PROFESSIONALISM AND PROCEDURE: NOTES ON AN EMPIRICAL STUDY

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TABLE OF CONTENTS

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I. Introduction

Abraham Lincoln, practicing law in Illinois, was once asked by a client to bring suit for $2.50 against someone who had not a penny with which to pay the claim. The client understood that his debtor was unable to pay, but would not be put off in his passion for revenge. Lincoln requested and obtained a ten dollar fee and gave half to the debtor who confessed judgment in the full amount of the $2.50 claim. The creditor was satisfied and the suit was ended.[1]

"It was a common thing," according to one student of Lincoln, "for Lincoln to discourage unnecessary lawsuits, and consequently he was continually sacrificing opportunities to make money."[2] Lincoln was asked, for example, to press a six hundred dollar claim against a widow with six children. Though confident of his ability to win, Lincoln reportedly did not like the case on the merits. He told the potential client, "I can set a whole neighborhood at loggerheads; I can distress a widowed mother and her six fatherless children, and thereby get for you six hundred dollars which rightly belong, it appears to me, as much to them as it does to you." Lincoln decided not to take the case, and giving "a little advice for nothing," he suggested that the man try some other way to make six hundred dollars.[3]

In cases which he accepted, Lincoln became legendary for charging low fees or foregoing a fee altogether; fellow lawyers looked upon this as "his only fault."[4] If he did have other faults, abuse of procedure was not one of them. Lincoln's law partner William Herndon once confessed to him that he had drawn up "a dilatory plea for the purpose of delaying a case for another term . . . to save their client's interests." When Lincoln questioned him about it, Herndon admitted that it was not "founded on fact." Lincoln urged repudiation of the plea, and Herndon withdrew it.[5]

C. Edwin Moore would have found these stories about Lincoln the stuff of admiration, but probably unremarkable because that was what lawyers were supposed to be like. A judge for over half a century, including sixteen years on the Iowa Supreme Court, the last nine as Chief Justice, he devoted

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1. 2 C. Sandburg, Abraham Lincoln (The Prairie Years) 64 (1926); A. Gross, Lincoln's Own Stories 24 (1912).

2. A. Gross, Lincoln's Own Stories 24 (1912).

3. *Id.* at 21-22.

4. *Id.* at 32. David Davis, a presiding circuit court judge, is quoted as having said, "Lincoln, your picayune charges will impoverish the bar." *Id.* at 33.

5. *Id.* at 36-37.

his life to public service. Law was primarily a way by which he could serve the public and only incidentally a way to earn a living. He was not in it for the money. Helping people to maintain good relations with one another, he is reported to have said, is "the highest purpose of the law."[6] With an uncommon measure of humility and gift for humor, he served that purpose well. Justice Clay LeGrand commented that Chief Justice Moore "was very devoted to doing the best he could to improve the system,"[7] and indeed, major reforms became law during his tenure as Chief Justice. State trial courts were unified; a client security fund was developed to make whole clients harmed by lawyers' improper management of their affairs; the Iowa Court of Appeals was created by the legislature with his active encouragement as a means to reduce appellate backlog and speed disposition of controversies.

A straightforward and unassuming person, he had no tolerance for dilatory, uncooperative, or deceptive practice. As Chief Justice, he authored several opinions upholding the imposition of severe sanctions for such conduct in the course of discovery procedures.[8] At the same time, he recognized that with proper professional education, many problems confronting the legal profession could be both avoided and solved.[9]

For seventeen years C. Edwin Moore helped to bridge the gap between law school and the Bar by teaching trial practice to Drake University law students. When he was Chief Justice of the Iowa Supreme Court, the Court became the second in the nation to require continuing legal education for lawyers. While teaching at Drake he helped to revive the tradition of Supreme Court Day, a time when the Supreme Court of Iowa came to the Law School and senior law students argued moot court cases to the court en banc. Years later, he presided over these Supreme Court Day arguments as Chief Justice with humor, obvious appreciation for the students, and continuing focus on the partnership which can exist among the Bench, the Bar, and the law schools. He announced the "Opinion of the Court," invariably reached "with great difficulty" and admiration for the students' demonstration of their advocacy skills.

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6. Des Moines Reg., May 12, 1988, at 6A, col. 3.

7. *Id.*

8. Haumersen v. Ford Motor Co., 257 N.W.2d 7 (Iowa 1977) (order prohibiting introduction of evidence in product liability trial); Smiley v. Twin City Beef Co., 236 N.W.2d 356 (Iowa 1975) (order striking defendant's counterclaim and entering default judgment in plaintiff's favor); Bos Lines, Inc. v. Phillips & Phillips, 226 N.W.2d 819 (Iowa 1975) (order dismissing plaintiff's petition). *See also* Sandhorst v. Mauk's Transfer, Inc., 252 N.W.2d 393 (Iowa 1977) (order imposing attorney's fees for wrongful failure to make requested admissions).

9. *Compare with* Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL EDUC. 285, 285 (1988) (calling for closer working relationships between the law schools and the legal profession and expressing dismay at the failure of some legal academics to understand or even admit "the problems facing the judiciary—or, for that matter, those facing other members of the legal profession").

Chief Justice C. Edwin Moore was a role model to the Bench and Bar and a great friend of the Drake Law School. This article is warmly dedicated to him.

A. *The Litigation Explosion, Frivolous Suits, and Discovery Abuse*

It is an understatement to say that the Lincoln who emerges through the above stories and others is not the public image of lawyers today. In the first place, a substantial percentage of the population, including lawyers,[10] does not believe that attorneys' fees are reasonable. The concern is deep-seated and widespread that the cost of litigation, of which attorneys' fees are a significant part, is too high.[11] Second, widely publicized class actions,[12] awards of statutory attorneys' fees in civil rights cases,[13] medical malpractice cases,[14] and others[15] have not given lawyers the reputation for discouraging litigation. Nor have Americans developed the reputation for being easily discouraged from pursuing litigation. On the contrary, many regard Americans as unduly contentious.[16] Thus, accounts are commonplace that

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10. *See Ethics Forum—Open Dialogue*, ETHICS AND THE LAW Vol. 1, No. 4, 63-73 (1989) [hereinafter ETHICS]; *In re* Fine Paper Antitrust Litigation, 98 F.R.D. 48 (E.D. Pa. 1983), *rev'd in part*, 751 F.2d 562 (3d Cir. 1984).

11. Jost, *Public Image of Lawyers: What Image Do We Deserve?*, A.B.A. J., Nov. 1988, at 50 ("Fee-happy lawyers are blamed for everything from high insurance rates to a breakdown in personal morality . . . ."); Wall St. J., Sept. 24, 1985, at 30, col. 1; JUDICIAL COORDINATING COMMITTEE OF THE IOWA SUPREME COURT, PUBLIC OPINION SURVEY: THE IOWA COURT SYSTEM 15-17 (Fall 1981) (77% of persons responding agreed with the statement "Lawyers' fees are too expensive."); Nat'l L. J., Aug. 18, 1986, at s-3 (reporting results of nationwide poll of public's views of lawyers); *Cutting Legal Fees*, Nat'l L. J., Mar. 21, 1983, at 12, col. 1. *See also* H. E. Catto, Jr., *The Litigious Society* (commentary for National Public Radio's *All Things Considered*, February 18, 1986) ("What caused the explosion in litigation. One cause is greed. Who can forget the vulture-like flight of plaintiffs' lawyers to India after the Bhopal disaster? Lawyers typically claim at least a third of any award, and with awards for pain and suffering running to millions of dollars, that can mean huge legal fees.").

12. *See, e.g.*, International Union v. Brock, 477 U.S. 274 (1986); *In re* "Agent Orange" Product Liability Litigation, 818 F.2d 145 (2d Cir. 1987); State v. Levi Strauss & Co., 41 Cal. 3d 460, 715 P.2d 564, 224 Cal. Rptr. 605 (1986).

13. *See, e.g.*, Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986); City of Riverside v. Rivera, 477 U.S. 561 (1986); Cobb v. Miller, 818 F.2d 1227 (5th Cir. 1987); McCann v. Coughlin, 698 F.2d 112 (2d Cir. 1983).

14. *See, e.g.*, Godwin v. Schramm, 731 F.2d 153 (3d Cir.), *cert. denied*, 469 U.S. 882 (1984); Hathaway v. Baldwin Park Community Hosp., 186 Cal. App. 3d 1247, 231 Cal. Rptr. 334 (1986); Bernier v. Burris, 113 Ill. 2d 219, 497 N.E.2d 763 (1986).

15. *See, e.g.*, Jost, *supra* note 11, at 47 (quoting Richard T. Kennedy, member of the American Bar Association's Special Coordinating Committee on Professionalism, as saying "The public is getting an image of lawyers as interested mainly in profit and not in serving the interests of justice."); *Lawyers Lead Hunt for New Groups of Asbestos Victims*, Wall St. J., Feb. 18, 1987, at 1, col. 6; *Manville's Bid to Evade Avalanche of Lawsuits Proves Disappointing*, Wall St. J., July 15, 1986, at 1, col. 6; *Lawyers for Victims of Bhopal Gas Leak Fight One Another*, Wall St. J., May 1, 1986, at 1, col. 6.

16. *E.g.*, Des Moines Reg., Aug. 11, 1987, at 5T, col. 3 (reporting on Chrysler President

ours is a "litigious"[17] or a "suing society"[18] in which Americans suffering from "hyperlexis"[19] have produced a "litigation explosion."[20]

Rules of procedure have been accorded a good share of the blame for making lawsuits easy to file and litigation expensive. For example, many[21] believe that the rule authorizing so-called "notice pleading"[22] has led to the filing of unnecessary and frivolous suits imposing burdens on defendants and courts alike.[23] When thoughts turn to the cost of litigation and rules of

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Lee Iacocca's remarks to the American Bar Association and quoting him as stating that Americans are willing to sue "at the drop of a hat" and that "unbridled advocacy is the problem today and it's getting out of hand."); Newsday, Dec. 9, 1984, at 119, col. 1 ("The United States gives to many the impression of becoming a nation of lawyers and clients, a land of promiscuous litigation . . . ."); Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83 (1976).

17. *E.g.*, J. Leiberman, The Litigious Society (1982); Rosenberg, *Contemporary Litigation in the United States*, in Legal Institutions Today: English and American Approaches Compared 152 (H. Jones ed. 1977). *But see* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. Rev. 4, 5-11, 62-72 (1983) (critical review of literature on the "litigation explosion").

18. *The Suing Society*, Newsday, July 13, 1983, § 2, at 4 ("Americans today show an unprecedented desire to tell it to the judge.").

19. Manning, *Hyperlexis: Our National Disease*, 71 N.W.U. L. Rev. 767, 772 (1977).

20. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

21. *See Report of the Ad Hoc Committee to Study the High Cost of Litigation to the Seventh Circuit Judicial Committee and the Bar Association of the Seventh Federal Circuit*, 86 F.R.D. 267, 272 (1979) ("There has been a growing concern recently that the pendulum has swung too far in the direction of notice-type pleading. In general, the committee perceives that complaints increasingly are filed with the intention of later looking to discovery to identify issues and elements that, with foresight and effort, should have been initially pleaded."); Liman, *The Quantum of Discovery vs. the Quality of Justice: More is Less*, Litigation, Fall 1978, at 8 ("notice pleadings, rather than delineating issues for discovery, have become formless warrants entitling the pleader to pry almost any information from his adversary.").

22. Fed. R. Civ. P. 8; Iowa R. Civ. P. 69. The Iowa rule is patterned after Federal Rule of Civil Procedure 8. It differs in that the Iowa rule prohibits inclusion in the plaintiff's pleading of a monetary prayer in cases seeking unliquidated damages. Conley v. Gibson, 355 U.S. 41, 47-48 (1957), uses the term "notice pleading." Judge Charles Clark, chairman of the committee which drafted the Federal Rules of Civil Procedure, did not use the term "notice pleading." The departure from the "best precedents" under code pleading was, he thought, not great. "We do not require detail. We require a general statement." As to how much detail that entailed, Judge Clark referred readers, lawyers and judges to the terms following the federal rules.

23. This is certainly a view shared by a number of trial court judges in Iowa. A questionnaire sent to the 99 active Iowa District Court Judges in 1983 asked, "Do 'notice pleadings' (in contrast to the former Rule of Civil Procedure requiring a petition to state the facts constituting the cause of action) create any significant problem for the court in the ordinary civil case?" Twenty-seven of the 54 who responded answered "yes," 26 answered "no," and one commented but did not answer. *See* Iowa Supreme Court Advisory Committee on Rules, Study of Civil Litigation in the Iowa District Court (1985) [hereinafter Study], Vol. 2, at 2-18 and app. J5 (containing the verbatim comments of judges in response to the question concerning notice pleadings).

One judge, asked whether "notice pleadings" create any significant problems for the court

procedure, however, no rules come more quickly to mind than those authorizing pretrial discovery.[24] Discovery, according to one federal judge, is the trial lawyer's "not so magnificent obsession,"[25] and according to another, "[t]he average litigant is overdiscovered, overinterrogated and overdeposed."[26] "Delay and excessive expense now characterize a large percentage of all civil litigation," Justice Powell wrote, dissenting from the adoption in 1980 of amendments to the discovery rules.[27] "The problems arise in significant part," he continued, "as every judge and litigator knows, from abuse of discovery procedure available under the Rules."[28] These criticisms and complaints are interrelated. Notice pleadings are viewed as "the principal cause of extensive, expensive, and unnecessary discovery with resulting burdens on the courts settling discovery disputes," and discovery is seen as both protracting litigation as well as making it unnecessarily expensive.[29] Sometimes the expense is prohibitive, and access to the courts is precluded by the cost of initiating or continuing litigation.[30]

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in the ordinary case, replied:

> Yes. It generates sloth in the filing of cases. The good, busy attorney is no problem . . . as he wants to know if he or she has a case before they start. However, there are too many times when a petition is filed and then counsel tries to find out if he or she has a case.

Others agreed. "Under the old rule," another explained, "a lawyer had at least to sit down and analyze his case. Now all he has to say is, 'the client was hurt and he wants money.' Notice pleading amounts to no pleading and encourages sloppy preparation and undisciplined thinking to pass as a lawyer's professional work product." *Id.* at ¶ 10, pp. 10-11. Additional comments made the same point. "Notice pleadings encourage attorneys to file pleadings, prepare for trials and try cases without really knowing the elements of their cause of action or affirmative defense."*Id.* at 11. "Cases are filed before the attorney knows whether he has a cause of action or not. Creates many unnecessary motions and amendments to petition." *Id.* "Lawyers do not understand that they must still have a 'cause of action'—they feel that as long as their client 'feels bad' they have a case." *Id.* at 12.

24. *E.g.*, A.B.A. COMM'N ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 29 (1986) [hereinafter BLUEPRINT]; Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 229 (1985), Brazil, *Views from the Frontlines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 219; Smith, *The Concern Over Discovery*, 28 DRAKE L. REV. 51, 51 (1978-79).

25. McMillan, *Discovery: A Not So Magnificent Obsession*, LITIGATION, Fall 1976, at 5.

26. Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 222 (1978) (quoting federal judge and U.S. Attorney General Griffin Bell, attributed to Judge Aldisert).

27. *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 523 (1980) [hereinafter *Amendments*]. Justice Powell regarded the amendments as "tinkering changes [which would only] delay for years adoption of genuinely effective reform." *Id.* at 523.

28. *Id.*

29. STUDY, *supra* note 23, Vol. 2, app. J5, at 12; Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 8-9 (1984) [HEREINAFTER ADVERSARY SYSTEM].

30. *See Civil Discovery: Lawyers Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 828 & n.67. A questionnaire sent to members of the Association of Trial Lawyers of Iowa in 1983 asked, "Within the last three (3) years have you decided not to accept a meritorious, non-domestic relations civil case based upon your predic-

Many have been concerned that the discovery rules, as practiced and enforced, have made it impossible to dispose of every civil action in the "just, speedy, and inexpensive" manner intended by the Rules of Civil Procedure.[31] Concerns have generally been of two types. First, there has been concern over "bad faith" on the part of counsel and/or the parties. Untruthful responses to discovery requests,[32] deliberate concealment of relevant information which has been requested,[33] and destruction of critical documents[34] or their "burial" in file cabinets or warehouses otherwise made available[35] are certainly examples of "bad faith" in discovery practice, though the concept is broad enough to include instances of delayed or evasive responses.[36] Second, there has been concern about too much discovery, or "overdiscovery."[37] Examples include cases in which numerous and burdensome interrogatories are served;[38] interrogatories are not tailored to the facts or needs of a particular case;[39] unduly broad requests are made;[40] and

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tion of the cost of pursuing or responding to civil discovery?" Of the 106 who answered the questionnaire, 55, or 51.9% of those responding, answered "yes." Dissenting from adoption of the 1980 amendments to the Federal Rules of Civil Procedure, Justice Powell wrote, "Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate." Amendments, supra note 27, at 523.

31. *E.g.*, Levin & Colliers, *supra* note 24, at 238-46 (1985); Smith, *supra* note 24; Liman, *supra* note 21, at 8 ("Discovery in litigation of any complexity, is more often an obstacle than a means to the 'just, speedy and inexpensive determination' of litigation.").

32. *See, e.g.*, United States v. Rodriguez, 765 F.2d 1546, 1556 (11th Cir. 1985); Kline v. Wolf, 88 F.R.D. 696, 700 (S.D.N.Y. 1981); Norman v. ARCS Equities Corp., 72 F.R.D. 502, 506 (S.D.N.Y. 1976).

33. *See, e.g.*, Synanon Found., Inc. v. Bernstein, 503 A.2d 1254, 1263 (D.C.), *cert. denied*, 479 U.S. 815 (1986); Bevan v. Wanicka, 505 So. 2d 1116, 1118 (Fla. Dist. Ct. App. 1987); Lubbers v. Norfold & W. Ry. Co., 147 Ill. App. 3d 501, ____, 498 N.E.2d 357, 369 (1986). *See also* Kiechel, *The Strange Case of Kodak's Lawyers*, FORTUNE, May 8, 1978, at 188-94.

34. *See, e.g.*, Craig v. A. H. Robins Co., Inc., 790 F.2d 1, 3 (1st Cir. 1986); Whitewater Valley Canoe Rental, Inc. v. Board of Franklin County Comm'rs, 507 N.E.2d 1001, 1008 (Ind. Ct. App. 1987); Dion v. Graduate Hosp., 360 Pa. Super. 416, ____, 520 A.2d 876, 883 (1987).

35. Roxse Homes Ltd. Partnership v. Roxse Homes, Inc., 399 Mass. 401, ____, 504 N.E.2d 633, 636 (1987); Deeter v. Angus, 179 Cal. App. 3d 241, ____, 224 Cal. Rptr. 801, 808 (1986); Paramount Pictures Corp. v. Miskinis, 418 Mich. 708, ____, 344 N.W.2d 788, 795 (1984).

36. *See, e.g.*, Smith v. National Bank, 182 Ga. App. 55, ____, 354 S.E.2d 678, 680 (1987); Baughn v. Rapidways Truck Leasing Co., 698 S.W.2d 618, 620 (Mo. Ct. App. 1985); Independent Insulating Glass v. Street, 722 S.W.2d 798, 802 (Tex. Ct. App. 1987).

37. *See, e.g.*, Jaquette v. Black Hawk County, 710 F.2d 455, 462-63 (8th Cir. 1983); Joftes v. Kaufman, 324 F. Supp. 660, 660 (D.D.C. 1971) ("Excessive discovery has been conducted in each case.").

38. *See, e.g.*, Dykowsky v. New York City Transit Auth., 124 A.D.2d 465, 507 N.Y.S.2d 626 (1986); Benzzenberg v. Telecom Plus, 119 A.D.2d 717, 501 N.Y.S.2d 131 (1986); Aeron Aviation Corp. v. Chemco Int'l Leasing Inc., 117 A.D.2d 573, 498 N.Y.S.2d 49 (1986).

39. *See, e.g.*, Toyota Motor Corp. v. Greene, 483 So. 2d 130 (Fla. Dist. Ct. App. 1986); State *ex rel.* Anheuser v. Nolan, 692 S.W.2d 325 (Mo. Ct. App. 1985); Manzo v. Westchester Rockland Newspapers, Inc., 106 A.D.2d 492, 482 N.Y.S.2d 834 (N.Y. App. Div. 1984).

40. *See, e.g.*, McGowan v. General Dynamics Corp., 794 F.2d 361 (8th Cir. 1986); Mort v. A/S D/S Svenborg, 41 F.R.D. 225 (E.D. Pa. 1966); Brake v. Beech Aircraft Corp., 184 Cal. App.

needless, or needlessly long, depositions are taken.[41] In each case the litigation becomes protracted, and the expense of maintaining or defending it multiplies. Beyond "bad faith" and "overdiscovery" is a simple failure or refusal to practice good faith. The discovery rules were designed to operate extrajudicially, with each party cooperating to enable others to gain access to relevant, nonprivileged information,[42] but the practice of "playing hardball" in which some engage has betrayed this original intent.[43] Aggravating perceived problems of "bad faith" and "overdiscovery" has been a general belief, at least until recently, that aside from a few celebrated cases the courts have been reluctant to enforce the discovery rules in a meaningful fashion.[44]

Concerns over meritless suits and defenses, inflated fees, costly litigation, and discovery abuse are part of a larger concern that the legal profession is losing sight of professionalism.[45] The practice of law is viewed as having become "a bottom-line business," with increasing numbers of lawyers and clients adopting and pursuing a "win-at-any-cost" attitude.[46] A loss of

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3d 930, 229 Cal. Rptr. 336 (1986).

41. *See, e.g.*, Monarch Ins. Co. v. Insurance Corp. of Ireland, 110 F.R.D. 590 (S.D.N.Y. 1986); Bank of Whitewater v. Decker Inv., Inc. 238 Kan. 308, 710 P.2d 1258 (1985); Lake Shore Investors v. Rite Aid Corp., 67 Md. App. 743, 509 A.2d 727 (1986).

42. *See* Brazil, *The Adversary Character of Civil Discovery, A Critique and Proposals to Change*, 31 VAND. L. REV. 1295 (1978); IOWA R. CIV. P. 121(a).

43. *See* ETHICS, *supra* note 10, at 66 (Former California Supreme Court Justice Cruz Reynozo sensed "a far elevated shrillness in the practice of law" today, in contrast to what he recalled twenty years ago. "It is common now for lawyers to play 'hardball' almost all the time. They won't give you anything without a motion to compel, they won't cooperate."); Solvy & Byman, *Hardball Discovery*, LITIGATION, Fall 1988, at 8. *See also* A.B.A. SEC. OF LITIG., REPORT OF THE DISCOVERY COMMITTEE'S SUBCOMMITTEE ON PRETRIAL LITIGATION ETHICS AND PRACTICES (Jan. 1981).

44. S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 4 (1985); Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264 (1979).

45. On Chief Justice Burger's recommendation the American Bar Association appointed a Commission on Professionalism. Its report, " . . . *In the Spirit of Public Service:" A Blueprint for Rekindling Lawyer Professionalism*, was published in 1986. Its title is drawn from Dean Roscoe Pound's definition of a "profession," which the Commission approved. R. POUND, THE LAWYER FROM ANTIQUITY TO RECENT TIMES 5 (1954). The label may or may not be a useful one. *See* Rotunda, *The Word 'Profession' Is Only a Label—and Not a Very Useful One*, 4 LEARNING & THE LAW 16, 53 (1977) ("The professional quality of dedication to serving client interests—of rendering a service beyond self-interest, of duty, of a spirit of public service—are attributes of individuals, not organizations.").

