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Edith Beerdsen

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Assistant Professor of Law, Temple University, James E. Beasley School of Law. I am grateful to Edward K. Cheng, Jeffrey Dunoff, Maurice Dyson, James Gibson, Helen Hershkoff, Christopher B. Jaeger, Olatunde C. Johnson, Jody Kraus, Tom Lin, Faraz Sanei, David Simon and David Simson (both great and not the same person!) for helpful comments and suggestions. Thanks also to participants at the SEALS conference, NYU Lawyering Scholarship Colloquium, and David Simon's Junior Scholars' Workshop, for generative conversations, and to several anonymous practicing litigators for helpful discussions. Finally, I am indebted to Millie Price, Mary Sims, Nick Lewis, and the entire Georgia Law Review team for very careful editing that made this Article better.

DISCOVERY CULTURE

Edith Beerdsen[*]

In a litigation environment that features managerial judges, few trials, and increasing volumes of fact evidence, discovery is often what shapes and determines a case. The process is largely invisible to the public and the courts, and the rules of civil procedure do little to guide it. Instead of being a rule-governed process, civil discovery is to a large extent shaped by what this Article terms Discovery Culture: the norms and practices that govern everyday discovery practice and evolve over time within legal communities.

This Article introduces the concept of Discovery Culture, explores its nature as an extralegal practice, and examines the implications for a civil justice system that has Discovery Culture at the very core of its operations. It argues that the formal rules have ceded so much ground to cultural norms that the discovery process, as currently practiced in the federal judicial system, is more akin to an environment of "order without law" than to an environment governed by law in a traditional positivist sense. Ensuring adequate procedural protections requires a recognition of the central role of Discovery Culture in the discovery process, and procedural measures to make its norms and practices visible and evaluable.

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I did not appreciate how unimportant law can be when I embarked on this project. – Robert C. Ellickson[1]

I. INTRODUCTION

Many civil cases' fates are decided in discovery.[2] The judicial system sets up the battleground—a venue, an assigned judge, and some indication of a timeline—and the parties stage their discovery processes against this backdrop. It is they—the parties and their legal representatives—who decide what actually happens in the discovery phase, with very limited supervision by the court.[3]

The rules of civil procedure do little to guide this process.[4] Most of the rules pertaining to the discovery process lay out unspecific reasonableness standards, and those that do set forth more concrete directives, such as deadlines or limits on the use of specific discovery instruments, can be stipulated around, usually without requiring the court's approval.[5]

In the absence of strict guidance, civil discovery has become largely governed by what this Article calls Discovery Culture: a set of practices and norms that develop in a legal community over time and that determine almost all aspects of civil discovery, including which types of discovery requests are considered reasonable and

[1] ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES vii (1st ed. 1991) [hereinafter ELLICKSON, ORDER WITHOUT LAW].

[2] *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 526 (2012) (explaining that modern discovery enables litigants to gather the information they need to settle their case); *see also* Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 73 (2020) ("[D]iscovery is often outcome determinative."); Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 951 (2004) ("Discovery produces settlements . . . ."); Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 481 (1958) (asserting that discovery is "the key to effective federal civil procedure").

[3] *See* Seth Katsuya Endo, *Discovery Hydraulics*, 52 U.C. DAVIS L. REV. 1317, 1334 (2019) [hereinafter Endo, *Discovery Hydraulics*] (noting that lawyers are the "main players" in the discovery process); Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1657 (2016) (claiming that discovery is "a virtually unpatrolled no-man's land of litigation"); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 499 (2007) ("[V]irtually all discovery take[s] place extrajudicially . . . .").

[4] The rules that purport to apply to the civil discovery process are FED. R. CIV. P. 26–37.

[5] *See infra* section II.B.

which are considered excessive, when a party might cooperate, when it might resist, and when it might seek court intervention.

In recent years, significant scholarly attention has been given to relatively formal efforts by parties to customize procedure, various forms of which have been termed "New Private Process,"[6] "private procedural ordering,"[7] "customized procedure,"[8] "bespoke procedure,"[9] "ad hoc procedure,"[10] and "contract procedure."[11] Much of the debate has centered on the extent to which the procedural rules of the road should be alterable by contract before a dispute has even arisen.[12] Other authors have examined the implications of

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[6] *See, e.g.*, Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1802 (2014) (describing changes to conventional dispute-resolution procedures that collectively "constitute what should be understood as a 'New Private Process'").

[7] *See, e.g.*, Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 128 (2018) ("Litigants now use an increasingly sophisticated set of contractual agreements that alter or displace standard procedural rules, a practice known as 'private procedural ordering.'").

[8] *See, e.g.*, Moffitt, *supra* note 3, at 469 ("We do not require litigants to bring unrelated claims together; we merely invite them to do so. To the extent that they have created a customized procedure in which they have agreed not to do so, why not enforce that agreement?"); W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865, 1869 (2015) (referring to parties' modifications of the background rules of litigation as "customized procedure").

[9] *See generally* David A. Hoffman, *Whither Bespoke Procedure*, 2014 U. ILL. L. REV. 389 (exploring procedural variation by contract).

[10] *See* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 772–73 (2017) ("Ad hoc procedure is designed to address a procedural problem that arises in a pending case or litigation. It is then applied retroactively to that pending case or litigation in order to achieve a desired result.").

[11] *See* Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 511 (2011) (defining "contract procedure" as "the practice of setting out procedures in contracts to govern disputes that have not yet arisen, but that will be adjudicated in the public courts when they do arise").

[12] *See, e.g.*, *id.* at 512 (arguing that certain contractual agreements regarding procedural aspects of litigation inappropriately outsource government functions to private parties); Moffitt, *supra* note 3, at 462 (arguing that civil litigation is too much of a "unitary, choiceless process" and that greater tailoring of procedural rules to parties' needs should be permitted); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 799 (2011) (exploring the normative implications of contractual procedural ordering); Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329,

procedural customization through ad-hoc legislation[13] or by the parties' choice to forego use of the judicial system altogether in favor of alternative dispute resolution.[14] But significant flexibility to alter procedural processes exists *within* everyday civil proceedings, even absent pre-dispute contracts, legislative efforts, or exits from the courthouse.[15] The Federal Rules of Civil Procedure (FRCP or the Rules) leave ample room for parties to shape certain aspects of their case, and courts tend to take a hands-off approach so long as the parties are able to reach agreement.[16]

1331, 1333–34 (2012) (exploring the benefits and hazards of "party rulemaking"); Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedure*, 91 TEX. L. REV. 1475, 1493–94 (2013) (comparing pre-dispute and post-dispute procedural agreements); Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 598–99 (2007) (examining the limits on parties' ability to contract for public dispute resolution rules); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contact: A Convoluted Confluence of Private and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1088–89 (2002) (assessing the appropriate role of "pre-litigation agreements" in public dispute resolution); *see also* Effron, *supra* note 7, at 155 (examining contractual tools of private procedural ordering to argue that litigants and judges are "co-interpreters" of procedural rules); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contact Design*, 115 YALE L.J. 814, 856 (2006) (discussing contract procedure in analyzing tradeoffs between front-end and back-end transaction costs). For additional sources, see Effron, *supra* note 7, at 129 nn.1–2.

[13] *See, e.g.*, Bookman & Noll, *supra* note 10, at 835–40 (analyzing bases for legitimacy for ad hoc legislation altering procedure in pending cases).

[14] *See, e.g.*, Resnik, *supra* note 6, at 1802 (arguing that avenues of alternative dispute resolution reduce the public's opportunity to gain information about the claims and the decisions rendered).

[15] *See* Effron, *supra* note 7, at 141 (during the discovery process, the Federal Rules of Civil Procedure's (FRCP's) "design encourages party agreement and preferences within certain boundaries"); H. Allen Blair, *Promise and Peril: Doctrinally Permissible Options for Calibrating Procedure Through Contract*, 95 NEB. L. REV. 787, 803 (2016) ("[The FRCP] also leave litigants with broad discretion in conducting their affairs throughout the litigation process.").

[16] *See* Blair, *supra* note 15, at 803–04 (describing aspects of the litigation process that the rules allow litigants to control); Moffitt, *supra* note 3, at 499 ("The rules contemplate that virtually all discovery will take place extrajudicially, with the courts intervening only when invited by the parties, and even then, only reluctantly."); Andrew S. Pollis, *Busting up the Pretrial Industry*, 85 FORDHAM L. REV. 2097, 2103 (2017) ("At [least at a] superficial level, pretrial discovery proceeds without court involvement."); *see also* Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983, 988 (2018) ("[The] civil justice system delegates significant coercive power to private parties.").

The procedural aspects of civil litigation that have received the most airtime in the customization literature are those that establish the larger contours of the case and that are sometimes agreed upon by contract before a dispute arises, such as limitations periods,[17] personal jurisdiction,[18] choice of forum,[19] and choice of fact finder.[20] A healthy debate is taking place over whether parties ought to be given more or rather less leeway to customize these aspects of civil procedure,[21] and whether parties are making adequate use of the customization options already available to them.[22] These discussions have largely left untouched the area of civil litigation where customization of procedure is routine, expected, and even encouraged: civil discovery. The parties' ability to customize their experience during the discovery phase of litigation has been recognized,[23] but has not received nearly as much attention,

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[17] *See, e.g.*, Bone, *supra* note 12, at 1347 (discussing party customization of statutes of limitation).

[18] *See, e.g.*, Blair, *supra* note 15, at 828–9 ("Even procedural requirements that might seem 'immutable,' such as jurisdictional requirements, have, in recent years arguably been subject to some contractual modification.").

[19] *See, e.g.*, Davis & Hershkoff, *supra* note 11, at 523 ("The Court's relaxed acceptance of ex ante contract procedure is best illustrated by its treatment of forum selection clauses."); Effron, *supra* note 7, at 159–60 (discussing judicial discretion regarding forum selection clauses); Moffitt, *supra* note 3, at 492–93 (describing choice of forum clauses as an example of "private, predispute customization by prospective litigants"); Blair, *supra* note 15, at 828 ("In a variety of instances, parties do, in fact, take advantage of this ability [to alter procedure to their preferences], including when contracting for forum."); Shapiro, *supra* note 16, at 1054 n.332 (collecting scholarship relating to the enforcement of forum-selection clauses).

[20] *See, e.g.*, Davis & Hershkoff, *supra* note 11, at 522 ("[T]he civil jury right can be waived ex ante.").

[21] *See, e.g.*, *id.* at 559–60 (calling for more oversight of party-made procedure); Moffitt, *supra* note 3, at 478 (arguing for more flexibility to tailor procedural rules); Taylor & Cliffe, *supra* note 12, at 1088 (calling for Congress to define the limits of party-made procedure).

[22] *See, e.g.*, Bone, *supra* note 12, at 1351 (expressing surprise that there is not more evidence in the case law of party agreements to alter procedure); Blair, *supra* note 15, at 815 (opining that it is "puzzling" that parties do not engage in more procedural customization).

[23] *See, e.g.*, Effron, *supra* note 7, at 141 ("[Civil] discovery is a system of party control with modest, often discretionary, judicial intervention."); Blair, *supra* note 15, at 803 ("[P]arties enjoy tremendous flexibility in tailoring discovery processes."); Jessica Erickson, *Bespoke Discovery*, 71 VAND. L. REV. 1873, 1874, 1917 (2018) (exploring the benefits and risks of "bespoke discovery provisions" where parties would "agree to alter the scope of discovery prior to a dispute").

perhaps because of a relative lack of empirical data,[24] or because of scholarly attitudes dismissing discovery affairs as "pedestrian."[25]

Discovery, however, deserves our attention. Not only is it the vehicle through which a significant proportion of cases find their resolution;[26] it is also the litigation phase where many parties spend the majority of their resources and much of their time.[27] Moreover, of all aspects of civil practice, it is by far the most customizable. As I will argue in this Article, discovery customization has become such a large part of litigators' everyday practice that civil discovery has become a norm-based, cultural practice, akin to an environment that Robert Ellickson has termed "order without law," rather than a process governed by law.[28] And it is worth exploring whether that is as it should be.

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[24] *See* Davis & Hershkoff, *supra* note 11, at 516–17 (stating that "we know surprisingly little" about the scope, nature, and impact of contract procedure, because it "appears to be flying beneath the radar and escaping oversight and empirical study"); Bone, *supra* note 12, at 1346 (observing that published case law includes few examples of party agreements).

[25] *See* Blair, *supra* note 15, at 813 (describing procedural stipulations such as modifications of deadlines as "pedestrian" and "minor"). *But see* Rosenberg, *supra* note 2, at 481 (stating that discovery is "the key to effective federal civil procedure").

[26] *See* Langbein, *supra* note 2, at 526 (arguing that civil discovery has been substituted for trial); Yeazell, *supra* note 2, at 950 (arguing that civil discovery plays a central role in producing settlement); *see also* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) [hereinafter Galanter, *The Vanishing Trial*] (tracing the dramatic decline of civil trials in the second half of the twentieth century).

[27] *See* Marrero, *supra* note 3, at 1656 ("[D]iscovery . . . generates more legal fees and expenses than any other round of court proceedings."); Blair, *supra* note 15, at 807–08 (discussing discovery dynamics as a Prisoner's Dilemma between parties who "would be best served by both acting reasonably," but "know that the other is likely to defect"); John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (gathering data demonstrating that "[D]iscovery costs now comprise between 50 and 90 percent of the total litigation costs in a case"); Effron, *supra* note 7, at 177 ("[T]he time spent in discovery far outweighs the time that most litigants will ever spend in front of a judge."); Michael Moffitt, *Three Things to Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203, 1221 (2009) ("Much of the action in modern litigation takes place in discovery . . . .").

[28] *See* ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 4 (introducing the concept of "order without law" as "coordination to mutual advantage without supervision by the state").

The process of discovery in federal courts has been party-driven since the FRCP took effect in 1938,[29] but the parties' power to shape litigation processes has increased substantially in recent decades, due to three well-documented and more or less parallel developments, working together to transform the practice of discovery. The first development is the virtual disappearance of trial from the civil judicial landscape. The overwhelming majority of civil cases these days are settled or dismissed rather than adjudicated at trial.[30] It has been suggested that trials have become a rare occurrence *precisely because* the rules allow for extensive discovery: discovery allows the parties to gather the information they need to reach an informed settlement.[31] The discovery process has thus become arguably the most important phase of a civil litigation proceeding.[32]

The second development is the increasingly managerial role assumed by judges in the federal system. The increase in both caseloads and case complexity in the federal judicial system in the second half of the twentieth century has made it necessary for judges to take on increasingly managerial responsibilities, while adjudicating cases (or presiding over jury trials) only infrequently.[33]

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[29] *See* Langbein, *supra* note 2, at 542, 542–44 (discussing the shifts in the procedural landscape heralded by the arrival of the FRCP); Resnik, *supra* note 6, at 1794–97 (describing how the rules reshaped federal discovery).

[30] *See* Langbein, *supra* note 2, at 524–26 (providing statistics demonstrating that most cases are resolved pretrial); Galanter, *The Vanishing Trial*, *supra* note 26, at 459 ("[T]rials are declining in every case category.").

[31] *See* Langbein, *supra* note 2, at 526 (2012) (arguing that the vanishing trial is a direct result of the 1938 rules of procedure, which enabled litigants to gather the information they needed to render trials unnecessary).

[32] *See* Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1514 (2016) ("[Discovery is] a focal point in debates about whether our litigation system 'works.'"); Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1252 (2020) [hereinafter Endo, *Contracting for Confidential Discovery*] ("[T]rials, settlement, and dispositive motions all turn on information exchanged during discovery."); *see also* Pollis, *supra* note 16, at 2097 ("What has supplanted the trial culture is . . . a culture of pretrial practice.").

[33] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982) (describing emergence of managerial judges); Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 6 (2019) (observing the "unrelenting rise of managerial judging"); Stephen N.

FRCP Rule 16, which was once a simple provision permitting a court to schedule a court conference,[34] is now a "centerpiece of judicial management."[35] This managerial shift has recalibrated the forces that operate in the civil discovery process. It has diminished the role of procedural rules and increased the autonomy of not only the judge but also the parties to a proceeding.[36] Indeed, in an environment where judges are managing large caseloads as managers rather than adjudicators, the parties and their counsel have become the actors who most actively shape the process of litigation—the ones who determine the day-to-day unfolding of a case.[37]

The third development is the increased complexity and volume of civil discovery brought about by electronic discovery.[38] As discovery materials have become not only more voluminous but also

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Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 44 (1994) (lamenting ad hoc case management at the expense of preannounced specific rules); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1851–77 (2014) (exploring the history of the twentieth-century transition towards case management).

[34] *See* 3 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 16 App.01 (3d ed. 2022) (providing historical versions of Rule 16).

[35] Resnik, *supra* note 6, at 1803; *see also* FED. R. CIV. P. 16 (providing detailed and lengthy provisions regarding "Pretrial Conferences," "Scheduling," and "Management").

[36] *See* Effron, *supra* note 7, at 177–79. Professor Effron has argued that, when it comes to a civil proceeding as a whole, parties and judges have become both co-managers of the proceeding and co-interpreters of applicable law. *Id.* As explored in more depth in Part II, this Article proceeds from an observation that, in the discovery phase, the responsibility balance has tilted even further, and the parties are the main determinants of what happens.

[37] *See* Moffitt, *supra* note 3, at 499 ("[D]iscovery is essentially a party-driven process."); Marrero, *supra* note 3, at 1657 (describing discovery as "a virtually unpatrolled no-man's-land of litigation"); Effron, *supra* note 7, at 141 (characterizing civil discovery as "a system of party control with modest, often discretionary, judicial intervention"); Blair, *supra* note 15, at 803 ("[P]arties enjoy tremendous flexibility in tailoring discovery processes."); Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 699 (2006) (arguing that in the discovery context, "[w]e have put in the hands of civil litigants powers that in many legal systems only state officials enjoy").

[38] *See* Endo, *Discovery Hydraulics*, *supra* note 3, at 1342 (observing a rise in discoverable materials as a result of the use of email); Sedona Conf., *The Sedona Principles, Third Edition: Best Practices, Recommendations and Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 58 (2018) (addressing the unique challenges raised by the volume and complexity of electronically stored information).

increasingly varied and complex, the process of discovery itself has become more time and labor intensive.[39]

While each of these three developments has received significant coverage in the scholarly literature, analyses have thus far overlooked the way in which these transformations of the judicial system have not only put a very central part of the judicial dispute-resolution mechanism in the hands of parties and their lawyers, but have put it largely beyond the reach of the rules of civil procedure altogether. While some cases are adjudicated or settled in the earliest stages of litigation, the substantial number of cases that proceed to discovery enter an environment that is loose and informal, relatively unmoored from any procedural rules, and largely invisible to the public and even the courts.[40] Discovery takes place outside of the courtroom, in conversations among lawyers, behind closed doors in law firms, by telephone or teleconference. It is unaddressed in judicial opinions and unobserved by jurors or the public at large.[41]

This Article shines a spotlight on the culture of civil discovery that has eclipsed the influence of the federal rules in the realm of discovery.[42] It describes civil discovery as a practice in which legal rules provide certain rather loose guidelines and safeguards, but that is significantly influenced by what this Article terms Discovery Culture.[43] The Article proposes a definition of Discovery Culture,

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[39] *See, e.g.*, Marrero, *supra* note 3, at 1608, 1687 ("[M]odern electronic technologies . . . give rise to discovery that is ever more massive, at times unmanageable [and] usually very expensive . . . . Even in routine cases, discovery costs nowadays potentially can run into the hundreds of thousands and even millions of dollars.").

[40] In 2020, approximately twenty percent of terminated federal civil cases were terminated before the court took any action, sixty percent at or before the motion to dismiss stage, and almost twenty percent reached an end during or after discovery. *See Statistical Tables for the Judiciary, Table C-4*, U.S. DIST. CTS. (Dec. 31, 2020), https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (reporting the number of civil cases terminated by stage of the case for the one-year period ending on December 31, 2020). The percentage of cases reaching the discovery phase varies wildly by type of case, from less than one percent for habeas cases to up to fifty-five percent of employer liability suits. *Id.*

[41] *See infra* section II.A.

[42] I am not the first to point out that parties have significant freedom in the process of discovery. *See, e.g.*, *supra* notes 36–37. This Article is the first, however, to frame the practice as a cultural one, largely disconnected from procedural rules. *See infra* Part II.

[43] *See infra* Part II.

offers a categorization of the types of norms it encompasses, and explores the type of authority it exerts. Applying Robert Ellickson's "order without law" framework to the legal profession, it argues that law plays a peripheral role in the discovery process. Law is not entirely absent in the discovery phase, but the process more closely resembles an environment of order without law than a process governed by law or negotiated in the law's shadow.[44]

This legal peripheralist view of the discovery process provides a useful lens for evaluating the role of rules in the litigation process,[45] and it turns out that, unlike in Ellickson's Shasta County, the norms-based ordering found in the civil discovery practice is not necessarily a utopian vision of party empowerment. This Article argues that the rules have ceded so much ground to cultural norms that they may currently fail to provide some of the procedural protections they were enacted to provide, and may foster inequality between parties, reduce the predictability of litigation processes and outcomes, and reduce the publicity value in the litigation process.[46] In fact, they have rendered a core part of civil practice so invisible as to render it impossible to evaluate the extent to which the discovery rules may be failing us.[47] So long as the norms-based dimension of civil discovery is not recognized, attempts to steer behavior through rule changes will remain ineffective. An understanding of the rules' attenuated power in discovery can inform efforts to achieve the rules' objectives.[48]

The examples and specific discussion in this Article focus primarily on civil discovery as it is practiced in federal court. However, the phenomenon of Discovery Culture is not limited to federal practice. We can expect Discovery Culture to evolve in different directions in different practice areas and different geographic locales, and these differences could become the topic of future work. For this initial exploration of the concept of Discovery

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[44] *See generally* ELLICKSON, ORDER WITHOUT LAW, *supra* note 1 (developing a theory of "order without law").

[45] *See id*. at 147 (contrasting legal peripheralism, which emphasizes the role of norms in the creation of social order, with legal centrism, "the belief that governments are the chief sources of rules and enforcement efforts").

[46] *See infra* section IV.A.

[47] *See infra* section IV.A.

[48] *See infra* section IV.B.

Culture, the federal framework is appropriate. Not only is it a framework with which many civil litigators in all fifty states interact from time to time, but the FRCP have also been adopted in almost half of U.S. states and have informed practice in many others.[49]

The remainder of this Article proceeds as follows. Part II describes the civil discovery process and the rules that purport to apply to it. It introduces the concept of Discovery Culture and presents evidence for its existence based on lawyer surveys, litigation practice guides, judicial descriptions of the discovery process, historic rule changes, and empirical data from three representative federal district courts. Part III explores the character of discovery as a norms-based practice akin to an environment of "order without law," in which cultural norms have pushed formal rules to the periphery. Part IV draws out implications of the civil discovery process's character as a norms-based, cultural practice that is only weakly influenced by formal rules. It also proposes a number of interventions aimed at maintaining the benefits of the dominance of norms in the civil discovery process, while mitigating the negative effects of a strong Discovery Culture.

II. THE NATURE OF CIVIL DISCOVERY

This Part introduces the concept of Discovery Culture. Section II.A provides a brief overview of the practice of discovery in civil litigation and the role envisioned for the parties in this practice. Section II.B reviews the Federal Rules of Civil Procedure that purport to apply to the civil discovery process and their stated purpose. Section II.C offers a definition of Discovery Culture that will be used in the remainder of the Article. Section II.D marshals evidence for the proposition that Discovery Culture exists and governs modern civil discovery practice.

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[49] *See* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1049 (2016) ("About half of the states have adopted the [FRCP] verbatim" and even in other states, "procedural practice . . . often lines up with federal court practice.").

A. THE PRACTICE OF DISCOVERY

The discovery phase of a civil litigation refers to the period during which parties develop the facts they need to establish their claims or defenses. The parties do this through an exchange of information and documents and through depositions of witnesses.[50] Discovery typically starts either after a motion to dismiss has been filed and denied or after it has become clear that no such motion will be filed.[51] It typically ends at a predetermined deadline, negotiated by the parties or imposed by the court.[52] The discovery process can last anywhere from months to years[53] and can consume a vast amount of time and resources.[54]

The discovery process serves to provide parties with the information they need to either reach an informed settlement or present their claims or defenses effectively at trial.[55] With only a smattering of cases being litigated all the way to trial each year in

[50] *See generally* FED. R. CIV. P. 26–37 (providing for discovery through a variety of mechanisms).

[51] Absent extensions (which are routinely granted), a motion to dismiss is due twenty-one days after service of the complaint in the case. *Id.* R. 12(a)–(b). This means that, typically, within twenty-one days of service, the plaintiff will know whether a motion to dismiss will be brought.

[52] The Rules require the parties to file a joint discovery plan before their initial court conference. *Id.* R. 26(f). This initial discovery plan is often perfunctory, but it does often include an initial set of deadlines. *See* Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167, 176 (2006) ("The problem has been that the [Rule 26(f)] meet-and-confer is too often treated as a perfunctory 'drive-by' exchange. If Rule 26(f) has been approached in this fashion, the Rule 16 conference may accomplish little more than setting a few dates.").

[53] *See* Marrero, *supra* note 3, at 1666 (discussing the length of the discovery process); *Statistical Tables for the Judiciary, Table C-5*, U.S. DIST. CTS. (Dec. 31, 2020), https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (reflecting that civil cases that enter discovery stay in that phase for more than eighteen months on average).

[54] *See supra* note 27; *see also* THOMAS E. WILLGING ET AL., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 3, 15 (1997) (finding, in a survey of recently closed cases, excluding case types that tend not to involve discovery, that discovery had occurred in eighty-five percent of cases and represented fifty percent of overall litigation costs in the median case).

[55] *See* Subrin, *supra* note 33, at 30 (asserting that discovery serves the "twin goals" of enlightened settlement and preparation for trial).

the federal system,[56] the discovery process has taken on increased importance.[57] The parties' objectives during the discovery phase have been said to be both "informational" and "impositional": many discovery actions are aimed at gathering useful information, but some are aimed at creating settlement leverage by imposing or threatening to impose burdens on the other side.[58]

The discovery process is often discussed and described as if it were just as rule bound as the rest of the civil litigation process.[59] In reality, however, it is governed by the norms and practices that constitute the everyday experience of document production, depositions, disputes over search terms, meet and confers, etc. It is these norms and practices that this Article terms "Discovery Culture." This concept will be developed further in sections I.C and I.D below.

The discovery process can encompass a number of different types of discovery, the most common of which include document discovery

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[56] In 2019—the most recent year in which the courts were not affected by Covid-19—the portion of civil dispositions by trial was 0.7%. *Statistical Tables for the Judiciary, Table C-4*, U.S. DIST. CTS. (December 31, 2019), https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables. As Galanter noted in his 2004 study, this percentage overstates the number of completed trials, because it includes cases that settled during trial. Galanter, *The Vanishing Trial*, *supra* note 26, at 461 & n.4. Trials in state court are more common, but there, too, they are becoming increasingly rare. *See id.* at 508 (detailing the decline of trials in state courts).

[57] *See* Freer, *supra* note 32, at 1512 ("Part and parcel of the vanishing trial is a focus on pretrial practice."); Pollis, *supra* note 16, at 2098 (asserting that the vanishing trial has made the pretrial phase of litigation "a stage unto itself").

