Discovery as a Compliance Problem

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INTRODUCTION

Discovery in commercial cases too often becomes a quagmire. Lawyers have an ethical obligation to advance their clients' interests,[1] and for litigators, the prevailing mental model is zealous advocacy.[2] A litigator's personal incentives align with that mental model,

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1. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2023) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation.").

2. *See id.* at Preamble ("As [an] advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *see also id.* at r. 1.3 cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); *see also* Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837, 854 (1998) (describing zealous advocacy as "an affirmative moral obligation, even when it came into conflict with other ethical rules"); *see also* Donald C. Langevoort, *Gatekeepers, Cultural Captives, or Knaves?: Corporate*

because by going the extra mile, the lawyer hopes to please the client, justify a bigger fee, and earn more business.[3] In civil litigation, advancing a client's interests often means taking aggressive positions in discovery.[4] Information is power, so not producing documents deprives an adversary of power.[5] Time is another precious resource, so backloading the discovery schedule when producing documents or witnesses deprives the adversary of time.[6] Discovery doctrines require fact-specific applications,[7] so there is ample wiggle room for motivated reasoning.[8] And the level of enforcement for discovery violations is

Lawyers Through Different Lenses, 88 FORDHAM L. REV. 1683, 1692 (2020) ("[P]rinciples of professional responsibility for the public good sit in the shadow of counterbalancing demands of zealous representation, confidentiality, and loyalty.").

3. *See generally* Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1912 (2008) ("[T]he ethical norm that is most widely embraced by large firm lawyers is the very one that reduces the strains in the lawyer-client relationship: zealous advocacy."); JONATHAN R. MACEY, THE DEATH OF CORPORATE REPUTATION 150 (2013) ("[I]ntense competition exists for clients at big law firms."); Langevoort, *supra* note 2, at 1686–87 ("As a matter of simple economics, clients pay the bills and normally prefer that the professionals they retain facilitate—not frustrate—their chosen ends. Intense competition among skilled lawyers forces them into acquiescence."); Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 6 (1999) ("[L]aw practice is becoming increasingly commercial in nature."); Tom Kimbrough, *Law Firm Dynamics: Don't Hate the Player, Hate the Game*, 75 SMU L. REV. F. 241, 257 (2022) (quoting a guide for law firm associates explaining, "[t]he law firms we know are keenly aware that competition for clients and the lawyers to serve them brilliantly is intense"); Melissa Mortazavi, *Code of Silence*, 40 CARDOZO L. REV. 2171, 2211 (2019) ("Big law clients assert their needs and police misconduct through economic pressure—fees and taking their business elsewhere.").

4. *See* Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 715 (1998) ("[Lawyers] argued that polite resistance—making the other side work hard for every single document—was simply the obligation of zealous advocacy."); *see also* Mortazavi, *supra* note 3, at 2195 ("[V]erbal harassment, highly adversarial discovery production, and making and contesting all possible motions and requests . . . can be viewed as not only legitimate, but expected by clients."); *see also* Seth Katsuya Endo, *Discovery Hydraulics*, 52 U.C. DAVIS L. REV. 1317, 1334 (2019) ("[L]awyers are dependent on their clients for directions and much of the sought-after information. And sometimes clients may wish to hide information or otherwise act in a recalcitrant way.").

5. *See* Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1252 (2020) ("[T]rials, settlement, and dispositive motions all turn on information exchanged during discovery."); *see also* Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 94 (2020) ("By forcing the parties to engage in a thorough exchange of information, discovery shapes the parties' calculation of probable success and therefore 'increases settlements and decreases trials.'").

6. *See* Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 177 (2018) ("[T]he time spent in discovery far outweighs the time that most litigants will ever spend in front of a judge."); *see also* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 543 (2000) ("One consequence of discovery flows from the value of information gleaned, while another derives from the burden discovery inflicts on the respondent."); *see also* Edith Beerdsen, *Discovery Culture*, 57 GA. L. REV. 981, 994 (2023) ("[M]any discovery actions are aimed at gathering useful information, but some are aimed at creating settlement leverage by imposing or threatening to impose burdens on the other side.").

7. *See* Zambrano, *supra* note 5, at 81 ("[T]o speak of broad discovery as a homogeneous coherent procedure is misleading because there is no single process that is invariant from case to case.").

8. Motivated reasoning is an intuitive decision-making process that distorts both the collection and weighing of information. Jennifer Arlen & Lewis A. Kornhauser, *Battle For Our Souls: A Psychological Justification for Corporate and Individual Liability for Organizational Misconduct*, 2023 U. ILL. L. REV. 673, 696 (2023); *see also* Yuval Feldman, Adi Libson & Gideon Parchomovsky, *Corporate Law for Good People*, 115 NW. U. L. REV. 1125, 1141 (2021) ("[A]mbiguity provides an individual with 'moral wiggle room,' which increases her ability

low, so the perceived risk of sanction is slight.[9] The combination of significant incentives for misconduct, ample opportunities for misconduct, and minimal risk of consequences for misconduct can cause the civil discovery process in commercial cases to spin out of control.

Corporate compliance professionals confront similar problems. Corporate managers have a fiduciary duty to maximize the corporation's value for its stockholders' benefit. A corporate manager's personal incentives align with that fiduciary mandate, both because of compensation arrangements tied to financial targets and because enhancing profitability can result in promotion.[10] Pushing legal boundaries can help a manager meet or beat financial targets.[11] The relevant regulations are often unclear or require fact-specific application,[12] creating room for motivated reasoning.[13] The level of enforcement for legal violations is low, because business operates outside of the view of law enforcement,[14] and many law enforcement agencies are notoriously underfunded.[15]

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to justify her behavior and maintain her ethical self-conception, as long as there is some view under which her actions are ethical.").

9. *See* Hon. Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1657 (2016) (discovery is "a virtually unpatrolled no-man's-land of litigation"); *see also* Mortazavi, *supra* note 3, at 2211 ("[W]ith powerful clients encouraging bad behavior one might expect heavy bar involvement—rather, silence indicates the opposite."); *see also* Beerdsen, *supra* note 6, at 990 ("[T]he substantial number of cases that proceed to discovery enter an environment that is loose and informal, relatively unmoored from any procedural rules, and largely invisible to the public and even the courts.").

10. John Armour et al., *Board Compliance*, 104 MINN. L. REV. 1191, 1216 (2020) ("Executive compensation is typically tightly linked to a firm's stock price so as to encourage focus on shareholder value.").

11. *See* John Armour, Jeffrey Gordon & Geeyoung Min, *Taking Compliance Seriously*, 37 YALE J. ON REG. 1, 21 (2020) ("Actions that boost the firm's stock price in the short run but harm it in the long run may appeal to managers (but ultimately hurt investors)."); *see also* Natasha Burns & Simi Kedia, *The Impact of Performance-Based Compensation on Misreporting*, 79 J. FIN. ECON. 35, 63 (2006) (concluding that CEOs are significantly more likely to engage in financial misreporting when compensated with option portfolios that are sensitive to stock price); *see also* Kabir Ahmed & Dezso Farkas, *A Proposal to Encourage Up-the-Ladder Reporting by Insulating in-House Corporate Attorneys from Managerial Power*, 39 DEL. J. CORP. L. 861, 873 (2015) (stating that corporate executives "exploit market fluctuations, manipulate earnings, and misrepresent material facts to meet short-term earnings expectations and reap their bonuses").

12. *See, e.g.*, Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 LAW & CONTEMP. PROBS. 47 (2020) (describing the ambiguities in regulatory compliance and enforcement).

13. *See supra* note 8 and accompanying text.

14. *See* U.S. SENT'G GUIDELINES MANUAL § 8 Introductory Comment (U.S. Sent'g Comm'n 2023) (noting that the guidelines "provid[e] a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program" (emphasis added)); *see also* Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 254 (2020) ("When organizations fail to properly address potential compliance failures, it presents a particularly problematic situation, because the responsibility for preventing and detecting misconduct within an organization lies primarily with the organization itself.").

15. Press Release, U.S. Dep't of Treasury, Remarks by Assistant Secretary for Tax Policy Lily Batchelder for the American Bar Association (Feb. 11, 2023), https://home.treasury.gov/news/press-releases/jy1267 [https://perma.cc/HPZ4-ELHK] ("[F]or decades, the IRS been underfunded and overworked. It has lacked the resources to properly serve the American people and to enforce tax laws among high-earners and large corporations."); SEC OFF. INVESTIGATIONS, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME 364 (Aug. 31, 2009), https://www.sec.gov/files/oig-5090.pdf [https://perma.cc/7N8Z-C4QU] ("Bachenheimer also attributed the SEC's failure to uncover Madoff's Ponzi scheme to a lack of resources: 'The resource issues and the challenges that we were facing . . . . We had to buy our own legal pads. We had to buy our own pens. It got to the point where we didn't have paper for the printers. . . . We had cases that

Compliance professionals have responded to these problems by developing systems designed to reduce violations.[16] Those systems are not perfect, but they provide lessons for civil discovery in commercial cases. Two concepts are most pertinent: culture and salience.[17]

The concept of culture acknowledges that humans are not coolly rational probability calculators who focus only on the magnitude of sanction discounted by the probability of result. The economist's simplifying assumptions of rational choice are an acceptable place to start, but human nature is more complex.[18] The concept of culture recognizes that humans are motivated to act in pro-social ways, and stressing pro-social norms affects behavior.[19] The concept of salience recognizes that compliance improves when a person who has the opportunity to engage in misconduct recognizes the existence of a moral choice, understands the value of compliance, and appreciates the consequences of violating a norm.[20] When those factors are not present, salience decreases, and actors may fail to comply without any sense of what they are doing.[21] Both concepts point to potentially valuable approaches to discovery in commercial cases. The Delaware courts have explored some of these techniques, and their experience provides helpful examples.[22]

The compliance-based emphasis on culture calls for activating a different dimension of a commercial litigator's identity: the role of the attorney as an officer of the court.[23] It also calls for emphasizing the professional norm of civility and the benefits that come from reducing the competitive dynamics in litigation. The Delaware courts consistently emphasize these ideals,[24] as do leaders in the Delaware bar.[25] The compliance-based emphasis on salience calls for ensuring that litigators perceive when they are making an aggressive discovery call that pushes the envelope or taking a position that will cause the level of discovery conflict to escalate. Attorneys must not simply discount a broad objection to producing documents, a borderline assertion of privilege, or a missed deadline as something normal that everyone does. The litigator making the decision—whether a senior partner, junior partner, or associate—must see the problematic choice and perceive how making a different decision can help the client in the long run.

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had remained open for years.'"); *see also* Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 606–07 (2012) ("In the corporate governance context, one need not search long for claims of underfunding by regulatory or law enforcement agencies."); Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CALIF. L. REV. 697, 726 (2020) ("Given the volume, complexity, and dispersion of data in any investigation of crime within a large global corporation, prosecutors acting alone could not get to the bottom of a matter in reasonable time, at least not with current resources.").

16. *See* Eugene F. Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965, 978 (2018) (explaining that compliance programs are designed to prevent misconduct, detect misconduct, and align behavior with regulation).

17. *See infra* Part III.

18. *See infra* notes 95–97 and accompanying text.

19. *See infra* Part III.A.

20. *See infra* Part III.B.

21. *See infra* Part III.B.

22. *See infra* Part IV.

23. MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 2 (AM. BAR ASS'N 2023).

24. *See infra* notes 126–31 and accompanying text.

25. *See infra* notes 132–39 and accompanying text.

Adopting a compliance-based approach requires commitments from both the bench and bar. To promote a culture of compliance, judges and senior lawyers must make an effort to establish a "tone at the top."[26] For trial judges, a compliance-based framework calls for hearing discovery disputes, not complaining about them, and applying brighter-line rules with clearer consequences that reduce the wiggle room for motivated reasoning. For appellate courts, enhancing compliance means backing up trial courts when they impose sanctions. For all members of the bar, a compliance-based framework requires internalizing different norms, accepting the risk of more frequent, albeit lower-stakes sanctions, and understanding that a more transparent and less contentious system of discovery benefits everyone.

Part I of this Article describes some of the problems that pervade discovery in commercial cases. Part II shows how corporate compliance professionals confront similar problems. Part III looks to the compliance literature for solutions that compliance experts have identified. Part IV explores how those approaches can improve the civil discovery process in commercial cases. The Delaware courts are often cited as leaders in commercial litigation, and Part IV uses examples from the Delaware courts to illustrate examples of a compliance-based regime for civil discovery.

I. CIVIL DISCOVERY AS A HOBBESIAN WORLD

Criticisms of discovery in commercial cases abound.[27] It is too extensive. It is too expensive.[28] It lacks clear rules.[29] It is characterized by ugliness and bad behavior.[30] Clearly, there is a problem. There is also a simple explanation: The current discovery environment reflects misaligned incentives, opportunities for misconduct, and a lack of enforcement.

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26. *See* Alfredo Contreras, Aiyesha Dey & Claire Hill, *"Tone at the Top" and the Communication of Corporate Values: Lost in Translation?*, 43 SEATTLE U. L. REV. 497, 509–14 (2020).

27. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 635 (1989) ("That discovery is war comes as no surprise."). This observation remains as true today as it was more than three decades ago.

28. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 560 (2007) (describing potential discovery as a "sprawling, costly, and hugely time-consuming undertaking"); *cf.* Arthur R. Miller, *From Conley to Twombly to Iqbal*: *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 5 (2010) (describing "broad discovery" as an "integral" component of the pretrial process).

29. Seth Katsuya Endo, *Discovery Dark Matter*, 101 TEX. L. REV. 1021, 1046–47 (2023) ("The absence of formal appellate guidance on discovery issues is a deliberate design choice—and one that carries real costs . . . . robust error correction and the development of uniform law are inhibited by the absence of appellate review").

30. *See, e.g.*, Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1618–19 (1996) (describing a discovery dispute in which the American Broadcasting Company alleged that Philip Morris produced in discovery one million foul-smelling documents on paper that was impossible to photocopy); Transcript of Telephonic Status Conference at 14:13–18, Stati v. Republic of Kazakhstan, ECF No. 184-3 (D.D.C. Aug. 10, 2020) ("The parties have showed nothing but utter disrespect to a magistrate judge of this court who seems to have the patience of Job. But you did that at your peril because I guess I don't, at least not when I'm supposed to read a bunch of self-serving, completely unproductive correspondence between two civil litigators who are being anything but civil."); Order, Johnson v. Everyrealm, Inc., No. 22-cv-6669, ECF No. 84 (S.D.N.Y. Apr. 26, 2023) (granting various extensions and urging civility after defense counsel attempted to use the unexpected early birth of plaintiff's counsel's child to extract, among other things, concessions in discovery).

A. The Incentive Problem

Ask one hundred litigators for the phrase that embodies their profession and the top five answers on the board will include "zealous advocacy."[31] Under the Model Rules of Professional Conduct, that concept is no longer an ethical obligation.[32] The flavor, however, remains. According to the nonbinding preamble, "[a]s an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."[33] Commentary to Rule 1.3 likewise advises that "[a] lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[34] Zeal means enthusiasm or eagerness.[35] However, because zeal shares an etymological root with zealotry, the two concepts can be confused. Zealotry is unreasonable and uncompromising. Exemplifying this perspective, Jonathan Macey writes that "[l]awyers are 'hired guns' for their clients."[36]

The Model Rules send a message to litigators that as long as a lawyer has a good faith belief that a tactic or position is legal, then its use is fair game. Thus, "[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate can proceed."[37] Commentary to Rule 1.3 advises that a lawyer "should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to indicate a client's cause or endeavor."[38] In these framings, illegality is the boundary for a lawyer's conduct.

Rule 3.4, which speaks to discovery, takes the same approach. Under that rule, a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."[39] The

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31. To the authors' knowledge, this question has yet to appear on *Family Feud*. *See* DAVID MARC & ROBERT THOMPSON, PRIME TIME, PRIME MOVERS: FROM I LOVE LUCY TO L.A. LAW—AMERICA'S GREATEST TV SHOWS AND THE PEOPLE WHO CREATED THEM 257 (1995) (explaining the gameplay of *Family Feud*).

32. The ABA Model Code of Professional Responsibility, which were promulgated by the ABA in 1969 contains language instructing that "a lawyer should represent a client zealously within the bounds of the law." ABA MODEL CODE OF PRO. RESP. canon 7 (AM. BAR. ASS'N 1969). The subsequently adopted Model Rules of Professional Conduct, however, have taken a step back from that formulation, equating "zeal" with "reasonable diligence" and qualifying that zeal with the admonition, "reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR. ASS'N 2023).

33. MODEL RULES OF PRO. CONDUCT preamble (AM. BAR. ASS'N 2023).

34. *See id.* at r. 1.3 cmt. 1.

35. *See* Restatement (Third) of the Law Governing Lawyers § 16 (Am. L. Inst. 2000) ("The term [zeal] sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. For legal purposes, the term encompasses the duties of competence and diligence.").

36. JONATHAN R. MACEY, THE DEATH OF CORPORATE REPUTATION 150 (2013) ("[I]ntense competition exists for clients at big law firms."); Donald C. Langevoort, *supra* note 2, at 1686–87 ("As a matter of simple economics, clients pay the bills and normally prefer that the professionals they retain facilitate—not frustrate—their chosen ends. Intense competition among skilled lawyers forces them into acquiescence.").

37. *See* MODEL RULES OF PRO. CONDUCT r. 3.1 cmt. 1 (AM. BAR. ASS'N 2023).

38. *Id*.

39. *Id.* at r. 3.4(a).

adverb "unlawfully" modifies those obligations, implying that within the bounds of the law, those actions are permitted. Likewise, a lawyer shall not "in pretrial procedure, . . . fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."[40] Once again, the obligation to comply applies to a "legally proper discovery request,"—*i.e.* not only legal but also proper. The rule calls for responding with a "reasonably diligent" effort, which is a matter of judgment.[41]

The Model Rules thus establish an ethical framework under which lawyers are expected to advance their client's interests to the extent the law permits. The business side of the practice of law pushes in the same direction. Particularly at large law firms, lawyers face intense competition for business.[42] "There are hundreds of national law firms that compete for clients with the most complex, difficult—and lucrative—cases and issues."[43] If one lawyer will not act aggressively, another will.

Not surprisingly, hardball discovery tactics are the norm. A survey of large law firm litigators found that many perceive their job as "making the other side work hard for every single document" such that withholding documents that should be produced becomes "a rational jockeying for negotiating position."[44] Sophisticated clients come to expect that type of behavior from their lawyers. No client ever complimented an attorney for producing a bad document or not asserting a colorable claim of privilege. In a vicious cycle, lawyer behavior adjusts to meet client expectations.[45]

B. Opportunities for Misconduct

The discovery process provides ample opportunities for misconduct. Delaying the production of documents, over-withholding documents, and expansive assertions of privilege are just three examples. Proving a case against a well-represented adversary generally requires contemporaneous documentary evidence.[46] Without that type of evidence to pin down or impeach a witness, depositions become exercises in squeezing Jello.

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40. *Id*. at r. 3.4(d).

41. The modifier makes some sense, as counsel should not generally be expected to expend unreasonably diligent efforts. The problem lies in determining where the line falls between reasonable and unreasonable where the litigator making the decision knows how drawing the line will affect the client's interests.

42. Regan, Jr., *supra* note 3, at 11 (describing the business models of large law firms as being shaped by "[c]ompetition for both clients and lawyers"); Kimbrough, *supra* note 3, at 257 (quoting a guide for law firm associates explaining, "[t]he law firms we know are keenly aware that competition for clients and the lawyers to serve them brilliantly is intense."). The reward for attracting large corporate clients is enormous. In 2021, a total of 52 law firms took in over one billion dollars in gross revenue. Kathryn Rubino, *All the Billion-Dollar Biglaw Firms: A Look at the Am Law 100*, ABOVE THE LAW (Apr. 26, 2022) https://abovethelaw.com/2022/04/all-the-billion-dollar-biglaw-firms-a-look-at-the-am-law-100/ [https://perma.cc/FCJ5-LLVC].

43. MACEY, *supra* note 3, at 151.

44. Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 715 (1998) (quoting a large firm litigator as saying "[d]isclose as little as possible before the ground rules are established. It's in your interest not to turn anything over but to have some 'integrity' before the court[.] [Y]ou risk dismissal if you don't produce something.").

45. *See, e.g*, Mortazavi, *supra* note 3, at 2209 (describing the market power of clients in encouraging discovery abuses and other instances of bad behavior by attorneys).

46. *E.g.*, Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1797 n.14 (2014) (describing asbestos litigation as a "poster

Time is a key resource. In many cases, the court sets a trial date with a discovery cutoff geared to that trial date. The discovery cutoff means there is a fixed period for conducting discovery. It takes time to obtain information to prove a case. Tactics that compress the amount of time that an adversary has to conduct discovery reduce the likelihood that the adversary can obtain the evidence it needs.

Lawyers have a full bag of techniques for burning time. If there is a date for completing a substantial production of documents, the documents will appear on, just before, or just after the substantial completion date. Why give an opponent more time to conduct a review? The concept of "substantial" provides more room for strategic behavior. If you produce eighty percent of your documents by the substantial completion date, can you get away with making the rest of the production over the following weeks? What about fifty percent? Sometimes parties will attempt to combat the last-minute document dump by agreeing to a rolling production, but that term is equally subject to interpretation. Producing a few documents, then a few more, and then a few more will keep the production rolling, even if the bulk of it lands on or after the substantial completion date. The standards that govern civil discovery provide additional opportunities for aggressive behavior. The touchstones of discovery are relevance and proportionality.[47] Each concept is open to interpretation. A motivated lawyer can reason that a request for a particular category of documents, a response to an interrogatory, or a deposition of a particular witness is either wholly or partially irrelevant. Even if relevant, the lawyer can object that the request is overly broad, unduly burdensome, and disproportionate to the needs of the case.

Privilege is another area where judgment calls abound. A party is entitled to obtain *nonprivileged* material that is relevant and proportional. At first blush, the standard for privilege might seem clear. Under federal law, a communication is privileged if is made between an attorney and client (or certain of the client's agents) in confidence for the purpose of obtaining or providing legal advice.[48] But what about communications that mix business and legal advice? Imagine that the chief marketing officer and the senior vice president for sales are emailing about whether the company could save money by renegotiating a contract. They copy an in-house lawyer. Or imagine that after a successful renegotiation, the same employees work together over email to draft a press release, with the in-house lawyer making stylistic edits. In a suit over the contract, can the corporation legitimately invoke privilege for those emails?

At oral argument in a case involving the scope of the attorney-client privilege, Chief Justice Roberts observed that parties are entitled to make arguments in good faith and that "even if you've got only a 10 percent chance of—of prevailing, it could still be bona fide."[49] With that type of license, litigators can often find a basis to withhold a document for privilege.

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case" for the power of civil discovery and describing the impact of materials uncovered in discovery on public debate and ultimate liability for bad actors).

47. This is the language of Federal Rule of Civil Procedure 26(b). FED. R. CIV. P. 26(b). Most states have rules of civil procedure that mirror that language. For example, in the Delaware Court of Chancery, the general provisions governing discovery use the exact same phrase. DEL. CH. CT. R. 26(b).

48. *See In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 359 (3d Cir. 2007) (quoting Restatement (Third) of the Law Governing Lawyers § 68 (Am. L. Inst. 2000)).

49. Transcript of Oral Argument at 8:15-17, *In re* Grand Jury, No. 21-1397 (Jan. 9, 2023).

The privilege log is the principal mechanism for asserting privilege and enabling the other party to assess those assertions.[50] But privilege logs are rife with abuse.[51] They often have thousands of entries, with parties claiming that a quarter or a third of their total production is privileged.[52] That is facially implausible because it would mean that instead of conducting business, the party spends a quarter to a third of its time consulting with lawyers and obtaining legal advice.

Privilege logs reach this size because many lawyers seem to start by invoking privilege for any document that has a lawyer on it, as well as documents from a lawyer-custodian's files that don't.[53] Descriptions on a privilege log fall into two camps. Sometimes, they are so ritualized and identical as to seem generated by rote.[54] Other times, they present opportunities for creativity. Aggressive assertions of privilege are particularly common in high-stakes corporate cases, because lawyers in large corporations are regularly involved in business discussions, and big law firms can field teams of associates to conduct large-scale privilege reviews.[55]

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50. Klig v. Deloitte LLP, No. CIVA 4993, 2010 WL 3489735, at *6 (Del. Ch. Sept. 7, 2010) ("The privilege log serves as the fulcrum on which the adversary's decisions turn. The log is supposed to provide sufficient information to enable the adversary to assess the privilege claim and decide whether to mount a challenge.").

51. *Id.* ("Vapid and vacuous descriptions interfere with the adversary's decision-making process. Just as you can't hit what you can't see, you can't challenge what the other side hasn't described. Presented with pages of inscrutable descriptions, the adversary must first undertake the burden of fighting for a usable log. This builds [in] another round of multi-stage decisions, increasing the payoff for the party that broadly and vaguely asserts privilege.").

52. Oral Argument on Motion to Compel Tr. at *3–4, Navient Sols., LLC v. Conduent Educ. Servs., LLC, C.A. No. 2019-0316, (Del. Ch. Dec. 5, 2019) ("25 percent of [Conduent's] production appears on its privilege log."); Mechel Bluestone, Inc. v. James C. Justice Cos., Inc., 2014 WL 7011195, at *6 (Del. Ch. Dec. 12, 2014) ("The initial privilege log was 672 pages long and contained 6,125 entries. As of September 12, 2014, Mechel had produced 11,201 documents, meaning that it had designated over one-third of the responsive documents as privileged. The underlying transaction was a business deal. Yet Mechel was claiming that one-third of the documents and communications relating to the transaction were legal in nature.").

53. *See, e.g.*, Spread Enterprises, Inc. v. First Data Merch. Servs. Corp., No. CV 11-4743, 2013 WL 618744, at *1 (E.D.N.Y. Feb. 19, 2013) (showing a party taking the position that all emails copying in-house counsel were automatically privileged); Oral Argument on Motion to Compel Tr. at *114, Stilwell Assocs., L.P. v. HopFed Bancorp, Inc., C.A. No. 2017-0343 (Del. Ch. Aug. 28, 2017) ("In the documents that I review in camera, I, unfortunately, frequently see privilege asserted for things like setting up telephone calls, where there's no substantive legal advice whatsoever. There's not even an indication of what the topic of the call will be, or perhaps there's, at most, a high-level indication of what the topic will be. But because a lawyer has been copied on the e-mail setting up the time of the call, someone has asserted privilege for it and boldly claimed that it is a communication providing legal advice relating to, and then they insert a short description of the transaction the litigation is about.").

