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INTRODUCTION

CIVIL document discovery is so routine for lawyers that most take for granted the central inefficiency in the process: opposing counsel. If a lawyer could simply walk into the opposing party's office or home and collect the documents (paper or electronic) that the lawyer deems relevant to the issues in a case, that would be a simple and cost-effective way to discover the facts of the case.

But that is not how civil document discovery works.[1] Each party (or more accurately, its attorney) is the gatekeeper of its own information. This gatekeeping function prevents an opposing party from rifling through a party's irrelevant and privileged information. It also means substantially more effort and cost for both sides. The party seeking information must provide written requests, seeking the production of documents relevant to the dispute.[2] The requesting party must then rely upon the responding attorney to: (1) ensure that the appropriate information is preserved; (2) collect, process, and review the necessary information to determine the documents responsive to the request; (3) object to any aspect of a request that is improper (such as because it seeks discovery of privileged, irrelevant, or disproportionately burdensome information); and (4) produce the responsive (but not objectionable) documents.[3]

In short, the quality of civil document discovery depends upon the responding attorney. The requesting attorney will receive the documents he or she is entitled to only if the responding attorney is competent at document discovery;[4] complies

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1. The reference to "civil document discovery" in this article encompasses both e-discovery and paper document discovery.

2. FED. R. CIV. P. 26(b)(1), 34(a)-(b)(1).

3. FED. R. CIV. P. 34(b)(2). *See also EDRM Model*, DUKE L., https://www.edrm.net/frameworks-and-standards/edrm-model/ (last visited Jan. 31, 2019) (The Electronic Discovery Reference Model provides a conceptual representation of the steps the responding attorney takes in electronic document discovery.).

4. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(1) (AM. LAW INST. 2000) (An attorney is required to exercise the competence and diligence normally exercised by attorneys in similar circumstances.).

with discovery obligations under the Federal Rules of Civil Procedure ("FRCP"),[5] professional conduct rules,[6] and other sources of law;[7] and acts in good faith.[8]

In the e-discovery era—of large volumes of information that are easily changed or deleted and stored in diverse locations—case law reveals there are often problems with opposing counsel's competence, compliance with rules and other legal obligations (referred to collectively as "rule compliance"), and good faith.[9] In some cases, producing attorneys do not properly guide their clients in the preservation of documents, resulting in spoliation of evidence.[10] In others, the attorney fails to collect and review the right categories of information, resulting in responsive documents not being produced.[11] Case law reveals that producing attorneys sometimes withhold discoverable documents relying upon baseless, misleading, or otherwise improper objections.[12]

Whether the cause of these discovery problems is incompetence, a lack of rule compliance, or a sinister motive, the "trust me" tradition of document discovery contributes to the problem.

I. A TRADITION OF "TRUST ME" DISCOVERY UNDER THE FRCP

With a few narrow exceptions,[13] the FRCP does not require responding attorneys to provide an explanation for how they conducted document discovery.

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5. *See generally* FED. R. CIV. P. 26-37.

6. MODEL RULES OF PROF'L CONDUCT, r. 3.4 (AM. BAR ASS'N 2014).

7. For example, the duty to preserve documents is a common law duty. *See* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment (explaining that the rule relies upon the duty to preserve as established by case law).

8. Though rare, there are cases that address an attorney's intentional document discovery misconduct.

9. *See generally*, David Kessler, et al., *A Guide to Remedying Document Discovery Mishaps*, 44, No. 4 LITIG. 18, (2018) (explaining reasons for errors in document discovery, including errors in dealing with the volume of information and using appropriate review tools in the information age). *See also* Paula Schaefer, *Attorneys, Document Discovery, and Discipline*, 30 GEO. J. LEGAL ETHICS 1, 7-17 (2017) [hereinafter Schaefer, *Discipline*].

10. *See, e.g.*, Bd. of Regents of Univ. of Neb. v. BASF Corp., No. 4:04CV3356, 2007 WL 3342423, at *4 (D. Neb. Nov. 5, 2007) (where attorney did not explain that request for documents encompassed electronic documents, resulting in some information being deleted and other information being belatedly collected). *See also* Paula Schaefer, *Attorney Negligence and Negligent Spoliation: The Need for New Tools to Prompt Attorney Competence in Preservation*, 51 AKRON L. REV. 607, 618-20 (2017) (providing examples of attorney negligence resulting in spoliation of evidence).

