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THE PRETRIAL DISCOVERY PROCESS IN CIVIL CASES: A COMPARISON OF EVIDENCE DISCOVERY BETWEEN CHINA AND THE UNITED STATES

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Abstract: This article compares and contrasts the pre-trial discovery mechanisms used in China and the United States, as well as the advantages and disadvantages of each. Although both use similar discovery tools, like requests to inspect evidence and expert examination of the parties, their discovery systems vary greatly. Ultimately, China prefers that judges largely conduct discovery, that the parties mutually select expert witnesses, and that the primary objective is to determine the truth, even at the expense of finality. Conversely, the United States prefers a much more adversarial system, in which the parties collect the evidence, submit motions to the court, and select partisan expert witnesses. Unlike China, the United States also gives substantial weight to finality, prohibiting retrials at the appellate level, but permitting appellate review to ensure substantial justice is achieved. While the Chinese discovery system is efficient and fair, the burden on the Chinese judge to collect evidence is too great and threatens neutrality. To combat this, China should improve the parties' ability to discover evidence. Conversely, although the U.S. system produces zealous advocacy and extensive information, the parties are plagued by lengthy and expensive discovery procedures. Consequently, the United States needs to minimize excessive discovery with judicially determined limits.

INTRODUCTION

This Article examines the pre-trial discovery processes available in civil cases before courts in China and the United States. For purposes of this Article, the discussion of pre-trial discovery in the United States will utilize the Commonwealth of Massachusetts civil discovery procedures.¹ This discussion con-

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¹ Each state in the United States has its own Rules of Civil Procedure; although each state promulgates unique rules, they are, in large measure, based on the Federal Rules of Civil Procedure. The

cerns the similarities and differences between these civil procedure systems. Ascertaining what common functions and mechanisms are shared or distinct in these two systems will then serve as a framework to discuss the advantages and disadvantages of each, as well as the ultimate objectives sought in each system of justice.

As a demonstrative aid to illustrate how China and the United States use the tools of civil discovery, this Article relies on a hypothetical case, *June Lee v. Hawthorne*.² Plaintiff June Lee is a resident in the Hawthorne ten story apartment building. On July 4, 2009 while walking through the front courtyard of that building, a ten-inch wooden board dropped on her head, causing her to fall and lose consciousness. She believes the board dropped from a balcony of one of the apartments. She has brought a lawsuit against the Hawthorne management and all the residents of that apartment building, claiming negligence, failure to properly maintain the building, and assault and battery. She claims that she was hit in the head by the board, which was intentionally or negligently thrown or dropped from a balcony, but she does not know by whom or even from which balcony or apartment. She also alleges that when the accident took place the owners of apartment 805 were doing construction and, on information and belief, the board comes from that construction work. She claims that she suffered a concussion from the board hitting her head, causing her to fall, and that she has permanent impairment to her memory and various cognitive deficits.

This Article uses this hypothetical case to illustrate and evaluate the differences in the discovery procedures of obtaining evidence between the United States and China. What are the strengths and weaknesses of each system? What are the lessons that can be learned from each system?

I. THE PROCESS OF EVIDENCE DISCOVERY IN CHINA

Evidence discovery originated from the civil litigation of Anglo-American law; it is a specialized litigation process of evidence and information collection.³ Most Chinese scholars translate it as “evidence discovery” or “discover evi-

plaintiff’s attorney initially decides whether to sue in state or federal court. The jurisdictional requirements are quite stringent for federal court, so generally the hypothetical case described in this Article could only be brought in state court. The purpose of these rules is “to secure the just, speedy and inexpensive determination of every action.” See FED. R. CIV. P. 1; MASS R. CIV. P. 1.

² This article takes the idea for this hypothetical case from a civil case reported in the China Daily newspaper in May 2009. In that case, a woman in Chongqing municipality sued sixty one tenants in her apartment building after a stick landed on her head. Even though she could not determine where the stick came from, a court accepted her lawsuit, according to Chongqing Evening News.