54. *See, e.g.*, Williams v. Taser Int'l, Inc., 274 F.R.D. 694, 697 (N.D. Ga. 2008) (describing "boilerplate" privilege log descriptions that were "wholly inadequate to allow Plaintiffs or the Court to evaluate the validity of the assertions."); Klig v. Deloitte LLP, No. 4993, 2010 WL 3489735, at *1 (Del. Ch. Sept. 7, 2010) (noting that for 332 of the 342 documents on the defendant's privilege log "the log repeated verbatim under the heading 'Description' one of five identical phrases").

55. *In re* Anthem-Cigna Merger Litig., No. 2017-0114, 2020 WL 5106556, at *7 (Del. Ch. Aug. 31, 2020) (withholding the public relations work and communications of a strategic communications firm as privileged); *In re* Facebook, 2016 WL 7235222, at *2 (Del. Ch. Dec. 12, 2016) (withholding the work and communications of an investment bank as privileged); *see also* Elise Bernlohr Maizel, *The Case for Downsizing the Corporate Attorney-Client Privilege*, 75 HASTINGS L.J. 373 (2024).

Parties assert privilege expansively because the current system rewards that behavior. The other side might never challenge the assertion of privilege, in which case the gamble pays off. If the other side challenges the assertion, then the party may be able to justify its position to a judge who has better things to do than wade into a dispute over privilege calls. That is particularly true if the party asserting privilege counters the challenge by attacking some of the other side's privilege calls. In most cases, the worst that can happen is that a party will eventually be ordered to produce the documents they should have produced in the first place, while in the meantime forcing the other side to expend resources fighting for them and reducing the amount of time that the other side has to use them. For a party deciding on whether to assert privilege, most paths lead to upside, even for a borderline or across-the-borderline call.

The impact of this type of gamesmanship can be enormous. Discovery determines the facts that a party can prove or disprove. Although most cases settle, parties bargain in the shadow of what they can prove.[56] Discovery becomes the main battleground where cases are won or lost. That means the quality of the discovery process has a tangible impact on the system of justice.

C. Enforcement

When two professional sports teams meet, each side makes every effort to win, but there is a referee (and usually several) present to enforce the rules. Players and fans may disagree with a call, but at least someone is there to make it. In civil discovery, the litigants compete on their own, without a referee present. The court looms in the background, but the parties conduct the day-to-day business of discovery themselves.[57] To continue the sports analogy, imagine that the referee is not at the game but rather sitting in an office on the other side of town. If a player thinks a foul has been committed, the game stops, and the player writes the referee to describe what she believes occurred. The other team's player can dispute what occurred and argue that whatever happened was not a foul. The other team's player can also point out all of the fouls that the complaining player allegedly committed. Both players would schedule a time to talk to the referee about what happened, and only then would the referee make a decision about whether a foul had occurred. That is how enforcement in civil discovery works.

To enable the process of civil discovery to unfold without on-the-scene judicial involvement, parties are expected to cooperate.[58] The process begins with parties serving written discovery requests, including requests for production of documents, interrogatories, and requests for admission. The other side responds with written objections. The parties

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56. *See* Beerdsen, *supra* note 6, at 988 ("The overwhelming majority of civil cases these days are settled or dismissed rather than adjudicated at trial. . . . [D]iscovery allows the parties to gather the information they need to reach an informed settlement."); Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1252 (2020) ("[T]rials, settlement, and dispositive motions all turn on information exchanged during discovery.").

57. *See, e.g.*, FED. R. CIV. P. 26 (setting forth the federal rules for civil discovery); *see also* Endo, *supra* note 4, at 1334 (2019) (lawyers are the "main players" in the discovery process); Marrero, *supra* note 4, at 1657 (2016) (discovery is "a virtually unpatrolled no-man's-land of litigation").

58. Cartanza v. Cartanza, No. 7618, 2013 WL 1615767, at *2 (Del. Ch. Apr. 16, 2013) (describing discovery as a "cooperative and self-regulating process managed between the parties").

then "meet and confer" about what custodians are likely to have responsive documents, what date range will capture material relevant to the case, what search terms to use for identifying electronic documents, and a variety of other issues.

If a party believes that its adversary is failing to comply with the discovery rules or the parties' agreements, then the answer is to bring the dispute to the court. But parties are reluctant to play that card. Judges routinely express their distaste for discovery disputes, which can be tedious, involve ugly behavior, and often require delving into the details.[59] Parties know this, so they take into account that an opponent will hesitate before bothering a court with minor issues. Parties also know that if the opponent does challenge a position, then the parties are expected to meet and confer again in an attempt to resolve the dispute. During that process, an aggressive litigant can move off of an extreme position, thereby looking reasonable and reducing the downside of taking the extreme position in the first place.

The resulting dynamic turns discovery into a protracted series of negotiations. An initial request for documents may well be overly broad, both because the requesting party does not know what documents exist and to provide room for compromise. The producing party responds with a series of similarly broad objections. Negotiation by deficiency letter ensues, with each side disagreeing with the other side's position. Meet-and-confer sessions follow, then more letters attempting to document while in disagreeing over the commitments each side made and the issues that remain open. Resolutions are reached on some issues, but not on others.

In this dynamic, each side gets rewarded for starting from the most extreme positions that can be defended to a court as having been taken in good faith. Some of those positions may go unchallenged. For those that are challenged, the meet and confer process provides opportunities to move away from the extreme.

Sometimes, one side will file a motion. At that point, the other may concede, compromise, or fight. Once one side files a motion, the other side usually files a motion of its own. The judge will hear radically different stories about what occurred. To a reviewing court, the scene can look like children fighting in the sandbox, and a busy judge may be tempted to send both kids to their rooms. When relief is granted, the typical order requires that the discovery be made. Rarely are additional sanctions imposed, such as an award of attorneys' fees or costs or a ruling that draws an adverse inference precludes a party from relying on particular documents. The resulting dynamic repeats the decision tree for asserting privilege but on a wider scale. The do-over system offers the withholding party upside without meaningful downside. If the aggressive position is not challenged or the withholding party wins, then the bet pays off. If the withholding party loses, then it merely has to do what it should have done in the first place.

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59. *See, e.g.*, Effron, supra note 6, at 143 (2018) ("The rules do not encourage or reward parties for bringing their discovery disputes directly to the judge's attention. In fact, parties that eschew these rather obvious cues can be subject to judicial ridicule."); *see also* Transcript of Telephonic Status Conference, Stati v. Republic of Kazakhstan, 14-1638 (D.D.C. 2021) ("The magistrate judge should not have to waste her time pulling adults apart on the playground. The level of effort on the part of the attorneys, the time, the paper, the judicial resources that have all been devoted to the discovery dispute . . . have long since passed the point where they can be considered to be reasonable justified by the nature and scope of the dispute itself.").

Sometimes, a Court will impose a meaningful sanction, but that level of consequence is rare. Compared to the amount of aggressive behavior that takes place, the likelihood that any one decision will lead to sanctions is vanishingly small. When a large sanction is awarded, it becomes newsworthy precisely because such a consequence is so rare.[60] Even then, the amounts involved may not be meaningful to the law firms or their clients. When Facebook faced litigation over its use of private user information, its lawyers at Gibson Dunn directly and repeatedly contradicted the magistrate in the case, "using delay, misdirection, and frivolous arguments to make litigation unfairly difficult and expensive for their opponents."[61] In response, United States District Judge Vince Chhabria ordered sanctions against both the lawyers and the firm of $925,078.51.[62] That sanction was nominally large, but Judge Chhabria acknowledged the amount was "loose change" for both Facebook and Gibson Dunn.[63] Judge Chhabria expressed a hope that the sanction encouraged the parties to "behave more honorably moving forward," but with a small chance of any sanction, and when parties have the ability to pay even a major sanction with money found in their couch cushions, economically rational decisionmakers will continue to take extreme positions.[64]

The current state of affairs undermines the fairness of our civil litigation system. If a party lacks the funds to challenge an "opening offer" by fighting a protracted discovery battle, that party will likely lose out on critical information that could be used to prove or defend a claim.[65] Well-resourced litigants can afford to go ten rounds over document discovery, but the burden for parties without a substantial litigation budget can mean the difference between winning or losing in court.

II. BUSINESS AS A HOBBESIAN WORLD

As with civil discovery in commercial cases, corporate employees operate in a world full of legal obligations, but rife with opportunities for misconduct. As with civil discovery, there are benefits for misconduct, and the likelihood of enforcement is low. Cynicism about the legitimacy of legal mandates and their enforcement can further undermine compliance.

A. The Incentive Problem

Corporations are profit-maximizing entities. Directors and officers have a fiduciary duty to maximize the value of the corporation for the benefit of its stockholders. That does

60. Doug Austin, *Ten BRUTAL Sanctions Case Law Rulings: eDiscovery Best Practices*, EDISCOVERYTODAY (May 5, 2023), https://ediscoverytoday.com/2023/05/05/ten-brutal-sanctions-case-law-rulings-ediscovery-best-practices [https://perma.cc/PG5L-AT7E] (collecting ten rulings and observing that "[h]opefully, these ten BRUTAL sanctions law rulings will show that significant sanctions do still occur"); Andrew Karpan, *Cooley Attorney Ordered to 'Personally Pay' For 'Hubris'*, LAW360 (Aug. 4, 2022), https://www.law360.com/articles/1518288 [https://perma.cc/52TU-T6PV].

61. Order Granting in Part Plaintiffs' Motion for Sanctions at 1–2, *In re* Facebook, Inc. Consumer Priv. User Profile Litig., No. 18-md-02843 (N.D. Cal. Feb. 9, 2023).

62. *Id.*

63. *Id*.

64. *Id*.

65. *See* Thermo Fisher Sci. PSG Corp. v. Arranta Bio MA, LLC, No. 2022-0608, 2023 WL 300150, at *2 (Del. Ch. Jan. 18, 2023) ("hiding non-privileged information on a privilege log poses a risk of severe prejudice to the party subjected to discovery abuse.").

not mean that directors and officers must myopically focus on the stock price and shortchange other constituencies like employees. On the contrary, taking good care of a company's employees can be the best way to generate profits for an entity. But just as the concept of zealous advocacy animates a litigator's sense of self, so too the fiduciary duty to maximize the value of the corporation for the benefit of the stockholders can cause a director or officer to focus exclusively on the bottom line. Taken to an extreme, it can become a convenient rationalization for sacrificing other values.[66]

Compensation arrangements reinforce this dynamic because compensation structures for officers and senior employees are often linked to profitability.[67] Stock-based compensation is intentionally designed to align personal interest with the stock price, and it can lead to myopic decision-making and excessive risk-taking.[68] More generally, compensation sends a signal about what the firm values: When compensation is geared to profits without taking into account other metrics, the message to managers and employees is that the firm prioritizes returns above all else.[69]

66. Scholars have studied this phenomenon in the world of investment banking, where they find that the culture of the investment bank can lead to prioritizing returns over the concern about illegality. *See, e.g.*, Andrew Lo, *The Gordon Gekko Effect: The Role of Culture in the Financial Industry*, 22 ECON POL'Y REV. 17, 35 (2016) ("Lehman Brothers spent more time concealing the flaws in its balance sheet than it spent remedying them . . . AIG felt so secure in its practice of risk management that it allowed billions of dollars of toxic assets to appear on its balance sheet not once, but twice."); Alain Cohn, Ernst Fehr & Michel André Marechal, *Business Culture and Dishonesty in the Banking Industry*, 516 NATURE 86, 86 (2014) ("[E]mployees of a large, international bank behave, on average, honestly in a control condition. However, when their professional identity as bank employees is rendered salient, a significant proportion of them become dishonest. . . . [S]uggest[ing] that the prevailing business culture in the banking industry weakens and undermines the honesty norm."); *cf.* Alain Cohn, Ernst Fehr & Michel André Maréchal, *Do Professional Norms in the Banking Industry Favor Risk-Taking?* (Univ. of Zurich, Dep't of Econ., Working Paper No. 244, 2017), https://ssrn.com/abstract=2954489 (finding bank employees whose identity was salient took comparatively less risk than the control group in the study).

67. Armour, Gordon & Min, *supra* note 11, at 21 (describing how stock-based pay can encourage managers to underinvest in compliance and causes managers to care about the value of that stock "only over the time period for which they hold the stock."); *see also* Arlen & Kornhauser, *supra* note 8, at 695 ("[E]mployees regularly benefit from organizational misconduct, producing a potential conflict between the choice that favors their egoistic self-interest and the ethical choice.").