11. *See, e.g.*, Witt v. GC Servs. Ltd. P'ship, 307 F.R.D. 554, 568-69 (D. Colo. 2014) (concluding that defense counsel failed to conduct a reasonable search for responsive documents). *See also* Schaefer, *Discipline*, *supra* note 9, at 13-14 n.77 (collecting cases).

12. *See, e.g.*, Atlas Res. Inc. v. Liberty Mut. Ins. Co., 297 F.R.D. 482, 489-90 (D.N.M. 2011) (ordering party to produce documents that it improperly withheld based on its blanket objections). *See also* Schaefer, *Discipline*, *supra* note 9, at 12-13 (describing how attorneys misuse boilerplate objections and withhold documents on the basis of such objections in discovery).

13. FED. R. CIV. P. 26(b)(5)(A), 34(b)(2)(B)-(C) (The areas in which the FRCP requires transparency about a party's document discovery process are: (1) the obligation to provide a privilege log listing all documents withheld on the basis of privilege; and (2) the obligation to state any

Even though the requesting attorney is entirely dependent upon the competence, rule compliance, and good faith of the responding attorney, the requesting attorney cannot demand any information about how the requesting attorney did that job, unless and until there is some evidence of a problem.[14]

This is "trust me" document discovery. The responding attorney simply produces documents to opposing counsel and says "trust me." Trust me, I preserved documents that are relevant to this dispute.[15] Trust me, I collected and reviewed the documents that would contain the documents responsive to your request.[16] Trust me, I acquired the right tool to conduct that review, and I used that tool correctly.[17] Trust me, the documents I withheld were not responsive to your requests.[18] While opposing attorneys can certainly agree to exchange this information, there is no requirement that they do so.[19]

This is the framework that has been in place since the adoption of the FRCP in 1938—a time when document discovery involved pieces of paper in a client's drawer or file folder.[20] This was a time when it did not take much skill to conduct document discovery and there were substantially fewer opportunities to get it wrong—negligently or intentionally. [21]

Eighty years later, document discovery is substantially more complex, and there are myriad opportunities for the producing attorney to get it wrong. Yet, the FRCP continues to allow document discovery to be a black box: the recipient of discovery must simply believe that opposing counsel's process was sound. An attorney is generally not permitted to seek information about the opposing party's

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objections to a document request with specificity and to state whether documents are being withheld on the basis of any such objection.).

14. *See, e.g.*, Hubbard v. Potter, 247 F.R.D. 27, 29-30 (D.D.C. 2008) (explaining that discovery about a party's discovery process is only available when documents produced "permit a reasonable deduction that other documents may exist or did exist and have been destroyed.").

15. FED. R. CIV. P. 26(f)(3)(C) (There is no requirement to disclose information about preservation methods, but the parties are encouraged to discuss and provide their "views and proposals" to the court on "any issues about disclosure, discovery, or preservation" of electronically stored information ("ESI") in their 26(f) conference.).

16. FED. R. CIV. P. 34 (There is no requirement that the responding party state how it decided which documents to collect or how it conducted its document review.).

17. *Id.* (There is no requirement that the responding party state the tool it used to conduct its review and how it used that tool to conduct the review.).

18. FED. R. CIV. P. 26(b)(5)(A) (Though there is an obligation to produce a log of privileged documents withheld, there is no obligation to produce a log of "non-responsive" documents withheld.).

19. Rule 26(f) does not give much direction about what discovery-related topics the parties should discuss in their planning conference, and in any event, the conference happens so early in the case that many attorneys are not prepared to engage in a meaningful discussion about how they will respond to discovery requests that they have not yet received. FED. R. CIV. P. 26(f)(1)-(3). *But see* FED. R. CIV. P. 26(d)(2) (effective December 1, 2015) (This relatively recent amendment allows Rule 34 requests for production to be served prior to the 26(f) Conference, which could facilitate a more meaningful discovery planning conference.).

