcome of the litigation would result in false, perjured testimony, regardless of the moral scruples of the party testifying. *Id.*

9. P. Connolly, E. Holleman, & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery 6 (1978) [hereinafter cited as Judicial Controls: Discovery]. *See also* Hazard & James, *supra* note 8, at 171-75.

10. National Clay Products Co. v. District Court, 214 Iowa 960,970, 243 N.W. 727, 732 (1932).

was codified by the early statutes relating to civil procedure.[11] The common law equitable bill of discovery was also included, permitting parties to obtain from an opposing party evidence essential to their claim or defense.[12] The early statutes also included the right to obtain similarly essential evidence from nonparties.[13] This had been permitted at common law under the auxiliary jurisdiction of the equity court, as part of the power to compel discovery in suits in which no relief other than discovery was demanded.[14] In 1860 the early Iowa statutes were revised, eliminating the disqualification of parties as witnesses.[15] However, the provisions pertaining to discovery were retained.[16] These included the use of subpoenas duces tecum, and the production of papers or books "material to the just determination of any cause."[17] The revision of 1860 also added a new discovery tool that was destined to become the nemesis of many a trial attorney: interrogatories.[18] However, the scope of inquiry permitted by interrogatories in 1860 was greatly restricted when compared to the present day use of interrogatories.[19]

From the 1860 revisions until the Iowa Rules of Civil Procedure were adopted in 1943, the statutes relating to the aspect of civil procedure now referred to as discovery remained substantially the same. In general, the discovery statutes provided only those procedures required to assure that a litigant could produce at trial the evidence necessary to sustain his *own* claim or defense. Except as specifically provided for in the statutes, the old equitable bill of discovery, available at common law, was expressly prohibited.[20]

Because of the limited purpose for which discovery was permitted prior to 1943 (*i.e.*, obtaining evidence necessary to sustain the party's own claim or defense), the scope of inquiry through discovery was very restrictive. Depositions—when allowed—were limited to matters that would be admissible in evidence.[21] Except in equity actions, a party to litigation could not ordinarily

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11. IOWA CODE § 2390 (1851). This section stated that "[a] person who has a direct, certain, legal interest in the suit is not a competent witness unless called for that purpose by the opposite party as herein provided. . . ." *Id.*

12. *Id.* §§ 2415, 2423.

13. *Id.*

14. National Clay Products Co. v. District Court, 214 Iowa 960, 970, 243 N.W. 727, 732 (1934). *See generally* McCash, *supra* note 8, at 68-69. It is of interest to note that this old auxiliary equitable remedy has recently been used to require a nonparty to permit inspection of premises and produce tangible objects that could not be appropriately reached by means of a subpoena duces tecum. *See* Order entered Jan. 20, 1975, Greiner v. Gunnar A. Olsen Corp., C74-2021 (N.D. Iowa).

15. IOWA CODE § 3980 (1860).

16. IOWA CODE §§ 4026 (production of documents); 4065 (taking of depositions); 4094 (perpetuation of testimony); 3980 (written interrogatories) (1860).

17. IOWA CODE §§ 2415, 2423 (1851). These sections were incorporated in IOWA CODE § 4026 (1860).

18. IOWA CODE § 2985 (1860).

19. The scope of interrogatories under IOWA CODE § 2985 (1860) was limited to matters material to the action and matters in issue.

20. IOWA CODE § 10953 (1939).

21. IOWA CODE §§ 11394, 11407 (1939).

be deposed by his adversary prior to trial.[22] Even when permitted in equitable actions, a party's deposition was limited to material matters necessary to enable the plaintiff to establish his claim.[23] As late as 1934, the Iowa Supreme Court stated that the legislature had good reasons for *not* compelling parties to an action to divulge all pertinent matters of fact to their adversaries in advance of trial.[24] However, parties were allowed to annex to their petition interrogatories to be answered by the opposing party. The answers could be read at trial like a deposition.[25] The scope of inquiry was strictly limited, however, to only material facts in issue.[26] On proper petition, the court could require the production of any papers or books which were material to a just determination of the cause.[27] This procedure was also narrowly restricted in accord with old common law discovery, so as to permit production of only those things material to the claim or defense of the party seeking discovery, and could not be used to require an adversary to disclose the evidence he relied on to sustain his own claim or defense.[28]

The above discussion of the scope of discovery in Iowa (prior to 1943) illustrates the fact that the Iowa courts had adamantly refused to permit discovery to be used to require a litigant to reveal the evidence on which he relied, even in the face of the contention that such a revelation might enable his adversary to explain away the evidence and presumably shorten the proceedings by settlement or an expedited trial.[29] To be discoverable, matters had to be (1) material to the claim or defense of the party seeking the discovery, and (2) admissible in evidence.[30] It was often pointed out by the courts that it was not the purpose of the discovery statutes to permit "fishing" or

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22. IOWA CODE § 11358 (1931). This section stated that "either party may so take the deposition of any witness." In Bagley v. District Court, 218 Iowa 34, 254 N.W. 26 (1934), the Iowa Supreme Court interpreted the above statute and determined that the terms "party" and "witness" were not synonymous, and thus the statute was not applicable to the deposition of parties in actions at law. Without statutory authority, the court ruled that depositions of parties in actions at law were forbidden under ordinary circumstances, because parties to a lawsuit could always provide testimony at trial on behalf of either party. *Id.* at 37-38, 254 N.W. at 28-29.