³ See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 554–56 (2010).

dence;⁴ some scholars call it “evidence disclosure;”⁵ others translate it to either “evidence investigation,” or “investigating evidence.”⁶ The basic meaning of the term is one party exercising legally regulated procedural rights to collect evidence, to discover evidence, and to investigate evidence actively and proactively.⁷ No Chinese law has yet clearly stipulated such a discovery procedure. The Civil Procedure Law of the People’s Republic of China 2012 (Civil Procedure Law), however, regulates a system for “investigating and collecting evidence.”⁸ This Article therefore uses the phrase “investigating and collecting evidence” when studying and exploring traditional legal systems in China, rather than the technical term “evidence discovery,” which has not been used before in China.

A. Investigating and Collecting Evidence

Because China has no singular regulated procedure of collecting and investigating evidence, Chinese civil litigation merges evidence discovery and evidence investigation into a single litigation procedure.⁹ Whether it is in a pre-filing stage, pre-trial stage, or during the court trial period, there are commensurate practices relating to evidence discovery to learn the facts of the case. The following are the major aspects of evidence discovery:

1. Parties and Lawyers Conduct Investigations and Collect Evidence

June Lee, the plaintiff in the hypothetical personal injury case, may appoint a litigating agent to proceed with her litigation, or she may proceed with the litigation herself. In China, there is a wide selection of professionals who may be a representing agent, but a lawyer is the main litigating agent.¹⁰ Article 64 Section 1 of the Civil Procedure Law requires a party to offer evidence to prove their

⁴ See YANMIN CAI & HONG HAO, ANALYSIS OF DUE PROCESS OF LAW—A STUDY OF CONTEMPORARY AMERICAN CIVIL PROCEDURAL SYSTEM 154 (2000); GEOFFREY C. HAZARD & MICHELE TAROFFO, AMERICAN CIVIL PROCEDURE: AN INTRODUCTION 118 (Zhang Mao trans., 1999).

⁵ CAI & HAO, *supra* note 4, at 154; HAZARD & TAROFFO, *supra* note 4, at 118.

⁶ TAN WEI JANG, THEORETICAL POSITIONS OF THE LEGISLATION OF CIVIL EVIDENCE 294 (2010).

⁷ See *id.* at 292.

⁸ See Zhonghua Renmin Gongheguo Minshi susong fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 129 (2012). Article 129 of the Civil Procedure Law regulates the system when it states that “Judges must carefully examine case materials and investigate and collect necessary evidence.” *Id.*

⁹ See Richard W. Wigley & Xu Jing, *Evidence Collection and Alternatives to “Discovery,”* CHINA LAW INSIGHT (Apr. 15, 2011), <http://www.chinalawinsight.com/2011/04/articles/dispute-resolution/evidence-collection-and-alternatives-to-discovery-in-prc-litigation/> (last visited Apr. 16, 2014).

¹⁰ See Civil Procedure Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 61 (2012).

theory.¹¹ Evidentiary material must be attached to the plaintiff's complaint or to the defendant's counterclaim.¹² The evidence offered must be relevant.¹³

a. Collecting and Offering Evidence That a Party Already Possesses

Both parties may collect and offer evidence they already possess, including, for example, a contract signed by the parties, correspondence or letters between the parties, etc. In *June Lee v. Hawthorne*, the plaintiff could offer the following as evidence: the fallen wood block which injured her, the diagnosis certification issued by the examining hospital, her medical expense bills, and so forth.

b. Collecting and Offering Evidence That a Party Does Not Possess

According to Article 61 of the Civil Procedure Law, the representing lawyer and other legal representatives have the right to investigate and collect evidence and to review the reference materials of the case.¹⁴ According to Article 35 of the Law of the People's Republic of China on Lawyers 2008 (Lawyers Law), should a lawyer decide to investigate and to collect evidence by himself, he may conduct an investigation of materials held by the requested party's working unit or involved individuals by presenting his professional lawyer certification or a certificate from his law agency.¹⁵ There is no rule clearly regulating both parties and lawyers on how to collect evidence. In practice, the common method used by parties and lawyers is to question witnesses present at the scene and to later offer to the court a notarized witness testimony record.¹⁶ The lawyer may also send a lawyer's questioning letter to the opponent for answers or for an explanation as to whether he was absent from or present at the scene.¹⁷ This is

¹¹ See *id.* art. 64, § 1 ("A party shall have the burden to provide evidence in support of its own propositions.").