46. *See* ETHICS, *supra* note 10, at 64-66 (quoting Professor Arthur Miller, Elliot Richardson, and Attorney Alan R. Woodard); Jost, *supra* note 11, at 50 (discussing debate within legal profession "regarding whether business values [have] supplanted professionalism in the nation's law firms"); Brown, *Narcissism, Manners, and Morals: Can Grace and Collegiality Be Salvaged?*, LITIGATION, Summer 1987, at 18 (quoting former New York City Mayor John V. Lindsay as saying, "What the present-day American law profession has become in many respects is a bottom-line business . . . . The only thing that counts is winning. Anything else is losing. There's no such thing as standing for a principle that's going to lose. We live in a 'me' not a 'we' society today.").

civility, and a consequent decline in professionalism, results. The lack of cooperation drives up costs, delays disposition of disputes, hurts the image of lawyers and the reputation of the legal profession, and prevents the "just, speedy and inexpensive resolution" of client controversies.

B. *The 1983 Amendments to the Federal Rules—Addressing Problems by Altering Procedural Rules*

One approach to addressing these concerns has been through adoption and amendment of rules of procedure, most notably through the 1983 amendments to the Federal Rules of Civil Procedure.[47] Changes in existing rules to limit discovery had been proposed.[48] The Amendments eventually adopted, however, had broader goals and directly addressed meritless or improper pleadings or motions, unreasonable or abusive discovery, and delay in disposing of litigation. Amendments to the Federal Rules of Civil Procedure that year struck language which for 45 years had provided that the frequency of use of discovery devices was not limited[49] and cast the federal courts in a far more active role of processing civil litigation.[50] Federal Rule 16 was dramatically and extensively revised to provide, among other things, that it is the responsibility of the court to expedite disposition of the action and to establish "early and continuing control" of the case so that it does not become "protracted because of lack of management" or become characterized by "wasteful pretrial activities." Federal judges became case managers.[51]

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47. *See* A. Miller, The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility (Federal Judicial Center 1984); *Adversary System*, *supra* note 29; *Judicial Conference—Second Circuit*, 101 F.R.D. 161, 196-200 (1983) (remarks of Professor Miller). Professor Miller was the Reporter for the Advisory Committee on Civil Rules of the Judicial Conference of the United States. *See also* Mullen & Smith, *Judicial Sanctions 1988*, 17 Mem. St. U.L. Rev. 483 (1987); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. Chi. L. Rev. 619 (1977).

48. *See, e.g.*, A.B.A. Action Comm'n to Reduce Court Costs & Delay, Attacking Litigation Costs and Delay 7-22 (1984); *Second Report of the Special Committee for the Study of Discovery Abuses*, 92 F.R.D. 137 (1980). *See also* Hufstedler, *The Future of Civil Litigation*, 1980 Utah L. Rev. 753, 761 (advocating "substantial limitations on discovery," including a " 'meat ax' limitation . . . experimentally"); Oliver, *Economical Litigation*, 71 Kentucky L.J. 647 (1982-83); Smith, *supra* note 24; Chapper, *Limiting Discovery*, 20 The Judges' J. 20 (1981); Epstein, *Reducing Litigation Costs in Small Cases*, 20 The Judges' J. 8 (1981). Former Supreme Court Justice Arthur Goldberg proposed elimination of oral depositions. Goldberg, *Eliminate Oral Discovery*, 72 A.B.A. J. 40 (1986). In Iowa the number of interrogatories one could ask without obtaining leave of court or the agreement of the party served was limited to 30, Iowa R. Civ. P. 126(a), as was the number of admissions one could serve, Iowa R. Civ. P. 127.

49. *See* Fed. R. Civ. P. 26(b)(1).

50. *See* Fed. R. Civ. P. 16.

51. The change in role has been controversial. *Compare* Resnick, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982) *with* Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 Hastings L.J. 505 (1984). *See also* Miller & Culp, *The New Rules of Civil Procedure: Managing*

While the change in Rule 16 was substantial, the most significant of the amendments—that to Rule 11[52]—operated directly on counsel and parties and gave greater and stricter content to the obligation assumed in filing pleadings, motions, discovery and the like. The rule as amended imposes an obligation of reasonable inquiry prior to filing a document and requires that it be well-grounded in fact to the best of counsel's knowledge, information, and belief, supported either by existing law or a good faith argument for its modification or extension, and not interposed for purposes of harassment or other improper purpose. As interpreted, Rule 11 substituted objective standards of "reasonableness" in place of the subjective good faith standard previously utilized to determine whether there had been a violation.[53] Both par-

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Cases, Limiting Discovery, Nat'l L. J., Dec. 5, 1983, at 23-25.

52. FED. R. CIV. P. 11 provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

In 1987 Iowa amended Iowa Rule of Civil Procedure 80(a) to adopt the new language. *See* Iowa Code § 619.19 (1987). Rule 11 as amended provoked and continues to provoke substantial discussion. *See, e.g.*, Remsburg & Gaer, *General Overview of Federal Rule of Civil Procedure 11*, 38 DRAKE L. REV. 261 (1988-89); Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988); Shaffer, *Rule 11: Bright Light, Dim Future*, 7 REV. OF LITIG. 1 (1987); Roddy & Webb, *Practice and Procedure Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 36 DEF. L.J. 489 (1987); Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986). Application of the amended rule may be inconsistent, *see* S. KASSIN, *supra* note 44, and its enforcement can generate clear disagreement between Bench and Bar, *see* Symposium, *Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans?*, 54 FORDHAM L. REV. 1, 20-31 (1985).

53. *E.g.*, O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987); Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986); Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986); Rodgers v. Lincoln Towing Serv., 771 F.2d 194, 205 (7th Cir. 1985); Eastway

ties and counsel can move for sanctions under Rule 11, and the court itself is authorized to impose sanctions on its own motion. If a violation of the rule is found, sanctions must be imposed, and other 1983 amendments similarly encourage or require the imposition of sanctions.[54]

C. *An Empirical Study of Civil Litigation in Iowa*

The Supreme Court of Iowa is authorized to "prescribe all rules of pleading, practice, evidence and procedure . . . ."[55] Several amendments to the Iowa Rules of Civil Procedure exemplify the court's mandate to do so "for the purpose of simplifying the proceedings and prompting the speedy determination of litigation upon its merits."[56] These amendments include the approval of simplified pleadings,[57] a limitation upon the number of interrogatories or requests for admission which can be served without leave of court or agreement between the parties,[58] and a requirement that counsel make a good faith effort to resolve a discovery dispute before asking the court to settle it.[59]

The Iowa Supreme Court has also expressed its concern with the cost of litigation and the impact of discovery upon parties in civil cases.[60] In 1981

Constr. Co. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985).

54. *See* FED. R. CIV. P. 16, 26(g); *Advisory Committee Notes*, 97 F.R.D. 165 (1983).

55. IOWA CODE § 602.4201 (1985).

56. *Id.*

57. Iowa Rule of Civil Procedure 69, as amended in 1975, eliminated "fact pleading" and adopted the "notice pleading" approach of Federal Rule of Civil Procedure 8.

58. Iowa Rule of Civil Procedure 126(a) as amended in 1980, and Iowa Rule of Civil Procedure 127 as amended in 1986, respectively, set limits of 30 interrogatories and 30 requests for admission which can be propounded without agreement of the party served or leave of court granted upon a showing of good cause.

59. IOWA R. CIV. P. 122(e).

60. On December 1, 1978 the Supreme Court of Iowa appointed a 19 member Cost of Litigation Study Committee to study litigation costs in Iowa trial courts. Included as subjects for study were costs and delays traceable to unlimited discovery. The Committee's Report and the Report of the Action of the Supreme Court on the Report of the Cost of Litigation Study Committee is on file with the author. More recently the court again appointed a special committee on discovery to study costs related to it. Several cases reveal the Iowa Supreme Court's concern about the cost of litigation and the impact of discovery. *E.g.*, Farley v. Seiser, 316 N.W.2d 857, 859 (Iowa 1982) (en banc) (disapproving a "discovery" or nonevidentiary deposition, under present rules, in part because such a procedure would likely "inject a new, duplicitous, and costly proceeding into discovery processes that are already under thoughtful criticism for being too expensive"); Nichols v. Hocke, 297 N.W.2d 205, 206 (Iowa 1980) (a trial court had no power under the Rules of Civil Procedure, nor any inherent power, to order a pretrial hearing for the purpose of requiring plaintiffs to substantiate a punitive damages claim; "To whatever extent it might be imagined that the procedure attempted here would go further in rooting out prejudice, we reject the procedure because the imagined improvement comes at too high a price in expense of the litigants."); Pollock v. Deere & Co., 282 N.W.2d 735 (Iowa 1979) (discussing use of a protective order to accommodate the interests of the parties in obtaining access to material facts while minimizing inconvenience, burden, and expense). Rule 123 provides as much, and the Iowa Supreme Court has made this clear. *See* Jones v. Iowa State

the court explicitly requested that the Supreme Court Advisory Committee on Rules "continue the study of rules and statutes relating to . . . deposition expense, formulation of issues, and discovery."[61] The Advisory Committee knew of proposals to limit both the scope and extent of discovery as well as to involve the court in the management of civil litigation.[62] It was unwilling, however, to adopt proposals borne of experience elsewhere and in other courts, uncritically and without regard to litigation and practice in Iowa. As others have recognized, problems of delay and discovery may vary from jurisdiction to jurisdiction, and there is "no universal solution to delay and cost problems. . . ."[63] Thus, the Advisory Committee believed that it was appropriate first to conduct an empirical study of civil litigation in Iowa, focusing on pretrial and discovery practice, to determine: (1) whether and to what extent problems did in fact exist; and if so, (2) whether such problems could or should be addressed by changes in the civil rules.[64] Some rules might be more burdensome in practice than beneficial. A study of civil litigation in the Iowa District Court was therefore undertaken by the Advisory Committee and co-sponsored by the Iowa Supreme Court, the Iowa State Bar Foundation, and the Iowa State Bar Association. Work commenced in 1983 and continued through 1985, when the data compiled by the committee was formally presented to the Supreme Court.[65]

Highway Comm'n, 261 Iowa 1064, 1067-68, 157 N.W.2d 86, 87-88 (1968) ("This court has repeatedly held rules relative to discovery are to be interpreted liberally . . . . However, trial courts are vested with discretion measurably to control, limit and even prevent discovery in any form where, for cause shown or evident, it will not in the opinion of the court promote the administration of justice in a particular case."; denying motion to compel production of documents where parties seeking discovery had "filed interrogatories seeking substantially the same information now sought by their application to produce records," to which "answers [had been] given in detail," and where plaintiffs had conducted cross-examination at first trial of persons from whom reports were sought, during which they elicited "most if not all the information here solicited"); Cook v. Cook, 259 Iowa 825, 836, 146 N.W.2d 273, 279 (1966).

61. Letter from Arthur A. McGivern, Justice, Supreme Court of Iowa, to H. Richard Smith, Chairman, Supreme Court Advisory Committee on Rules of Civil Procedure (Nov. 30, 1981).

62. *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137 app. at 149 (1980).

63. A.B.A. Action Comm'n to Reduce Court Costs & Delay, Attacking Litigation Costs and Delay ____ (1984); Chapper, *supra* note 48.

64. An additional purpose was to measure the pace of civil litigation in the Iowa district courts and to identify places where delays were occurring as well as the kinds of cases, if any, which were particularly likely to become protracted.

65. The cases selected for study were intended to be representative of practice in Iowa. They did not include any kind of litigation particularly or disproportionately. There was no special focus on "big" or "problem" cases as opposed to "ordinary" litigation, and the sample was selected fairly from both the rural and urban areas of the state. As far as practicable, the cases selected constituted a fair sample of civil cases filed and maintained in the Iowa district courts. It was not believed that domestic relations cases—dissolutions, modifications, support, domestic abuse, and paternity actions—shared the problems with which the Advisory Committee was concerned, so these cases were excluded. Other than domestic relations cases, cases

In June of 1986 the Supreme Court of Iowa appointed a Special Study Committee on Discovery specifically to investigate discovery issues.[66] The court's charge explained that reports of the "effectiveness and worth" of the discovery rules were in conflict and that while the rules had their "defenders," they also had severe critics.[67] Cost was a particular concern. "We see indications that the system is abused by some, with skyrocketing litigation costs as a result. Some litigants blame the discovery system with "pricing them out of court."[68] The Special Committee's charge was "to examine and evaluate the [discovery] system and determine whether it is operating in the best interests of the public."[69] Work of the Special Committee commenced in 1986, and the Final Report was presented to the Supreme Court in 1988.

The author was privileged to work with the Advisory Committee, the Special Study Committee on Discovery, and to direct the Study of Civil Litigation in the Iowa District Court. This article canvasses some of the data compiled in the Study and discusses the nature of the civil docket in Iowa as well as discovery practice in state court. Certain changes in the rules are addressed and the question whether there was a need for Iowa to adopt the federal approach mentioned above is considered. Troubling consequences of Rule 11 are measured against the findings of the study. Finally, other means to address current problems in civil practice and any lack of professionalism in the legal profession are considered.

II. Nature of the Iowa District Court's Docket

A. *Reason for Tracking Cases Involving Federal Discovery*

Identification of the types of civil cases filed and their frequency, as well as the kinds of cases in which discovery is conducted and its frequency, was a critical first step in measuring the work of the Iowa District Court and determining its needs. Motions,[70] pretrial conferences,[71] and trials[72] occurred

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were randomly selected from each of Iowa's judicial districts and judicial election districts. Fourteen hundred cases were randomly selected for study from those filed in 1980. A complete description of the methodology of the Study appears in Volume I, at xxiv-xlv. The data is reported in two volumes entitled *Study of Civil Litigation in the Iowa District Court*, Volumes I and II, Conducted by the Iowa Supreme Court Advisory Committee on Rules. *See* Study, *supra* note 23. The Study was conducted under the direction of the author.

66. In the Matter of the Appointment of Members to a Special Study Committee on Discovery (June 9, 1986) (on file with the author).

67. *Id.*

68. *Id.*

69. *Id.*

70. Of the cases in which no discovery was filed, no motion was made in 41.8% of the cases and only one motion was filed in the next 43.6% of the cases. In contrast, among the cases in which formal discovery took place, only 28.8% were disposed of without motion and 23.6% with one motion. Less than 3% of the cases without formal discovery, as opposed to 33% of the cases with formal discovery, had three or more non-discovery motions.

71. A pretrial conference was held in only 30 of the 1070 randomly sampled cases which

significantly more often in cases in which formal discovery took place between and among the parties than in cases where no formal discovery was undertaken. Discovery-related motions and hearings would not occur except in such cases. Motions, pretrial conferences, and trial necessarily require the courts to review memoranda and briefs, consider competing arguments, perhaps conduct hearings, prepare rulings and written opinions, preside at pretrial conferences, develop instructions, and draft findings and conclusions. Cases in which discovery occurred, therefore, made substantially more demands upon judicial resources than ones in which no formal discovery took place. Moreover, delay is far more likely to take place where the parties pursue formal discovery.[73] A functional study of civil filings, therefore, appropriately tracked the nature and percentage of cases in which formal discovery is conducted. A decrease in the number of civil filings, for example, may signal little, if any, decrease in the demand for district court resources. It may reflect only fewer creditor filings as the economy improves and employment increases, or as loan practices become more restrictive, or it may be a function of an increase in the jurisdictional limit of small claims. These would not have been cases, in all likelihood, whose resolution would have entailed substantial expense to the parties or substantial demand for judge time. But an increase in the quantum of filings in which discovery was being conducted would increase the likelihood of motions, pretrial conferences, bench and jury trials, all of which cause expense and demand the court's resources.

B. *A Look at the Docket*

Table 1 categorizes the 1400 cases randomly selected for study and for each category indicates the number and percentage of such cases in which formal discovery was conducted. Conceptually the cases fall into very familiar, generally common law categories, with tort, contract, and property claims accounting for more than 85% of the random sample.

Perhaps contrary to the beliefs of some,[74] tort suits do not comprise the

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did *not* involve formal discovery, or 2.8%, while pretrial conferences occurred in 89 or 27% of the 330 cases which *did* involve formal discovery. Predictably, the frequency of pretrial conferences increases when cases actually go to trial.

72. Of the 1070 cases in which no discovery was conducted, only 73 cases, or 6.8%, went to trial. In contrast, in the 330 cases in which some formal discovery was utilized, 64 cases, or 19.4%, were disposed of after trial. Moreover, only one of the 73 non-discovery cases which went to trial was tried to a jury, whereas 21 of the 64 discovery cases, or nearly one-third, resulted in jury trials.

73. The median disposition time of the 1070 randomly selected cases in which no discovery occurred was 98 days; 75% of such cases were disposed of within fourteen months, or 430 days. STUDY, *supra* note 23, Vol. 1, Table 126, at 183. In contrast, the median disposition of the 330 cases which entailed formal discovery was 581 days; 10% of such cases took more than three years to reach final judgment in the district court. *Id.*

74. V. FLANGO, R. ROPER & M. ELSNER, THE BUSINESS OF STATE TRIAL COURTS (1983) ex-

majority of the docket, but the 291 tort suits did account for one-fifth of the sample. Cases arising out of automobile accidents constituted 60% of the tort cases filed. There were thirty-six suits to recover damages for personal injuries arising out of causes other than automobile accidents. These represented one-eighth of the tort cases but less than 3% of the randomly sampled cases. Slightly more than 10% of the randomly sampled cases, but again less than 3% of the random sample, involved intentional torts. The most common of these were suits for slander and for assault and battery, including actions against police officers and the cities which employed them for alleged assault and battery by policemen. The other major category among tort cases was suits to recover for property damage arising out of causes other than automobile accidents. The 291 tort cases included litigation which has received substantial attention in the legislature—namely, products liability, professional malpractice, and dram shop actions. There were, however, only eleven malpractice suits, six products cases, and three dram shop actions among those randomly selected—in each case, less than 1% of the cases sampled, and considered together, less than 1½% of the 1400 cases randomly selected.

By far the largest category of cases in the sample was suits on open accounts, promissory notes, and contract debt, such as unpaid insurance premiums or hospital bills. There were 422 cases in this category, accounting for over 30% of the random sample. These suits sought to collect liquidated or readily ascertainable damages. In this respect they may be likened to the replevin actions, mortgage foreclosures, and landlord-tenant cases, which sought possession on account of nonpayment of rent. In each case the central issue related to the debtor's default on an obligation to pay a sum certain. There were forty-nine replevin actions, ninety-six mortgage foreclosures, and thirty-one forcible entry and detention cases. If these are added to the 422 suits on accounts, promissory notes, and contract debt, the resulting combination of 598 cases represents over 40% of the random sample.

Suits on open accounts, promissory notes, and contract debt were differentiated from contract cases in which the prayer included unliquidated damages, even though the two categories are akin to one another conceptually. There were 183 suits for breach of contract seeking unliquidated damages, accounting for over one-eighth of the 1400 cases in the random sample. Suits concerning insurance contracts, suits involving mechanics liens, and most of the litigation between employers and employees—conceptuallyand functionally—can be regarded as breach of contract litigation, increasing the frequency of suits of that nature from 13% to 15% of the sample.

Property rights were at issue in 14% of 199 non-domestic relations civil

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plores six "myths" about the business of state trial courts. One such myth is that the civil case workload of state courts consists primarily of tort cases.

filings sampled. These included the landlord-tenant cases and mortgage foreclosures described above, quiet title and partition actions, condemnation proceedings, suits to abate nuisances, attachment proceedings, and the like. Some of the forty-six suits characterized as injunctive actions were related to property rights. One such suit, for example, sought to compel a city to condemn property where efforts to condemn it in the past had been abandoned. Still others included a suit to enforce a restrictive covenant and a case seeking to prevent erection of seven-foot high corrugated steel fence on defendant's property. The injunction cases were separately categorized because they generally focused on statutory provisions and were filed to obtain compliance.

The balance of the docket, individually of lesser percentages, was diverse but familiar. It included petitions for judicial review and other exercises of appellate jurisdiction by the district court, habeas corpus and post-conviction relief proceedings, and habitual offender actions. Interestingly a percentage of the civil filings were not in any proper sense of the term "cases," because adversary proceedings, at least in any immediate sense, were not contemplated. These include filings of copies of judgments to establish liens, a recording or filing in one county of a lis pendens, applications for a search warrant and an inspection warrant, confessions of judgment which simultaneously commenced and disposed of cases, and a petition for change of name. The number of such cases, however, constituted less than 2% of the random sample.

C. *The Discovery Cases*

As Table 1 indicates, some cases are demonstrably more likely to involve formal discovery than are others. For example, tort actions only constituted a fifth of the 1400 cases in the random sample, but they represented nearly three-fifths of the discovery cases. More specifically, auto accident cases represented approximately one-eighth of all cases randomly selected for study but nearly a third of the cases in which discovery was conducted. Of the 174 auto accident cases, 120 involved personal injury claims while fifty-four sought only to recover for damage to property. Three-quarters of the personal injury actions entailed formal discovery while only one quarter of the property damage actions involved the use of formal discovery. Clearly the likelihood of formal discovery is increased substantially if the action is one for personal injuries. This point is emphasized by the frequency of formal discovery in personal injury actions which did *not* arise out of auto accidents. There were thirty-six such cases among the 1400 randomly sampled; five out of every six of these entailed formal discovery.

Unlike tort litigation, in which the data reveal that formal discovery was conducted in nearly two-thirds of the cases, suits to collect an unpaid account, debt or promissory note will probably not involve formal discovery. The 422 suits of this character constituted nearly a third of the random

sample, but no formal discovery was conducted in over 90% of these cases. The thirty-nine such cases in which formal discovery was utilized represented less than one-eighth of the discovery cases. The frequency of formal discovery was even less in replevin actions and mortgage foreclosures. Only 2% and 3%, respectively, of such cases involved any formal discovery. Formal discovery was more likely to be utilized in the separately categorized but related cases for breach of contract where the prayer included unliquidated damages. In the 219 suits of this nature, discovery was conducted in sixty-nine cases, or approximately one-third of these filings. Nevertheless, that is less than half the frequency of discovery in the tort cases. The parties conducted formal discovery in only nine of the 199 property related cases, or less than 5%.

As noted above, the percentage of the randomly selected cases which were professional malpractice or products liability suits was small, barely more than 1% of the random sample when considered together. One hundred percent of the products suits and 90% of the malpractice cases, however, involved the use of formal discovery. Moreover, litigation of either sort ordinarily involves expert witnesses and is likely to include multiple and/or third party defendants. Products liability and malpractice actions, therefore, have impact upon the parties and the court far beyond the mere number of such cases. To illustrate, there was no motion, let alone a resisted motion, in 531 of the 1400 cases in the random sample. In contrast, there were forty-three motions in the six discovery cases raising product liability issues; discovery related motions were filed in one of every two products cases. The total amount of discovery in the products suits substantially exceeded the median for non-products suits.[75]

The amounts in controversy in the discovery cases were higher than for the sample as a whole.[76] Among the 1400 randomly sampled cases, damages were sought in 1027 of them. Of these 1027 cases, over one-half prayed for $5000 or less. In only sixty-two of the 538 such cases was formal discovery conducted. These sixty-two cases accounted for less than one-fifth of the discovery cases. Whereas the median for all randomly sampled cases seeking damages was between $2000 and $5000, the median damage prayer among the discovery cases exceeded $25,000. Of the 1400 cases randomly sampled, 132 cases—less than 10%—sought money damages in excess of $100,000 or sought a "fair and adequate" award. Formal discovery was pursued in 99 of these cases, or exactly 75%.