[58] *See* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 543 (2000) ("One consequence of discovery flows from the value of information gleaned, while another derives from the burden discovery inflicts on the respondent."). In some cases, discovery can also have an "expositional" value: unearthing and reviewing relevant documents can sometimes help the producing party understand the strengths and weaknesses of its position.

[59] *See, e.g.*, Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 157 (1999) (exploring rule-based solutions for a number of discovery problems); Partha P. Chattoraj, *Overview of the Rules Governing Depositions in Practice*, *in* FUNDAMENTALS OF TAKING AND DEFENDING DEPOSITIONS 37, 39 (2017) (listing rules of deposition procedure and case law interpreting them, without touching on deposition practice not directly addressed by rules). *But see* 7 MOORE ET AL., *supra* note 34, § 30.02 ("[G]ood deposition practice is in many ways a matter of common sense and professionalism more than an exercise in legal doctrine or rule.").

(an exchange of documents between the parties), depositions (out-of-court testimony by witnesses under oath), and interrogatories (requests for information calling for written responses from the receiving party).[60] Each type of discovery typically follows a three-step sequence: (1) a request; (2) a response to the request; and, if needed, (3) negotiations between the parties about the appropriateness and reasonableness of the request and the adequacy of the response.[61] A discovery request is typically made in writing, in one of half a dozen or so more or less standardized forms, such as a document request, a deposition notice, or a set of interrogatories.[62] The party responding to the request can either agree to provide what is being requested or object to all or part of the demand.[63] A party who agrees to the requested form of discovery will offer a date for the requested deposition, agree in writing to provide the requested documents, or respond in writing to a set of interrogatories.[64] A party objecting to a request will typically respond in the form of more or less formalized "responses and objections," in which it responds to each element of the request in turn with specific objections.[65] It is not uncommon for an initial discovery request to be intentionally overbroad, and for the

[60] *See* FED. R. CIV. P. 30, 33–34 (providing for depositions, interrogatories, and document discovery, respectively). In some cases, there may also be inspections of property, physical or mental examinations, or requests for admissions. *See id.* R. 34–36 (providing for these procedures).

[61] *See* Marrero, *supra* note 3, at 1659 (arguing that discovery tends to revolve around overbroad demands and countering responses); Beckerman, *supra* note 58, at 550 & n.185 (describing the "'meet and confer' obligations" under FRCP 26(c) and 37(a)).

[62] *See, e.g.*, FED. R. CIV. P. 30(b)(1), 33(a)(1), 34(b)(1) (describing required elements of certain discovery requests). Note that the standard forms are not provided by the rules. They are developed, used, and adapted in the realm of what this Article will call Discovery Culture.

[63] *Id.* R. 33(b), 34(b)(2).

[64] *Id.* R. 30(b)(1), 33(b)(3), 34(b)(2).

[65] *See, e.g.*, *id.* R. 33(b)(4) ("The grounds for objecting to an interrogatory must be stated with specificity."); *id.* R. 34(b)(2)(B) ("[T]he response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons."); ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 8:1074–75 (The Rutter Group 2022) ("[T]he responding party may serve objections. . . . To save time and effort, the responding party may wish to set forth [facts necessary to justify the objection] in the *response to the interrogatories*."). Objections to deposition notices may be made with similar formalities, or in less formal email or letter correspondence. FED. R. CIV. P. 32(d).

response, in similarly sweeping fashion, to contain primarily blanket objections.[66]

Unless the responding party immediately agrees to the request with no limitation (i.e., agrees to provide the requested information, documents, or witness), a "meet and confer" process will typically follow, in which the parties negotiate over the parameters for the responding party's response.[67] This process, which often takes place by telephone, is the venue where the actual scope of discovery is hammered out.[68] A well-functioning meet-and-confer process will often proceed in an iterative manner, especially when the matter is complex, or the information requested is extensive. In an initial series of conversations, counsel for the responding party will seek to understand what types of information the requesting party seeks to discover. Counsel for the requesting party will seek to understand the responding party's objections, what information and material are actually in that party's possession or control and in what form, and what obstacles the party faces in gathering the requested

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[66] *See* Beckerman, *supra* note 58, at 525 ("Proficient advocates . . . propound[] wide-ranging, penetrating and comprehensive discovery requests . . . [while] simultaneously asserting all possible objections in response to adversaries' requests . . . ."); Marrero, *supra* note 3, at 1659–60 ("One side sends overbroad demands for information"; the other counters with "maximally evasive, minimally useful responses."). Although several courts have rejected the use of "boilerplate objections," their use is still widespread. *Compare, e.g.*, Fischer v. Forrest, No. 14 Civ. 1304, 1307, 2017 U.S. Dist. LEXIS 28102, at *8 (S.D.N.Y. Feb. 28, 2017) ("[T]he responses to requests 1–2 stating that the requests are 'overly broad and unduly burdensome' is meaningless boilerplate. . . . This language tells the Court nothing."), *with, e.g.*, Katherine Gallo, *Why These Objections Are Garbage*, RESOLVING DISCOVERY DISPUTES (Oct. 8, 2019), https://www.resolvingdiscoverydisputes.com/request-for-production-of-documents/document-production-code-compliant-demand/why-these-objections-are-garbage ("Boilerplate objections are becoming more and more common in response to each of the document requests.").

[67] *See* Beckerman, *supra* note 58, at 550 & n.185 ("[A]ttorneys [] try in good faith to reach an agreement concerning the desired discovery without judicial intervention.").

[68] *See* Steven D. Ginsburg, *Tips on Meet-and-Confer Conferences*, ABA: PRAC. POINTS (Feb. 28, 2017), https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2017/tips-on-meet-and-confer-conferences/ ("These agreements can include . . . the scheduling and number of depositions, reservation of objections . . . until trial, using a single court reporter/videographer, a uniform method of service of papers, and a protective order for confidential information.").

information.[69] Next, in consultation with their clients, the parties will negotiate parameters for discovery that are feasible and acceptable to all.[70] Meet-and-confer conversations are often heavily influenced by the lawyers' own experiences in earlier cases. A requesting lawyer who, in a previous, similar case, obtained a certain type of discovery will not hesitate to request production of the same type of information in the instant case. A responding lawyer who in the past has successfully resisted a particular type of request will often be inclined to resist it in the instant case as well. If, on the other hand, the request is within the customary range, this lawyer will be inclined to cooperate rather than resist.

Typically, negotiations result in an agreement specifying what will be produced (and who will be made available for depositions), as well as when and how.[71] As discovery progresses, additional discovery requests may be made, each kicking off a new round of responses and negotiations.

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[69] *See* FED. R. CIV. P. 26 advisory committee's note to 2015 amendment ("A party requesting discovery . . . may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference . . . ."); CRAIG BALL, COMPETENCY AND STRATEGY IN ELECTRONIC DISCOVERY 292 (2018), http://www.texasbarcle.com/cle/OLViewArticle.asp?a=199277&t=PDF&e=16257&p=1 ("Meet and confer is more a process than an event."). Information may be difficult to retrieve, if, for example, it is stored in an archival tape system or data warehouse. It may also be stored in complex ways, such as in large databases that can be queried or partially exported in a multitude of ways. *See generally* N.Y. STATE BAR ASS'N, BEST PRACTICES IN E-DISCOVERY IN NEW YORK STATE AND FEDERAL COURTS 1 (2011) [hereinafter NYSBA REPORT] ("[A] reference for best practices in e-discovery based on the current state of the law.").

[70] *See* NYSBA REPORT, *supra* note 69, at 21 ("One common practice is for counsel for both parties to attempt to enter into an agreement regarding the scope of the search and the search terms."); Ginsburg, *supra* note 68 (listing common meet-and-confer topics).

[71] For example, a responding party may end up agreeing to perform "a reasonable search" for emails relating to a specific transaction, sent or received by specified employees, during a specified time period, using an agreed-upon set of search terms. NYSBA REPORT, *supra* note 69, at 21. Negotiations can also result in a plan for a phased discovery process, prioritizing production of documents that are the most salient or accessible, with additional production to happen only if the initial information proves insufficient. *See id.* at 25 ("[Parties can] attempt to contain the costs of e-discovery by attempting to agree with counsel at the preliminary conference to limit e-discovery as much as reasonably possible given the facts and circumstances of the case."); Endo, *Discovery Hydraulics*, *supra* note 3, at 1348 (describing a "sampling" process whereby "the producing party only searches a designated portion of the discoverable material").

The primary responsibility for running the discovery process lies with the parties and their legal representatives, and discovery negotiations generally take place without the court's involvement.[72] The Rules create an expectation that parties collaborate to determine the contours of discovery and work together in good faith to resolve any disagreements, preferably without assistance from the judicial system.[73] Only if an impasse is reached will parties consider seeking the court's intervention,[74] typically in the form of a motion to compel (to enforce a discovery request) or a motion for a protective order (to avoid responding to a discovery request).[75] While neither type of motion is rare, both mechanisms are widely regarded as instruments of last resort when it comes to resolving discovery disputes.[76]

There are multiple reasons for parties' general reluctance to involve the court in their discovery disputes. *First*, as described above, the Rules place primary responsibility on the parties to manage discovery.[77] A party who tries to engage the court too early

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[72] *See* FED. R. CIV. P. 26(f)(2) (placing the responsibility on parties to confer about the particulars of the discovery process and develop a discovery plan); *id.* R. 26 advisory committee's note to 2015 amendment ("It is expected that discovery will be effectively managed by the parties in many cases."); Effron, *supra* note 7, at 141 ("[Civil] discovery is a system of party control with modest, often discretionary, judicial intervention."); *see also supra* note 37.

[73] *See* FED. R. CIV. P. 26 advisory committee's note to the 2015 amendment (explaining that judicial intervention in the discovery process should only occur "when the parties are legitimately unable to resolve important differences and . . . when the parties fall short of effective, cooperative management on their own"). Even in the 1930s, when the rules were enacted, discovery was understood to be a cooperative, party-driven practice. *See* Sedona Conf., *The Sedona Conference Cooperation Proclamation*, 10 (Supp.) SEDONA CONF. J. 331, 332 (2009) (explaining the original purpose behind the uniform civil procedure rules).

[74] *See* Beckerman, *supra* note 58, at 518 (arguing that the Rules disincentivize judicial intervention in discovery matters).

[75] *See* FED. R. CIV. P. 26(c)(1) (providing that a party may move for a protective order as long as the party "has in good faith conferred or attempted to confer with other affected parties . . . without court action"); *id.* R. 37(a)(3)(A)–(B) (providing for motions to compel disclosure or a discovery response).

[76] *See infra* note 78 and accompanying text.

[77] *See supra* note 72 and accompanying text.

or too often will be seen as failing to discharge this responsibility.[78] *Second*, significant costs are associated with the filing or defending of a discovery motion.[79] This cost typically far exceeds the cost of a few additional meet-and-confer calls and letters, which might also resolve the dispute.[80] *Third*, negotiating for discovery parameters without involving the court allows the parties to create tailored solutions, taking into account the parties' needs and challenges in a way that a court is less able to do.[81] *Fourth*, judges are widely believed to have a pronounced distaste for discovery disputes and to regard these disputes as "quarrels between bickering children."[82] Because parties tend not to want to risk souring their relationship with the judge, they typically prefer not to seek the court's assistance except as a matter of last resort.[83] *Fifth*, there is seldom a need to seek the court's intervention. Experienced counsel have a well-developed sense of what types of discovery moves are generally considered acceptable or common, and they expect judges to be generally aware of these norms as well.[84] A party that knows it is

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[78] *See* FED. R. CIV. P. 37(a)(1) (stating that a party moving to compel must certify that it has attempted in good faith to obtain the requested discovery without court action); *see also* Effron, *supra* note 7, at 143 ("The push for party agreement is pervasive . . . ."); 7 MOORE ET AL., *supra* note 34, § 30.05 ("[I]t is generally prudent to attempt to reach agreement on . . . discovery matters, before approaching the court, because many judges will expect that to have been done . . . .").

[79] *See* Endo, *Discovery Hydraulics*, *supra* note 3, at 1353 (highlighting the benefits of mediating discovery disputes, which include reducing litigation costs by "forgoing costly motion practice").

[80] *See* Steven S. Gensler, *A Bull's-Eye View of Cooperation in Discovery*, 10 (Supp.) SEDONA CONF. J. 363, 370 (2009) ("When parties engage in expected outcome-based cooperation, they are, in essence, choosing to take the shortest, fastest, and least costly path to what the rules, as applied, ultimately would require them to do anyway.").

[81] *See* Bone, *supra* note 12, at 1383 ("[P]arties usually have better information about their cases than the court . . . .").

[82] Moffitt, *supra* note 3, at 499 & n.150. There is ample support for this belief. *See id.* (collecting sources supporting the notion that "most judges hate to deal with discovery disputes"); Beckerman, *supra* note 58, at 568 & n.253 (collecting sources describing discovery disputes as "puerile affairs," "spitting match[es]," and "distasteful and wasteful in general"); *see also id.* at 518 ("[J]udges unrealistically tend to assume that discovery's cooperative ideal should be realizable in all cases.").

[83] *See* Moffitt, *supra* note 3, at 499 nn.150–51 (noting that the FRCP contemplate court protection from a discovery request only as a last resort, and that "[j]udges' distaste for discovery disputes is widespread and well known").

[84] *See infra* section II.D.

making an unreasonable or unusual request and is rebuffed by its counterparty will not expect to find a sympathetic ear with the judge.[85] A party that knows its request is within the usual realm, conversely, can usually expect the opposing side to relent eventually, rather than having to defend against a motion.[86] Moreover, once discovery agreements have been made by the parties, they are rarely scrutinized, second-guessed, or disturbed by a judge.[87]

In practice then, judges' managerial responsibilities tend to play out at a higher level of generality—at status conferences, where judges have an opportunity to steer the overall direction of discovery—rather than in the everyday practice of discovery.[88] Everyday discovery disputes do occasionally reach the court in the form of a motion, but these motions are the exception rather than the rule and are often sparked by unusual circumstances.[89]

With the court somewhat removed from the everyday practice of civil discovery, customs and norms that develop and propagate in interactions between counsel are key determinants of what happens during the civil discovery process.[90] As I will argue in Part III, this Discovery Culture is not fully divorced or separate from law. It is developed and practiced against a backdrop of procedural rules and legal precedent, but law determines only a small part of what actually happens in civil discovery.

Before turning to a definition and more detailed description of Discovery Culture (in section II.C), I first turn to the rules that purport to apply to the discovery process and their stated purpose.

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[85] *See* Effron, *supra* note 7, at 143 (stating that parties bringing discovery disputes to court "can be subject to judicial ridicule").

[86] *See id.* (describing a preference in discovery for agreement between the parties over efforts to involve the judge).

[87] *See* Endo, *Contracting for Confidential Discovery*, *supra* note 32, at 1254 ("Quite commonly, when parties agree about an issue, courts do not carefully examine the legal questions."); Shapiro, *supra* note 16, at 1014 ("[L]awyers' procedural choices will draw only sporadic judicial scrutiny.").

[88] There are, of course, exceptions. *See, e.g.*, Endo, *Discovery Hydraulics*, *supra* note 3, at 1347–48, 1348 n.182 (describing individual rules of S.D.N.Y. Judge Lorna G. Schofield, which include unusually detailed discovery provisions).

[89] *See infra* section II.D.

[90] *See infra* section II.D.

B. THE FORMAL RULES OF DISCOVERY

The FRCP, the "great trans-substantive code,"[91] govern virtually all federal civil proceedings, and therefore by construction cannot possibly provide optimal guidance for every type of case and every eventuality. The drafters opted against a detailed and intricate web of contingencies and exceptions and instead created a code of "stunning simplicity"[92] that pitches its guidance at a high level of generality.

The stated purpose of the Rules has not changed much since they were enacted in 1938. Even as discovery's orientation has shifted from trial to settlement, insufficient attention has been paid to the role the rules ought to play during this process. The original set of rules included a stated purpose that endured without amendment for more than five decades:

> "*These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action.*"[93]

In the past three decades, this statement of purpose was amended twice to effect a substantive change and once as part of a nonsubstantive restyling effort.[94] Its amendment history reflects the managerial shift in district judges' roles,[95] increasing concerns about unbridled proliferation of discovery,[96] as well as increased delegation of case-management responsibilities to the parties.[97] The most recent amendment, in 2015, aimed to emphasize the role of the

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[91] Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975); *see also* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 376 (2010) ("A procedural rule is trans-substantive if it applies equally to all cases regardless of substance.").

[92] Marcus, *supra* note 91, at 371.

[93] 1 MOORE ET AL., *supra* note 34, § 1 App.01(1).

[94] *See id.* § 1 App.02–06 (providing historical versions of Rule 1).

[95] In 1993, Rule 1 was amended to read: "These rules . . . shall be construed *and administered* to secure the just, speedy, and inexpensive determination of every action." *Id.* § 1 App.04(1) (emphasis added).

[96] The 1993 amendment was made in recognition of "the affirmative duty of the court . . . to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay." *Id.* § 1 App.04(2).

[97] In 2015, Rule 1 was amended to read: "These rules . . . should be construed, administered, and *employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1 (emphasis added).

parties in effectuating the objectives of the rules.[98] By contrast, the statement's amendment history does not reflect any consideration of the virtual disappearance of trials from the civil legal landscape or the overwhelming prevalence of resolution through settlement in contemporary civil practice. The statement of purpose currently reads:

> "*These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding*."[99]

Even today, therefore, when less than one percent of civil cases end in an adjudication,[100] the FRCP are geared toward the "determination" of cases, rather than, more broadly, their resolution.[101] While the daily practice of civil procedure in courts and between the parties has evolved into a practice aimed at settlement, it is telling that the rules that purport to apply to this practice are still framed in these anachronistic terms.[102]

The federal rules collectively have been characterized as "open-textured standards rather than rules,"[103] and this character is especially pronounced when it comes to the rules pertaining to the discovery process. The FRCP provide twelve rules relating to the discovery stage of civil actions.[104] The remainder of this section provides a brief overview of these rules and the extent to which they provide concrete, applicable guidance to litigants. The substance of

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[98] *See* 1 MOORE ET AL., *supra* note 34, § 1 App.06(2) ("[J]ust as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way.").

[99] FED. R. CIV. P. 1. The words "and proceeding" were added to the end of the purpose statement as part of a nonsubstantive restyling effort in 2007. 1 MOORE ET AL., *supra* note 34, § 1 App.05(2).

[100] *See supra* note 40 (reporting on the number of civil cases terminated by stage of the case for the one-year period ending on December 31, 2020).

[101] This anachronism carries through in case law. *See, e.g.*, Stevo v. Frasor, 662 F.3d 880, 887 (7th Cir. 2011) ("[Federal and local rules] should be construed to provide for the 'just, speedy, and inexpensive determination of every action' *on its merits*." (emphasis added) (quoting FED. R. CIV. P. 1)).

[102] It is also curious that no scholarship, to my knowledge, has recognized the outdated use of "determination" in Rule 1. FED. R. CIV. P. 1.

[103] Blair, *supra* note 15, at 801.

[104] FED. R. CIV. P. 26–37.

Rules 26 through 37, the FRCP's discovery rules, can be divided roughly into three categories: (1) **norm-referential rules**: rules that set out requirements that depend on norms such as reasonableness, timeliness, or proportionality; (2) **default-setting rules**: rules that set out more concrete requirements but allow parties to stipulate around those defaults without the court's permission; and (3) **firm rules**: rules that set out firmer standards that can be circumvented by stipulation only with the court's permission. Most of the substance of Rules 26 through 37 falls into categories (1) or (2).[105]

Norm-referential rules make up a large portion of Rules 26 through 37. This category of rules includes provisions that require the scope of discovery to be "proportional to the needs of the case,"[106] limit discovery to sources that are "reasonably accessible,"[107] bar discovery that is "unreasonably cumulative,"[108] require "timely" supplementation of incomplete discovery responses,[109] and allow extended depositions "if fairly needed."[110] In all these instances, the rules depend on community norms to define the boundaries of reasonableness, timeliness, proportionality, and necessity. Because discovery disputes are rarely adjudicated,[111] the content of these norms does not tend to come from formal precedent, but rather from everyday discovery practice.

Default-setting rules set out more concrete requirements but allow parties to depart from the default by stipulation. For example, these rules set discovery deadlines, but allow extensions of those deadlines for any form of discovery by stipulation.[112] They set limits

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[105] *See infra* notes 106–113 and accompanying text. Contrast the Federal Rules of Evidence, which have been described as a "frozen regime." G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 943 (2022).

[106] FED. R. CIV. P. 26(b)(1).

[107] *Id.* R. 26(b)(2)(B).

[108] *Id.* R. 26(b)(2)(C).

[109] *Id.* R. 26(e)(1)(A).

[110] *Id.* R. 30(d)(1).

[111] *See supra* notes 72–87 and accompanying text.

[112] *See, e.g.*, FED. R. CIV. P. 29(b) (permitting parties to extend the time allotted for discovery by stipulation); *id.* R. 34(b)(2)(A) (permitting parties to adjust deadlines for discovery responses by stipulation).

on the number of depositions and interrogatories, but allow the parties to stipulate to exceed these limits.[113]

Firm rules, which can be circumvented only with the court's permission, are rare. Examples of firm rules include a provision that requires court approval for extensions of time that "would interfere with the time set for completing discovery, for hearing a motion, or for trial"[114] or for deposing a witness who is incarcerated.[115] This category of rules can, at times, have a subcategory: firm rules that are routinely ignored.[116]

Owing to the flexible and undemanding nature of the norm-referential and default-setting rules, which make up most of the formal discovery rules, what parties actually do during the course of civil discovery bears hardly any relationship to the formal rules. Consider for example the number of depositions taken. In some instances, parties will stay within the default allotments and take ten or fewer depositions.[117] In other cases, the number of depositions vastly exceeds the number allowed under the rules.[118] In neither case is it obvious that the number of depositions was actually

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[113] *See, e.g.*, *id.* R. 30(a)(2)(A) (permitting parties to exceed the default cap of ten deposition limit by stipulation); *id.* R. 33(a)(1) (permitting parties to exceed the default cap of twenty-five written interrogatories by stipulation).

[114] *Id.* R. 29(b). Prior to 1970, court permission was required for every such extension. *See infra* note 219.

[115] *Id.* R. 30(a)(2)(B).

[116] *See*, *e.g.*, Shapiro, *supra* note 16, at 1003 (explaining that in the past, Rule 34 required a court order for discovery requests, but this requirement was "oft-ignored" and ultimately removed). Rules that are routinely ignored currently include the provision that initial disclosures should include a full production or description of documents supporting a party's claims or defenses and a full list of individuals with information about those claims or defenses. FED. R. CIV. P. 26(a)(1). This observation is based on my own experience in eight years of civil litigation practice, as well as conversations with current civil litigators, and is supported by surveys of attorneys across the United States. *See, e.g.*, EMERY G. LEE III & THOMAS E. WILLGING, FED. JUD. CTR. NAT'L, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 114–15 (2009) [hereinafter LEE & WILLGING, PRELIMINARY REPORT] (quoting surveyed attorneys stating "[i]n general many lawyers fail to comply with the rule requiring initial disclosures" and "[w]hen a party does comply, the initial disclosures are barely sufficient").

[117] *See, e.g.*, Herzog v. St. Peter Lutheran Church, 884 F. Supp. 2d 668, 671 (N.D. Ill. 2012) (reflecting a total of three depositions taken by close of discovery).

[118] *See, e.g.*, *In re* Intuniv Antitrust Litig., No. 1:16-cv-12653, 2021 U.S. Dist. LEXIS 26012, at *30 (D. Mass. Jan. 29, 2021) ("[T]here have been dozens of depositions.").

limited by, or even affected by, the rules.[119] The case law is replete with off-hand references to large numbers of depositions having been taken in particular cases, with no indication in the record that court permission was ever sought.[120]

In some cases, the Rules could be said to function as fence posts or as suggested guidelines. They function as fence posts when they provide certain bright-line entitlements. For example, because Rule 30(a) permits up to ten depositions (absent a stipulation for more), a party receiving fewer than ten deposition notices cannot object on grounds that these depositions are too numerous.[121] But it may still seek to avoid the depositions on grounds of relevance or cumulativity. In practice, this can render the cap virtually meaningless. An eleventh deposition will routinely be agreed to if it is "relevant to any party's claim or defense and proportional to the needs of the case,"[122] and, conversely, a ninth deposition will be resisted if it fails to meet that requirement.[123] The Rules function as suggested guidelines when they provide a starting point for negotiations, often leaving significant room for interpretation and maneuvering. For example, Rule 33 permits twenty-five interrogatories "including all discrete subparts,"[124] inviting lawyers

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[119] For a more detailed discussion of the Rules' effect on the number of depositions taken, see *infra* section III.A.

[120] *See, e.g.*, Yourga v. City of Northampton, No. 16-30167, 2018 U.S. Dist. LEXIS 151958, at *3–4 (D. Mass. Sep. 6, 2018) (explaining that the plaintiff had already taken sixteen depositions with four more scheduled by the time defendant sought to take four more resulting in a total of twenty-four depositions); Marchand v. Town of Hamilton, No. 09-10433, 2011 U.S. Dist. LEXIS 19666, at *7 (D. Mass. Feb. 9, 2011) (reporting twenty-six days of depositions having taken place without indication of court approval); *In re* Intuniv Antitrust Litig., 2021 U.S. Dist. LEXIS 26012, at *30 (stating that "there have been dozens of depositions," without any reference to previous court intervention); Rosie D. *ex rel.* John D. v. Patrick, 593 F. Supp. 2d 325, 328 (D. Mass. 2009) (noting that "scores of depositions" have been taken, without any indication of prior court permission).

[121] *See* FED. R. CIV. P. 30(a)(2) (noting that a party may notice up to ten depositions without leave from the court).

[122] *Id.* R. 26(b)(1).

[123] *See id.* (requiring deposition requests to be relevant and proportional). For depositions in excess of ten, the burden shifts, however. For depositions one through ten, the deposition is presumptively permitted. *See* Marrero, *supra* note 3, at 1660 (characterizing the first ten depositions as presumptive). For depositions in excess of ten, the party seeking the deposition has to seek agreement from the opposing party or permission from the court. FED. R. CIV. P. 30(a)(2).

[124] FED. R. CIV. P. 33(a)(1).

to hone the art of multi-question interrogatories without creating "discrete subparts."[125] Furthermore, a party may be willing to accept interrogatories in excess of twenty-five by negotiated stipulation.[126]

The discovery rules' most salient function may well be their allocation of responsibilities.[127] Even when they provide little substantive guidance, the rules clarify the parties' and the court's respective responsibilities along the procedural way. Had there been no rules of discovery procedure, the parties' freedom to shape the discovery process may not have been as clearly defined.

C. A DEFINITION OF DISCOVERY CULTURE

What the parties allow each other to do during the discovery process and the ways in which they allow each other to interpret the rules, stipulate around the rules, or even ignore the rules altogether is a matter of Discovery Culture: a set of practices that develops in a legal community over time and governs what discovery requests are considered reasonable or excessive, when a party might cooperate or resist, and when it might seek the court's intervention.

