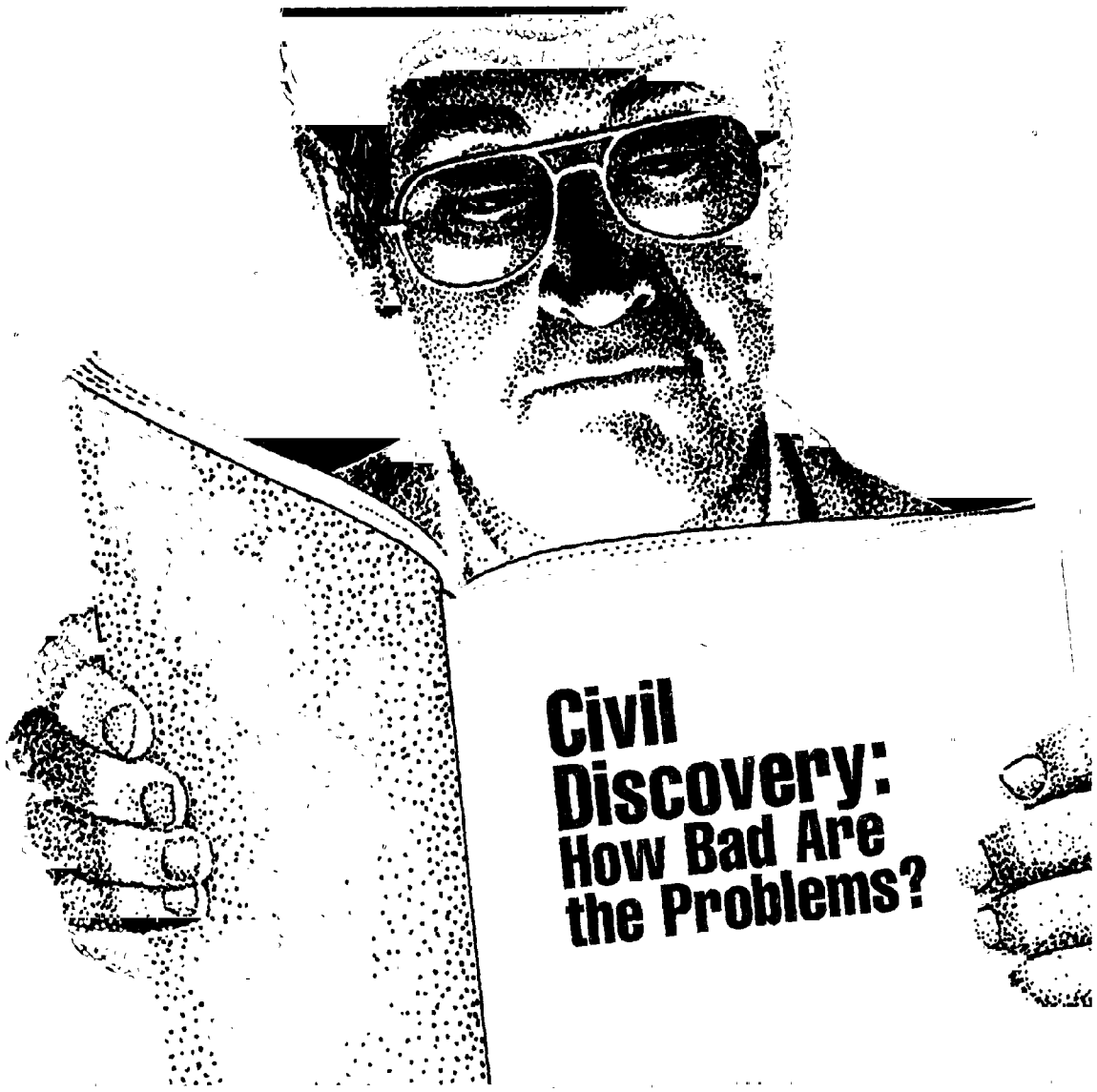


Civil Discovery: How Bad Are the Problems?