20. *See generally* Milberg LLP & Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules*, 4 FED. CTS. L. REV. 131, 137-44 (2011) (describing discovery in federal court since the adoption of the FRCP in 1938).

21. *Id.*

discovery process unless there is evidence of a problem—no small task for a party that may not know whether the documents it has not received actually do (or did) exist.[22]

The Sedona Conference has insisted that the responding party should control the decision whether to reveal information about its document discovery process. The 2018 Third Edition of the Sedona Principles includes Principle 6, providing that the responding party is in the position to decide how to preserve and produce its own information.[23] In support of this Principle, the Sedona Conference states that responding parties should consider providing opposing counsel with documentation of the party's discovery process, but "should not be required to produce documentation of their discovery processes unless there has been a showing of a specific deficiency in their discovery processes."[24] The Sedona Conference also provides that neither requesting party nor court should dictate how a responding party meets its discovery obligations, "and there should be no discovery on discovery, absent an agreement between the parties, or specific, tangible, evidence-based indicia … of a material failure by the responding party to meet its obligations."[25] The Sedona Conference's position on transparency is aligned with the FRCP: a responding party's document discovery process can be a black box.

II. THE BENEFITS OF REQUIRING TRANSPARENCY IN MODERN CIVIL DOCUMENT DISCOVERY

Despite this tradition of secrecy, there are potential benefits in a shift toward more transparency about a responding party's discovery process. As a threshold matter, it is important to recognize that transparency could be achieved through amendments to the FRCP. The rules could require a responding party to reveal detailed information about its document discovery processes—from its preservation methods to its review procedures, and everything in between.[26] Such rules could take the form of required disclosures (such as those currently required in Rule 26(a)) on topics related to preservation, collection, search, and production tools, methods, and processes.[27] Alternatively, the FRCP could explicitly provide that information about document discovery processes may be requested without

22. *See, e.g.*, Orillaneda v. French Culinary Inst., 2011 WL 4375365, at *6 (S.D.N.Y. Sept. 19, 2011) (holding that discovery about a party's discovery process is not available where the requesting party could not establish "any specific reasons to believe the defendant's production was deficient").

23. *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 118-30 (2018).

24. *Id.* at 126-27.

25. *Id.* at 123.

26. Of course, even under the current FRCP, a requesting attorney is permitted to seek—and a responding attorney is permitted to reveal—information about its discovery processes. Such conversations could take place in a Rule 26(f) discovery planning conference. But without required transparency, many attorneys will not be able to take advantage of the benefits of this information about discovery, because opposing counsel will simply refuse the request.

27. The current disclosures required under Rule 26(a) include initial disclosures, expert testimony disclosures, and pretrial disclosures. FED. R. CIV. P. 26(a)(1)-(3). The rule could be amended to add a category called "Document Discovery Process Disclosures."

making any showing that a document production is incomplete.[28] There are undoubtedly other avenues by which the FRCP could be amended to require more information about a responding party's discovery methods. Whatever the form of the rules, the goal would be transparency in civil document discovery.

A shift from "trust me" to transparency would contribute to improvements in civil document discovery. Transparency could reveal problems with an attorney's competence, rule compliance, and good faith before those problems are compounded. Further, the end of black box discovery would lessen the opportunity—and thus the temptation—for responding attorneys to engage in small (and sometimes large) violations of their discovery obligations. While some have expressed concern that transparency would increase the cost of discovery, that fear can be addressed by engaged judges rather than discovery secrecy.

A. Transparency Would Reveal Problems with the Responding Attorney's Document Discovery Process Before Those Problems Are Compounded.

With transparency about a responding attorney's document discovery process, a requesting attorney can evaluate whether a responding party took the appropriate steps to comply with its discovery obligations.[29] When a problem is revealed early in the process, the requesting attorney is then able to address that problem before it is compounded. Whether the issue is a lack of competence in modern discovery, non-compliance with the letter of the discovery rules, or an attorney's bad faith conduct, timely disclosure is key.

A hypothetical can illustrate this. Suppose that text messages are not produced in response to a request for production of documents. Under the current "trust me" system, the receiving attorney will not necessarily know if there are no text messages that are responsive to the document requests, if the responding party's erroneous search methods failed to detect responsive text messages, if the responding party improperly failed to preserve text messages from key custodians, or if harmful texts were intentionally withheld. While the requesting attorney can certainly inquire of the responding attorney, the document production may be so large and the possible problems so numerous that it is impossible to identify "missing text messages" as a concrete problem.