23. Bagley v. District Court, 218 Iowa 34, 39-40, 254 N.W. 26, 29 (1934).

24. *Id.* at 39, 254 N.W. at 29.

25. IOWA CODE § 11185 (1939).

26. *See, e.g.*, Lee v. Blumer, 189 Iowa 1145, 1149, 179 N.W. 625, 627 (1920); McFarland v. City of Muscatine, 98 Iowa 199, 201, 67 N.W. 233, 234 (1896). In *McFarland*, the court refused to permit, in a personal injury action, interrogatories which:

> [A]sked plaintiff when and where she was born, where she had lived from the time she was 12 years of age, and the name of the person or persons with whom she lived, or for whom she worked, and their address; what occupation she was engaged in just prior to coming to Muscatine, and for whom she worked; whether her parents were living; if so, their residence, occupation, and names.

Id.

27. IOWA CODE §§ 11316, 11317 (1939).

28. Grand Lodge A.O.U.W. v. Webster County Dist. Court, 150 Iowa 398, 401, 130 N.W. 117, 119 (1911).

29. McManus v. Mullin, 165 N.W. 58, 59 (Iowa 1917).

30. Travelers Ins. Co. v. Jackson, 201 Iowa 43, 46, 206 N.W. 98, 99 (1925).

"exploring" expeditions into an opponent's case.[31] These restrictions upon the scope of discovery remained in effect until the first Iowa Rules of Civil Procedure were adopted in 1943.[32] These rules were inspired and influenced by the federal rules (which became effective in 1938),[33] and significantly altered the Iowa discovery process in a relatively brief period of time.

Because the Iowa discovery rules have been greatly influenced by their federal counterparts, an assessment of the present scope of discovery in Iowa is facilitated by an understanding of the original rationale and purposes underlying the federal rules. In formulating the federal rules, the drafters were faced with an important choice between two recognized procedural models for requiring parties to make their positions and contentions known to their adversaries: (1) the pleading model, which relied on an exchange of detailed written statements supplemented by such informal investigation as the parties chose to make, and (2) the discovery model, which involved more vestigial, uninformative pleadings and relied primarily on formal investigative procedures carried out with legally required cooperation of adversaries and neutrals.[34] The drafters of the federal rules of civil procedure opted for the discovery model (providing for notice-type pleadings and broad discovery),[35] in order to secure the just, *speedy* and *inexpensive* determination of actions.[36] This is of interest since there now exists a large body of critics who contend that notice pleadings and broadened discovery are significantly responsible for the increased time and expense involved in present day civil litigation.[37]

Pursuant to the discovery model for civil litigation as incorporated in the federal rules, a party was not limited to seeking information supportive of his own case; he became entitled to know the basis of his opponent's case.[38]

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31. National Clay Products Co. v. District Court, 214 Iowa 960, 969, 243 N.W. 727, 732 (1932). The court stated that "[a] party . . . is not entitled to a roving commission to ransack his adversary's books, papers or evidence, or to embark upon a mere fishing expedition or exploratory enterprise." *Id.*

32. 1943 Iowa Acts ch. 311 (49th G.A.). The 1943 rules were intended, *inter alia*, to "*speed up the judicial process* and to make more certain, *less expensive* and generally more satisfactory the determination of controversies and adjudication of rights by the courts *with the dispatch which the public has learned to expect* in most other fields." Cook, *Commentaries on the New Iowa Rules of Civil Procedure*, 29 IOWA L. REV. 1 (1943) (emphasis added).

33. Order of Dec. 20, 1937, 302 U.S. 783. Justice Brandeis did not approve of the adoption of the rules.

34. *See, e.g.*, JUDICIAL CONTROLS: DISCOVERY, *supra* note 9, at 8; Lacy, *Discovery Costs in State Court Litigation*, 57 OR. L. REV. 289 (1978).

35. *See, e.g.*, Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1034 (1978) [hereinafter cited as *Discovery Sanctions* Note].

36. FED. R. CIV. P. 1 (emphasis added).

37. *See, e.g.*, JUDICIAL CONTROLS: DISCOVERY, *supra* note 9; Lasker, *The Court Crunch: A View From The Bench*, 76 F.R.D. 245 (1978); Pollack, *supra* note 1.