By Wayne D. Brazil

DURING the last few years many practicing lawyers, judges, and legal scholars have criticized the way pretrial discovery is working in civil litigation and have committed a great deal of time to drafting proposals for its improvement. Most of this criticism has been based primarily on the personal experience and observations of the critics. For that reason, it has lacked one very important quality: it has not been able to show how widespread and damaging the problems it exposes are. In 1979 the American Bar Foundation began sponsoring a study whose purpose was to meet this need.

The team of lawyers and scholars who designed the study wanted to know how severe, how recurrent, and how costly the problems that beset the discovery system are. Toward that end, we prepared a comprehensive set of questions that we posed in lengthy interviews to 180 litigators who practice in the Chicago area. Because we interviewed lawyers from a wide range of civil practices, we were able to compare the experiences and complaints of groups of quite differently situated attorneys.

What did we learn? The data show that there are great differences between the character of discovery in large cases and in smaller cases and that in larger lawsuits the system is plagued with severe problems that prevent it from effectively serving the purposes for which it was designed. The interviews also produced a dramatically intense and consistent chorus of criticism of the role the courts play in the discovery arena. An overwhelming majority of the lawyers we interviewed blame the judiciary for many of the discovery system's most severe problems. Four of every five respondents believe the courts should impose sanctions more frequently. And litigators who primarily handle larger matters call in loud and remarkably united voices for more help from the courts in controlling what appears to be a runaway system.

We should begin with an overview of what the data show about discovery in larger cases, which we define as those in which $1,000,000 or more is in dispute. The United States Supreme Court has provided the backdrop against which these data must be evaluated. According to the Court, the machinery

of discovery is designed to help "secure the just, speedy, and inexpensive determination of every action" and, in particular, to assure that "[m]utual knowledge of all relevant facts gathered by both parties [which] is essential to proper litigation." It follows that the discovery system must be evaluated from two different perspectives: (1) how *efficient* is the process and (2) does it actually *result* in the exchange of the important information?

Early in each interview we asked for general impressions about how well the discovery system is working. Only 7 per cent of the big case litigators offered clearly positive assessments. By contrast, 43 per cent of the lawyers in this category expressed aggressively negative views, while the remaining 50 per cent had mixed feelings about the health of the discovery process.

Responding to specific questions about obstacles to their discovery efforts, big case lawyers portrayed a system whose most salient characteristic is gross inefficiency. Among the sources of that inefficiency, none plays a more pervasive, troublesome role than evasion. Evasive responses to discovery requests have become a ubiquitous feature of the system in sizeable lawsuits. Big case lawyers reported that their discovery efforts are impeded or completely frustrated by their opponents' evasive or incomplete responses in four of every five of their cases.

The litigators' admissions about the way they shape their own responses to discovery probes from other parties are almost as dramatic and probably more revealing. As a group, the big case attorneys admitted that "the purpose of distracting another party's attention from or obscuring the existence of information" affects how they present their responses to discovery requests in nearly half of their cases. The same group of litigators also confessed that the way they prepared "a client or witness to be deposed result[s] in other parties not learning something of arguable significance from [their] client or witness during his deposition" in about 60 per cent of their cases.

It is interesting that those we interviewed do not ascribe the evasive practices primarily to dishonesty or bad faith. In fact, the lawyers in our sample believe that dishonesty by an opposing party or attorney is an obstacle to discovery in less than 20 per cent of their cases. Instead of blaming outright cheating, litigators tend to view evasion as the product of aggressive adversarial maneuvering—for example, construing discovery probes as narrowly as their language will possibly permit.

Providing evasive or only partly responsive answers to discovery requests is not the only form of "foxholing" that plagues larger lawsuits. Another widely used avoidance technique is delay. The big case lawyers we interviewed complained that unjustifiable dilatoriness by opponents impedes or blocks their discovery efforts in one of every two cases. The same group conceded that "the purpose of gaining time or slowing down part or all of an action" affects their own "use of discovery tools" in about 40 per cent of their cases. Similarly, these lawyers admitted that "the purpose of imposing work burdens or economic pressure on another party or attorney" affects how they conduct discovery in about one third of their cases.