D. *"Frivolous" Litigation*

Merely because the conceptual nature of civil suits is familiar does not mean that the cases are well-founded and meritorious. On the contrary,

75. STUDY, *supra* note 23, Vol. 1, Table 13, at 31.
76. STUDY, *supra* note 23, Vol. 1, Table 10, at 25, & Table 14, at 34.

many contend that frivolous lawsuits are a substantial cause of the "explosion" of civil litigation in recent years.[77] Tort suits, especially malpractice and products liability claims, are identified as reasons for the increase in filings, and advocates of tort reform, in particular, complain of frivolous litigation. "By now," *The Wall Street Journal* recently editorialized, "collecting examples of tort-law outrages is almost a national sport."[78] Tort reform, it continued, was necessary to slow "the litigation explosion" and "cut down on frivolous cases."

Extensive study of the data gathered in the course of the Study of Civil Litigation in the Iowa District Court belies the assertion that frivolous claims generally and tort actions particularly, are behind the "explosion" of civil filings. On the contrary, it strongly indicates that frivolous litigation—either as commenced or as continued—does not occur to any significant extent in Iowa. First, as noted earlier,[79] debt-related claims constituted 40% of the random sample, nearly twice the percentage of tort cases. This substantial number of cases evinces a credit economy sensitive to national, state and local conditions. Unemployment and recession, which did not escape Iowa in the late 1970s and early 1980s, will almost inevitably increase the number of civil filings as debtors default on credit transactions. Second, although tort cases represent a fifth of the non-domestic relations civil docket and are certainly not insignificant in number, a substantial majority

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77. *E.g.*, S. KASSIN, *supra* note 44, at 1; Carpenter, *The Pampered Poodle and Other Trivia*, LITIGATION, Summer 1980, at 3; *Summary Judgment*, Wall St. J., July 18, 1986, at 12, col. 1. To eliminate frivolous claims or sanction those who bring them is one reason Rule 11 was amended to require reasonable pre-filing inquiry and reasonable belief that a claim is "well-grounded in fact" and legally supportable. Speaking of the objectives of the 1983 Rules Amendments, Professor and Reporter Arthur Miller said:

> There is a widespread feeling that there is a lot of frivolous conduct on the part of lawyers out there, a lot of vexatious conduct, a lot of inefficient conduct. That conduct can take the form of instituting actions that should never have been brought, the frivolous case, the sham defense (I am trying to be absolutely neutral across the board)—a lot of frivolous defenses are interposed just as frivolous cases are interposed. Frivolous motions are made, and there is frivolous or vexatious discovery. Lawyers, it is said, need to be controlled to some degree. I repeat, we do not know how much of this there really is, because what one person would call frivolous, somebody else would call meaningful or substantive. We may be the victims of the phenomenon known as the cosmic anecdote: Somebody tells a war story at one bar association meeting, and it is picked up by ten other lawyers who then tell the same anecdote at ten other bar association meetings, and before you know it people are rioting in the streets saying the foundations of the republic are crumbling, because this incident, which has only happened once, now appears to have happened a thousand times. We really don't know, but the advisory committee—composed of your colleagues on the district courts, a couple of court of appeals judges, and some distinguished trial lawyers from around the country—felt that there had to be some meaningful restraint put on lawyer behavior to cut out some of this type of conduct.

See A. MILLER, *supra* note 47, at 11-12.

78. Wall St. J., April 7, 1986, at 12, col. 1.

79. *See* Table 1 *infra*.

of these—60%—arose out of automobile accidents and are not of the sort commonly offered as "outrages" and "horror stories." Automobile negligence cases, in fact, outnumbered by more than ten times the professional malpractice and products liability suits,[80] which are most commonly cited in discussions of frivolous cases. Third, there were very few cases disposed of by summary judgment. Summary judgment may be denied in order to provide the person against whom the motion is made further opportunity to pursue discovery,[81] so denial of a motion for summary judgment is not necessarily grounds for concluding that the suit has a reasonable basis. Nevertheless, denial of the motion indicates that, in the opinion of the judge, either there are genuine issues of material fact, or the moving party is not entitled to judgment as a matter of law, or both.[82] The cases in which summary judgment was granted tended to be the ones in which suit was to collect an open account, a note in default, or readily ascertainable contract debt. Fourth, there were no cases brought for wrongful institution of civil proceedings, and the one claim of abuse of process was asserted in a counterclaim and dismissed before trial. Surely the infrequency of such claims is some indication that frivolous or groundless lawsuits are themselves relatively infrequent. Finally, the answers of active district court judges who responded to a questionnaire distributed as a part of the empirical study support the conclusions that frivolous litigation is only occasional in Iowa and that it does not explain the increase in civil filings which has occurred. The judges were asked whether "[w]ithin the last three (3) years [you] have . . . been involved in a judicial capacity in any civil case in which you believe that the plaintiff's petition was frivolous or without foundation?"[83] Thirty-one of the 54 who responded, or more than 60% answered "Yes," but the median number of suits identified over the three-year period was between six and ten. Two-thirds of those who answered "Yes" put the total number at 20 or fewer. Indeed, a higher percentage of judges answered that they had been involved in a judicial capacity in a civil case in which they believed "that the defendant's answer, affirmative defenses and/or counterclaims were frivolous or without foundation," and the median number of such suits, albeit comparatively few, was higher than the median estimate of frivolous petitions.[84]

What are "frivolous" cases? Illustration is more common than definition. There is an "I-know-it-when-I-see-it" quality to the discussion of frivo-

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80. There were 174 automobile accident cases and, in total, 17 malpractice or products cases.

81. FED. R. CIV. P. 56(f); IOWA R. CIV. P. 237(f).

82. *But cf.* Lucchesi v. Giannini & Uniack, 158 Cal. App. 3d 777, 205 Cal. Rptr. 62 (1984) (denial of summary judgment alone does not establish as a matter of law that there was probable cause to file suit).

83. STUDY, *supra* note 23, Vol. 2, at xiv.

84. *Id.* at 2-21.

lous suits, such that a mere reading of the given facts would require a reasonable person to conclude that the suit is baseless and unwarranted.[85] "A father lifts his baby into a ceiling fan," said one commentator, "and when the child is hurt sues for damages because the fan had no warning label."[86] Another wrote: "A lady falls asleep on her couch while smoking, and starts a fire. What does she do? Sues the folks who made the couch and the folks who made the cigarettes."[87] Factually strange or fantastic suits, however, were largely absent from the 1400 cases in the random sample and the 211 delay cases. There were no suits by children against parents for "malparenting," no suits by aggrieved fans complaining of referees' bad calls, no suits by disappointed students seeking a change of grade or by disappointed suitors whose dinner dates stood them up,[88] no suits by passengers upset because their "pampered poodles"[89] were not allowed to fly first class, nor any other of the cases which seem repeatedly to make the news. In a sense, though some would qualify, there were not even very many "good stories" which surfaced among the 1400 cases studied.

The standard for "frivolous" cannot be superficial or anecdotal. Much has been written[90] about the legal content of the term "frivolous," and legislative definition given.[91] The United States Supreme Court itself has appeared divided on the concept's meaning.[92] Federal courts interpreting Rule 11 have held that sanctions may be imposed without any showing of subjective bad faith and that sanctions must be imposed "where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of the existing law."[93] If this standard is applied as a definition of "groundless" or "frivo-

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85. "Frivolous" is defined as "[s]o clearly and palpably bad and insufficient as to require no argument or illustration to show the character as indicative of bad faith upon a bare inspection; or a pleading, argument, motion or objection." BALLENTINE'S LAW DICTIONARY 503 (3d ed. 1969).

86. H.E. Catto, Jr., *supra* note 11.

87. *Somebody's Gotta Pay*, FORBES, March 10, 1986, at 100.

88. *See* THE ROLE OF COURTS IN AMERICAN SOCIETY: THE FINAL REPORT OF THE COMMISSION ON THE ROLE OF COURTS 19-4 (1984); Renfrew, *Social Factors*, STATE CT. J., Fall 1985, at 12.

89. Carpenter, *supra* note 77.

90. *E.g.*, Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003 (1977); Note, *A Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561 (1980); Note, *A Frivolous Lawsuit May Destroy the Career of a Professional: Is There No Remedy?*, 12 U. RICH. L. REV. 421 (1983).

91. WIS. STAT. § 814.025 (1983-84). *See* Comment, *Is Wisconsin's Frivolous Claim Statute Frivolous? A Critical Analysis of Wis. Stat. § 814.025*, 68 MARQ. L. REV. 279 (1985).

92. *See* Hyde v. Van Wormer, 474 U.S. 992, 992-93 (1985) (Brennan, J., dissenting).

93. *In re* TCI Ltd., 769 F.2d 441 (7th Cir. 1985); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985).

lous" litigation, it must be conceded that there were some cases in which factual information was readily available which rendered plaintiff's claim untenable under existing law and where plaintiff's counsel made no effort, or no substantial effort, to argue for the modification or reversal of existing law. Such cases, however, were very few and their number belies—at least in Iowa—that meritless litigation is being commenced to any significant extent.

The more difficult question is not whether an action was frivolous when filed but whether it is frivolous to continue the case after reasonable opportunity for discovery has revealed a claim that is weak at best.[94] Whether and at what point it becomes "untenable" to maintain a claim can be a difficult judgment to make, first for attorneys personally involved in the case, and second, for a court asked to impose sanctions on an attorney who resists dismissal. With regard to these cases, in which continuation of the proceedings arguably becomes unreasonable and therefore wrongful, the court at least is equipped with procedural tools, which defendants may invoke, for its own and defendants' protection. It is not inconsistent with permitting suit to proceed to impose discovery deadlines, including deadlines for the selection, identification and discovery of experts, as well as a date certain for trial.[95] Moreover, where appropriate opportunity for discovery has been made available to the parties, and plaintiff lacks admissible evidence on any of the elements of his claim, the opposing party may seek and the court should order summary judgment.[96]

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94. *See* Mathias v. Glandon, 448 N.W.2d 443 (Iowa 1989); J. Ebersole & B. Burke, Discovery Problems in Civil Cases 66 (Federal Judicial Center 1980). This problem has been discussed as follows:

> It is difficult to decide, even with hindsight, whether a claim is frivolous. Defense attorneys in several of the overdiscovery cases insinuated that the cases were frivolous. Yet of the six overdiscovery cases that were tried, the plaintiffs prevailed in two. In one of these cases we had left the initial interview with the impression that the plaintiff had lost. Later, a review of the court files showed that the judge had ruled in the plaintiff's favor.
>
> In one overdiscovery case, the judge agreed with the defendant's attorney that the claim had been frivolous and that it was "the grossest abuse of the discovery process" he had ever seen. It was only after considerable discovery and preparation of a pretrial order, however, that it became clear the plaintiff had no case. Thus, although a frivolous claim clearly leads to wasteful discovery, the determination of frivolity was not an easy matter in any of the cases in this study.

Id. at 66. The federal courts are divided on the question whether Rule 11 provides a basis for imposing sanctions where a lawyer acted reasonably in commencing suit but where it was unreasonable to continue it.

In Mathias v. Glandon, 448 N.W.2d 443 (Iowa 1989), the Iowa Supreme Court held that Iowa Rule of Civil Procedure 80—counterpart to Federal Rule of Civil Procedure 11—does not impose a "continuing obligation upon counsel" so as to mandate dismissal of a claim which "could no longer be considered well founded. . . ." *Id.* at 447.

95. *See* Fed. R. Civ. P. 16; Iowa R. Civ. P. 136.

96. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Mor-

III. The Nature and Frequency of Formal Discovery

Discovery in the cases in which it is conducted in some measure reflects the existence of issues which do not lend themselves to dispassionate evaluation and objective resolution. Issues of negligence or intent, whether a product was "defective," and the extent of personal injuries or damages cannot be resolved in the same way or as easily as whether goods were sold or money loaned, whether payment was made and in what amount, and the balance due, if any. The same may be said where defenses like estoppel, unmerchantability, unworkmanlike performance, or fraud are asserted. Thus, tort cases and contract actions seeking unliquidated damages constituted 80% of the discovery cases, and less than 10% of the suits seeking to recover for unpaid accounts, promissory notes, or liquidated contract debt involved any formal discovery.[97] Of the latter over 40% of the 39 such cases asserted affirmative defenses such as breach of warranty, estoppel, or fraud. There is an elusive quality to the facts in these cases which does not generally characterize mortgage foreclosures, replevin actions, and suits on accounts and promissory notes, where the evidence is largely documentary. The elusiveness or "arguability" of the "facts" in the discovery cases resists stipulation, and it is for cases of this sort especially that the discovery rules were conceived, developed, and refined. Discovery in these cases serves many familiar and useful purposes, including identification of issues, preparation for trial, and avoidance of surprise. The likelihood of cases being disposed of on their merits is increased, and settlement of cases, if not facilitated by the discovery rules, is at least put on a sounder basis. In accomplishing these purposes, the discovery rules represent one of the great reforms in the history of procedure.

At the same time they are only rules. They may be used to excess; they may be abused; they may not be enforced. Evidence that discovery is being used in cases for which it was intended does not mean that it is not being overused and abused, or that the discovery rules as construed and enforced are "secur[ing] a just, speedy, and inexpensive determination of all controversies on their merits."[98]

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gan v. Harris Trust & Sav. Bank, 867 F.2d 1023 (7th Cir. 1989). As a result of the Supreme Court cases, the Eighth Circuit Court of Appeals has announced it "should be somewhat more hospitable" to summary judgment motions than it has been in the past. City of Mt. Pleasant v. Associated Elec. Coop., 838 F.2d 268, 273 (1988). "The motion for summary judgment can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' time for those cases that really do raise genuine issues of material fact." *Id.* A case may be weak and be properly disposed of by summary judgement yet not be frivolous within the meaning and purpose of Rule 11. Hartman v. Hallmark Cards, Inc., 853 F.2d 117 (8th Cir. 1987).

97. *See* Table 1 *infra.*

98. Fed. R. Civ. P. 1; Iowa R. Civ. P. 67.

A. *Frequency of Use of Formal Discovery*

Table 2 charts the frequency of use of formal discovery devices in all of the non-domestic relations civil cases which were randomly selected for study. As indicated, less than a quarter of the cases in the sample entailed the use of any formal discovery devices; less than 5% entailed more than five separate discovery events, and less than 3% involved more than nine. Among those cases in which discovery *was* conducted the median number of discovery devices used by *all* parties was three, and only a third of these cases involved the use of more than three discovery devices by all parties. Only a tenth of the cases in which formal discovery was conducted involved the use of more than nine discovery devices by all parties. Studies elsewhere and at other times have similarly found that the vast majority of civil cases are not characterized by extensive discovery. Nearly four decades ago a study of the federal dockets in New York, Philadelphia, Baltimore, Chicago, and Alexandria, Virginia revealed no evidence of discovery in well over half of all cases. While cautioning that "much discovery will not appear in the court records," the author of the study found that discovery was used in only a quarter of all cases.[99] In the 1970s the Federal Judicial Center studied more than 3000 terminated cases in six United States District Courts and found no formal discovery in over one-half of the cases.[100] Of those cases which did involve discovery, the median number of discovery requests was three, and the percentage of cases in which discovery was conducted which involved ten or more discovery requests was somewhat over a tenth.[101] These figures are identical to those revealed in the Study of Civil Litigation in the Iowa District Court and charted in Table 2. More recently, an extensive study of 1649 civil lawsuits evenly divided between state and federal cases concluded that "relatively little discovery occurs in the ordinary law suit."[102] No discovery was conducted in more than one-half of the cases, and cases in which more than five separate discovery events took place were "rare."[103]

Table 2 charts the frequency of use of formal discovery by all parties. The frequency of use of formal discovery by the parties individually was ordinarily less than for all parties. When discovery is viewed separately according to plaintiffs and defendants, a remarkable parallel is found to exist between plaintiffs and defendants in the frequency of use of formal discovery. Table 3 charts discovery by plaintiffs and defendants in the discovery

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99. *The Practical Operation of Federal Discovery*, 12 F.R.D. 131, 133 (1951).

100. P. Connolly, E. Holleman, M. Kuhlman & M. Kuhlman, Judicial Controls in the Civil Litigative Process: Discovery 29 (Federal Judicial Center 1978). No formal discovery was conducted in 51.7% of the cases. *Id.*

101. *Id.* The actual figure was 11.8%.

102. Trubek, Sarat, Felstiner, Kritzer, & Grossman, *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. Rev. 75, 90 (1983).

103. *Id.*

cases and reveals that both plaintiffs and defendants utilized formal discovery three or fewer times in five of every six cases in which either party chose to pursue formal discovery. What is suggested by these figures is that one side *generally* does not overwhelm the other through discovery and that discovery practice in *most* civil litigation in Iowa is fairly balanced between the parties, even in the cases which went to trial.

Explanation for the frequency of discovery in civil litigation in Iowa lies in part in the nature of the district court's civil business. Suits on notes or open accounts, replevin actions, mortgage foreclosures, suits to quiet titles, small claims appeals, habitual offender actions, petitions for judicial review, forcible entry and detainer actions, and many suits seeking preliminary injunctions provide little occasion for discovery. Moreover, "informal" discovery appears to take place often, for many reasons, and is not included in the above data on "formal" discovery.[104]

The amount of formal discovery in civil litigation in Iowa revealed by the study is further explained by the amounts or matters in controversy. Over one-half of the 1400 randomly selected cases in which damages were sought prayed for $5000 or less; and even among the cases in which some formal discovery was conducted, almost one-third involved an amount in controversy of $10,000 or less.[105] Given these amounts and the cost of pursuing formal discovery, the relative infrequency of its use is not surprising. Finally, most civil cases, including those in which formal discovery is conducted, do not involve multiple or third party defendants. As the number of parties with conflicting interests increases, so does the total amount of discovery in the case; but multiple or third party defendants were involved in less than one quarter of the discovery cases.[106]

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104. Informal discovery occurs for a variety of reasons. In many of the suits in which discovery is appropriate, for example, automobile accident litigation, the issues are familiar; and the information needed to be exchanged in order for both sides to evaluate the case is fairly well settled and recognized by all. Plaintiffs, furthermore, have an interest in communicating information to defendants in order to enable them to evaluate the case and address settlement; and it is commonly understood by all parties that relevant information can be obtained through formal discovery. Added to these factors is the fact that the trial bar, particularly in less populous counties, is relatively small and its members are well-known to one another. As a result, a sense of community prevails which, especially in smaller cases uncomplicated by multiple parties, tends to dispense with many formalities. Preparation for trial through one's own witness and files, it has been suggested, can save time and expense, avoid educating one's opponents through joint discovery, and "can often lead to quick settlements." Moot, *Consider Doing No Discovery*, LITIGATION, Fall 1988, 36, 39. A similar view is expressed in Fisher, *He Who Pays the Piper*, 64 HARV. BUS. REV., Mar.-Apr. 1985, at 150, 151, 155. *See also* McElhaney, *Informal Investigation*, LITIGATION, Spring 1982, at 51.

105. STUDY, *supra* note 23, Vol. 1, Table 10, at 25 & Table 14, at 34.

106. Of the 330 cases in which formal discovery took place, 249 of them, or 75.5%, did not involve multiple or third party defendants. In these cases the median amount of discovery was two discovery events. In contrast, among the 81 cases which did involve multiple or third party defendants, the median amount of discovery was six discovery events. In more than a third (37%) of such cases, the amount of discovery exceeded nine discovery events.

B. *Lawyers and Judges Assess Discovery*

Data on the frequency of use of formal discovery is not informative about the manner in which it is conducted, and whether problems exist which amendments to the rules of procedure might usefully address. To obtain insights into these and other issues about discovery practice, questionnaires on discovery practice were circulated to persons who were believed to be most knowledgeable about it:[107] (1) the active district court judges; and (2) attorneys identifiable as persons substantially engaged in trial practice.[108] The questionnaires distributed to judges differed in some respects from the questionnaires submitted to attorneys, but they were substantially the same in several areas.

Both attorneys and judges were asked to estimate the percentage of civil cases in which each had been involved, either as a practicing attorney or in a judicial capacity, in which certain identified discovery problems had occurred or had come to their attention. Table 4 gives the percentages stated in the median response of the attorneys and judges who responded to the questionnaire as well as the estimated percentage at the seventy-fifth percentile.

The responses of the attorneys and the judges alike strongly indicate that discovery abuse is limited to a real minority of the civil cases in which discovery takes place. For example, the median response of both judges and attorneys was that many kinds of discovery abuse widely discussed occur in only ten percent of the cases. These include voluminous and/or disorganized production of documents, irrelevant discovery requests, excessive number of depositions, and unreasonably long depositions. There is some variation at the 75th percentile, but the five percent difference seems slight. Certain types of discovery abuse,[109] such as an excessive number of requests for admissions, instructions to a deponent not to answer which are not based on privilege,[110] and interruption of a party's examination of a deponent before a critical portion of the examination was concluded,[111] are consistently figured at five percent or less, with an estimate of ten percent of the cases at the seventy-fifth percentile. Similarly, privileges, including attorney-client and work product privileges, do not appear to prevent the discovery of significant information in the overwhelming majority of civil cases. Here, too, the

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107. The questionnaire drew heavily from *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 A.B. FOUND. R.J. 787, 875-89 (1980).

108. The attorneys selected to receive the questionnaire were: members of the Association of Trial Lawyers of Iowa, primarily representing plaintiffs; the Defense Counsel Association, primarily representing defendants; and the Iowa Academy of Trial Lawyers, comprised of attorneys with substantial trial experience, representing either plaintiffs or defendants.

109. *See* Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation*, 48 FORDHAM L. REV. 907 (1980).

110. *Id.* at 943.

111. *Id.* at 945.

percentage is very low, 1% to 5% being the median response in each case.

The most serious problems noted by attorneys and judges were: (1) evasive or incomplete responses; and (2) extended delays in responding to discovery requests. These problems occurred in a quarter to a third of the cases, according to the median response, with many lawyers and judges believing the problems were more prevalent than that. Interestingly, while attorneys regarded evasive or incomplete responses to discovery requests as the most prevalent problem which they had experienced in their civil cases, lack of candor or bad faith by a party or his attorney was estimated, at the median, to occur in a substantially lower percentage of the cases. Probably no discovery problem has been discussed more than an excessive number of interrogatories, particularly interrogatories of a substantive nature not designed to identify witnesses and relevant documents. Perhaps reflecting practice under the 1980 amendment to the Iowa Rules of Civil Procedure, which limited one to thirty interrogatories in the absence of the opposing party's consent or leave of court, the median response of attorneys indicates that excessive interrogatories characterize only 15% of the cases. Judges' responses in this area were somewhat higher. The estimate of 45%, which the seventy-fifth percentile response of both attorneys and judges revealed, suggests that many, albeit a minority, believe the problem is greater than that.