Continuing with this hypothetical, if there is a problem that caused responsive text messages to be withheld, the passage of time may make it difficult, costly, or impossible to fix that problem. For example, numerous depositions may have been taken without the benefit of the missing text messages that witnesses would have been asked to address in their testimony. If the text messages are belatedly produced, a party may be faced with choosing between the cost of re-taking the depositions or proceeding without potentially important testimony.

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28. The logical place to include such a requirement is within the "Discovery Scope and Limits" rule. FED. R. CIV. P. 26(b)(1).

29. Craig B. Shaffer, *Deconstructing "Discovery About Discovery"*, 19 SEDONA CONF. J. 215, 216 (2018) (explaining that allowing discovery about discovery enables a requesting party "to evaluate the reasonableness and thoroughness" of a responding party's document discovery efforts).

Required transparency could change the outcome of this hypothetical. Suppose that the FRCP contains a preservation disclosure rule that requires disclosure of the party's custodians whose documents were preserved, types of documents preserved, method of preservation, date of preservation, etc. A responding attorney's preservation disclosure may reveal a complete lack of competence at preservation, including a failure to preserve any text messages from key players in the case. With this information, the other attorney can intervene immediately to guide the responding attorney in preserving the information, or if necessary, to seek the court's assistance. This early intervention may result in a category of documents being preserved and produced in a timely manner.

B. Required Transparency Would Reduce the Opportunity for—and Thus Lessen Attorney Likelihood of—Violating Discovery Obligations.

When given the opportunity, most people cheat a little. Psychology and behavioral economics professor Dan Ariely has reached this conclusion based on extensive research into the conditions that contribute to dishonesty.[30] In one experiment, subjects were asked to answer 20 problems and were promised cash for each problem solved. In the control condition, in which each subject's answers were checked, the average subject correctly solved 7 of 20 problems.[31] When the experiment was changed to let subjects check their own work, report the questions they correctly solved, and shred their answer sheet, the average number of correct answers rose to 12 of 20.[32]

In another version of this same experiment, Ariely found that in the control condition, on average, people solved 4 of 20 problems, while in the shredder scenario, people claimed to have solved an average of 6 of 20 problems.[33] Ariely explained that the overall increase was not attributable to a few people who claimed to solve a lot of the problems, but rather from "lots of people who cheated by just a little bit."[34]

Outside of laboratory testing conditions, Ariely provided anecdotal evidence of this human tendency to be a little dishonest. In his book, Ariely recounted a true story about thefts that were occurring in a museum gift shop selling $400,000 in merchandise a year, but suffering theft losses of $150,000 per year.[35] The gift shop was staffed by volunteers who made change from a cash box and had no record-keeping obligations.[36] When a new manager thought he had identified an employee as the thief, he set up a sting operation that involved marked bills.[37] It turned out that the suspected employee was stealing, but even after he was fired, the losses

30. DAN ARIELY, THE (HONEST) TRUTH ABOUT DISHONESTY (2013).
31. *Id.* at 198.
32. *Id.* at 198-200.
33. *Id.* at 18.
34. *Id.*
35. *Id.* at 6-7.
36. *Id.*
37. *Id.* at 7.

continued.[38] When additional controls were put in place that required recordkeeping of inventory and sales, the thefts ended.[39] The takeaway is that the misconduct was not the product of one bad apple, but the conduct of numerous individuals who were a little dishonest when given the opportunity.

Applying these lessons to document discovery, if given the opportunity, many attorneys will sometimes diverge (a little) from their obligations under the FRCP. For example, despite knowing that a document is responsive to a request for production—and thus should be produced under FRCP 34—an attorney may withhold that document if it is damaging and there is an argument that the document can be withheld based on an objection. The "opportunity" to cheat is the lack of transparency under the FRCP. Like the shredder in the problem-solving experiment, the document discovery black box provides the opportunity and temptation for attorneys to cheat a little.