38. Nichols v. Sanborn Co., 24 F. Supp. 908, 910 (D. Mass. 1938). In *Nichols*, the court held that the new federal rules abrogated the prior equity rules relating to discovery, and allowed a party to discover any relevant matter in order to learn facts pertinent to the issues at trial. This liberal interpretation of discovery thus allowed a party to ascertain facts relating to an adversary's case. *Id. See generally* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2011 (1970).

Although discovery was initially limited to matters admissible in evidence, following the 1948 amendment to the federal rules[39] this limitation was removed and it was no longer a proper objection that the matter sought would not be admissible at trial.[40] While there was some effort to protect a lawyer's work product, it was established in the well known case of *Hickman v. Taylor*[41] that discovery attempts for the purpose of determining the underlying facts of an opponent's case were no longer objectionable as constituting "fishing expeditions."[42]

Despite the broad scope of discovery of the federal rules and their influential effect upon the Iowa rules, the original Iowa rules were more restrictive than their federal counterparts.[43] This was true even though federal court decisions interpreting the federal rules were relied on by the Iowa courts to aid in implementing the Iowa discovery rules.[44] Initially, interrogatories were limited to matters necessary to permit a litigant to prepare his own case for trial.[45] Production of documents was limited to matters material to a just determination of the cause.[46] Inspections were limited to property or objects relevant to an issue in the case.[47] Depositions of a party could not be taken for discovery purposes, and all depositions were limited to matters relevant to a claim or defense in the case, or matters identifying persons possessing

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39. Order of Dec. 27, 1946, 329 U.S. 843.

40. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 81 (3rd ed. 1976); 8 WRIGHT & MILLER, *supra* note 38, at § 2007.

41. 329 U.S. 495 (1947).

42. Hickman v. Taylor, 329 U.S. 495, 507 (1947). The Court stated:

> [D]eposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.

Id.

43. *See* Note, *Discovery and Inspection Under the New Iowa Rules*, 29 IOWA L. REV. 71, 81 (1943). The author commented that *"[m]uch waste of the parties' time and money should be avoided* as truth may be ascertained more readily . . . and thus meritorious cases may be afforded a *more expeditious trial." Id.* at 81-82 (emphasis added).

44. *See, e.g.*, Hitchcock v. Ginsberg, 240 Iowa 678, 37 N.W.2d 302 (1949).

45. Hardenbergh v. Both, 247 Iowa 153, 161-62, 73 N.W.2d 103, 108 (1955). *See* Iowa rule 121 (1946).

46. *See* IOWA R. CIV. P. 129 (1946); Chandler v. Taylor, 234 Iowa 287, 12 N.W.2d 590 (1944). In *Chandler*, the first case decided under the new Iowa discovery rules, the court was reluctant to abandon the traditional constraints on discovery, stating:

> We have also held repeatedly that an application for the production of books and papers must be limited to documents that are material to the determination of the issues before the court; it cannot be used for a fishing excursion, to rifle an adversary's files, to discover evidence adverse to that of the applicant, or to expose the private affairs of a litigant not relevant to the controversy at hand.

Id. at 297, 12 N.W.2d at 595.

47. In 1946 Iowa Rule of Civil Procedure 131, governing inspection of property, used the language "relevant to the issue" as opposed to federal rule 34, which allowed property inspections "material to the cause."

relevant facts.[48] Until 1957 the definition of the term discovery, as expressed by the Iowa Supreme Court, still adhered to the traditional common law concepts that discovery was the disclosure of facts in the exclusive possession of an opponent that were necessary for a litigant to prove his case.[49]

Continuing to be influenced by the course charted by the drafters of the federal rules, substantial revisions were made in the Iowa Rules of Civil Procedure in 1957.[50] Depositions were permitted of adverse parties.[51] The scope of discovery undertaken by depositions or interrogatories was expanded to include any matter relevant to the subject matter of the litigation.[52] The last vestiges of the old common law restrictions were removed when the rules expressly provided that discovery was not limited to matters relating to the claim or defense of the party, nor to matters admissible at trial.[53]

In 1973, the Iowa rules were further revised and restructured to conform almost precisely to the broad scope of the federal discovery rules.[54] Presently, this broad scope of discovery is almost without restriction, except for privileged matters.[55] Fishing expeditions are not objectionable.[56] Far from restricting discovery, the courts encourage it, and in some instances attempt to compel the litigants to carry out discovery whether they want to or not.[57] Attention of the courts has shifted from efforts to determine whether discovery is justified to finding adequate sanctions to compel full discovery by the litigants.[58]

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48. Iowa R. Civ. P. 140, 141 and 143 (1946).