In this Article, I use the term Discovery Culture to refer to the norms and practices that govern those aspects of the civil discovery process that are neither directly determined by the FRCP or other sources of law, nor so novel that how courts might rule on them is unknowable. One might think of discovery decisions as being subject to three forces. (*See* Fig. 1.) One force derives directly from the rules of procedure that apply to the discovery process. A second force derives from other formal sources, such as substantive law, rules of evidence, or common-law conceptions of privilege. The third force arises from Discovery Culture.

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[125] *See* Marrero, *supra* note 3, at 1660 (noting that parties prepare interrogatories that can contain "hundreds of written questions, some purposely arranged with subparts and parts of subparts that resemble an outline of the tax code").

[126] *See id.* (indicating that in practice the number of interrogatories can run in the hundreds); *see also, e.g.*, Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc., No. 02-12102, 2003 U.S. Dist. LEXIS 19629, at *2 (D. Mass. Oct. 30, 2003) (stating that the parties stipulated to fifty interrogatories in excess of the twenty-five allotted by the Rules).

[127] *See infra* notes 211–227 and accompanying text.

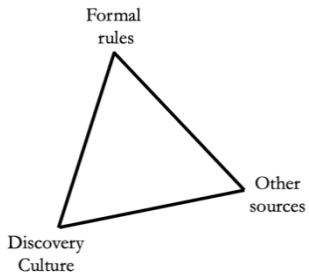

Figure 1: The Forces Operating on the Civil Discovery Process

Many discovery scenarios are governed by a combination of forces. For example, parties negotiating production of documents will be operating under the force of the Rules (which establish the availability of document requests and a few basic parameters),[128] other formal sources (such as substantive law informing which materials are relevant, and common or statutory law governing privilege and work product),[129] and Discovery Culture (which informs almost everything else: what sources of documents will be searched, with what search terms, for which time period, what metadata will be provided, how privilege will be asserted, etc.).

There are also scenarios that are governed by none of the three forces. These involve issues so novel or unusual that they not only are not contemplated by the Rules or by other sources of law, but also have not yet crystallized into Discovery Cultural norms. A novel form of data storage might fall into this category for a while, until practice catches up and customary ways of handling this type of storage become entrenched and incorporated in the prevailing Discovery Culture.[130] During this period, how a court might rule on

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[128] *See* FED. R. CIV. P. 34 (establishing the contours of a party's production of documents).

[129] *See*, *e.g.*, *id.* R. 26(b)(5) (relating to the discovery of information that is "privileged or subject to protection").

[130] The rise of Slack-message discovery provides a recent example. Slack corporate chat platforms did not exist prior to 2013 and initially there were no practical—let alone customary—ways to gather discoverable data from a Slack environment. *See* John Koetsier, *Flickr Founder Stewart Butterfield's New Slack Signed Up 8,000 Companies in 24 Hours*, VENTUREBEAT (Aug. 15, 2013, 5:27 PM), https://venturebeat.com/2013/08/15/flickr-founder-

the issue is, in a sense, unknowable, because there is neither law nor custom to guide the decision.

Scenarios governed by Discovery Culture are numerous, some more directly tied to formal rules than others. The norms of Discovery Culture can be roughly divided into three categories: (a) norms that supply the content of norm-referential rules; (b) norms that relate to matters addressed by default-setting rules; and (c) norms that fill gaps in the rules.[131]

Norms in the first category provide context for norm-referential rules,[132] which, for example, allow discovery from sources that are "reasonably accessible," "proportional to the needs of the case," and not "unreasonably cumulative or duplicative."[133] Because such rules leave the parties' rights and obligations largely unspecified, and because (as discussed in section II.A) discovery disputes are rarely adjudicated by courts, filling in the details largely falls to the parties, with only limited court oversight.[134] The content of the norm-referential rules—i.e., what is considered reasonable or proportional in practice—is a matter of Discovery Culture. For example, a legal community will have norms that guide what volume of email it is reasonable to review in a particular kind of dispute, whether and when it is reasonable to retrieve documents

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stewart-butterfields-new-slack-signed-up-8000-companies-in-24-hours (describing Slack's launch in 2013); *see also The Lawyer's Guide to Discovery and Investigations in Slack*, LOGIKCULL, https://www.logikcull.com/slack (last visited October 2, 2022) ("[U]ntil recently, virtually no discovery platform was capable of handling [Slack data] . . . ."). These days, discovery from the Slack platform is common enough that Slack itself has created tools and relationships with discovery vendors to allow attorneys to gather Slack data. *See A Guide to Slack's Discovery APIs*, SLACK HELP CTR., https://slack.com/help/articles/360002079527-A-guide-to-Slacks-Discovery-APIs (last visited July 4, 2021) (explaining the process for collecting Slack data). Among the current frontiers in discovery practice might be the use of videoconferencing for depositions, inspections, and hearings. *See* Scott Dodson, *Videoconferencing and Legal Doctrine*, 51 SW. L. REV. 9, 10 (2021) (analyzing the impact of videoconferencing on procedural doctrine).

[131] We can expect there to be limited or no norms associated with the category of firm rules. As their name suggests, these rules provide firm guidance that does not invite deviation.

[132] *See supra* notes 106–109 and accompanying text (introducing the concept of norm-referential rules).

[133] FED. R. CIV. P. 26(b)(2)(B), (b)(2)(C)(i), (b)(1).

[134] *See supra* notes 72–85 and accompanying text (describing the cooperative nature of discovery and court's limited role in adjudicating discovery disputes).

archived on a tape drive or from conversations in a Slack environment, how flexible a party is expected to be when scheduling depositions, etc., etc., etc., and these norms may differ by practice area and geography, and change over time.[135]

Discovery Culture also governs practice around default-setting rules of civil procedure. For example, parties can take any number of depositions, of any duration, without approval from the court, so long as the opposing party agrees to depart from the default cap of ten.[136] The parties' assessment of the reasonability and proportionality of a particular number of depositions in a given case will be guided in part by how discovery proceeded in earlier, similar cases.[137]

Finally, Discovery Culture fills in numerous gaps in the rules.[138] Scenarios that are not explicitly addressed by the rules but come up with regularity include negotiations over the number of custodians to involve in an email review, the number and type of search terms

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[135] *See, e.g.*, *supra* note 130 (discussing the evolution of discovery from Slack environments); *see also* LEE & WILLGING, PRELIMINARY REPORT, *supra* note 116, at 119 (quoting a surveyed attorney's comment: "I feel the various proposed rule changes of late are behind, by at least a few years, the curve of learning and practice"); *infra* notes 157–172 and accompanying text (exploring variation in attorney practice across geographies).

[136] *See* FED. R. CIV. P. 30(a), (d) (providing for stipulations between the parties regarding the time and duration of depositions). In practice, parties do not necessarily explicitly stipulate to depositions in excess of ten. The noticing party simply notices the deposition, and if the responding party does not raise an objection, the deposition goes ahead. *See* 7 MOORE ET AL., *supra* note 34, § 29.05(1) (noting that committing stipulations regarding discovery procedure to writing is good practice, but not required).

[137] *See, e.g.*, LEE & WILLGING, PRELIMINARY REPORT, *supra* note 116, at 184–85 (quoting a surveyed attorney's comment: "In this case, I had worked with the opposing attorney on a number of other trials. We were able to meet early on and work out an agreement. . . . Opposing counsel . . . is a long time adversary, so we enjoy a mutual respect and civility in cooperating in discovery matters to gain more efficient results").

[138] Borrowing a term from H.L.A. Hart, one might refer to these scenarios as falling within the "open texture" of the rules. *See* H.L.A. HART, THE CONCEPT OF LAW 120–32 (Oxford Univ. Press 1961) (setting forth a theory of the open-textured nature of language); *see also* Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1747 (1992) (describing the rules of discovery as "loosely textured rules"); Blair, *supra* note 15, at 801 (claiming that the procedural rules comprise "predominately of open-textured standards rather than rules").

to employ in a search of electronic documents, and a variety of more technical aspects of the discovery process.[139]

All three categories of norms could be influenced by norms of collegiality. It is customary, for example, to schedule depositions on mutually agreed-upon dates, even though no rule requires this, and even though it is not necessarily in the parties' interest to accommodate each other's scheduling preferences.[140] Likewise, extensions on discovery deadlines are often liberally granted, in anticipation of future reciprocation of this courtesy.[141] Norms of collegiality, however, can also be exploited for strategic purposes.[142]

In summary, the discovery process as a whole is governed by three types of formal rules of procedure (norm-referential rules, default-setting rules, and firm rules); a variety of other sources of statutory and common law (including substantive law and law relating to various privileges); and three types of Discovery Cultural norms (norms providing context for norm-referential rules, norms governing departures from defaults, and norms filling in gaps in the formal rules).[143] One might expect norms to be the dominant force only when either there are no applicable formal rules or the

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[139] Just a few of many examples include: what types of metadata will be included in a document production; whether identical duplicates shall be produced; whether or not "email threading" will be employed (the review and/or production of only the most complete email chain); to what extent technology-assisted review tools will be used and how; and to what extent text and instant messages will be collected and reviewed. *See, e.g.*, BALL, *supra* note 69, at 292–303 (describing typical topics of discussion between counsel during a meet and confer about document production).

[140] *See* 7 MOORE ET AL., *supra* note 34, § 30.20(1)(b)(i) (advising that parties may schedule depositions "at their convenience, even if this results in a deposition at odd hours").

[141] *See, e.g.*, Lyndsay Markley, *A Primer on Professionalism*, 51 TORT TRENDS, no. 3, Sept. 2015, at 1, 2 (describing the common granting of extensions as an aspect of professionalism in law).

[142] *See, e.g.*, *Discovery Wars—The Meat and Potatoes of American Litigation*, STIMMEL L., https://www.stimmel-law.com/en/articles/discovery-wars-meat-and-potatoes-american-litigation (last visited Aug. 10, 2021) (explaining tactics that attorneys may employ in resisting opposing counsel's search for information). Norms of collegiality allow a lawyer to deploy scheduling constraints strategically, to ensure that witness depositions end up lined up in a desired order.

[143] As noted above, some aspects of discovery—those that are too novel or unusual for there to exist either a rule or a custom on point—are governed by none of these sources. *See supra* note 130 and accompanying text.

applicable formal rules are impractical or a bad fit for the particular circumstances. However, given the weak nature and limited scope of formal rules, it is not a stretch to say that Discovery Cultural norms are the dominant force in many discovery matters.[144] The legal community is simply used to operating outside of or around the rules when it comes to discovery.[145]

To clarify the concept and influence of Discovery Culture, it may be helpful to distinguish practices based on Discovery Culture from other actions engaged in in the absence of formal guidance. A lawyer who assesses how to respond to a discovery demand from a perspective infused by Discovery Culture will assess the demand informed by community practices: what the lawyer knows about community norms from past observations and experience, conversations with colleagues, etc. This assessment may differ, and may lead to a different conclusion, from an assessment informed only by the lawyer's own independent reasoning applied to the facts.[146]

The content of Discovery Culture can differ by practice area. In complex corporate litigation, no one bats an eye at document requests that result in the review of one million documents, but a search term that would result in *ten* million search hits would typically invite pushback and a demand for the narrowing of search terms.[147] In a smaller, less complex case, for example, in a dispute between two individuals, a million search hits would be much less acceptable.[148] The formal rules contemplate discovery "proportional to the needs of the case."[149] Those needs can be expected to vary by

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[144] *See infra* section II.D; *see also* Marrero, *supra* note 3, at 1657 (calling discovery "a virtually unpatrolled no-man's land").

[145] *See infra* section II.D.

[146] For some types of assessments, the latter is difficult to imagine. Assessments of "reasonability" or "timeliness" may well be impossible to make without reference to prevailing norms of some kind.

[147] This assertion is based on my own experience litigating complex civil cases and was confirmed with currently practicing litigators.

[148] *See, e.g.*, THOMAS E. WILLGING & EMERY G. LEE III, FED. JUD. CTR. NAT'L, IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL LITIGATION 6 (2010) [hereinafter WILLGING & LEE, IN THEIR WORDS] (quoting a plaintiff's attorney stating that "[s]takes particularly affect how much discovery one does" and a defense attorney stating that "[o]ur guide on costs is the amount at stake").

[149] FED. R. CIV. P. 26(b)(1).

case type and, in the absence of guidance from the formal rules, there is no reason to believe that notions of proportionality have developed identically in all areas of practice.[150]

D. EVIDENCE OF DISCOVERY CULTURE

A central feature of party-driven discovery is that it is largely hidden from the public eye. While the norms and practices of Discovery Culture to a greater or lesser extent are known or knowable by insiders, they may be unknowable to outsiders to a specific legal community.[151] They do not take the form of written rules or formal precedent, and while they govern a large part of the everyday practice of discovery, they do not tend to be documented systematically in a public way. Parties tend to work out discovery agreements between themselves, most of the time without the court's involvement, and when there is no dispute between the parties, it is well-documented that courts are reluctant to second-guess agreements reached between parties.[152] Even when a dispute is brought to court, a substantive discussion of the discovery dispute in question may remain hidden from public view. Only if the matter becomes the topic of a discovery motion are the substance of a dispute, the parties' arguments, and the court's reasoning in resolving it likely to come to light.[153] While discovery motions are

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[150] *See id.* R. 26(b)(1) & advisory committee's note to 2015 amendment (explaining that notions of proportionality can vary by substantive area, as they may depend both on the "monetary stakes" of a case and on the extent to which it seeks to "vindicate vitally important public or personal values"); *see also infra* notes 157–172 and accompanying text (discussing geographical variation in discovery practice).

[151] Outsiders include unrepresented parties, nonparties, out-of-state attorneys, newly admitted attorneys, and attorneys new to the relevant area of law. *See infra* Part IV.

[152] *See* Endo, *Contracting for Confidential Discovery*, *supra* note 32, at 1260 (indicating that courts have a "tendency to defer to parties' agreements"); Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 334 (1999) (asserting that courts tend to "defer to the parties' own resolution" of issues).

[153] *See* David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 714 (2007) (most orders produced by trial judges "are never fully explained and thus are not read by non-parties to lawsuits").

not rare, in the overall practice of civil discovery they are the exception rather than the rule.[154]

If Discovery Culture is largely invisible to the public, how do we know that it exists? While empirical evidence of its full scope and content is difficult to come by, glimmers of Discovery Culture and its widescale influence can occasionally be observed in a public setting. In this section, I gather some of this evidence in hopes of convincing the reader that Discovery Culture exists and has a profound influence on how civil discovery is practiced. I first review indications of Discovery Culture in recent lawyer surveys, litigation practice guides, descriptions of the discovery process, and historic rule changes. Next, I analyze discovery opinions from three representative federal district courts to supply further evidence of Discovery Culture's influence.

In asserting that the civil discovery process is governed to a significant extent by Discovery Culture, I am making two claims: (1) there are significant parts of the civil discovery process that are governed by party behavior rather than by formal rules; and (2) the party behavior that governs significant parts of the civil discovery process is based in large part on community norms. This section will present evidence for both.

[154] *See supra* notes 72–85 and accompanying text (discussing why parties tend not to involve the court in discovery disputes).

1. Traces of Discovery Culture in Surveys, Commentaries, and Rule Changes. In 2009 and 2010, the Federal Judicial Center performed a series of wide-ranging surveys and interviews of civil litigators.[155] The researchers contacted attorneys of record for a large sample of recently closed federal civil cases that were likely to have involved discovery and solicited their views and experiences during various aspects of civil practice.[156] The studies were not aimed at exploring Discovery Culture, but in responding to questions about matters such as court involvement in discovery and suggested rule changes, the responding attorneys provided a rare recorded glimpse of it. Their responses to survey and interview questions evoke a civil discovery practice in which local and practice-area-specific subcultures play an important role, practitioners know each other, and are used to collaborating on discovery matters, along lines known to those inside the culture, but not necessarily to outsiders. Here is a small sample:

> "*I practice primarily admiralty law and get along well with the other admiralty practitioners in the state of Florida. We stream line discovery which makes litigation cost effective and beneficial to client.*"[157]
>
> "*I would much rather deal with an employment law specialist from a large firm than with a generalist lawyer from a small law firm. The generalist may do things we don't expect . . . .*"[158]
>
> "*There are some dedicated lawyers who handle employment cases and they . . . do a fine job and we handle those cases efficiently. Then there are a group of outliers and some dabblers.*"[159]

[155] LEE & WILLGING, PRELIMINARY REPORT, *supra* note 116; WILLGING & LEE, IN THEIR WORDS, *supra* note 148.

[156] To create their "discovery-heavy" sample of cases, the researchers eliminated case types that tend to be litigated without discovery, such as bankruptcy appeals, habeas cases, and student loan collection cases. LEE & WILLGING, PRELIMINARY REPORT, *supra* note 116, at 77. More than eighty percent of responding attorneys reported that some amount of discovery had taken place in the cases about which they were contacted. *Id.* at 8.

[157] *Id.* at 159.

[158] WILLGING & LEE, IN THEIR WORDS, *supra* note 148, at 14.

[159] *Id.*

> "*In single plaintiff employment cases in my practice area the lawyers tend to cooperate in discovery and have very few disputes. I am not sure if that is because of the federal bench in Alabama or because of the temperament of the local lawyers.*"[160]
>
> "*Oregon is a congenial place to practice. We generally work out a lot of issues without court intervention.*"[161]
>
> "*I feel the various proposed rule changes of late are behind, by at least a few years, the curve of learning and practice.*"[162]

Because these comments are scattered among free-form responses to broader questions about civil discovery, it is impossible to tell how representative they are of civil litigators' views overall. They provide, however, one piece of evidence of the importance of Discovery Culture in civil discovery practice.

The survey comments also provide a modicum of support for the notion that discovery practices can evolve differently in different practice areas. Consider this snapshot of attitudes toward electronically stored information (ESI) circa 2009, from three different attorneys:

> "*Since 2004, probably 90% of my time has been spen[t] on discovery and a large portion on ESI.*"[163]
>
> "*I have never met an attorney who wants to get into the electronic issues. Neither of us brings it up.*"[164]
>
> "*[I]n every case in which I have been involved . . . we enter an agreement up front to not have to produce ESI except in PDF form.*"[165]

These comments taken together indicate that as of 2009, ESI was being approached very differently by different legal subcultures.

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[160] LEE & WILLGING, PRELIMINARY REPORT, *supra* note 116, at 162.

[161] *Id.* at 123.

[162] *Id.* at 119.

[163] *Id.* at 172.

[164] WILLGING & LEE, IN THEIR WORDS, *supra* note 148, at 16.

[165] LEE & WILLGING, PRELIMINARY REPORT, *supra* note 116, at 172.

Practice guides and client guides provide further confirmation of the existence of norms-driven discovery practices. They occasionally discuss how certain discovery devices are typically used, rather than only what is required to comply with the rules. This type of guidance can delve into the minutiae of various discovery instruments,[166] as well as indicate variation in the extent to which these instruments are used in different legal communities.[167]

Judges and academics have also remarked on the way parties shape the course of discovery in norms-driven ways. Writing about the civil discovery process, Hon. Lee. H. Rosenthal (U.S. District Court for the Southern District of Texas) identified a "gap" between the rules and their application that limits the rules' effectiveness.[168] As an example, she described, disapprovingly, litigators' tendency to provide the court with "minimalist" discovery plans[169] and, more generally, how ineffective various rule changes over the years have been.[170] Hon. Victor Marrero (U.S. District Court for the Southern District of New York) blamed attorney culture for the prevalence, in his view, of discovery abuse in civil cases, writing that civil

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[166] *See, e.g.*, BALL, *supra* note 69, at 276 (listing the "typical" metadata fields included in a document production); *id.* at 209 (indicating that even though better suited formats exist, lawyers often exchange documents in Tag Image File Format (TIFF)); *id.* at 277–78 (describing typical discussions about deduplication of documents); Brad Perry, *Considering Time Zones When Processing ESI*, LINKEDIN (July 18, 2018), https://www.linkedin.com/pulse/considering-time-zones-when-processing-esi-brad-perry ("[I]t is common practice to normalize the entire document collection to a standard time zone."); Tyler D. Trew, *Ethical Obligations in Electronic Discovery*, ABA PRAC. POINTS (June 5, 2018), https://www.americanbar.org/groups/litigation/committees/professional-liability/practice/2018/ethical-obligations-in-electronic-discovery ("In jurisdictions that don't impose court-mandated ESI conferences, it has become commonplace for parties to negotiate and enter into ESI protocols.").

[167] *See, e.g.*, WEIL & BROWN, *supra* note 65, ¶ 8:930 (noting that in California practice, parties will often voluntarily agree to attach documents referenced in interrogatories, even though it is not required); *Discovery*, VT. FAM. L., https://www.vermontfamilylaw.com/discovery (last visited Mar. 26, 2023) (explaining that in Vermont family law practice, parties will often ask each other for a set of financial documents rather than engage in formal discovery).

[168] *See* Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 231 (2010) (discussing this "gap" and its implications).

[169] *Id.* at 241.

[170] *See id.* at 235–36 ("Although the debate over the change in the scope of discovery was passionate, it too was perceived as having little effect on practice.").

discovery is a "*virtually* unpatrolled no-man's land of litigation."[171] Writing about discovery practices, Prof. Stephen Subrin noted that "[w]hat actually happens in litigation is often a faint, distorted shadow of what appears in the rules or the academic literature."[172]

The history of certain rule amendments provides additional evidence of the existence and influence of Discovery Culture. Rules have sometimes been amended to codify existing disregard. For example, in 1970, Rule 29 was amended to permit parties to modify discovery procedure by agreement. The advisory committee noted that "[i]t is common practice for parties to agree on such variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect."[173] Also amended in 1970 was Rule 34, to eliminate a requirement of court approval before service of a discovery request. The advisory committee noted that the revision was "to a large extent a reflection of existing law office practice."[174]

In other instances, amendments were intended to effect a major course correction, but in practice barely had any effect. An amendment to Rule 26 in 1983, intended by the drafters as a "180-degree shift" in the approach to discovery by introducing explicit limitations on the scope of discovery, "seems to have created only a ripple."[175] A later amendment to the same rule was so controversial that it took twenty years to enact and yet it, too, was "perceived as having little effect on practice."[176]

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[171] Marrero, *supra* note 3, at 1657.

[172] Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts*, 52 DEPAUL L. REV. 299, 301 (2002).

[173] FED. R. CIV. P. 29 advisory committee's notes to 1970 amendment.

[174] *Id.* R. 34 advisory committee's note to 1970 amendment; *see also* Shapiro, *supra* note 16, at 1003 (describing the requirement as "oft-ignored" before its removal).

[175] Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 353–54 (2013); *see also* Rosenthal, *supra* note 168, at 235 ("[T]his amendment 'seems to have created only a ripple in the caselaw, although some courts now acknowledge that it is clearer than it was before that they should take responsibility for the amount of discovery in cases they manage.'" (quoting 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2008.1, at 121 (2d ed. 1994))).

[176] Rosenthal, *supra* note 168, at 236. A more recent rule change, a 2020 amendment adding a meet-and-confer requirement about deposition topics to Rule 30(b)(6), may likewise end up having a limited effect, as "many litigators were already in the practice of having a meet and

2. Evidence of Discovery Culture in Court Opinions. The content and frequency of judicial opinions relating to discovery disputes provide additional evidence that discovery disputes are usually worked out between the parties, and that, on the rare occasions that they do reach court, unusual factors tend to be at play. To assess how frequently courts address discovery disputes, I reviewed opinions addressing Rule 30(a), which governs when depositions may be taken from fact witnesses, from three federal district courts for a period of ten years (2011 to 2020). I reviewed opinions from the federal district courts for the districts of Massachusetts, Minnesota, and Nevada, for two reasons: in recent years (1) the annual number of civil filings in these three district courts have been close to the average number of filings for federal district courts nationwide;[177] and (2) the distribution of case types filed in these three districts have been typical for a federal district court.[178] In other words, these three courts represent middle-of-the-pack federal district courts, with a roughly typical caseload.

For each of these three districts, I identified all opinions included in the Lexis+ database for the date range January 1, 2011 to December 31, 2020 that made reference to Rule 30(a), any subpart of it, or any range of rules that includes it.[179] The initial dataset

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confer as a best practice . . . ." *Electronic Discovery and Information Governance—Tip of the Month: Rule 30(b)(6) Has Changed—What Do You Need to Know?*, MAYER BROWN (Feb. 26, 2021), https://www.mayerbrown.com/en/perspectives-events/publications/2021/02/electronic-discovery-information-governance-tip-of-the-month-rule-30b6-has-changed-what-do-you-need-to-know.

[177] *See Federal Judicial Caseload Statistics, Table C-1*, U.S. DIST. CTS., (Mar. 31, 2020), https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (reporting civil cases filed, terminated, and pending by federal district, for one-year periods ending on March 31, 2019, and March 31, 2020).

[178] *See Federal Judicial Caseload Statistics, Table C-3*, U.S. DIST. CTS., (Mar. 31, 2020), https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (reporting civil cases filed, by federal district and nature of suit, for one-year periods ending on March 31, 2019, and March 31, 2020).

[179] In other words, the search captured references to Rule 30(a) or any subsections of it ("Rule 30(a)(1)," "Rule 30(a)(2)(A)," etc.), Rule 30, Rule "30 et seq.," Rule 30(a)–(b), Rules 30–37, etc. Note that disputes under Rules 30(b) through (f) are excluded from this analysis, though a few cases under Rule 30(b)(6) happened to be caught in searches for cases referencing Rule 30(a). Rule 30(b)(6) governs depositions of corporate representatives

identified in this manner contains 146 opinions: 22 from the District of Massachusetts, 33 from the District of Minnesota, and 91 from the District of Nevada.[180] Of these 146 opinions, 104 were issued by a magistrate judge and 42 by a district judge.[181] The data were further validated through a PACER docket search for the same courts and the same time period.[182] For further detail about the dataset, see the Appendix.

The objective of this review was to determine (1) how frequently courts are involved in disputes about whether a deposition of a fact witness can be taken; and (2) in what kinds of circumstances court involvement in these disputes typically occurs. While a thorough understanding of factors driving adjudication of deposition disputes would require a much larger dataset, the goal here is more modest: to evaluate the underlying observation of this Article that everyday discovery practices in the vast majority of instances are negotiated between the parties without court involvement.

Depositions of fact witnesses are among the most common discovery instruments.[183] Rule 30(a), governing these depositions,

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testifying on behalf of an organization. Like Rule 30(a) depositions, Rule 30(b)(6) depositions are usually noticed, scheduled, and taken without court involvement, but when unresolvable disputes do arise, they tend to be different in nature from those arising in connection with 30(a) depositions. For the sake of clarity and simplicity, the analysis in this section is limited to depositions of witnesses whose testimony was sought under Rule 30(a).

[180] For a tabulation of the cases in the dataset, see Appendix.

[181] *See* Appendix. In one case, an opinion was issued by a panel of three magistrate judges. Dargis v. Wyeth, Inc., No. 04-3967, 2012 U.S. Dist. LEXIS 189881 (D. Minn. Nov. 30, 2012).