68. Nitzan Shilon, *Replacing Executive Equity Compensation: The Case for Cash for Long-Term Performance*, 43 DEL. J. CORP. L. 1, 16 (2018) (incentives presented by the prevailing equity compensation model for managers can lead those managers "to sacrifice long-term value for the short term, take excessive risks, reject value-increasing risky projects, manipulate stock price, and trade on inside information"); Ahmed & Farkas, *supra* note 11, at 873 (2015) ("[U]pper management, especially CEOs, are often motivated by perverse executive compensation incentives to take excessive risks and engage in extreme short-term profit-seeking.").

69. *See* PRINCIPLES OF THE LAW: COMPLIANCE AND ENFORCEMENT FOR ORGANIZATIONS § 4.05(d) (AM. L. INST. 2021) (describing the expressive power of compensation structures and suggesting that rewarding excessive risk-taking "drowns out" messages encouraging ethical behavior and compliance).

Lawbreaking can be profitable.[70] For example, providing financial services to sanctioned Russian oligarchs can be quite lucrative.[71] The same is true of cheating on environmental regulations,[72] defrauding customers,[73] or exposing employees to unsafe working conditions.[74] Compliance is expensive, creating an innate tension between the duty to deliver value for stockholders and the duty to ensure legal compliance.

Ironically (if not surprisingly), a number of traits that correlate with business success also correlate with higher incidents of misconduct. Individuals and organizations that exhibit higher levels of creativity and inventiveness tend to deploy those skills to circumvent legal rules.[75] High-performing individuals and firms also tend to be adept at impression management, so that circumventing of rules is coded as commendable rather than culpable.[76]

Overconfidence is another recurrent bias found in successful individuals.[77] It makes sense that a moderately excessive level of optimism and overconfidence would encourage risk-taking and lead to greater effort and persistence. Some number of individuals will

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70. Soltes, *supra* note 16, at 976–77 ("[I]t may be profitable for a firm to provide financial services to a drug cartel, but . . . [i]n return for the privilege of operating within a jurisdiction, firms agree to abide by certain rules and regulations or else face punishment."); *see generally* John Connor & Robert Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427 (2012) (conducting a deterrence analysis of antitrust law and suggesting that collusive behavior in violation of such laws is economically rational, strengthening the need for more severe sanctions).

71. *See, e.g.*, Indictment, United States v. Malofeyev, S1-21-cr-676 (S.D.N.Y) (seeking asset forfeiture of $10 million allegedly deposited in Texas Bank by associate of sanctioned Russian oligarch); Press Release, DOJ, Russian Oligarch Charged with Violating U.S. Sanctions (Apr. 6, 2022), https://www.justice.gov/opa/pr/russian-oligarch-charged-violating-us-sanctions [https://perma.cc/6PFS-N4RD].

72. *See, e.g.*, Press Release, DOJ, Toyota Motor Company to Pay $180 Million in Settlement for Decade-Long Noncompliance with Clean Air Act Reporting Requirements (Jan. 14, 2021), https://www.justice.gov/opa/pr/toyota-motor-company-pay-180-million-settlement-decade-long-noncompliance-clean-air-act [https://perma.cc/BHC5-NXFL] ("Toyota's conduct likely resulted in delayed or avoided recalls, with Toyota obtaining a significant economic benefit, pushing costs onto customers, and lengthening the time that unrepaired vehicles with emission-related defects remained on the road.").

73. INDEP. DIRS. OF THE BOARD OF WELLS FARGO & CO., SALES PRACTICES INVESTIGATION REPORT 35–38 (2017), https://s3.documentcloud.org/documents/3549238/Wells-Fargo-Sales-Practice-Investigation-Board.pdf [https://perma.cc/R3C9-72NZ] (describing the types of misconduct committed by Wells Fargo employees and the motivations for doing so).

74. *See, e.g.*, Press Release, U.S. Dep't of Labor, Profit Over People: Alarming Trend Continues at Dollar General Stores Where Seven Southeast Inspections Again Find Willful Violations (Nov. 1, 2022), https://www.osha.gov/news/newsreleases/region4/11012022 [https://perma.cc/X6H8-YN5Q] ("Dollar General has shown a pattern of alarmingly willful disregard for federal safety standards, choosing to place profits over their employees' safety and well-being.").

75. *See* Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 936, 961–62 (2017); *see also* Martin Obschonka et al., *Rule-breaking, Crime, and Entrepreneurship: A Replication and Extension Study with 37-year Longitudinal Data*, 83 J. VOCATIONAL BEHAV. 386, 394 (2013) (identifying early antisocial rule-breaking behavior in adolescence as a valid positive predictor of a subsequent entrepreneurial career in adulthood in men, but not in women). There is some evidence that individuals who pursue careers in business may, on average, employ a mental schema that prioritizes financial returns over compliance with rules. *See generally* Laura Parks-Leduc, Russell P. Guay & Leigh M. Mulligan, *The Relationship Between Personal Values, Justifications, and Academic Cheating for Business vs Non-Business Students*, 20 J. ACAD. ETHICS 499 (2022).

76. *See* Langevoort, *supra* note 74, at 937.

77. *See, e.g.*, Richard Ronay et al., *Playing the Trump Card: Why We Select Overconfident Leaders and Why it Matters*, THE LEADERSHIP Q., Dec. 2019, at 15.

succeed, validating their beliefs. The winners of corporate tournaments are therefore likely to be those who, on average, have taken chances that paid off, and those successes will have reinforced their beliefs in their judgment and abilities, leading in turn to greater self-confidence.[78] Those internalized beliefs feed into compliance. When a situation requires an assessment of legal risk, overconfident managers may be just that—overconfident about their interpretation of the law, their ability to achieve compliance, and their ability to justify their actions after the fact.[79]

B. Opportunities for Misconduct

Corporate compliance today must account for a plethora of laws and regulations. Some legal commands are clear (Pay the taxes you owe!), but many are not (What counts as income versus capital gains? What can be deducted from the gain? What is the net value of the gain?).[80] Unclear laws invite motivated reasoning. Moreover, though corporations have an obligation to put in place a compliance program to prevent, detect, and deter violations of law, they are largely left to police themselves.[81] The combination of legal gray areas and self-policing creates opportunities for misconduct. Even when legal commands are clear, the powerful combination of personal incentives and organizational loyalties can motivate law-breaking.[82] When legal commands are unclear, managers have the "moral wiggle room" to engage in greater misconduct and justify their behavior.[83]

C. Enforcement

When corporations break the law, they face potential criminal sanctions and civil liability. If managers induce a corporation to break the law, then they too, theoretically, can face personal liability.[84]

Though the possibility of criminal or civil penalties looms, lawbreaking largely occurs outside of the view of law enforcement. Law enforcement agencies aimed at curbing

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78. *See* Donald C. Langevoort, *Behavioral Ethics, Behavioral Compliance*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 263, 266 (Jennifer Arlen ed., 2018) (noting the "uneasy possibility not only that self-deception as to legal and ethical risk is commonplace, but that it might be especially common among the most successful people in the organization—the survivors of the Darwinian promotion tournaments that operate as the pathways to influence and power").

79. *See* Langevoort, *supra* note 75, at 949, 953; *see also* Catherine Schrand & Sarah Zechman, *Executive Overconfidence and the Slippery Slope to Financial Misreporting*, 53 J. ACCT. & ECON. 311, 327 (2012) (finding the majority of financial misstatements do not meet the legal standards of intent, but are, rather, the result of overconfident and optimistic biases).

80. *See, e.g.*, Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 L. & CONTEMP. PROBS. 47 (2020) (describing the vague standards and compliance grey areas in complying with the Foreign Corrupt Practices Act (FCPA), the Bank Secrecy Act (BSA), and worker protection laws).

81. *See supra* note 14 and accompanying text.

82. *See supra* Part II.A.

83. Feldman, Libson & Parchomovsky, *supra* note 8, at 1141 ("The behavioral ethics explanation for this conduct is that ambiguity provides an individual with "moral wiggle room," which increases her ability to justify her behavior and maintain her ethical self-conception, as long as there is some view under which her actions are ethical.").

84. United States v. Park, 421 U.S. 658, 676 (1975) (holding responsible corporate agents may held criminally accountable for causing violations of the FDA).

corporate crime are notoriously underfunded,[85] and corporate wrongdoing can be difficult to detect, even when massive. Take Volkswagen as an example. In 2009, the company began selling cars with software designed to deceive regulators about emissions.[86] Volkswagen sold eleven million cars containing the deceptive software over six years before being discovered.[87] It is impossible to know how much corporate lawbreaking goes undetected, but it seems safe to assume that we only see the tip of the iceberg.[88]

Just telling managers to behave is not a sufficient answer because of the incentives to commit misconduct. Managers may justify their actions with the excuse that "everybody does it." That framing implies that misconduct is competitively necessary and socially acceptable, even if the law says otherwise.[89]

Just telling managers to keep an eye out for misconduct also may not solve the problem, because identifying and reporting corporate misconduct can hurt near-term profitability.[90] Once managers are aware of misconduct, they have an obligation to do something to remedy it, and sometimes that remedy requires cutting off practices or loopholes that generate profits. To resolve the resulting dilemma, corporate managers may create facially attractive but ultimately ineffective compliance programs to avoid learning information that would compel them to act.[91]

Simply increasing enforcement seems like the obvious solution, but it can backfire. Aggressive enforcement can lead to counternarratives about overly zealous prosecutors or internal oversight departments pursuing proverbial witch hunts. Or individuals and groups can become cynical about the law itself, believing that regulations result from lobbying by powerful competitors or anti-business partisanship.[92] Those scripts validate non-compliance by de-legitimizing the legal regime. The more cynical that an individual or group

85. *See supra* note 15 and accompanying text.

86. JACK EWING, FASTER, HIGHER, FARTHER: HOW ONE OF THE WORLD'S LARGEST AUTOMAKERS COMMITTED A MASSIVE AND STUNNING FRAUD 208 (2018).

87. *Id.*

88. *See* Alexander Dyck, Adair Morse & Luigi Zingaes, *How Pervasive is Corporate Fraud?*, 29 REV. ACCT. STUD. 736 (2024) (estimating detection rate of approximately 33%); *see also* Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality*, 26 J. FIN. CRIME 923, 924 (2019) ("[F]irms' own investigative and hotline records show that corporate misconduct is not a rare or exceptional event that happens within only a small number of 'low-integrity' firms once every few years . . . misconduct is a regular and omnipresent challenge within large organizations.").

89. Arlen & Kornhauser, *supra* note 8, at 701 ("Evidence shows that people are less likely to anticipate shame should they violate a legal norm if those in the social group to which they are most identified turn a blind eye to—and may even approve of—their illegal conduct.").

90. Garrett & Mitchell, *supra* note 80, at 47 ("[W]hat makes the compliance enterprise deeply uncertain and problematic is that the information generated by compliance efforts is simultaneously useful and dangerous.").

91. *See* Armour et. al., *supra* note 11 (explaining that the combination of incentives inherent in executives compensation structures is likely to "manifest itself in compliance programs that are more 'check the box' in form: inadequately resourced, lacking in operational autonomy, and poorly integrated into business operations"); *see also* Ontario Provincial Council of Carpenters' Pension Tr. Fund et al. v. Walton, 2023 WL 3093500 (Del. Ch. Apr. 26, 2023) ("Taken at face value, the report describes a good compliance program . . . [t]he report did not engage with the compensation programs and other incentive structures that can overwhelm the most well-intentioned compliance program.").

92. Langevoort, *supra* note 75, at 960–61.

becomes, the less likely they are to engage in compliance and the more likely they are to practice evasion or resistance.[93]

III. CORPORATE COMPLIANCE AND ITS LESSONS

Corporate compliance professionals seek to improve the state of legal compliance in the business world. Over a half-century—and particularly since the Enron and WorldCom scandals—compliance has developed into "a key form of preventative law" designed to supplement traditional principles of prohibition and penalty.[94] Modern programs seek to accomplish three goals: prevent future misconduct, detect current misconduct, and align behavior with compliant outcomes.[95]

The need for compliance programs exists because real-world human interactions are messy. Under the cold precision of an economic model, "[i]f the law imposes the right mix of detection and sanctions, firms will for that reason alone have an incentive to take steps to reduce legal risk."[96] Under this framework, a government actor can achieve the desired level of compliance (point A), by imposing a specific penalty (P) and providing a level of enforcement (E): A = P x E. To obtain more compliance, simply increase either P or E.[97]

The real world is more complex. For any given level of sanction or investment in enforcement, the actual level of compliance will be far lower due to problems with detection, uncertainty regarding the operative rule, and conflicts of interest.[98] One study estimates that under the Foreign Corrupt Practices Act, the current rates of detection and sanction are more than eight times lower than what the penalties should generate.[99]

To fill the gap, compliance experts have developed best practices designed to promote compliance. Two attributes of a strong compliance program have potential application for discovery in commercial cases: culture and salience.

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93. Langevoort, *supra* note 75, at 959; *see also* Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCH. PUB. POL'Y, & L. 78, 78 (2014) (collecting empirical literature demonstrating that "when authorities are viewed as legitimate they are better able to motivate people to comply with the law"); Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 TEMP. L. REV. 451, 467 (2003) (describing the role of legitimacy in compliance with law).

94. Langevoort, *supra* note 75, at 933; Yaron Nili, *Board Gatekeepers*, 72 EMORY L.J. 91, 105 (2022) (situating the development of the compliance function in response to the Enron and WorldCom collapses).