49. Hardenbergh v. Both, 247 Iowa 153, 160, 73 N.W.2d 103, 106 (1955). Note, however, that the *Hardenbergh* court stated that the "modern trend" was to broaden and liberalize the scope of discovery. *Id.* at 160-61, 73 N.W.2d at 107.

50. 1957 Iowa Acts ch. 311 (57th G.A.). For a discussion of the changes proposed by the Advisory Committee to the Iowa Supreme Court preceding the enactment of the 1957 rules, *see* Vestal, *New Iowa Discovery Rules*, 43 IOWA L. REV. 8 (1957).

51. Iowa R. Civ. P. 141 (1957).

52. Iowa R. Civ. P. 121, 143 (1957).

53. Iowa R. Civ. P. 143 (1957).

54. 1973 Iowa Acts ch. 316 (65th G.A.).

55. *See, e.g.*, Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394, 1396 (D.D.C. 1973).

56. *See* note 42 *supra*.

57. *See* Identiseal Corp. v. Positive Identification Sys., Inc., 560 F.2d 298 (7th Cir. 1977). In *Identiseal*, the federal district court ordered the plaintiff to conduct discovery, rather than allowing the plaintiff to develop the entire case at trial. The district court based its order to compel plaintiff to conduct discovery upon federal rule 16, which grants the trial court wide pretrial discretion to simplify a lawsuit before trial. On appeal, the circuit court held that (1) rule 16 did not confer upon the district court the power to *compel* the litigants to conduct discovery, and (2) the plaintiff's attorney, not the court, had the discretion to determine whether it was in the best interest of his client to develop his entire case at trial rather than conduct discovery. *Id.* at 302. *But see* Buffington v. Wood, 351 F.2d 292 (3rd Cir. 1965), where the Third Circuit held that a federal district judge had the power to compel discovery under rule 16. The court stated that "[t]o make pretrial effective, district courts must have full power to require complete discovery." *Id.* at 298.

58. Haumersen v. Ford Motor Co., 257 N.W.2d 7 (Iowa 1977); Sandhorst v. Mauk's Transfer, Inc., 252 N.W.2d 393 (Iowa 1977). In *Haumersen*, the court upheld sanctions imposed against the defendant for failing to complete discovery according to time tables established by the trial court, even though the defendant's failure was not necessarily willful, and the trial court's imposition of sanctions was deemed severe. *Id.* at 14.

III. Present Concerns

Prior to adoption of the Iowa Rules of Civil Procedure in 1943, there had been substantial opposition from the bench and bar to changing from the existing statutory procedures to rules modeled after the federal rules.[59] However, after the rules were adopted there seems to have been little complaint.[60] One reason for this may have been the fact that lawyers did not make maximum use of discovery during the early years of the Iowa rules. A survey conducted in 1953, ten years after the rules were adopted, indicated a rather limited use of discovery.[61] Of course, it wasn't until the amendments of 1957 that the rules permitted depositions of adverse parties and a broadened scope of discovery.[62]

Whatever the early experience was, the question now being raised is whether—in adopting the philosophy of the framers of the federal rules—we have attempted to come too far too fast, without adequate assessment of the results flowing from the procedural changes made to establish the discovery model of civil procedure. There is no question that today there exists great concern, in Iowa and elsewhere, as to whether or not discovery is accomplishing the intended purpose of making civil litigations speedier and less costly.[63] Comments by noted trial lawyers,[64] federal judges,[65] state court judges,[66] law review authors,[67] leaders of the bar[68] and journalists[69] indicate the breadth of this concern.

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59. News Bulletin of the Iowa State Bar Association 1 (Dec. 1940). At the time it was stated that "the general feeling of the bench and bar of the state is that the new federal rules should not be adopted or substituted for our present system." *Id.*

60. Vestal, *supra* note 50. The author stated that "the bench and bar of the State of Iowa generally have been rather satisfied with the operation of the Iowa Rules of Civil Procedure adopted in 1943 . . . ." *Id.*

61. *See* Vestal, *A Decade of Practice Under The Iowa Rules of Discovery*, 38 Iowa L. Rev. 439 (1953). Professor Vestal, in examining the speed with which litigation was determined during the ten year period following the adoption of the 1943 rules, questioned the amount of use by attorneys of the various discovery techniques in Iowa, stating:

> For what it may be worth, the answers to the questionnaire revealed that among this group of good practitioners, almost thirty percent had *never* used the provisions for obtaining depositions under Rule 140 and the sections following. Three out of eight had *never* used Rule 132 to obtain a physical examination; four out of ten had *never* used Rule 129 to obtain the production of books or documents. Slightly more than four out of ten had *never* used the provision for interrogatories under Rule 121 and the Rules following.

Id. at 454.

62. *See* Vestal, *supra* note 50.

