Rule 37(a)'s Loser-Pays "Mandate": More Bark Than Bite

Lindsey D. Blanchard

University of the Pacific, McGeorge School of Law, lblanchard@pacific.edu

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LINDSEY D. BLANCHARD*

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* Visiting Assistant Professor, University of St. Thomas School of Law (Minneapolis, Minnesota).
I. INTRODUCTION

Ever since the Federal Rules of Civil Procedure were adopted in 1938, practitioners have found ways to use—or abuse—the discovery rules to their advantage, increasing the cost of litigation for their opponents. After four decades of complaints about the discovery system, the Federal Judicial Center ("FJC") undertook an investigation of the types and frequency of discovery abuse in civil litigation.1 The FJC elicited feedback from hundreds of attorneys, ultimately publishing its 1980 study confirming the existence of discovery abuse.2 Among the major problems identified by the participants were resistance to discovery, over-discovery, and misuse of discovery tools.3 Over thirty years later, the problems remain the same. In a 2008 study conducted by the American College of Trial Lawyers Task Force on Discovery4 ("ACTL") and the Institute for the Advancement of the American Legal System

1. JOSEPH L. EBERSOLE & BARLOW BURKE, FED. JUDICIAL CTR., DISCOVERY PROBLEMS IN CIVIL CASES 1–2 (1980).

2. See id. at 1–5.

3. See id. at 10–29. In a 1979 study of Chicago-area litigators conducted by then-Professor Wayne D. Brazil (the "Brazil study"), 100% of the respondents noted that "evasive or incomplete responses" had hindered their discovery efforts at some point. See Wayne D. Brazil, Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 AM. B. FOUND. RES. J. 787, 835 (1980) [hereinafter Brazil I].

4. The American College of Trial Lawyers is comprised of more than 5700 members from the United States and Canada. About Us—Membership, AM. C. OF TRIAL LAWS., http://www.actl.com/Content/NavigationMenu/AboutUs/Membership/default.htm (last visited Nov. 16, 2011). Members are selected by invitation and include attorneys who represent plaintiffs and defendants in civil proceedings, as well as prosecutors and criminal defense lawyers. Id. These attorneys are considered to be the best in their state or province and have at least fifteen years of trial experience. About Us—Membership Criteria, AM. C. OF TRIAL LAWS., http://www.actl.com/Content/NavigationMenu/AboutUs/MembershipCriteria/default.htm (last visited Nov. 16, 2011). The ACTL engages in a variety of activities aimed toward maintaining and improving the standards of trial practice, the administration of justice, and the ethics of the profession. About Us—Overview, AM. C. OF TRIAL LAWS., http://www.actl.com/AM/Template.cfm?Section=About_Us (last visited Nov. 16, 2011).
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(“IAALS”), practitioners overwhelmingly expressed their concerns that discovery is overused and abused.6

Based on these survey results, it would appear that the discovery system is not working. Over the past seven decades, however, there has been a direct correlation between lax enforcement of discovery sanctions and discovery abuse. In both the 1980 and 2008 studies, for example, the practitioners complained that judges were not adequately enforcing the discovery rules governing sanctions.7 Thus, the problem lies not in the types—or lack—of tools

5. The IAALS, part of the University of Denver, is a national nonpartisan organization comprised of individuals who have achieved recognition in their former roles as judges, lawyers, academics, and journalists. Who We Are, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL Sys., http://www.du.edu/legalinstitute/whoweare.html (last visited Nov. 13, 2011). The IAALS provides leadership, conducts research, and develops recommendations with the goal of improving the process and culture of the civil justice system. What We Do, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL Sys., http://www.du.edu/legalinstitute/whatwedo.html (last visited Nov. 13, 2011).


7. See EBERSOLE & BURKE, supra note 1, at 70; Interim Report, supra note 6, at A-4; see also Wayne D. Brazil, Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 AM. B. FOUND. RES. J. 217, 248 (1980) [hereinafter Brazil II] (discussing Chicago-area litigators’ view that “courts rarely will sanction an attorney or client for an initial violation of the rules of discovery”). A number of attorneys in the 1980 FJC study specifically focused on the courts’ failure to award attorney’s fees to the prevailing party on a motion to compel under Rule 37(a). See EBERSOLE & BURKE, supra note 1, at 70. In addition, the authors of the 1990s state court study found that the courts’ reluctance to award expenses to the prevailing party on a motion to compel discovery was a significant factor in preventing parties from seeking the courts’ assistance. See Keilitz et al., supra note 6, at 37 tbl.4.
in place to curb discovery abuse, but in the under-utilization of the existing tools.\footnote{8} In other words, the discovery rules have "more bark than bite."

The simple and seemingly obvious solution, then, is stricter enforcement of the discovery sanctions available under the Federal Rules. Despite the practitioners' continual call for such action,\footnote{9} academics and commentators keep pushing for extensive changes to the Rules. For example, the ACTL and IAALS issued a Final Report on discovery abuse in 2009 in which they proposed numerous principles to be the basis for future reform. These guiding principles include mandatory initial production—as opposed to a description—of relevant, non-privileged materials, as well as addi-

\footnote{8. C. RONALD ELLINGTON, U.S. DEP'T OF JUSTICE, A STUDY OF SANCTIONS FOR DISCOVERY ABUSE 2 (1979) (stating that Rule 37 sanctions that are "mere hollow threats . . . will not stop discovery abuses"); Frank F. Flegal & Steven M. Umin, Curbing Discovery Abuse in Civil Litigation: We're Not There Yet, 1981 BYU L. REV. 597, 603 (1981) ("If, as the evidence shows, [Rule 37's sanctions] provisions are not being utilized by a significant number of judges, the process will break down because lawyers and litigants will learn that discovery abuses are not subject to sure and effective detection and correction." (footnote omitted)).}

\footnote{9. Of the 174 litigators in the Brazil study who were asked whether they would favor increased use of the courts’ sanctioning power, 80% responded in the affirmative. Brazil I, supra note 3, at 865–66. Likewise, of the 1178 attorneys who responded to the FJC's 1997 Case-Based National Survey of Counsel in Closed Federal Civil Cases, 42% said that “[i]mposing fee-shifting sanctions more frequently and/or imposing more severe sanctions for violations of discovery rules or orders” is a type of reform that “holds the most promise for reducing discovery problems.” THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 1, 10, 44 tbl.35 (1997). As one respondent to the 2008 ACTL/IAALS Study noted, “[s]trict enforcement of rules would recover cost and promote prompt/efficient administration of justice.” Interim Report, supra note 6, at B-2. In the NCSC survey, attorneys cited “[p]resumptive cost shifting on discovery motions” as one of the most effective measures of controlling discovery abuse. Keilitz et al., supra note 6, at 38 tbl.5. Likewise, they suggested imposition of costs and sanctions as the “single measure” the courts should take to improve the discovery process. Id. at 39 tbl.6. Thus, “[a]ttorneys apparently want judges to use the power of the court to shape their colleagues’ conduct.” Id. at 38.}
tional limits on the scope of discovery. Other popular proposals include earlier and increased case management by the judiciary and automatic imposition of large monetary penalties or harsh preclusion sanctions upon loss of a discovery motion.

Those solutions are not ideal. Adding more limits to discovery would only increase the parties' incentives to employ obstructionist tactics. In addition, requiring greater judicial oversight would place a heavier load on the already over-burdened court system, and imposing harsher sanctions earlier in the process would introduce the risk that some cases would be decided on a technicality rather than on the merits.

Instead of overhauling the current system, the first step in the fight against discovery abuse should be to heed the practition-

10. See Am. Coll. of Trial Lawyers Task Force on Discovery & Inst. for the Advancement of the Am. Legal Sys., Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System 1–4, 7–12, (rev. Apr. 15, 2009), http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008. Discovery was previously limited through amendments to the Rules in 1993 (which capped the permissible number of depositions and interrogatories) and in 2000 (which mandated initial disclosures and narrowed the scope of discovery from information relevant to the subject matter of the lawsuit to information relevant to the parties' claims and defenses). See FED. R. CIV. P. 26, Advisory Comm. Note (2000 Amendments); FED. R. CIV. P. 33, Advisory Comm. Note (1993 Amendments).


13. See Beckerman, supra note 11, at 511 (“[M]ore judicial attention to discovery disputes and earlier, firmer and more constant judicial management of discovery-heavy cases would involve opportunity costs to docket management too great for many judges to accept.”); see also Dudley, supra note 11, at 200–01 (“[T]his approach departs from the traditional model of judicial detachment and fairness. . . . [and] is too time-intensive to be a systemic cure.”).

14. See Beckerman, supra note 11, at 556–57, 559.
ers’ call. And, Rule 37(a) of the Federal Rules of Civil Procedure—which mandates an award of reasonable expenses, including attorney’s fees, to the prevailing party on a motion to compel discovery—should be the starting point. Not only is Rule 37(a)’s instruction to award expenses clear, it probably is the most straightforward and convenient method of curbing unfair discovery conduct and of leveling the playing field between litigants.

