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THE DISRUPTION OF MANDATORY DISCLOSURE WITH THE
WORK PRODUCT DOCTRINE: AN ANALYSIS OF A
POTENTIAL PROBLEM AND A PROPOSED SOLUTION

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The Disruption of Mandatory Disclosure with the Work Product Doctrine: An Analysis of a Potential Problem and a Proposed Solution[†]

Every idea for improved procedures must be imaginatively pretested to foresee its evolving shapes under the fires of adversary zeal.

—Marvin E. Frankel¹

One of the most paradoxical and troublesome features of the Federal Rules of Civil Procedure is that they combine the adversary model of litigation with broad, party-initiated, and party-controlled discovery of all relevant information. Litigants, who will later battle over their legal standings at trial or at the settlement table, must repress their adversarial tendencies and cooperate to ensure all relevant information is exchanged between them. Their ultimate conflict is supposed to be a fully informed one.² The discovery provisions contained in Rules 26 through 37 provide the means for uncovering and exchanging this relevant information.³ By using depositions,⁴ interrogatories,⁵ requests for documents,⁶ and the other formal discovery procedures,⁷ litigants can bring to their ultimate conflict the maximum number of relevant facts. However, formal discovery under the Federal Rules has not been without its abuses,⁸

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1. MARVIN E. FRANKEL, *PARTISAN JUSTICE* 18 (1980).

2. See 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2001, at 15 (1970) ("The basic philosophy of the present federal procedure is that prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged.").

3. See FED. R. CIV. P. 26-37.

4. FED. R. CIV. P. 27-28, 30-32.

5. FED. R. CIV. P. 33.

6. FED. R. CIV. P. 34.

7. *E.g.*, FED. R. CIV. P. 35 (allowing for a physical and mental examination of a party or a person in the legal control of a party if the mental or physical condition of the person is in controversy); FED. R. CIV. P. 36 (providing for requests for admission).

8. *E.g.*, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640 (1976) (reinstating a district court's dismissal of plaintiffs' case when their repeated failure to answer crucial