63. *See* note 32 *supra*.

64. Kennelly, *Pretrial Discovery—The Courts and Trial Lawyers Are Finally Discovering That Too Much of It Can Be Counterproductive*, The Trial Lawyer's Guide 458, 465-66 (1977).

65. *See, e.g.*, Lasker, *supra* note 37; Pollack, *supra* note 1; Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475 (1975).

66. Blair, *Attacking The Caseload Dilemma: An Open Letter To The Bench And Bar Of Iowa*, 27 Drake L. Rev. 319, 321 (1978).

67. *Discovery Sanctions* Note, *supra* note 35.

68. *See* note 2 *supra*.

69. *See* note 3 *supra*.

One such concern is that over-zealous lawyers have abused the discovery procedures. Such criticism can quickly be generated by simply mentioning to members of the bench and bar the subject of written interrogatories. One Iowa trial lawyer expressed the feeling of many attorneys concerning interrogatories when he stated that "[m]any lawyers ask numerous unneeded, irrelevant, inappropriate questions often regurgitated from an automated typewriter."[70] There seems to be general agreement that the advent of automatic typewriters has contributed greatly to the use, or overuse, of interrogatories.[71] It has been stated that there are six good arguments against the use of form interrogatories as produced by automatic typewriters:

> (1) they tend to be used as instruments of harassment;
> (2) they result in a carefully framed answer prepared by opposing counsel rather than a spontaneous answer from his client;
> (3) they are inflexible;
> (4) they are time consuming;
> (5) they serve to educate opposing counsel concerning his own case, and
> (6) interrogatories designed for general use in all types of cases are ill-adapted for use in any one of them.[72]

The taking of discovery depositions has also been subjected to criticism. It has been suggested that under the present rules, discovery depositions afford an opportunity for attorneys with questionable competency in a courtroom setting to exhaustively interrogate witnesses from previously prepared questions, even though the questions prove to be inappropriate in view of the testimony elicited from the deponent at trial.[73] As well as being potentially detrimental to the client's case, such depositions add unnecessary time and expense to the litigation.

It is the increasing cost of civil litigation, allegedly due to the overuse of discovery, that has been the greatest cause for concern. This is evidenced by several recently initiated studies of the problem. Chief Justice Warren E. Burger of the United States Supreme Court, in his opening address at the 1976 Pound Conference, voiced his concern over rising litigation costs. He requested that the Standing Committee on Rules of the Judicial Conference of the United States conduct hearings on possible changes in pretrial proceed-

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70. James, *President's Letter*, 2 IOWA TRIAL LAWYER 17 (March, 1977).

71. *See, e.g.*, Blair, *supra* note 66, at 321. Judge Blair states that "[d]iscovery disputes clog our motion calendars, while automatic typewriters churn out hundreds of form interrogatories requiring hundreds of answers or objections and engendering an equivalent response from opposing counsel." *Id.*

72. Kennelly, *supra* note 64, at 471-72.

73. 2 J. KENNELLY, LITIGATION AND TRIAL OF AIR CRASH CASES 13-14 (1968). The author stated:

> Some lawyers seek to display their limited knowledge, and ask *previously written* questions, without regard to the responsiveness of the witness. Untrained in actual trials, they seek to cover all possible areas of interrogation with witnesses, and are unable to perceive the seriously adverse responses they elicit, which when read to a jury can be disastrous to their case.

Id.

ings, in order "to provide all necessary legal services at the lowest possible cost."[74] Also, in 1976 the (then) president of the American Bar Association asked the Section on Litigation to form a special committee[75] (ABA Discovery Committee) to undertake a study of the same subject. In addition, reference has previously been made to the committee recently appointed by the Iowa Supreme Court to study the costs of litigation.[76]

Whether the present concern over discovery is justified has proven to be a difficult question to answer. It is much easier to find statements of opinion on the subject than to find empirical data to support those opinions. Over the years there have been a number of efforts to study the effects of discovery on civil litigation.[77] For the most part, the results have been inconclusive.

One of the reasons for the lack of empirical data on which to judge the effects of discovery is the subjective nature of the inquiries necessary to obtain that data. If the question to be resolved is whether or not discovery has caused more cases to be settled, statistical data can be obtained from which conclusions can be drawn.[78] In addressing this question, one authority determined that increased discovery did not increase case settlements, and that cases with discovery were *more likely* to be tried than settled.[79] If the question is whether there has been too much discovery in a case, and whether it has been too expensive, the response is probably going to be greatly influenced by whether you are surveying the prevailing or losing party. The winning litigant may think the discovery was essential and well worth the cost, while his opponent may think it was a waste of time and money.