¹² See *id.* art. 121.

¹³ See *id.* art. 64, § 1.

¹⁴ See *id.* art. 61 ("Lawyers who serve as litigation representatives or other litigation representatives shall have the right to investigate and collect evidence, and may consult relevant materials to the case. The scope and measures of consulting relevant materials to a case shall be regulated by the Supreme People's Court.").

¹⁵ *Zhonghua Renmin Gongheguo lushi fa* (中华人民共和国律师法) [Law of the People's Republic of China on Lawyers] (promulgated by the Standing Committee Nat'l People's Cong., Oct. 28, 2007, effective Jun. 1, 2008), art. 35, § 2 (2008) ("When a lawyer investigates to collect evidence for a case on his own, he may, on the strength of his lawyer's practice certificate and the papers issued by his law firm, inquire of the unit or individual concerned about the legal matter which he has undertaken to handle.").

¹⁶ See Wigley & Jing, *supra* note 9 (discussing Chinese courts' preference for documentary evidence).

¹⁷ Cf. CLARA INGEN-HOUSZ, BAKER & MCKENZIE, GLOBAL GUIDE TO COMPETITION LITIGATION CHINA 1 (2012), available at <http://www.bakermckenzie.com/files/Uploads/Documents/Global>

similar to the interrogatory process used in the United States. Nevertheless, China presently has no clear rule on this kind of questioning. In the end, there is no penalty or sanction that a Chinese court may issue to those who refuse to respond to a lawyer's questioning letter.

c. Preserving Evidence by Means of Notarization

Notarization is one of the common methods litigants use to collect evidence in China.¹⁸ Regulated by Article 11 of the Notarization Law of the People's Republic of China 2005 (Notarization Law), the notarization agency or organization may handle matters relating to securing and preserving subject evidence when a petition is filed by a natural person, an entity, or an organization.¹⁹ The preservation of evidence by a notarization agency is a litigation strategy frequently used by parties, especially prior to the litigation process.²⁰ For instance, when a witness is going abroad and it might be difficult to obtain the witness's testimony, prior to the litigation a party may request a notarization agency make a record or recording of the relevant witness's testimony for the party to use at

[%20Antitrust%20&%20Competition/Guide%20to%20Competition%20Litigation/China.pdf](#) (discussing demand letters in China).

¹⁸ See Fu Jin Chua, *Litigation and the People's Court*, in *MANAGING BUSINESS DISPUTES IN TODAY'S CHINA: DUELING WITH DRAGONS* 126, 149 (Michael J. Moser ed., 2007).

¹⁹ Notarization Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Mar. 1, 2006), art. 11 § 1, ¶ 9 (2006). Article 11 of the Notarization law states that: "Depending on the request of a natural person, legal person or any other organization, the notarial office may handle the following affairs . . . (9) preservation of evidence." *Id.* Article 18 states:

To serve as a notary, one shall meet the following requirements: (1) having the nationality of the People's Republic of China; (2) being between 25 and 65 years old; (3) being fair-minded and upright, observing laws and rules of discipline, and being of good moral character; (4) having passed the national judicial examination; and (5) having served as an intern in a notarial institution for two or more years, or having three or more years of experiences in another legal profession and having served as an intern in a notarial institution for one year or more, and being professionally qualified.

Id. art. 18. Article 19 states:

A person who has been engaged in teaching or research of law or has a senior professional title, or a person who has been a university graduate or had a higher educational background and has served as a public servant or lawyer for 10 full years in adjudication, procuratorial work, legislative work or legal service, if he has left his post and has been professionally qualified, may serve as a notary.