Doctrinal shields of information—the attorney-client privilege, the work product doctrine, and rules protecting trade secrets — also are significant sources of friction and inefficiency in the discovery stage of major lawsuits. Litigators whose median-sized case was $1,000,000 or more reported that the way opponents use the attorney-client privilege makes discovery more difficult in more than one case in every three and that in half of their cases some other doctrinal protection of information impedes (either temporarily or permanently) their access to relevant evidence.

Even while acknowledging that assertions of privilege provoke many discovery disputes, very few of the attorneys we interviewed objected to the policies and values on which the privileges are based. In fact, many went out of their way to affirm their belief in the legitimacy and importance of privilege doctrine. And three of every four whom we asked about the scope of the attorney-client privilege said it should be left as it is. It also is noteworthy that the vast majority of the lawyers indicated that when an opponent fails to discover something significant from them, the reason is much less likely to be the intervention of a privilege than some deficiency or limitation in the way that opponent conducted discovery.

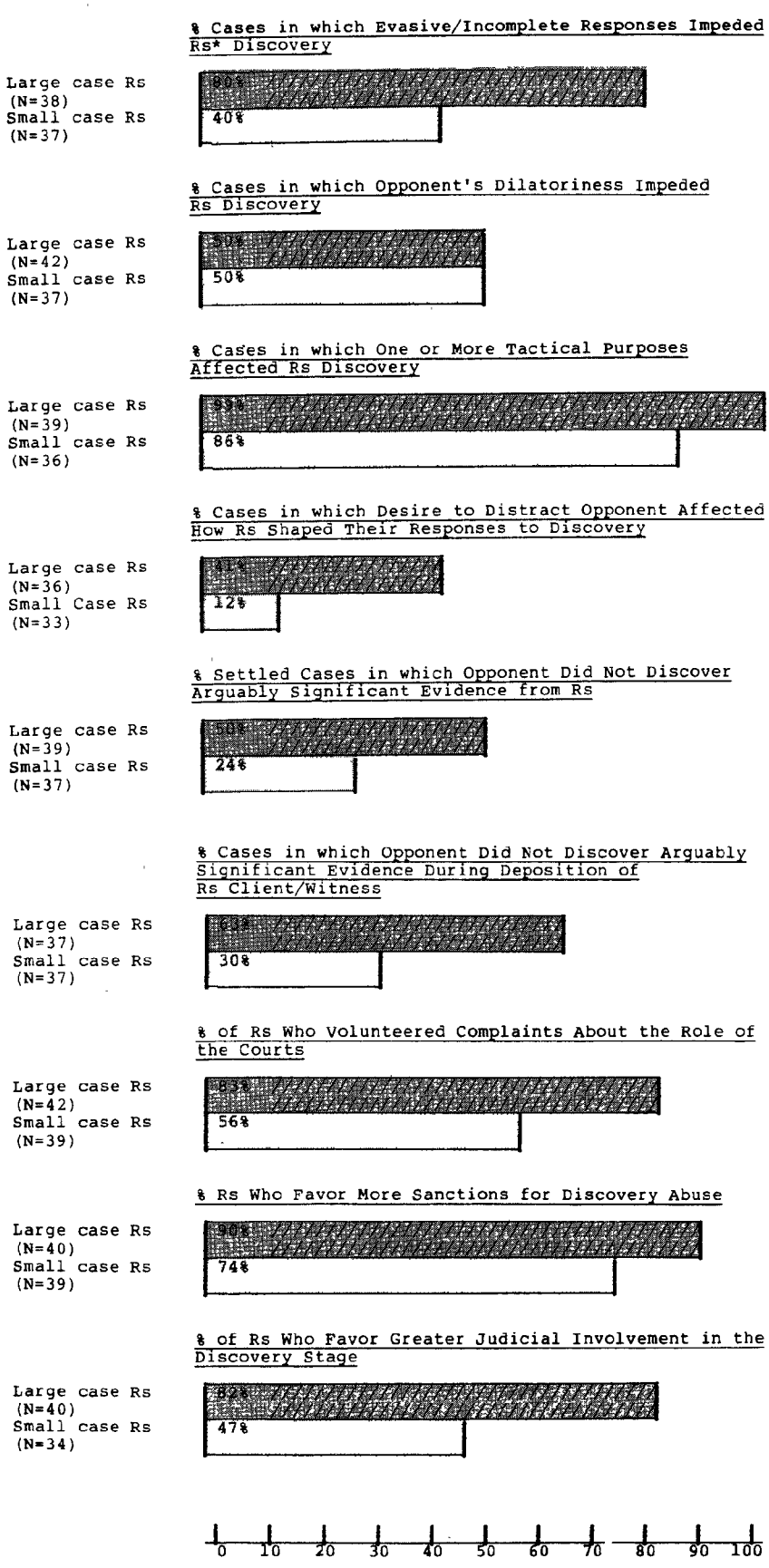
These deficiencies or limitations, however, by no means are always self-imposed. The big case litigators we interviewed made it quite clear that they spend considerable time and creative energy trying to increase the odds that opposing counsel will fail to discover damaging information from their clients. As one declared, "Most attorneys still see discovery as a game and play it to the hilt to avoid disclosure."