Strict enforcement of Rule 37(a) may seem likely to generate some of the same undesirable side effects as the proposed overhauls of the discovery rules, such as increased use of judicial resources. However, those effects can be avoided if the courts enforce the discovery sanctions in conjunction with the rules of professional conduct by which attorneys are also bound. Thus, full integration and utilization of the various mechanisms already in

15. See Willging et al., supra note 9, at 46 (discussing survey respondents’ clear preference for “changes in judge and attorney behavior” over “changes in the rules”); Brazil I, supra note 3, at 797 (repeating one Chicago-area litigator’s response in the 1979 survey that, “[t]he rules are excellent. The enforcement of the rules stinks.”); Mary M. Schroeder & John P. Frank, Discovery Reform: Long Road to Nowheresville, 68 A.B.A. J. 572, 574 (1982) (“There is nothing wrong with existing Rule 37, the sanctions rule, except that it is not enough used. We now have adequate machinery to control discovery abuses under that rule if we would only use what we have.”). There has been some recent support for this position among academics and commentators. In May 2010, Duke University School of Law hosted the 2010 Civil Litigation Review Conference. John G. Koeltl, Progress in the Spirit of Rule 1, 60 Duke L.J. 537, 537–38 (2010). Many of the legal system’s different stakeholders—including judges, lawyers, academics, the government, corporations, public interest groups, and individuals—provided input. Id. at 539. The consensus among some of the participants was that extensive reform of all of the Federal Rules of Civil Procedure likely is unnecessary; rather, the Rules as written should be utilized to their full potential. See, e.g., id. at 543–45 (“For judges, the Duke Conference suggests that greater efforts should be made to understand and use the tools available . . . . Changes in the Rules can only go so far to curb abuse.”); Paul W. Grimm & Elizabeth J. Cabraser, The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burdens, or Can Significant Improvements be Achieved Within the Existing Rules? 4, 7 (unpublished manuscript) (on file with author and The University of Memphis Law Review) (arguing that the existing Rules contain all of the mechanisms necessary to ensure fair discovery but that judges’ and lawyers’ attitudes regarding discovery must be changed).
place to regulate attorney and judicial conduct can lead to a cost-effective solution.

Part II of this Article discusses the history and purposes of the expenses and attorney's fees provisions under Rule 37(a) of the Federal Rules of Civil Procedure.\textsuperscript{16} Part III addresses the courts' failure to enforce those provisions and the effects of that failure on the courts and litigants. Finally, Part IV proposes a rather simple solution to the problem: courts must adhere to the plain language and legislative intent of Rule 37(a) and award the amount of reasonable expenses, including attorney's fees, requested by the prevailing party on a motion to compel discovery. Judges should presume the fee requests are accurate and appropriate without engaging in an extensive review. Only in the event a judge believes an attorney is violating his or her duty of candor to the court should the judge deny a fee request. In that instance, the judge should report the requesting attorney to the appropriate disciplinary authority for further investigation. By applying the Federal Rules of Civil Procedure and the rules of professional conduct in this way, the courts can effectively add more "bite" to Rule 37(a) and take an important step toward curbing discovery abuse.

II. THE HISTORY AND PURPOSES OF RULE 37(a) SANCTIONS

Pursuant to its authority under the Rules Enabling Act of 1934, the U.S. Supreme Court appointed an Advisory Committee to draft a set of uniform rules of civil procedure for the federal district courts.\textsuperscript{17} The Advisory Committee engaged in a thorough process when developing its recommendations, including seeking feedback from judges and attorneys and creating "the best rules

\textsuperscript{16} This Article focuses on application of Federal Rule of Civil Procedure 37(a). However, a majority of states have adopted an identical rule. See infra note 33. Thus, the reasoning and resolution set forth herein apply equally to those state court systems.

\textsuperscript{17} INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., HISTORICAL BACKGROUND TO THE FEDERAL RULES OF CIVIL PROCEDURE 4-5 (2009) [hereinafter IAALS HISTORICAL BACKGROUND]. The Rules Enabling Act states that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals." 28 U.S.C. § 2072(a) (2006).
rather than the rules that might be supported most widely or might appease special interests." These rules—the Federal Rules of Civil Procedure—took effect in September 1938 and broadly expanded the scope of discovery in the federal court system.

In conjunction with the new, more liberal discovery rules, the Advisory Committee enacted sanctions provisions. These discovery sanctions serve numerous purposes. First, they deter litigants from avoiding their discovery obligations. Second, they punish litigants for unfair conduct. Third, they restore the wronged party to the position it would have been in had the sanctionable conduct not occurred and simultaneously prevent the other

19. Id. at 1, 6-7.
21. See Cady, supra note 20, at 515 (citing Cine Forty-Second St. Theatre, 602 F.2d at 1066); Tew, supra note 20, at 322 (citing Nat'l Hockey League, 427 U.S. at 643; 8B CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2281 (3d ed. 2010)); see also Adam Behar, Note, The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37, 9 CARDOZO L. REV. 1779, 1785 (1988) (“In 1976, the Supreme Court established that general deterrence was a permissible—and perhaps even mandatory—goal of Rule 37.” (citing Nat'l Hockey League, 427 U.S. at 642-43)).
22. See Tew, supra note 20, at 322-23 (citing Nat'l Hockey League, 427 U.S. at 643).
party from profiting from its unfair conduct. Finally, they demonstrate the courts’ authority and encourage respect for the legal process. However, “[t]he real benefit of accomplishing these purposes is a reduction of needless costs and delays.”

Rule 37(a), in particular, has the potential to serve each of these purposes. Under that Rule, a party can “move for an order compelling disclosure or discovery” when another party has, for example, failed to answer a question during a deposition, answer an interrogatory, or permit inspection of documents or premises. The court may then award the prevailing party its reasonable expenses related to the motion, including attorney’s fees, as a sanction. Such an award should deter similar conduct in the future, punish the losing party for maintaining an unreasonable position, restore financial status quo, and demonstrate the court’s authority over the parties and their conduct.

As originally enacted, Rule 37(a) stated in regard to the payment of expenses:

If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney’s fees. If the motion is denied and if the court finds that the motion was made without substantial justi-

23. See id. at 323 (citing Zubulake v. USB Warburg LLC, 229 F.R.D. 422, 437 (S.D.N.Y. 2004)); see also Cady, supra note 20, at 515 (citing Cine Forty-Second St. Theatre, 602 F.2d at 1066).
25. Cady, supra note 20, at 515.
26. FED. R. CIV. P. 37(a)(1), (3)(A)–(B). A party also may bring a motion to compel if a deponent fails to answer a question under Rule 30 or 31 or an entity fails to make a designation under Rule 30(b)(6). See FED. R. CIV. P. 37(a)(3)(B). “For purposes of [Rule 37(a)], an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.” FED. R. CIV. P. 37(a)(4).
27. FED. R. CIV. P. 37(a)(5)(A).


fication, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.28

Although the Federal Rules were amended in 1946 and 1966,29 the first major alteration of the discovery provisions came in 1970 on the heels of a study conducted by the Columbia Project for Effective Justice relating to discovery practices in the U.S. district courts.30 According to the Advisory Committee:

[T]he rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery. The present provision of Rule 37(a) that the court shall require payment if it finds that the defeated party acted without “substantial justification” may appear adequate, but in fact it has been little used. Only a handful of reported cases include an award of expenses, and the Columbia Survey found that in only one instance out of about


29. The amendment process, which takes two to three years to complete, involves seven stages: initial consideration by the advisory committee, publication and public comment, consideration of the public comments and final approval by the advisory committee, standing committee approval, Judicial Conference approval, Supreme Court approval and transmittal to Congress, and Congressional review. IAALS HISTORICAL BACKGROUND, supra note 17, at 10. According to one academic, “it ‘requires more steps to amend a Federal Rule of Civil Procedure than it does to amend the U.S. Constitution.’” Id. at 11 (quoting Stephen C. Yeazell, Judging Rules, Judging Judges, 61 LAW & CONTEMP. PROBS. 229, 235 (1998)).