95. Soltes, *supra* note 16, at 978.

96. Langevoort, *supra* note 75, at 937; *see also* Arlen & Kornhauser, *supra* note 8, at 684 (describing the assumptions of classical deterrence theory).

97. Under an economic model, there are two channels to deter crime. The first is to raise the probability of conviction. The second is to raise the punishment to a level where it exceeds any gains. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180 (1968).

98. *See* Malloy, *supra* note 93, at 460–70 (describing obstacles to deep knowledge of all that affects compliance).

99. *See* Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, Foreign Bribery: Incentives and Enforcement 6 (Apr. 7, 2017) (unpublished manuscript), https://ssrn.com/abstract=1573222 ("Using our baseline estimate that the probability of getting caught is 6.4%, total penalties imposed on bribe payers would have to increase by 8.3 times to drive the average ex ante NPV to zero. . . . This implies that bribe-tainted projects will continue to be profitable . . . .").

A. Culture

Compliance authorities identify *culture* as the cornerstone of a successful compliance program.[100] The concept of culture refers to the set of shared beliefs that an individual, group, or organization, uses to make sense of competing pressures and goals, including the relative importance and legitimacy of compliance.[101] Culture is the operating system that governs behavior when no one is looking.[102]

One robust finding from the behavioral ethics literature is that the level of cheating in experimental settings is markedly lower than it could be and that small interventions—nudges—can generate higher levels of pro-social behavior.[103] Culture explains this finding. Culture works because of the power of identity and beliefs, including deeply wired human impulses towards pro-social behaviors like cooperation and loyalty. Behavioral experiments show that individuals want to maintain a positive self-image and to be seen by others as "good" people.[104] When an opportunity for selfish action arises, the sense of what "should" be done can constrain the desire to act selfishly. Culture is what creates the shared sense of what people in a particular organization do.

Leadership is critical to culture, and compliance professionals therefore emphasize the "tone from the top."[105] Senior personnel and other respected figures must emphasize the importance of culture and demonstrate that they are not exempt.

Creating and maintaining a culture requires clear and consistent messaging. Occasionally communicating a desire for compliance is not enough. Messaging also must be tied to the choices that employees face. General ethical reminders that occur well before a moral choice have little impact because employees generally see themselves as good people who

100. *See, e.g.*, Todd Haugh, *The Power Few of Corporate Compliance*, 53 GA. L. REV. 129, 138 (2018) ("[A]n assumption regarding compliance failures has taken hold—corporate leaders and regulators see compliance lapses as broad failures of organizational culture."); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2082 (2016) ("All firms exist within a nexus of legal, regulatory, and social norms. The contemporary compliance function is the means by which firms adapt their behavior to these constraints. More concretely, compliance is the set of internal processes used by firms to adapt behavior to applicable norms.").

101. *See* Greg Urban, *Corporate Compliance as a Problem of Cultural Motion*, 69 RUTGERS L. REV. 495, 499 (2017).

102. *See generally* Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking*, 96 CORNELL L. REV. 1209 (2011) (mapping the ways that cultural forces and professional expectations shape lawbreaking).

103. *See* Langevoort, *supra* note 75, at 946; *see also* Ruthanne Huising & Susan S. Silbey, *From Nudge to Culture and Back Again: Coalface Governance in the Regulated Organization*, 14 ANN. REV. L. & SOC. SCI. 91, 95 (2018) (surveying behavioral literature regarding "nudges").

104. For example, in experiments, individuals will not cheat so brazenly that they have to see themselves as cheaters. *See, e.g.,* Jason Dana, Roberto A. Weber & Jason Xi Kuang, *Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness*, 33 ECON. THEORY 67, 77–78 (2007).

105. PRINCIPLES OF THE L. ON COMPLIANCE & ENF'T FOR ORGS. § 4.06(c) (AM. L. INST. 2021) ("An organization's board of directors and executive management should regularly demonstrate and communicate the importance of its risk culture, including as it relates to compliance risk, setting an appropriate 'tone at the top' and ensuring it is also a tone *from* the top."); *see also* Contreras, Dey & Hill, *supra* note 26, at 509–14.

will do the right thing.[106] It is only when actually confronted with the moral choice that the dilemma arises.[107]

Mental scripts affect moral choices. A compliance program must provide scripts that explain why regulation is necessary, even helpful, and why compliance is beneficial.[108] Proper framing of the compliance challenges is also critical. Examples and case studies can show how non-compliant behavior happens, situational pressures and rationalizations can affect "good" people.[109] A script that frames non-compliance as the result of "a few bad apples" can cause employees to discount the risk of non-compliance because they see themselves as good.[110] An important theme is humility and the recognition that anyone can be fallible when it comes to legal risk.[111]

Compliance messages also must not be undermined by other signals. As noted previously, compensation can contribute to culture through its expressive function. If a compensation structure rewards financial performance without any incentives for compliance, that structure coveys a powerful counter-message about the organization's priorities.[112]

B. Salience

A second feature of compliance programs is that the compliance issue must be *salient*. Individuals must recognize that they are facing a moral choice. If the consequences are remote in time, then actors will discount them. If the consequences are rare, then the actors discount them further. And if the consequences seem random, then actors will perceive what they do does not affect the likelihood of suffering consequences, so behavior will not change.

Human beings are not rational calculating machines who weigh contingent risks precisely based on their likelihood of occurrence. Humans make intuitive decisions, and if a possible outcome does not clear a particular threshold, then an actor will discount it

106. Feldman, Libson & Parchomovsky, *supra* note 8, at 1133 (describing "individuals' tendency for ethical self-concept maintenance: their need to maintain their ethical view of themselves while promoting their materialistic self-interest").

107. *See, e.g.*, Cohn, Fehr & Maréchal, *supra* note 66, at 86–89 (finding that employees of a large, international bank behave, on average, honestly in a control condition. However, when their professional identity as bank employees is rendered salient, a significant proportion of them become dishonest.).

108. To this point, studies find that the perceived legitimacy of organizational rules or laws has a strong influence on employee rule-following and internal policy adherence. *See* Tom R. Tyler, *Reducing Corporate Criminality: The Role of Values*, 51 AM. CRIM. L. REV. 267, 276 (2014).

109. One of the most dramatic examples of this phenomenon in recent memory is the account creation scandal at Wells Fargo. An internal investigation completed by Sherman & Sterling on behalf of the independent directors of Wells Fargo found that employees who engaged in acts of misconduct were not motivated by direct pecuniary self-interest, but rather by intense competition and pressure to meet sales goals. *See* INDEP. DIRS. OF THE BD. OF WELLS FARGO & CO., *supra* note 73, at 37–38.

110. *See* Langevoort, *supra* note 2, at 1687 ("[I]t is about good people doing bad things—there are not so many bad apples as bad barrels . . . ordinary (nonsociopathic) people are naturally inclined to be reasonable and honest but easily tempted otherwise by self-serving inferences, especially in the face of strong situational incentives and pressures.").

111. Langevoort, *supra* note 75, at 966.

112. Armour et al., *supra* note 10, at 1216 ("Executive compensation is typically tightly linked to a firm's stock price so as to encourage focus on shareholder value. This can create conflict over the establishment of a compliance program, and over how such a program is run." (citations omitted)).

entirely.[113] Thus, for example, the presence of a background ethical norm, such as legal compliance, only becomes operative if the circumstances bring the norm to the individual's attention.[114] Behavioral research indicates that incidents of cheating fall when a subject is prompted about the existence of a moral choice, making that dimension salient.[115]

Other factors increase the likelihood of cheating. Situations involving competition and rivalry generally lead to greater aggressiveness and risk-taking, which increases levels of misconduct.[116] Aggressive risk-taking becomes most pronounced when a person or group faces a perceived risk of loss. People who find themselves "in a hole" and believe that aggressive or even dishonest behavior is the only way out are more likely to engage in misconduct, and without necessarily recognizing that what they are doing is wrong.[117]

Corporate and individual criminal liability become ineffective in deterring corporate misconduct when government enforcement authorities do not detect and punish misconduct with sufficient predictability and regularity.[118] To use an everyday example, it makes sense to decline to take a walk in the park if the sky is threatening or the chance of rain is particularly high. If the sun is out when you leave your apartment, the chance of rain may not occur to you.

To make risks of misconduct salient, compliance efforts introduce monitoring and auditing, not just training and trusting.[119] Teaching a norm is ineffective unless it is backed up by monitoring. At the same time, intense monitoring can be counterproductive, because it signals distrust and can create backlash. Compliance systems strive to establish a constructive level of monitoring while also communicating its necessity so that its presence does not provoke resistance or demoralization.[120]

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113. *See* Arlen & Kornhauser, *supra* note 8, at 690 ("When people face a conflict between two factors important to their intuitive decisions, their intuitive choice will tend to depend on which factor was most salient at the time, and not on a weighing of costs and benefits.").

114. Jennifer Arlen, *Evolution of Director Oversight Duties and Liability Under* Caremark*: Using Enhanced Information-Acquisition Duties in the Public Interest* 7 (N.Y.U. L. & Econ. Rsch., Rsch. Paper No. 23-05, 2023) (discussing expression of ethical norms only has a deterrent effect "when employees face a sufficiently high threat of detection and sanction to render the threat salient to employees at the moment they are considering whether to violate the law").

115. Langevoort, *supra* note 75, at 952.

116. *See, e.g.*, Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968 (2002) (describing the risk-taking culture at Enron); David Orozco, *Compliance by Fire Alarm: Regulatory Oversight Through Information Feedback Loops*, 46 J. CORP. L. 97, 100 (2020) (describing Boeing's "aggressive managerial culture that prioritized cost-cutting and speed-to-market over aircraft safety and regulatory compliance"); Hillary A. Sale, *The Corporate Purpose of Social License*, 94 S. CAL. L. REV. 785, 796 (2021) (describing the "extreme" competition and sales pressures that drove the Wells Fargo fake accounts scandal).

117. *See* Scott Rick & George Loewentsetin, *Hypermotivation*, 45 J. MKTG. RSCH. 645, 645 (2008) ("A wide range of evidence suggests that people who find themselves 'in a hole' and believe that dishonest behavior is the only apparent means of escape are more likely to cheat, steal, and lie.").

118. Arlen, *supra* note 114, at 7 ("[E]mployees generally do not consider their risk of punishment when contemplating criminal conduct because government enforcement authorities do not detect and sanction misconduct reliably enough to create the requisite material risk of detection.").

119. *See* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 496 (2003) (observing that effective compliance systems "contain monitoring and auditing systems").

120. Langevoort, *supra* note 75, at 967.

IV. APPLYING THE LESSONS OF COMPLIANCE TO CIVIL DISCOVERY

The compliance literature offers lessons that could improve the discovery process. This Part explores the ways the Delaware courts have begun to apply some of those lessons and lays out a proposal outlining what is left to do.

A. A Different Culture for Civil Discovery in Commercial Cases

The compliance literature teaches that to change how lawyers conduct discovery in commercial cases, the *culture* must change. A different culture for discovery in commercial cases calls for a different narrative. The narrative of the zealous advocate battling heroically for the interests of the client is well-suited to representing human clients facing some of life's most difficult challenges, such as criminal defense or immigration matters, and particularly when the individual and their counsel face a power imbalance, such as in litigation against the state. In commercial cases, the metaphor can become toxic. A pro-compliance culture must counterbalance that narrative by emphasizing the lawyer's roles as an officer of the court and as a member of the professional legal community. In place of a mental model of warriors engaged in zero-sum conflict, a pro-compliance mental model emphasizes the cooperative goal of assisting the court in ascertaining the truth and achieving justice.

Just as portions of the Model Rules and commentary support the narrative of the zealous advocate, other portions of the Model Rules support the narrative of the officer of the court. Commentary to Model Rule 3.3 emphasizes that attorneys have "special duties" as "officers of the court" that include an obligation to "avoid conduct that undermines the integrity of the adjudicative process."[121] The same comment observes that an advocate's duty to present the client's case "with persuasive force" is "qualified by the advocate's duty of candor to the tribunal."[122] Commentary to Model Rule 1.3 cautions that "[a] lawyer is not bound, however, to press for every advantage that might be realized for a client," and that "[t]he lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."[123] Compliance with the reasonable demands of an adversary in discovery is a component of the candor required by rules of professional conduct.[124]

Turning these concepts into a culture starts with the tone at the top.[125] To build a compliance-based culture for discovery, courts and senior members of the bar must emphasize the lawyer's role as an officer of the court.

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121. MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 2 (AM. BAR ASS'N 2023).

122. *Id*.

123. *Id*. at r. 1.3 cmt. 1.

124. Model Rule of Professional Responsibility 3.3 is not limited in its application to when an advocate is literally standing in front of the judge or making written submissions to the court. The Comment to Rule 3.3 makes clear that "[i]t also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition." *Id.* at r. 3.3 cmt. 1. In short, candor is required in discovery.

125. *See* PRINCIPLES OF THE L. ON COMPLIANCE & ENF'T FOR ORGS. § 4.04(c) (AM. L. INST. 2021) ("A consistent tone on risk management and compliance . . . [is] fundamental to any effective risk-management program.").