Behavioral science suggests that it may be even easier for an attorney to bend the rules of discovery than it would be for someone to steal from the gift shop or to cheat, such as in Ariely's experiment. First, attorneys are playing a partisan role, which may cause them to make skewed judgments about their discovery obligations.[40] Second, discovery process decisions—such as whether a document should be produced—are more subjective than the relatively straightforward decisions faced in the experiment or in the gift shop. As a result, these decisions are even easier to rationalize, making a bad decision more likely.[41] Third, there is strong evidence that individuals who are tired or otherwise mentally and physically depleted, find it more difficult than others to exercise self-control and make good decisions.[42] Thus, an attorney who is over-worked or stressed faces a greater risk of not playing by the rules of discovery. Finally, obedience and conformity pressure can cause a person to defer to an authority figure or the crowd rather than do the right thing.[43]

Greater transparency about a party's document discovery process can lessen the opportunity, and thus the likelihood, of attorneys violating their discovery

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38. *Id.*

39. *Id.*

40. Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639, 1651 (2015) (explaining that partisanship research reveals that people playing a partisan role have difficulty making objective decisions, such as whether a document should be produced in discovery).

41. Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, ANN. REV. L. SOC. SCI. 93 (2012) ("[R]esearch has found that the more room a situation provides for people to rationalize their behavior, the more likely they are to behave unethically.").

42. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 41-44 (2011) (explaining research showing that people who are depleted, through handling complex mental tasks, exercising self-control, or even hunger, have more difficulty making good decisions (such as one that is reasoned and not the product of self-interest)).

43. *See generally* Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1149-52 (2013) (explaining obedience research). *See also* ARIELY, *supra* note 30, at 199-202 (explaining that when a confederate was introduced to the experiment—to make the point that cheating was socially acceptable—experiment subjects reported answering 15 of 20 questions correctly, which was 8 more than the average under control conditions and 3 more than when they simply had the opportunity to cheat).

obligations. If responding attorneys know their opponents have an easy method of learning that they are cheating, such as mandatory disclosure of preservation efforts or document review methods, this could have a meaningful impact on discovery. Of course, with numerous factors in play, transparency is not a panacea. But research gives us reason to believe it is a necessary starting point in this complex era of document discovery.

C. The Concern that Transparency May Increase Discovery Costs Is Legitimate, But Can Be Addressed.

Some attorneys and commentators oppose transparency in discovery because they believe it will result in higher costs.[44] The fear is that the more information provided to opposing counsel about the document discovery process, the more likely that process is to be second-guessed—resulting in motion practice and higher costs.[45] In short, the fear is that the more an opponent knows about the producing party's decision-making process, the more likely the opponent is to find fault.

The most vocal opponents to increased transparency in discovery are sophisticated, repeat players in litigation.[46] They likely oppose transparency because they conceive themselves to be the responding party and not the requesting party, and therefore they do not view concerns about how they conduct discovery as legitimate.[47] The protests of those who are competent at discovery should not obscure the reality that many other attorneys lack discovery competence. The reality is that transparency is necessary to detect discovery problems in many cases.

That being said, there is a legitimate concern that transparency could increase the cost of discovery. It is inescapable that there is a level of subjectivity in making

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44. *See, e.g.*, Hal Marcus, *Transparency in E-Discovery? Save It for Your Clients*, LEGALTECH NEWS (Feb. 13, 2018); Shaffer, *supra* note 29, at 215 (explaining that opponents of discovery about discovery argue that it "is inappropriate in most instances and, more often than not, results in unnecessary expense"); Letter from the Elect. Discovery Inst. to Craig Winlein, Exec. Dir., Sedona Conference (June 30, 2017), https://static1.squarespace.com/static/562e6078e4b09a433f4a0d06/t/59dec33c268b96c326c2b080/1507771200045/2017-06-30+Comment+in+Response+to+Proposed+Revision+to+Sedona+Principle+6.pdf [hereinafter EDI Letter] (asserting that allowing "discovery-on-discovery" without evidence of a problem in a document production would result in courts "being called upon to oversee every minute aspect of a producing party's actions").

45. Marcus, *supra* note 44 (arguing that transparency about a party's discovery process provides "more data points … for opposing counsel to challenge" and can trigger "unnecessary disputes and costly motion practice").