[182] To confirm that in searching for opinions in the manner described above I was not missing a significant volume of deposition-related opinions recorded only as docket entries, I performed a parallel search of docket entries in the PACER database. I performed this search using Bloomberg software, for the same courts and time range. Because Bloomberg ignores punctuation and spacing, a search for "30(a)" considers text such as "9:30 am" a hit, making a search for "30(a)" by itself not feasible. Instead, I performed a search for docket entries mentioning "Rule 30(a)," "FRCP 30(a)" or "Fed. R. Civ. P. 30(a)." This PACER search turned up only sixteen additional deposition-related disputes for the ten-year period. It is difficult to learn the context of a deposition-related dispute from docket entries, but this PACER search confirms that there were not many decisions that were recorded on the docket rather than in written opinions. For further detail about the PACER search results, see Appendix.

[183] *See, e.g.*, 7 MOORE ET AL., *supra* note 34, § 30.02 ("[D]epositions [are] a major pretrial litigation event and often comprise the most significant or costly pretrial segment of a case."); LEE & WILLGING, PRELIMINARY REPORT, *supra* note 116, at 8, 10 (reporting on a survey of cases likely to involve discovery, and finding that discovery had occurred in more than eighty

consists mostly of "default-setting" components but also has one "firm" component.[184] The default-setting parts of the Rule provide that as a general matter, once discovery starts, the parties on each side of the case collectively can depose up to ten individuals, once, without permission from either court or opposing party.[185] They also provide that the parties can depose additional persons or the same individual more than once without permission from the court, so long as the opposing party agrees to stipulate to the additional depositions.[186] The firm part of the Rule specifies one special circumstance in which court approval is required regardless of other parties' willingness to stipulate: when the person to be deposed is "confined in prison."[187]

If the assumption is correct that the number and identity of individuals to be deposed is usually agreed upon between counsel for the parties without court involvement (whether based on prevailing community norms or negotiated in a vacuum), we expect the dataset to have a number of characteristics. First, we expect a substantial part of the dataset to reflect circumstances that could not have been resolved by the parties without court involvement: disputes involving unrepresented parties, nonparties, or depositions of incarcerated individuals, which require court permission. Second, we expect the remainder of the dataset to be small, reflecting the rarity of deposition disputes that could have been resolved by the lawyer without court involvement but for some reason were not. If the additional assumption is correct that parties negotiate discovery parameters against a backdrop of Discovery Culture, we expect this remainder of the dataset to largely reflect relatively unusual circumstances, where Discovery Cultural norms may not have been available as a source of guidance.

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percent of cases and depositions in fifty-four percent); *see also Litigation Corner: 3 Things to Remember if You Are Being Deposed*, SWEET STEVENS KATZ WILLIAMS (Oct. 30, 2014), http://www.sweetstevens.com/newsroom/litigation-corner-3-things-to-remember-if-you-are-being-deposed ("Depositions are common in almost every litigated case . . . .").

[184] *See* FED. R. CIV. P. 30(a) (setting forth requirements relating to the scheduling and taking of depositions).

[185] *Id.* R. 30(a)(1), (2)(A)(i).

[186] *Id.* R. 30(a)(1), (2)(A)(i)–(ii).

[187] *Id.* R. 30(a)(2)(B).

Table 1 summarizes the dataset and suggests that adjudication of deposition disputes is exceedingly rare.[188] 35 opinions in the initial dataset did not involve disputes about depositions, but were either false hits or stray references to Rule 30(a) in an unrelated context.[189] 39 additional opinions involved unrepresented parties, in most cases incarcerated plaintiffs. Four opinions involved nonparty witnesses who had refused or failed to appear for a deposition. The remaining dataset—consisting of disputes that could in principle have been resolved by counsel without adjudication—includes 68 opinions. This equals roughly one opinion per sitting judge or magistrate judge over a ten-year period[190] or one deposition-related dispute for every 1,532 civil cases filed in these three courts over the ten-year span.[191]

[188] For further detail on the dataset, see Appendix.

[189] False hits are search hits that are not true references to FED. R. CIV. P. 30(a). Stray references are search hits where the rule is mentioned in passing, in opinions that did not involve deposition-related disputes. For more detail, see Appendix and note a.

[190] The district courts for the Districts of Massachusetts, Minnesota, and Nevada currently collectively seat 67 judges: 40 district judges and 27 magistrate judges. The current number of judgeships (including open seats, but excluding judges in senior status) is 52. U.S. DIST. CT. DIST. MASS., https://www.mad.uscourts.gov; *Chambers Contact Information*, U.S. DIST. CT. DIST. MINN., https://www.mnd.uscourts.gov/chambers-contact-information; U.S. DIST. CT. DIST. NEV., https://www.nvd.uscourts.gov/court-information/judges.

[191] The number of cases initiated in the Districts of Massachusetts, Minnesota, and Nevada during the 2011 to 2020 period is 105,715. *See Statistical Tables for the Judiciary, Table C-1*, U.S. DIST. CTS., https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (last visited Mar. 6, 2023) (reporting civil cases filed, terminated, and pending by federal district, for each calendar year).

	D. Mass.	D. Minn.	D. Nev.	Total
Initial dataset	**22**	**33**	**91**	**146**
False hit or stray reference	8	2	25	35
Unrepresented party	4	10	25	39
Nonparty witness	1	-	3	4
Remaining dataset	**9**	**21**	**38**	**68**
Obstruction at deposition	2	2	7	11
Sanctions/rebuke	-	4	4	8
Other ("legitimate disputes")	**7**	**15**	**27**	**49**

Table 1: Opinions Dated 2011–2020 Reflecting Disputes under FED. R. CIV. P. 30(a)

In 19 cases, the dispute was evidently brought about by aberrant behavior by counsel or parties. Eleven times, an exasperated court granted a party the right to re-depose a witness because either counsel or witness had obstructed the deposition the first time around.[192] In eight additional opinions, the court either imposed sanctions or otherwise issued a stern rebuke of one or more parties' conduct.[193] This leaves 49 opinions in which a court adjudicated a

[192] *See* Appendix. The dataset is too small to make any inferences, but it may be relevant that almost half of the obstruction cases and several of the cases in which counsel's behavior triggered a rebuke from the court involved at least one party represented by counsel from a different jurisdiction, admitted pro hac vice.

[193] *See, e.g.*, Agarwal v. Or. Mut. Ins. Co., No. 2:11-cv-01384, 2013 U.S. Dist. LEXIS 7717, at *7 (D. Nev. Jan. 18, 2013) ("The motion shows a casual and consistent disregard for the Federal Rules, Local Rules, and discovery process in general."); EEOC v. Mattress Firm, Inc., No. 2:13-cv-1745, 2014 U.S. Dist. LEXIS 152842, at *4 (D. Nev. Oct. 27, 2014) ("[T]his dispute would have been avoided if counsel for either party fully satisfied their ethical obligations."); Great Lakes Gas Transmission L.P. v. Essar Steel Minn., LLC, No. 09-3037, 2011 U.S. Dist. LEXIS 164622, at *47 (D. Minn. Mar. 3, 2011) ("[A] monetary sanction in all practicality would be futile at deterring the noncompliant party in this case, given . . . their demonstrated inclination towards unnecessarily litigious tactics to date.").

discovery-related dispute without indicating that the dispute should never have been brought.

The first thing to note is that 49 deposition-related disputes in a ten-year span, heard by district or magistrate judges in three federal courts, does not amount to much. Since depositions are frequently used discovery devices, this number indicates that most depositions are noticed and taken without court involvement. A second observation is that many (albeit not all) of these 49 opinions involve relatively unusual situations, such as witnesses residing abroad, depositions of representing counsel acting as a witness, and the emergency deposition of a terminally ill witness.[194] For these kinds of exceptional circumstances, there may not have been customary resolutions under prevailing norms of discovery.

In sum, a review of ten years' worth of opinions relating to depositions under Rule 30(a) from three federal district courts indicates that adjudicated disputes under Rule 30(a) are rare and tend to come up primarily in instances involving unrepresented parties, nonparties, outright obstruction by counsel or parties, or relatively unusual fact patterns that can be expected to have no customary approach in Discovery Culture.

III. THE NATURE OF DISCOVERY CULTURE

This Part further explores the nature of Discovery Culture and the role it plays in the civil discovery process. It argues that the discovery process is not well described as governed by formal law or the "shadow of the law" (section III.A) but is more akin to a framework of "order without law" (section III.B).

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[194] *See, e.g.*, McGee v. Hanger Prosthetics & Orthotics, Inc., No. 2:12-cv-00535, 2013 U.S. Dist. LEXIS 55563, at *4 (D. Nev. Apr. 18, 2013) (involving a party resisting in-person deposition of witness whose Canadian citizenship application might be jeopardized if he were to travel outside of Canada); Oehmke v. Medtronic, Inc., No. 13-2415, 2015 U.S. Dist. LEXIS 64340, at *3–4 (D. Minn. Mar. 26, 2014) (involving a party seeking deposition of counsel to opposing party); Snow Covered Cap., LLC v. Weidner, No. 2:19-cv-00595, 2019 U.S. Dist. LEXIS 107557, at *1–2 (D. Nev. Jun. 26, 2019) (involving a party seeking expedited deposition of terminally ill witness).

A. THE LAW AND ITS SHADOW

At first glance, the practice of civil discovery might look like a process governed by legal rules. The rules of procedure that apply to the practice are enacted through a well-defined sequence of steps[195] and, after their adoption, are recognized by federal judges as legal authority applicable to civil actions brought in federal district courts.[196] The practice that is the subject of these rules, therefore, could be said to exhibit certain characteristics of a system governed by law or taking place in the shadow of the law. However, the norm-inflected interpretations and applications of the rules that suffuse the everyday practice of civil discovery do not fit well within standard positivist conceptions of a formal legal system.[197] As described in Part II, the civil discovery practice is replete with practices that are not the subject of formal rules at all.[198] The legal force of these social practices is much less defined than that of formal legal rules. While judges may decide to adopt and enforce a particular discovery custom, any entitlement to enforcement of a discovery practice is much more attenuated than an entitlement

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[195] *See* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2119–24 (1989) (describing the process for amending the FRCP).

[196] *See* FED. R. CIV. P. 1 (providing that the FRCP apply in "all civil actions and proceedings in the United States district courts," with certain narrow exclusions and limitations); FED. R. CIV. P. 81 (listing exceptions). Applying H.L.A. Hart's concept of law, for example, we might say that the Rules of Civil Procedure are rules recognized by the federal judicial system's Rule of Recognition. *See* HART, *supra* note 138, at 97–120 (introducing the concept of a Rule of Recognition, which determines which rules officials in a legal system regard as part of the system's body of law).

[197] There are conceptions of law that are capacious enough to include norm-based systems of social ordering. *See, e.g.*, DICK W.P. RUITER, LEGAL INSTITUTIONS 119–35 (Francisco Laporta et al. eds., 2001) (discussing conceptions of "unwritten law"). For purposes of this Article, I use the term "law" to refer to formal forms of law recognized by jurisdictions within the U.S., including statutory law and law deriving from precedent.

[198] Applying H.L.A. Hart's framework, we might note that these practices are observed from the internal point of view, but not recognized by the legal system's Rule of Recognition. *See* HART, *supra* note 138, at 86–88, 92 (exploring sources of obligation); SCOTT J. SHAPIRO, LEGALITY 81–82, 96–97 (Harv. Univ. Press 2011) (discussing and critiquing Hart's theory).

deriving from a formal rule.[199] The aspects of the practice that have a tenuous connection to the formal rules—those that are either specified in norm-referential or default-setting rules or not specified at all—do not fit commonly used descriptions of a legal system. Because the latter aspects predominate, not only is the civil discovery process as a whole inadequately characterized as a legal system; the same may be true even for the parts of the process where the Rules *do* exert some force.

Even with respect to the formal rules of civil procedure that apply in the discovery context, there is room for debate as to whether they can be considered rules of law. These rules have been formally enacted and are without doubt recognized as a source of legal authority by U.S. courts.[200] In light of the dominance of Discovery Culture as a force governing the discovery process, however, it is far from obvious that the rules affect the behavior of members of the relevant community. While it is rare for lawyers to behave in direct violation of a rule of discovery procedure, it is common for rules to exert a very weak force on behavior in the discovery process.

An important question to ask in determining whether a rule is a legal rule is whether behavior would be different if the rule did not exist. If an individual behaves in a way that is compliant with a rule, but not *because of* the rule, we might ask whether the

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[199] *See, e.g.*, AMTRAK v. Cimarron Crossing Feeders, No. 16-cv-1094, 2017 U.S. Dist. LEXIS 157363, at *20 (D. Kan. Sept. 26, 2017) (permitting inquiry at deposition about materials reviewed by deponent in preparation, because "it is not unusual for attorneys to ask deponents what they have reviewed in preparation for their deposition"). Opinions differ on the extent to which courts ought to give force to custom. *See, e.g.*, Ann E. Carlson, *Classifying Social Norms*, *in* THE JURISDYNAMICS OF ENVIRONMENTAL PROTECTION: CHANGE AND THE PRAGMATIC VOICE IN ENVIRONMENTAL LAW 407 (Jim Chen ed. 2003) (surveying criteria courts might use in deciding whether to enforce community norms); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 127 (1992) (explaining that decisions relying on community norms can be unpredictable). This carries through in a context of party preference. *See* Davis & Hershkoff, *supra* note 11, at 562 ("[T]he judge has an obligation to ensure—at some level—the integrity of the court system and not simply to endorse the procedural preferences of the parties."); Effron, *supra* note 7, at 134 (noting that courts routinely enforce party choices); Shapiro, *supra* note 16, at 1024 (arguing that courts only withhold enforcement of party preferences when there is evidence of abuse); Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 22 (2014) (explaining that party conduct can affect the contours of law, but only to the extent that the law allows it to).

[200] *See supra* note 196 and accompanying text.

individual is in fact abiding by the rule: i.e., whether there is a causal connection between the existence of the rule and the individual's behavior. Joseph Raz's "service conception" of law is instructive here.[201] In this conception, if a rule does not guide behavior—i.e., if individuals governed by the rule behave identically regardless of whether the rule exists—then the rule is not a law, in Raz's view.[202] The rule does not provide any service, i.e., it does not help those who are supposed to be guided by it. Put more colloquially, the rule does not *do* anything.[203]

Many discovery rules are so broad that a wide range of behavior could be thought of as compliant with the rules. When a party notices ten or fewer depositions, for example, it is in compliance with Rule 30(a)(2)(A)(i), which caps the number of depositions at ten absent stipulation or court approval.[204] When it notices more than ten depositions under a stipulation with opposing parties, it is also in compliance with the rule.[205] When it notices more than ten depositions without explicitly stipulating to the depositions in excess of ten, it is arguably *still* in compliance with the rule: so long as the other side does not object, the parties' course of conduct can be thought of as an implicit stipulation to permit the party to take more than ten depositions.[206] The rule governing depositions could be said to affect the behavior of the parties (i.e., to "provide a service") some of the time: without the rule, formal stipulations might not be a part of the negotiation process relating to the

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[201] *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 63 (1968) [hereinafter RAZ, THE MORALITY OF FREEDOM] (introducing the service conception of law); Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1014, 1026 (2006); *see also* Gillian K. Hadfield & Barry R. Weingast, *What Is Law? A Coordination Model of the Characteristics of Legal Order*, 4 J. LEGAL ANALYSIS 471, 502 (2012) (reviewing "coordination accounts" of law grounded in a perspective that "a rule counts as a legal rule if the participants in a given legal community believe and behave as if it were a legal rule").

[202] *See* RAZ, THE MORALITY OF FREEDOM, *supra* note 201, at 63 (explaining the service conception of law).

[203] *Id.*

[204] *See* FED. R. CIV. P. 30(a)(2)(A)(i) ("A party must obtain leave of court, and the court must grant leave . . . if the parties have not stipulated to the deposition and . . . the deposition would result in more than 10 depositions being taken . . . .").

[205] *Id.* R. 30(a).

[206] This happens routinely. *See supra* note 142 and accompanying text.

scheduling of depositions. In other words, it may well be the case that parties enter into discovery stipulations because the Rules require them to do so. But in a world without Rule 30(a)(2)(A)(i), negotiations about the scheduling of depositions would still take place, and the parties might still reach agreement at a number of depositions smaller than, greater than, or equal to ten. In reality, the rule capping depositions at ten per party is probably most powerful there where it, strictly speaking, does *not* operate: by barring depositions in excess of ten, the rule implicitly permits depositions in numbers smaller than ten.[207] A party can object to, say, a fifth deposition on a variety of grounds, but not on numerosity grounds alone.[208]

The number of depositions taken by a party, therefore, need not be ten or lower for the rule to have operated. A law, even if it is not enforced, can promote compliance with a norm expressed by the law.[209] Furthermore, compliance with a rule need not be universal for the rule to have an effect.[210] Nevertheless, when the number of depositions actually agreed to greatly exceeds ten, it is hard to argue

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[207] One could interpret Rule 30(a)(2)(A)(i) as expressing a view that ten depositions in a case is presumptively reasonable. Such a view could be a codification of community norms. *See* Leonard Hoeft, *The Force of Norms? The Internal Point of View in Light of Experimental Economics*, 32 RATIO JURIS 339, 356 (2019) (explaining that law can express to outsiders what community norms are).

[208] The party can still object to the deposition on grounds of relevance, cumulativity, or, for example, the prospective deponent's status as an "apex" witness. *See* FED. R. CIV. P. 26(b) (setting forth the scope and limits of discovery); Rembrandt Diagnostics, LP v. Innovacon, Inc., No. 16-cv-0698, 2018 U.S. Dist. LEXIS 17766, at *15 (S.D. Cal. Feb. 2, 2018) (explaining that under the apex doctrine, depositions of high-level executives are disfavored when alternative discovery methods are available).

[209] *See, e.g.*, Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant,* 144 U. PA. L. REV. 1643, 1674 (1996) ("State enactment, without enforcement, can sometimes tip the social system into conformity with the law by causing citizens to believe correctly that more of them will enforce the norm."); Carlson, *supra* note 199, at 117 (discussing the intersection of social norms and law).

[210] *See supra* note 209; *see also* Hoeft, *supra* note 207, at 356 ("Even nondeterrent sanctions do have an influence."); HART, *supra* note 138, at 91–96 (posing that universal compliance is not a prerequisite for legality; primary rules are rules with which *most* members of a community comply *most* of the time).

that the rule has had a substantial effect on the behavior of the parties.[211]

We can expect the rule to operate most strongly in cases where the number of depositions taken is somewhere close to ten. As a result of the rule, a party considering noticing an eleventh or twelfth deposition may experience more hesitation than it did when it noticed its third or seventh deposition. But since disputes over deposition requests are rarely adjudicated in written opinions,[212] it is unclear that many cases fall into this category. What opinions do exist suggest that the number of depositions taken in individual cases covers a wide range.[213] Even if we accept the notion that Rule 30(a)(2)(A)(i) has some bite in this category of cases, it is far from clear that this category is particularly common or that the rule's bite is particularly strong.

The rule regarding depositions is just one example, but the Rules' grip on other discovery instruments is equally loose. A similarly broad range of behavior could be considered in compliance with rules setting out norms of reasonability or proportionality, or with other default-setting rules.[214] In sum, the process of discovery is not well described as a process governed by formal (legal) rules. That is not to say that the entirety of civil discovery practice is extralegal in nature. The practice takes place within a legal framework that sets up long-range timelines, requires the parties to cooperate, makes the court available should disputes arise, and, on some

[211] Discovery is hardly the only area of law where legal obligations depend on notions of reasonability or other norm-based determinations, and this Article should not be read to imply that all such areas of law are governed more strongly by cultural practices than by legal rules. Discovery is unusual in the extent of its reliance on norm-referential standards, the relative lack of more robust rules, and the repetitive nature of the practice that provides fertile soil for the formation of habits and conventions.

[212] *See supra* notes 72–85 and accompanying text.

[213] *See, e.g.*, *In re* Lupron Mktg. & Sales Practs. Litig., 228 F.R.D. 75, 96 (D. Mass. 2005) (noting that class-action plaintiffs took twenty-six depositions); Bezdek v. Vibram USA Inc., 79 F. Supp. 3d 324, 333 (D. Mass. 2015) (noting that class-action plaintiffs took no depositions).

[214] For example, the Rules require parties to meet and confer to reach agreement on matters of reasonability, FED. R. CIV. P. 37(a)(1), but it is not self-evident that these negotiations are spurred or affected in any way by this requirement. In addition, it cannot be assumed that a court in absence of such rules would not similarly require reasonable behavior.

specific aspects of discovery, may have well-developed case precedent. But what actually happens in discovery in many cases is determined by other forces. The Rules may have played—and may still play—a role in creating the space in which Discovery Culture can develop,[215] but they do not themselves directly determine discovery behavior to a large degree.

Although the norms of Discovery Culture do not fit positivistic conceptions of legal rules very well, they can take on some flavor of legality. Judges adjudicating discovery disputes may "recognize" the validity of a given practice in a legal community. That is to say, a judge may observe and give force to a social norm, even if the norm does not—prior to the adjudication—have the force of law.[216] For example, if a judge, in adjudicating a discovery dispute, either explicitly or implicitly imports notions of reasonableness that derive from community norms, then the norms at issue are transformed into formal legal rule.[217] They are authoritative in the case at issue and, having served as a basis for the judge's decision, may serve as precedent in future cases.[218] In this way, a community practice can make its way into law.[219]

Some former Discovery Cultural practices may have attained the status of law in this manner. For example, not long ago, a privilege log describing documents withheld from a production on the basis of attorney-client privilege or attorney work product would

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[215] The opposite is true as well: some formal rules have been heavily influenced by Discovery Culture. *See supra* section II.D.

[216] *See supra* section II.D.

[217] This transubstantiation will often not be complete. Discovery pronouncements by a judge are often not published at all or published in a summary order. *See* Hoffman et al., *supra* note 153, at 714 (noting that most decisions are not published). This renders them rather ineffectual as precedent.

[218] To put it in H.L.A. Hart's terms, once a judge, in a judicial opinion, recognizes a community norm as authoritative, the legal system's Rule of Recognition will henceforth recognize the judge's opinion and reasoning as a source of legal authority. *See* HART, *supra* note 138, at 92 (explaining the Rule of Recognition concept).

[219] For examples where this has happened, see Shapiro, *supra* note 16, at 1003 (noting that prior to 1970, Rule 34 required a court order for discovery requests, but this requirement was "oft-ignored" and ended up being eliminated from the rules); FED. R. CIV. P. 29 advisory committee's note to 1970 amendment ("It is common practice for parties to agree on [certain procedural] variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect.").

customarily provide a description of each individual document.[220] As document volumes increased over time, this practice became increasingly burdensome. Litigants started to experiment with "category logs" (also known as "bucket logs"), in which documents would described by category rather than individually.[221] This practice originally took place without judicial sanction, but by now, in some jurisdictions, courts have ruled that a category log can satisfy the requirements of a privilege log.[222] In those jurisdictions, parties can now rely on legal precedent when they choose to log documents by category. Discovery Cultural practices can also attain the status of formal law by being codified as part of a rule amendment.[223]

In other instances, norms may not have been fully "converted" into law, but may still influence courts' decisions in adjudicating discovery disputes. By virtue of their involvement in status conferences and the occasional discovery dispute, and perhaps through their connections with members of the bar, judges may be quite familiar with current discovery practices and may take them into account when resolving a discovery dispute. The extent to which a judge has done so can be difficult to determine. Even on the rare occasions when a court is involved in a discovery dispute, the

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[220] *See, e.g.*, Sec. & Exch. Comm'n v. Thrasher, No. 92 Civ. 6987, 1996 U.S. Dist. LEXIS 3327, at *2 (S.D.N.Y. Mar. 19, 1996) ("Typically, a privilege log must identify each document and provide basic information, including the author, recipient, date and general nature of the document."); *see also* FED. R. CIV. P. 26(b)(5) (requiring description of information withheld under a claim of privilege or work product).

[221] For a sample of a category privilege log, see Michael Downey & Paige Tungate, *Practical Advice on Privilege Logs*, ABA L. PRAC. TODAY (Sept. 14, 2018), https://www.lawpracticetoday.org/article/practical-advice-privilege-logs.

[222] *See, e.g.*, Oracle U.S. v. Rimini St., No. 2:10-cv-00106, 2020 U.S. Dist. LEXIS 176646, at *19 (D. Nev. Sept. 25, 2020) (accepting "assertion of privilege based on a category of documents"); *Several Courts Allow Categorical Privilege Logs*, MCGUIREWOODS PRIVILEGE POINTS (Jan. 20, 2021), https://www.mcguirewoods.com/client-resources/privilege-ethics/Privilege-Points/2021/1/several-courts-allow-categorical-privilege-logs ("Although nearly every court normally requires a detailed privilege log, lawyers should remember that in some situations categorical logs will suffice.").

[223] For examples, see *supra* notes 173–174 and accompanying text.

written record may not reflect in any detail how the dispute was resolved.[224]

Most of the time, though, discovery practices that are not guided by formal rules do not change through legal mechanisms. Rather than being formally endorsed, rejected, or supplanted by statute or judicial ruling, discovery practices more typically change the way nonlegal social rules do: gradually, through changed behavior, over time.[225]

Discovery practices certainly do change. For instance, as methods for the collection and review of discovery materials evolve and mature, the range of manageable—and therefore considered acceptable—discovery volumes expands.[226] As clients' use of technology changes over time and generates new types of materials available for discovery (from physical documents to email, to text messages, to instant messages, to communications through corporate Slack, Jabber, and Skype environments, to self-deleting social-media posts, etc.), increased use and familiarity with these technologies, over time, alters the extent to which each specific type of material is considered burdensome to collect and produce.[227] An ever-evolving network of social rules governs lawyers' behavior in seeking and providing discovery material, but what keeps these rules nonlegal in nature is that there is no ex ante authority guiding the shifting limits of the reasonable scope of discovery in a case. It is the behavior of lawyers that shifts these limits.[228]

While the practice of civil discovery is not well described as a process governed by legal rules, it is no better described as taking

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[224] *See* Diego A. Zambrano, *Judicial Mistakes in Discovery*, 113 NW. U. L. REV. 197, 212 (2018) ("[T]he vast majority of discovery orders are released without an explanatory decision."); 7 MOORE ET AL., *supra* note 34, § 30.02(2) ("Because deposition rulings seldom determine case outcome, district courts seldom write lengthy (or any) opinions for publication . . . .").

[225] *See supra* note 130; *cf.* HART, *supra* note 138, at 90–91 (discussing the existence and change over time of nonlegal social rules).

[226] *See supra* notes 38–39.

[227] *See, e.g.*, *supra* note 130 (discussing evolving standards for discovery from corporate Slack environments); *see also* FED. R. CIV. P. 26(b)(2)(B) (exempting from discovery materials whose collection would impose an undue burden).