In the 1930s proponents of the Federal Rules of Civil Procedure hoped that the provisions for discovery would be largely self-executing and would reduce substantially the role of adversary pressures and tactics during the pretrial stage of litigation. Our data suggest that these hopes were naïve and stillborn. At least in larger cases, tactical jockeying plays a pervasive, dominating role in the discovery process. Big case litigators routinely seek ways to manipulate discovery tools and to shape their responses to discovery probes in order to secure some adversarial advantage. The lawyers in our sample who typically handle large lawsuits reported that tactical considerations affect how they conduct or respond to discovery in 99 per cent of their cases and that tactics affect how they time discovery events in 92 per cent. These staggering figures evidence the fact that a high percentage of the attorneys who handle large lawsuits perceive discovery as the arena in which most of the decisive battles of litigation are fought and assume that it is professionally irresponsible to fight the war without making a full commitment to maneuvering for whatever advantages might be available.

The evasive, dilatory, and other tactical purposes that play such a large role in the pretrial development of big cases help make discovery a wasteful process. Many big case litigators complained that much of the information requested by opposing parties is either wholly irrelevant to matters in dispute or of only marginal utility. When asked in an open-ended question to identify the most troublesome kinds of discovery abuse, 62 per cent of the big case lawyers in the sample complained about overdiscovery and 45 per cent about some form of harassment. These percentages were even higher among attorneys who primarily represented corporate clients: 72 per cent volunteered complaints about overdiscovery and 61 per cent bemoaned other forms of harassment.

Several lawyers admitted that only a small percentage of the information their own discovery efforts produce is really useful. Many also reported that to uncover key information they had to develop elaborate systems of discovery probes, employing different kinds of

Summary of Major Characteristics of Two Discovery Systems: Comparing Experiences and Attitudes of Large and Small Case Litigators



* Rs = Respondents (the interviewed attorneys).