In connection with the preparation of this Article, a review was made of selected cases docketed in the Iowa District Court in Polk County and the United States District Court for the Southern District of Iowa. In doing so, it was easy to find cases from which it could be generalized that a great deal of discovery had been conducted that added tremendously to the cost of the litigation. It is difficult, however, to draw any conclusions with regard to the propriety of the discovery and the value to the client.[80] A decision was made

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74. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 96 (1976).

75. ABA DISCOVERY ABUSE REPORT, *supra* note 5.

76. *See* note 4 *supra*.

77. *See, e.g.*, JUDICIAL CONTROLS: DISCOVERY, *supra* note 9; W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM (1968); Lacy, *supra* note 34; Speck, *The Use Of Discovery In United States District Courts*, 60 YALE L.J. 1132 (1951).

78. *See* GLASER, *supra* note 77.

79. GLASER, *supra* note 77, at 97, 114; Lasker, *supra* note 37, at 252.

80. JUDICIAL CONTROLS: DISCOVERY, *supra* note 9, at 35. Although this study did not explore "discovery abuse" as such, the data compiled was relevant to present concerns that discovery is too expensive and time consuming. As the report indicates:

> It is possible for a single discovery request to be abusive, as it is possible for sixty-two requests to be appropriate, relevant, and facilitative in the just disposition of a particular case. The data do suggest, however, that discovery abuse, to the extent it exists, does not permeate the vast majority of federal filings . . . abuse — to the extent it exists — must be found in the *quality* of the discovery requests, not in the *quantity*. . . .

Id.

by the author of this Article that it would be inappropriate, if not impossible, to second guess competent trial attorneys and pass judgment on their use of discovery. However, the unavailability of empirical data on which to base a judgment about discovery does not mean that the concerns being voiced can be ignored. Leaders of the bench and bar, as well as the public, perceive that there is an overuse of discovery resulting in an unwarranted cost to the client. This alone is a compelling reason to re-examine the historical purpose and use of discovery in order to determine if that purpose can be better met through procedures that would be less onerous to the bench, bar and public.[81]

IV. The Future

What effect is all of this concern going to have on discovery? It is a little early to say, but there are already indications that changes will take place.

A. *Greater Court Involvement in Discovery*

It appears that there will be greater judicial participation in discovery procedures in the future. This is a bit ironic in that one of the goals of the framers of the Federal Rules of Civil Procedure was to reduce the court's involvement in discovery matters.[82] Throughout most of the history of the rules, the courts have exercised restraint in this regard.[83] Because of perceived abuses, however, that judicial restraint in the area of discovery is being replaced by a tougher, less tolerant attitude.[84] While this trend was first noted in cases where the courts invoked sanctions to compel discovery,[85] it is clear that the United States Supreme Court's hard-line approach in *National Hockey League v. Metropolitan Hockey Club, Inc.*[86] will be used not only to compel discovery, but also to eliminate procedural abuses in overuse of discovery.[87]

The trend toward greater court involvement is also noted in the drafts of proposed amendments to the Federal Rules of Civil Procedure, circulated

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81. Judge Lasker has stated that lengthy, delayed trials are expensive, resulting in both an increased financial burden on those members of the public who choose to litigate, and barring access to the courts for possibly the majority of Americans. Lasker, *supra* note 37, at 250. He further stated that:

> Unless we find working solutions to the problem of the cost of legal services our fellow citizens are bound to ask more frequently in the future whether it is economically and morally justified that the legal profession should receive as large a portion of the national income; that is, whether our contributions to the public wealth justify what we are paid in comparison to the contribution of others in society.

Id. at 251.

82. *See* Judicial Controls: Discovery, *supra* note 9, at 9-10.

83. *See* Glaser, *supra* note 77, at 154-56.

84. Judicial Controls: Discovery, *supra* note 9, at 14-17; *Discovery Sanctions* Note, *supra* note 35, at 1044-45.

85. *See, e.g.*, SCM Societa Commerciale v. Industrial & Commercial Research Corp., 72 F.R.D. 110, 112 (N.D. Tex 1976).

86. 427 U.S. 639 (1976).

87. *See Discovery Sanctions* Note, *supra* note 35, at 1049.

in March 1978 and revised and re-circulated in February 1979, by the Committee on Practice and Procedure of the Judicial Conference of the United States (Judicial Conference Committee).[88] Included is a proposed change in rule 26, which would provide for a discovery conference. The conference would be held by the court and thereafter an order entered, which would:

> (1) identify the issues for discovery purposes;
> (2) establish a plan and schedule of discovery;
> (3) set limitations on discovery, if any, and
> (4) determine such other matters, including the allocation of expenses, as necessary for the proper management of discovery in the case.[89]

The revised report also recommends that rule 37 be amended to require parties and their attorneys to cooperate in good faith in framing a discovery plan as contemplated by the recommended amendment to rule 26.