50 motions decided under Rule 37(a) did the court award expenses. It appears that the courts do not utilize the most important available sanction to deter abusive resort to the judiciary.³¹

The Committee, therefore, shifted the burden, changing the standard from a requirement that expenses be awarded only if the losing party acted without substantial justification to a requirement that expenses be awarded unless the losing party acted with substantial justification.³² Thus, the relevant portion of Rule 37(a), which is now located in subdivision (a)(5), currently reads:

(A) If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. *But the court must not order this payment if:*

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.33

According to the Advisory Committee, “expenses should ordinarily be awarded” under this new language.34

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33. FED. R. CIV. P. 37(a)(5) (emphasis added). The above language also reflects two other substantive amendments to Rule 37(a) made since 1970: what to do (1) when information that should have been produced without court involvement is produced after the motion to compel is filed, and (2) when the moving party fails to confer with opposing counsel prior to bringing a motion to compel. See FED. R. CIV. P. 37, Advisory Comm. Note (1993 Amendments). An overwhelming majority of the states have adopted a rule with language virtually identical to Rule 37(a) of the Federal Rules of Civil Procedure. See KAN. STAT. ANN. § 60-237(a)(5) (Supp. 2010); LA. CODE CIV. PROC. ANN. art. 1469(4) (2005); OKLA. STAT. ANN. tit. 12, § 3237(A)(4) (West 2009 & Supp. 2011); S.D. CODIFIED LAWS § 15-6-37(a)(4) (2004 & Supp. 2011); WIS. STAT. ANN. § 804.12(1)(c) (West 1994 & Supp. 2011); ALA. R. CIV. P. 37(a)(4); ALASKA R. CIV. P. 37(a)(4); ARIZ. R. CIV. P. 37(a)(4); ARK. R. CIV. P. 37(a)(4); COLORADO CIV. P. 37(a)(4); DEL. SUPER. CT. CIV. R. 37(a)(4); FLA. R. CIV. P. 1.380(a)(4); HAW. R. CIV. P. 37(a)(4); IDAHO R. CIV. P. 37(a)(4); ILL. SUP. CT. R. 219(a); IND. R. TR. P. 37(A)(4); IOWA CT. R. CIV. P. 1.517(1)(d); KY. R. CIV. P. 37.01(d); ME. R. CIV. P. 37(a)(4); MD. R. 2-433(d); MASS. R. CIV. P. 37(a)(4); MICH. CT. R. 2.313(A)(5); MINN. R. CIV. P. 37.01(d); MISS. R. CIV. P. 37(a)(4); MO. SUP. CT. R. 61.01(g); MONT. R. CIV. P. 37(a)(4); NEB. CT. R. DISC. § 6-337; NEV. R. CIV. P. 37(a)(4); N.J. CT. R. 4:23-1(c); N.M. R. CIV. P. 1-037(A)(4); N.C. R. CIV. P. 37(a)(4); N.D. R. CIV. P. 37(a)(4); OHIO R. CIV. P. 37(A)(4); OR. R. CIV. P. 46A(4); R.I. SUPER. CT. R. CIV. P. 37(a)(4); S.C. R. CIV. P. 37(a)(4); TENN. R. CIV. P. 37.01(4); TEX. R. CIV. P. 215.1(d); UTAH R. CIV. P. 37(a)(4); VT. R. CIV. P. 37(a)(4); VA. SUP. CT. R. 4:12(a)(4); WASH. SUPER. CT. CIV. R. 37(a)(4); W. VA. R. CIV. P. 37(a)(4); WYO. R. CIV. P. 37(a)(4). California’s Civil Discovery Act contains similar language, as well. See CAL. CIV. PROC. CODE § 2023.030(a) (West 2007).

34. FED. R. CIV. P. 37(a)(4), Advisory Comm. Note (1970 Amendments); see Werner, supra note 32, at 306 (“The purpose of this . . . revision was to encourage judges to make an award of expenses the norm in dealing with discovery motions.”).
III. THE PROBLEM AND ITS EFFECTS

Notwithstanding the various amendments to the Federal Rules, discovery abuse remains prevalent today.\(^{35}\) In fact, approximately half of the survey respondents in the 2008 ACTL/IAALS Study believed discovery abuse occurs in nearly every case.\(^ {36}\) In addition, 71% of the respondents believe discovery is used to force settlement.\(^ {37}\) Despite the seemingly pervasive nature of this unfair behavior, even more respondents—86%—claim that judges rarely impose sanctions.\(^ {38}\) Furthermore, according to the literature and studies regarding this issue, it appears that sanctions truly are rarely imposed. Most of the literature and studies, however, focus on imposition of the more severe sanctions available under Rule 37(b), (c), and (d), which include establishing certain facts as admitted, striking pleadings, dismissing an action, and rendering a default judgment. The problem really begins, however, with the courts’ failure to impose the basic sanction of awarding reasonable expenses, including attorney’s fees, to the prevailing party under Rule 37(a) on a motion to compel. Even this ostensibly insignificant failure has a significant impact on the courts and litigants. Solving this problem will not only serve to prevent at least some discovery abuse, but also may bolster the courts’ confidence in imposing the stricter sanctions available under Rule 37.

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35. See Interim Report, supra note 6, at A-4 ("Only 34% of [the survey respondents] think that the cumulative effect of changes to the discovery rules since 1976 has significantly reduced discovery abuse . . . .").

36. Id. In-house counsel have made similar observations. In a companion survey to the 2008 ACTL/IAALS Study, conducted between November 2009 and January 2010, 367 chief legal counsel and general counsel noted that discovery abuse is prevalent: 40% of the respondents indicated that parties “often” or “almost always” “ignore or violate discovery rules;” more than 60% of the respondents noted that parties “often” or “almost always” “harass or obstruct the opposition;” and more than 70% of the respondents indicated that parties “often” or “almost always” “overuse permitted discovery procedures.” INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL LITIGATION SURVEY OF CHIEF LEGAL OFFICERS AND GENERAL COUNSEL BELONGING TO THE ASSOCIATION OF GENERAL COUNSEL 4, 8, 26–27 fig.23 (2010).

37. See Interim Report, supra note 6, at A-4.

38. Id.
A. The Problem: Judicial Reluctance to Become Involved in Discovery Disputes Leads to Lax Enforcement of Rule 37(a)

Almost since the inception of the Federal Rules of Civil Procedure, judges have been reluctant to award expenses on motions to compel discovery. As noted by the Advisory Committee regarding the 1970 Amendments to the Federal Rules, the expenses provision in Rule 37(a)—characterized as "the most important available sanction to deter abusive resort to the judiciary"—had rarely been used up to that point.39 Although lawmakers attempted to address that problem in the 1970 Amendments, various sources demonstrate that little has changed.

For example, in the immediate aftermath of the 1970 Amendments, the Columbia Journal of Law and Social Problems surveyed U.S. district court judges throughout the country regarding the effect of the written changes.40 Seventy-seven percent of the responding judges stated that they did not award expenses any more frequently than under the former Rule 37(a).41 Nor were sanctions imposed more frequently during the ensuing decade.42 A Department of Justice study conducted in 1977 and 1978 "found that judges usually imposed sanctions only after [they] first ordered discovery, gave a party a second chance to comply, and the failure to comply was willful or not explained."43 In fact, 86.3% of

41. Id. at 643.
42. See, e.g., Helen H. Stern Cutner, Discovery—Civil Litigation's Fading Light: A Lawyer Looks at the Federal Discovery Rules After Forty Years of Use, 52 TEMP. L.Q. 933, 955 (1979) ("Despite repeated recognition of the fact that the discovery rules are not functional unless appropriate available sanctions are utilized, and despite the attempt by rule amendment to make the imposition of mild sanction mandatory unless specific finding of good faith is made, the courts consistently ... fail to impose any sanction whatsoever."); id. at 955 n.63 (stating that eight years after the 1970 Amendments, the sanction of an expense award to the prevailing party "remain[ed] a paper tiger, ignored and scorned by the courts and attorneys alike"). But see Werner, supra note 32, at 310–16 (discussing the results of the author's survey of federal court decisions published between January 1975 and October 1977 and concluding that federal judges were not as reluctant to enforce Rule 37 as indicated by the Columbia Journal of Law and Social Problems survey).
the responding judges stated that they rarely, if ever, awarded expenses to a prevailing party.44

Studies from the 1980s show a similar trend. In the cases reported for the FJC's 1980 survey of practitioners, expenses had been granted in only one out of 250 Rule 37(a) motions requesting expenses.45 Likewise, in a year-long study beginning in 1981 and conducted in Arizona's Maricopa County Superior Court, expenses were assessed under a state court rule nearly identical to Rule 37(a) in only 32% of motions to compel that went to oral argument.46 The study's authors found very few instances in which judges awarded costs absent a request, or imposed costs against an unsuccessful movant.47 Also, in a 1989 study of the Central District of the Los Angeles Superior Court's cases involving California's Civil Discovery Act—which includes California's equivalent to Rule 37(a)48—monetary sanctions were awarded in the amount requested only 27% of the time.49 The court reduced the amount requested in 25% of the motions and denied sanctions, even though the motion was granted, 23% of the time.50 Thus, "most judges continued to ignore the presumption contained in Rule 37(a)"]."51

44. See Ellington, supra note 8, at 8, 53. This percentage is based on questionnaires completed by 194 active and senior federal district court judges in 76 out of the 94 U.S. judicial districts. See id. at 3, 53.

45. See Ebersole & Burke, supra note 1, at 70.

46. See Joy A. Chapper & Roger A. Hanson, Cost-Shifting in Maricopa County Superior Court: An Examination of Rule 37(a)(4), 8 Just. Sys. J. 325, 326, 328, 330 (1983). The study's authors reviewed 190 discovery motions that went to oral argument, interviewed 44 attorneys by telephone, and interviewed 10 judges. Id. at 328. Of the 190 motions, 109 were motions to compel discovery. Id. at 330 tbl.1. Costs were awarded to the successful movant in 35 of those motions. Id.