When the estimates for the different groups of attorneys, as well as for all attorneys and all judges are compared, the median responses reveal a substantial consensus. In view of the different interests suggested by their associations and positions, the consensus is striking. Even at the seventy-fifth percentile for each group of respondents, there was substantial agreement. Two areas in which there was variation in responses were: (1) evasive or incomplete responses to discovery requests; and (2) excessive number of interrogatories. The attorneys' estimate of the frequency of evasive or incomplete responses to discovery requests was nearly double that of the judges. An explanation for this disparity may be that answers to interrogatories, responses to requests for production, and answers to requests for admission are matters which judges generally do not see or scrutinize. Factors of time, expense, the likelihood of securing real relief from the court,[112] and the procedural requirement that attorneys attempt in good faith to work out discovery differences with opposing counsel before bringing them to the attention of the court,[113] dissuade counsel from attempting to enlist a judge's assistance in many, and perhaps most, discovery matters. Rather than moving to compel more complete answers, attorneys simply communicate orally what information they need, or ignore the answer and perhaps proceed to take depositions if sufficient responses cannot be informally secured. The situation may be the opposite with respect to excessive numbers of interrog-

112. *See* text accompanying notes 195-201.

113. IOWA R. CIV. P. 122(e).

atories or admissions, since the median response of the judges was higher than that of attorneys in this area. The number of interrogatories or admissions is a matter objectively determinable and more readily established than the sufficiency of a response to a discovery request, so that an excessive number might be brought to the court's attention through objections or motions for a protective order. Judges, in short, may be more aware of this kind of problem than others, and thus give a higher estimate of the frequency with which it occurs.

Other than with respect to the number of interrogatories and the number of admissions, if attorneys and judges disagreed as to the frequency with which a discovery problem occurred, the attorneys' estimates were greater than the judges' estimates. Oddly, however, attorneys who responded to the questionnaire were substantially more likely than judges who responded to believe that the present system of discovery is working well. Lawyers and judges alike were asked which of several statements best described the attorneys' or judges' assessment of how well the current system of discovery is working. Table 4 reveals the statements which followed the question as well as the attorneys' and judges' responses. The first two statements communicate strong satisfaction with the current rules and express an opinion that there are few, if any, problems. Roughly one-half of the lawyers, but only one-third of the judges, answered that the current system of discovery is working very well and indicated that abuse of discovery is not a serious problem in Iowa in the district court. Conversely, about a third of the lawyers but over one-half of the judges responded that the rules were only working "reasonably well" and that there were many cases of discovery abuse meriting the attention of the bench and bar. Attorneys who answered that the discovery rules were not working even reasonably well, and that significant changes both in the scope and in the amount of discovery were in order, constituted a distinct minority—less than 5%. Nearly 10% of the judges agreed.

Similar results were obtained in response to questions which asked whether there was too much discovery in state court and whether the discovery rules should be changed to limit the availability of discovery. While a third of the lawyers responded that there is too much discovery, nearly two-thirds of the responding judges agreed. In addition, three-quarters of the attorneys—including some who *did* think there was too much discovery—did *not* believe that the discovery rules should be changed to limit the amount of discovery which could be undertaken without leave of court; less than one-half of the judges, however, were opposed to such limits. A majority of the judges who responded indicated that they *were* in favor of limiting the amount of discovery.

In the final analysis, the attorneys' and judges' responses estimating percentages of cases in which certain problems occurred and their conclusions about how well the "current system of discovery" is working are inconclusive. No one had kept statistics and only impressions were recorded. In

any event, a substantial percentage of the attorneys and judges who responded expressed the thought that there are many cases of discovery abuse meriting attention.[114]

C. *Objections, Motions, and Hearings*

The discovery rules were designed to assure each side in a civil controversy mutual access to all relevant facts,[115] and the obligation of parties and counsel to observe good faith in conducting and responding to discovery.[116] It would appear that problems do not develop in a substantial majority of cases in which discovery is conducted. The lawyers' and judges' estimates of the frequency of identified discovery problems[117] support that conclusion. Their estimates and comments, however, as well as recent cases,[118] indicate that to some extent practice falls short of meeting the articulated standard, at times dramatically. In an effort to identify the nature and frequency of discovery problems which do exist so that attention might be given to ways to address them, data was gathered and compiled on objections to discovery, discovery-related motions, and hearings on such objections and motions.

1. *Objections*

There was a notable absence of formal objections to discovery requests, or any part of them, in the discovery cases. Of the cases in which interrogatories were filed, no objections were asserted in over 80% of the cases; this was also true in cases in which requests for production or admission were made.[119] Moreover, in nearly two-thirds of the cases there was not only no

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114. STUDY, *supra* note 23, Vol. 2, at 1-13, 2-38. Over 55% of the judges who answered, answered affirmatively.

115. *E.g.*, Hickman v. Taylor, 329 U.S. 465 (1941).

116. *See, e.g.*, IOWA R. CIV. P. 80(a), 123, 127, 134(a)(4). The obligation to conduct and respond to discovery in good faith has recently been explicitly stated. IOWA R. CIV. P. 121(b) as amended in 1986, provides: "The rules providing for discovery and inspection shall be liberally construed and shall be enforced to provide the parties with access to all relevant facts. Discovery shall be conducted in good faith, and responses to discovery requests, however made, shall fairly address and meet the substance of the request."

117. *See supra* notes 107-14 and accompanying text.

118. *See supra* notes 32-41 and accompanying text.

119. *See* STUDY, *supra* note 23, Vol. 1, Tables 20-21, at 43-44; Table 30, at 53; Table 68, at 97. The study reflects that objections were filed in response to different types of discovery as follows:

a. *Interrogatories*

Of the 269 cases in which interrogatories were served by one or more of the parties, no objections to any of the interrogatories were made in 228 or over five-sixths of the cases in the random sample in which this form of discovery was utilized; and no objections were asserted to any of the interrogatories in 90% of the 582 sets served in the randomly sampled cases. In four-fifths of those cases in which answers to interrogatories *did* include an objection, there was only one set in which an objection was made.

There were only 105 interrogatories objected to in all 582 sets served in the randomly sam-

objection to any discovery but also no discovery related motion filed. That does not mean that in all cases without objections the discovery conducted consisted of fair requests for relevant and unprivileged information. A party from whom discovery was sought who found some part of the discovery objectionable, rather than objecting, often initiated negotiations informally to determine what the discovering party "really wanted." In some cases an objectionable request was simply answered. For example, interrogatories seeking work product without any showing of need or inability to obtain the substantial equivalent were often answered "no" or "not applicable." Moreover, an incomplete or evasive response to a discovery request which could be viewed as objectionable may be seen as preferable to a formal objection, inasmuch as an objection attracts attention and can trigger a motion for an order compelling discovery or a hearing or both. This wastes time and incurs expense. Nevertheless, the relative infrequency of objections to discovery is certainly some evidence that lawyers *generally* cooperate in the discovery stage of most civil litigation in state court in Iowa.

2. *Discovery-Related Motions and Hearings*

No discovery-related motion was filed in 1304 of the 1400 cases randomly selected for study, so that over 93% of the cases randomly selected revealed no discovery problems brought to the attention of the court requir-

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pled cases. Many of the objections were obviously appropriate, such as requests for the name and address of experts retained or specially employed in anticipation of litigation or preparation for a trial who were not expected to be called to testify, and for their findings and opinions. In only eight cases did the objections to interrogatories prompt a motion to compel. That is only 3% of the cases in which interrogatories were served.

b. *Requests for Production of Documents*

Of the 116 discovery cases in which requests for production of documents were filed, no objections were raised in ninety-three, or over 80%, of the cases. The frequency of such objections was not significantly greater in the cases which were tried or tried to a jury. The 23 cases in which objections were made tend to be described by multiple defendants and substantial amounts in controversy. The median amount in controversy of these 23 cases exceeded $100,000; and twelve of the 23 cases involved multiple or third party defendants. Many of the requests to which objection was made were objectionable. These included: (1) requests for copies of witnesses' statements which had been taken in anticipation of litigation, without any attempt to show substantial need therefor and inability without undue hardship to obtain the substantial equivalent; and (2) requests for state and federal income tax returns of corporate defendants in cases in which punitive damages were not sought. Other objections, for example, to the "form" of the requests or to an asserted lack of "reasonable particularity" in the description of the requested document, are more questionable. Motions to compel in response to objections to request for production were rare.

c. *Admissions*

There were generally very few objections to requests for admissions. There were 56 cases in which requests for admissions were filed. Of these, there were only six cases in which objections were asserted. Thus, in 90% of the cases in which admissions were filed there were no objections. Moreover, of the 77 sets of requests for admission which were served in all of the discovery cases, in only nine such sets did the responses include objections.

ing ruling. Formal discovery was conducted in only 330 of these cases. The ninety-six cases in which discovery-related motions were filed represent nearly 30% of the cases in which formal discovery was conducted. This indicates that counsel are able to work out any discovery problems which develop without applying to the court for relief in the vast majority—over 70%— of the cases in which discovery is conducted. At the same time the nearly 30% of the cases which do generate motions cannot be ignored, for each such motion involves expense for at least one of the parties, delay for both, and will ordinarily draw upon the public's limited judicial resources.

The data revealed that when motions were filed, hearings were held on those motions in less than half the cases.[120] Some explanation for that figure is found in the fact that discovery disputes were sometimes discussed at pretrial conferences, which were not considered "hearings" for purposes of analyzing the data. Further explanation is found in the nature of the motions. Many[121] were motions for orders compelling discovery where no timely response had been provided, and no resistance to such motions was filed, so that the issues were simple and clear. No argument or request for hearing was made,[122] and the court ruled without any hearing being held. In still other cases, the court scheduled a hearing only in the event discovery was *not* provided by a stated date, or cancelled the hearing when the requested discovery was provided.[123]

Certain kinds of cases are more prone to discovery disputes leading to discovery motions than others. For example, discovery motions were filed in barely more than 20% of the automobile accident cases in which formal discovery occurred.[124] In contrast, discovery motions were filed in 40% of the professional malpractice cases and 50% of the products liability cases.[125] It is also useful to look at the amount in controversy. The 330 discovery cases generated 190 discovery motions. Nearly one-half of these were filed in cases

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120. Discovery-related motions were filed in 96 cases, and hearings on such motions were held in 44 cases.

121. There were a total of 190 discovery-related motions filed. Of these 190 motions, 60 (31.5%) were motions to compel answers to interrogatories, 26 (13.7%) were motions to compel production of documents, and notwithstanding that Iowa, like Federal Rule 36, deems unanswered requests to be admitted, five (2.6%) were motions to "compel" responses to requests for admissions.

122. Iowa Rule of Civil Procedure 117 authorizes the district court to hold a telephone hearing, but such hearings were not formally authorized until 1985. The time required to travel to and participate in a hearing, not to mention other factors, is a disincentive to requesting hearings. *See infra* notes 198-99, and accompanying text. In one case a party, whose opponent had failed to answer interrogatories and provide documents, had moved for an order compelling discovery but had not requested a hearing. The court, nevertheless, scheduled a hearing, and the party seeking discovery tried desperately to reach the opposing party's counsel over the telephone so as to avoid having to travel over an hour to attend the hearing.

123. *See infra* text accompanying notes 194-212.

124. STUDY, *supra* note 23, Vol. 1, Table 71, at 100.

125. *Id.*

in which the amount in controversy exceeded $100,000 or plaintiff sought "fair and adequate" relief.[126] Indeed, 40% of the cases which sought damages over $100,000 or in an amount which would "fairly and adequately" compensate plaintiff involved one or more discovery-related motions; of the cases seeking less, 25% involved a discovery motion.[127] Similarly, the presence of multiple defendants with differing interests increases the likelihood of a party filing a discovery motion. Thirty-two of the seventy-one discovery cases in which multiple defendants were involved, or 45%, included one or more discovery motions. In contrast, of the 259 cases in which multiple defendants were not involved, only sixty-four, or 25%, included a discovery motion. Trial also increases the likelihood of discovery motions. Twenty-seven of the 64 discovery cases in which a trial occurred entailed discovery motions. This is over 40%. In comparison, of the 266 discovery cases in which no trial occurred, discovery motions were filed in sixty-nine or roughly 25% of such cases.[128]

Cases where the amount in controversy is substantial, where multiple counsel are involved, or where expert witnesses are involved, are cases in which a traditional posture of cooperation is threatened. However, an examination of the discovery motions and the frequency of cases in which they were filed reveals substantial cooperation among lawyers in Iowa. In situations where leave of court is required in the absence of agreement among the parties, the method is generally one of agreement.

IV. Problems in Discovery Practice

The above data suggests, as lawyers and judges responded, that the discovery rules are in fact working reasonably well, if not very well. There is much, however, that the above data does not reveal. First, it does not indicate that overdiscovery is not a problem in individual cases.[129] Second, the data reveals little of the quality of responses to discovery. The relative infrequency of objections and discovery motions does not necessarily mean that discovery was conducted cooperatively and in good faith so that each side was assured timely access to all relevant facts. The lack of objections and discovery-related motions may be the result of the cost of applying to the court for assistance and the perceived likelihood of the district court's inter-

126. Study, *supra* note 23, Vol. 1, Table 72, at 101.

127. *Id.*

128. Study, *supra* note 23, Vol. 1, Table 84, at 114.

129. *See* Fed. R. Civ. P. 26(b)(1); Iowa R. Civ. P. 121(c). Overdiscovery may occur where the devices employed are needlessly duplicative. Or, quite apart from the total number of discovery devices employed, a single discovery device may be a source of abuse. A single set of interrogatories may far surpass 30 in number however they are counted. A single deposition may be unwarranted or abusive, last for hours, go on for days, or require travel out-of-state on the eve of the trial with no assurance that the witness will be called to testify. The data on the frequency of discovery does not rule out "overdiscovery" in any of these senses.

est or willingness to become involved. Third, even if discovery-related motions were not filed in 70% of the discovery cases, the frequency with which they were filed did approach one in every three cases in which discovery occurred. Finally, state as well as federal rules of procedure contemplate the "speedy" disposition of civil cases. Data concerning the nature and frequency of discovery does not reveal the impact of discovery upon the disposition time of civil cases. In regard to these matters, which are not addressed by data discussed in the preceding section, a detailed exploration of the use of individual discovery devices did reveal problems which deserve attention.

A. *Overdiscovery*

For a variety of reasons it is easier to conceptualize overdiscovery than to identify it in any systematic and reliable way. A natural bias of the participants prohibits reliance upon their assessments that it occurred in individual cases. Further, case files do not reveal what alternatives to formal discovery were available as a practical matter, for example, personal interviews of parties and witnesses as opposed to depositions. Moreover, in most cases the file does not reveal the need for discovery which was pursued, nor can its effectiveness ordinarily be measured. Finally, the mere fact that the total amount of discovery in a case exceeded medians does not mean that the discovery was improper or that there was overdiscovery. Litigation is of all sorts, involves different amounts, different issues, and different configurations of claims and parties. In litigation involving a substantial amount in controversy, with a number of parties and claims, a great deal of discovery by the parties may not be "overdiscovery" in the sense condemned by the rules as undue and oppressive.

Correlating the total number of discovery devices employed to the amount or matter in controversy offers some insight into "overdiscovery." There are limits on discovery in small claims,[130] for example, and some have suggested strict limits on the use of formal discovery in cases in which the amount in controversy does not exceed $25,000.[131] At some point the cost of discovery can become disproportionate to the claim.

Table 5 charts the frequency of use of formal discovery in the discovery cases according to the amount or matter in controversy. A predictable correlation can be seen. An increase in the total amount of discovery is generally accompanied by an increase in the amount in controversy. Thus, of the thirty-nine cases which involved the use of ten or more formal discovery requests, twenty-one of them sought monetary damages in excess of $100,000. That is more than twice the percentage of the discovery cases gen-

130. *See* IOWA R. CIV. P. 141 (prohibiting depositions in small claims except with leave of court for good cause shown).

131. Epstein, *supra* note 48. *See* ACTING COMMISSION TO REDUCE COURT COSTS AND DELAY, ATTACKING LITIGATION COSTS AND DELAY 2, 7-22 (1984).

erally in which that amount was in controversy. On the other hand, there are a number of cases seeking $25,000 or less revealed in Table 5 in which the total amount of discovery exceeded the median of three formal discovery requests. Concern for the "inexpensive" resolution of cases, as the rules require, suggests inquiry into these cases for explanation of the additional discovery.

In many such cases there *are* explanations for the discovery undertaken. In some cases, the total discovery by any one party was neither excessive—two or three discovery events—nor out of proportion to the opponent's discovery, yet the total by both parties exceeded the median of three discovery events. This was particularly true in cases which involved multiple or third-party defendants.

Table 6 compares the frequency of formal discovery in cases which involved no multiple or third party defendants with cases which involved multiple or third party defendants. In the former category the median amount of discovery was two events; in the latter the median was six. Further, in many cases there was, in total, discovery above the median of three discovery "events," but the "events" were not burdensome or inappropriate.[132] In other cases where there was seemingly disproportionate discovery—disproportionate because in a case involving $25,000 or less the median was exceeded—further inquiry revealed actively pursued counterclaims, or trial, or both.

Nevertheless, in some cases reasonable explanations were not forthcoming, and a review of them leaves one with a definite and firm conviction that too much discovery relative to the case occurred. There *is* overdiscovery in some cases. In some cases the total amount of discovery by one side dwarfs that undertaken by the other. Table 6 compares plaintiff's(s') to defendant's(s') discovery in the 330 discovery cases; Table 7 makes the same comparison for the 249 discovery cases which involved neither multiple nor third party defendants. While a sense of proportion is evident, there are obvious exceptions. Overdiscovery did occur in cases in which it appeared that comparatively little was at stake.[133]

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132. Not all "events," of course, are the same. One set of interrogatories may contain 10 questions, another 75; one deposition may last for 20 minutes, the next for several hours. One set of interrogatories may ask for documents to be attached to the answers, and a request for production is not filed; in another case a formal request is served.

133. In one case the buyers of a home sued their sellers for misrepresentation. Plaintiffs alleged that the condition of the roof and the condition of the heating and ventilating system had been misrepresented. They sought actual damages of $7062. Claiming fraud, they sought punitive damages as well. Denials and a counterclaim for abuse of process followed. The parties made 19 motions, and conducted 13 formal discovery events, including seven depositions. The case which produced the greatest number of discovery events among the random sample arose out of a fire. The actual damages were alleged to be $32,000, to which a seemingly tenuous claim of punitive damages in the amount of $300,000 was added against one of the defendants. Multiple defendants were sued, and crossclaims and counterclaims were filed. There were 56

In cases involving larger amounts in controversy, a substantial amount of discovery often occurred. Many of these cases may be readily identified as tort actions in which serious injuries or death had occurred. In these cases the damages appear to have been provably substantial and there were multiple parties, both plaintiffs and defendants. Some of the discovery may well, in retrospect, not have been "necessary," but whether the discovery in these cases can be documented as "unnecessary" probably misses the point. Litigation of this sort may assume an unusually adversary posture. At worst the tendency towards cooperation in discovery practice otherwise amply evidenced in civil litigation in Iowa is eroded; at best the parties find themselves involved in extensive discovery as each party acts in self-interest and self-protection. The point to note is that this kind of case shows a natural tendency towards substantial discovery, and a more active role for the court is suggested.

Unnecessary discovery may occur within a single discovery device. Interrogatories and depositions were examined for this purpose.

1. *Interrogatories*

There is no question that in some cases interrogatories are a real source of "overdiscovery," both in the sense that they exceed thirty in number and in the more meaningful sense that they go far beyond the reasonable needs of the case. In one suit proceeding on a theory of product liability, defendants served "thirty" interrogatories, but the interrogatories served were spread over sixty-one pages and included some 250 to 275 separately identifiable questions. In still another case, involving a $2300 auto accident with a counterclaim for less than $9000, plaintiffs' set of interrogatories also exceeded 250 in number.

Recognition that a single discovery request can be unduly expensive or burdensome prompted amendment of the discovery rules in 1980 to provide that "[a] party shall not serve more than thirty interrogatories on any other party except upon agreement of the parties or leave of court granted upon a showing of good cause."[134] The rule does not define "interrogatory," but an intention to include subparts and to limit an interrogatory to a single question seems manifest in the comments of the committee which recommended

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formal discovery devices utilized. Plaintiff served 16 sets of interrogatories, ten sets of requests for production, and four sets of requests for admissions; plaintiff also took seven depositions. In combination the defendants and third party defendant served two sets of interrogatories and three sets of requests for production, and they took fourteen depositions. After three weeks of trial, the jury awarded plaintiff $40,000. It is hard to read this multi-volume file, in a case involving property damage under $40,000 and no personal injury, without reaching the conclusion that the case was blown far out of proportion and that the amount of discovery pursued was simply excessive.

134. IOWA R. CIV. P. 126.

the amendment[135] as well as in the Iowa Supreme Court's interpretation of a previous, identical limitation.[136] For purposes of determining whether excessive interrogatories were being filed and measuring the effect of this amendment, therefore, subparts which asked genuinely separate questions and multiple questions within a single interrogatory were counted as distinct interrogatories.

The 1980 amendment appears to have reduced significantly the number of interrogatories asked, but the frequency of sets exceeding thirty questions was still substantial. Among the discovery cases, over one-half[137] of the sets of interrogatories filed prior to the effective date of the rule exceeded thirty interrogatories. In contrast, one third[138] of the sets of interrogatories served after the amendment's effective date did so. Plaintiffs and defendants served sets of interrogatories which exceeded thirty questions with approximately the same frequency.[139]

The percentage of cases in which interrogatories exceeded thirty is substantially greater than the median of 15%, the frequency with which cases involved an "excessive number of interrogatories of a substantive nature" according to attorneys' responses to the questionnaire.[140] Several observations, however, are in order. First, not all sets of interrogatories exceeding thirty in number can be regarded as "excessive." Rule 126 only requires leave of court to propound more than thirty interrogatories where the parties are unable to agree. There were only three instances in which a party serving more than thirty interrogatories sought permission in court to do so, and there were relatively few instances in which a party objected, moved to strike, or moved for a protective order on account of interrogatories whose number exceeded that authorized by the rule. Within the meaning of the rule, therefore, there may have been "agreement" for more than thirty interrogatories to be served. Second, Rule 126 does not distinguish between interrogatories of a "substantive" nature and those which seek to identify documents and witnesses, especially expert witnesses, and interrogatories of a non-substantive nature were included for purposes of determining whether

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135. REPORT OF THE COST OF LITIGATION STUDY COMMITTEE 2-5 (Sept. 12, 1979) (on file with author).

136. Hot Spot Detector, Inc. v. Rolfes Elec. Corp., 251 Iowa 647, 102 N.W.2d 354 (1960).

137. STUDY, *supra* note 23, Vol. 1, Table 23, at 46 (57.6%).

138. STUDY, *supra* note 23, Vol. 1, Table 24, at 47 (34.6%).

139. STUDY, *supra* note 23, Vol. 1, Table 26, at 49. Plaintiffs served 51.5% of the sets which exceeded 30 questions, while defendants served 48.5%. Tort cases were substantially more likely than contract cases to include sets of interrogatories exceeding 30 questions. Over 80% of the cases in which interrogatories exceeding 30 were served, were tort cases. Only one in eight suits involving an account, promissory note, or liquidated contract debt included excessive sets, while fewer than one in five suits for breach of contract involved excessive interrogatories. In contrast, all of the products liability cases and 70% of both the medical malpractice cases and the automobile accident cases included interrogatories which exceeded 30 questions.