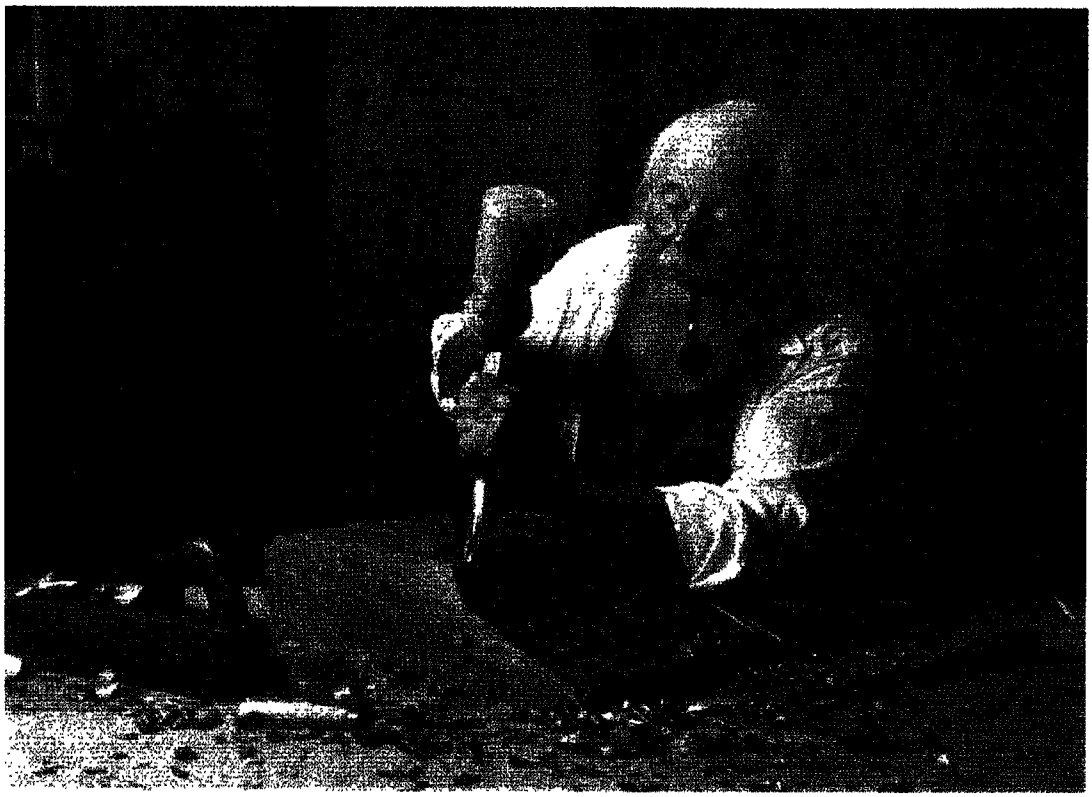
discovery devices in carefully orchestrated sequences, and that they had to commit substantial resources not only to sifting through immense amounts of material produced by their opponents but also to framing careful follow-up inquiries.

Some of this inefficiency is attributable, of course, to the complex legal theories on which some large cases turn and to the large data bases the theories sometimes require. The lawyers we interviewed, however, left us with no doubt that whatever inefficiency is inherent in the development of big cases is substantially aggravated by adversarial maneuvering that intensifies through cycles of mutual mistrust. The kind of attitude that both reflects and generates mistrust was succinctly articulated by one interviewed litigator: "In the adversarial system it's one group's job to get information and the other's not to give it to them."

These attitudes, or knowing that some lawyers hold these beliefs, provoke fear of evasive or parsimonious responses to discovery requests. That fear motivates a probing attorney to frame exhaustive and inevitably overbroad requests for information, which in turn can induce a responding lawyer to try to avoid replying altogether or to interpose as many objections and to provide as little data as possible. The cycle, as one lawyer in our sample described it, commonly consists of "an overbroad request followed by overbroad objections and overinclusive assertions of privilege."

The inefficiency of the discovery process in larger cases might be tolerable if it regularly accomplished the goal of distributing all the important information about a case among all the parties. Unfortunately, the system as it operates in larger cases has no such redeeming feature. The data provided by the litigators we interviewed indicate that in half of the larger, more complex lawsuits that are closed by settlement, at least one of the attorneys believes he knows something of significance about the case that counsel for other parties have not discovered. Lawyers who typically handle larger cases also reported that in half of the cases they settle they believe that another party still has relevant information, including communications protected by privilege, that they have not discovered. Thus it appears that our inefficient and costly system fails to distribute the relevant evidence evenly among the parties to larger lawsuits in at least half of the settled cases.

Craftsmanship



These figures are particularly disconcerting because the vast majority of cases are closed by settlement rather than trial. Nor are the shadows they cast over the system significantly less portentous merely because there are many different reasons that could help account for the fact that so many of the larger cases are settled with at least one side believing the other is at a significant informational disadvantage. The discovery system must be evaluated as it operates within the real world of economic, psychological, and professional pressures. The theoretical argument that more information could be discovered if the tools of discovery were better used or if economic pressures did not limit how much discovery could be conducted is, at least at one level, irrelevant. We must have a system that can accomplish its objectives within the context of the realities of current litigation practice, and the system of discovery as it operates within today's economic and professional environment achieves its primary end of assuring "Mutual knowledge of all the relevant [and consequential] facts gathered by both parties" in only one of every two big cases that is settled.