47. Id. at 329.


50. Id. at 82 (stating that no sanctions were awarded in 24% of the cases because the motion was denied).

51. Vairo, supra note 43, at 595 (citing Paul R. Connolly et al., Fed. Judicial Ctr., Judicial Controls and the Civil Litigation Process: Discovery 21–26 (1978); Ellington, supra note 8, at 53); see also Wayne D. Brazil, Improving Judicial Controls over the Pretrial Development of Civil Ac-
Fast-forward to the present, and—not surprisingly—the trend continues. While there was an abundance of empirical analysis of the discovery system in the 1970s and 1980s, the studies trickled off in the following decades. However, the 2008 ACTL/IAALS Study contains one telling fact: 86% of the respondents believed that “discovery sanctions are seldom imposed.” And whether judges really are reluctant to enforce Rule 37(a) and whether they actually do fail in practice to enforce Rule 37(a) are both largely irrelevant. As noted in the 2008 Study, “[w]here abuses occur, judges are perceived to be less than effective in enforcing the rules.” This perception alone causes attorneys to res-
ist discovery. Instead of cooperating to resolve a discovery dispute prior to a hearing, the attorneys—expecting the judge or magistrate to split the baby—"preserve their extreme positions in order not to move the middle ground over to the advantage of the adversary."55

Why do judges fail to enforce Rule 37(a)? Apparently, Rule 37's language is not the problem—91% of the judges polled in the Department of Justice's 1977–1978 study stated that "Rule 37 [is] adequate as written."56 Rather, a variety of factors external to the Rule likely contribute to this continued reluctance, with two primary culprits: a desire to avoid expending scarce judicial re-

54. ROBERT E. KEETON, KEETON ON JUDGING IN THE AMERICAN LEGAL SYSTEM 166–67 (1999); see Brazil III, supra note 51, at 922 ("[P]erceptions of judicial leniency have very negative effects on the pretrial environment. In essence, they result in a restraint vacuum in which economic and competitive pressures often lead litigators and parties to violate clear duties or, at least, to test the outer limits of the elasticity of the rules or of the system for enforcing them."); Flegal & Umin, supra note 8, at 603 ("If, as the evidence shows, [the Rule 37 sanctions] provisions are not being utilized by a significant number of judges, the process will break down because lawyers and litigants will learn that discovery abuses are not subject to sure and effective detection and correction." (footnote omitted)). A similar phenomenon has been observed in the U.S. District Court for the Eastern District of Virginia. See Rebecca Love Kourlis & Jordan M. Singer, Managing Toward the Goals of Rule 1, 4 FED. CTNS. L. REV. 1, 16–17 (2010). A local rule in that district provides the court with discretion to grant extensions of discovery deadlines upon written motion, but the understanding among the local bench and bar is that such motions are "frowned upon." Id. at 16 (citing E.D. VA. R. 37(F)). Not surprisingly, one study shows that while these motions are granted 96% of the time in the Eastern District of Virginia, attorneys in that district file only 6 such motions per every 100 cases compared to the study-wide average of 25 motions per 100 cases. Id. (citing INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 57 tbl.16 (2009)). Thus, "[w]hile the statistics show that such motions are frequently granted when requested, the perception that extensions and continuances should not be sought is extraordinarily powerful." Id. at 17.

55. KEETON, supra note 54, at 167; see Beckerman, supra note 11, at 518 ("[Because] many courts tend to treat discovery problems with inappropriate leniency . . . clients and lawyers inclined to pursue or retain informational advantage by violating discovery rules lack adequate incentives to compel their compliance . . . .").

56. ELLINGTON, supra note 8, at 54.
sources on an issue that does not involve the merits of the case and an aversion to “punishing” attorneys.  

1. So Much Judging, So Little Time

Motions to compel discovery consume a great deal of a judge’s most precious resource: time. And, judges increasingly have little time to spare. As of March 31, 2010, there were 22% more civil cases and 7% more criminal cases pending in the U.S. district courts than there were in 2006. 

Unfortunately, the increase in litigation was not accompanied by a similar increase in judicial resources. In fact, there was no increase in authorized fed-

57. See Beckerman, supra note 11, at 565–68 (discussing the judiciary’s failure to become more involved in the discovery process as a product of limited resources, the requirement that the courts engage in specific fact-finding, and a distaste for dealing with unprofessionalism); Flegal & Umin, supra note 8, at 603 (stating that judges disregard discovery motions because of “mounting [judicial] caseloads”); Vairo, supra note 43, at 595 (“Judges cited several reasons for declining to impose sanctions: a distaste for becoming involved in discovery disputes that litigants should be able to resolve themselves; a feeling that litigants should seek sanctions against an adversary only when they have been without fault in complying with discovery; and a feeling that the imposition of a sanction embarrasses or humiliates the attorney or party and should thus be resorted to only in extreme situations.” (citing ELLINGTON, supra note 8, at 111–16)). Other reasons may include the judiciary’s misunderstanding of both the scope of discovery abuse and the bar’s desire for greater use of sanctions, the courts’ fear of escalating hostility between the parties and decreasing the appearance of impartiality, and some judges’ sympathies toward the pressures faced by the attorneys engaged in discovery abuse. Brazil III, supra note 51, at 923–24, 927–28. In addition, compliance with some U.S. district courts’ local rules causes a failure to award fees in discovery disputes. Moss, supra note 52, at 560. For example, some local rules require parties to allow the judge to attempt to resolve a discovery dispute before the parties can file a Rule 37 motion. Id. at 560–61 (discussing the local civil rules in the U.S. District Court for the Southern District of New York and the U.S. District Court for the Eastern District of New York). “Thus, while local civil rules cannot formally repeal a federal rule of civil procedure, [some districts’] Local Civil Rules have effectively repealed the Rule 37 mandatory fee-shifting provision by preventing most Rule 37 motions from ever getting filed.” Id. at 562.

eral district court judgeships during that time period.\textsuperscript{59} Thus, as of mid-2010, there were approximately 519 cases pending in the U.S. district courts per authorized judgeship, compared to only 451 cases pending per authorized judgeship in 2006.\textsuperscript{60}

Federal magistrate judges, who often handle motions to compel discovery in federal court,\textsuperscript{61} are equally busy. For the year ending September 30, 2010, they presided over 169,134 pretrial motions, 20,515 settlement conferences, and 52,322 other pretrial conferences in civil cases.\textsuperscript{62} They also conducted 98,115 pretrial motions, 38,921 pretrial conferences, and 2222 evidentiary hearings in felony cases.\textsuperscript{63} In addition, federal magistrate judges held 333 civil jury trials and 171 civil trials without a jury.\textsuperscript{64} All of this, and more, was completed by only approximately 527 full-time and 44 part-time magistrate judges.

With so many cases and responsibilities, it is not surprising that judges would prefer not to spend time dealing with nondispositive discovery disputes.\textsuperscript{66} Such motions typically involve

\begin{itemize}
\item \textsuperscript{60} Id.
\item \textsuperscript{62} FEDERAL MAGISTRATE JUDGES ASSOCIATION, http://www.fedjudge.org/ (last visited Nov. 15, 2011).
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Id. (stating the number of magistrate judgeships as of 2011).
\item \textsuperscript{66} \textit{See}, e.g., Beckerman, \textit{supra} note 11, at 518 ("It is well known that judges dislike discovery disputes and that some resent the time that resolving them takes from other judicial activities."); Brazil III, \textit{supra} note 51, at 887 ("[M]any of the judges we interviewed declared that the intensity of the demands on their time by other responsibilities, responsibilities they view as substantially more important (e.g., conducting criminal and civil trials), makes it impossible for them to commit significantly more time to discovery matters.").
\end{itemize}
full briefing and consideration of fact-intensive issues with which a judge is not likely to be particularly familiar—e.g., whether the document sought is likely to contain information "relevant to any party's claim or defense," or whether an interrogatory has been answered "fully." In addition, the mandated award of expenses under Rule 37(a) involves a fact-intensive determination of whether the losing party was "substantially justified" in maintaining its position and whether the expenses and attorney's fees requested by the prevailing party are "reasonable."

While the discovery issues themselves have no direct relationship to the merits of the underlying lawsuit, resolution of those issues may at least aid in discovery of information that could resolve the lawsuit. Conversely, the expense award considerations are not even tangentially related to the merits, and they consume a great deal of time. For example, judges generally analyze requests for attorney's fees using the "lodestar" method, which requires them to determine whether the hourly rate claimed by the attorney and the alleged number of hours spent preparing the motion are reasonable in light of the prevailing rates in the community and the particular attorney's experience.

67. See Beckerman, supra note 11, at 550 ("Since motions to compel and motions for protective orders inevitably require fact-scrutinizing judicial interventions typically after full briefing, the procedures are time-consuming and generate much fact-intensive, satellite litigation.").

68. FED. R. CIV. P. 26(b)(1).

69. FED. R. CIV. P. 33(b)(3).

70. FED. R. CIV. P. 37(a)(5).

“reasonable,” therefore, is a subjective, fact-intensive inquiry. Judges base this determination upon the detailed affidavits and documents, such as contemporaneous time records, that counsel must submit in order to explain their requests. Perhaps fearful that attorneys may try to reap a windfall, judges closely scrutinize these fee petitions, sometimes generating opinions in excess of fifteen pages. Thus, it is no wonder that the already overburdened judiciary refrains from enforcing Rule 37(a)’s loser-pays mandate.