140. *See* Table 3 *infra*.

more than thirty were asked. There were cases in which the expert witness interrogatories alone caused the number asked to exceed thirty. Because it usually is essential to ask expert witness interrogatories in order to obtain discovery of experts, the estimates yielded by the questionnaires of the frequency of "excessive number of interrogatories of a substantive nature" cannot logically be compared to the data on sets of interrogatories asking more than thirty questions. Finally, there were many cases in which persons served interrogatories which, with subparts, exceeded thirty in an obvious effort to obtain focused and non-evasive answers. A more broadly stated question is unlikely to secure such answers. If interrogatories were given a less adversary reading, and fuller, more cooperative responses could be expected, the number of sets of interrogatories which exceed thirty would be lower.

2. *Depositions*

The frequency of depositions is a common complaint.[141] The consensus among lawyers, however, was that an excessive number of depositions is not taken in the vast majority (90%) of cases in which they were involved.[142] Data from the discovery cases supports this view. No depositions were taken in nearly one-half of the cases in which any formal discovery was conducted;[143] the median number of depositions in cases in which they were taken was two;[144] and neither plaintiffs nor defendants took more than two depositions in nearly 90% of the discovery cases.[145] Plaintiffs or defendants, including multiple defendants, took more than three depositions in less than 10% of the discovery cases. A description of the cases in which either did so is familiar and predictable. Generally these were tort cases involving multiple and/or third party defendants in which plaintiffs sought unliquidated damages in excess of $100,000.[146] Whether plaintiffs or defendants take the

141. *See supra* text accompanying notes 37-41.

142. *See* STUDY, *supra* note 23, Vol. 2, at 1-16, 1-20; *infra* Table 4.

143. *See* STUDY, Vol. 1, Table 33, at 56 (48.8%).

144. *Id.* Depositions were taken in 168 cases. No more than two depositions were taken in 89, or 53%, of these cases.

145. STUDY, *supra* note 65, Vol. 1, Table 34, at 57.

146. Plaintiffs took more than three depositions in 25 of the 330 discovery cases. Nineteen of the 25 such cases involved multiple defendants, and another involved a third party action. Twenty-three of the 25 cases were tort actions, including three of the six products liability cases which appeared in the discovery cases. The two which were *not* tort actions were construction contract cases, with substantial counterclaims for defective workmanship and performance. Fifteen cases sought unliquidated damages in excess of $100,000, so that the median amount in controversy exceeded $100,000. An additional three prayed for "fair and adequate" relief. Trial preparation also appears to be an important factor influencing the frequency of depositions. Nine of these cases went to trial, and three settled on the eve of or immediately before trial.

Defendants took more than three depositions in 20 of the 330 discovery cases. An analysis of these cases reveals a pattern similar to that described for plaintiffs. Five were tried, and four

depositions, or both, it is less important in the abstract to determine whether one or more of these depositions was "unnecessary" than to recognize that cases of this sort tend to involve substantial discovery, including a substantial number of depositions. Accordingly, the court should take a more active role in this type of case.

A needlessly long deposition can be as costly as an unnecessary one. Data on the frequency of depositions does not address their length. The median response of lawyers was that unreasonably long depositions occurred in only 10% of their civil cases in which formal discovery was conducted. When asked to estimate the average length of time taken in hours of different types of depositions, the lawyers' median responses were two and a half hours for the deposition of a party, one hour for that of a witness, and two and a half hours for the deposition of an expert witness.[147] As a part of the Study of Civil Litigation, persons whose depositions were taken in any of the cases studied were mailed a brief questionnaire about their deposition. Deponents were asked, among other things, to estimate how long their deposition took. With the exception of ordinary witnesses, whose median estimate of the length of their deposition was two hours, the responses of deponents were substantially the same as the lawyers.[148]

Whether the lengths of time indicated are "unreasonably long" or whether a given deposition lasted longer than it should have, is a subjective assessment. Of those whose deposition was taken and who responded to the questionnaire about them, over one-half of the parties and ordinary witnesses answered that they "believe[d] that the deposition lasted longer than it should have" in their case. Deponents were also asked whether their "deposition [made] a positive or negative impression upon [their] view of the process for resolving civil (not criminal) lawsuits?" Forty six and one-half percent responded that the deposition made a positive impression while 33% responded that their impression was negative.[149] Of the latter, more than 80% answered that the deposition lasted longer than it should have, and 80% of those who thought their deposition lasted longer than it should have indicated that the attorney asked many irrelevant and repetitious questions.[150] Many who stated that the deposition did not make a positive

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settled on the eve of trial. Twelve such cases involved multiple defendants; and a thirteenth included an active third party action. Eighteen of the 20 were tort actions. The two which were not tort actions were the same construction contract cases mentioned above. Fourteen cases sought unliquidated damages of more than $100,000, and two others sought "fair and adequate" relief, so that the median amount in controversy similarly exceeded $100,000. Of the four seeking money damages of $100,000 or less, three involved multiple or third party defendants, two included counterclaims, and a third contained several crossclaims. FREQUENCY STUDY (1987) (on file with author).

147. *See* STUDY, *supra* note 23, Vol. 2, at 1-32.

148. *See* STUDY, *supra* note 23, Vol. 2, at 3-8.

149. *Id.* at 3-21.

150. *Id.* at 3-11, 3-12. Of all deponents responding, the percentages were 41.6% and

impression on them commented that the attorney taking the deposition was more than just repetitious. "They were trying to trick me," one party said, "asking the same question in different ways to see if I'd respond the same way."[151] An expert complained of "[q]uestions asked repeatedly until the answer they are after is rendered."[152] An ordinary witness wrote, "Both sides were more interested in what they want you to say rather than the truth of what happened. They asked the same questions repeatedly, trying to get the answer they wanted to hear."[153]

Even though a greater percentage reported a positive impression, the number reporting that the deposition took longer than it should have, and the number receiving a negative impression are significant and should be noted. The kinds of cases in which they were involved may also be noted. Of those commenting that the deposition was too long, over 60% were involved in litigation with multiple defendants, and over 80% were involved in cases in which the prayer was either for more than $100,000 or for "fair and adequate" relief.[154] Of those on whom a negative impression was made, over half were involved in litigation with multiple defendants and exactly half in cases seeking over $100,000 or "fair" compensation.[155] These are the cases, of course, in which there tends to be more discovery, including more depositions, and more motions.

B. *Bad Faith, Evasion, and Delay*

1. *Bad Faith*

In recent years there have been highly publicized instances of intentional concealment or destruction of relevant documents. These have supported claims of bad faith in discovery practice and calls for strict enforcement of the rules and imposition of sanctions. It has never been clear, however, to what extent discovery practices in civil litigation within particular jurisdictions or within the state courts have been characterized by bad faith. Attorneys' median estimates of "lack of candor or bad faith by the opposing party or attorney" ranged from just 4% of their civil cases to 10%, with a median response of all attorneys of 10%.[156] Even at the seventy-fifth

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40.6%, respectively. Few said that "frequent objections or comment from other attorney" (6.9%), "quarrels or arguments between or among attorneys" (7.9%), or "threats by the attorney to stop the deposition in order to argue a legal point to a judge" (2.9%) contributed to the depositions being too long. Multiple attorneys asking the same or substantially the same question was frequently cited (29 of 101, or 28.7%)as a cause of lengthy depositions.

151. *Id.* at app. D3.

152. *Id.*

153. *Id.*

154. *Id.* at app. D5.

155. *Id.* at app. D6.

156. STUDY, *supra* note 23, Vol. 2, at 1-15.

percentile for the various attorney groups, the respondents estimated that "lack of candor or bad faith by the opposing party or attorney" occurred in no more than 20% of their civil cases during the preceding three years.[157] It would appear, therefore, that bad faith in discovery practice does not occur in state court in 80-90% of the civil cases in which discovery is conducted.

The words "bad faith" and "lack of candor" may imply knowing concealment of facts, or extreme behavior, and estimates of its occurrence by attorneys may have been low for that reason. The cases in the random sample revealed very few cases in which the issue of "bad faith" even arose. An evaluation of discovery practice, however, should not be limited to those traditional notions of "bad faith," and it may be understood instead simply as an absence of the "good faith" which parties and their counsel are obligated to observe in discovery.[158] Quite apart from "bad faith," therefore, the frequency of evasive and incomplete responses may usefully be explored in evaluating the discovery system, as may the length of time taken to respond to discovery requests.

2. *Evasive and Incomplete Responses*

Estimates of the percentage of civil cases in which parties responded evasively or incompletely to discovery requests were generally consistent among lawyers representing both plaintiffs and defendants.[159] In each case evasive and incomplete responses to discovery requests represented the most prevalent problem noted in discovery practice. Members of the Association of Trial Lawyers of Iowa estimated that evasive or incomplete responses to their discovery requests were received in 35% of their cases.[160] The median percentage estimated by members of the Defense Counsel Association was identical.[161] The median estimate of members of the Iowa Acad-

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157. *Id.*

158. At a minimum the concept of good faith requires that parties and their counsel pursue and respond to discovery in furtherance of the objectives of discovery and in compliance with the rules. IOWA R. CIV. P. 121(b). The Supreme Court of Iowa has stated on a number of occasions that the discovery rules are to be construed and enforced so that litigants have timely and meaningful access to all relevant facts which are not protected by privilege, and to this end the rules prescribe time limits within which to respond to discovery and condemn an evasive or incomplete response. *E.g.*, IOWA R. CIV. P. 126, 127, 134(a). For purposes of discovery a response is "evasive" or "incomplete" when it improperly denies access to all relevant facts or discoverable material fairly called for by a discovery request. Thus, interrogatories must be answered "separately and fully" and the reasons for an objection must be stated. IOWA R. CIV. P. 126. Further, denial of a request for admission "shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder." IOWA R. CIV. P. 127.

159. *See* Table 3 *infra*.

160. STUDY, *supra* note 23, Vol. 2, at 1-15.

161. *Id.*

emy of Trial Lawyers was somewhat lower at 25%.[162] Whether the frequency is 25% or 35%, the estimate is substantial. The rules, of course, do not countenance *any* evasive or incomplete responses.

An effort was made to document these estimates in the randomly sampled cases in which formal discovery was conducted. A mere reading of case files, however, does not permit adequate evaluation of discovery for the purpose of ascertaining the extent to which evasive or incomplete responses occur.[163] Nevertheless, it is clear from many cases included in the randomly sampled case population that parties and counsel responding to discovery make responses which are evasive or incomplete. In one personal injury case, for example, the defendant submitted an interrogatory asking for information on the plaintiff's injuries, which had been pleaded in only a very general fashion in the petition. "State with specificity," the interrogatory demanded hopefully, "your exact physical condition at present and any disabilities, complaints or pain or physical limitations which you currently have." Plaintiff answered, "Poor." In a case in which plaintiff was seeking to have the court disregard the existence of a corporate defendant and affix liability to an individual defendant, who was a shareholder, officer, and director of the corporate defendant, the plaintiff served the individual defendant with a request for production of the articles of incorporation, bylaws, minutes of various meetings, and corporate income tax returns. The individual defendant objected to the request, stating that plaintiff's discovery should have been directed to the corporate defendant, not the individual defendant. The court ordered the individual defendant to comply with the plaintiff's request for production "to the extent that he [had] in his possession any of the documents requested." In answers to subsequent interrogatories, which the individual defendant had to be compelled to provide, defendant disclosed that he was in fact the person who had custody of the relevant documents. The response of defendant was plainly dilatory and evasive.

One of the most egregious examples of a pointless objection occurred in

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162. *Id.*

163. First, a substantial number of interrogatories are simply answered "no" or "not applicable," and it is usually impossible to determine whether this answer is accurate and responsive, on the one hand, or a reflection of an unduly narrow reading of the interrogatory, on the other. In the second place, to evaluate responses to discovery, one would have to know what was known by or what information was reasonably available to or obtainable by the person responding to discovery; and that knowledge cannot ordinarily be obtained. Third, a motion to compel discovery predicated upon an evasive or incomplete response would call attention to the alleged inadequacy or insufficiency of a response; but very few such motions were filed. The "remedy" for an evasive or incomplete response is usually a deposition, which is quicker and less expensive than negotiating with counsel about the sufficiency of a response, perhaps revealing impressions, theories and opinions of counsel in the process; applying to the court for relief, perhaps being required to attend a hearing and argue the motion; and awaiting a ruling, possibly to lose the motion and be told to take a deposition.

a case in which a teacher sued a school district for improperly subtracting sums from his annual salary. Plaintiff's discovery asked for various rules and regulations of the defendant school district which defendant had claimed authorized the deduction. In identifying the school district in the interrogatories, plaintiff misspelled its name. Instead of referring to the "Lenox" Community School District, the plaintiff's interrogatories repeatedly referred to the "Lennox" Community School District. Defendant refused to answer these interrogatories because "there is no Lennox Community School District . . . ." Obviously the sound of the word is the same whichever spelling is used, and the name of the school district was properly spelled in the caption of the case appearing on the document filed. It could not honestly be claimed that defendant was misled. The objection based upon misspelling, therefore, was an intentional refusal to respond, sufficiently or at all, to discovery.

Evasive and incomplete responses to interrogatories characterize expert witness discovery. The Federal[164] and Iowa[165] Rules of Civil Procedure both provide for discovery of a party's expert witnesses who are expected to be called to testify at trial, and in exceptional circumstances, experts who are not expected to be called as witnesses. As to experts whom the other party expects to have testify, one may through interrogatories discover the identity of the expert, the subject matter of the expected testimony, and both "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."[166] Further discovery in federal court, and in Iowa until 1987,[167] is available only upon motion and is subject to such limitations "as the court may deem appropriate."[168]

The rule did not describe expert witness discovery in practice as revealed in the cases studied. Interrogatories represent the normal method of discovering the *identity* of any expert expected to be called at trial, but information as to the facts and opinions to which the expert was expected to testify, and a summary of the grounds for each opinion the expert would give, were ordinarily obtained through depositions, which the parties arranged without applying to the court. Attorneys estimated that in 90% of their cases involving experts the deposition was taken of the adverse party's expert, and at least 95% of the time the deposition was taken by agreement of the parties without application to the court for an order authorizing further discovery.[169]

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164. FED. R. CIV. P. 26(b)(4).

165. IOWA R. CIV. P. 125.

166. FED. R. CIV. P. 26(b)(4)(A)(i).

167. In 1987 the Iowa Supreme Court substantially amended the rules governing expert witness discovery and, inter alia, eliminated the formal requirement of court approval to take an expert's deposition. *Compare* IOWA R. CIV. P. 122(d) (1987) *with* IOWA R. CIV. P. 125(a) (1988).

168. FED. R. CIV. P. 26(b)(4)(A).

169. It may be, of course, that interrogatories are answered incompletely because the par-

Evasive responses to interrogatories regarding experts help to explain the departure from the rule in practice. Specific facts and opinions to which the expert was going to testify were rarely disclosed in answers to interrogatories, or they were stated only in a cursory fashion; and the grounds for each opinion were not summarized but omitted altogether. Answers to interrogatories of this sort were so inadequately and incompletely answered that depositions were a necessity. When asked, "[w]hat kind of discovery is sufficient to permit adequate preparation for cross-examination and rebuttal when an expert is expected to testify at trial on behalf of an adverse party," only two of 240 attorneys responded, "[a]nswers to interrogatories."[170] Fifty percent responded "[t]aking the expert's deposition"; and an additional one quarter answered that in order to obtain sufficient discovery, one has to serve interrogatories, request production of the expert's report, *and* take the expert's deposition.[171] The deposition of experts can add significantly to the cost of litigation, especially where the expert resides out-of-state,[172] and because of the frequent difficulty of meshing attorneys' schedules with the expert's, the need for expert witness depositions can delay readiness for trial and disposition of litigation substantially.[173]

Evasion can occur through an unreasonable or unfairly narrow reading

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ties assume that a deposition will be taken. It probably is true, too, that for all the reasons that depositions are preferable to interrogatories, most attorneys prefer to take the deposition of the adverse party's expert. A motion for an order compelling a more thorough or specific response may be an unattractive alternative; and in any event reliance upon the responses to expert witness interrogatories may be unwise, inasmuch as they are usually drafted by counsel. A motion may be made at trial to exclude an expert or limit the expert's testimony, Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 108-09 (Iowa 1986), but the prospect of losing the motion through inability to demonstrate prejudice is a substantial incentive simply to take the deposition.

170. STUDY, *supra* note 23, Vol. 2, at 1-33.

171. *Id.*

172. A telephone deposition is available under Rule 140(d) of the Iowa Rules of Civil Procedure, but in a close case and perhaps most cases the telephone is no substitute for observing and examining the expert in person. In addition, where the deposition is taken of an out-of-state expert, both the rules of evidence and the rules of procedure permit it to be introduced into evidence at trial; and surprise and unfairness can result from its use at trial. Terse, barely responsive answers to interrogatories afford no realistic basis for trial preparation or for conduct of a deposition which may be introduced in evidence. The deposition in effect is a substitute for answers to interrogatories and is a "discovery" deposition. The rules of procedure, however, do not distinguish between "discovery" and "evidentiary" depositions, and the former are not recognized. Nor is a protective order properly issued to limit use of the deposition at trial. Farley v. Seiser, 315 N.W.2d 857 (Iowa 1982) (en banc); Osborne v. Massey-Ferguson, 290 N.W.2d 893 (Iowa 1980). Thus, where the expert resides outside Iowa, the deposition may be introduced into evidence at trial under Iowa Rule of Civil Procedure 144(c). At that point no cross-examination will be available. Insofar as that expert is concerned, the real "trial" occurred during the deposition; and cross-examination had to be conducted, if conducted at all, at that time. Answers to interrogatories, however, would probably not have prepared counsel to do so adequately.

173. *See infra* notes 183-88 and accompanying text.

of a discovery request which does not address the substance of the matter asked,[174] but there are other ways in which a party may deny other parties access to relevant facts. Documents may be destroyed[175] or withheld,[176] or relevant information fairly and sufficiently requested may be concealed through answers which are deceptive.[177] Burying relevant documents in a mass of documents is another example.[178] In each case relevant facts and documents may go undisclosed, and the goal of deciding cases on their merits frustrated. Moreover, evasion lengthens the discovery process by necessitating motions and hearings,[179] informal discovery, or additional formal discovery such as depositions. The expense of maintaining or defending the litigation is increased, and the more time taken in discovery tends to delay final disposition of the case.[180] A significant occurrence of evasion in these senses was not revealed by an examination of the cases selected for study, and the comments of lawyers indicated it was exceptional among Iowa attorneys, particularly among experienced counsel who knew one another. There was, however, a growing sense that such abuse was "out there" and is all the more dangerous because it is difficult to detect.

3. *Delay in Responding to Discovery*

Delay in responding to a request for discovery constitutes a withholding of information. The information sought may not be known at the time the discovery is conducted, or an investigation will have to be undertaken in order to respond. At other times, however, delay in responding to discovery is itself a form of evasion.[181] This is certainly true where the answer to the

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174. *See supra* notes 158-162 and accompanying text. *See also* Sellon v. Smith, 112 F.R.D. 9 (D. Del. 1986). The problem of the unduly narrow reading is discussed in A.B.A. SEC. OF LITIG., REPORT OF THE DISCOVERY COMMITTEE'S SUBCOMMITTEE ON PRETRIAL LITIGATION ETHICS AND PRACTICES (Jan. 1981).

175. *E.g.*, Craig v. A.H. Robbins Co., Inc., 790 F.2d 1 (1st Cir. 1986); Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472 (S.D. Fla. 1984).

176. *See supra* note 35 and accompanying text.

177. *E.g.*, Shelton v. American Motors Corp., 106 F.R.D. 490, 497 (W.D. Ark. 1985), *rev'd on other grounds*, 805 F.2d 1323 (8th Cir. 1986); Ostendorf v. International Harvester, Inc., 433 N.E.2d 253, 257 (Ill. 1982); Haumersen v. Ford Motor Co., 257 N.W.2d 7 (Iowa 1977).

178. *E.g.*, Consolidated Equip. Corp. v. Associates Commercial Corp., 104 F.R.D. 101 (D. Mass. 1985). Federal Rule of Civil Procedure 34 was amended to address this form of abuse. *See Advisory Committee Notes*, 85 F.R.D. 521, 532 (1980). *See also Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 149, 177 (1977) (proposing amendment of Rule 34 to stop "a reprehensible practice much discussed by the Committee—the deliberate attempt by a producing party to burden discovery with volume or disarray. It is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance.").

179. *See* FED. R. CIV. P. 37; IOWA R. CIV. P. 134.

180. *See infra* section IV(C).

181. *E.g.*, Shelton v. American Motors Corp., 106 F.R.D. 490 (W.D. Ark. 1985), *rev'd on other grounds*, 805 F.2d 1323 (8th Cir. 1986); Parrett v. Ford Motor Co., 52 F.R.D. 120 (W.D.

request for discovery is known or reasonably available to the party from whom discovery is sought, but responses are made neither within the period provided by the rules nor within any extension to which the discovering party or the court accedes. Extended delays in receiving responses to discovery was second only to evasive and incomplete responses as the problem in discovery practice most frequently noted by lawyers. The median estimate of both the Association of Trial Lawyers of Iowa and the Iowa Defense Counsel Association was that extended delays in receiving responses to discovery occurred in 25% of their cases. The median for the Iowa Academy of Trial Lawyers was 20%.[182]

Expert witness discovery as revealed in the discovery cases was characterized by lengthy delays in the identification and discovery of experts. Supplementation of expert witness interrogatories in the weeks and days before trial and depositions of experts on the eve of and even during trial were common. Often a continuance of the trial resulted, presumably causing duplicate trial preparation later and needless expense in consequence. Attorneys and judges were asked whether "the timing of discovery of an adverse party's expert(s) expected to be called at trial [is] a significant factor contributing either to undue delay in the resolution of a case or increased costs to the parties or both?"[183] A majority of the members of the Association of Trial Lawyers of Iowa, the Defense Counsel Association, and the Iowa Academy of Trial Lawyers answered "yes," and by substantially the same percentage. The percentage of judges who agreed was even greater. Three quarters of the judges who responded to the questionnaire indicated that the timing of expert witness discovery was a significant factor contributing either to undue delay or cost or both.[184] In theory, expert witness interroga-

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Mo. 1969).

182. *See* Table 3 *infra*. It was generally not possible to document delay in obtaining depositions, physical or mental examinations, or production of documents, though reported cases provide ample evidence of its occurrence. *E.g.*, Krugman v. Palmer College of Chiropractic, 422 N.W.2d 470 (Iowa 1988); Haumersen v. Ford Motor Co., 257 N.W.2d 7 (Iowa 1977). Delays in responding to interrogatories could be measured, however, since information was filed from which to identify the date on which discovery was sought and the date on which answers, if any, were filed. The study substantiated delay in answering interrogatories. Three quarters of all sets of interrogatories served in the randomly sampled cases in which discovery occurred were not answered within the 30 days provided by Iowa Rule of Civil Procedure 126 for responding to interrogatories. Moreover, fewer than half the sets of interrogatories which were served were answered within two months. One of every five sets served was not answered at all. Over 40% of the interrogatories which were answered were not answered within two months. "Delay" as lawyers understood it in responding to the questionnaire on discovery does not necessarily begin to occur at the end of one month following a discovery request, but neither should interrogatories be considered "answered" merely because responses were filed. Evasion and delay, in other words, are inseparably linked.

183. STUDY, *supra* note 23, Vol. 2, at 1-34. Fifty-seven and one half percent (57.5%) of the members of the Association of Trial Lawyers of Iowa and of the Defense Counsel Association answered "yes"; 62.1% of the Iowa Academy of Trial Lawyers agreed.