While the figures about information distribution for the small percentage of cases that are resolved by judgment after trial, as opposed to settlement, are lower, they are not particularly reassuring. The predominantly big case litigators in our sample reported that in approximately 30 per cent of the cases they had tried to completion they "still had arguably significant information (including information protected by privilege) which . . . another party had not discovered." About 75 per cent of these lawyers reported having had that experience in at least one case they had tried to judgment. More than 80 per cent of the big-case litigators also admitted having been surprised by new information produced by an opponent in at least one trial, but surprises reportedly occur only in about 15 per cent of the tried matters. In sum, our data indicate that while the discovery system is more likely to distribute the significant information evenly among the parties in the larger cases that are tried to judgment than in those which are settled, even in the tried cases the system often fails to correct informational imbalances between parties.

The data generated by our study suggest that discovery in smaller cases, which we defined as those in which $25,000 or less is in dispute, is a very different animal from that in larger cases and that in the smaller matters it is afflicted by substantially less debilitating abuses and problems. As a group, lawyers who primarily handle smaller cases are measurably less dissatisfied with how the discovery system works than are their larger case counterparts. While 43 per cent of the big case litigators expressed clearly negative assessments of the discovery system, this view was shared by only 23 per cent of the smaller case lawyers. The contrast at the other end of the general assessment spectrum was even greater. While only 7 per cent of the lawyers who primarily handle large cases could muster strong endorsements of the system, 31 per cent of the smaller case attorneys were quite enthusiastic about it.

Discovery system works more effectively in smaller cases

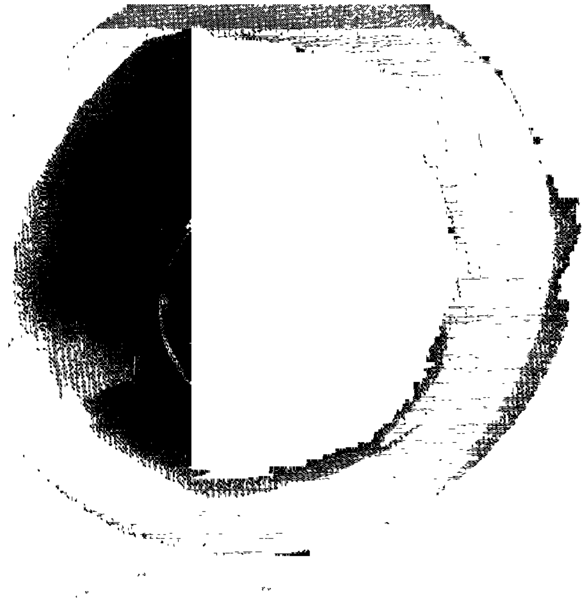
The more positive sentiments of the smaller case litigators seem justified. Discovery appears to work more effectively as a system for distributing information in small lawsuits than in larger, more complex matters. While big case litigators believe that an opponent fails to discover significant information from them in one of every two cases they settle, smaller case attorneys reported having that belief in only about one of every four settled cases. Smaller case attorneys also believe that an opponent fails to discover significant information from them in only about 12 per cent of the cases they try, whereas the comparable figure for large case attorneys is approximately 30 per cent.

In smaller matters there is less money available to support elaborate tactical plans, there tends to be less data to process, and the existence and sources of relevant evidence tend to be more predictable. Not surprisingly, smaller case attorneys reportedly exchange information with less friction, less tactical jockeying, and less harassment. This is not to suggest that discovery in smaller cases is problem free but only to say that many of the system's problems are substantially less severe in smaller matters. For example, smaller case lawyers reported friction arising because of assertions of the attorney-client privilege in only about 12 to 15 per cent of their cases, while the figure for the big case litigators was roughly 40 to 45 per cent. Similarly, 62 per cent of the large-case litigators volunteered complaints about overdiscovery, and 45 per cent complained about harassment, while the corresponding figures for the smaller case group were only 38 per cent and 28 per cent.