Delaware decisions do this. The Delaware Supreme Court has held explicitly that the lawyer's role as an officer of the court takes precedence over the lawyer's duty to a client:

> All members of the Delaware Bar are officers of the Court. Although a lawyer has a duty to his or her client, each Delaware lawyer has sworn an oath to practice "with all good fidelity as well to the Court as to the client." This responsibility to the "Court" takes precedence over the interests of the client because officers of the Court are obligated to represent these clients zealously within the bounds of both the positive law and the rules of ethics.[126]

Decisions from the Court of Chancery and the Delaware Superior Court likewise emphasize the officer-of-the-court role.[127]

Delaware decisions also stress the related ideal of civility, which emphasizes the lawyer as a member of a dignified profession whose members should engage in certain types of behavior and should not engage in other types of behavior.[128] Here too, the Delaware Supreme Court has taken the lead, writing that civility plays "an important role in the administration of civil and criminal justice" and that "[w]ithout it, litigation becomes even more expensive and public trust and confidence in the administration of justice is undermined."[129] The Delaware Supreme Court has frequently returned to the importance of civility, emphasizing that "[c]ivil behavior towards the tribunal and opposing counsel does not compromise an attorney's efforts to diligently and zealously represent his or her clients."[130] Numerous Delaware decisions stress the need for civility, remind attorneys to recommit themselves to civil behavior when interactions have become heated, or praise attorneys for having upheld the standards of civility during a difficult case.[131]

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126. *In re* Abbott, 925 A.2d 482, 487–88 (Del. 2007); *see also* Delaware Optometric Corp. v. Sherwood, 128 A.2d 812, 816 (Del. 1957) (explaining that an attorney is "an officer of the court and an important adjunct to the administration of justice" whose profession is "affected with a public interest and was created for the protection of the public" such that "[t]he right and privilege of an attorney to be remunerated for his services" is "only incidental to its primary purpose—to serve the interests of justice."); *id.* at 817 (noting that the "primary responsibility of lawyers" is "acting as officers of the court for the assistance of the public").

127. A Westlaw search for "officer of the court" reveals over 70 decisions from the Court of Chancery and over 100 decisions from the Delaware Superior Court that use the term. Search results for the phrase "officer of the court" in case decisions from the Delaware Court of Chancery and Delaware Superior Court, WESTLAW, https://1.next.westlaw.com/ (use search field for the phrase "officer of the court", select "Delaware" as jurisdiction, and after results have populated, use the "Jurisdiction" filter to only look at decisions of the Delaware Court of Chancery and Delaware Superior Court).

128. Professor Veronica Root Martinez has described a version of legal professionalism where lawyers "are members of a profession that requires them to take into account concerns other than the wishes of their clients." Veronica Root Martinez & Caitlin-Jean Juricic, *Toward More Robust Self-Regulation Within the Legal Profession*, 69 WASH. U. J.L. & POL'Y 241, 245 (2022).

129. Kuang v. Cole Nat. Corp., 884 A.2d 500, 507 (Del. 2005).

130. *In re Abbott*, 925 A.2d at 488.

131. A Westlaw search for "civility" identifies at least 90 Delaware written decisions using the term. Search results for the phrase "civility" in case decisions in the state of Delaware, WESTLAW, https://1.next.westlaw.com/ (use search field for the phrase "civility", select "Delaware" as jurisdiction). For an example of an opinion reminding counsel about civility, see New Castle Shopping, LLC v. Penn Mart Discount Liquors, Ltd., No. 4257-VCL, 2009 WL 5197189 at *3 (Del. Ch. Oct. 27, 2009) ("I am troubled by the lack of civility that appears to have

Leaders of the Bar have joined the courts in this endeavor. The Delaware State Bar Association has adopted Principles of Professionalism for Delaware Lawyers for members of the Delaware Bar.[132] The fourth Principle addresses civility and states:

> Professional civility is conduct that shows respect not only for the courts and colleagues, but also for all people encountered in practice. Respect requires promptness in meeting appointments, consideration of the schedules and commitments of others, adherence to commitments whether made orally or in writing, promptness in returning telephone calls and responding to communications, and avoidance of verbal intemperance and personal attacks.[133]

The Principle continues by warning that lack of civility "may be detrimental to a client's interests and contrary to the administration of justice."[134] The Principles specifically address discovery and pre-trial proceedings. They admonish that a lawyer "should use pretrial procedures, including discovery, solely to develop a case for settlement or trial and not to harass an opponent or delay a case."[135] They advise that "stipulations and agreement should be made between counsel to reduce both the cost and the use of judicial time."[136] They also note that written discovery requests "should be carefully crafted to demand only relevant matter and responses should be timely, candid, and not evasive."[137] They similarly state that a party should only take "those depositions necessary to develop or preserve the facts."[138] The Principles call for scheduling pre-trial procedures "so as to accommodate the schedules of all parties and attorneys involved" and call for reasonable extensions of time "not be withheld arbitrarily."[139]

For all this promising rhetoric from the bench and Bar, one admitted challenge in establishing a culture lies in generating buy-in from its members.[140] Here, the relatively small size of the Delaware bar provides an advantage. Research shows that in smaller, more networked communities, customary practice and reputation operate more effectively as

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marked this case. In this instance, I have chosen not to delve into the history of who did what, when, and to whom. Going forward, counsel will make a renewed effort to adhere to the Principles of Professionalism for Delaware Lawyers, with particular reference to Principle A.4, Civility."). For an example of an opinion praising counsel for their civility, see Phillips v. Hove, No. 3644, 2011 WL 4404034, at *28 (Del. Ch. Sept. 22, 2011) ("I commend current counsel for their professionalism and civility towards each other, notwithstanding their clients' deep-seated enmity").

132. SUPREME COURT OF DELAWARE OFFICE OF DISCIPLINARY COUNSEL, PRINCIPLES OF PROFESSIONALISM FOR DELAWARE LAWYERS (2020), https://courts.delaware.gov/forms/download.aspx?id=39428 [https://perma.cc/3JQR-92NV].

133. *Id*. § A.4.

134. *Id*.

135. *Id*. § B.2.

136. *Id*.

137. SUPREME COURT OF DELAWARE OFFICE OF DISCIPLINARY COUNSEL, *supra* note 132, at § B.2.

138. *Id.*§ B.

139. *Id.*

140. Martinez & Juricic, *supra* note 128, at 246 ("The upshot is the legal profession, through the American Bar Association and other avenues, continues to tout the importance of self-regulation by and for lawyers, even as the profession's members have become increasingly concerned with business concerns.").

constraints—for good or ill.[141] Currently, there are approximately 3,300 active members of the bar practicing in Delaware, with another 675 practicing out of state.[142] Since Thomas Spry was first admitted to practice in 1676, there have been fewer than 8,000 Delaware lawyers.[143] By contrast, in 2022, 24,208 attorneys were working in the New York City offices of the state's 100 largest law firms.[144] Because of the smaller size of its bar, Delaware attorneys are statistically more likely to interact repeatedly with members of the court and each other.[145] Lawyer specialization makes repeat interactions all the more likely. Only a subset of the Delaware bar practices frequently in the Delaware Court of Chancery, just as other subsets concentrate their practice on medical malpractice cases, family court matters, or real estate.[146] The prospect of repeated interactions helps limit extreme behavior because a reputation for extreme behavior can harm a lawyer's credibility with the court or make opposing counsel less cooperative. In states with larger populations of lawyers, creating a culture around an individual court or practice area may offer an alternative approach.

One area where Delaware faces a consistent cultural challenge is in the large number of out-of-town lawyers who appear *pro hac vice*. Those lawyers often bring with them expectations from other jurisdictions which may not mesh with Delaware's legal culture. The Delaware Supreme Court has responded formally to the problem by requiring as a condition of *pro hac vice* admission that an out-of-state attorney review the Principles of Professionalism for Delaware Lawyers.[147]

The more significant response is informal: Delaware judges expect the Delaware lawyers who sponsor their non-Delaware counterparts to act as cultural translators and to be

141. For seminal works on this subject, see Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989); Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525 (1993); Avner Greif, *Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies*, 102 J. POL. ECON. 912 (1994); Lisa Bernstein, *Contract Governance in Small-World Networks: The Case of the Maghribi Traders*, 113 NW. U. L. REV. 1009, 1014 (2019) (revising Greif's work); *cf.* William T. Allen, *The Pride and the Hope of Delaware Corporate Law*, 25 DEL. J. CORP. L. 70, 72–73 (2000) ("I suppose that the small size of the Delaware community has facilitated the development of a local professional culture . . . [i]t is much more feasible for a professional culture of this sort—one that gives appropriate incentives to citizens to seek judicial careers and that supplies opportunities for lawyers to develop an artist's sensitivity to complexity in corporate law—to develop in a small professional community.").

142. Interview with Clerk of Court, Supreme Court of Delaware (July 25, 2023) (on file with author).

143. *Id.*

144. Patrick Smith, *Scramble for Associates, Laterals Leads to Bigger New York Offices*, N.Y. L.J. (July 18, 2022), https://www.law.com/newyorklawjournal/2022/07/18/scramble-for-associates-laterals-leads-to-bigger-new-york-offices/ (on file with *the Journal of Corporation Law*).

145. Some lawyers, of course, may interact with judges and each other frequently no matter how large the local bar may be. Mathematically, however, size matters. The number of possible connections in a network scale geometrically. That increases the power of the network, but also decreases the likelihood that a node with a limited number of connections or interactions will interact with other nodes in the network.

146. Professors Afra Afsharipour and Matthew Jennejohn have studied the attorneys who practice before Delaware's Court of Chancery, finding that the network of litigators who appear in Chancery cases are highly specialized and tightly knit. Afra Afsharipour & Matthew Jennejohn, *Gender and the Social Structure of Exclusion in U.S. Corporate Law*, 90 U. CHI. L. REV. 1819, 1824 (2023). This network is not without its faults or systemic blind spots—women are dramatically underrepresented among Chancery litigators. *Id.* at 1886.

147. Del. Sup. Ct. R. 71(b)(ii).

actively involved in the case. From the standpoint of the Delaware Court of Chancery, there is no such thing as local counsel. "Even when forwarding counsel has been admitted *pro hac vice* and is taking a lead role in the case, the Court of Chancery does not recognize the role of purely 'local counsel.'"[148] The Delaware lawyer who appears in an action always remains responsible to the Court for the case, its presentation, and the positions taken.[149]

B. Making the Cultural Narratives Salient

The compliance literature teaches that cultural concepts will not have real-world effects unless they are salient when individuals make choices. For civil discovery, that means connecting the officer-of-the-court narrative and the mental model of civility to common situations that parties confront in discovery. The Delaware courts have made explicit efforts to do this.

Perhaps the best-known example is an addendum that the Delaware Supreme Court appended *sua sponte* to its 1994 decision in *Paramount Communications v. QVC Network, Inc.*[150] The opinion affirmed the issuance of an injunction blocking a multi-billion dollar merger.[151] The addendum called out a particularly egregious example of deposition misconduct. The Delaware Supreme Court started the addendum by noting that "[t]he issue of discovery abuse, including lack of civility and professional misconduct during depositions, is a matter of considerable concern to Delaware courts and courts around the nation."[152] After detailing the abusive manner in which an out-of-state attorney defended the deposition, the Court decried the behavior as "outrageous and unacceptable" and admonished that "[i]f a Delaware lawyer had engaged in [that] kind of misconduct . . . that lawyer would have been subject to censure or more serious sanctions."[153] The *QVC* addendum was a wake-up call for practitioners and set the tone for how Delaware courts would approach discovery abuse, with a particular emphasis on deposition practice.[154]

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148. James v. Nat'l Fin. LLC, No. 8931, 2014 WL 6845560, at *12 (Del. Ch. Dec. 5, 2014).

149. State Line Ventures, LLC v. RBS Citizens, N.A., No. 4705, 2009 WL 4723372, at *1 (Del. Ch. Dec. 2, 2009) ("A Delaware lawyer always appears as an officer of the Court and is responsible for the positions taken, the presentation of the case, and the conduct of the litigation."); *accord* Wood v. U.S. Bank Nat'l Ass'n, 246 A.3d 141, 151 (Del. Ch. 2021) (explaining that where New York-based counsel was neglectful in meeting discovery obligations, Delaware counsel should have "assisted in keeping the case on track").

150. Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 34, 39 (Del. 1994).

151. *Id*. at 37.

152. *Id*. at 52.

153. *Id*. at 55. The Addendum cited a then-recent decision from the Delaware Supreme Court reprimanding a Delaware lawyer for similar conduct. *See In re* Ramunno, 625 A.2d 248, 250 (Del. 1993) (issuing a public reprimand to Delaware lawyer for violating Rule 3.5 of the Rules of Professional Conduct because of "insulting conduct toward opposing counsel").

154. More recently, in 2019, the Delaware Supreme Court again took the step of adding an addendum to an opinion. *In re* Shorenstein Hays-Nederlander Theatres LLC Appeals, 213 A.3d 39, 69 (Del. 2019). This time, the Court addressed a witness's obstreperous conduct during a deposition and the obligations of a lawyer to take action. After quoting extensively from the client's "ridiculous and problematic responses to questions," the Court affirmed the trial court's award of fees and costs for bad faith litigation tactics. The Court noted that it added the addendum "to remind counsel that they have a responsibility to intercede and not sit idly by as their client engages in abusive deposition misconduct." *Id*. at 78.