2. That Isn’t My Job!

In addition to, and in part because of, the ever-increasing judicial caseload, the judge’s role in the litigation process has

72. See Dan B. Dobbs, “Awarding Attorney Fees Against Adversaries: Introducing the Problem,” 1986 Duke L.J. 435, 484–86 (1986). In analyzing attorney’s fees awards in other contexts, Professor Dobbs discussed the difficulty of determining the reasonableness of the time element. See id. Not only do lawyers’ work styles differ greatly, but litigation tasks lack standardization. Id. at 485. Therefore, a judge may have to consider that there is a large range of reasonable time expenditures for any given motion and then determine whether the time claimed by the particular attorney at issue falls within that range. See id.

73. See Global Ampersand, LLC, 261 F.R.D. at 502 (“The party seeking the award of fees must submit evidence to support the number of hours worked and the rates claimed.” (citing Van Gerwen v. Guarantee Mut. Life Co., 214 F.3d 1041, 1045 (9th Cir. 2000)); Envirosource, Inc., 981 F. Supp. at 881 (“The fee applicant bears the burden of documenting the hours expended and the hourly rate. To establish hours spent by each attorney at a firm, the fee applicant is to furnish contemporaneous time records specifying the date, the hours and the nature of the work done . . . .” (citations omitted)); Slawotsky, supra note 20, at 499 (“The fee request must be reasonable and documented through affidavits and supporting documentation.” (footnote omitted)).

74. See Byron C. Keeling, “A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct,” 25 Tex. Tech. L. Rev. 31, 53 (1993) (“Proving the extreme measures that some lawyers will take to make a fast buck, the documents that support fee requests often contain exaggerated calculations of expenses and billable hours.” (citing Dobbs, supra note 72, at 436 n.11)).

changed dramatically. Traditionally, judges were thought of as "overseer[s] and umpire[s]" of the disputes before them. Over time, judges have had to learn to also fill the role of case manager and mediator. "Thus, the judge's roles now include lion tamer, shepherd, timekeeper and director. She is not only in charge of quality control, but also must monitor and insure the progress of the product as it moves along the assembly line."

Judges have never really taken ownership of their role as disciplinarians. As many commentators have noted, "[j]udges are, after all, human." And, like most humans, judges have a desire to be liked, which influences their behavior. Whether conscious or not, the desire to be liked may affect their propensity to dole out punishment. In addition, the overwhelming majority of

77. See id. at 1118–19, 1122 (stating that "the role of the judge has evolved greatly over the last several decades, with a premium being put on management ability"); see also Chad M. Oldfather, Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design, 36 HOFSTRA L. REV. 125, 130 (2007) (noting that today's trial court judges have large caseloads and have, therefore, been forced to take on "a more 'managerial' role"); Judith Resnik, Managerial Judges, 96 HARV. L. REV. 374, 376–79 (1982) ("Many federal judges have ... adopt[ed] a more active, 'managerial' stance. In growing numbers, judges are not only adjudicating the merits of issues presented to them by litigants, but also are meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation. ... [They] have become mediators, negotiators, and planners—as well as adjudicators." (footnote omitted)).
78. Rendell, supra note 76, at 1119; see Resnik, supra note 77, at 378 ("Today, federal district judges are assigned a case at the time of its filing and assume responsibility for shepherding the case to completion. Judges have described their new tasks as 'case management'—hence my term 'managerial judges.' ... They negotiate with parties about the course, timing, and scope of both pretrial and posttrial litigation." (footnote omitted)).
79. See KEETON, supra note 54, at 167 ("[A]nything that is in the nature of disciplining counsel is likely to be seen by the judge as one of the most onerous and unpleasant responsibilities of judging ... "); see also Cady, supra note 20, at 531 ("[I]t can be especially unpleasant and difficult for judges to confront and admonish lawyers when rules or orders have been neglected." (citing Oliveri v. Thompson, 803 F.2d 1265, 1271 (2d Cir. 1986))).
80. See, e.g., Oldfather, supra note 77, at 128 (footnotes omitted). Professor Oldfather cited to numerous works in which "the implications of the humanity of judges" are discussed. See id. at 128–29 n.11.
81. Id. at 135.
judges ascend to the bench from private practice. Many of those judges, therefore, actually sympathize with lawyers who succumb to the pressure to cross the line from zealous to over-zealous representation and are reluctant to issue rulings that will have a negative and potentially long-lasting impact on a lawyer’s professional reputation. When combined with overflowing dockets and limited judicial resources, this tendency to remain neutral in the face of attorney misconduct leads to disastrous results.

B. The Effects: Lax Enforcement of Rule 37(a) Causes More Abuse, an Increased Burden on the Courts, and Forced Settlements

The courts’ failure to properly enforce Rule 37(a) undercuts the very reason for the Federal Rules’ existence—“to secure the just, speedy, and inexpensive determination of every action.” In particular, the refusal to impose Rule 37(a) sanctions—whether for lack of time or lack of desire—encourages more discovery abuse, which in turn increases the burden on the courts and ultimately forces the “little guy” to settle.

82. See Louis Harris & Assocs., Inc., Judges’ Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases, 69 B.U. L. Rev. 731, 754 (1989) [hereinafter Harris Poll]. According to a nationwide study conducted in 1987 of 1,000 federal and state trial judges, over 80% of those judges were in private practice before donning the robe. Id. at 731, 754, tbl.9.1. The rest primarily held positions as prosecutors or civil litigators. Id. at 754 tbl.9.1. There is no reason to believe the composition of the federal and state benches is much different today.

83. See Brazil III, supra note 51, at 927–28; see also John M. Levy, The Judge’s Role in the Enforcement of Ethics—Fear and Learning in the Profession, 22 Santa Clara L. Rev. 95, 106 (1982) (noting that judges shy away from the disciplinarian role because “[j]udges are lawyers and are subject to the social and personal feelings for the members of their profession”).

84. Beckerman, supra note 11, at 511.

85. Fed. R. Civ. P. 1; see Interim Report, supra note 6, at A-2–A-3 (discussing survey results in which 65% of the respondents “believe that the Federal Rules of Civil Procedure are not conducive to meeting the goal of a ‘just, speedy, and inexpensive determination of every action’”).
1. A Vicious Cycle

It is no surprise that discovery abuse is a major cause of delay in the civil litigation process. As one federal judge noted, “[o]bviously no court can efficiently dispose of cases on its docket if it becomes bogged down in a morass of motions relating to proper questions and answers in depositions, interrogatories, requests for admissions and for production of documents.”

Rather than decide the discovery motion or engage in the review necessary to make a proper award of expenses under Rule 37(a), the lack of available resources combined with the judiciary’s general distaste for dealing with discovery disputes cause judges to put cases involving discovery motions on the backburner. Those cases

86. See John H. Beisner, Discovering a Better Way: The Need for Effective Civil Litigation Reform, 60 DUKE L.J. 547, 549 (2010) (“Discovery abuse . . . represents one of the principal causes of delay and congestion in the judicial system.”) (citing Harris Poll, supra note 82, at 733); Harris Poll, supra note 82, at 735 tbls.1.1 & 1.2 (showing that 47% of the federal judges polled and 34% of the state judges polled believe that “abuse of the discovery process” causes delays in litigation); see also EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE 1, 11, 18 & fig.12 (2010) (summarizing the results of surveys of attorneys in the ACTL, the American Bar Association Section of Litigation, and the National Employment Lawyers Association, and finding that the “time to complete discovery” was the most common answer to the question asking for the “primary cause of delay in the litigation process”); Interim Report, supra note 6, at A-6 (“With respect to delay, 56% of Fellows said that the time required to complete discovery is the primary cause of delay in the litigation process . . .”).

87. Proceedings of the Seminar on Procedures for Effective Judicial Administration, Part III, Discovery and Motions Practice, 29 F.R.D. 191, 289 (1961) [hereinafter Discovery and Motions Practice] (providing the remarks of the Honorable Joe Ewing Estes). Judge Estes was the Chief Judge of the U.S. District Court for the Northern District of Texas when he wrote the above-referenced article. See id. at 280 n.10.

88. See Beckerman, supra note 11, at 518. As previously discussed, judicial reluctance to deal with discovery disputes is due in part to the courts’ lack of the time and resources necessary to engage in the fact-intensive review and in part to the courts’ unwillingness to make fact-dependent calls as to lawyers’ professional behavior. See supra Part III.A. By engaging in no fact-finding, however, the courts are—in addition to creating more work for themselves—really engaging in bad fact-finding. See Moss, supra note 52, at 566 (“[W]hen [judges] refuse to award fees to prevailing parties on discovery dis-
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Thus, the discovery issues remain unresolved, the conflicts build, and the parties are forced to bring more discovery motions before the court. Even when the motions are heard, the lack of enforcement of the sanctions provisions simply encourages further misconduct and, consequently, more discovery motions. So, in the end, the judges are back at square one and are shouldering twice the burden.

2. David Doesn't Stand a Chance

Not only does the judges' failure to adequately enforce the Federal Rules lead to an increased burden on the courts, but it also forces the "little guys" to settle cases because they cannot afford to pursue their claims. In this manner, many cases are "decided"

89. Beckerman, supra note 11, at 518.

90. This delay and unfettered consumption of judicial resources affects not only the court and the parties in the immediate lawsuit, but also litigants in other pending and future cases. See Jonathan T. Molot, An Old Judicial Role for a New Litigation Era, 113 YALE L.J. 27, 39–40 (2003) ("In an overcrowded court system, partisanship's tendency to string out the litigation process means fewer court resources for other pending cases . . . . If judges do not intervene, overzealous litigants might not only inflict harm on their immediate adversaries, but also clog dockets and thereby deprive future litigants of their day in court.") (footnotes omitted)).