Relative to other sources of difficulty with the discovery process, the two problems that cause the most frustration for the smaller case litigators in our sample are evasion and dilatoriness by opponents. Evasive or incomplete responses to requests for information reportedly impede discovery by smaller case attorneys in about 40 per cent of their cases — not an insignificant incidence but a far cry from the 80 per cent figure reported by the big case lawyers. Smaller case litigators feel victimized even more, however, by what they perceive as the unjustifiably extended delays that routinely precede responses to their discovery probes and reportedly impede the exchange of information in more than half of the smaller cases filed in courts in the Chicago area.

Some dilatoriness is the product of intentional tactical ploys, but the principal source of the problem appears to be the vacuum created by the five-year backlog in the civil trial docket of the state courts (law division) sitting in Cook County. This severe backlog apparently encourages attorneys to overcommit themselves — that is, to accept more cases than they can prepare adequately for trial — and sets in motion cycles of procrastination. The several-year interval between the date lawsuits are initiated and the date a trial court will be available reportedly has a particularly counterproductive effect on defense lawyers, who often feel little incentive either to develop their cases or to make serious efforts to reach prompt settlements. Clients who perceive an opportunity to postpone payment of a probable obligation for four or five years sometimes feel strong incentives to do so — for instance, an opportunity to make high yield alternative investments of their funds and the likelihood of being able to satisfy claims with dollars cheapened by inflation.

The lawyers we interviewed attributed so many of the problems with discovery in smaller cases to the pervasive effects of the backlog in the trial docket in Cook County that it is tempting to speculate that the system could function much more effectively in smaller cases if trial dates were available within a relatively short period after pleadings



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were filed. Indeed, the availability of early trial dates may help account for reports that attorneys who practice in less populous areas have fewer difficulties with discovery than their urban counterparts. Smaller case litigators did not express fear that they could not adjust to or adequately prepare for early trial dates. On the contrary, they vigorously endorsed the view that the pressure of an early trial date would have an overwhelmingly healthy effect on the discovery process, greatly reducing the sloppy case management and dilatory practices that are smaller case lawyers' principal sources of frustration with the system.

The availability of early trial dates, of course, would not cure all of the defects of the discovery system as it operates in smaller cases. Evasion would remain a consequential problem. Lawyers would continue to try to manipulate the tools of discovery to impose pressures on opposing parties and would persist in efforts to color perceptions of relative strengths and weaknesses so as to create a favorable climate for settlement. Because the source of these kinds of problems is the adversarial character of the system itself, there will be no simple solutions. But because these are the same kinds of problems that burden discovery (albeit much more severely) in the bigger cases, reforms developed for larger lawsuits may be applicable to smaller matters as well.

Final stage will look toward designing remedies

The final stage of the American Bar Foundation's study of discovery will consist of analyzing and extending reform proposals the respondents made during the interviews and examining judicial views both of the discovery process generally and of various suggestions for improving it. While all of the results of this stage of the project will not be ready for publication until later this year, there are findings we can report now that have important implications for reform efforts.

The lawyers interviewed readily acknowledged that lawyers and ways of lawyering are responsible for many of the defects of the discovery system. Despite these concessions, however, many lawyers feel that the principal culprits in the discovery system's failings are judges. The only partly articulated theory supporting this belief seems to be that irresistible economic and adversarial pressures will compel attorneys to adopt evasive and sometimes abusive tactics unless the courts impose a system of predictably tight and telling restraints. In this view, it is the judiciary's responsibility to create an environment that is sufficiently hostile to chicanery and incompetence to drive those forces from the discovery arena.

According to a sizable majority of the litigators we interviewed, the courts are failing miserably to meet these responsibilities. The most dramatic indictments of the role of the judiciary were made in response to an open-ended question posed near the beginning of each interview. The lawyers were asked if they felt there were "any problems with the current system" of discovery. More lawyers mentioned the negative impact of the judiciary than any other single problem: 71 per cent volunteered complaints about the performance of the courts. The percentage was even higher among those who practiced primarily in federal court: 86 per cent offered unprompted criticisms of the way judges handle discovery. To be fair, it is important to note that lawyers who practice primarily in federal court generally are involved in larger suits.