Cultural norms also become salient when deviations result in timely and consistent consequences.[155] That means courts must be willing to address discovery disputes, which in the short term translates into hearing more discovery disputes until expectations reset. For courts, that can be disappointing, because if one side prevails on a motion to compel, particularly if the ruling results in the shifting of costs or criticism of the other side, then the losing party often tries to even the score by securing a similar ruling of its own. The concern that one discovery ruling will generate the need for more discovery rulings likely fuels some of the judicial reluctance to intervene in discovery disputes. But if the discovery process is to improve, then courts must become more involved.

For consequences to be timely, discovery disputes cannot be allowed to sit. If parties spend sixty days briefing a discovery dispute, wait another thirty days to get a hearing, and wait another thirty days for a decision, then much of the time for fact discovery will have unfolded without an answer. The concern that discovery will need to be redone may affect the court's ruling, and the need to reset the schedule may reward a party to take an aggressive position in part to achieve delay. Parties often do not have equal ability to wait. It is therefore important to impose rapid briefing schedules for discovery motions and for the court to issue prompt rulings, either during the hearing, through pre-hearing rulings on the papers, or through a decision issued promptly after the hearing. For discovery disputes, timeliness and clarity can be more important than nuance and precision.

For consequences to be consistent, rulings must be more predictable. Certain actions should lead to high-probability results. While there can always be case-specific circumstances that lead to particularized rulings, those situations should be rare. If parties know that particular consequences will follow, then they will be better able to police themselves.

The *QVC* addendum meets all of the criteria for making a discovery issue salient. After denouncing the abusive deposition defense as "outrageous and unacceptable," the Delaware Supreme Court informed the bar that "[a]lthough busy and overburdened, Delaware trial courts are 'but a phone call away' and would be responsive to the plight of a party and its counsel bearing the brunt of such misconduct."[156] The Delaware Supreme Court thus sent a clear message that Delaware judges should entertain these types of disputes and that counsel should be willing, in an extreme case, to take the difficult step of calling the court. The Delaware Supreme Court also indicated the consequences that could follow, including "exclusion of obstreperous counsel," "ordering the deposition recessed and reconvened promptly in Delaware," or the appointment of a neutral to preside over the deposition."[157] The Court also noted that "[c]osts and counsel fees should follow."[158] The addendum made deposition misconduct salient and left no room for ambiguity as to the scope of acceptable conduct. Delaware attorneys routinely send the *QVC* addendum to their co-counsel before moving their admission *pro hac vice*.

The discovery process can be improved when other issues receive the *QVC* treatment. Courts must be clear and direct in dictating norms and eliminate room for motivated reasoning as much as possible. Deadlines provide a starting point. Parties must treat deadlines

155. *See supra* Part III.B.

156. Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 55 (Del. 1994).

157. *Id*.

158. *Id*.

in scheduling orders as mandates, and courts must enforce them. Missing a deadline should generally result in waiver of the responding party's position, subject to a showing of excusable neglect. That is particularly important in discovery, where parties often agree to modify or waive deadlines and where, as part of the emphasis on civility, parties should grant reasonable accommodations.[159] But parties can turn the emphasis on civility into a weapon by abusing requests for extensions. For the case process to stay on track, deadlines have to mean something.

The Delaware courts take a hard line on deadlines. The Delaware Supreme Court led this effort by reiterating in a 2012 decision that "parties must be mindful that scheduling orders are not merely guidelines but have the same full force and effect as any other court order."[160] The Court of Chancery has made clear that this rule applies to discovery cutoffs as well.[161] Consequently, "[a] party that disregards the provisions in a scheduling order that govern discovery is engaging in discovery abuse. If a party cannot meet a deadline, the onus is on that party to be forthcoming and transparent about the situation and the reasons for it."[162] To ensure that parties respect discovery deadlines, the court has imposed sanctions for missing them, such as by entering a default judgment,[163] holding the noncompliant in contempt,[164] and excluding late-produced evidence.[165] Addressing an extreme set of facts, the Delaware Supreme Court held that "[l]itigants who continually miss discovery deadlines . . . may not claim surprise by imposition of the ultimate sanction of dismissal."[166] Recognizing that a party cannot unilaterally hold up a case, the high court admonished that "[t]rial courts must be afforded broad discretion to fashion orders to expedite cases consistent with the administration of justice and the efficient disposition of their caseloads."

A second issue is privilege. As discussed previously, attorneys can stretch the bounds of privilege to withhold documents, and attorneys can prepare privilege logs whose principal function is to conceal documents rather than enable the other side to evaluate privilege assertions.[167] Courts undermine the incentives for preparing a good log by allowing parties

159. This is also a place where what should be routine practice is sometimes weaponized. *See, e.g.*, Order, ECF No. 84, Johnson v. Everyrealm, Inc., No. 22-cv-6669 (S.D.N.Y. Apr. 26, 2023) (ordering various extensions and urging civility after defense counsel attempted to use the unexpected early birth of plaintiff's counsel's child to extract, among other things, concessions in discovery).

160. Americas Mining Corp. v. Theriault, 51 A.3d 1213, 1238 (Del. 2012).

161. *In re* ExamWorks Gp., Inc. S'holder Appraisal Litig., No. 12688, 2018 WL 1008439, at *6 (Del. Ch. Feb. 21, 2018); IQ Hldgs., Inc. v. Am. Commercial Lines, Inc., No. 6369, 2012 WL 3877790, at *2 (Del. Ch. Aug. 30, 2012); E.I. du Pont de Nemours & Co. v. Admiral Ins. Co., No. 89C-AU-99, 1994 WL 682420, at *23 (Del. Ch. Nov. 17, 1994).

162. *ExamWorks*, 2018 WL 1008439, at *6; *accord* Order Granting in Part and Denying in Part Plaintiff's Motion to Compel, Froot Family Ltd. P'ship v. Mainstreet Asset Mgmt., Inc., No. 2018-0114, 2018 WL 6068437, at *1 (Del. Ch. Nov. 16, 2018).

163. *E.g.*, Wollner v. PearPop Inc., 2022 WL 2205359, at *4 (Del. Ch. June 21, 2022); Charter Commc'ns Operating, LLC v. Optymyze, LLC, No. 2018-0865, 2021 WL 1811627, at *28 (Del. Ch. Jan. 4, 2021).

164. Zaslansky v. FZ Holdings US, Inc., No 2021-0168, 2023 WL 2854738, at *4 (Del. Ch. Apr. 10, 2023).

165. *E.g.*, Terramar Retail Centers, LLC v. Marion #2-Seaport Tr. U/A/D June 21, 2002, No. 12875, 2018 WL 6331622, at *9 (Del. Ch. Dec. 4, 2018).

166. Wahle v. Med. Ctr. of Del., Inc., 559 A.2d 1228, 1233 (Del. 1989).

167. *See* Maizel, *supra* note 55.

to supplement their logs when their sufficiency is challenged.[168] When the only consequence for not preparing a good log is a do-over, there is no reason to prepare a good log in the first place.

The consequences for improperly asserting privilege can be readily clarified. If a party misses a deadline to produce a log, then waiver should result. If a party fails to identify an attorney whose advice is associated with a particular document, then privilege for that document is waived. If an initial log is facially inadequate, then a party should not receive a do-over. A court can either hold that privilege is waived or engage in a limited *in camera* review to evaluate whether privilege has been asserted in an overly broad fashion. One option is to randomly sample 10% of the entries on the log, and then apply a threshold for using those samples to assess the validity of the log as a whole. If, for example, a third or more of those entries are not actually privileged, then the court could order waiver on the grounds that privilege was being asserted improperly.

The Delaware Court of Chancery has taken strong steps to promote integrity in the assertion of privilege. For decades, the Delaware courts had issued decisions specifying the requirements for an adequate privilege log,[169] but there was no expectation that those requirements would be enforced other than through an order requiring supplementation.[170] Through a series of rulings over the past decade, the Delaware Court of Chancery has made clear that one consequence of an inadequate privilege law could be waiver of privilege. By imposing waiver in several cases, the court demonstrated that the possibility was realistic.[171] Before these rulings, the requirements for a good log were known but not salient. No one took them into account when making decisions about preparing a log, because the likely outcome of a motion to compel would only be a do-over. After these rulings, the requirements for a good log were both known and salient.

A third issue is the use of boilerplate objections. When a party serves written discovery requests, the responding party traditionally larded up its responses with boilerplate objections.[172] Those objections appear at the beginning of the responses and list formulaic

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168. *See, e.g.*, Dollar Tree Stores, Inc. v. Toyama Partners LLC, No. CV 100325, 2011 WL 3156971, at *4 (N.D. Cal. July 26, 2011) (ordering parties with deficient privilege logs to supplement those logs with 30 days); *see also* Taction Tech., Inc. v. Apple, Inc., No. 21-CV-00812, 2023 WL 4611826, at *1 (S.D. Cal. July 18, 2023) (allowing party of continue to assert work product protection over documents after that party first refused to provide a privilege log and then provided a privilege log that did not identify sender or recipient of withheld documents).

169. *E.g.*, Union Pac. Res. Grp., Inc. v. Pennzoil Co., No. 97-64, 1997 WL 34655410, at *1 (D. Del. Aug. 12, 1997); Cont'l Grp., Inc. v. Justice, 536 F. Supp. 658, 664 (D. Del. 1982); Coastal Corp. v. Duncan, 86 F.R.D. 514, 520 (D.Del.1980); Int'l Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 93–94 (D. Del. 1974); Unisuper Ltd. v. News Corp., C.A. No. 1699–N, slip op. at 2 (Del. Ch. Mar. 9, 2006); Reese v. Klair, No. 7485, 1985 WL 21127, at *5 (Del. Ch. Feb. 20, 1985).

170. *See* Klig v. Deloitte, LLP, 2010 WL 3489735, at *4 (Del. Ch. Sept. 7, 2010) (discussing counsel's argument the Supreme Court of Delaware should grant interlocutory review of a ruling that imposed waiver as a sanction for an inadequate log because the ruling allegedly announced "a new one-strike-and-you're-out rule for parties asserting privileges in the Court of Chancery").

171. *See* Mechel Bluestone, Inc. v. James C. Justice Cos., Inc., 2014 WL 7011195 (Del. Ch. Dec. 12, 2014); *Klig*, 2010 WL 3489735.

172. *See generally* Steven S. Gensler & Lee H. Rosenthal, *Breaking the Boilerplate Habit in Civil Discovery*, 51 AKRON L. REV. 683, 687–89 (2017) (describing the use of boilerplate objections to discovery responses); *see*

objections on grounds of overbreadth, burdensomeness, lack of proportionality, etc. All of the responses to the written discovery requests are made "subject to the General Objections," and many of the general objections are restated in each response. When presented with this type of response, the requesting party does not know what the responding party actually plans to produce, because whatever they have said is qualified by objections whose meaning is open for interpretation.[173] The responses are thus not responses at all. They simply kick off a series of deficiency letters, responsive letters, and meet-and-confer sessions that chew up time, bog down the process, and make the participants miserable.[174]

From time to time, isolated federal decisions had taken aim at boilerplate objections.[175] Through a series of rulings, the Delaware Court of Chancery joined those judges in making clear that boilerplate objections were not valid objections at all. To make a valid objection, a responding party had to identify its objection to a request with specificity and state what it was going to do. A party thus could not object to a specified period as "overbroad." A party had to say why the time period was overbroad and identify the time period that the responding party intended to use instead.[176]

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also Matthew L. Jarvey, Note, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 DRAKE L. REV. 913, 916 (2013) ("The problems with using boilerplate objections, however, run deeper than their form or phrasing. Their use obstructs the discovery process, violates numerous rules of civil procedure and ethics, and imposes costs on litigants that frustrate the timely and just resolution of cases.").

173. *See* Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 DENV. U. L. REV. 473, 482–83 (2010).

174. Paula Schaefer, *Attorneys, Document Discovery, and Discipline*, 30 GEO. J. LEGAL ETHICS 1, 12–13 (2017) ("As a result of boilerplate objections . . . the attorney who receives the boilerplate objections [either] spends time and money filing a motion to compel to seek any documents withheld based on the objections [or] . . . does not pursue a motion to compel, and is prejudiced by never (or only belatedly) receiving the documents deceptively withheld.").

175. *See, e.g.*, St. Paul Reinsurance Co., LTD. v. Commercial Fin. Corp., 198 F.R.D. 508, 511–13 (N.D. Iowa 2000) (criticizing boilerplate objections); Walker v. Lakewood Condo. Owners Ass'n, 186 F.R.D. 584, 587 (C.D. Cal. 1999) ("Boilerplate, generalized objections are inadequate and tantamount to not making any objection at all."); Athridge v. Aetna Cas. and Sur. Co., 184 F.R.D. 181, 190 (D.D.C. 1998) ("Aetna includes the standard, boilerplate 'general objections' section in its responses to plaintiffs' request for production which includes blanket objections as to relevance, burdensomeness and attorney-client privilege and work product privilege. Such general objections do not comply with Fed. R. Civ. P. 34(b) and courts disfavor them."); *In re* Aircrash Disaster Near Roselawn, Ind. Oct. 31, 1994, 172 F.R.D. 295, 306–07 (N.D. Ill. 1997) ("The aircraft defendants have alleged pat, generic, non-specific objections to each document request, repeating the familiar boilerplate phrase that each and every request is 'vague, overly broad, unduly burdensome, and seeks information that is not relevant . . . .' The[se] objections are inconsistent with both the letter and the spirit of the Federal Rules of Civil Procedure."); Obiajulu v. City of Rochester, 166 F.R.D. 293, 295 (W.D.N.Y. 1996) ("Such pat, generic, non-specific objections, intoning the same boilerplate language, are inconsistent with both the letter and spirit of the Federal Rules of Civil Procedure."); Roseberg v. Johns-Manville Corp., 85 F.R.D. 292, 296 (E.D. Pa. 1980) ("To voice a successful objection to an interrogatory, GAF cannot simply intone this familiar litany. Rather, GAF must show specifically how . . . each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive.").