91. See supra text accompanying notes 52–55.

92. Two main forms of discovery abuse are propounding overly broad discovery requests and withholding information to which the opposing party is entitled. Dudley, Jr., supra note 11, at 193–94. Both behaviors "often result[] from a desire to wear down an opponent who has inferior litigating resources, or to exert settlement leverage unrelated to the merits of the dispute." Id. at 194; see also Interim Report, supra note 6, at A-4 (discussing survey results in which 71% of the respondents "believe counsel use discovery as a tool to force settlement"); Werner, supra note 32, at 303–04 (stating that the Columbia Law School Project for Effective Justice's survey indicated that large corporations used discovery inappropriately to force small businesses to settle).
before the merits can even be reached.\footnote{See Keeling, supra note 74, at 36–37 ("Hardball litigators gamble that groundless motions and abusive discovery tactics will compel their opponents to give up the fight. More often than not, the gamble works." (footnote omitted)).} As former U.S. Supreme Court Justice Lewis F. Powell, Jr. noted in 1978:

Discovery as it now operates may enable the party with the greater financial resources to prevail simply by the threat or reality of exhausting the available resources of the weaker opponent. Settlements are coerced, and persons or businesses of comparatively limited means pay unjust claims, or refrain from pursuing just claims, simply because they cannot afford the cost of litigation. The mere threat of delay and unbearable expense thus denies justice to many actual or prospective litigants.\footnote{Lewis F. Powell, Jr., Reforms—Long Overdue, 33 Rec. of the Ass’n of the Bar of the City of N.Y. 458, 461 (1978). Practitioners have identified the same problem in various surveys conducted over the years. See Interim Report, supra note 6, at A-6 (finding that 83% of the respondents “believed that litigation costs drive cases to settle that should not settle on the merits”); Brazil II, supra note 7, at 225 (“One . . . problem reported by litigators whose practices primarily involve smaller cases is vulnerability to economic pressure, pressure which opponents with more substantial resources can impose through discovery devices.”).}

Unfortunately, Justice Powell’s words still ring true today. Consider these examples provided by Professor John S. Beckerman, but from the standpoint of David versus Goliath.\footnote{See Beckerman, supra note 11, at 551–52. Professor John S. Beckerman used these examples to depict the incentive structure present in the Federal Rules of Civil Procedure in low-stakes versus high-stakes litigation. See id. He does not discuss the nature of the parties involved. See id.}

First, assume that it costs from $7,500 to $15,000 for each side to brief and argue an average discovery motion. The risk of having to pay from $15,000 to $30,000 (one’s own and one’s adversary’s expenses) if one were to lose the motion would be a significant disincentive to taking an unjustified or unreasonable position in a paradigmatic “ordinary” case in which
the maximum at stake is $100,000 and the total litigation budget for each side is in the neighborhood of $35,000.96

Without strict enforcement of Rule 37(a) in this situation, Goliath likely loses his incentive to abide by his discovery obligations, and David is forced to settle. Withholding important information from the opponent at a cost of only $15,000—a drop in the bucket to Goliath—to potentially protect $100,000 makes sense economically, but spending 43% of the litigation budget to bring a motion to compel with no guarantee of recovering those expenses or obtaining the requested information could be detrimental to David. On the other hand, strict enforcement of the expenses provision in Rule 37(a) should serve its deterrent purpose in this situation. Even Goliath—to remain Goliath—must pay attention to economics, and spending 86% of his litigation budget during discovery does not make good business sense.

Second,

where the stakes approach or exceed half-a-million dollars, the risk of having to pay from $15,000 to $30,000 if one loses a motion to compel . . . is much less important and undoubtedly worth bearing in order to obtain or preserve strategic informational advantage.97

One conclusion to draw from this example is that Goliath has no incentive to cooperate in the discovery process—with or without strict enforcement of the expenses provision in Rule 37(a)—when the stakes are high.98 However, Goliath’s incentive to cooperate is

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96. Id.
97. Id. at 552.
98. See id. at 551 (“[T]he incentive structure inherent in the Federal Rules fails to provide sufficient incentives to cooperate, except in low-stakes cases where the amount at issue does not justify the costs of litigating a discovery motion with its risk of sanctions. The risk of having to pay one’s adversary’s attorney’s fees incurred in litigating a motion to compel discovery or motion for protective order in addition to one’s own fees, however, pales into insignificance as the stakes in the litigation increase.” (footnotes omitted)); see also Dudley, Jr., supra note 11, at 191 (stating that the monetary sanctions available under the Federal Rules are not adequate to deter discovery abuse
not the only important consideration in evaluating the effectiveness of Rule 37(a). Even with the greater stakes, David’s litigation budget probably still hovers closer to the $35,000 mark. While sanctions may not discourage Goliath from ignoring his discovery obligations in this situation, there is still an immense benefit to David from strict enforcement of Rule 37(a) because an award of expenses, including attorney’s fees, allows him to stay in the game. The only way David will ever realize this benefit, however, is if the judiciary begins to enforce the Rule consistently and puts an end to the vicious cycle of abuse and delay.

IV. PROPOSED SOLUTION: APPLY RULE 37(a) ACCORDING TO ITS PLAIN LANGUAGE AND LEGISLATIVE INTENT, WITH SUPPORT FROM THE RULES OF PROFESSIONAL CONDUCT

This Article focuses on the straightforward issue of proper enforcement of Rule 37(a) as the first step in curbing discovery abuse. The proposed solution is equally uncomplicated. Courts should enforce Rule 37(a) according to its plain language and the Advisory Committee’s intent that a sanction of reasonable expenses against the losing party on a motion to compel discovery be the rule rather than the exception. Courts should presume that the amount of expenses, including attorney’s fees, requested by the prevailing party is reasonable. Only if a court determines that the amount requested is patently unreasonable—and, therefore, that the requesting attorney is not fulfilling his or her duty to not charge unreasonable fees to the client or duty of candor to the court—should the court deny the request. In that instance, the court, pursuant to its duty under the applicable code of judicial conduct, should refer the matter to the appropriate disciplinary authority for

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when the stakes are high); Werner, supra note 32, at 327 (“Since [the opponent’s costs and attorney’s fees] frequently are miniscule in relation to what is at stake in the litigation, some doubt arises over whether this sanction is much of a deterrent to discovery abuse.”).

99. See Beckerman, supra note 11, at 552 (“Whenever the stakes involved in litigation are great enough for a party to risk incurring all or part of the expenses of a discovery motion—including paying the opponent’s attorney’s fees if the court’s ruling on the motion is adverse—there is little to lose and potentially much to gain from dilatory, evasive or obstructive behavior by discovery respondents or from overreaching discovery by discovery proponents.”).
further review. All of the basic rules and processes needed to carry out this solution are in place; thus, the bench simply must utilize them.\textsuperscript{100}

\textbf{A. The Right Tools Already Exist}

A call for reformation of the Federal Rules is unnecessary at this point in time. Rather,

[w]hile it is possible to envision some changes to the Rules of Civil Procedure, it is worth asking whether that is the best route to improvement, or whether the real problem is the failure to adhere to the Rules in their current form. In fact, the existing Rules provide all of the necessary tools to achieve the changes in practice that have eluded us for decades.\textsuperscript{101}

One such tool is Rule 37(a). Rule 37(a) was enacted to help curb discovery abuse, but, due to lack of enforcement, it has never been given a chance to fulfill its potential. Therefore, only after the judiciary consistently enforces Rule 37(a) according to its plain language, and in conjunction with rules of professional conduct and codes of judicial conduct, will it be evident whether the Rule in its current form can accomplish the Advisory Committee's elusive goal.

\textbf{1. Rule 37(a) Requires Sanctions, with \textit{Limited} Exceptions}

Judges are quite familiar with the concept of statutory interpretation\textsuperscript{102} as it is a prerequisite to rendering a sound decision on a statutory issue. The basic rules of statutory interpretation apply equally to the Federal Rules of Civil Procedure. Thus, the

\begin{itemize}
\item \textsuperscript{100} See Cady, supra note 20, at 485 ("The present legal framework in this country is strong. . . . A renewed recognition and understanding of the existing procedures could provide needed relief, and restore the legal system to the luster it richly deserves.").
\item \textsuperscript{101} Grimm & Cabraser, supra note 15, at 4.
\item \textsuperscript{102} Statutory interpretation is the process by which the meaning of legislation is construed. See BLACK'S LAW DICTIONARY 894, 1547 (9th ed. 2009) (defining "interpretation," "statutory interpretation," and "statutory construction").
\end{itemize}
Federal Rules must be given their plain meaning, and the "inquiry is complete if... the text of the Rule [is] clear and unambiguous." If the language is unclear or ambiguous, then it becomes necessary to examine the drafting party's intent in using the particular language at issue.