184. STUDY, *supra* note 23, Vol. 2, at 2-38.

tories, like any other interrogatories, must be answered within thirty days of receipt. In practice, parties from whom expert witness discovery is sought regularly responded, if they answered at all, "None at this time" or "Discovery is continuing. Will supplement later."[185]

The district court has long had authority to establish deadlines for closing discovery, including expert witness discovery,[186] but in the cases sampled deadlines were rarely set, and little control was exercised over this form of discovery. Moreover, although the court has inherent power to impose sanctions for late identification of experts or supplementation of expert witness interrogatories,[187] sanctions were rarely imposed in the cases sampled. Responses to late identification and supplementation varied. Usually no objection was raised and the parties proceeded with discovery. Frequently the case was continued. Only in very rare cases was the expert excluded.[188]

C. *Prolonging Disposition of the Litigation*

Cases which involve formal discovery take substantially longer to resolve than cases which do not involve formal discovery. Table 7 compares the time elapsed from the filing of the petition to the entry of final judgment in the district court for all 1400 cases selected for study, all 1070 of the non-discovery cases, and all 330 of the discovery cases. It also includes, for the discovery cases, time lapse data according to certain procedural characteristics, such as different amounts of discovery, the involvement of multiple defendants, the use of impleader, and disposition after trial.

The differences between the non-discovery and the discovery cases are striking. The median disposition time of the non-discovery cases was three months and one week; the median disposition time of the discovery cases was sixteen months longer. Moreover, among the discovery cases it appeared that the more formal discovery undertaken by the parties, the longer it was likely to take to dispose of the case. For example, where discovery by the parties was at or below the median of three discovery events, the median disposition time was 497 days. In contrast, where discovery exceeded three

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185. Attorneys commented extensively on expert witness discovery. The most widely noted objections were delay in identification of testifying experts and "last minute" supplementation of interrogatories disclosing experts who might be called to testify at trial. This created a need for further discovery, including hurriedly arranged and often more expensive depositions on the eve of and during trial, and not infrequently a "need" to obtain a rebuttal expert. Judges' comments were similar and pointed out the frequent consequences of late identification of testifying experts, namely, additional discovery, additional experts, additional cost, and additional delay.

186. Iowa Rule of Civil Procedure 136(a) gave the district court this authority. Amended Rule 136 continues this authority, as does new Rule 125(c).

187. *See* White v. Citizens Nat'l Bank & Trust Co., 262 N.W.2d 812 (Iowa 1978). Rule 125 was amended to reguire supplementation within 30 days of trial and to provide expressly that the court may exclude expert witnesses from testifying.

188. *See infra* notes 203-12 and accompanying text.

events, the median disposition time was 659 days. For the seventy cases comprising 5% of the random sample in which the parties made more than five formal discovery requests, the median of 709 days is just shy of two years. Where total formal discovery was greater than nine discovery events, the median disposition time of 796 days exceeded two years.

There is no doubt that discovery is an important factor in the length of cases. Evaluations of the significance of discovery vary, but approximately one-half of both judges and lawyers responding to the questionnaires stated that discovery was a major factor in determining the disposition time of a case; another 40% of both judges and lawyers characterized it as "the most significant factor."[189] The data revealed in the Study and in Table 7 corroborated these evaluations and confirmed that formal discovery is characteristic of cases which, as a group, take a longer time to dispose of than cases which do not involve formal discovery. At the same time lawyers and judges identified attorneys as the crucial factor affecting the time it takes to dispose of an ordinary civil case. When asked what, in their experience, was the most important factor tending to delay the disposition of an ordinary case, lawyers and judges most frequently answered the attorney or attorneys handling the case.[190] The answers were expressed in a variety of ways but they inevitably focused upon the interest of the attorneys in the case, their ability and experience, their diligence, and their cooperation with one another. Focus on the attorneys, of course, is not inconsistent with the opinion that discovery is a major factor in how long it takes to dispose of a case.

Lengthy disposition time in the discovery cases often stirred strong feelings among parties and witnesses. One of the questions in the questionnaire mailed to persons who had been deposed was, "In your opinion what are the most important factors tending to delay the resolution of civil (not criminal) lawsuits?"[191] The responses are illuminating and troubling.[192] Most commonly, lawyers were blamed. One plaintiff's expert responded, "Attorneys 'playing games' back and forth." A defendant's opinion was that "attorneys can make more money." A defendant in a different case agreed, writing "lawyers bleeding people for money." Plaintiff in still another suit answered, "Lawyers are the ones making the money—delay—time involvement is to their advantage." Another plaintiff answered simply, "Stall in time by insurance company lawyers." Still another suggested that "the system . . . set guidelines for concluding. We wanted to get the case concluded but their

189. STUDY, *supra* note 23, Vol. 2, at 1-12, 2-25. Thirty-seven and nine-tenths percent (37.9%) of the attorneys and 44.4% of the judges thought discovery was "the most significant factor" in how long it takes to resolve an ordinary case. Forty-eight and eight-tenths percent (48.8%) of the attorneys and 50% of the judges thought it was "a major factor, but not the most important one."

190. STUDY, *supra* note 23, Vol. 2, at 1-44, 2-26, 2-27.

191. STUDY, *supra* note 23, Vol. 2, at 3-22, 3-23.

192. STUDY, *supra* note 23, Vol. 2, app. D7, at 13-17.

attorney kept delaying. Attorneys like to keep the clock running." Lawyers were also seen as delaying lawsuits for other than financial reasons. "The time span that attorneys drag out cases," a defendant wrote, "in hopes the facts will become cloudy in memory or forgotten altogether." Defendant in a different case made almost the same comment: "Time fogs memory as to exact circumstances surrounding particular groups of occurrences. Delay may assist one or more parties to success." One of the respondents who had been plaintiff in a case made the same observation. "Advantages [are] gained by delays," he wrote.

Whatever the reasons for the longer time to dispose of the cases in which formal discovery was conducted, it is only fair to say that parties and witnesses whose depositions were taken repeatedly expressed wonder, dismay, and frustration that it took as long as it did to "get to court," "get to trial," or "get it over."[193] Thus, one defendant answered the question about what the most important factors were tending to delay disposition of the suit, "I have no idea. Getting a court date took a long time—I don't know why." Others responded similarly. "One thing I was a little displeased about is [sic] that it took so long. It happened in '79 and was resolved in '84. Don't really know why it took so long." There is little doubt that delay is frustrating to litigants and witnesses. "The thing that made me the maddest," wrote a party plaintiff, "was always putting off the court date." Plaintiff in a different lawsuit agreed. "What irritated me more than anything was how long it took to get to court, get the whole case done with, and a lot of that was discovery." A defendant apparently forgot information he considered important. "It took over two years for this suit to come to trial. I had forgotten important details. I wish I would have been given an opportunity to say anything additional I felt was important to clarify something I felt needed clarified."

Sometimes the feelings engendered by delay in civil litigation are very bitter and shape the participants' views of the legal system and everyone involved in it:

> Four years—its [sic] disgusting. Case got so intertwined with other suits and counter-suits I've become disinterested. I am a very disillusioned person about the judicial system, disillusioned and discouraged by the whole process. Attorneys have too many opportunities to line their own pockets and drag the whole thing out.
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> . . . .
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> All I wanted was to get the problem resolved—I didn't want any money and didn't sue for it. I would be satisfied if they would fix it. If ever I get involved in a suit again, I won't be so naive. It can't come out well. It's already a loser—my attorney has been negligent all through the case, not on top, their side knew things about the case two to three weeks before I did. It's the worst investment I ever made. If my wife knew how

193. *See* STUDY, *supra* note 23, Vol. 2, app. D8, at 18-21.

much it has cost, she'd have a heart attack.[194]

V. The Role of the Court: Enforcement of the Rules and the Use of Sanctions

The relative infrequency of objections and discovery-related motions is evidence of substantial cooperation among lawyers trying suits in Iowa, but that does not mean that discovery problems did not arise. In a percentage of cases which should not be ignored, disputes *do* develop. The court is required to give its attention to these cases. The trial lawyers to whom the questionnaire on discovery and delay in civil litigation was sent were asked, "Do the courts provide sufficient assistance in resolving discovery problems or disputes that arise in civil litigation?"[195] A majority of the attorneys who responded to the questionnaire answered that the courts did provide "sufficient assistance."[196] However, a substantial percentage—over 40%—answered that the courts did not do so.[197] A recurring theme in their comments was that the district court judges do not adequately enforce the discovery rules and that it was too time-consuming and expensive to do so in any event.[198]

Many expressed the belief that the court "did not want to become involved in the discovery process." "Judges tend to consider discovery problems as a nuisance," wrote one lawyer. "They chew out the lawyers instead of simply ruling in a strong and forceful manner, to wit, substantial sanctions." Making the same point, another attorney said that "[m]ost judges seem to consider discovery disputes insignificant and burdensome. Few will really assist counsel in resolving discovery problems." Many commented that the court was simply not interested, and this perception clearly discourages some from seeking relief from the court for discovery problems. Wrote one ATLI member, "frequently the person seeking protection or relief on discovery matters is treated summarily, with little attention paid to consistency, precedence, or logic. One gets the feeling that judges are upset with you for bothering them whether you are right or wrong." Another added, "Oftentimes the judges tell the attorneys that this is a matter that should be worked out between them. Obviously, if a matter could have been worked out between the parties, it would not have ended up in court for a judicial determination."

The discovery rules do provide devices to deter untimely, evasive, or incomplete discovery,[199] but attorneys who made comments indicated that

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194. *Id.* at 21.
195. *See* Study, *supra* note 23, Vol. 2, at viii.
196. *Id.* at 1-22.
197. *Id.*
198. *See* Study, *supra* note 23, Vol. 2, app. A3, at 26-33.
199. *See* Fed. R. Civ. P. 16, 37; Iowa R. Civ. P. 134, 136.

the district court was not using these devices. They frequently expressed the need, particularly in complex cases or ones involving multiple parties or claims, for a discovery schedule or deadlines to be set by the court, and they repeatedly wrote that courts refused to impose sanctions or award attorneys' fees and expenses to the prevailing party on a discovery motion.[200] The district court, it was said, failed "to put any 'teeth' into the rule for sanctions for discovery abuse." "Very seldom do courts enforce the discovery rules or impose sanctions with sufficient impact to resolve the present dispute, avoid future problems, or act as a deterrent to abuse of discovery practices." Comments of this sort were made over and over again by attorneys representing both plaintiffs and defendants. No comment was made more frequently or insistently.[201]

The written comments of lawyers responding to questionnaires were necessarily subjective and general. In significant measure, however, the cases studied corroborated lawyers' comments about the infrequency of deadlines, the frequency with which the procedure for compelling discovery generated delay, and the near non-existence of sanctions and awards of costs or attorneys' fees.[202]

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200. *See* STUDY, *supra* note 23, Vol. 2, app. A3, at 26-33.

201. *See id.*

202. The district court not only did not rule promptly but did not rule at all on nearly one-quarter of the discovery-related motions which were filed. STUDY, *supra* note 23, Table 74, at 103. In some of these cases the district court attempted to act as a mediator and withheld ruling so that the lawyers could "work it out." In other cases the party involved eventually complied, and the court ruled that the motion was "moot." In still other cases no reason appears in or is suggested by the file for the lack of a ruling.

Many cases corroborated the comments of attorneys that the district court was not enforcing the discovery rules. In one case defendant's attorney served interrogatories containing 17 questions upon plaintiff's attorney. No answers were served, and after a telephone call, two letters written two and a half weeks apart, and the passing of nearly three months, defendant filed a motion to compel. Plaintiff answered the interrogatories four days later, and the court declared the motion to compel moot. Similarly, and in another Judicial District, plaintiff served interrogatories containing 10 questions upon defendant. No answer being received in over three and one-half months, plaintiff moved to compel the answers to the interrogatories. The court "sustained" the motion but gave the defendant an additional two weeks within which to answer the interrogatories. When defendant still had not answered the interrogatories by the date ordered by the court, plaintiff moved for sanctions. Defendant's answers were filed five days later, and two weeks after that the same judge declared the motion for sanctions "moot." In another case defendants moved for a protective order prohibiting depositions, and requesting taxation of attorney's fees, alleging that plaintiff had unreasonably and deliberately scheduled depositions on dates when plaintiffs knew that defendants' attorneys were unavailable. The court rescheduled the depositions, but without addressing defendants' allegations, declined to award any fees. In other cases the court would "sustain" the motion to compel but give the defaulting party anywhere from 10 to 30 days within which to answer. In some of these cases the court said that sanctions would be imposed if the non-moving party had not complied by the extension date, and in some cases the court said that a hearing would be held unless the defaulting party came into compliance by the hearing date. Last day compliance "mooted" any request for attorney's fees or other relief.

Clearly there are disincentives to making meritorious discovery motions, and these disincentives explain in part the relative infrequency of discovery-related motions. The process is time-consuming and can be expensive. To discourage any need for discovery motions and compensate the prevailing party for having to pursue the matter in court, the rules provide for an award of expenses, including attorneys' fees, to the prevailing party, and authorize the imposition of sanctions.[203]

The study revealed, however, that lawyers fail to seek such relief and the courts refuse to grant it.[204] Lawyers generally did not ask for discovery sanctions. Among the 330 discovery cases, there were only fifteen requests or motions for sanctions. These constituted 1½% of all motions made in the discovery cases, and barely 8% of all of the discovery-related motions. Generally the motions for sanctions were made on account of failure to respond to interrogatories or to produce documents. Eighty percent of the motions for sanctions in the discovery cases related to failures to answer interrogatories or produce documents. If motions for sanctions were made, they generally were not granted, and if granted, the sanctions imposed were likely to be de minimis. Among the discovery cases only four, or approximately one quarter, of the motions for sanctions were granted. The "sanction" selected was costs or attorneys' fees in each case. Fees assessed in three of the cases were $40, $100, and $162.50, respectively.

An award of expenses and attorneys' fees to one prevailing on a motion to compel or motion for protective order is not a "sanction." Under Rule 134(b) and (d) the district court has the authority to impose various sanctions, which may include reasonable attorneys' fees, where the opposing party has failed to comply with the discovery rules or has disobeyed a court order compelling discovery.[205] An award of fees and expenses under Rule

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203. FED. R. CIV. P. 37(a)(4); IOWA R. CIV. P. 134(a)(4).

204. STUDY, *supra* note 23, Vol. 1, Table 70, at 99.

205. IOWA R. CIV. P. 134(b) and (d) provide:

(b)(1) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under R.C.P. 147"e" to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision "a" of this rule or R.C.P. 132, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

134(a)(4) is different.[206] It recognizes that in order for discovery to operate extrajudicially, there must be deterrents readily available for noncompliance and just compensation for the party who is forced to seek judicial assistance; and it is designed to minimize judicial time in determining whether to award fees and expenses. The rule *presumes* that fees and expenses should be

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(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

. . . .

(d) If a party or an officer, director, or managing agent of a party or a person designated under R.C.P. 147"e" to testify on behalf of a party fails

(1) To appear before the officer who is to take his deposition, after being served with a proper notice, or

(2) To serve answers or objections to interrogatories submitted under R.C.P. 126, after proper service of the interrogatories, or

(3) To serve a written response to a request for inspection submitted under R.C.P. 129, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs "A", "B", and "C" of subdivision "b"(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by R.C.P. 123.

206. IOWA R. CIV. P. 134(a)(4) provides:

If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

awarded to the prevailing party. Only if the district court finds that the losing party's position "was substantially justified or that other circumstances make an award of expenses unjust," is the court not required to make the award of expenses and attorneys' fees.[207]

In the cases studied, however, the district court ordinarily did not require the unsuccessful party to pay the prevailing party for expenses incurred, including reasonable attorneys' fees. This is evident from the cases studied and the bare handful of occasions on which attorneys' fees were awarded. This fact also emerges from the judges' own responses to one of the questions contained in a questionnaire submitted to them. The question asked was, "In ruling on a motion for an order compelling discovery, how often will you, in addition, award the prevailing party the reasonable expenses incurred in obtaining or opposing the motion, including reasonable attorneys' fees, pursuant to . . . [Rule] 134(a)(4)?"[208] Over a third of the fifty-four judges who responded checked, "Almost never" and over one-half responded only "occasionally."[209] Seven, or 13%, answered, "Frequently."[210] No one said that attorneys' fees were "usually" awarded.[211]

A substantial number of the discovery motions which were made in the discovery cases were simple motions to compel answers to interrogatories or production of documents, and no resistance was filed or request for hearing made. In these cases, it does not appear that opposition to the motion, if there was any informal opposition to the motion, was "substantially justified," as required by Rule 134(a)(4) in order for the district court *not* to award fees and costs. Rarely was it clear why an award of attorneys' fees and expenses would have been "unjust."

There are reasons why the district court might be reluctant to impose sanctions. The rule requires opportunity for hearing, and on balance the court might find it wasteful of its limited time to become involved in attorneys' fees litigation and sanction hearings. Attorneys, of course, are free to press the matter if they choose, and as indicated, most attorneys do not choose to do so. It may not be fair to fault the court for failing to provide relief which most attorneys did not seek. Nevertheless, it is accurate to say that where sanctions *were* sought, the judges generally did not grant them; where attorneys' fees were sought, the fees allowed, if awarded at all, were

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207. Without this kind of procedural rule compensating for the time spent in obtaining discovery, applying to the court for enforcement of the discovery rules will be costly to the client, enough so, perhaps, to dissuade the attorney from pursuing the matter to court. The policy of deterring non-cooperation in discovery demands appropriate compensation for the cost of having to seek the court's aid in obtaining discovery. *See In re* Stanffer Seeds, Inc., 817 F.2d 47 (8th Cir. 1987)(interpreting corresponding Federal Rule of Civil Procedure 37(a)(4), and holding that total denial of fees was an abuse of discretion).

208. STUDY, *supra* note 23, Vol. 2, at xvi.

209. STUDY, *supra* note 23, Vol. 2, at 2-34.

210. *Id.*

211. *Id.*

calculated neither to encourage parties to seek the court's assistance in enforcing the discovery rules nor to deter uncooperative parties or their counsel from future noncompliance.[212]

VI. Procedure and Professionalism

A. *Changing the Rules*

Rules of procedure and principles of professionalism often mirror one another. The attorney's duty of competence,[213] for example, finds both expression and legal profession,[214] instances of "mudslinging" and derogatory remarks,[215] lack of cooperation among counsel,[216] and litigation tactics which evince a "win-at-all-costs" mentality[217] are therefore disturbing. "Professionalism" is many things, but it is not one of these. Both Bench and Bar must address conduct and attitudes of these sorts.

One value of the empirical study was perspective and the ensuing recognition that in Iowa there is a broad foundation and structure of professionalism upon which to base a response to concerns about the profession held

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212. The experience described in the text is not peculiar to Iowa. *See, e.g.*, A. Miller, *supra* note 47, at 30-31; Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Calif. L. Rev. 264 (1979).

213. Model Code of Professional Responsibility Canon 6 (1989).

214. A. Miller, *supra* note 47. *See supra* notes 42-46 and accompanying text. *Accord* Brown, *supra* note 46, at 18.

215. Rand v. Anaconda-Ericsson, Inc., 623 F. Supp. 176, 190 (E.D.N.Y. 1985); Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 289 (N.D. Tex. 1988). *See also* Letter from Judge Sandra I. Rothenberg, District Court, Denver, Colorado, to Members of the Family Law Section of the Colorado Bar Association (April 14, 1988) (on file with author) (expressing concern over "significant number of counsel who . . . make personal, derogatory comments at depositions and open court discourteous to opposing counsel, the opposing party, and even the Court") [hereinafter Rothenberg Letter].

216. Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 288 n.11 (N.D. Tex. 1988) ("Our court has experienced an increasing number of instances in which attorneys refuse to agree to an extension of time in which to answer or to respond to a dispositive motion, or even to consent to the filing of an amended pleading, notwithstanding that the extension of time or the amended pleading would delay neither the disposition of a pending matter nor the trial of the case."); Ellis v. Roshei Corp., 143 Cal. App. 3d 642, 192 Cal. Rptr. 57 (1983) (sanctioning attorney who refused to stipulate to amendment to cross-complaint which specified statute upon which statutory duty was alleged because his client was "suspicious"). *See also* Rothenberg Letter, *supra* note 215, at 2.

217. *E.g.*, Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 288 (N.D. Tex. 1988) ("litigators who persist in viewing themselves solely as combatants, or who perceive that they are retained to win at all costs without regard to fundamental principles of justice" fail the standard of conduct expected of them); Grigori v. Banks Am., 207 Cal. App. 3d 291, 254 Cal. Rptr. 853 (1989) (quoting trial judge who lamented metamorphosis of case from a legal and factual dispute among the parties to a personal conflict among many of the attorneys involved: "In this whole matter is an unattractive satire of the current state of our justice system where a 'win at all costs' philosophy obscures the legitimate purposes of litigation."). *See also* Rothenberg Letter, *supra* note 215, at 3.

by the public and within the Bench and Bar. Contrary to widespread reports of frivolous cases and discovery abuse, very few cases appeared implausible or otherwise gave indication of "frivolousness"; and the vast majority of civil cases—over 75%—involved no formal discovery or, where it did occur, not very much.

Counsel in civil cases in Iowa generally appear to cooperate with one another and to work out most problems which develop between them without applying to the court for relief. This is evidenced by the fact that the median number of motions for both the 1400 cases randomly selected for study and the 330 such cases which involved formal discovery was one and in 70% of the formal discovery cases no discovery motion was filed.[218] The relatively few motions filed and the infrequency of formal discovery suggest a high level of cooperation among counsel in conducting and responding to discovery, amending pleadings, scheduling depositions and trials, and practicing law. Such data counseled caution in amending the pleading or discovery rules, and tended to confirm both that the discovery rules worked very well and that in only a few cases was there any abuse of the rules.[219] Even those who thought that the discovery rules were only working "reasonably well" and that in many cases "there was discovery abuse meriting attention by Bench and Bar" tended to comment that the problem was not the rules but the court's failure to enforce them.[220] The Special Committee on Discovery agreed. "[T]he discovery rules are working reasonably well," it concluded, "and [other than certain recommended changes] do not need to be altered in any significant way."[221] A study of the cases, in short, belied assessments of the discovery rules which assumed extensive abuse and a need for new and dramatic limitations on discovery.[222] There was ample evidence shown of cooperation and professionalism in practice which receive little attention in the literature on discovery abuse and anecdotal discussion of the discovery rules.

To recognize that problems are the exception rather than the rule does not mean there is license to ignore them. Concern about the rules of procedure and practice under them[223] was not shown to be unwarranted or misplaced. While not the rule, overdiscovery was identifiable; incomplete and

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218. Discovery-related motions were filed in only 29.1% of the 330 cases in which formal discovery was undertaken. *See supra* text accompanying notes 119-28.

219. STUDY, *supra* note 23, Vol. 2, at 1-13. Precisely 11.7% of the attorneys answered that the discovery rules were working very well and no significant changes were necessary; and 47.5% stated that they were working very well and in only a few cases was there any abuse of the rules.

220. *Id.* (32.1%).

221. REPORT OF SPECIAL STUDY COMMITTEE ON DISCOVERY 22 (May 1988) (on file with author). In the opinion of the Committee "(1) there is generally *not* too much discovery in civil cases in state court and (2) discovery is generally *not* pricing people out of court." *Id.*

222. *See supra* text accompanying notes 24-31.