[228] *See* HART, *supra* note 138, at 90–91 (analyzing the change in social norms in environments lacking formal legal rules); SHAPIRO, *supra* note 198, at 83 (discussing Hart's "rule of change" and the shifting of norms through group behavior).

place "in the shadow of the law," i.e., against a backdrop of formal legal rules.[229] Behavior is said to take place in the shadow of the law when formal legal rights are well-defined and credible, and when courts provide a background of norms and procedures for the enforcement of those rights.[230] Parties who bargain in the shadow of the law can reach agreement without legal coercion, because both sides know what their rights and obligations are under the law, making the outcome of a potential adjudication relatively predictable.[231] But without an applicable law, there is no shadow of the law. In discovery, even when parties negotiate over practices governed by norm-referential rules or default-setting rules, it is often difficult to predict whether a judge adjudicating a hypothetical discovery dispute would make a ruling directly based on these rules (the FRCP or related case precedent) or whether the judge's decision would be informed by unwritten and largely undocumented norms of Discovery Culture.[232] Other discovery practices are even more difficult to conceptualize as taking place in the shadow of the law. Many discovery norms relate to issues that are not addressed by the formal discovery rules.[233] Unlike in the classic "shadow of the law" example of divorce negotiations,[234] the formal legal approach to these issues is not well defined.

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[229] *See* Barack D. Richman, *Norms and Law: Putting the Horse Before the Cart*, 62 DUKE L.J. 739, 744 (2012) (discussing the origins of the term "shadow of the law" (citing Martin Shapiro, *Courts*, *in* 5 HANDBOOK OF POLITICAL SCIENCE 321, 328–29 (Greenstein & Polsby eds., 1975))).

[230] *See id.* (citing Galanter's argument that "the princip[al] contribution of courts to dispute resolution is providing a background of norms and procedures against which negotiations and regulation in both private and governmental settings take place").

[231] *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (arguing that divorce negotiations take place against the "shadow of the law," because there is an understanding of the outcomes a court will impose if no agreement is reached between the parties); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 23 (1981) (explaining that an agreement in the shadow of the law "is a reference to some existing normative structure, not a proposal to erect a new one").

[232] *See supra* notes 223–224 and accompanying text.

[233] *See supra* section II.C.

[234] *See* Mnookin & Kornhauser, *supra* note 231, at 968 ("The legal rules governing alimony, child support, marital property, and custody give each parent certain claims based on what

B. ORDER WITHOUT LAW

Discovery practice is better described as reflecting "order without law," a socio-legal type of environment first colorfully described by Robert C. Ellickson.[235] Ellickson's framework describes social systems in which community members engage in behavior that follows community norms in more or less predictable ways, and sanctions for norm violations are themselves governed by community norms, but those norms are not determined by law and may even contradict existing law.[236] Settings of "order without law" are distinct from those occurring "in the shadow of the law"; while actions in the shadow of the law take place against a backdrop of legal coercion, "order without law" refers to extralegal mechanisms that either replace legal coercion altogether or are an alternative, rather than an extension of, formal legal sanctions.[237]

Ellickson famously identified "order without law" in an agricultural community in Shasta County, in Northern California[238]—a community that he described as "close-knit."[239] A close-knit community, in Ellickson's description, is a community in which power is broadly distributed, information circulates easily, and members interact with other members repeatedly and can identify one another.[240] Similar social ordering has been identified in case studies involving lobster fishermen in Maine, whalers in New England, and diamond merchants in New York City, among

each would get if the case went to trial. In other words, the outcome that the law would impose if no agreement is reached gives each party certain bargaining chips—an endowment of sorts.").

[235] *See generally* ELLICKSON, ORDER WITHOUT LAW, *supra* note 1 (sociological study of norms in a rural county in California, giving rise to the theory of environments that exhibit "order without law").

[236] *See id.* at 103 (discussing norms in place and enforced among cattlemen).

[237] *See* Richman, *supra* note 229, at 742 (discussing ordering "in the shadow of the law" and environments of "order without law" as separate categories of self-enforcement mechanisms).

[238] *See* ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 1 (introducing the agricultural community that was the subject of his study).

[239] *Id.* at 178.

[240] *See id.* at 177–78 (defining "close-knit" group); *see also* Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 359 (2003) ("[C]lose-knit groups are made up of repeat players who can identify one another.").

other communities.[241] In all these cases, communities were relatively small and fixed, with membership of the community relatively constant.[242] Below, I argue that similar ordering exists in litigators' discovery practices. I will describe, in order, (1) Ellickson's general "order without law" framework, (2) why litigators engaging in discovery are a sufficiently close-knit community for order without law to arise, and (3) how order without law provides a better description of the civil discovery process than positivist notions of law.

A hallmark of an "order without law" environment is the relative strength of nongovernmental actors compared to governmental actors.[243] Ellickson formulated a multi-dimensional theory of rules, sanctions, and "controllers" that operate in this environment. [244] As a starting point, **norms** in Ellickson's framework both denote (descriptively) behavior that is "normal," i.e., widely engaged in by members of the community, and (normatively) behavior that members of the community believe *ought* to be followed.[245] **Rules** are those behavioral norms that actually affect community members' behavior, either by influencing their primary behavior—actions they take or decline to take—or by influencing their behavior when they detect and possibly choose to punish others'

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[241] *See* James M. Acheson, *The Lobster Fiefs: Economic and Ecological Effects of Territoriality in the Maine Lobster Industry*, 3 HUM. ECOLOGY 183, 187 (1975) (discussing how lobstermen must be admitted to a "harbor gang" and spend their working life on one small body of water); Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83, 85 (1989) [hereinafter Ellickson, *A Hypothesis*] (describing whalers' homes and layover ports as "few, intimate, and socially interlinked," with whaling ships often encountering one another at sea); Bernstein, *supra* note 199, at 115–116, 140 (discussing the diamond industry's "reputation bonds," which are effective within geographically concentrated, homogenous groups of people who transact with each other repeatedly).

[242] *See, e.g.*, Ellickson, *A Hypothesis*, *supra* note 241, at 85 (detailing how participants in the international whaling industry were a tight-knit group)

[243] *See* ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 123–264 (discussing the methods through which individuals control themselves and one another).

[244] *See id.* (laying out a taxonomy of the system of social control).

[245] *See id.* at 126 ("*Norm* denotes both behavior that is normal, and behavior that people *should* mimic to avoid being punished.").

behavior.[246] Thus, not every norm is a rule in this framework, but every rule is a norm. **Controllers** are individuals and organizations in the community that can create and enforce rules that apply to a member of the community (the "actor").[247]

Ellickson identified five types of rules that exist in an environment of order without law: substantive rules (defining what primary conduct should be rewarded or punished through the use of rewards or sanctions),[248] remedial rules (identifying the nature and magnitude of sanctions),[249] procedural rules (guiding the process by which a violation of a substantive rule can lead to imposition of a sanction),[250] controller-selecting rules (governing the division of labor between the five controllers),[251] and constitutive rules (determining the internal governance structure of controllers).[252]

Ellickson also identified five controllers operating on an actor: the first-party controller is the actor himself—the person engaging in the primary behavior at issue.[253] The actor can promulgate

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[246] *See id.* at 128 (explaining how rules impact primary and secondary behavior). In other words, Ellickson's norms appear to be coextensive with H.L.A. Hart's "behavioral practices," encompassing all practices followed by members of the community, whether out of habit or out of compliance with a social rule. *See* HART, *supra* note 138, at 83–85 (discussing manifestations of primary and secondary rules). Ellickson seems to hint at this connection in ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 128 n.14.

[247] *See* ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 130 (describing five different controllers operating on an actor).

[248] *See id.* at 132–33, 184 (describing substantive norms as those that identify everyday conduct unrelated to rulemaking and enforcement).

[249] *See id.* at 133, 207–09 (detailing how remedial rules often are those "more traditionally viewed as part of the substantive law" but communities may also have more informal remedial norms).

[250] Procedural rules determine the amount and type of information required before a sanction is considered warranted and how that information is gathered. *See id.* at 133, 230–33 (illustrating how procedural rules "govern a member's duties to transmit, to other members of the group, information whose circulation would help minimize internal disputing").

[251] Controller-selecting rules determine which controller will be called upon to remedy a particular violation of a substantive rule. *See id.* at 134–35, 240–64 (discussing controller-selecting rules' role in coordinating among the "social-control domains of the visible sovereigns that make and enforce laws and the invisible social forces that make and enforce norms").

[252] For example, in the case of organizational controllers, constitutive rules can include bylaws determining membership and meeting frequency. *Id.* at 133–34, 233–39.

[253] *See id.* at 126–27 ("An actor who imposes rules and sanctions on himself is exercising first-party control.").

substantive rules for himself, as part of a framework of personal habits and ethics, and can exert self-control to enforce them, including by imposing self-sanctions.[254] The second-party controller is the person who directly experiences the consequences from a violation of a rule by the actor, i.e., the person the actor acts upon.[255] This controller can affect the actor's behavior through formal or informal contracts, and sanction aberrant behavior through self-help (i.e., by applying his own remedies without involving third parties) or by invoking third-party controllers.[256] Finally, there are three third-party controllers: social forces (which create and enforce group norms through mechanisms such as gossip and social in- and exclusion), nongovernmental organizations (which can promulgate and enforce rules that apply to their membership), and governments (which can enact and enforce law).[257] When it comes to remedies, social forces can supply what Ellickson terms "vicarious self-help," a form of informal control that is supplied in response to violations of substantive rules.[258] Nongovernmental organizations can provide organizational control,[259] and governments can provide enforcement through the legal system.[260]

Ellickson hypothesized that norms that arise in a close-knit community will be welfare-maximizing with respect to "workaday matters": "members of a close-knit group develop norms . . . [that]

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[254] *See id.* at 127, 130–31 (discussing the elements of a comprehensive system of social control for first-party control actors).

[255] *See id.* at 126–27 ("A promisee-enforced contract is a system of second-party control over the contingencies that the contract covers; the person acted upon administers rewards and punishments depending on whether the promisor adheres to the promised course of behavior.").

[256] *Id.* at 131.

[257] *See id.* at 127 (discussing how third-party controllers can be nonhierarchically organized social forces, organizations, or governments).

[258] *Id.* at 131. In the community Ellickson studied, a common form of vicarious self-help consisted of negative and positive gossip. *See id.* at 232 (discussing the transmission of "truthful remedial gossip" by third parties to those "in the best position to make use of it").

[259] *See id.* at 131 (illustrating how organizations are able to provide "organizational control"). Nongovernmental organizations may control membership of the organization and may have disciplinary systems that apply to their membership. *Id.* at 248.

[260] *See id.* at 131 (illustrating how government actors can provide enforcement through the "legal system").

maximize the aggregate welfare" of the group in everyday affairs[261] and will "informally encourage each other to engage in cooperative behavior" to maintain those norms.[262] This hypothesis predicted that substantive rules in close-knit groups will be calculated to minimize transaction costs and deadweight losses[263] and that the group would tend to apply the least costly forms of punishment for violations of substantive rules.[264] In other words, the community's norms left the community as a whole better off than the set of laws offered by the legal system.[265] Controller-selecting norms would likewise be calculated to select the controller most likely to resolve matters in a way that is welfare-maximizing and minimizes aggregate transaction costs and deadweight losses.[266]

The limitation to "workaday matters" implies that norms may not be welfare maximizing (or may be weaker or nonexistent) with respect to rare or unusual situations.[267] Ellickson maintained that his hypothesis had "no bearing" on social environments that are not close-knit,[268] but other authors have subsequently identified analogous social structures in "intermediate-knit" communities, in which members of the community have repeat interactions and exchanges of information with some other members and looser relationships with others.[269]

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[261] *Id.* at 167; *see id.* at 174 (distinguishing workaday matters from other matters).

[262] *Id.* at 167; *see also* Bernstein, *supra* note 199, at 117 (observing that extralegal norms trump legal rules in a market if it is in the self-interest of market participants to adhere to them).

[263] ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 173.

[264] *Id.* at 174.

[265] *See id.* at 283 ("[L]awmakers . . . are unlikely to improve upon the group's customary rules."); *see also* Robert C. Ellickson, *The Aim of Order Without Law*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 97, 98 (1994) ("[M]embers of close-knit groups are usually capable of spontaneously generating informal rules that serve to promote cooperative (that is, cost-minimizing) outcomes among the group's members.").

[266] *See* ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 242–43 (describing how a controller tends to be chosen in a way that is welfare-maximizing).

[267] *See id.* at 174 (discussing why Ellickson's theory may not apply with respect to matters that are not "workaday matters").

[268] *Id.* at 169.

[269] *See, e.g.*, Strahilevitz, *supra* note 240, at 360 (arguing that aspects of Ellickson's theory can be applied to intermediate-knit groups).

There are about 1.3 million lawyers in the United States.[270] It would be implausible to suggest that a group of 1.3 million individuals form a close-knit community. However, a lawyer's primary professional community will typically be much smaller, and made up primarily of lawyers practicing in the same jurisdiction(s) and in the same area of specialization. Licensing requirements limit the number of jurisdictions in which a lawyer can practice, and most lawyers specialize in a single, or small number of, legal areas. And given the interactive nature of the profession, lawyers tend to be acquainted with, or familiar with the reputation of, many other lawyers and law firms practicing in their field.[271] Moreover, most lawyers practice in firms or other legal organizations,[272] which puts them in regular contact with other lawyers in their field. A law firm is a quintessential close-knit community, where power is broadly distributed (at least among the partnership), information circulates easily, and community members can identify one another and interact with each other repeatedly.[273]

Law firms play an important role in the maintenance and propagation of cultural norms that apply in the practice of civil discovery. Most lawyers do not start their careers as solo practitioners.[274] They start in a law firm or other legal organization,

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[270] AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 2 (July 2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf [hereinafter ABA PROFILE].

[271] For an anecdotal discussion, see *On Being a Lawyer of Good Reputation, and Why That Matters*, PITTSBURGH FAM. L. SERVS., P.C. (Mar. 17, 2011), https://pghfamlaw.com/2011/03/17/on-being-a-lawyer-of-good-reputation-and-why-that-matters ("The world of the practicing lawyer . . . is a fairly small one. We encounter the same opponents time and again, and the same judges. We get to know each other, and we share information (and sometimes, gossip!) about our colleagues, and about our own experiences with them.").

[272] *See* AM. BAR ASS'N, LAWYER DEMOGRAPHICS YEAR 2016, https://properpr.files.wordpress.com/2016/11/lawyer-demographics-tables-2016-authcheckdam.pdf (indicating that seventy-five percent of active lawyers work in private practice, a majority of whom work in multi-lawyer firms, and that most remaining active lawyers work in government and private industry organizations).

[273] *See* ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 177–78 (defining a close-knit group).

[274] *See* ABA PROFILE, *supra* note 270, at 64 (reporting only 0.8% of recent law school graduates work as solo practitioners).

where they learn the ropes from more experienced lawyers.[275] Through this training model, cultural practices are passed down from generation to generation.

The existence of specialized plaintiff's and defense bars suggest that there may be even closer knitting in some subgroups of the profession. This does not render the overall community loose-knit.[276] For purposes of an "order without law" analysis, it could be argued that the community of lawyers within a firm or legal organization forms a close-knit community, and the larger community of lawyers practicing in a given specialty field and in a given jurisdiction an intermediate-knit community, in which some lawyers interact with each other frequently and others are strangers to one another.[277]

The limitation to workaday matters fits the reality of civil discovery well. Discovery Culture encompasses norms that inform how discovery is run as well as what happens when those norms are violated. When unusual situations arise, there may not exist a sufficiently strong normative framework for disputes to be resolved without court intervention.[278] But for discovery situations that come up over and over again, there is ample space for cultural norms to develop and guide behavior.

Ellickson offered a number of hypotheses relating to the relative strength or dominance of the various controllers operating on behavior in a community. He hypothesized that a close-knit society that can cheaply inculcate its norms will tend to rely on self-control more than a society that is less close-knit.[279] Second-party control

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[275] *See* Neil Hamilton & Lisa Montpetit Brabbit, *Fostering Professionalism Through Mentoring*, 57 J. LEGAL EDUC. 102, 112 (2007) (asserting that interactions with experienced lawyers are significant contributors to the development of new lawyers' professional skills).

[276] In Shasta County, there were two major subgroups in the community, whose interests were in some respects opposed: ranchers, whose livelihood depended on the wellbeing of their cattle, and "ranchette" owners, who grew crops that were (to the ranchette owners' chagrin) an attractive food source for the ranchers' roaming cattle. ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 21, 30, 178. Ellickson considered the community as a whole close-knit. *Id.*

[277] *See* Strahilevitz, *supra* note 240, at 359 (defining an intermediate-knit group); *see also* Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 320 (1995) ("[L]aw firms and the other forms of social organization of lawyers . . . serve important cognitive and information-processing functions as well, preserving . . . not only the knowledge of experienced individuals but also the 'knowledge of the firm.'").

[278] *See supra* section II.D.

[279] ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 245.

in the form of contracts tends to favor individuals who have acquired special skills, but when skills are relatively uniform, parties may prefer to avoid the transaction costs involved in the formation of contracts, and instead honor default rules (whether formal or informal ones).[280] From a utilitarian standpoint, Ellickson proposed that government involvement in making rules is a rational choice when government has a comparative advantage over individuals or groups in the community in making rules that promote cooperative outcomes.[281] The government controller also is likely to play a role in controlling antisocial tendencies of subgroups in the community.[282]

A description of civil discovery as a process of order without law proceeds as follows. As a starting point, all five types of rules exist and have a place in the model. Substantive rules are the norms that govern how things are done in the process of discovery: how information is requested and supplied, what type of information can be requested, what types of requests can be resisted, etc.[283] In civil discovery such rules tend to derive from both formal law (such as the FRCP) and informal structures (the norms of Discovery Culture).[284] Remedial rules include informal remedial measures such as a party's intentional lack of cooperation or wasting of time.[285] They also include more formal sanctions, including discovery motions and dispositive motions brought before a court, and disciplinary action sought from either a court or local bar. Procedural rules and controller-selection rules blend somewhat in the discovery context. Together, they determine what type of remedy or sanction a party might seek in in a given set of circumstances: when to try to resolve a conflict by meeting and conferring with opposing counsel, when to seek relief from the court,

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[280] *See id.* at 246–47 ("Contracts are better than informal social forces at systematically rewarding those who have gone to the trouble of acquiring special skills.").

[281] *Id.* at 249.

[282] *See id.* at 250 (highlighting the state's "strength and territorial breadth" as an asset for limiting antisocial tendencies).

[283] This includes everything from who can be deposed to what types of metadata to include in a document production.

[284] *See supra* section II.D.

[285] *See infra* note 290 and accompanying text.

and when to file a disciplinary complaint.[286] Finally, constitutive rules, governing the election of judges and bar disciplinary committees, operate in the background and are less relevant for our purposes here.

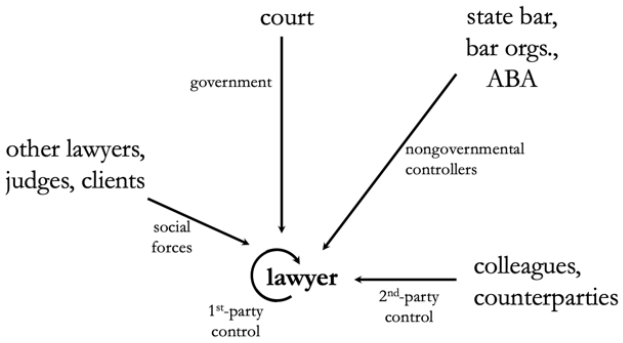

Figure 2: Ellickson's Controllers Operating on a Lawyer in Discovery

All five controllers and all five types of sanctions are present in the decentrally run discovery process, and as in Ellickson's study, nongovernmental controllers are a powerful presence. (See Fig. 2 for a schematic representation.) The first-party controller in civil discovery is represented by a lawyer's self-control and personal and professional ethics. Lawyers accultured to an area of practice have absorbed the prevailing norms and in many situations will control themselves: they will be inclined to cooperate with counsel for other parties when it comes to discovery matters.[287] Since many lawyers

[286] Rules of professional ethics play a role in this space. *See* MODEL CODE OF PRO. RESP. DR 1-103(A) (AM. BAR ASS'N 1980) (providing that lawyers are under an obligation to report certain rule violations and unethical conduct by other members of the bar).

[287] *See* ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 126–27 (explaining that first-party controllers can operate from a point of reflection on individual events in addition to responding to social forces). To be clear, cooperation does not necessarily conflict with duties of zealous representation. A lawyer can cooperate with opposing counsel to help their client navigate the discovery process with relative efficiency and a measure of predictability. *See, e.g.*, LEE & WILLGING, PRELIMINARY REPORT, *supra* note 116, at 62–63 (explaining that 93% to 95% of surveyed litigators agreed or strongly agreed that lawyers can cooperate while being zealous advocates for their clients); *id.* at 111 (quoting surveyed attorneys asserting "In my experience, the vast majority of opposing counsel have been cooperative and professional in

start their careers working closely with and under supervision of other lawyers, the legal profession can efficiently inculcate community norms at the beginning of a lawyer's career, which is predictive of a strong presence of first-party control.[288] Indeed, a lawyer who has been trained within a legal community may perform or refrain from certain actions without direct external prompting, because he knows that they do or do not comport with commonly accepted norms. Regular interactions with colleagues and opposing counsel throughout a litigator's career serve to reinforce the normative framework further.

Second-party controllers exert a powerful influence as well. Both a lawyer's team members and opposing counsel can be expected to affect the lawyer's behavior. Team members can influence a lawyer's behavior through collaboration and through formal or informal feedback. Opposing counsel can seek to influence the lawyer's behavior through negotiations and formal stipulations,[289] as well as in less cooperative manners, such as by retaliating against undesirable behavior by reciprocal undesirable behavior.[290] Lawyers tend to specialize in a subject matter area, but otherwise tend to be relatively unspecialized. As Ellickson predicts for a community in which members' skillsets are relatively similar, lawyers negotiating discovery parameters will often honor default rules rather than negotiate an agreement from scratch every time a discovery matter is to be resolved.[291]

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managing discovery" and "I've learned that lawyers can get along and cooperate and still be advocates for their clients").

[288] *See* ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 245 (discussing how "reliance on self-control" varies in different social circumstances).

[289] They can even seek to influence future behavior through pre-litigation contracts. *See generally* Resnik, *supra* note 6 (describing forms of privatized procedure).

[290] For example, opposing counsel might apply a self-help sanction when refusing a routine request for an extension of a deadline, refusing to agree to a deposition at a convenient location, engineering delays in the production of documents, etc.

[291] *See* ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 246 (describing how individuals can use third-party default rules to lower transaction costs); *see also, e.g.*, LEE & WILLGING, PRELIMINARY REPORT, *supra* note 116, at 172 (quoting surveyed attorney stating that "in every case in which I have been involved . . . we enter an agreement up front to not have to produce ESI except in PDF form").

Broader social forces can issue reputation-enhancing or reputation-reducing sanctions as well, by supplying carrots and sticks in the form of referrals, appointments, awards, and other forms of recognition (or lack thereof). Lawyers, as a professional group, tend to guard their reputation,[292] and many depend on their reputation for referrals and recommendations, so in some legal circles, even the threat of negative gossip could be an effective deterrent. Nongovernmental organizations that can influence lawyers' behavior, through both recognition and disciplinary action, include the American Bar Association, the state bar, and local bar associations.

Formal legal coercion certainly does play a role in civil discovery. The governmental controller is represented by the courts, which have a role in controlling behavior of antisocial subgroups in the community. In that modality, courts have an advantage over other controllers.[293] Courts can punish undesirable behavior through formal rulings, usually resulting in adverse consequences for the lawyer's client and, in extreme cases, even for the lawyer herself.[294] They also come into play sometimes to adjudicate unusual issues. But they do so relatively infrequently[295] and play a much smaller role than opposing counsel in the average case and the legal community more generally.

The importance of the second-party and social-forces controllers in the process of civil discovery suggest that civil discovery more closely resembles an environment of "order without law" than an environment governed by law.[296] In everyday affairs, lawyers are the more dominant controllers (of their own and other lawyers'

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[292] *See* Ido Baum, *The Accidental Lawyer: A Law and Economics Perspective on Inadvertent Waiver*, 3 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 112, 157 (2013) ("[L]awyers care about their reputation and take measures to develop and safeguard it.").

[293] *See* ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 250 (explaining that, in this context, "judge-made law tends to be efficiency enhancing"); *see also* LEE & WILLGING, PRELIMINARY REPORT, *supra* note 116, at 166 (quoting surveyed attorney stating that "[d]iscovery works best when the parties and their lawyers cooperate. The court's role is basically to act as a referee when they don't").

[294] *See generally* Jeffrey A. Parness, *Enforcing Professional Norms for Federal Litigation Conduct: Achieving Reciprocal Cooperation*, 60 ALA. L. REV. 303 (1996) (exploring the "multiple centers of professional control" to which lawyers in the U.S. are subject).

[295] *See supra* section II.D.

[296] ELLICKSON, ORDER WITHOUT LAW, *supra* note 1.

behavior) than government. Lawyers have more information than courts about the case at hand[297] and more experience with discovery methodology, as they engage in civil litigation practice every day.

Despite the similarities between civil litigation behavior and the community behavior observed by Ellickson, lawyers depart in a number of ways from what Ellickson found in Shasta County. The norms system described by Ellickson existed in a framework in which there was no central enforcer and no actor with special power to proclaim norms.[298] This decentralized power structure made it difficult to ascertain the content of existing norms.[299] In civil discovery, even though other enforcers may be stronger and more dominant in everyday affairs, there *is* a central enforcer with special power to create and enforce rules: the court presiding over a particular case and the legislative arm of government entrusted with promulgating the rules of procedure.[300] However, these entities have chosen to exert that power only in a very limited sense: rather than promulgating and enforcing detailed and strict rules, they have created a framework of broad, unspecific, and easily circumvented rules.[301]

That said, the courts' role is not as marginal as in Ellickson's Shasta County. Parties to civil discovery rarely bring their disputes to court, [302] but seeking court assistance is not as virtually-unheard-of as in Shasta County, nor are the hurdles involved as high. For one thing, it is much easier to go to court for a litigant who is, by definition, already involved in a court proceeding than for a cattle rancher involved in a fencing dispute, who usually is not.[303] Furthermore, unlike in Shasta County, where community norms in

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[297] *See supra* note 81 and accompanying text.

[298] *See* ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 130 (noting that, although "[n]orms are harder to verify [when] their enforcement is highly decentralized," the Shasta County residents still "honor a norm that an owner of livestock is responsible for the conduct of his animals").

[299] *See id.* (describing the difficulty in articulating non-legal norms despite their existence).

[300] *See supra* note 199.

[301] *See supra* section II.B.

[302] *See supra* section II.C.

[303] In addition, some judges do take an expansive view of their obligations under Rule 16. *See supra* note 88 (describing how some judges impose unusually detailed discovery requirements).

some instances directly contradicted existing law,[304] the legal community will typically not create norms that directly contradict or undermine formal law. With respect to these informal rules created outside of the legal system, however, it is as difficult for an outsider or newcomer to determine what the prevailing rules are as it was for Ellickson in Shasta County.