As discussed above, Rule 37(a) states that a court "must" impose the sanction of "reasonable expenses... including attorney's fees" against the losing party on a motion to compel discovery unless the losing party was "substantially justified" in maintaining its position or "other circumstances make an award of expenses unjust." While the mandatory nature of this language is unambiguous, the meaning and frequency with which the exceptions to the Rule should be applied are not as clear. Therefore, it is necessary to examine the legislative intent behind Rule 37(a).

Perhaps aware that Rule 37(a) was not a model of clarity, the Advisory Committee expressed its intent in drafting that provision in the comments following the Rule. As for "substantial justification," the Advisory Committee noted that where "the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court... the losing party is substantially justified in carrying the matter to court." Likewise, the Advisory Committee expressed its view that "the court retains the power to find that other circumstances make an award of expenses unjust—as where the prevailing party also acted unjustifiably." Despite these exceptions, "expenses should ordinarily be awarded" under Rule 37(a). Thus, Rule 37(a) embodies a presumption that expenses should be awarded, and that

104. See id. at 543–46 (examining the Advisory Committee's intent and purpose in drafting Rule 11 of the Federal Rules of Civil Procedure).
105. FED. R. CIV. P. 37(a)(5); see supra text accompanying notes 32–33.
106. But see Brazil III, supra note 51, at 931 (arguing that courts need more guidance in determining what constitutes "substantially justified" or the nature of "other circumstances which make an award of expenses unjust").
108. Id. (emphasis added).
109. Id.
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presumption can be overcome only if the losing party meets its burden to satisfy one of the exceptions.110

The courts' written opinions seem to reflect the Advisory Committee's articulation of its intent as to the meaning of the exceptions. For example, the U.S. Supreme Court has stated that the "substantially justified" standard is satisfied where there is a "'genuine dispute'"111 or where "'reasonable people could differ as to [the appropriateness of the contested action].'"112 And, when courts find "other circumstances" present, the circumstances tend to include instances in which the prevailing party acted as poorly as the losing party.113

These exceptions, however, are not meant to swallow the rule. The courts must be careful to adhere to the drafters' intent and engage in these inquiries only in those limited circumstances envisioned by the drafters—i.e., when there is a "genuine" dispute or the prevailing party also acted in an "unjustifiable" manner.114

110. See id. (noting that the 1970 Amendments put the burden of proof on the losing party to show substantial justification and that "the change in language is intended to encourage judges to be more alert to abuses occurring in the discovery process"); supra text accompanying note 32.


112. Id. (quoting Reygo Pac. Corp. v. Johnston Pump Co., 680 F.2d 647, 649 (9th Cir. 1982)). This language is the prevailing standard for "substantial justification." See Neumont v. Florida, 610 F.3d 1249, 1253 (11th Cir. 2010) (per curiam); Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1, 12 (1st Cir. 2005); Doe v. Lexington-Fayette Urban Cnty. Gov't, 407 F.3d 755, 765 (6th Cir. 2005).

113. See Cummings v. Standard Register Co., 265 F.3d 56, 68 (1st Cir. 2001) (declining to award attorney's fees when the prevailing party brought its motion to compel production of documents five days prior to the deadline for production); Solomon v. Scientific Am., Inc., 125 F.R.D. 34, 39 (S.D.N.Y. 1988) (declining to award expenses and attorney's fees to a party who successfully resisted the opponent's discovery request where the party's papers relied on conclusory affidavits and failed to note controlling precedent); Harlem River Consumers Cof. v. Associated Grocers of Harlem, Inc., 64 F.R.D. 459, 467 (S.D.N.Y. 1974) (declining to award expenses and attorney's fees against the losing party where the losing party was a nonprofit corporation with an uncertain financial condition).

114. As long as the courts engage in these inquiries in appropriate circumstances, litigants with legitimate claims of discovery abuse should not be deterred from seeking relief. Cf. Werner, supra note 32, at 307 n.37 ("If the
After all, the courts have an "affirmative duty . . . to exercise the authority conferred by the[] [R]ules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay."115 And attorneys, as officers of the court, share this duty:116 "A lawyer . . . has an obligation to his profession and to the court not to hinder or delay his opponent in obtaining full and fair discovery, and to refrain from employing [discovery] procedures for harassment."117 Thus, when the losing party has engaged in obstructionist behavior or needlessly raised costs, the award of expenses should be an ordinary, if not automatic, occurrence.118 That was the Advisory Committee's intent, to which the judiciary should adhere.

2. Ethics Rules Must Be Enforced in Conjunction with Rule 37(a)

Once a judge has determined that there is a prevailing party on a motion to compel discovery and that an award of expenses is proper, the judge should award the amount requested by the prevailing party's attorney with the presumption that the amount is reasonable.119 In other words, under the current text of Rule 37(a), disposition of the district courts was to award expenses against the losing party on practically every discovery motion, this would deter many valid complaints of discovery abuse from being filed for fear of losing on the motion.").

115. FED. R. CIV. P. 1, Advisory Comm. Note (1993 Amendments). Rule 1 itself states that the Federal Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."


117. Discovery and Motions Practice, supra note 87, at 287.

118. See id. ("A judge should use every sanction and protective order in the book to curb any obstruction as well as abuse of the discovery procedure."); EBERSOLE & BURKE, supra note 1, at 70 ("One attorney felt that 'there should be an almost automatic award of expenses under rule 37(a) motions.'"). As one scholar has noted, "[T]he litigation expenses one party incurs solely or primarily as a consequence of an opponent's violation of his obligations under the discovery rules cannot fairly be viewed as anything other than an entitlement." Brazil III, supra note 51, at 940–41.

119. See Brazil III, supra note 51, at 924 (stating that discovery rules should be rewritten to make the imposition of sanctions "more automatic"); Cutner, supra note 42, at 983 (arguing that Rule 37(a) should include a "stated minimum attorney's fee to be paid any party found to be wholly innocent with regard to the motion"); Seth Hufstedler & Paul Nejelski, A.B.A. Action Commis-
judges should—and can—forgo the fact-intensive lodestar inquiry as to "reasonableness." At this point, the losing party already has shown itself to have acted in bad faith—or, at the very least, in direct violation of its discovery obligations—and the judge has determined that the prevailing party has not engaged in any serious misconduct of its own. Thus, the equities should favor the winning party.

Judges need not fear that they are going out on a limb here. Rather, rules of professional conduct and codes of judicial conduct provide the final check on the prevailing party's attorney. In addition to attorneys' general obligations to expedite litigation and act fairly toward opposing parties, attorneys owe to their clients a duty not to charge unreasonable fees and to the courts a duty

siOn Challenges Litigation Cost and Delay, 66 A.B.A. J. 965, 967 (1980) ("The action commission has been studying the feasibility of experiments with either greater enforcement of current rules or modifications which would make the use of sanctions more automatic. For example, a court could adopt a presumption that a party losing a discovery motion would normally pay the cost and attorney's fees involved in that motion."). But see Brazil III, supra note 51, at 949 (suggesting "[d]istrict courts could establish and periodically review a presumptively reasonable hourly rate for fees").

120. See Keeling, supra note 74, at 39 ("Harassing or stalling tactics find their genesis in a bad faith desire to win lawsuits through subverting the legal process.").

121. As discussed above, one of the exceptions to an award of expenses under Rule 37(a) is where both parties have acted badly. See supra text accompanying notes 108 and 113.

122. MODEL RULES OF PROF'L CONDUCT R. 3.2 (2009) (stating that a lawyer "shall make reasonable efforts to expedite litigation consistent with the interests of the client"); see id. cmt. 1 ("Dilatory practices bring the administration of justice into disrepute. . . . [A] failure to expedite [will not] be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose.").

123. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2009) ("A lawyer shall not: (a) unlawfully obstruct another party's access to evidence . . . [or] (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party . . . ."); see id. cmt. 1 ("The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.").

of candor. In particular, Rule 1.5 of the Model Rules of Professional Conduct specifically states that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." And, Rule 3.3 requires "candor toward the tribunal," which means, among other things, that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal." Of particular importance to situations involving expense requests, is that

an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.

Rules governing professional conduct are not superfluous. Rather, each rule is an imperative, discussed in terms of "shall not." Moreover, "[f]ailure to comply with an obligation or pro-

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125. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009).
126. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2009); see id. cmt. 1 ("Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances."). Several factors are to be considered in determining whether a fee is reasonable, including

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly . . . (3) the fee customarily charged in the locality for similar legal services . . . (6) the nature and length of the professional relationship with the client [and] (7) the experience, reputation, and ability of the lawyer or lawyers performing the services . . .

MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2009). These factors mirror the considerations of the lodestar analysis. See supra text accompanying note 71.

127. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009). "This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process." Id. cmt. 2.