Id. art. 19.

²⁰ See Deng Yong, *Notarial Evidence in Internet Copyright Disputes*, LIFANG & PARTNERS, http://en.lifanglaw.com/_d270770546.htm (last visited Apr. 16, 2014).

trial.²¹ Generally speaking, the notarization agency should present the real situation as a whole objectively by purchasing or requesting the real objects, by taking photographs at the scene, by making video recordings, by questioning witnesses, or by making a recording of certain witnesses' oral testimony, as well as by being objective in its operational procedures and findings.²² After a notarization agency gathers legal facts and documents in compliance with the legal action of public notarization, the People's Court should use this evidence as the basis to decide on the facts, with the exception of existing rebuttal evidence which can sufficiently overturn the notarized certification.²³ The credibility of the preservation certification of notarized evidence is higher than all other evidence.²⁴ The probability of the People's Court accepting notarized evidence is much higher during litigation.²⁵

d. Court Requests for Parties to Offer Evidence After Legal Explanation and Clarification

Because China does not practice a compelled lawyer-presentation system, some litigants' ability to offer evidence may vary from strong to weak, or some litigants may not understand the litigating procedure and therefore be ignorant as to how to offer evidence.²⁶ To this end, litigants may not even know what kind of evidence to offer. The People's Court has the responsibility and the duty of explaining to the litigants the requirements of offering evidence and its possible legal consequence.²⁷ When the judge thinks the evidence is insufficient or incomplete, he will ask the party to offer more relevant evidence.²⁸ For example, in *June Lee v. Hawthorne*, a defendant resident may claim that he was not at the location of the incident, but not offer sufficient evidence to support his claim. In that case, the judge may ask the defendant to introduce more sufficient evidence of his absence from the location. Should the incident have occurred during work-

²¹ Zhonghua Renmin Gongheguo Minshi susong fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 81 (2012).

²² See *id.* art. 70.

²³ See Notarization Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Mar. 1, 2006), art. 36 (2006).

²⁴ See Huang Hui et. al, *China's Evidence Rules Explained*, CHINA IP FOCUS 2010, <http://www.wanhuida.com/Portals/1/YRNewsAttachment/1072/China's%20Evidence%20Rules%20Explained.pdf>.

²⁵ See *id.*

²⁶ Mo Zhang & Paul J. Zwier, *Burden of Proof: Developments in Modern Chinese Evidence Rules*, 10 TULSA J. COMP. & INT'L L. 419, 440 n.111 (2002).

²⁷ See Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 65, § 2 (2012) (“[The] people's court shall, in accordance with the claims of the parties and the situations of the trial, determine the evidence that the parties should provide and the time limit thereof.”).

²⁸ See *id.* art. 65.

ing hours, for instance, he then could offer testimony from co-workers at his working unit.

A judge can exercise the right of explanation and clarification to urge parties to improve their evidence to develop a better finding of the facts. Judges afford this opportunity in situations where parties are limited by their personal ability or condition, because such limitations cause an inability to offer or state their own theory. When the court is only idly standing by without offering any help, it may result in a situation where the party that should have won instead loses, and the party that should have lost wins. This type of judgment goes against the purpose of establishing a system of national Chinese civil litigation and makes a mockery of justice and of the purpose of a fair trial.²⁹

2. The Court Conducts Investigations and Collects Evidence

Section 2 of Article 64 of the Civil Procedure Law states that if parties or their litigation agents cannot gather evidence by themselves due to some objective difficulties, or if the People's Court is of the opinion that certain evidence is necessary for the case, the People's Court shall investigate and collect evidence.³⁰