An Iowa district court judge has also recommended that the courts become more involved in the discovery process so that the scope of discovery can be tailored to fit the individual case, and a definite discovery schedule established and adhered to.[90]

B. *Scope of Discovery*

Consideration has been given to restricting the scope of discovery. The ABA Discovery Committee has recommended that the term "subject matter," as used in the definition of the scope of discovery in rule 26(b)(1), be changed to "issues."[92] This recommendation was an attempt to place limits on the expanded scope of discovery. The Committee of the Judicial Conference gave consideration to this change. In its March 1978 report, the Judicial Conference Committee, instead of adding a new term that it felt would only further invite unnecessary litigation attempting to broaden the scope of discovery, eliminated in its entirety from rule 26(b)(1) the phrase "subject matter involved in the pending action, whether it relates to the . . ." As thus changed, the rule would have provided that the scope of discovery extended only to any matter not privileged, and relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party.[93] That approach would have been more restrictive than the one presently permitted. However, in its revised report of February 1979, this suggestion was deleted and no change was recommended for the scope of discovery. The committee states in the revised report that while abuse of discovery is very serious in certain cases, it is not so general as to require changes in the rules that govern discovery in all cases.[94]

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88. *See* PROPOSED AMENDMENTS, *supra* note 5; REVISED PROPOSED AMENDMENTS, *supra* note 5.
89. REVISED PROPOSED AMENDMENTS, *supra* note 5, at 6.
90. Blair, *supra* note 66, at 321.
92. ABA DISCOVERY ABUSE REPORT, *supra* note 5, at 3.
93. PROPOSED AMENDMENTS, *supra* note 5, at 6.
94. REVISED PROPOSED AMENDMENTS, *supra* note 5, at 5.

C. *Interrogatories*

The ABA Discovery Committee also recommended that the number of interrogatories a litigant is entitled to propound, as a matter of right, be restricted to 30.[95] The Judicial Conference Committee did not adopt that limitation. In the March 1978 report the committee did propose that rule 33 be amended to provide that a district court might, by action of a majority of the judges thereof, limit the number of interrogatories that could be used by a party.[96] The Judicial Conference Committee at that time did not feel that a nation-wide limitation was needed, but felt that the individual judicial districts should be allowed to adopt such a restriction. However, in the revised report of February 1979, even this recommended rule change was dropped.

D. *Depositions*

No recommendations were made in either the ABA Discovery Committee report or the Judicial Conference Committee proposal with regard to restrictions on discovery depositions. In view of the concern over the cost of discovery, such restrictions should be considered. It would not be unreasonable to limit the number of non-party discovery depositions a litigant could take, as a matter of right, nor to limit the time of examination at a deposition that a litigant was entitled to, as a matter of right. By order, the court could always provide for the unusual case that required more extended discovery by deposition.

E. *Re-examining the Pleading Model for Discovery*

In addition to considering changes in the rules as discussed above, there must also be a re-examination of the decisions made by the drafters of the Federal Rules of Civil Procedure, which greatly influenced the development of discovery practices in Iowa and other jurisdictions. Specifically, the decision to use discovery as the method of informing litigants about their adversary's case, as opposed to pleadings, should be reviewed. It would be naive to suggest that the course of history should be reversed and a decision made to go back to the pleading model of informing litigants concerning an opponent's case. However, there may be some middle ground between the pleading and discovery models that would better serve the efficient administration of justice.

The pleading model envisioned a detailed statement of a litigant's case in his pleadings. Under present day practices, such a requirement is not realistic. Often the plaintiff's attorney is not retained sufficiently in advance of the running of the statute of limitations on an action to be able to conduct the investigation necessary to prepare such a detailed statement. Similarly, a defendant is ill-prepared to give a detailed statement at the time he re-

95. ABA Discovery Abuse Report, *supra* note 5, at 20.
96. Proposed Amendments, *supra* note 5, at 29.

sponds to the petition. Notice pleadings are sufficient to commence an action.

However, once there has been sufficient time to allow the parties to develop their cases factually, is there any reason why they should not be required to then make a detailed, definitive statement of the basis of their case and the evidence on which they rely? If that were provided for in the rules, with adequate sanctions to discourage attorneys from "sandbagging" their opponents, much of the discovery now being conducted could be eliminated. Applying the concepts of the pleading model at this stage of the proceedings, the parties could be required to prepare and file not only a list of their witnesses, but also a sworn statement from each witness setting out the matters that are expected to be testified to at trial. After the filing of such statements, the parties could then undertake such further discovery as necessary.

F. *Expert Witnesses*

With regard to expert witnesses, the parties could be required to file a report from the expert setting out:

(1) the expert's qualifications;
(2) all information submitted to the expert;
(3) all tests, investigations, *etc.*, carried out by the expert;
(4) the results thereof, and
(5) the expert's opinions and the basis thereof.