The civil litigation framework also differs from Shasta County's informal system of norms in the way sanctions operate. In the classic examples of order without law (cattle ranchers in Shasta County, lobster fishermen in New England, etc.), actors and targets of sanctions coincide: when a member of a community, or a community as a whole, determines that a community member (the "actor") has violated a norm and the imposition of a sanction is warranted, any sanction imposed will be borne by the actor.[305] In the civil discovery setting, by contrast, sanctions can be borne by a more diffuse group. When a lawyer disregards community norms, it may be the *client* who suffers the consequences.[306] While a lawyer is expected to have his clients' interest at heart, this is an important distinction. Some lawyers may be more strongly affected by disperse social forces—forces threatening the lawyer's own reputation—than by second-party forces whose power to harm aimed primarily at the client. Indeed, in some cases, the power of social forces may render a lawyer more amenable to falling in line with a given norm, instead of challenging it on a client's behalf.[307]

Finally, it is much less clear in the civil discovery context than in the setting of Shasta County that order without law with a peripheral role for the court is welfare-maximizing, empowering

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[304] *See* ELLICKSON, ORDER WITHOUT LAW, *supra* note 1, at 82 (observing that the Shasta County ranchers' beliefs as to how the law would impose liability for collisions with livestock are incorrect).

[305] *See id.* at 123–36 (describing how systems of social control can operate and affect the actor who is controlled).

[306] For example, lack of cooperation may result in delay or retaliatory discovery requests that impose costs and require effort.

[307] *See, e.g.*, Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1455 (2017) (observing that sometimes lawyers can be more loyal to opposing counsel than to their own clients); *see also* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 114–15, 114 n.47 (1974) [hereinafter Galanter, *Haves*] (describing the tension between loyalty to clients and loyalty to other lawyers and the court).

members of the community in a broad sense. The implications of the presence of a norm-based social structure right in the middle of a legal system created by formal law are discussed further in Part IV.

C. LAW AND NORMS IN CIVIL DISCOVERY

Viewing civil discovery as a blend of informal law with a pinch of formal law puts the spotlight on a number of unique characteristics. One such quirk is that the norms that govern discovery practices are primarily created by lawyers rather than their clients, and therefore the community that is relevant to evaluating compliance with norms is that of lawyers rather than clients. This is unusual. The merits of a tort case may hinge on the reasonability of a party's behavior and those of a contract case may hinge on the parties' course of conduct or prevailing norms in the parties' industry. When it comes to discovery matters, however, regardless of the case's subject matter, notions of reasonability and common practice arise in the context of lawyer behavior. Even though the formal rules impose obligations and rights on clients, the discovery process is usually arranged and orchestrated by lawyers, and it is the lawyers' conduct that is evaluated, by counterparties and judges, against prevailing norms of conduct. Nevertheless, the contours of discovery can determine substantive outcomes,[308] and it is the parties rather than the lawyers who experience the consequences of discovery decisions or negotiated outcomes.

A second quirk is the unique relationship between the relevant community and the judicial system. Compared to cattle ranchers in Shasta County or whalers in New England, the lawyers in whose community Discovery Culture develops and evolves stand in a much more proximate relationship to judges. Judges themselves can be said to be members of the community in which litigation culture arises, or to have been in the past. Judges often take the bench after spending years in legal practice, and in their judicial capacity they continue to be exposed to the everyday practice of discovery, as they preside over status conferences and adjudicate discovery

[308] *See, e.g.*, Bone, *supra* note 12, at 1375 (describing how constraints on discovery can affect the outcome of a litigation).

disputes.[309] Judges therefore may have an intimate familiarity with the community's prevailing norms, and may have participated in creating them. For example, because judges know that deadline extensions tend to be liberally agreed to by counterparties, a party whose run-of-the-mill extension request is rebuffed by a counterparty can expect to find a sympathetic ear with the court, even though no procedural rule specifically entitles it to an extension.[310]

Notions of reasonableness are shaped over time, and clients will often rely on lawyers to guide them (or even decide for them) in responding to discovery requests.[311] In instances where opposing parties cannot reach agreement about a discovery matter, clients will typically rely on lawyers to guide them in deciding whether to seek adjudication by filing a discovery motion.[312] In rendering advice to their clients relating to discovery disputes, lawyers can be expected to rely on their assessment of (a) the strength and applicability of relevant formal rules and to what extent their content depends on community norms; (b) what the relevant community norms are; (c) how established and respected these norms are; and (d) how likely it is that the judge will be aware of the norms and amenable to enforcing them. The more entrenched community norms are, the more likely a judge can be expected to be familiar with them and enforce them.[313] Well-propagated Discovery Cultural norms can therefore take on a legal status somewhere in

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[309] *See* Federal Judicial Center, *Demography of Article III Judges, 1789–2020*, https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges (last visited July 8, 2021) (indicating that the average age of Article III judges at the time of their appointment is approximately fifty years).

[310] Further research is needed to explore the extent to which courts tend to follow or enforce norms, including whether and when they might impose cost-shifting sanctions on parties who fail to abide by widely accepted litigation norms.

[311] *See* MODEL RULES OF PRO. CONDUCT r. 1.4(b) (AM. BAR. ASS'N 2021) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

[312] *See id.* (establishing attorneys' obligations with respect to client communication).

[313] Judges may not be current members of a community of litigators, but they stand in a position of proximity to it. *Cf.* Eden Sarid, *Don't Be a Drag, Just Be a Queen—How Drag Queens Protect Their Intellectual Property Without Law*, 10 FIU L. REV. 133, 167 (2014) (describing "correlated-communal sanctions" imposed to punish violations of norms within the Israeli drag queen community by venue owners and others with close connections to the community).

between formally enforceable rules and nonlegal norms with no purchase in a formal legal proceeding.

A third quirk arises from the fact that discovery disputes are procedural in nature (even though they may have substantive consequences), and are adjudicated by a judge rather than a jury.[314] A court adjudicating a discovery motion in many instances will be called upon to decide on the reasonability of a discovery request or response. These reasonableness determinations depend on norms that exist in the legal community, not in the personal or professional community of the clients. Even though the determination may turn in part on the particulars of a client's computer infrastructure or organizational structure, it is the *lawyers*' culture that determines what kind of request is considered reasonable or unreasonable. Contrast this with the reasonableness determinations more commonly encountered in legal practice, in which the reasonableness of clients' actions is at issue, and, if the case goes to a jury trial, will end up being evaluated by (in the idealized conception of legal practice) a cross-section of peers from the clients' community. When it comes to discovery positions staked out by opposing lawyers, a judge may in fact be more of a peer than a jury would be. Ordinarily, the judge will be more of an expert on litigation procedure than a jury. But it is worth noting that the resolution of discovery disputes represents an instance where, in the middle of a lawsuit about some action or inaction by one or more parties, there is an adjudication about the reasonableness or unreasonableness of the parties' lawyers' positions.

IV. IMPLICATIONS AND PROPOSED INTERVENTIONS

The legal peripheralist view of the discovery process developed above provides a useful lens for evaluating the role of rules in the civil discovery process. The discovery Rules' subordinate role in relation to cultural norms raises the question to what extent they are accomplishing the goals for which they were enacted. As I argue below, the dominance of cultural norms in civil discovery may not be nearly as welfare enhancing as it was in Ellickson's Shasta

[314] *See* FED. R. CIV. P. 7(b)(1) (describing motions as a request for a court order).

County, and it is worth considering whether, in light of the Rules' weak nature, there may be better ways to give the rules back some of their bite or accomplish the Rules' goals in other ways.

Section IV.A explores implications of the discovery process's blended legal and extralegal nature for the way discovery is conducted. Section IV.B offers suggestions aimed at harnessing the strengths of Discovery Culture while protecting more weakly positioned parties, as well as the public at large, against some of the risks it poses.

A. IMPLICATIONS

The unfolding of civil discovery as a process with significant extralegal components has some benefits. Because parties to lawsuits are uniquely positioned to find cost-effective and efficient solutions to procedural challenges, a discovery process dominated by Discovery Culture can result in cost savings and efficiency gains.[315] Because the influence of the rules of procedure in this area is limited, however, it is important to ask whether the rules are accomplishing the goals for which they were enacted. I argue in this section that the answer is likely no. In creating so much flexibility that outcomes of discovery negotiations tend to be more dependent on area-specific cultural norms than on formal criteria, the rules (1) fail to provide some of the procedural safeguards they are meant to provide; (2) create a number of unintended consequences, including inequality between different types of parties and other violations of trans-substantivity norms; (3) reduce the predictability of litigation processes and outcomes; and (4) harm the publicity value of the litigation process.

1. Ineffective Procedural Safeguards. The Rules' stated purpose is "to secure the just, speedy, and inexpensive determination of

[315] *See, e.g.*, LEE & WILLGING, PRELIMINARY REPORT, *supra* note 116, at 144, 185 (quoting attorneys commenting that "[t]he cooperative conduct of counsel is the number one driving factor in the cost of litigation" and "we enjoy a mutual respect and civility in cooperating in discovery matters to gain more efficient results for our clients and so as to not burden the courts with discovery squabbles"); WILLGING & LEE, IN THEIR WORDS, *supra* note 148, at 14 ("There are some dedicated lawyers who handle employment cases and . . . we handle those cases efficiently."); *see also* Davis & Hershkoff, *supra* note 11, at 526 (describing negotiated procedure as often "Pareto-efficient").

every action and proceeding."[316] While judges and advocates alike tend to believe that a party-driven system of discovery in many cases promotes efficiency and reduces costs,[317] it is less clear that such a system, when based largely on party-developed norms rather than on rules arrived at through a democratic process, also tends to lead to "just" outcomes.

Whether the current system is plagued by over-discovery, under-discovery, or whether discovery tends to happen at just the right level is a topic of perennial debate beyond the scope of this Article.[318] However, when the amount and type of discovery that takes place to a large extent is determined by prevailing Discovery Cultural norms, safeguards against these norms developing in unfair or otherwise undesirable ways are limited—much more limited than if discovery were governed entirely by rules enacted through a formal process. Powerful parties can shape procedural customs in their favor, with reduced recourse for less powerful parties, and there is no reason to believe that the norms that evolve over time will strike an optimal balance between all parties' (and nonparties') interests.

The power of "repeat players" in the litigation system is well-documented.[319] Over the course of their career, civil litigators enter the discovery phase over and over again, for many different clients, in many different cases. Even if some of their clients are "one-shot" litigants,[320] the lawyers themselves are repeat players within the system.[321] As repeat players, lawyers contribute to the shaping and propagation of the discovery norms in the legal area in which they

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[316] FED. R. CIV. P. 1.

[317] *See supra* note 315.

[318] *See* Miller, *supra* note 175, at 356 (discussing ongoing debates about the merits and drawbacks of broad discovery).

[319] *See generally* Galanter, *Haves*, *supra* note 307 (describing the advantages experienced by "repeat players" in litigation).

[320] *See id.* at 97 (contrasting "one-shotters"—"claimants who have only occasional recourse to the court"—with "repeat players . . . who are engaged in many similar litigations over time").

[321] The observation that lawyers are repeat players in the litigation system is not novel. *See, e.g.*, Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 188 (1995) (exploring implications of repeat-player status of Supreme Court advocates).

practice.[322] Marc Galanter has described the numerous ways in which repeat litigants can shape the system to their benefit.[323] Among other benefits these litigants have is their ability to "play for rules": prioritize the creation of helpful precedent over a favorable outcome in any individual proceeding.[324] Certainly, ethics rules governing lawyers' conduct require that lawyers zealously represent the interests of their clients,[325] and, certainly, courts exist as a backstop to curb egregious behavior. But over time, a lawyer specializing in a certain kind of representation is likely to have opportunities to "play for rules" in ways that do not violate this requirement.[326]

A lawyer's ability to shape the rules is likely to be especially strong when the "rules" being played for are informal norms rather than formal rules of procedure. Playing for a substantive rule (say, a favorable interpretation of a particular statute) may call for a strategy whereby some cases are litigated aggressively and to their fullest extent, while others are settled out of court.[327] Playing for a discovery norm, on the other hand (say, a gradual increase in the number of documents that is considered reasonable to review for production), can be done without giving up any substantive claims or defenses, and without involvement of a court. A lawyer may choose to press for an advantage in some cases and decline to do so in others, without otherwise changing their litigation strategy.

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[322] *See* Galanter, *Haves*, *supra* note 307, at 98–103 (enumerating advantages that "repeat players" have in the litigation system).

[323] *Id.*; *see also* Burch & Williams, *supra* note 307, at 1520–21 (arguing that the frequent repeat-player status of plaintiff's lawyers, defense lawyers, and defense clients in multidistrict litigation disadvantages plaintiff parties).

[324] *See* Galanter, *Haves*, *supra* note 307, at 100 (describing repeat players' ability to influence rule development).

[325] *See* MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2022) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

[326] *See* Galanter, *Haves*, *supra* note 307, at 103 (describing how repeat players "can trade off symbolic defeats for tangible gains" and "are more likely to be able to invest the matching resources necessary to secure the penetration of rules favorable to them").

[327] *See id.* at 101 ("We would expect [repeat players] to 'settle' cases where they expected unfavorable rule outcomes. Since they expect to litigate again, [repeat players] can select to adjudicate (or appeal) those cases which they regard as most likely to produce favorable rules."); *see also* Freeman Engstrom, *supra* note 33, at 15 (recognizing that newly invented procedure can be "contagious").

Indeed, playing for norms of Discovery Culture may well happen almost imperceptibly. The gradual and almost imperceptible nature of the process, however, does not mean that the process is not taking place.

As discussed below, parties' disparate ability to shape the rules may result in unequal burdens and benefits, with certain parties benefiting from shifts in procedural norms to other parties' detriment. When procedural matters are guided by norms rather than formal law, the procedural protections enjoyed by parties who are at risk of being disadvantaged by the system are much diminished. In fact, as I argue in the next subsection, when discovery is governed by norms rather than rules, inequality is all but assured.

2. Inequality and Other Unplanned Consequences. When certain parties have a superior ability to shape Discovery Culture, consequences not intended by the FRCP can result, including inequality between different types of parties and other violations of norms of trans-substantivity.[328] The prominence of Discovery Culture suggests that in certain areas of the law, the rules may over time have skewed in favor of defendants or plaintiffs. This is especially likely to be the case in fields where repeat-player clients team up with repeat-player lawyers on one side of the litigation but not the other.[329]

The implications of a strong Discovery Culture are also likely to disadvantage "outsiders"—lawyers and clients who are not familiar with the prevailing norms of Discovery Culture in the given practice and geographical area. Such outsiders include unrepresented parties, newly admitted attorneys, attorneys admitted pro hac vice who normally practice elsewhere, and attorneys who are new to the relevant field. These "outsider" litigants may have an interest in determining what the norms and practices are that govern discovery within a particular legal subculture, but the content of norms is much more difficult to ascertain than the content of

[328] *See supra* note 91 and accompanying text.

[329] For example, a manufacturer of consumer goods may be a repeat player in product-defect litigation, and may have their go-to counsel to handle the litigation against a series of one-shot plaintiffs.

rules.[330] Lawyers who are well-accultured to the area in which they practice, on the other hand, can offer their clients advantages that come in addition to the rule-shaping benefits that Galanter describes, since procedural matters can affect substantive outcomes.[331] A party lawyer who is well versed in the relevant Discovery Culture can be expected to optimize a client's discovery position and avoid costly motions. (She cannot, however, avoid the expense of motion practice entirely when pitted against an outsider or an unusually combative counterparty.[332]) When Discovery Culture exerts a powerful force, clients are likely worse off when they are represented by newer lawyers, or by lawyers who do not ordinarily practice in the given field at issue.[333]

The importance of norms is also likely to affect disproportionally parties who require special permission to engage in otherwise routine discovery practices, such as plaintiffs who bring a suit *in forma pauperis* (IFP).[334] IFP litigants require special permission before taking a deposition, and as a result they end up being subject to more stringent standards than other parties are. When an IFP litigant seeks to schedule a deposition, it costs an opposing party less to oppose the deposition than it would otherwise: the issue is already before the court, the party may have to respond to a motion or show up for a hearing anyway, and since the motion is already on the court's calendar, there are no concerns about "upsetting the court" with an unnecessary discovery dispute. Other parties, meanwhile, do not need the court's permission to notice a

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[330] *See supra* section II.D.

[331] *See* Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 818 (2010) ("[P]rocedure can, in a very practical sense, negate, resuscitate, or generate substantive rights.").

[332] *See, e.g.*, LEE & WILLGING, PRELIMINARY REPORT, *supra* note 116, at 185 (quoting surveyed attorney's comment: "pro se plaintiffs . . . are usually harder to work with than . . . attorneys—with exceptions").

[333] There are, of course, additional reasons why a less experienced lawyer may be less effective than a more experienced one. *See, e.g.*, Blasi, *supra* note 277, at 330 (asserting that a lawyer working on a client's case is typically guided "not by decision-theoretic principles at each juncture, but by 'judgment' or 'experience'").

[334] *See, e.g.*, Weathers v. Loumakis, No. 2:15-cv-00027, 2016 U.S. Dist. LEXIS 147463, at *4 (D. Nev. Oct. 24, 2016) ("The *in forma pauperis* statute . . . does not authorize expenditures for discovery.").

deposition, and are less likely to face a motion, and more likely to be able reach an agreement outside of court.

Nonparties are even less protected in a norms-heavy system. Parties negotiating aspects of discovery procedure are less likely to take nonparties' interests into account than drafters of formal legislation would. In this sense, Discovery Culture is likely much less welfare-maximizing for the community as a whole than the norm-based system was in Ellickson's Shasta County.

More broadly, a discovery practice that is to a large extent driven by norms can be expected to create differences in practice across substantive areas, in contravention of the trans-substantive (non-subject-matter-specific) ideal of the FRCP.[335] Since the Rules' enactment, departures from the rules have occasionally been enacted or judicially created, and whether the rules on the whole can still be considered trans-substantive is a matter for debate.[336] But it has been argued that departures from trans-substantivity ought to issue only from a legislative process.[337] If a procedural choice is not value-neutral, the argument goes, then the choice ought to be made by legislators rather than judges, because the former are better able to ensure that a broader variety of interest groups are heard in the process.[338] This argument applies with even more force when it comes to non-trans-substantive procedure created by parties and their counsel. Parties and their representatives negotiating about procedural mechanisms have

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[335] *See* Marcus, *supra* note 91, at 371–72 (praising the simplicity of the trans-substantivity principle).

[336] *See, e.g.*, Freeman Engstrom, *supra* note 33, at 71 ("[T]hough many continue to insist that our procedural rules are transsubstantive, the reality is that the transsubstantive ship has, for better or worse, sailed.").

[337] Marcus, *supra* note 91, at 416.

[338] *See id.* at 419 ("Legislators can make value choices for law because they represent everyone else in some manner or another."); *see also* Carrington, *supra* note 195, at 2075 (describing Congress's efforts to achieve "political neutrality in rulemaking"); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2246–47 (1989) (crediting trans-substantive procedure for protecting the rights of politically weaker parties). *But see* Samuel Issacharoff, *Rule 23 and the Triumph of Experience*, 84 L. & CONTEMP. PROBS. 161, 182 (2021) (arguing that "ad hoc procedure" allows a court to apply its "deep wisdom," gained from experience, and ensure that cases become litigable).

very little incentive to take interests of other parties or nonparties into account. The nonpublic nature of discovery procedure renders it difficult to evaluate the extent to which certain interests are being neglected.

3. Reduced Predictability. A norms-driven procedural environment reduces the ability of parties and prospective litigants to assess the likely course their case might take. It reduces their ability to predict both how their opposing counsel may behave and how their assigned judge may rule in case a discovery dispute were to be teed up for adjudication. In a party-driven discovery process in which disputes are only rarely adjudicated, the availability of precedent is limited.[339] This is true regardless of the source of authority governing the discovery process, but the implications are especially stark when the authority largely consists of community norms. With much of discovery norm development taking place behind closed doors, it is all but impossible for an outsider to ascertain what the prevailing norms are and assess its likelihood of success accordingly.[340]

Moreover, when a process is governed to a significant extent by community norms, it is more difficult to predict how a judge might rule if adjudication were to occur. While judges may be familiar with and enforce a certain discovery norm, the parties' entitlement to enforcement with respect to a given norm is much less clear than their entitlement to enforcement of a rule, and the outcome of a prospective dispute turning on discovery norms is therefore bound to be more dependent on the assigned judge and less predictable.[341]

This reduced predictability can also punish parties who are "insiders" and tend to abide by community norms. When a judge declines to enforce a community norm, such a party has limited recourse.[342]

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[339] *See supra* notes 72–85 and accompanying text.

[340] *See, e.g.*, David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. 1001, 1039–40, 1039 n.142 (2021) (describing how repeat players can exploit information asymmetries in discovery).

[341] *See supra* notes 199–226 and accompanying text.

[342] Appeals from discovery decisions, for example, are not common. *See, e.g.*, U.S. MAGISTRATE JUDGES OF THE E. DIST. VA., FED. BAR ASS'N, NEW RULES . . . AND OLD RULES THAT THE MAGISTRATE JUDGES THINK YOU SHOULD KNOW! (May 19, 2014), https://www.fedbar.org/northern-virginia-chapter/wp-content/uploads/sites/74/2019/10/2014-

4. Reduced "Publicity." Finally, the risks to the public of processes that happen behind closed doors are exacerbated when those processes are based on norms rather than rules. Judith Resnik has warned of the perils of "private procedure" to the publicity value of litigation: "the public's opportunities to have firsthand knowledge of the claims brought, the interactions among disputants, and the decisions made."[343] Jeremy Bentham, who first wrote about the value of "publicity," considered it an essential tool for ensuring correctness of judicial outcomes.[344] The public's opportunity to witness the practice of litigation first-hand diminish when major parts of a court proceeding disappear from the courthouse.[345]

As with predictability concerns, this is true regardless of the source of authority governing the discovery process, but the concern is heightened when the authority largely consists of community norms. As discussed above, when rules are supplanted in whole or in part by norms, some of the safeguards that the Rules were intended to provide are weakened.[346] With those safeguards weakened it is even more important for justice to be visible—for litigants whose rights are now less protected, as well as for the public.

B. POTENTIAL INTERVENTIONS

Because the Rules have limited influence on discovery practice, and past rule changes have not always had the desired effect,[347] it stands to reason to seek improvement by changing the prevailing

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05-19-pdf.pdf ("Appeals from Rule 45 discovery motions are relatively rare . . . ."); Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 351 (2000) (explaining why discovery orders are rarely appealed).

[343] Resnik, *supra* note 6, at 1802.

[344] *See id.* at 1836 (describing Bentham's belief that publicity functions to "enhanc[e] [the] accuracy, education, and discipline" of courts).

[345] *See id.* at 1807 (describing how the vast majority of evidentiary proceedings take place outside of federal courthouses, as a result of Article III judges' delegation of adjudicatory powers).

[346] *See supra* section IV.A.*1*.

[347] *See supra* section II.D.

cultural norms rather than by changing the rules.[348] My main proposal is to enhance required disclosures relating to discovery activity. Such disclosures would improve nonparties' ability to gain information about discovery that took place in a given case, and would improve the ability of "outsiders" to determine what the currently prevailing norms in a given legal subculture are. Moreover, the information that such disclosures make available could be used to evaluate whether further reforms are necessary and what form they could take.

1. Expanding Disclosures. A simple proposal that could be implemented as an initial measure would be to mandate disclosures of important discovery metrics at the conclusion of a proceeding, e.g., in conjunction with the filing of a notice of dismissal, settlement, or notice of judgment. The disclosure could include such metrics as the number of witnesses deposed, the number of documents produced, the search terms used to identify the documents, and a description of any technological tools used to prioritize or reduce the universe of documents to be reviewed for relevance. It might also include disclosures of discovery sought but not received. The information required to make such disclosures should be readily available to all parties to a litigation, so compiling it for an end-of-case disclosure should not impose a significant burden, especially when parties know in advance that they will be required to make such disclosures and can keep track of their discovery activities accordingly.[349]

A disclosure requirement would result in significant benefits to future litigants and other members of the public, who currently have limited access to this type of information.[350] Mandatory disclosures of actually negotiated discovery parameters would allow parties in other cases, as well as prospective litigants, to research what discovery practices are within the currently common range. To

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[348] *See* HART, *supra* note 138, at 90–91 (explaining that social rules that are determined by behavior are capable of change, but only through changed behavior in the community over time).

[349] A party could partially comply with disclosure requirements by filing a copy of any document requests and responses, interrogatories and interrogatory responses, and document notices supplemented by information about search terms and depositions actually taken.

[350] *See* Resnik, *supra* note 6, at 1802 (emphasizing the value of public access to information relating to court actions).

the extent that courts seek to stay abreast of evolving norms in Discovery Culture in aid of their adjudication of discovery disputes, courts would benefit as well.

More visibility into discovery practices could also inform potential further reforms. It would allow for a more thorough evaluation of the current state of Discovery Culture and a better determination of whether its dominance is in fact harming the rights of certain types of litigants and under what circumstances. As discussed in section IV.A, it is quite likely that the norms that make up current Discovery Culture have been heavily influenced by certain kinds of parties, to the detriment of others. Many norms will strike a balance between one party's need for discovery and another party's burden in supplying it, and there is no reason to think that that balance has been struck in a way that is objectively fair, including to nonparties, unrepresented parties, and others who were not "in the room" where, over time, the norms were created.[351]

2. Potential Further Reforms. The playing field between insiders and outsiders could be leveled further by increasing contact between the parties and the court. Armed with more knowledge about current discovery practices, district and magistrate judges would be better equipped to intervene at critical moments during the discovery process. Judges who recognize the role of culture could take an active approach and try to shape the prevailing discovery culture through local rules, rulings, and conversations with parties and colleagues. This would require increased judicial resources, most likely in the form of additional magistrate judges, but the benefits could be great. Not only would it provide an additional avenue for keeping judges up to date on evolving Discovery Cultural norms, but it would also reduce some better-positioned parties' ability to take advantage of weaker parties. When deciding whether to seek the court's assistance in obtaining or resisting discovery, parties take into account not only the particulars of the discovery dispute at issue and any prevailing rules or norms, but also the cost of bringing or objecting to a motion. As a matter of logic, if litigation

[351] *Cf.* Carlson, *supra* note 199, at 410–11 (arguing that, in determining whether to enforce a community norm in a legal proceeding, one factor that courts should consider is whether everyone affected was adequately represented in the process by which the norm was created).

of discovery disputes were cheaper, more discovery disputes would be litigated. Requiring the parties to appear before a judge regularly, to discuss discovery progress, would reduce the "discount" they can obtain by not litigating a discovery dispute.[352] By requiring parties to report to court regularly about discovery progress, the cost of discussing percolating disputes (that have not yet reached an impasse) is reduced, increasing cost-conscious parties' strength in negotiations about discovery procedures. Uncoupling magistrate judges from district judges could also be beneficial. Anecdotally, lawyers are just as disinclined to raise disputes with magistrate judges as with district judges, because of a perception that magistrate judges report back to the district judge.[353]

Finally, it may be beneficial to update the text of Rule 1 to make explicit that the rules aim to secure *outcomes*, and perhaps even *processes*, that are just, speedy, and inexpensive, not only just, speedy, and inexpensive determinations of the fraction of a percent of cases that end up being adjudicated. Such a change in Rule 1 would unlikely affect discovery behavior substantially, but it may contribute to a more constructive way of thinking about the discovery process—one that views it less as a step on the road toward trial and more as a stage of litigation that can decide the fate of the case and that merits its own procedural safeguards.