The People's Court investigating and collecting evidence is a necessary complement to Chinese discovery if the parties do not gather relevant evidence due to some objective obstacles. Two categories of court involvement exist: one where the People's Court proactively investigates and collects evidence according to its working function and power, and the other where the court acts upon one or more petitions submitted by the parties involved.³¹ When a court initiates an investigation and collects evidence in accordance with its functions and power, it faces two major limitations. First, the facts in question may damage or obstruct the state's interests,³² the public's interests, or other people's legal interests. Second, procedural matters not relevant to the substance of the legal argument itself may surface, such as the court adding additional parties according to its duties and power, the lawsuit being terminated or concluded, or a judge recusing themselves. In addition, the People's Court may proceed with an investiga-

²⁹ YUQIAN BI, EXPLANATION AND INTERPRETATION OF CERTAIN PROVISIONS OF THE SUPREME PEOPLE'S COURT ON THE EVIDENCE FOR CIVIL ACTIONS 346 (2002).

³⁰ See Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 64, § 2 (2012) ("A people's court shall investigate and collect evidence which a party and its litigation representative are unable to collect for some objective reasons and evidence which the people's court deems necessary for trying a case.").

³¹ See *id.*; Niels J. Philipson, *The Law and Economics of Professional Regulation: What Does the Theory Teach China?*, in ECONOMIC ANALYSIS OF LAW IN CHINA 112, 134 (Thomas Eger et al. eds., 2007).

³² Such as defense, diplomatic, or military secrets.

tion and collection of evidence in accordance with a party's petition. Parties cannot petition the court to investigate and to collect any evidence randomly; there are limits to what evidence may be requested. Major examples of what kinds of material a petition may request are: 1) requested files and materials belonging to and kept by a related government department, which a party may only obtain by an application from the People's Court according to and within its duties and power; 2) requested materials that relate to national secrets, commercial secrets, or personal privacy; 3) requested material that a requesting party or his litigation agent, due to inevitable obstacles, could not collect themselves.³³

In practice, when a third party holds evidence, such as personnel records, bank account information, or medical records, the need often arises for the court to investigate and to collect such evidence. Usually this evidence is difficult for parties to obtain, so they need the court to intervene. In *June Lee v. Hawthorne*, if the plaintiff had reported to the police immediately following her injury, there would be a police incident report and a written record of the on-scene questioning by the police. Should a party need to use this police incident report as evidence in the litigation, they would need to petition the People's Court to receive the report from a local police station.

In addition to requesting relevant material from respective units (working departments), other methods of discovery include questioning the person under investigation, making a record of excerpts of certain documents made by the related unit, or collecting documents that are relevant to the facts of the case.³⁴ Examination is another important method to discover evidence. Inspection and examination are crucial ways to preserve, review, and certify the evidence offered by the parties.³⁵

Trial personnel of the People's Court conduct inspections, investigate the location, articles or objects in question by means of examination, photograph, and survey, either personally or by delegating to an appropriate person.³⁶ The written record of the inspection and examination results is called the transcript of inspection and examination.³⁷ In a civil lawsuit, it is often difficult, or even impossible, to bring some material evidence to the court or even identify the loca-

³³ See Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), arts. 64, § 2, 68 (2012).

³⁴ See Dan Harris, *How to Sue A Chinese Company. Part II. Discovery*, CHINA LAW BLOG (Nov. 9, 2010), http://www.chinalawblog.com/2010/11/how_to_sue_a_chinese_company_part_ii_discovery.html (last visited Apr. 16, 2014).

³⁵ See John J. Capowski, *China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*, 47 TEX. INT'L L.J. 455, 484 (2012).

³⁶ See Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 80 (2012).

³⁷ See *id.* art. 63 ("Evidence shall be classified as follows: . . . (8) transcripts of inspection and examination.").

tion of certain evidence.³⁸ In order to make the facts and the truth clearly known, the trial personnel must conduct an examination on site.³⁹ For example, in litigation involving real estate disputes, building foundation disputes, disputes between neighbors, and disputes over land and so forth, one must have a clear understanding of the site. After conducting an on-site exploratory examination, the court personnel may better understand the situation and then make a record of the examination findings so as to present the relevancy of the site and/or items inspected. In addition to the written record, court personnel may conduct an on-site examination by taking photographs, video recordings, measurements, pictures, drawings or sketches, inspections, and by questioning relevant personnel.⁴⁰ Should scientific or technological problems surface during the course of an examination, the court may hire an appraisal expert to participate.⁴¹

In *June Lee v. Hawthorne*, one of the defendants may claim he resided in an apartment with no window or balcony facing the street or with a window or balcony with a different orientation, making it impossible for him to throw anything to any person below. On defendant's petition, the judge may conduct an exploratory examination to check out the orientation of the defendant's apartment in order to draw a conclusion about which direction the window or balcony faces.