46. *See, e.g.*, EDI Letter, *supra* note 44 (signed by a number of major corporations, including GlaxoSmithKline, General Electric Company, Microsoft Corporation, Bristol-Myers Squibb, Eli Lilly & Co., Shell Oil Company, Ford Motor Company, Johnson & Johnson, and Novo Nordisk Inc.).

47. *Id.* (agreeing with the proposition stated since the First Edition of the Sedona Principles that responding parties—and not courts or adversaries—are in the best position "to devise their own solutions to meeting the responding party's obligations to preserve and produce ESI" and asserting that it follows from that proposition that discovery about preservation and production decisions is disfavored).

discovery decisions, particularly when "proportionality" is a consideration.[48] If more is known about a party's process related to making such decisions, some parties will be tempted to use that information to file a motion to compel.[49] Even if a court ultimately finds the responding party acted appropriately in its document discovery process, engaging in motion practice is time consuming. All of this has the potential for driving up the overall cost of discovery.

But the fear of increased costs is not a reason to jettison the positive aspects of greater transparency. Judges are in a powerful position to act as a check on the risk of increased cost under a system of required transparency.[50] Judges who are more actively engaged in parties' discovery tend to deal with fewer discovery-related motions.[51] Thus, they could make a difference by proactively addressing unresolved and unaddressed questions in early scheduling conferences, including prompting parties to discuss issues about preservation, disclosure, and discovery that it appears (from their 26(f) report) that they had not yet addressed.[52]

Relatedly, while presiding over a scheduling conference, a judge may recognize that the attorneys are not yet in a position to discuss how they will address discovery issues in the case. When judges find themselves in that situation, they might consider scheduling additional pretrial conferences for a time when the parties will necessarily know more about their plans for conducting document discovery in the case.[53] Judges can also require parties to seek a conference with the court prior to seeking a discovery related-order.[54] Finally, under current FRCP provisions, the prevailing party on a motion to compel is awarded its costs.[55] Awarding such costs (or noting that such costs can be awarded) can be a powerful reminder that there is something to lose in discovery motion practice, even for the requesting party. In all of these ways, judges can curtail the threat of rising costs even if transparency were required under the FRCP.

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48. FED. R. CIV. P. 26(b)(1) (To fall within the scope of discovery, information must be proportional to the needs of the case.).

49. FED. R. CIV. P. 37(a)(3)(B)(iv).

50. Shaffer, *supra* note 29, at 219-21 (arguing against a policy against discovery about discovery and explaining that judicial case management is essential to effective document discovery, and stating that judges "should not be required or expected to sit passively while a flawed discovery process continues unabated and unresolved").

51. *Id.* at 268 ("This author has found that when regular discovery conferences have been set, the parties either resolve disputes on their own or significantly narrow the areas of disagreement before speaking with the court.").

52. FED. R. CIV. P. 16(a)(3)(iii).

53. FED. R. CIV. P. 16(a)(2)-(3) (permitting the court to order the parties to appear for pretrial conferences for purposes such as "establishing early and continuing control so that the case will not be protracted because of lack of management" and "discouraging wasteful pretrial activities"). *See also* Shaffer, *supra* note 29, at 215 (describing the court's discretion to require parties to "meet and confer in person in a genuine, good faith effort to plan discovery and to submit a discovery plan for the court's approval" (internal citations omitted)).

54. FED. R. CIV. P. 16(b)(3)(B)(v) (providing that a scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court").

55. FED. R. CIV. P. 37(a)(5)(A)-(C) (providing that except in limited circumstances, the court must award payment of expenses to the prevailing party).

CONCLUSION

The "trust me" approach to civil document discovery no longer works in modern practice. Allowing a responding party's discovery processes to be a black box obscures incompetence and contributes to widespread, though perhaps minor, discovery rule violations. Transparency about a party's discovery process could allow simple problems to be resolved before they are compounded, and it could lessen the opportunity for discovery misconduct. While there is a risk that increased costs could accompany mandatory transparency, judges have the tools and ability to address that risk. If attorneys, judges, and rule-makers recognize the value of transparency, the next big challenge will be developing a framework for greater transparency under the FRCP.