V. CONCLUSION

The role of Discovery Culture in our civil litigation system has been overlooked and insufficiently considered as a force that governs what happens in the discovery phase of a civil litigation. A civil litigation system where (a) few cases go to trial; (b) judges' roles are primarily managerial rather than adjudicatory; and (c) the day-to-day control over the discovery process is largely assigned to the parties calls for a thorough look at what happens during the discovery phase, which typically happens behind closed doors, and is almost fully orchestrated by the parties.

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[352] *See* Galanter, *Haves*, *supra* note 307, at 139 (explaining that parties often settle at a "settlement discount" that accounts for the cost savings of not having to litigate a claim).

[353] This perception was conveyed to me by a number of practicing civil litigators. One litigator mentioned that even accounting for case complexity, discovery motions tend to be brought more frequently in cases where an independent discovery master has been appointed.

In this Article, I have argued that the civil discovery process is a practice in which legal rules provide certain rather loose guidelines and safeguards, but that is largely governed by Discovery Culture; a process that more closely resembles an environment of order without law than a practice governed by law.[354] I argued that, as a result, the formal rules that apply to the discovery process may be insufficiently equipped to provide the safeguards for which they were enacted, and reduce the fairness, predictability, and public visibility of civil litigation processes.

The current set of rules was created at a time when discovery was a step on the way to a likely trial. As trials have become rare and discovery has grown in scope and volume, the rules have been amended several times, but have largely retained the fiction that discovery takes place as part of a march toward trial. Today's discovery landscape calls for a rethinking of the rules of civil procedure and their role in the discovery process. A better understanding of how discovery agreements come into being and the extent to which discovery culture is influenced by the judiciary and by rules is necessary to understand whether the rules, and the system as a whole, provide sufficient protections. A better understanding could inform the design of rules of civil procedure as well as efforts aimed more directly at changing the norms that shape Discovery Culture.

This exercise is timely. Specialist discovery practices are still new on the scene, but may soon become major players in the arena where discovery norms are created and propagated.[355] If so, civil discovery may, in some cases, become a practice in which discovery is fully orchestrated and conducted by lawyers in a legal subculture

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[354] *See supra* Part III.

[355] *See, e.g.*, *Fisher Phillips Adds National eDiscovery Partner, Continues Expansion in Pennsylvania*, FISHER PHILLIPS (Apr. 14, 2021), https://www.fisherphillips.com/news-insights/fisher-phillips-adds-national-ediscovery-partner-continues-expansion-in-pennsylvania.html (announcing a labor and employment firm's "firm's first full-time eDiscovery Partner"); *E-Discovery. Solved.*, LITSMART E-DISCOVERY, https://www.ktlitsmart.com (last visited Aug. 10, 2021) (attorney advertising pitching a "team of attorneys, paralegals, project managers and data analysts" dedicated to e-discovery); *Profile of Scott B. Reents*, CRAVATH, SWAINE & MOORE, https://www.cravath.com/people/scott-b-reents.html (last visited Jan. 7, 2022) (describing specialist counsel as "Lead Attorney, Data Analytics and E Discovery").

that is fully separate from the legal subculture of lawyers who worked on the earlier stages of the case (pleadings, motions to dismiss) and who may resume work on the case at a later stage (summary judgment and, very occasionally, trial). In such a split system, clients who hire lawyers to litigate their case from beginning to end may well be at a significant disadvantage: in the discovery stage, they will have to negotiate the culture as relative outsiders. If it is necessary to shore up the procedural safeguards that the formal rules no longer adequately provide during the discovery phase of a civil litigation, it is important to do so now.

APPENDIX

Table A: Court opinions from the district of Massachusetts, Minnesota, and Nevada, dated between January 1, 2011 and December 31, 2020 referencing section 30(a), any subsections of it ("Rule 30(a)(1)," "Rule 30(a)(2)(A)," etc.), or any range of rules encompassing it.

No.	Opinion	Distr.	Judge	False/ Stray [356]	Pro se[357]	P H V [358]	Description[359]
1	*Hart v. MCI Concord Superintendent*, 2012 U.S. Dist. LEXIS 170358 (D. Mass. Nov. 27, 2012)	Mass.	District	false			Reference to Mass. Crim. Proc. R. 30 (postconviction relief)
2	*Hodges v. Roden*, 2011 U.S. Dist. LEXIS 126676 (D. Mass. Sep. 7, 2011)	Mass.	Magi-strate	false			Reference to Mass. Crim. Proc. R. 30 (postconviction relief)
3	*In re Clemens*, 2020 U.S. Dist. LEXIS 185658 (D. Mass. Oct. 7, 2020)	Mass.	District	false			Reference to Mass. Crim. Proc. R. 30 (postconviction relief)
4	*Reaves v. Vidal*, 2019 U.S. Dist. LEXIS 222902 (D. Mass. Dec. 31, 2019)	Mass.	District	false			Reference to Mass. Crim. Proc. R. 30 (postconviction relief)
5	*Smith v. Goguen*, 352 F. Supp. 3d 125 (D. Mass. 2018)	Mass.	District	false			Reference to Mass. Crim. Proc. R. 30 (postconviction relief)
6	*Green v. Cosby*, 160 F. Supp. 3d 431 (D. Mass. 2016)	Mass.	District	stray		Π & Δ	Reference to FRCP 30(c) and (d) in deciding marital disqualification under Massachusetts law
7	*Quaglieri v. Steeves*, 2013 U.S. Dist. LEXIS 42621 (D. Mass. Mar. 26, 2013)	Mass.	District	stray			Summary judgment decision referencing FRCP 30 in passing
8	*Redmond-Nieves v. Okuma Am. Corp.*, 2018 U.S. Dist. LEXIS 127883 (D. Mass. Jul. 31, 2018)	Mass.	Magi-strate	stray			Stray reference to FRCP 30 as part of general recitation on document discovery
9	*Jimenez v. Nielsen*, 326 F.R.D. 357 (D. Mass. 2018)	Mass.	District		No Δ		Expedited discovery prior to motion to dismiss
10	*Facey v. Dickhaut*, 2013 U.S. Dist. LEXIS 91139 (D. Mass. Jun. 27, 2013)	Mass.	District		Π		Deposition of incarcerated plaintiff
11	*Hudson v. Spencer*, 2014 U.S. Dist. LEXIS 185223 (D. Mass. Nov. 4, 2014)	Mass.	Magi-strate		Πs		Pro se plaintiff refused to answer questions at deposition
12	*Jones v. Experian Info. Solutions*, 2016 U.S. Dist. LEXIS 137254 (D. Mass. Sep. 30, 2016)	Mass.	District		Π	Δ	Pro se plaintiff misunderstood procedure for accessing deposition transcript

[356] False hits are search hits that are not true references to FED. R. CIV. PROC. 30(a), any of its subparts, or a range of code sections that includes it. They included five opinions referencing Massachusetts Rule of Criminal Procedure 30(a) (governing post-conviction relief) that had been incorrectly coded in the Lexis+ database as referencing FED. R. CIV. P. 30(a), and one Nevada opinion incorrectly citing FED. R. CIV. P. 30(a)(2) where a reference to 33(a)(2) was unambiguously intended. Stray references (3 in Massachusetts, 2 in Minnesota, and 24 in Nevada) are search hits where the rule is mentioned in passing, in opinions that did not involve deposition-related disputes. For example, in six regulatory proceedings in Nevada, the court issued a post-trial monitoring order granting a federal agency broad discovery powers including the ability to depose witnesses under Rule 30.

[357] Except where indicated otherwise, Π indicates that at least one plaintiff was unrepresented and Δ indicates that at least one defendant was unrepresented.

[358] Π and Δ indicate that at least one plaintiff or one defendant, respectively, was represented by out-of-state counsel appearing pro hac vice.

[359] Second and subsequent decisions in the same case are noted in red. For purposes of Table 1, each decision is counted individually.

13	*Koninklijke Philips N.V. v. Wangs Alliance Corp.*, 2018 U.S. Dist. LEXIS 607 (D. Mass. Jan. 2, 2018)	Mass.	District			Π & Δ	Witness refused to appear for deposition
14	*Siupa v. Astra Tech, Inc.*, 2012 U.S. Dist. LEXIS 178789 (D. Mass. Dec. 18, 2012)	Mass.	Magi-strate			Π	Counsel obstructed deposition. (Court withdrew pro hac vice admission.)
15	*Winters v. Ocean Spray Cranberries, Inc.*, 2019 U.S. Dist. LEXIS 182211 (D. Mass. Oct. 22, 2019)	Mass.	District		[360]	Π & Δ	Obstruction of deposition by counsel.
16	*Fed. Home Loan Bank of Boston v. Ally Fin., Inc.*, 2016 U.S. Dist. LEXIS 180940 (D. Mass. Dec. 30, 2016)	Mass.	District			Π & Δ	Motion for additional depositions; joint modified scheduling order approved
17	*Fiske v. Meyou Health, Inc.*, 2014 U.S. Dist. LEXIS 84172 (D. Mass. Jun. 20, 2014)	Mass.	District				Motion for additional depositions; incorrect notice given
18	*United States ex rel. Banigan v. Organon USA Inc.*, 2013 U.S. Dist. LEXIS 125341 (D. Mass. Aug. 30, 2013)	Mass.	District			Π & Δ	Motion for additional depositions
19	*Yourga v. City of Northampton*, 2018 U.S. Dist. LEXIS 151958 (D. Mass. Sep. 6, 2018)	Mass.	Magi-strate				Motion for additional depositions
20	*Yourga v. City of Northampton*, 2018 U.S. Dist. LEXIS 30430 (D. Mass. Feb. 26, 2018)	Mass.	Magi-strate				*(same case as #19)* Motion for additional depositions; parties ordered to meet and confer
21	*Thai Le v. Diligence, Inc.*, 312 F.R.D. 245 (D. Mass. 2018)	Mass.	Magi-strate				Motion for second deposition of witness
22	*Conning v. Halpern*, 2020 U.S. Dist. LEXIS 178635 (D. Mass. Sep. 29, 2020)	Mass.	District				Deposition objections on the basis of relevance
23	*Imation Corp. v. Sanho Corp.*, 2016 U.S. Dist. LEXIS 103626 (D. Minn. Aug. 5, 2016)	Minn.	District	stray			Stray reference to FRCP 30 in list of rules recently amended
24	*Johnson v. Mead Johnson & Co.*, LLC, 2012 U.S. Dist. LEXIS 194694 (D. Minn. May 21, 2012)	Minn.	Magi-strate	stray		Π & Δ	Stray reference in FRCP 30 as often working in tandem with FRCP 26
25	*American Dairy Queen Corp. v. Blume*, 2013 U.S. Dist. LEXIS 59394 (D. Minn. Jan. 11, 2013)	Minn.	Magi-strate		Δ		Pro se defendant refused to be deposed
26	*Doud v. Durham Sch. Serv., L.P.*, 2017 U.S. Dist. LEXIS 34651 (D. Minn. Mar. 9, 2017)	Minn.	District		Π	Δ	Pro se plainitff failed to appear for deposition
27	*Fca Constr. Co. v. Singles Roofing Co.*, 2011 U.S. Dist. LEXIS 169904 (D. Minn. Aug. 2, 2011)	Minn.	Magi-strate		Δ		Lack of cooperation in discovery by pro se defendant
28	*Nelson v. Williams*, 2013 U.S. Dist. LEXIS 205242 (D. Minn. Oct. 18, 2013)	Minn.	Magi-strate		Δ		Pro se defendant refused to be deposed
29	*Owens v. Linn Cos.*, 2017 U.S. Dist. LEXIS 81389 (D. Minn. Apr. 17, 2017)	Minn.	Magi-strate		Π		Pro se plainitff failed to appear for deposition
30	*Rader v. Ally Fin., Inc.*, 2020 U.S. Dist. LEXIS 34433 (D. Minn. Jan. 30, 2020)	Minn.	Magi-strate		Π		Failure to serve deposition notice
31	*Reed v. A & A Stanley Constr.*, 2014 U.S. Dist. LEXIS 164780 (D. Minn. Jun. 19, 2014)	Minn.	Magi-strate		Δ		Pro se defendant failed to appear for deposition
32	*Rodriguez v. PJ Hafiz Club Mgmt.*, 2019 U.S. Dist. LEXIS 114112 (D. Minn. Jul. 10, 2019)	Minn.	Magi-strate		Π		Pro se plaintiff refuses to be deposed
33	*Linegar v. Lobanoff*, 2011 U.S. Dist. LEXIS 170343 (D. Minn. Aug. 23, 2011)	Minn.	Magi-strate		Π	Δ	Second deposition of witness
34	*Irish v. United States DOJ*, 2015 U.S. Dist. LEXIS 31827 (D. Minn. Feb. 9, 2015)	Minn.	Magi-strate		Π		Bivens action by pro se detainee, including for harassment during deposition
35	*Bigham v. R & S Heating & Air Conditioning, Inc.*, 2020 U.S. Dist. LEXIS 214128 (D. Minn. Nov. 17, 2020)	Minn.	District				Obstruction of deposition by witness
36	*Damgaard v. Avera Health*, 2015 U.S. Dist. LEXIS 46997 (D. Minn. Apr. 10, 2015)	Minn.	Magi-strate			Π	Obstruction of deposition by counsel
37	*Dargis v. Wyeth, Inc.*, 2012 U.S. Dist. LEXIS 189881 (D. Minn. Nov. 30, 2012)	Minn.	Magi-strates			Π & Δ	Order of questioners during depositions. Court notes: "parties should find their own solutions to an issue that could pervade every civil case: Who goes first when both parties notice a fact deposition?"

[360] This case involved many plaintiffs and many plaintiff's counsel. One plaintiff appeared pro se. Given the involvement of numerous plaintiff's counsel and lack of indication that the dispute at issue was caused by the pro se plaintiff, I did not categorize this case as a pro se case.

38	*Krekelberg v. Anoka Cty.*, 2017 U.S. Dist. LEXIS 233387 (D. Minn. Aug. 8, 017)	Minn.	Magi-strate				Officer status of witnesses for subpoena purposes. Court admonishes parties for losing sight of the civility and proportionality
39	*Wagner v. Gallup, Inc.*, 2014 U.S. Dist. LEXIS 84188 (D. Minn. Jun. 20, 2014)	Minn.	Magi-strate				Incorrect use of subpoenas. Court imposes sanctions based on "a serious dereliction of that duty"
40	*Great Lakes Gas Transmission L.P. v. Essar Steel Minn.*, LLC, 2011 U.S. Dist. LEXIS 164622 (D. Minn. Mar. 3, 2011)	Minn.	Magi-strate			Π & Δ	Motion for additional depositions. Court notes: "a monetary sanction in all practicality would be futile at deterring the noncompliant party in this case, given the extensive resources of all the parties and their demonstrated inclination towards unnecessarily litigious tactics to date."
41	*Sellner v. MAT Holdings, Inc.*, 2017 U.S. Dist. LEXIS 223618 (D. Minn. Oct. 10, 2017)	Minn.	Magi-strate				Motion for additional depositions
42	*Bombardier Rec. Prods. v. Arctic Cat, Inc.*, 2014 U.S. Dist. LEXIS 157957 (D. Minn. Sep. 24, 2014)	Minn.	Magi-strate			Π	Deposition of 'apex' witness
43	*Oehmke v. Medtronic, Inc.*, 2015 U.S. Dist. LEXIS 64340 (D. Minn. Mar. 26, 2014)	Minn.	Magi-strate				Deposition of counsel
44	*PHL Variable Ins. Co. v. 2008 Christa Joseph Irrevocable Trust*, 2012 U.S. Dist. LEXIS 195451 (D. Minn. Sep. 21, 2012)	Minn.	Magi-strate				Deposition of counsel
45	*St. Jude Med. S.C., Inc. v. James Saxon & Boston Sci. Corp.*, 2013 U.S. Dist. LEXIS 175069 (D. Minn. Dec. 10, 2013)	Minn.	District				Request for expedited discovery prior to motion to dismiss
46	*Bombardier Rec. Prods. v. Arctic Cat, Inc.*, 2016 U.S. Dist. LEXIS 184531 (D. Minn. Apr. 19, 2016)	Minn.	Magi-strate			Π	*(Same case as #42)* Motion for additional depositions
47	*CPI Card Grp., Inc. v. Dwyer*, 2018 U.S. Dist. LEXIS 193257 (D. Minn. Nov. 13, 2018)	Minn.	Magi-strate				Motion for additional depositions
48	*Johnson v. Charps Welding & Fabricating, Inc.*, 2017 U.S. Dist. LEXIS 222472 (D. Minn. Mar. 3, 2017)	Minn.	Magi-strate				Motion for additional depositions
49	*United States v. R.J. Zavoral & Sons, Inc.*, 2014 U.S. Dist. LEXIS 200897 (D. Minn. Jan. 17, 2014)	Minn.	Magi-strate				Motion for additional depositions
50	*Azarax, Inc. v. Wireless Communs. Venture LLC*, 2018 U.S. Dist. LEXIS 63111 (D. Minn. Apr. 13, 2018)	Minn.	Magi-strate			Π & Δ	Deposition of witness in Brazil, where counsel may be arrested
51	*Alexander v. 1328 Uptown, Inc.*, 2019 U.S. Dist. LEXIS 173315 (D. Minn. Oct. 7, 2019)	Minn.	Magi-strate				Motion to quash deposition on basis of relevance
52	*Entrust DataCard Corp. v. Atl. Zeiser GmbH*, 2019 U.S. Dist. LEXIS 6372 (D. Minn. Jan. 14, 2019)	Minn.	Magi-strate				Deposition of witness in other state
53	*Honeywell Int'l Inc. v. ICM Controls Corp.*, 2013 U.S. Dist. LEXIS 169064 (D. Minn. Nov. 22, 2013)	Minn.	Magi-strate				Motion to quash deposition on basis of relevance
54	*Luminara Worldwide, LLC v. Liown Elecs. Co.*, 2016 U.S. Dist. LEXIS 184212 (D. Minn. Aug. 12, 2016)	Minn.	Magi-strate				Motion for additional deposition time
55	*Murphy v. Piper*, 2018 U.S. Dist. LEXIS 192184 (D. Minn. Nov. 9, 2018)	Minn.	District				Motion for additional deposition time with witnesses with cognitive delay
56	*Svi, Inc. v. Supreme Corp.*, 2018 U.S. Dist. LEXIS 234686 (D. Nev. Mar. 7, 2018)	Nev.	Magi-strate	false			Incorrectly cites FRCP 30(a)(2) where FRCP 33(a)(2) is intended
57	*Avendano v. Sec. Consultants Group*, 302 F.R.D. 588 (D. Nev. 2014)	Nev.	Magi-strate	stray			Rule 11 sanctions motion
58	*Brazier v. Brigandi*, 2015 U.S. Dist. LEXIS 35046 (D. Nev. Mar. 20, 2015)	Nev.	Magi-strate	stray	Π		Stray reference to FRCP 30 in court's explanation of discovery process to pro se plaintiff
59	*Cranmer v. Colo. Cas. Ins. Co.*, 2014 U.S. Dist. LEXIS 163585 (D. Nev. Nov. 20, 2014)	Nev.	Magi-strate	stray			Stray reference to FRCP 30 in general recitation of protective effect of protective order
60	*Edwards v. Hightower*, 2014 U.S. Dist. LEXIS 95294 (D. Nev. Jul. 9, 2014)	Nev.	District	stray	Π		Stray reference to FRCP 30; pro se plaintiff incorrectly used subpoena
61	*FTC v. AMG Servs.*, 2016 U.S. Dist. LEXIS 135765 (D. Nev. Sep. 30, 2016)	Nev.	District	stray		Π & Δ	Stray reference to FRCP 30(b)(6) in referring to deposition testimony

62	*FTC v. AMG Servs.*, 2017 U.S. Dist. LEXIS 66689 (D. Nev. Apr. 30, 2017)	Nev.	District	stray		Π & Δ	*(Same case as #61)* Stray reference to FRCP 30(b)(6) in referring to deposition testimony
63	*FTC v. Consumer Def., LLC*, 2019 U.S. Dist. LEXIS 225283 (D. Nev. Dec. 5, 2019)	Nev.	District	stray			Stray reference to FRCP 30 in enumeration of discovery powers under post-judgment monitoring order
64	*FTC v. EMP Media, Inc.*, 2018 U.S. Dist. LEXIS 107606 (D. Nev. Jun. 15, 2018)	Nev.	District	stray			Stray reference to FRCP 30 in enumeration of discovery powers under post-judgment monitoring order
65	*FTC v. Ideal Fin. Solutions, Inc.*, 2016 U.S. Dist. LEXIS 23102 (D. Nev. Feb. 23, 2016)	Nev.	District	stray	Δ	Δ	Stray reference to FRCP 30 in enumeration of discovery powers under post-judgment monitoring order
66	*FTC v. Johnson*, 2017 U.S. Dist. LEXIS 137279 (D. Nev. Aug. 24, 2017)	Nev.	District	stray		Π & Δ	Stray reference to FRCP 30 in enumeration of discovery powers under post-judgment monitoring order
67	*FTC v. Omics Grp.*, 374 F. Supp. 3d 994 (D. Nev. 2019)	Nev.	District	stray			Stray reference to FRCP 30 in enumeration of discovery powers under post-judgment monitoring order
68	*GNLV, Corp. v. Southeast Amusement, Inc.*, 2015 U.S. Dist. LEXIS 192562 (D. Nev. Mar. 27, 2015)	Nev.	Magi-strate	stray			Stray reference to parties' earlier agreement to deposition under FRCP 30
69	*Hendrix v. Neighbors*, 2014 U.S. Dist. LEXIS 79510 (D. Nev. Jun. 10, 2014)	Nev.	District	stray	Π		Stray reference to FRCP 30 in court's explanation of discovery process to pro se plaintiff
70	*Hernandez v. Vanveen*, 2015 U.S. Dist. LEXIS 59985 (D. Nev. May 7, 2015)	Nev.	Magi-strate	stray			Reference to FRCP 30 in general recitation of discovery obligations
71	*Hernandez v. Vanveen*, 2015 U.S. Dist. LEXIS 60683 (D. Nev. May 8, 2015)	Nev.	Magi-strate	stray			*(Same case as #70)* Stray reference to FRCP 30 in connection with Rule 35 examination report
72	*Jackson v. City of Reno*, 2019 U.S. Dist. LEXIS 212351 (D. Nev. Dec. 4, 2019)	Nev.	Magi-strate	stray	Π		Stray reference to FRCP 30 in court's explanation of discovery process to pro se plaintiff
73	*Krause v. Nev. Mut. Ins. Co.*, 2013 U.S. Dist. LEXIS 180049 (D. Nev. Dec. 16, 2013)	Nev.	Magi-strate	stray		Δ	Reference to FRCP 30(b)(6) deposition taken earlier, without dispute
74	*Messina v. Singh*, 2017 U.S. Dist. LEXIS 144812 (D. Nev. Sep. 7, 2017)	Nev.	Magi-strate	stray			Stray reference to FRCP 30 deposition notice served alongside a different discovery request at issue
75	*Millenium Drilling Co. v. Beverly House-Meyers Revocable Trust*, 2015 U.S. Dist. LEXIS 2117 (D. Nev. Jan. 8, 2015)	Nev.	Magi-strate	stray		Π & Δ	Stray reference to scope of FRCP 30 in connection with dispute about defective Rule 45 subpoena
76	*NML Capital LTD. v. Republic of Arg.*, 2014 U.S. Dist. LEXIS 110625 (D. Nev. Aug. 11, 2014)	Nev.	Magi-strate	stray			Stray reference to FRCP 30 as court discusses what discovery avenues might be available to party
77	*United States EEOC v. Mattress Firm*, 2016 U.S. Dist. LEXIS 36992 (D. Nev. Mar. 21, 2016)	Nev.	Magi-strate	stray			Stray reference to FRCP 30 in footnote noting that a particular interview was not a deposition
78	*United States v. Prime Sites, Inc.*, 2018 U.S. Dist. LEXIS 22465 (D. Nev. Feb. 12, 2018)	Nev.	District	stray			Stray reference to FRCP 30 in enumeration of discovery powers under monitoring order
79	*Williams v. Nev. Dep't of Corr.*, 2015 U.S. Dist. LEXIS 40409 (D. Nev. Mar. 30, 2015)	Nev.	Magi-strate	stray	Π		Stray reference to FRCP 30 in court's explanation of discovery process to pro se plaintiff
80	*Garay v. City of Las Vegas*, 2020 U.S. Dist. LEXIS 200664 (D. Nev. Ot. 8, 2020)	Nev.	Magi-strate	no dis-pute		Π	Parties joint request for extension of discovery cut-off date
81	*Clockwork IP, LLC v. Aladdin One Hour HVAC, Inc.*, 2015 U.S. Dist. LEXIS 67177 (D. Nev. May 21, 2015)	Nev.	Magi-strate		Δ		Pro se defendant failed to make FRCP 30(b)(6) witness available. Sanctions ordered.
82	*Almy v. Davis*, 2013 U.S. Dist. LEXIS 139364 (D. Nev. Jul. 31, 2013)	Nev.	Magi-strate		Π		Pro se plaintiff's motion for additional depositions
83	*Almy v. Davis*, 2013 U.S. Dist. LEXIS 157552 (D. Nev. Nov. 1, 2013)	Nev.	Magi-strate		Π		*(Same case as #82)* Pro se plaintiff's motion for additional depositions
84	*Jackson v. Nev.*, 2019 U.S. Dist. LEXIS 237352 (D. Nev. Feb. 8, 2019)	Nev.	Magi-strate		Π		Incarcerated in forma pauperis litigant seeking deposition
85	*McDonald v. Olivas*, 2014 U.S. Dist. LEXIS 130293 (D. Nev. Sep. 17, 2014)	Nev.	Magi-strate		Π		Pro se, in forma pauperis litigant seeking depositions
86	*McDonald v. Olivas*, 2014 U.S. Dist. LEXIS 95299 (D. Nev. Jul. 14, 2014)	Nev.	Magi-strate		Π		*(Same case as #85)* Pro se, in forma pauperis litigant seeking depositions
87	*Picozzi v. Clark Cnty. Det. Ctr.*, 2016 U.S. Dist. LEXIS 151136 (D. Nev. Oct. 31, 2016)	Nev.	Magi-strate		Π		Pro se, in forma pauperis litigant seeking depositions
88	*Picozzi v. Clark Cnty. Det. Ctr.*, 2017 U.S. Dist. LEXIS 37896 (D. Nev. Mar. 15, 2017)	Nev.	Magi-strate		Π		*(Same case as #87)* Pro se, in forma pauperis litigant seeking access to deposition transcript