223. *E.g.*, Smith, *supra* note 48.

evasive responses were evident; delay in disposition of civil suits, especially ones involving discovery, was documented. In litigation involving expert witnesses these problems often became pronounced. Indeed, nearly 60% of the lawyers[224] responding to the questionnaire and 86% of the judges[225] indicated that "the timing of discovery of an adverse party's expert(s) expected to be called at trial [was] a significant factor contributing either to undue delay in the resolution of a case or increased cost to the parties or both."

Rules of procedure were enacted or amended to respond to these concerns. First, while no limit was placed on the amount of discovery which could be conducted,[226] Iowa Rule 121(c) was amended to authorize a court to limit discovery which is needlessly expensive or duplicative.[227] Second, a new rule was adopted to make clear that incomplete and evasive responses violate the rules of procedure and what is expected of counsel in a civil system to resolve disputes. "The rules providing for discovery and inspection shall be liberally construed," new Rule 121(b) provides, "and shall be enforced to provide the parties with access to all relevant facts. Discovery shall be conducted in good faith, and responses to discovery requests, however made, shall fairly address and meet the substance of the request."[228] Third, the rule governing expert witness discovery was extensively revised and expanded, giving clear direction to the district court to compel early and full disclosure of experts. In addition, the rule was amended to require an expert who would be called to testify at trial to *sign* answers to interrogatories regarding the expert's qualifications, findings, mental impressions, opinions and conclusions;[229] the expert's testimony at trial is explicitly confined to the "fair scope" of the answer given.[230] Finally, in order to address problems

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224. STUDY, *supra* note 23, Vol. 2, at 1-34 (57.5%).

225. STUDY, *supra* note 23, Vol. 2, at 2-38 (85.7%).

226. *See supra* text accompanying note 48. In 1983 Federal Rule 26(b)(1) was amended to eliminate language providing that discovery was not limited and to send a contrary message. *See* Miller, *supra* note 47, at 32-34.

227. IOWA R. CIV. P. 121(c) provides:

> Unless the court orders otherwise under R.C.P. 123, the frequency of use of these methods is not limited. The court shall order otherwise if it determines that: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) 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 language of the amendment was drawn, with some modification, from Federal Rule of Civil Procedure 26(b).

228. IOWA R. CIV. P. 121(b).

229. IOWA R. CIV. P. 125(a)(1).

230. IOWA R. CIV. P. 125(d). The purpose of this amendment, in conjunction with that limiting the expert's testimony at trial to the "fair scope" of the answer, is to encourage full disclosure rather than evasion or concealment, in the hope that costly depositions might be avoided.

of cost and delay, the Iowa Supreme Court adopted revised rules on pretrial conferences[231] patterned after Federal Rule 16, as amended in 1983. District court management of cases to minimize delay and reduce costs, particularly in cases made complex by the presence of multiple parties, experts, or complicated issues, was intended.[232] Some proposed changes were not made. Despite the attitude of 50% of the judges that principles of notice pleading caused them significant problems in the ordinary case, no change was recommended by the Advisory Committee in the rules governing pleading.[233] Acknowledging disagreement, the committee concluded that there was insufficient evidence that the existing rule was causing problems which could not better be addressed through procedures for case management and, where appropriate, summary judgment.[234] It also recommended adoption of Federal Rule 11, rather than changing notice pleading, as a means to address meritless claims and defenses where they were asserted.

B. *Sanctions and Enforcement of the Rules*

A focus on rules and amendments to them presupposes that the rules will be followed and enforced where non-compliance occurs. Otherwise, rules are little more than a "paper tiger."[235] Attorneys commented repeatedly, however, privately and in writing,[236] that courts needed to enforce the rules and impose sanctions in order to address problems which existed or oc-

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231. IOWA R. CIV. P. 136-38.

232. IOWA R. CIV. P. 136(a). The empirical study found that the cases with multiple parties and experts—suggesting complex issues—were the ones in which the most formal discovery took place, the most motions were filed, and the most time to resolve occurred.

233. IOWA R. CIV. P. 69(a). In May of 1988 the Iowa Supreme Court declined to adopt a recommendation made in December 1987 that Rule 69(a)—stating the requirements for plaintiff's position—be amended to require that the petition state the factual basis of the claim and the legal theory or theories upon which it is based.

234. IOWA R. CIV. P. 237.

235. Cine Forty-Second St. Theater Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1063-64 (2d Cir. 1979).

236. In response to the question, "Do the courts provide sufficient assistance in resolving discovery problems or disputes that arise in civil litigation? If not please explain," attorneys typically answered that the rules were not enforced:

> Attorneys fees are not assessed for abuse.
>
> Judges do not impose adequate sanctions for failure to make discovery.
>
> . . . The bench does not realize that it must be willing to put teeth into sanctions for failure to cooperate in discovery. Far too many second chances are given.
>
> The judges cave in so much that I seldom try to get them involved. The process is too cumbersome (trip to courthouse) and you only allow defendant to bill more time to his client. Very seldom do courts enforce the discovery rules or impose sanctions with sufficient impact to resolve the present dispute, avoid future problems, or act as a deterrent to abuse of discovery practices.
>
> Judges are not courageous enough.

STUDY, *supra* note 23, Vol. 2, app. 3, at 26-33 *passim*. *See supra* text accompanying notes 195-212.

curred. The Supreme Court Special Committee on Discovery similarly concluded that enforcement rather than amendment of the rules was the answer to objectionable practices and uncooperative responses to discovery requests.

> The committee believes that vigorous enforcement of the rules rather than rewriting of them is the better approach to cases in which problems surface. The committee would urge the District Court Judges to exercise the ample authority which the rules confer upon them to secure the just, speedy and inexpensive resolution of civil controversies. The Rules of Civil Procedure pertaining to discovery provide a viable and sound framework within which discovery controversies may be resolved. Where breakdown occurs, the rules need to be enforced, with minimum delay by the court and minimum cost to the parties. The party responsible for the breakdown should bear the costs, including attorneys fees, as provided by existing Rule 134 unless there is indeed substantial justification for the non-prevailing position.[237]

A need to sanction objectionable, abusive, or disobedient conduct when and where it occurred clearly emerged from the cases studied and the comments of lawyers. Courts have been willing to do so,[238] but they have traditionally hesitated to impose severe sanctions on clients for what are in all likelihood the derelictions of counsel.[239] One of the "themes"[240] of the 1983 amendments to the Federal Rules of Civil Procedure was the need for cost sanctions to be administered in order to deter violation of the rules by counsel and clients. In a series of cases[241] the United States Supreme Court signaled that there was an entirely appropriate role for the administration of sanctions if the "just, speedy and inexpensive"[242] resolution of all civil controversies was to be secured. The amendments to the Federal Rules, which Iowa adopted,[243] broadly provided for sanctions with respect to pleading,[244] discovery,[245] pretrial,[246] and indeed, with respect to every motion and

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237. REPORT OF THE SPECIAL COMMITTEE ON DISCOVERY 23 (May 1988).

238. *E.g.*, Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962); Smiley v. Twin City Beef Co., 236 N.W.2d 356 (Iowa 1975) (entry of default judgment and dismissal of counterclaim); Bos Lines, Inc. v. Phillips & Phillips, 226 N.W.2d 819, 821 (Iowa 1975) (dismissal of action; "Plaintiff's counsel was not diligent in this matter.").

239. *E.g.*, Edgar v. Slaughter, 548 F.2d 770, 773 (8th Cir. 1977); McCargo v. Hedrick, 545 F.2d 393, 396 (4th Cir. 1977); Britt v. Corporation Peruana De Vapores, 506 F.2d 927, 932 (5th Cir. 1975).

240. Miller, *supra* note 212, at 36 ("The last theme is sanctions.").

241. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976); Hall v. Cole, 412 U.S. 1 (1973).

242. FED. R. CIV. P. 1. *Accord* IOWA R. CIV. P. 67.

243. IOWA R. CIV. P. 80(a); Iowa Code § 619.19 (1989). Iowa has not adopted Federal Rule of Civil Procedure 26(g) as such, but Iowa Rule of Civil Procedure 80 clearly encompasses proscribed conduct in discovery.

244. FED. R. CIV. P. 11.

245. FED. R. CIV. P. 26(g).

paper.[247]

It needs no citation to report that sanctions are more prevalent today than they were five years ago. For example, the Iowa Supreme Court only recently affirmed the dismissal of a plaintiff's claim on account of a "long record of procrastination and inattentiveness" by her attorney, including noncompliance with three orders of the court.[248] It is coming to be recognized that lawyers and judges owe "[a] common duty to the fair administration of our system of justice."[249] Lawyers discharge this duty by conforming their conduct to standards set by the rules; judges discharge this duty by detecting and punishing offenders.[250]

Symbolizing and expressing this common duty is Federal Rule 11.[251] The rule focuses on and asserts the duty of counsel toward the judicial system in the course of civil representation, and it mandates the imposition of sanctions by courts, which may act sua sponte, where violations of the rule occurs. It has unquestionably altered the nature of practice before the courts. In requiring reasonable inquiry into facts and law before documents are filed in court, subject to judicial sanctions for failure to do so, Rule 11 is simple and powerful impetus to good practice. At its core is a fundamental concern about competence and "good lawyering."[252] Amendment of the rule

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246. FED. R. CIV. P. 16.

247. FED. R. CIV. P. 11, 7.

248. Krugman v. Palmer College of Chiropractic, 422 N.W.2d 470, 475 (Iowa 1988) ("We regret that the sanction in this case visits the sins of counsel on his client.") (citing Cine Forty-Second St. Theatre v. Allied Artists, 602 F.2d 1062, 1068 (2d Cir. 1979)). *See also* Kendall/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235, 241 (Iowa 1988) ("clients are responsible for the actions of their lawyers and in appropriate circumstances dismissal or default may be visited upon them because of the actions of their lawyers.").

249. Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 DRAKE L. REV. 483, 490 (1986-87).

250. *Id.*

251. *See* IOWA R. CIV. P. 80(a). *See supra* notes 52-54 and accompanying text.

252. *See* Cady, *supra* note 249, at 506. The rule has clearly raised lawyers' "consciousness" concerning sound legal practice. *See, e.g.*, A.B.A. SEC. LITIG. FEDERAL PROCEDURE COMMITTEE, SANCTIONS: RULE 11 AND OTHER POWERS 9-10 (1986) (practical suggestions for avoiding Rule 11 sanctions); Shaffer, *supra* note 52, at 33-35. In the article by Shaffer, the following "suggestions" are given to "assist counsel and their clients in avoiding sanctions under Rule 11."

> *Before filing any pleading in federal court:*
>
> (1) Recognize that your subjective good faith in filing the pleading is not enough to avoid sanctions.
>
> (2) Confirm that your pleading is not designed to harass the adversary or to delay or extend the cost of the proceedings, and remember that the *objective circumstances* of the litigation will probably determine whether there has been an improper purpose.
>
> (3) Conduct a thorough personal interview with your client and key witnesses about the pleading.
>
> (4) If possible, confirm your client's version of the facts through other sources.
>
> (5) Review pertinent documents that may support the pleading.
>
> (6) If the facts supporting the pleading are available without discovery, greater fac-

to mandate that courts impose sanctions on counsel, parties, or both for violations will naturally increase compliance with its requirements.

It has also become clear, however, that a sanction-oriented approach to problems in civil practice where they occur is inadequate and can be counterproductive. First, although it was hoped that Rule 11 would not stir up satellite proceedings,[253] it has done so.[254] In the five years following the 1983 amendment of Rule 11 over 1000 reported cases have addressed or applied Rule 11.[255] Inevitably, litigation over sanctions has delayed disposition

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tual certainty is required.

(7) Even if many facts are available only through discovery, you must still evaluate evidence from your client and other available sources and make a reasonable assessment of the evidence likely to be available from your adversary during discovery.

(8) Make your own personal assessment of the legal issues involved, and of the defenses which might bar the claim, such as statute of limitations.

(9) If you are not experienced in the given field (for example, antitrust law or RICO claims), obtain an opinion from an experienced practitioner and research the law carefully so that you can make an informed decision as to the validity of the claim or defense. You must bring some experience to bear on the issues before invoking the federal court system. Be aware, however, that reliance upon other counsel on fundamental questions of the law (as opposed to the facts) has resulted in sanctions.

(10) Carefully evaluate the prayer for damages in your complaint, because requesting exorbitant damages can violate Rule 11.

(11) In writing your briefs, confirm that your legal theories are supported by existing law, or a good faith argument for the extension, modification or reversal of existing law. It is entirely appropriate to urge that existing law be changed. In fact, vigorous representation of your client requires such an approach. However, if your argument seeks a change of existing law, make it clear to the court in your brief that you are seeking a change in the law.

(12) Make sure that all arguments and sub-arguments in your brief comply with Rule 11 requirements.

(13) If you must file a pleading hurriedly to avoid a time bar, do so and promptly thereafter carry out the foregoing suggestions.

(14) If you are local counsel, do not sign the pleading, motion or brief unless you have determined that Rule 11 has been complied with by lead counsel.

Shaffer, *supra* note 52, at 33-35 (footnotes omitted). These are only matters, the author concluded, of good lawyering. The point at bottom is often one of competence. *See* Rodgers v. Lincoln Towing Serv., Inc., 771 F.2d 194, 205-06 (7th Cir. 1985); *cf.* Evans v. Arthur, 139 Ariz. 362, ___, 678 P.2d 943, 945 (1984).

253. A. MILLER, *supra* note 47.

254. Townsend v. Holman Consulting Corp., 881 F.2d 788, 792 (9th Cir. 1989) ("Since Rule 11 was amended six years ago, it has increasingly become the well-spring of the very satellite litigation we have consistently decried.").

255. Note, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901 (1988); See also Remsburg & Gaer, *General Overview of Federal Rule of Civil Procedure* 11, 38 DRAKE L. REV. 261, 304 (1988-89)(as of April, 1989, a Westlaw search revealed over 2000 federal cases involving Rule 11). Professor Miller feared that sanctions proceedings might become "the great cottage industry of the 1980s," Miller, *supra* note 227, but he thought that after a few years, "with sensible, restrained application of sanctions, that practice will stabilize . . . ." *Id.* Commentators have called attention to the extensive Rule 11 litigation which has developed. Shaffer, *supra* note 52, at 26-27; Nelken, *supra* note 52, at 1325-26. A task force appointed to study

of suits and increased costs.[256] Second, Rule 11 and the prospect of sanctions threatens to chill litigation,[257] and for others, does chill advocacy.[258] This is contrary to the intent of the Advisory Committee,[259] and some courts are "[m]indful of the potential chilling effects" on those "who argue in good faith for the modification or extension of rights and remedies,"[260] but the possibility of proceedings for sanctions, inconsistent determinations, and appeals necessarily gives pause.[261] This is what the rule was designed to do, but comments from attorneys, particularly ones active in civil rights litigation,[262] indicate that the existence of and prevalence of its use by opposing counsel and courts do indeed "chill" advocacy. Disposition of these cases on the merits, if need be through summary procedures,[263] should be sufficient without resort to Rule 11 except in extreme cases. Third, the court's exercise of the power conferred under Rule 11 to sanction lawyers handling cases before it can undermine or supplant existing bar disciplinary procedures essential to self-regulation and status as a profession.[264] There is a place, un-

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actual implementation of amended Rule 11 in the Third Circuit recently concluded, among other things, that "Rule 11 motions are not routine, in the Third Circuit," although it also said that this conclusion is "debatable." RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 at 95 (Am. Judicature Soc'y 1989) [hereinafter THIRD CIRCUIT TASK FORCE].

256. Rosenburg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243, 244 (1984).

257. Nelken, *supra* note 52.

258. Shaffer, *supra* note 52, at 24-26.

259. *Advisory Committee Notes*, 97 F.R.D. 165, 199 (1983) ("The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.").

260. Woodrum v. Woodward County, 866 F.2d 1121, 1127 (9th Cir. 1989); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1540 (9th Cir. 1986), *rev'g* 103 F.R.D. 124 (N.D. Cal. 1984). *See also* Threaf Properties, Ltd. v. Title Ins. Co., 875 F.2d 831, 835 (11th Cir. 1989) (reversing imposition under Rule 11 of monetary sanctions on plaintiff's attorneys).

261. *See* Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd*, 801 F.2d 1531 (9th Cir. 1986). The District Court opinion of Judge Schwarzer, reading Rule 11 expansively to incorporate counsel's obligation under the Code of Professional Responsibilities, including a duty of candor, has been criticized by commentators. *See* Shaffer, *supra* note 52, at 24-25; Nelken, *supra* note 52, at 1323-25, 1347-53; Note, Golden Eagle Distrib. Corp. v. Burroughs Corp.: *Sanctions Under Amended Federal Rule 11: Defining the Judge's Role*, 16 CAP. U. L. REV. 751 (1987). It has been applauded by others. *See* Note, *Attorney Sanctions—Rule 11—Deterring Unethical Motion and Pleading Practice*, 36 KAN. L. REV. 173 (1987); Reich & Schaffer, *Getting Even*, LITIGATION, Winter 1987, at 30.

262. *See* THIRD CIRCUIT TASK FORCE, *supra* note 255, at 68-72 ("shar[ing] some of the concerns of the plaintiffs' civil rights bar" but urging greater discrimination in evaluation of impact).

263. *See supra* note 96 and accompanying text. That a claim is "weak" and is disposed of on summary judgment does not mean that it was groundless or that Rule 11 was violated. Hartman v. Hallmark Cards, Inc., 853 F.2d 117 (8th Cir. 1987).

264. *Compare* Gregori v. Bank of America, 207 Cal. App. 3d 291, 254 Cal. Rptr. 853 (1989) (where attorney developed "social relationship" with opposing counsel's secretary, motion for disqualification would not be granted but misconduct would be reported to State Bar of California "so that it may determine whether disciplinary action is appropriate.") *with* Golden

questionably, indeed a demonstrated need, for judicial enforcement of rules of procedure and the responsibilities they impose. However, too expansive interpretation of the reach of Rule 11, for example, to include ethical considerations and injunctions, can result in judicial performance of essential bar functions.[265] Finally, quite apart from the burgeoning satellite litigation over the meaning of Rule 11 and the propriety of sanctions in given cases, the incidence of sanctions litigation—including motions to sanction counsel for moving for sanctions[266]—will produce harmful effects. Because a motion for sanctions represents essentially an attack on opposing counsel, it adds a second layer of contention and personalizes the dispute between counsel.[267] In the process it escalates the controversy and makes settlement all the more difficult.[268] The bar is not held high in the public vision, and a dimin-

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Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984), *rev'd* 801 F.2d 1531 (9th Cir. 1986) (imposing sanctions under Rule 11 for violation of duty of candor, *i.e.*, for not disclosing adverse authority and misstating existing law to the court). *See also* Britt v. Federal Land Bank Ass'n, 153 Ill. App. 3d 605, 505 N.E.2d 387 (1987) (motion for sanctions cannot be based on violation of section 7-102 of the Code of Professional Responsibility, proscribing groundless claims, and appropriate forum was Disciplinary Commission); Dondi Props. Corp. v. Commerce Savings & Loan Corp., 121 F.R.D. 284, 290 (N.D. Tex. 1988) ("Except in those instances in which an attorney's conduct prejudicially affects the interests of a party opponent or impairs the administration of justice, adjudication of alleged ethical violations is more appropriately left to grievance committees constituted for such purpose.").

265. BLUEPRINT, *supra* note 24, at 10-11 (self-regulation is an essential element which distinguishes a profession from other occupations).

266. *See* Mathias v. Glandon, 448 N.W.2d 443 (Iowa 1989)(prevailing defendants moved for sanctions; plaintiff resisted and cross-moved for sanctions against the defendants for filing a frivolous motion for sanctions). Professor Miller reported "a recurring nightmare" in which a party successfully resisted a motion for sanctions, after which the prevailing party "move[d] to sanction the sanction motion." A. MILLER, *supra* note 47, at 41. It is a dream come true. *See, e.g.*, Partington v. Gedan, 880 F.2d 116, 131 (9th Cir. 1989). In Foy v. First Nat'l Bank of Elkhart, 868 F.2d 251, 258 (7th Cir. 1989), the prevailing party on appeal was sanctioned for having made a "frivolous argument that [appellant] should be sanctioned for filing this appeal." In Meeks v. Jewel Cos., Inc., 845 F.2d 1421, 1422 (7th Cir. 1988), the Seventh Circuit "reminded the bar" that "[a]ny frivolous motion, pleading or request, is subject to sanctions, including a motion or request for sanctions." It commented about "the frequency with which lawyers in this court . . . are including in their briefs groundless requests for Rule 38 sanctions." *Id.* Similarly, in SK Hand Tool Corp. v. Dresser Indus., 852 F.2d 936, 945-46 (7th Cir. 1988), the prevailing party on appeal made "general" requests for sanctions which were untailored to the issues in the case and which "smack[ed] of boilerplate." The court found the requests "flippant," and was "sharply critical of the attitude" manifested. The court was tempted to sanction the requests but did not. *Id. Accord* Aircraft Trading & Servs., Inc. v. Braniff, Inc., 819 F.2d 1227, 1228 (2d Cir. 1987). Clearly the courts can have no patience with frivolous sanction requests. If they do, satellite litigation—with all its cost and delay—results, and the process itself can chill advocacy.

267. A task force in the Third Circuit asked attorneys whether Amended Rule 11 had any effect on relations with attorneys for opposing parties. While 53% reported no effect and 7% reported an improvement, 40% responded that such relations had been aggravated by the amended rule. THIRD CIRCUIT TASK FORCE, *supra* note 255, at 85-86.

268. This view is most candidly expressed in Weiss, *A Practitioner's Commentary on the*

ished sense of professionalism of and within the Bar can result. The atmosphere fostered is not one of reason or healing, conducive to future cooperation or settlement. If judicial unwillingness to enforce the rules of procedure governing practice in the courts undermines good practice, counsel's zealous pursuit of sanctions will likewise frustrate realization of the goal to secure a just, speedy, and inexpensive determination of controversies.

In the final analysis rules of procedure can express principles of professionalism, but they cannot embody them; as with Rule 11, there are limits to what they can accomplish.[269] Other responses are in order including the numerous recommendations of the ABA's Commission on Professionalism,[270] which engage the Bench and Bar in discussion of what should rightly be expected of counsel and how to secure such expectations. Bench-Bar conferences, for example, can present an effective setting and forum in which to address common concerns of both lawyers and judges, and cooperation between the Bar and law schools may be manifested in a number of ways.[271] It can also be effective in "rekindling professionalism" for a group to state its values and endorse rules of conduct designed to realize them.[272] The Ameri-

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Actual Use of Amended Rule 11, in Symposium—Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans?, 54 FORDHAM L. REV. 1, 23-24 (1985):

> [T]he judicial system requires a cooperative atmosphere among lawyers. Settlement is the most effective and cheapest way to get rid of a case; and without having settlements in the percentages that we do I don't think it would be possible for the judicial system to work. What Rule 11 does is inject in an atmosphere that is already a hostile one, an additional adversarial proceeding that will only exacerbate that hostility and reduce the possibilities for settlement. Professionals have to control emotions, they have to calm their clients, they have to interact with one another and they have to present themselves to the court, sometimes aggressively but always in control. When you get into this Rule 11 business, it creates an atmosphere that too easily causes the lawyers to lose control. It is very difficult to be attacked by another lawyer with respect to veracity and competence, and continue to maintain the kind of relationship in that proceeding that is necessary for that proceeding to conclude in a proper way. One must wonder whether it is an effective way to get at the problems that are perceived to exist. I think it is not.