Near the end of each interview the lawyers were asked if they felt they received "adequate and efficient help from the courts in resolving discovery disputes and problems." While 16 per cent said "sometimes," more than two thirds of the remaining lawyers said "no." Again the percentage was measurably higher among the big case litigators. About 90 per cent of them feel underserved by the courts, in sharp contrast to the slightly less than 50 per cent of the smaller case lawyers who have that feeling.

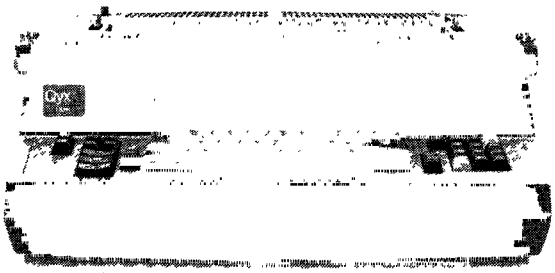
While a wide range of criticisms was leveled against the judges (among other things, judges were said to be condescending, inhospitable, superficial, arbitrary, and biased), there is one aspect of judicial behavior that provoked far more complaints than any other. Eighty per cent of *all* the interviewed lawyers believe that the courts should more frequently sanction discovery abuse. This conviction is not confined to any one segment of the litigating bar. While an overwhelming 90 per cent of the big case litigators favor more frequent use of sanctions, three of four smaller case attorneys agree. Nor are these views casually held. Many litigators are intensely angry about what they perceive as the courts' failure to provide the discipline the system requires. These lawyers are convinced that the infrequency and the leniency with which courts use their sanctioning power is the root cause of discovery abuse.

Given the widely shared perception among big case litigators that the discovery system is almost out of control, it is hardly surprising that many of them want more from the courts than more vigorous enforcement of the rules. Eighty-two per cent of the lawyers who primarily handle larger matters support the broader proposition that the judiciary should be more thoroughly involved in the discovery stage of litigation. While there undoubtedly would be disagreement about the precise form of the involvement, there is little disagreement among big case litigators about the underlying need for more external control over and a better informed monitoring of the discovery process. Among smaller case lawyers, by contrast, there are sharper differences of opinion about whether there is a need for the judiciary to do more than strictly enforce the rules. Only about half of them favored "greater judicial involvement" (generally).

We should report one additional result of our study that has important implications for reform efforts. Contrary to some assumptions, there is no broad support for the notion that the scope of discovery should be narrowed. While among all the lawyers we interviewed 30 per cent favored cutting back the scope of discovery, twice as many (60 per cent) favored leaving the scope as it is and 10 per cent favored broadening it. There was less support for reducing the scope of discovery among smaller case litigators (16 per cent favored the idea) than among big-case lawyers, among whom only 34 per cent favored trying to narrow the reach of pretrial.

At least according to the lawyers in our sample, it would be a mistake to focus efforts to reform discovery on the formal descriptions of its proper scope. Instead, litigators believe the real need is to devise a system of restraints and rewards that will combat the pervasive problem of evasion and curb misuse of the system's tools. *Journal*

(Wayne D. Brazil is an associate professor of law at the Hastings College of the Law and an affiliated scholar at the American Bar Foundation. More detailed treatment of the study on which this article is based may be found in 1980 American Bar Foundation Research Journal *at 217 and 787.)*



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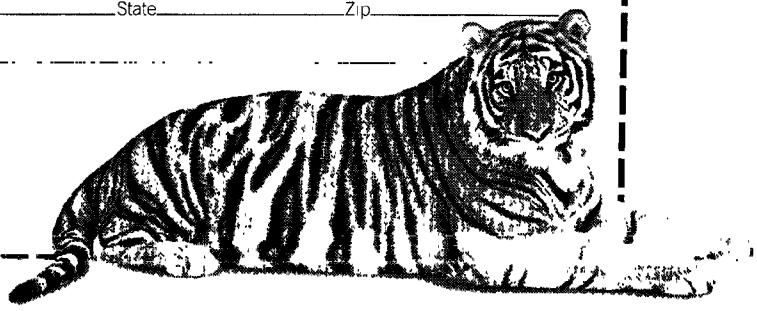

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