89	*Weathers v. Loumakis*, 2016 U.S. Dist. LEXIS 147463 (D. Nev. Oct. 24, 2016)	Nev.	Magi-strate		Π		Pro se, in forma pauperis litigant seeking depositions
90	*Bailey v. City of N. Las Vegas Police Dep't*, 2011 U.S. Dist. LEXIS 15155 (D. Nev. Feb. 4, 2011)	Nev.	Magi-strate		Π		Deposition of incarcerated witness
91	*Clark v. Thomas*, 2014 U.S. Dist. LEXIS 80228 (D. Nev. Jun. 11, 2014)	Nev.	District		Π		Deposition of incarcerated witness
92	*Roberts v. Cox*, 2012 U.S. Dist. LEXIS 45747 (D. Nev. Apr. 2, 2012)	Nev.	Magi-strate		Π		Deposition of incarcerated witness
93	*Albra v. Selene Fin.*, 2018 U.S. Dist. LEXIS 212159 (D. Nev. Dec. 17, 2018)	Nev.	District		Π		Pro se plaintiff failed to appear for deposition
94	*Duensing v. Gilbert*, 2013 U.S. Dist. LEXIS 111266 (D. Nev. Aug 5, 2013)	Nev.	Magi-strate		Π	Δ	Pro se plaintiff failing to respond to discovery requests
95	*Edwards v. Las Vegas Metro. Police Dep't*, 2015 U.S. Dist. LEXIS 62483 (D. Nev. May 8, 2015)	Nev.	Magi-strate		Π		Pro se plaintiff refusing to respond to deposition notice. Court notes the parties should have met and conferred.
96	*Friedman v. Baca*, 2019 U.S. Dist. LEXIS 159525 (D. Nev. Sep. 18, 2019)	Nev.	Magi-strate		Π		Pro se plaintiff refuses to be deposed
97	*Guangyu Wang v. Nev. Sys. of Higher Educ.*, 2019 U.S. Dist. LEXIS 116705 (D. Nev. Jul. 12, 2019)	Nev.	District		Π		Process for amending of deposition transcript
98	*Ingram v. Clark Cty. Sch. Dist.*, 2019 U.S. Dist. LEXIS 171754 (D. Nev. Oct. 2, 2019)	Nev.	Magi-strate		Π		Pro se plaintiff failed to appear for deposition
99	*Newton v. Las Vegas Metro. Police Dep't*, 2014 U.S. Dist. LEXIS 61851 (D. Nev. May 5, 2014)	Nev.	District		Π		Pro se plaintiff failing to respond to discovery requests
100	*Nichols v. Bannister*, 2011 U.S. Dist. LEXIS 122898 (D. Nev. Oct. 24, 2011)	Nev.	Magi-strate		Π		Pro se plaintiff following incorrect procedure for scheduling deposition
101	*Picozzi v. Clark Cty. Det. Ctr.*, 2017 U.S. Dist. LEXIS 171272 (D. Nev. Oct. 16, 201)	Nev.	Magi-strate		Π		*(Same case as ##87 and 88)* Pro se plaintiff seeking permission to depose by written questions
102	*Quiroz v. Dickerson*, 2013 U.S. Dist. LEXIS 203178 (D. Nev. Jun. 5, 2013)	Nev.	Magi-strate		Π		Pro se plaintiff following incorrect procedure for scheduling deposition
103	*Villa v. High Noon West, LLC*, 2016 U.S. Dist. LEXIS 140607 (D. Nev. Oct. 11, 2016)	Nev.	Magi-strate		Π		Pro se plaintiff failed to appear for deposition
104	*McGee v. Donahoe*, 2017 U.S. Dist. LEXIS 184210 (D. Nev. Oct. 31, 2017)	Nev.	District		Π		Expert deposition fees
105	*McGee v. Brennan*, 2016 U.S. Dist. LEXIS 67959 (D. Nev. May 23, 2016)	Nev.	Magi-strate		Π		*(Same case as #104)* expert deposition fees
106	*Ahern Rentals Inc. v. Damelio Commer. Contr.*, 2013 U.S. Dist. LEXIS 104877 (D. Nev. Jul. 26, 2013)	Nev.	Magi-strate				Witness refuses to appear for deposition
107	*Nationstar Mortg., LLC v. Flamingo Trails No. 7 Landscape Maint. Ass'n*, 316 F.R.D. 327 (D. Nev. 2016)	Nev.	Magi-strate				Witness refuses to appear for deposition. Court grants sanctions
108	*Walker v. Venetian Casino Resort, LLC*, 2011 U.S. Dist. LEXIS 123766 (D. Nev. Oct. 20, 2011)	Nev.	Magi-strate				Witness refuses to appear for deposition
109	*Brincko v. Rio Props., Inc.*, 278 F.R.D. 576 (D. Nev. 2011)	Nev.	Magi-strate			Π	Obstruction of deposition by counsel
110	*Casun, A.G. v. Ponder*, 2018 U.S. Dist. LEXIS 105403 (D. Nev. Jun. 25, 2018)	Nev.	Magi-strate				Obstruction of deposition by counsel
111	*Hooman Sadeh v. Venetian Casino Resort, LLC*, 2011 U.S. Dist. LEXIS 131985 (D. Nev. Nov. 15, 2011)	Nev.	Magi-strate				Obstruction of deposition by counsel
112	*Kabins Family LP v. Chain Consortium*, 2012 U.S. Dist. LEXIS 44580 (D. Nev. Mar. 30, 2012)	Nev.	District				Obstruction of deposition by counsel
113	*Luangisa v. Interface Operations*, 2011 U.S. Dist. LEXIS 139700 (D. Nev. Dec. 5, 2011)	Nev.	Magi-strate				Obstruction of deposition by counsel
114	*Rapaport v. Soffer*, 2012 U.S. Dist. LEXIS 183156 (D. Nev. Dec. 31, 2012)	Nev.	Magi-strate				Obstruction of deposition by counsel
115	*Torres v. Bellagio, LLC*, 2018 U.S. Dist. LEXIS 23102 (D. Nev. Feb. 13, 2018)	Nev.	Magi-strate				Obstruction of deposition by counsel
116	*Agarwal v. Or. Mut. Ins. Co.*, 2013 U.S. Dist. LEXIS 7717 (D. Nev. Jan. 18, 2013)	Nev.	Magi-strate			Δ	Omnibus discovery motion denied. Court notes "a casual and consistent disregard for the Federal Rules, Local Rules, and discovery process in general."
117	*United States EEOC v. Mattress Firm, Inc.*, 2014 U.S. Dist. LEXIS 152842 (D. Nev. Oct. 27, 2014)	Nev.	District				*(Same case as #77)* Deposition scheduling. Court notes that "this dispute would have been avoided if counsel for either party fully satisfied their ethical obligations."

118	*FDIC v. 26 Flamingo, LLC*, 2013 U.S. Dist. LEXIS 81932 (D. Nev. Jun. 10, 2013)	Nev.	Magi-strate			Δ	Motion for second deposition of witness. Court notes that "Defendant has failed to show that a sufficient meet and confer occurred."
119	*U-Haul Co. of Nev. v. Gregory J. Kamer, Ltd.*, 2013 U.S. Dist. LEXIS 116338 (D. Nev. Aug. 15, 2013)	Nev.	Magi-strate				Additional depositions. Court notes that "parties are encouraged to resolve disputes through stipulation to eliminate the need for this type of motion."
120	*El Dorado Energy, LLC v. Laron, Inc.*, 2013 U.S. Dist. LEXIS 71150 (D. Nev. May 16, 2013)	Nev.	Magi-strate			Π	Additional depositions
121	*Kabins Family Ltd. P'ship v. Chain Consortium*, 2012 U.S. Dist. LEXIS 201363 (D. Nev. Sep. 28, 2012)	Nev.	Magi-strate				*(Same case as #112)* Additional depositions
122	*Powell v. Texvans, Inc.*, 2011 U.S. Dist. LEXIS 5034 (D. Nev. Jan. 12, 2011)	Nev.	Magi-strate				Additional depositions
123	*U-Haul Co. of Nev., Inc. v. Gregory J. Kamer, Ltd.*, 2013 U.S. Dist. LEXIS 43338 (D. Nev. Mar. 26, 2013)	Nev.	District				*(Same case as #119)* Additional depositions
124	*Harter v. CPS Security (USA), Inc.*, 2013 U.S. Dist. LEXIS 3356 (D. Nev. Jan. 7, 2013)	Nev.	Magi-strate				Deposition of counsel
125	*Mid-Century Ins. Co. v. Wells*, 2013 U.S. Dist. LEXIS 203669 (D. Nev. Jun. 17, 2013)	Nev.	Magi-strate				Deposition of counsel
126	*My Home Now, LLC v. JPMorgan Chase Bank, N.A.*, 2016 U.S. Dist. LEXIS 149690 (D. Nev. Oct. 28, 2016)	Nev.	Magi-strate				Deposition of counsel
127	*Hologram USA, Inc. v. Pulse Entm't, Inc.*, 2014 U.S. Dist. LEXIS 71895 (D. Nev. May 27, 2014)	Nev.	Magi-strate			Π & Δ	Expedited discovery prior to motion to dismiss
128	*Snow Covered Capital, LLC v. Weidner*, 2019 U.S. Dist. LEXIS 107557 (D. Nev. Jun. 26, 2019)	Nev.	Magi-strate			Π	Expedited discovery prior to motion to dismiss, of terminally ill nonparty witness
129	*Wynn v. Bloom*, 2019 U.S. Dist. LEXIS 75439 (D. Nev. May 2, 2019)	Nev.	Magi-strate			Π & Δ	Expedited discovery prior to motion to dismiss
130	*Pac. Coast Steel v. Leany*, 2012 U.S. Dist. LEXIS 17792 (D. Nev. Feb. 13, 2012)	Nev.	Magi-strate				Motion to reopen discovery and re-depose a witness
131	*McGee v. Hanger Prosthetics & Orthotics, Inc.*, 2013 U.S. Dist. LEXIS 55563 (D. Nev. Apr. 18, 2013)	Nev.	Magi-strate				Video deposition of witness who cannot leave Canada for immigration reasons
132	*MGM Grand Hotel, LLC v. Kyung Shin*, 2017 U.S. Dist. LEXIS 137660 (D. Nev. Mar. 8, 2017)	Nev.	Magi-strate				Deposition of witness in Canada
133	*Otto v. Refacciones Neumaticas La Paz, S.A. DE C.V.*, 2019 U.S. Dist. LEXIS 50768 (D. Nev. Mar. 26, 2019)	Nev.	Magi-strate				Deposition of witness in Mexico
134	*SEC v. Banc de Binary*, 2014 U.S. Dist. LEXIS 34373 (D. Nev. Mar. 14, 2014)	Nev.	Magi-strate				Deposition of witness in Cyprus
135	*Avila v. Century Nat'l Ins. Co.*, 2013 U.S. Dist. LEXIS 33153 (D. Nev. Mar. 11, 2013)	Nev.	District				Adequacy of 30(b)(6) (corporate representative) witness
136	*Basile v. Novak*, 2020 U.S. Dist. LEXIS 58594 (D. Nev. Mar. 26, 2020)	Nev.	Magi-strate				Waiver of privilege
137	*Cannata v. Wyndham WorldWide Corp.*, 2011 U.S. Dist. LEXIS 134146 (D. Nev. Nov. 17, 2011)	Nev.	Magi-strate			Π	Relevance of deposition questions
138	*Cohan v. Provident Life & Accident Ins. Co.*, 2014 U.S. Dist. LEXIS 118925 (D. Nev. Aug. 26, 2014)	Nev.	Magi-strate			Π	Additional deposition time
139	*GenX Processors Mauritius Ltd. v. Jackson*, 2018 U.S. Dist. LEXIS 187957 (D. Nev. Nov. 2, 2018)	Nev.	Magi-strate				Adequacy of defendant's deposition objection
140	*Grahl v. Circle K Stores, Inc.*, 2017 U.S. Dist. LEXIS 141190 (D. Nev. Aug. 31, 2017)	Nev.	Magi-strate			Π	Adequacy of 30(b)(6) (corporate representative) witness
141	*Jackson v. UA Theatre Circuit, Inc.*, 278 F.R.D. 586 (D. Nev. 2011)	Nev.	Magi-strate				Whether a nonlawyer's interview of a witness constituted unauthorized practice of law. Court issues sanctions for unrelated reasons.
142	*Lee v. United States*, 2016 U.S. Dist. LEXIS 115542 (D. Nev. Aug. 29, 2016)	Nev.	District			Π	Objection to deposition on basis of necessity
143	*Schwartz v. Clark Cty., Nev.*, 2018 U.S. Dist. LEXIS 57392 (D. Nev. Apr. 4, 2018)	Nev.	District				Adequacy of 30(b)(6) (corporate representative) witness
144	*Slagowski v. Cent. Wash. Asphalt*, 291 F.R.D. 563 (D. Nev. 2013)	Nev.	Magi-strate			Π & Δ	Objection to deposition pending criminal indictment

145	*United States v. $177,844.68 in United States Currency*, 2015 U.S. Dist. LEXIS 90579 (D. Nev. Jul. 10, 2015)	Nev.	Magistrate				Relevance of witness
146	*USF Ins. Co. v. Smith's Food & Drug Ctrs., Inc.*, 2012 U.S. Dist. LEXIS 45852 (D. Nev. Apr. 2, 2012)	Nev.	Magistrate				Relevance of witness

Table B: Results of a PACER docket search using Bloomberg software, for "Rule 30(a)," "FRCP 30(a)" or "Fed. R. Civ. P. 30(a),"[361] from the district of Massachusetts, Minnesota, and Nevada, dated between January 1, 2011, and December 31, 2020.

No.	Docket	Distr.	8th Cir. Rule 30A[362]	Other false hit[363]	Incarcerated witness[364]	No dispute[365]	Other
1	*Babey v. Minnesota, State of et al.*, No. 0:11-cv-00209 (D. Minn. Jan. 27, 2011)	Minn.	x				
2	*Bobo v. State of Minnesota*, No. 0:14-cv-04843 (D. Minn. Nov. 24, 2014)	Minn.	x				
3	*Bresnahan v. Roy*, No. 0:11-cv-01418 (D. Minn. Jun. 01, 2011)	Minn.	x				
4	*Buckingham v. Symmes*, No. 0:11-cv-02489 (D. Minn. Aug. 29, 2011)	Minn.	x				
5	*Carlson v. Dooly et al*, No. 0:13-cv-00241 (D. Minn. Jan. 30, 2013)	Minn.	x				
6	*Conley v. Smith et al*, No. 0:13-cv-01069 (D. Minn. May 07, 2013)	Minn.	x				
7	*Crow v. Swanson*, No. 0:11-cv-00858 (D. Minn. Apr. 07, 2011)	Minn.	x				
8	*Deleston v. Fisher*, No. 0:12-cv-03006 (D. Minn. Nov. 30, 2012)	Minn.	x				
9	*Dudley v. Roy et al*, No. 0:13-cv-03400 (D. Minn. Dec. 10, 2013)	Minn.	x				
10	*Fargas v. United States of America et al*, No. 0:12-cv-02165 (D. Minn. Aug. 29, 2012)	Minn.	x				
11	*Foster v. Krueger*, No. 0:12-cv-02699 (D. Minn. Oct. 15, 2012)	Minn.	x				
12	*Gearhart et al v. Heart et al*, No. 0:16-cv-04035 (D. Minn. Dec. 1, 2016)	Minn.	x				
13	*Hayes v. U.S. Department of Justice et al*, No. 0:11-cv-00462 (D. Minn. Feb. 23, 2011)	Minn.	x				
14	*Jacobs v. Sletten et al*, No. 0:11-cv-00548 (D. Minn. Mar. 03, 2011)	Minn.	x				
15	*Larson v. Roy*, No. 0:12-cv-01590 (D. Minn. Jul. 02, 2012)	Minn.	x				
16	*Maxwell v. Gau*, No. 0:12-cv-01770 (D. Minn. Jul. 23, 2012)	Minn.	x				
17	*Michuda v. Minnesota, State of et al.*, No. 0:11-cv-01028 (D. Minn. Apr. 21, 2011)	Minn.	x				
18	*Michuda v. State of Minnesota et al.*, No. 0:11-cv-01030 (D. Minn. Apr. 21, 2011)	Minn.	x				
19	*Michuda v. State of Minnesota, et al.*, No. 0:11-cv-01029 (D. Minn. Apr. 21, 2011)	Minn.	x				
20	*Milner v. Smith*, No. 0:14-cv-04243 (D. Minn. Oct. 10, 2014)	Minn.	x				
21	*Perleberg v. Smith*, No. 0:14-cv-01827 (D. Minn. Jun. 05, 2014)	Minn.	x				
22	*Robeson v. English*, No. 0:11-cv-03237 (D. Minn. Nov. 02, 2011)	Minn.	x				
23	*Silva v. Fisher*, No. 0:12-cv-01934 (D. Minn. Aug. 07, 2012)	Minn.	x				

[361] Since Bloomberg ignores punctuation and spacing, a search for "30(a)" considers text such as "9:30 am" a hit, making a search for "30(a)" by itself not feasible.

[362] False hits: dockets referencing 8th Circuit rule 30A but not FED. R. CIV. PROC. 30 or any of its subparts.

[363] Other false hits.

[364] References to FED. R. CIV. PROC. 30 or any of its subparts in connection with the deposition of an incarcerated witness.

[365] References to FED. R. CIV. PROC. 30 or any of its subparts outside of the context of a deposition dispute.

24	*Sorenson v. Minnesota Department of Corrections et al*, No. 0:12-cv-01336 (D. Minn. Jun. 05, 2012)	Minn.	x				
25	*Sorenson v. Minnesota Department of Human Services ("MDHS") et al*, No. 0:15-cv-01573 (D. Minn. Mar. 17, 2015)	Minn.	x				
26	*Thelen v. State of Minnesota et al*, No. 0:12-cv-03150 (D. Minn. Dec. 20, 2012)	Minn.	x				
27	*Thomas v. Dooley*, No. 0:13-cv-01143 (D. Minn. May 13, 2013)	Minn.	x				
28	*Thomas v. State of MN*, No. 0:11-cv-02348 (D. Minn. Aug. 16, 2011)	Minn.	x				
29	*Vang v. Fabian*, No. 0:11-cv-00090 (D. Minn. Jan. 12, 2011)	Minn.	x				
30	*Vasquez v. Parker et al*, No. 0:11-cv-03243 (D. Minn. Nov. 03, 2011)	Minn.	x				
31	*Ward v. Minnesota*, State of, No. 0:13-cv-02021 (D. Minn. Jul. 26, 2013)	Minn.	x				
32	*Brik v. United States of America*, No. 0:16-cv-00290 (D. Minn. Feb.. 4, 2016)	Minn.	x				
33	*Bryant v. South Dakota State University (SDSU)*, No. 0:11-cv-00542 (D. Minn. Mar. 03, 2011)	Minn.	x				
34	*Burnett v. GlaxoSmithKline LLC. et al*, No. 0:16-cv-01137 (D. Minn. Apr. 29, 2016)	Minn.	x				
35	*Carlone v. Heat and Frost Insulators and Allied Workers Local 34*, No. 0:14-cv-00579 (D. Minn. Mar. 03, 2014)	Minn.	x				
36	*Flores v. United States Department of Health and Human Services*, No. 0:12-cv-02774 (D. Minn. Oct. 31, 2012)	Minn.	x				
37	*In re: Eldon Phillip Anderson*, No. 0:13-cv-01366 (D. Minn. Jun. 06, 2013)	Minn.	x				
38	*Martin v. Mpls School Dist #1*, No. 0:14-cv-04462 (D. Minn. Oct. 23, 2014)	Minn.	x				
39	*Perry v. Boston Scientific Family et al*, No. 0:13-cv-00733 (D. Minn. Mar. 29, 2013)	Minn.	x				
40	*Roberson v. Pearson et al*, No. 0:12-cv-02128 (D. Minn. Aug. 29, 2012)	Minn.	x				
41	*Rodriquez v. Colvin*, No. 0:15-cv-04583 (D. Minn. Dec. 30, 2015)	Minn.	x				
42	*Sanvee v. Hennepin County Human Services et al*, No. 0:12-cv-01702 (D. Minn. Jul. 13, 2012)	Minn.	x				
43	*Shulbe v. State of Minnesota et al.*, No. 0:14-cv-05091 (D. Minn. Dec. 29, 2014)	Minn.	x				
44	*Washington v. National Black Police Association*, No. 0:17-cv-02525 (D. Minn. Jul. 5, 2017)	Minn.	x				
45	*Westley v. Borer et al*, No. 0:17-cv-00103 (D. Minn. Jan. 10, 2017)	Minn.	x				
46	*Wilson v. EH Harassment*, No. 0:13-cv-00429 (D. Minn. Feb. 08, 2013)	Minn.	x				
47	*Wright v. First Student*, No. 0:11-cv-02121 (D. Minn. Jul. 28, 2011)	Minn.	x				
48	*Barbosa v. Wall*, No. 1:14-cv-11255 (D. Mass. Mar. 24, 2014)	Mass.		x			
49	*Brown v. Ricci*, No. 1:11-cv-11154 (D. Mass. Jun. 29, 2011)	Mass.		x			
50	*State Farm Fire & Casualty Company v. BMC USA Corporation et al*, No. 0:16-cv-01793 (D. Minn. Jun. 01, 2016)	Minn.		x			
51	*Cordero v. Dickhaut et al*, No. 1:11-cv-10098 (D. Mass. Jan. 13, 2011)	Mass.			x		x[366]
52	*Corgan v. Nevada Department of Public Safety Investigation Division, et al.*, No. 3:14-cv-00692 (D. Nev. Dec. 31, 2014)	Minn.			x		
53	*Debarr v. Carpentar et al*, No. 3:12-cv-00039 (D. Nev. Jan. 20, 2012)	Minn.			x		
54	*Faust v. Cabral et al*, No. 1:12-cv-11020 (D. Mass. Jun. 08, 2012)	Nev.			x		
55	*Hall v. Springfield, City of et al*, No. 3:13-cv-30002 (D. Mass. Jan. 07, 2013)	Mass.			x		
56	*Hudson et al v. Spencer et al*, No. 1:11-cv-12173 (D. Mass. Dec. 08, 2011)	Nev.			x		
57	*Johnson v. Ely State Prison et al*, No. 3:14-cv-00122 (D. Nev. Mar. 06, 2014)	Mass.			x		
58	*Johnson v. Moore et al*, No. 3:14-cv-00303 (D. Nev. Jun. 10, 2014)	Nev.			x		
59	*Johnson v. Nguyen et al*, No. 3:12-cv-00538 (D. Nev. Oct. 04, 2012)	Nev.			x		
60	*Latimore v. Suffolk County House of Correction et al*, No. 1:14-cv-13378 (D. Mass. Aug. 15, 2014)	Mass.			x		
61	*Lopes v. Riendeau et al*, No. 1:14-cv-10679 (D. Mass. Mar. 14, 2014)	Mass.			x		
62	*McClain v. Cousins et al*, No. 1:13-cv-10307 (D. Mass. Feb. 15, 2013)	Nev.			x		
63	*Moore v. Mend Correctional Care et al*, No. 0:15-cv-02848 (D. Minn. Jun. 29, 2015)	Mass.			x		

[366] This docket reflects both an issue related to a deposition of an incarcerated witness and a deposition dispute of a different nature. Below, I count this entry in both columns.

64	*Pattison v. The State of Nevada, Ex Rel*, No. 3:14-cv-00020 (D. Nev. Jan. 09, 2014)	Nev.			x		
65	*Willis v. Murnane Brandt et al*, No. 0:12-cv-00122 (D. Minn. Jan. 17, 2012)	Minn.			x		
66	*Woody v. United States Federal Bureau of Prisons et al*, No. 0:16-cv-00862 (D. Minn. Apr. 01, 2016)	Mass.			x		
67	*Akin v. Pack et al*, No. 3:16-cv-30048 (D. Mass. Mar. 16, 2016)	Minn.			x		
68	*Casaburri v. Gutwill et al*, No. 1:13-cv-10988 (D. Mass. Apr. 22, 2013)	Mass.			x		
69	*Cox v. Murphy et al*, No. 1:12-cv-11817 (D. Mass. Oct. 01, 2012)	Mass.			x		
70	*Deptula v. City of Worcester et al*, No. 4:17-cv-40055 (D. Mass. May 02, 2017)	Mass.			x		
71	*Garvey et al v. Town of Wilmington et al*, No. 1:17-cv-10472 (D. Mass. Mar. 21, 2017)	Mass.			x		
72	*United States of America v. $147,200.00 In U.S. Currency et al*, No. 0:18-cv-00605 (D. Minn. Mar. 02, 2018)	Nev.			x		
73	*White v. Prime Sonoma Shadows LLC*, No. 2:13-cv-02277 (D. Nev. Dec. 13, 2013)	Mass.			x		
74	*Williams v. Kawasaki Heavy Industries (USA), Inc, et al*, No. 3:16-cv-30142 (D. Mass. Aug. 16, 2016)	Mass.			x		
75	*Business Systems Consultants, Inc. v. Trend Micro Incorporated et al*, No. 1:11-cv-12287 (D. Mass. Dec. 22, 2011)	Mass.				x	
76	*Davine et al v. The Golub Corporation et al*, No. 3:14-cv-30136 (D. Mass. Jul. 30, 2014)	Mass.				x	
77	*Manteris v. Wal-Mart Stores, Inc.*, No. 2:11-cv-00045 (D. Nev. Jan. 11, 2011)	Nev.				x	
78	*BioPoint, Inc.. v. Attis et al*, No. 1:20-cv-10118 (D. Mass. Jan. 21, 2020)	Mass.					x
79	*Cai v. Switch, Inc. et al*, No. 2:18-cv-01471 (D. Nev. Aug. 08, 2018)	Mass.					x
80	*Cappucci v. Quality Cleaning & Restoration, Inc.*, No. 3:17-cv-30040 (D. Mass. Apr. 06, 2017)	Mass.					x
81	*DAHHAN v. OvaScience, Inc. et al*, No. 1:17-cv-10511 (D. Mass. Mar. 24, 2017)	Nev.					x
82	*Doe v. Williams College*, No. 3:16-cv-30184 (D. Mass. Nov. 23, 2016)	Mass.					x
83	*Harden v. Boston Scientific Corporation et al*, No. 1:15-cv-11503 (D. Mass. Apr. 02, 2015)	Mass.					x
84	*Hayes et al v. CRGE Foxborough, LLC*, No. 1:13-cv-12014 (D. Mass. Aug. 21, 2013)	Mass.					x
85	*In re Solodyn (Minocycline Hydrochloride) Antitrust Litigation*, No. 1:14-md-02503 (D. Mass. Feb. 25, 2014)	Mass.					x
86	*Lowell General Hospital v. OptumRx, Inc.*, No. 1:19-cv-11795 (D. Mass. Aug. 21, 2019)	Mass.					x
87	*Marti v. Schreiber/Cohen, LLC et al*, No. 4:18-cv-40164 (D. Mass. Oct. 03, 2018)	Mass.					x
88	*Metropolitan Property and Casualty Insurance Company v. Savin Hill et al*, No. 1:15-cv-12939 (D. Mass. Jul. 13, 2015)	Mass.					x
89	*Russo v. Lopez*, No. 2:11-cv-00284 (D. Nev. Feb. 22, 2011)	Mass.					x
90	*Shark Ninja Operating LLC v. Dyson Inc.*, No. 1:14-cv-13720 (D. Mass. Sep. 26, 2014)	Mass.					x
91	*Shrestha v. Delta Management Associates, Inc.*, No. 1:17-cv-12256 (D. Mass. Nov. 15, 2017)	Mass.					x
92	*Tersigni v. Wyeth et al*, No. 1:11-cv-10466 (D. Mass. Mar. 17, 2011)	Nev.					x
	Total:		**47**	**3**	**24**	**3**	**16**