176. *E.g.*, *In re* Oxbow Carbon LLC Unitholder Litig., No. 12447, 2017 WL 959396 (Del. Ch. Mar. 13, 2017); Order Granting Motion to Compel at *1, Quadrant Structured Products Co., Ltd. v. Vertin, No. 6990, 2015 WL 881051 (Del. Ch. Feb. 27, 2015); Order Regarding Plaintiffs' Motion to Compel, Quinlan v. Devlin, No. 6901, 2012 WL 1957631 (Del. Ch. May 30, 2012); *see also* Twitter, Inc. v. Musk, No. 2022-0613, 2022 WL 3591142, at *2 (Del. Ch. Aug. 23, 2022).

In addition to these rulings, the Court of Chancery amended its Rule 34(b) to provide that "the grounds and reasons for objection(s) shall be stated with specificity." The amendment also added language stating that "[a]n objection must state whether the responding party is withholding or intends to withhold any responsive materials on the basis of that objection."[177]

Before these measures, lawyers raised boilerplate objections by rote. The idea that it contributed to the undesirable state of discovery practice was not a consideration. Now, when lawyers respond to written discovery requests, the question of whether to assert boilerplate objections is salient. Not only that, but lawyers who receive requests burdened by boilerplate objections know they have recourse.

Providing consistent consequences for undesirable behavior is not the only means of increasing salience. Another step that the Delaware Court of Chancery has taken is to provide additional oversight through the role of discovery facilitator.[178] A discovery facilitator is a member of the bar who serves as a monitor for the discovery process and mediates discovery disputes.[179] The discovery facilitator does not have the authority to hear discovery disputes or make rulings. The facilitator instead promotes transparency and guides the parties to reasonable outcomes.[180]

The core function of the facilitator is to preside over meet-and-confer sessions and to document the results. Having a facilitator preside over the sessions tends to reduce the level of antagonism, precisely because a neutral party is observing.[181] Having a facilitator document the outcomes that the parties reached also avoids the back-and-forth letter-writing campaigns that take place after a meet-and-confer session in which parties about what commitments were made. The soft power implicit in the facilitator's role lies in the court's ability to ask the facilitator to report on what really happened during the meet-and-confer session, which provides another spur for the parties to strive to appear reasonable. There is also the implicit possibility that the court may ask the facilitator to make a recommendation about what the outcome should be. The parties should assume that because the court has appointed the facilitator, the court has confidence in that person's judgment and will be

177. Del. Ch. Ct. R. 34(b). The Advisory Committee for the Federal Rules of Civil Procedure took a similar step as part of the 2015 amendments to the Federal Rules. The Delaware Court of Chancery did not adopt those amendments, and its revision of Rule 34(b) occurred separately.

178. *See* Carl D. Neff, *Delaware Court of Chancery Issues Revised Guidelines for Persons Litigating in the Court of Chancery*, DEL. BUS. DISP. BLOG (Aug. 9, 2021), https://www.businessdisputeblog.com/2021/08/delaware-court-of-chancery-issues-revised-guidelines-for-persons-litigating-in-the-court-of-chancery [https://perma.cc/BD3A-HK6S].

179. *See, e.g.*, Akorn, Inc. v. Fresenius Kabi AG, No. 2018-0300, 2018 WL 4719347, at *4 (Del. Ch. Oct. 1, 2018) ("This case exemplifies how professionals can simultaneously advocate for their clients while cooperating as officers of the court. The parties were aided in this effort by a discovery facilitator who helped them craft and live by a detailed discovery plan.").

180. *See* AB Stable VIII LLC v. Maps Hotels & Resorts One LLC, No. 2020-0310, 2020 WL 7024929, at *45 n.180 (Del. Ch. Nov. 30, 2020), *aff'd*, 268 A.3d 198 (Del. 2021) ("The court appointed a discovery facilitator who provided invaluable assistance by promoting transparency, acting as an honest broker, and reducing the overall number of disputes.").

181. *See generally* Marian Riedy & Nancy Greenwald, *Mediating Discovery Disputes: When 'Meet and Confer' Alone is Not Enough*, 17 CARDOZO J. CONFLICT RESOL. 307 (2016) (proposing the use of mediators in discovery disputes).

guided by their recommendation. That reality permits the facilitator to guide the parties to a reasonable agreement.

The facilitator's role can be enhanced by adding the authority to require a party to provide information about its collection efforts, such as the hit counts that a particular search generates. One option is to allow the facilitator to obtain that information confidentially, not share it with the other side, but use it to guide the parties to a reasonable outcome. Another option is to allow the facilitator to require a party to share the information with the other side, which can be useful in low-trust situations.

A discovery facilitator can be particularly helpful at the start of the process—before disputes arise—when the facilitator can guide the parties in drafting a detailed discovery plan. To date, the Delaware Court of Chancery has generally appointed discovery facilitators only after problems developed. In one major case, however, the court-appointed a discovery facilitator at the outset, "who provided invaluable assistance by promoting transparency, acting as an honest broker, and reducing the overall number of disputes."[182]

C. Sanctions for Discovery Misconduct

The sanctions that courts impose for discovery misconduct contribute to both culture and salience. One of the lessons of the compliance literature is that aggressive enforcement can backfire by generating greater resistance. Assignments of fault or blame are likely to generate denial and defensiveness.[183] The same is true for discovery sanctions, where occasional, high-stakes sanctions for discovery misconduct are likely to do more harm than good. The current world of discovery practice in commercial cases is like a freeway where everyone is driving twenty miles per hour over the speed limit. The fine for that type of violation is considerable, but when everyone is doing it, handing out that type of fine can seem arbitrary.

As the *QVC* addendum shows, a state's highest court can address an issue decisively, but state supreme courts rarely see discovery issues. In states like Delaware that follow the final order doctrine, a discovery ruling is interlocutory and can only be certified for appeal and accepted under exceptional circumstances.[184] And state supreme courts are not used to lawyers and parties pushing the envelope, seeking small advantages in every interaction, and sometimes behaving badly in the hope that it pays off. When parties appear before the state supreme court, they are on their best behavior, their submissions are constrained by strict rules on appellate briefing, and their direct interactions with the court consist of a time-limited oral argument typically made by a senior practitioner. That is a different environment than the trenches of day-to-day commercial litigation.

Except for extreme scenarios like *QVC*, it is unlikely that a state supreme court will issue a bolt from the blue addressing discovery violations. Nor should trial judges expect to be able to issue bolt-from-the-blue rulings of their own. A ruling that confronts the status quo will generate resistance. Lawyers who engage in the challenged behavior and who

182. *See AB Stable VIII LLC*, 2020 WL 7024929, at *45 n.180.

183. Langevoort, *supra* note 75, at 968.

184. Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co., No. 9250, 2021 WL 4958253, at *2 n.18 (Del. Ch. Oct. 26, 2021) (collecting cases holding that discovery rulings are generally not subject to interlocutory appeal).

perceive that they may be at risk are likely to react negatively. Rather than generating a positive response, the ruling may prompt resistance. Compliance experts have found that enforcement initiatives can backfire by giving rise to oppositional narratives about witch hunts. A pathbreaking ruling could have the same effect.

The better path for trial courts who wish to change the culture and make discovery issues salient lies in working with the Bar to communicate about the issues, together with rulings that impose consistent, low-stakes consequences. That means enforcing the discovery rules, but it also means imposing some form of sanction that goes beyond requiring a party to do what it should have done in the first place. The latter type of ruling rewards bad behavior, thereby encouraging it.

Communicating with the Bar is necessary to generate buy-in. At least some members of the Bar must understand the underlying issues and perceive value in the direction that the court is heading. Articles in bar publications, talks to bar associations, and interactions with practitioners through groups that promote civility, such as the American Inns of Court, offer avenues for gathering support for cultural change.

When the time comes to impose sanctions for a discovery violation, Rule 37 offers a menu of solutions.[185] This article has already discussed waiver-based remedies, such as holding that privilege is waived for an inadequate log or that an objection is waived for a missed deadline. A court can also draw an inference that is adverse to the party that failed to comply with its discovery obligations, preclude the party from offering evidence on a particular point, or treat a fact as established for the purposes of the action.[186] Other alternatives include shifting the burden of proof or increasing the level of proof that a party must show, such as raising the standard from a preponderance of the evidence to clear and convincing evidence or requiring corroborating evidence from another source.[187] At the limit, a court can enter an order "dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."[188]

Another tool that courts have available is to more frequently shift fees and costs. In 1970, the Federal Rules of Civil Procedure were revised to make an award of fees and costs the presumptive outcome.[189] To avoid an award of fees and costs, the party that fails to fulfill its discovery obligations must show that the failure was substantially justified or point to other circumstances that would make the award unjust. The advisory committee viewed fee-shifting as a salutary incentive that would help minimize the need for court intervention in the discovery process.[190] The revision represented "an attempt to induce courts to make the award more frequently."[191]

However, from the perspective of the Delaware bench, fee-shifting largely remained the exception rather than the rule. Culturally, lawyers did not seem to distinguish between an award of fees in connection with a discovery ruling and an award based on bad faith

185. Del. Ch. Ct. R. 37.

186. James v. Nat'l Fin. LLC, No. 8931, 2014 WL 6845560, at *9 (Del. Ch. Dec. 5, 2014).

187. *Id.*

188. Del. Ch. Ct. R. 37(b)(2)(C).

189. *See* Notes of Advisory Committee—1970 Amendment, FED. R. CIV. P. 37.

190. CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2288 (3d ed. 2023) (citations omitted).

191. *Id*. § 2281 (citations omitted).

litigation tactics or under Rule 11. Both were regarded as similarly ignominious, even though only the latter carries the connotation of professional impropriety. Under Rule 37, fee-shifting serves the different purpose of causing parties to internalize the costs of their discovery positions. With the skyrocketing cost of litigation, however, fee-shifting under Rule 37 can be significant, with awards easily reaching six figures.

One alternative to a full award of fees and costs, particularly where a large award seems likely to roil the waters rather than calm them, is a "nudge" award. Behavior economists have found that parties often alter their behavior in response to small changes in conditions, terming these changes "nudges."[192] For example, when the metro D.C. area adopted a five-cent tax on plastic grocery bags, their use plummeted.[193] Consumers often switched to more expensive alternatives, suggesting that the price alone was not the determinant. Instead, the imposition of the tax may have conveyed new information to consumers about the harms of plastic bags, or it may have triggered a "norm cascade" in which shoppers did not want to be seen as someone who did not care about a salient issue.[194]

With a nudge award, a court shifts fees in a small, symbolic amount, such as $5000 or $10,000, to signal that the behavior was improper but without imposing the full cost of the discovery motion or inviting a dispute over the amount. The award retains its impact as a consequence and forces the lawyer to go to the client and explain the outcome but avoids what may seem like a disproportionate amount. A court can make a nudge award more significant by imposing it on the lawyer, rather than the client. Rule 37 permits fees to be imposed on the lawyer, the client, or both. Imposing a nudge award on the lawyer brings the ruling home, but with a personal consequence that operates at the level of a slap on the wrist.

The risk in nudge awards is that parties will view a comparatively low sanction as a price and, if parties are willing to pay it, interpret a moderate sanction as implicitly authorizing the misbehavior.[195] For that reason, a court must be aware of repeat violators. If attorneys or parties do not respond to nudge awards, then a more serious sanction may be required.

CONCLUSION

Discovery in commercial cases needs improvement. The question is not whether, but how. A compliance-based mindset that emphasizes culture and salience offers a promising new approach. This Article has identified problems with discovery and drawn an analogy to corporate wrongdoing. Noting that compliance experts have identified culture and salience as key components of a response to corporate wrongdoing, this Article has sought to apply those same lessons to discovery issues. Approaches taken by the Delaware courts provide examples of how judgments can introduce compliance-based initiatives. Future

192. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE (2009) (exploring the phenomena of psychological nudges).

193. Tatiana A. Homonoff, *Can Small Incentives Have Large Effects? The Impact of Taxes versus Bonuses on Disposable Bag Use*, 10 AM. ECON. J.: ECON. POL'Y 177, 210 (2018).

194. *See* Brian Galle, *Tax, Command . . . or Nudge?: Evaluating the New Regulation*, 92 TEX. L. REV. 837, 856 (2014).

195. Langevoort, *supra* note 75, at 972.

research will be necessary to determine whether those initiatives have positive, real-world effects.