3. Expert Evaluation

The expert evaluation utilizes specialized professional knowledge to identify or make an assessment.⁴² An expert is a person, either hired or appointed, who analyzes some specialized issue based on available factual materials, and who offers an assessment from this specialized perspective.⁴³ In China, an expert evaluation in a civil lawsuit can include the following: medical, documentation, accounting, technology, product quality, behavioral competency, etc.⁴⁴ In liability compensation cases, the amount of the compensation may vary according to the level of injury inflicted because the nature of the plaintiff's injury determines

³⁸ See *id.* art. 70.

³⁹ See *id.* art. 80.

⁴⁰ See *id.* art. 70.

⁴¹ See *id.* art. 79.

⁴² See *China Law Expert Witness Testimonial Service*, CHINA LAW BLOG (Sept. 15, 2012), <http://www.chinalawblog.org/law-topics/litigation-lawyer/277-china-law-expert-witness> (last visited Apr. 16, 2014); Zhang & Zwier, *supra* note 26, at 443.

⁴³ See Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 76 (2012); *China Law Expert Witness Testimonial Service*, *supra* note 42.

⁴⁴ See Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 76 (2012).

the value of compensation.⁴⁵ Therefore, the opinion of an expert is very critical.⁴⁶

After the court approves a party's petition to conduct an expert evaluation, both parties will first negotiate for a qualified institution or person to conduct the assessment or appraisal.⁴⁷ Should this negotiation fail, the court would then make an appointment for the case. In order to assure that an expert will come to a fair conclusion, China implements a withdrawal system.⁴⁸ For instance, a court cannot assign an expert to a case when any of the following applies: he is a party or a near relative of a party or litigation representative to the case; he has a personal interest in the case; or he has some other relationship with a party or litigation representative to the case which could influence the impartial adjudication.⁴⁹ Parties have the right to petition for the withdrawal of an expert they deem ineligible either by an oral or written application.⁵⁰

Parties may file an objection to the opinion of the expert.⁵¹ For instance, a party may request re-evaluation if one of the following situations applies: 1) the evaluation unit or the appointed individual did not possess the necessary certified qualifications; 2) the evaluation process seriously violated the law; 3) the expert opinion was obviously made with insufficient evidence; 4) the court cannot accept the presented material as evidence after cross examination.⁵²

In the past, an expert did not testify in court, which not only made it difficult for the court to ascertain the facts, but also reduced parties' acceptance of the verdict.⁵³ The Civil Procedure Law added a provision permitting the expert to testify in court.⁵⁴ According to the law, once the court notifies the expert to

⁴⁵ See *China Law Expert Witness Testimonial Service*, *supra* note 42; Zhang & Zwier, *supra* note 26, at 444.

⁴⁶ See Zhang & Zwier, *supra* note 26, at 443.

⁴⁷ See *id.* Most times the party's petition should govern the evaluation, but in some special instances the court should appoint the evaluation expert if it is necessary. See *id.*

⁴⁸ See Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 44 (2012).

⁴⁹ See *id.* arts. 44–45.

⁵⁰ See *id.* art. 44.

⁵¹ *Id.* art. 78 (“If the parties questioned the accuracy of the opinion of the expert, or the court deemed it is necessary for the expert to testify in court the expert shall testify in court. If the expert failed to testify in court, the opinion of the expert cannot be used as basis of fact finding; the party who paid evaluation fee may request refund.”).