(footnote omitted). The negative effects on cooperation, negotiation, and future interaction of the use of "coercive power," to which moving for sanctions may be likened, are explored and described in Tedeschi, Malkis & Gaes, *First Impressions, Norms and Reactions to Threats*, 33 HUMAN RELATIONS 647 (1980). *See also* Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 717 (1983) ("Often, punishing lawyers will change the atmosphere in which a judge works from one of cooperation to one that is combative [sic] and less effective in bringing controversies to just, speedy, and inexpensive resolutions.").

269. *See* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1086 (7th Cir. 1987) (Cudahy, J.) ("I continue to believe that the 1983 amendment of Rule 11 was sound in concept, but it will surely defeat its own purpose if not applied with wisdom and restraint.").

270. BLUEPRINT, *supra* note 24.

271. Examples include mentor programs, chapters of the American Inns of Court, and conferences.

272. *See* Walker, Thomas & Zelditch, *Legitimation, Endorsement and Stability*, 64 So-

can College of Trial Lawyers, for example, has long had a "Code of Trial Conduct." Among the numerous matters addressed it states that a lawyer has discretion in cooperating with opposing counsel and that "no client has a right to demand that his counsel shall be illiberal . . . ." Relying in part upon the American College of Trial Lawyers' Code of Conduct and in part on the Dallas Bar Association's "Guidelines of Professional Courtesy," the United States District Court in the Northern District of Texas recently adopted its own set of standards of practice.[273] Others have suggested a "code of professional courtesy"[274] or code of civility.[275] Apart from conferences and codes are individuals who by their personal and professional lives set great examples more powerful than words or exhortations.

Discussion of professionalism and appropriate responses to problems engenders anecdotes and even specific citations to reported cases evidencing incompetent, unethical, and unprofessional practice. The study of civil practice in Iowa discussed in this article, however, indicates that instances of such practice are far less common than conversation and nationally reported cases suggest. Exaggerated attention to these instances may hold as much danger for the Bar as disregard of them entirely. In addressing lack of professionalism, lawyers as well as the public must understand that such conduct is *not* the norm. We must also identify great examples and recognize and celebrate the principles of professionalism for which they stand. Justice Cardozo recognized the value of an inspiring example:

> We are fallen upon days that are spoken of by many as cynical and sordid. The profession is given over, we are told, to the pursuit of power and pelf. Let us beware of underrating the springs of altruism and energy that lie ready to be released at the call of a great example, the summons of an urgent need. With all our cynicism and sordidness, how our pulses quicken even now at the tale of those of our comrades—our comrades dead and living—who have felt the magic of ancient myth and, yielding to its glamor, have flung baser things away.
>
> It has been given to you and me to be partakers of these blessed memories. It has been given to you and me to prove in our own lives that the truth is in the myth and not in the sordid appearances, at times misnamed reality, which hide what is within.[276]

This article is dedicated to the memory of Chief Justice C. Edwin Moore, "a great example" of the sort Justice Cardozo spoke. As teacher,

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CIAL FORCES 620 (March 1986).

273. Dondi Properties Ass'n v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988).

274. *See* Joy, *Code of Professional Courtesy: Should We Have One? Do We Need One?*, IOWA ST. BAR ASS'N NEWS BULL. 16 (September 1988).

275. Rothenberg Letter, *supra* note 215, at 4.

276. B. CARDOZO, *Faith and a Doubting World*, in SELECTED WRITINGS: BENJAMIN NATHAN CARDOZO 99, 106 (1947). Justice Cardozo made these remarks to the New York County Lawyers Association at their annual dinner, given in his honor, on December 17, 1981.

mentor, friend, and judge he taught generations of law students and lawyers more about professionalism and the ethics of the profession than rules or sanctions alone could accomplish. Surely this is one reason why civil practice in Iowa is not characterized by the abuses and extremes reported popularly, and why we treasure his memory and the lessons he left behind.

TABLE 1

NATURE OF ALL CASES RANDOMLY SELECTED FOR STUDY[1] AND ALL SUCH CASES IN WHICH ANY FORMAL DISCOVERY WAS CONDUCTED[2]

Nature of the Case	Number (and Percentage) of Such Cases	Number (and Percentage) of Such Cases in Which Discovery Was Conducted[3]
Auto Accident	174 (12.4%)	103 (59.2%)
Other Personal Injury	36 (2.6%)	30 (83.3%)
Property Damage (Non-Auto Accident)	30 (2.1%)	27 (90.0%)
Intentional Tort	32 (2.3%)	12 (37.5%)
Professional Malpractice	11 (.8%)	10 (90.9%)
Products Liability	6 (.4%)	6 (100.0%)
Dram Shop	3 (.2%)	3 (100.0%)
Account/Debt/Note	422 (30.1%)	39 (9.2%)
Contract (Not Insurance)	196 (14.0%)	56 (28.6%)
Contract (Insurance)	9 (.6%)	7 (77.8%)
Mechanics Lien Foreclosure	27 (1.9%)	10 (37.0%)
Replevin	49 (3.5%)	1 (2.0%)
Landlord/Tenant	31 (2.2%)	3 (9.7%)
Mortgage Foreclosure	96 (6.9%)	3 (3.1%)
Quiet Title	31 (2.2%)	1 (3.2%)
Condemnation	6 (.4%)	1 (16.7%)
Fraudulent Conveyance	1 (.1%)	1 (100.0%)

1. (N = 1400)
2. (N = 330)
3. The percentage given is of the described case category. Thus, 103 of the 174 auto accident cases, or 59.2%, involved formal discovery.

TABLE 2

FREQUENCY OF USE OF FORMAL DISCOVERY DEVICES IN ALL NON-DOMESTIC RELATIONS CIVIL CASES RANDOMLY SELECTED FOR STUDY[1]

Number of Formal Discovery Devices Used by All Parties in the Case	Number of Cases in Which Stated Number of Discovery Devices Was Used	Percentage of All Cases Studied	Cumulative Percentage
0	1070		76.4%
1	77	76.4%	81.9%
2	77	5.5%	87.4%
3	59	5.5%	91.6%
4	29	4.2%	93.7%
5	18	2.1%	95.0%
6	14	1.3%	96.0%
7	4	1.0%	96.3%
8	11	.3%	97.1%
9	2	.8%	97.2%
10	9	.1%	97.9%
11	10	.6%	98.6%
12	5	.7%	98.9%
14	2	.4%	99.1%
16	1	.1%	99.1%
17	1	.1%	99.2%
19	2	.1%	99.4%
21	1	.1%	99.4%
22	2	.1%	99.6%
23	1	.1%	99.6%
28	1	.1%	99.7%
29	1	.1%	99.8%
42	1	.1%	99.9%
46	1	.1%	99.9%
56	1	.1%	100.0%

1. (N = 1400)

TABLE 3

FREQUENCY OF USE OF FORMAL DISCOVERY DEVICES IN ALL DISCOVERY CASES[1] IN WHICH DISCOVERY OCCURRED—DISTRIBUTION BETWEEN PLAINTIFFS AND DEFENDANTS

Amount of Discovery	Number of Cases (and Percentage of the Delay Cases) in Which Plaintiff Conducted Stated Amount of Discovery	Cumulative Percentage of Cases in Which Plaintiff Conducted Stated Amount of Discovery	Number of Cases (and Percentage of the Delay Cases) in Which Defendant Conducted Stated Amount of Discovery	Cumulative Percentage of Cases in Which Defendant Conducted Stated Amount of Discovery
0	73 (22.1%)	22.1%	85 (25.8%)	25.8%
1	103 (31.2%)	53.3%	106 (32.1%)	57.9%
2	68 (20.6%)	73.9%	57 (17.3%)	75.2%
3	32 (9.7%)	83.6%	26 (7.9%)	83.0%
4	19 (5.8%)	89.4%	21 (6.4%)	89.4%
5	10 (3.0%)	92.4%	7 (2.1%)	91.5%
6	6 (1.8%)	94.2%	6 (1.8%)	93.3%
7	2 (.6%)	94.8%	3 (.9%)	94.2%
8	1 (.3%)	95.2%	5 (1.5%)	95.8%
9	3 (.9%)	96.1%	2 (.6%)	96.4%
10	3 (.9%)	97.0%	1 (.3%)	96.7%
11	3 (.9%)	97.9%	0	0
12	2 (.6%)	98.5%	3 (.9%)	97.6%
14	0	0	2 (.6%)	98.2%
15	0	0	1 (.3%)	98.5%
16	1 (.3%)	98.8%	0	0
17	1 (.3%)	99.1%	1 (.3%)	98.8%
18	1 (.3%)	99.4%	0	0
19	0	0	1 (.3%)	99.1%
20	0	0	1 (.3%)	99.4%
21	0	0	1 (.3%)	99.7%
28	1 (.3%)	99.7%	0	0
35	0	0	1 (.3%)	100.0%
37	1 (.3%)	100.0%	0	0

1. (N = 330)

TABLE 4

LAWYERS' AND JUDGES' ESTIMATES
OF VARIOUS DISCOVERY ABUSES

Estimated percentage[1] of civil cases in which each of the following occurred or came to the court's attention between 1981 and 1983.

	ATLA[2]	DCA[3]	IATL[4]	All Attorneys[5]	All Judges[6]
a. The attorney-client privilege has prevented discovery of significant information	1% (5%)	2% (5%)	1% (5%)	1% (5%)	1% (5%)
b. Privileges or doctrinal protections other than the attorney-client privilege (e.g., work product doctrine, physician-patient privilege) have prevented discovery of significant information	5% (10%)	5% (10%)	5% (10%)	5% (10%)	2% (5%)
c. Cost of pursuing significant information has been excessive relative to size of case, resources of client or probable value of undiscovered information	25% (50%)	20% (25%)	10% (25%)	20% (40%)	10% (25%)
d. Extended delays in responding to discovery requests	25% (40%)	25% (50%)	20% (30%)	25% (50%)	25% (40%)
e. Evasive or incomplete responses to discovery requests	35% (50%)	35% (50%)	25% (50%)	35% (50%)	20% (30%)
f. Lack of candor or bad faith by a party or his attorney	10% (20%)	10% (20%)	5% (20%)	10% (20%)	5% (15%)
g. Voluminous and/or disorganized document production	10% (25%)	10% (25%)	10% (20%)	10% (25%)	10% (25%)
h. Excessive number of interrogatories of a substantive nature (i.e., not for the purpose of identifying documents, witnesses, or experts) when subparts or compound questions are counted	15% (50%)	15% (30%)	15% (30%)	15% (40%)	20% (40%)
i. Discovery requests not relevant to the issues raised by the parties' real claims and defenses	10% (25%)	15% (30%)	10% (25%)	10% (25%)	10% (20%)
j. Excessive number of requests for admission	0% (5%)	2% (10%)	5% (15%)	1% (10%)	5% (10%)
k. Instructions to a deponent not to answer which are not based on privilege	5% (10%)	5% (10%)	5% (10%)	5% (10%)	2% (10%)
l. Interruption of (your) (a party's) examination of a deponent before (you have) (he had) concluded a critical portion of (your) (his) examination	4% (10%)	5% (10%)	5% (10%)	5% (10%)	1% (5%)
m. Coaching a witness whose deposition (you were taking) (was being taken)	10% (20%)	10% (20%)	5% (10%)	10% (20%)	0% (1%)
n. Excessive number of depositions	5% (20%)	10% (20%)	10% (25%)	10% (20%)	10% (25%)
o. Unreasonable length of depositions	10% (20%)	10% (25%)	10% (30%)	10% (25%)	10% (20%)

[1] Percentages given are the median response. The percentage given below the median, in parentheses, is the estimate at the 75% percentile of the indicated group.
[2] Association of Trial Lawyers of Iowa (N = 106)
[3] Defense Counsel Association (N = 127)
[4] Iowa Academy of Trial Lawyers (N = 66)
[5] (N = 240)
[6] (N = 54)

TABLE 5

FREQUENCY OF USE OF FORMAL DISCOVERY DEVICES IN THE DISCOVERY CASES[1] AND DISTRIBUTION BY AMOUNT OR MATTER IN CONTROVERSY

Amount of Discovery	$1 - $2,000 (N = 27)	$2,001 - $5,000 (N = 35)	$5,001 - $10,000 (N = 32)	$10,001 - $15,000 (N = 16)	$15,001 - $20,000 (N = 12)	$20,001 - $25,000 (N = 17)
1	9 (33.3%)[2] (33.3%)[3]	16 (45.7%) (45.7%)	11 (34.4%) (34.4%)	2 (12.5%) (12.5%)	3 (25.0%) (25.0%)	3 (17.5%) (17.5%)
2	8 (29.6%) (62.9%)	14 (40.0%) (85.7%)	5 (15.6%) (50.0%)	4 (25.0%) (37.5%)	1 (8.3%) (33.4%)	7 (41.2%) (58.8%)
3	4 (14.8%) (77.8%)	3 (8.6%) (94.3%)	9 (28.1%) (78.1%)	7 (43.8%) 81.3%)	0	2 (11.8%) (70.6%)
4	3 (11.2%) (88.9%)	2 (5.7%) (100.0%)	2 (6.3%) (84.4%)	2 (12.5%) (93.8%)	2 (16.8%) (50.0%)	1 (5.9%) (76.5%)
5	2 (7.4%) (96.3%)	0	1 (3.1%) (87.5%)	0	1 (8.3%) (58.3%)	2 (11.8%) (88.2%)
6	0	0	2 (6.3%) (93.8%)	1 (6.3%) (100.0%)	1 (8.3%) (66.7%)	1 (5.9%) (94.1%)
7	0	0	1 (3.1%) (96.9%)	0	0	0
8	1 (3.7%) (100.0%)	0	1 (3.1%) (100.0%)	0	0	0
9	0	0	0	0	0	0
10	0	0	0	0	1 (8.3%) (75.0%)	0
11	0	0	0	0	1 (8.3%) (83.3%)	1 (5.9%) (100.0%)
12	0	0	0	0	1 (8.3%) (91.7%)	0
14	0	0	0	0	0	0
16	0	0	0	0	1 (8.3%) (100.0%)	0

1. (N = 330)
2. The first percentage indicates the individual frequency. Thus, of 27 cases in which the amount or matter incontroversy did not exceed $2,000, only one formal discovery device was used by the parties in nine, or 33.3% of the cases.
3. The second percentage indicates the cumulative percentage of cases involving the stated amount or matter in controversy in which parties made no more than the stated number of formal discovery requests. Thus, of the 27 cases in which the amount or matter in controversy. did not exceed $2,000, no more than two discovery requests were made by the parties in 62.9%, or 17, of the cases.

Amount of Discovery	$25,001 - $50,000 (N = 29)	$50,001 - $100,000 (N = 31)	$100,001 - $250,000 (N = 50)	$250,001 - 500,000 (N = 13)	Over $500,000 (N = 15)	"Fair & Adequate" Relief (N = 12)	Equitable Relief (N = 22)
1	7 (24.1%) (24.1%)	7 (22.6%) (22.6%)	10 (20.0%) (20.0%)	2 (15.4%) (15.4%)	1 (6.7%) (6.7%)	1 (8.3%) (8.3%)	5 (22.7%) (22.7%)
2	6 (20.8%) (44.8%)	6 (19.4%) (41.9%)	6 (12.0%) (32.0%)	1 (7.7%) (23.1%)	2 (13.3%) (20.0%)	2 (16.8%) (25.0%)	4 (18.2%) (40.9%)
3	5 (17.3%) (62.1%)	7 (22.6%) (64.5%)	10 (20.0%) (52.0%)	2 (15.4%) (38.5%)	1 (6.7%) (26.7%)	1 (8.3%) (33.3%)	8 (36.5%) (81.8%)
4	2 (7.0%) (68.9%)	3 (9.7%) (74.2%)	3 (6.0%) (58.0%)	1 (7.7%) (46.2%)	0	0	3 (13.6%) (90.9%)
5	1 (3.4%) (72.4%)	3 (9.7%) (83.9%)	3 (6.0%) (64.0%)	1 (7.7%) (53.9%)	0	0	0
6	4 (13.8%) (86.2%)	0	3 (6.0%) (70.0%)	0	2 (13.2%) (40.0%)	2 (16.8%) (50.0%)	1 (4.5%) (95.5%)
7	1 (3.4%) (89.7%)	0	1 (2.0%) (72.0%)	0	0	0	0
8	0	1 (3.2%)	3 (6.0%) (87.1%)	3 (23.0%) (78.0%)	1 (6.7%) (76.9%)	1 (8.3%) (46.7%)	0 (58.3%)
9	1 (3.4%) (93.1%)	0	1 (2.0%) (80.0%)	0	0	0	0
10	0	1 (3.2%) (90.3%)	4 (8.0%) (88.0%)	1 (7.7%) (84.6%)	1 (6.7%) (53.3%)	1 (8.3%) (66.7%)	1 (4.5%) (100.0%)
11	0 (93.5%)	1 (3.2%) (92.0%)	2 (4.0%)	0 (60.0%)	1 (6.7%) (75.0%)	1 (8.3%)	0
12	1 (3.4%) (96.6%)	1 (3.2%) (96.8%)	1 (2.0%) (94.0%)	0	1 (6.7%) (66.7%)	1 (8.3%) (83.3%)	0
14	0	1 (3.2%) (100.0%)	0	0	0	1 (8.3%) (91.7%)	0
16	0	0	0	0	0	0	0
17	0	0	0	0	0	1 (8.3%) (100.0%)	0
19	0	0	2 (4.0%) (98.0%)	0	0	0	0
21	1 (3.4%) (100.0%)	0	0	0	0	0	0
22	0	0	0	0	2 (13.2%) (80.0%)	0	0
25	0	0	1 (2.0%) (100.0%)	0	0	0	0
28	0	0	0	0	1 (6.7%) (86.7%)	0	0
29	0	0	0	1 (7.7%) (92.3%)	0	0	0
42	0	0	0	0	1 (6.7%) (93.3%)	0	0
46	0	0	0	0	1 (6.7%) (100.0%)	0	0
56	0	0	0	1 (7.7%) (100.0%)	0	0	0

TABLE 6

IMPACT OF MULTIPLE OR THIRD-PARTY DEFENDANTS ON FREQUENCY OF FORMAL DISCOVERY — COMPARISON OF FREQUENCY OF FORMAL DISCOVERY IN CASES WHICH DID *NOT* INVOLVE MULTIPLE OR THIRD-PARTY DEFENDANTS[1] TO FREQUENCY OF FORMAL DISCOVERY IN CASES WHICH *DID* INVOLVE MULTIPLE OR THIRD-PARTY DEFENDANTS[2]

Amount of Discovery	Number of Cases Which Did *Not* Involve Multiple or Third-Party Defendants[1] in Which Stated Amount of Discovery Was Conducted	Percentage/ Cumulative Percentage	Number of Cases Which Did Involve Multiple or Third-Party Defendants[2] Stated Amount of Discovery Was Conducted	Percentage Cumulative Percentage
1	68	27.3% (27.3%)	9	11.1% (11.1%)
2	66	26.5% (53.8%)	11	13.6% (24.7%)
3	51	20.5% (74.3%)	8	9.9% (34.6%)
4	23	9.2% (83.5%)	6	7.4% (42.0%)
5	14	5.6% (89.2%)	4	4.9% (46.9%)
6	10	4.0% (93.2%)	4	4.9% (51.9%)
7	1	0.4% (93.6%)	3	3.7% (55.6%)
8	7	2.8% (96.4%)	4	4.9% (60.5%)
9	-	-	2	2.5% (63.0%)
10	4	1.6% (98.0%)	5	6.2% (69.1%)
11	2	0.8% (98.8%)	8	9.9% (79.0%)
12	3	1.2% (100.0%)	2	2.5% (81.5%)
14	-	-	2	2.5% (84.0%)
16	-	-	1	1.2% (85.2%)
17	-	-	1	1.2% (86.4%)
19	-	-	2	2.5% (88.9%)
21	-	-	1	1.2% (90.1%)
22	-	-	2	2.5% (92.6%)
23	-	-	1	1.2% (93.8%)
28	-	-	1	1.2% (95.1%)
29	-	-	1	1.2% (96.3%)
42	-	-	1	1.2% (97.5%)
46	-	-	1	1.2% (98.8%)
56	-	-	1	1.2% (100.0%)

1. (N = 249)
2. (N = 81)

TABLE 7

SELECTED TIME LAPSES FROM PETITION TO FINAL JUDGMENT IN DIFFERENT CATEGORIES OF THE DISCOVERY CASES[1] AND COMPARISON TO ALL CASES SELECTED FOR STUDY AND ALL NON-DISCOVERY CASES

All Cases Selected for Study	All Non-Discovery Cases	All Discovery Cases
N = 1,400 cases	N = 1,070 cases	N = 330 cases
25th percentile: 50 days	25th percentile: 40 days	25th percentile: 334 days
MEDIAN: 190 days	MEDIAN: 98 days	MEDIAN: 581 days
75th percentile: 612 days	75th percentile: 430 days	75th percentile: 814 days
90th percentile: 847 days	90th percentile: 776 days	90th percentile: 1,085 days

All Cases With Fewer Than Four Discovery Requests	All Cases With More Than Three Discovery Requests	All Cases With More Than Five Discovery Requests
N = 213 cases	N = 117 cases	N = 70 cases
25th percentile: 273 days	25th percentile: 471 days	25th percentile: 452 days
MEDIAN: 497 days	MEDIAN: 659 days	MEDIAN: 709 days
75th percentile: 781 days	75th percentile: 915 days	75th percentile: 928 days
90th percentile: 950 days	90th percentile: 1,142 days	90th percentile: 1,196 days

All Cases With More Than Nine Discovery Requests	Tort Cases	All Cases Involving Formal Discovery and a Monetary Prayer Over $100,000
N = 39 cases	N = 191 cases	N = 78 cases
25th percentile: 575 days	25th percentile: 342 days	25th percentile: 539 days
MEDIAN: 796 days	MEDIAN: 598 days	MEDIAN: 756.5 days
75th percentile: 1,055.5 days	75th percentile: 834 days	75th percentile: 976 days
90th percentile: 1,247 days	90th percentile: 1,085 days	90th percentile: 1,136 days

All Discovery Cases *Not* Involving Multiple Defendants	All Discovery Cases Involving Multiple Defendants	All Discovery Cases Involving Third-Party Practice
N = 259 cases	N = 71 cases	N = 22 cases
25th percentile: 329 days	25th percentile: 446 days	25th percentile: 529 days
MEDIAN: 553 days	MEDIAN: 682 days	MEDIAN: 742.5 days
75th percentile: 802 days	75th percentile: 919 days	75th percentile: 839 days
90th percentile: 978 days	90th percentile: over 1,279 over (3-1/2 yrs.)	90th percentile: 1,015 days

All Discovery Cases in Which Jury Trial Occurred	All Discovery Cases in Which Trial to the Court Occurred	All Discovery Cases in Which Trial Occurred
N = 21 cases	N = 43 cases	N = 64 cases
25th percentile: 440 days	25th percentile: 371 days	25th percentile: 401 days
MEDIAN: 598.5 days	MEDIAN: 522 days	MEDIAN: 552.5 days
75th percentile: 782 days	75th percentile: 724 days	75th percentile: 763 days
90th percentile: 1,070 days	90th percentile: 1,053 days	90th percentile: 1,097 days