128. Id. cmt. 3.

129. MODEL RULES OF PROF'L CONDUCT Scope ¶ 14 (2009); see id. ¶ 16 ("Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings."). Because the rules discussed
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Hibitation imposed by a Rule is a basis for invoking the disciplinary process.\(^{130}\) And judges, pursuant to their codes of judicial conduct, are required to enforce these rules.\(^{131}\) Therefore, Rule 37(a) should be read and enforced in conjunction with these rules of professional conduct, and a judge who receives an affidavit of expenses from a prevailing party's attorney that is patently unreasonable must refer the matter to the appropriate disciplinary authority for further review.\(^{132}\) This possibility should deter even the most

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\(^{130}\) See 2A GUIDE TO JUDICIARY POLICY Canon 3(B)(5) (Judicial Conference 2009) ("A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that . . . a lawyer violated applicable rules of professional conduct."); MODEL CODE OF JUDICIAL CONDUCT R. 2.15(B) (2010) ("A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority."); id. R. 2.15(D) ("A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action."); id. R. 2.15 cmt. 1 ("Taking action to address known misconduct is a judge's obligation."); id. cmt. 2 ("[A]ctions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to . . . reporting the suspected violation to the appropriate authority or other agency or body."). \textit{But see} Levy, supra note 83, at 105 ("The Code of Judicial Conduct, 3B[] provides that a judge has the responsibility to initiate [sic] disciplinary measures against judges or lawyers for unprofessional conduct. Although there may be some question about the mandatory nature of the reporting requirement for judges, there is no ambiguity that the Code says it should be done.") (footnote omitted)).

\(^{131}\) See Brazil III, supra note 51, at 952 (arguing that the sanctions provisions should be redrafted to include "an explicit reminder that when an attorney has breached a duty the courts should consider referring the matter to disciplinary authorities"). Rules of professional conduct can be enforced by the disciplinary authority in the jurisdiction in which the lawyer is admitted to practice (even if the conduct occurs elsewhere) and in the jurisdiction in which the conduct occurs. MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (2009). Therefore, a
audacious attorney from inflating the numbers because the consequence of lying will be an ethics violation—a mar on the attorney’s professional reputation—rather than simply a reduced monetary award for the attorney’s client. Under this framework, no new rules or revisions to existing rules are necessary. The only missing ingredients are application and enforcement.

B. A Framework That Is Easy to Enforce and Likely to Be Extremely Effective

"[I]t is only the judges who can transform sanctions into a meaningful element of the discovery process." In other words, judges must adequately use the tools available to them, including Rule 37(a), in order to achieve the Advisory Committee’s goal of curbing discovery abuse. Judges need not fear this task. Buttressed by the various rules of professional conduct discussed above, Rule 37(a) allows for simple and swift application with memorable and effective consequences.

1. It Is Your Job, and Now You Will Have Plenty of Time to Do It

If enforced as detailed above, Rule 37(a) should no longer be a source of stress for the judiciary. The proposed solution addresses both of the main causes of judicial reluctance to award expenses to the prevailing party on a motion to compel. First, adherence to the Rule’s plain language and legislative intent, coupled with reliance on the rules of professional conduct, leads to an application of Rule 37(a) that consumes fewer judicial resources. Indeed, the presumption in favor of imposing an expenses sanction means that a court needs to consider whether the sanction is inappropriate only if the losing party comes forward with evidence to

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133. See Cutner, supra note 42, at 954 (discussing the proposition that personal sanctions against an attorney are more effective deterrents from bad conduct than losing a motion or “watching the client go down the drain”).

rebut the presumption.\textsuperscript{135} If the losing party fails to do so, the court has two “simple” choices: award the amount requested in the fee petition—with the presumption of reasonableness eliminating the fact-intensive lodestar analysis\textsuperscript{136}—or refer the matter to a disciplinary authority for review. Accordingly, judges need not worry that discovery motions will divert so many resources from “more important” matters.

Second, utilization of the proposed framework will enable judges to better adapt to their role as disciplinarians. Under this structure, it is clear that doling out punishment in the form of expenses to the prevailing party is part of a judge’s role; therefore, the stigma attached to imposing sanctions should begin to dissipate.\textsuperscript{137} In addition, once judges view Rule 37(a) expense awards as routine affairs, their view of the nature of the sanction may change from a focus on its punitive purpose to a focus on its compensatory purpose.\textsuperscript{138} This new understanding of Rule 37(a) will

\textsuperscript{135} On the other hand, one practitioner has suggested that the U.S. Supreme Court develop a list of factors to be considered when determining whether sanctions are appropriate. See Slawotsky, supra note 20, at 500. Introduction of a factor-intensive test, however, would only create more uncertainty for litigants and more work for the courts.

\textsuperscript{136} The presumption also eliminates the need to make the difficult determination of whether the increasingly popular alternative fee arrangements—those not based on the billable hour—are “reasonable.”

\textsuperscript{137} See Roger Hanson, The Changing Role of a Judge and Its Implications, CT. REV., Winter 2002 at 10, 10 (“Both scholarly researchers and visionaries of court improvement have accepted the fundamental premise that if judicial expectations or role orientations are changed, a judge’s role behavior will be altered in meaningful and substantial ways. And those ways might, in turn, affect a litigant’s behavior in a socially desirable manner.”); see also Moss, supra note 52, at 566 (stating that, while “passing judgment” on attorney conduct may be “undesirable,” it is required by multiple sources); Schroeder & Frank, supra note 15, at 574 (“[Imposition of the expenses sanction] does not call for a moral judgment. If the parties must go to court over a discovery issue, the cost of the trip has to be borne somewhere. We believe that, other than in exceptional circumstances, it should be borne by the loser.”).

\textsuperscript{138} See Brazil III, supra note 51, at 941 (“In fact, it may be neither accurate nor helpful to conceptualize an award that is limited to compensating a party for ‘the amount of the reasonable expenses occasioned’ by an opponent’s failure to comply with discovery rules as a sanction. That word carries for attorneys a subcultural (if not a legal) connotation of punishment that inhibits corrective judicial intervention in the discovery process . . . .”).
eliminate the existing barriers to enforcement and allow judges to properly enforce the Rule.

2. Adding “Bite” to Rule 37(a)’s “Bark”

Proper enforcement of Rule 37(a) adds the “bite” that has been missing from the Rule and should lead to the result the Advisory Committee intended: fewer instances of discovery abuse. As discussed above, the failure to enforce Rule 37(a) leads to a vicious cycle of abuse among litigants and an ever-increasing burden on the courts. However, if the judiciary is willing to strictly adhere to the spirit of Rule 37(a) and to impose existing ethical standards on attorneys, it can eliminate much of the time and money wasted through discovery abuse.  

For example, litigants will be more likely to comply with their discovery obligations if they know that judges will presume an expenses sanction is appropriate absent a strong showing of justification. They also will be more likely to comply with their discovery obligations if they know that judges will award costs and attorney’s fees as requested, rather than closely scrutinizing and reducing the amount requested. In addition, in the event that an unreasonable discovery motion is filed, an expense award will help little David hold his own against Goliath who tries to force settlement through discovery abuse, deterring Goliath from engaging in such conduct in the future. Thus, litigants will save money by not being forced into frivolous discovery motions, and the courts will reap the benefits of additional resources to direct to other matters.

139. See Cutner, supra note 42, at 970 (“Given a qualified judiciary which is willing to impose strict standards of competence and good faith upon the attorneys appearing in litigation, the bulk of wasted time and money resulting from discovery processes would be eliminated through adherence to the existing rules . . .

140. See Cady, supra note 20, at 522 (“When attorneys are acutely aware that sanctions lie ahead, a sincere effort will be made to achieve complete and fair discovery.”).

141. See supra text accompanying notes 54–55.

142. See Schroeder & Frank, supra note 15, at 574 (“It has been our direct observation, although limited, that discovery controversies plummet when sanctions are used.”).
V. CONCLUSION

Abuse of the discovery provisions in the Federal Rules of Civil Procedure has been a problem ever since they were enacted. Continued judicial reluctance to apply the sanctions provisions in the discovery rules further perpetuates the abuse. If and when discovery motions are heard, the small litigants often feel the brunt of the courts’ passivity.

The knee-jerk reaction to these problems thus far has been a cry for reformation of the discovery rules. However, as has been noted by practitioners for years, a much simpler solution already is available: stricter enforcement of existing discovery sanctions. Indeed,

[t]he judicial response to abuses sets the tone for the conduct of attorneys in our voluntary system of discovery. If sanctions are perceived as ineffective, the mire of the pretrial process will only intensify. If viewed as a credible deterrent, discovery will be enhanced and processing of cases within the legal system expedited. When attorneys are acutely aware that sanctions lie ahead, a sincere effort will be made to achieve complete and fair discovery.143

Rule 37(a) is one of the many sanctions available to curb discovery abuse, but like the other sanctions, it has never been consistently enforced. However, upon review of Rule 37(a)’s plain language, the Advisory Committee’s intent in drafting the Rule, and the rules in place to regulate attorney conduct, there is no excuse for not changing that trend. Rule 37(a)’s plain language and legislative intent mandate an almost automatic award of expenses, including attorney’s fees, to the prevailing party on a mo-

tion to compel discovery when that party has had to fight against an unreasonable opponent. Also, the rules of professional conduct governing attorney behavior allow for a presumption that the amount requested in the subsequent expense petition is reasonable. This simple framework removes the major barriers to Rule 37(a)’s enforcement—limited judicial resources and the judiciary’s aversion to punishing attorneys—and simultaneously increases compliance with discovery rules in the first instance by boosting Rule 37(a)’s deterrent effect. By utilizing the available tools in this manner, judges can help curb discovery abuse and eliminate the need for a major overhaul of the discovery system.