While the parties could then pursue such discovery as was necessary, such a procedure would, in many cases, eliminate the need for—or greatly reduce the length of—experts' depositions. In addition, the report would no doubt be far more understandable and usable than a multi-volume deposition taken by attorneys whose limited knowledge of the field prevented an orderly development of the opinions of an uncooperative expert witness.

G. *Inspection of Documents*

The production and inspection of documents has become a major contributor to the time and expense involved in many civil cases. Often the documents are of such a nature that each party is required to retain a consultant with special knowledge in the field just to go through the documents and determine what facts the documents reveal, separate and distinct from any opinions that might be based on those facts. In such cases, much time and expense could be saved if the court were to appoint a qualified person to inspect the documents on behalf of all parties and submit a report. While it might be that a party would choose to make some further inspection of the documents, such a procedure should certainly eliminate a lot of the duplication of effort that goes on in many cases at present.

H. *Court Appointed Experts*

Another area for consideration is the use of court appointed experts. Typically, the experts for the various parties to an action agree on most of

the factual issues requiring expert knowledge. Only a few such issues are actually controverted. Again, duplication of effort could be eliminated if initially a court appointed expert conducted an investigation and submitted a report to all parties. In some cases this might eliminate the need for the parties to have their own experts. At the very least it should reduce the time, and resulting expense, of any experts retained by the parties.

I. *Other Observations*

Undoubtedly, many other suggestions of a similar nature could be made. The underlying concept throughout all of these suggestions is, however, that the parties reveal to their opponents those matters which the opponents are entitled to know—without the necessity of the attorneys having to elicit those matters through adversary proceedings. At present, the vast majority of an attorney's time in preparing a civil case for trial is devoted to developing and obtaining disclosure of relevant facts. The time has come to reduce the amount of the attorney's time so spent, and let him devote his attention to his field of expertise—the law. To the extent possible, the facts should be developed and disclosed without the lawyer's direct involvement. While there will always be a need for the lawyer's skills in eliciting accurate facts from the recalcitrant party or prevaricating witness, such lawyer involvement in obtaining discovery should be the exception, not the rule. We should not develop an entire discovery procedure for these exceptions. In most cases, the information to which the parties are entitled can be fairly and accurately disclosed without the special skills of the advocate.

To summarize, if the pleading approach to disclosing the details of a litigant's case were used at the discovery stage of the proceedings, and the litigants and their counsel were held to a higher duty of voluntary disclosure, it would appear that a big step would have been taken toward eliminating many of the abuses that are now thought to exist. In fact, much of what has been suggested above has already been implemented by individual judges in developing their own special pretrial procedures.[97] It would be far better, however, to have these procedures uniformly provided for by rule, rather than leaving it to the individual judges.

V. Conclusion

The original purpose of discovery was to enable a party to obtain evidence in support of his claim or defense that he could not otherwise obtain. As fundamental changes were made in civil procedures, it was necessary that discovery serve the additional purpose of providing litigants a means of learning the details of their opponent's claim or defense. That change of purpose brought with it procedural changes that not only expanded the scope of the information that could be sought and the means of obtaining that informa-

97. *See, e.g.*, Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475 (1975); Solomon, *Techniques for Shortening Trials*, 65 F.R.D. 485 (1975).

tion, but also greatly removed the courts from involvement in the proceedings. Consequently, a whole new class of adversary type procedures were created that were not subject to direct control and supervision of judges, and were not carried out in accordance with the traditional rules governing the conduct of trials.

The result has been the addition of time and expense to civil proceedings, without a commensurate improvement in the quality of results. The bench, bar and public have perceived this disparity as indicating an abuse of the discovery procedures. The concern has become so great that it now appears that changes will be made.[98] The question is whether or not those changes will be made within the system by those most knowledgeable concerning its workings, or by others.

Consideration must be given to making changes in discovery. Some of the changes that should be given consideration are: (1) greater court involvement in discovery proceedings; (2) restrictions on the scope of discovery; (3) limitations on the amount of discovery that may be undertaken as a matter of right, and (4) procedures that reduce the amount of the lawyer's involvement in the development and disclosure of the facts relevant to the case.

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98. Ms. Evelyn Hicks, ABA section liason to the Section on Litigation, indicated in a telephone conversation of Feb. 21, 1979, that although no new reports have been issued since the 1977 ABA DISCOVERY ABUSE REPORT, *supra* note 5, the committee is still investigating the problem of discovery abuse and anticipates further recommendations. The REVISED PROPOSED AMENDMENTS, *supra* note 5, await comments and suggestions from the bench and bar, to be submitted not later than May 11, 1979. It is presumed by the author that further action regarding discovery abuse will be taken after that date.