⁵² See Zuigao Renminfayuan Guanyu Minshi Susong Zhengju De Ruogan Guiding (最高人民法院关于民事诉讼证据的若干规定) [Certain Provisions of the Supreme People's Court on Evidence in Civil Procedures] (promulgated by the Supreme People's Court, Dec. 21, 2001) art. 27 (2001).

⁵³ Zheng Xiaoqiong, *Civil Procedure Sound Proof System Proposed Draft Amendment to Crack Expert Witness “Double Low” Problem*, LEGAL DAILY (Nov. 4, 2011), http://www.legaldaily.com.cn/News_Center/content/2011-11/04/content_3078082.htm?node=33907 (last visited Apr. 16, 2014).

⁵⁴ See Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 78 (2012).

testify in court, the expert shall testify in court.⁵⁵ If the expert fails to testify in court, there are two results: one, the court cannot use the opinion of the expert as a basis of fact finding; and two, the party who paid the evaluation fee may request a refund.⁵⁶

The Civil Procedure Law also added another provision concerning a person with specialized knowledge attending the trial.⁵⁷ If one party questions the accuracy of an expert opinion, in addition to applying for the expert to testify in court, that party can also apply for the court to notify another person with specialized knowledge to attend the trial, and that person may impeach or corroborate the expert's opinion.⁵⁸ Through the impeachment or corroboration by this person with specialized knowledge, the judge may better comprehend and evaluate the expert's opinion. When deciding whether to accept the expert's opinion, the judge may consider the expert's view.⁵⁹

4. Evidence Exchange

The Chinese system of evidence exchange assimilates a commensurate system of disclosure from the U.S. discovery process.⁶⁰ This system requires both parties to disclose evidence and information on their own initiative prior to requesting any relevant evidence and information from an opponent.⁶¹ After the disclosure, parties then have the right to request needed information.⁶² The evidence exchange system provides ample opportunities for both parties to collect and disclose evidence. Due to the weak ability and little legal awareness of the majority of litigants in China at the present, this discovery process is not yet fully functioning.⁶³ Should one party be surprised when he receives the opponent's evidence, in general he would then want more time to gather additional evidence in light of the new discovery. This situation of going back and forth in gathering

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* art. 79 ("The parties may apply to the court to notify the person with specialized knowledge to attend court, and the person with specialized knowledge may offer his opinion on the opinion of expert or specialized issues.")

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* art. 133 ("[The] people's court shall handle the cases entertained in accordance with the following circumstances: . . . (4) if the case needs a trial, the people's court shall request the parties to exchange the evidence and make the disputes clear.")

⁶¹ See FED. R. CIV. P. 26.

⁶² LUXUAN BAI, *THE CIVIL PROCEDURE LAW OF THE UNITED STATES OF AMERICA* 80 (1998).

⁶³ See Jianfu Chen, *Implementation of Law in China—An Introduction*, in *IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA* 1, 14 (Jianfu Chen et al. eds., 2002); Peggy McNerny, *Modern Legal Profession in China Is Only 35 Years Old*, UCLA INT'L INST. (Jan. 28, 2014), <http://web.international.ucla.edu/Institute/Article/136768> (last visited Apr. 16, 2014) (exploring the evolution of the legal awareness of ordinary Chinese citizens).

new evidence prolongs the litigation process. Thus, Chinese law regulates the system of evidence exchange by directing parties to exchange evidence that is already in one's possession, giving each party needed evidence and a better understanding of the opponent's evidence, so that both parties will have a fixed set of evidence discovery prior to the trial.⁶⁴ This provides each party with a better and clearer knowledge of the details of the case, the weaknesses and strengths of the evidence on both sides, and a better estimate of the litigation costs, as well as the end result. After weighing the possible benefits, parties can make a wise decision concerning settlement or trial.⁶⁵

The judge or the clerk should make a record of undisputed facts and evidence in the files during this process of evidence exchange.⁶⁶ Disputed evidence still in need of proof is recorded and categorized according to the facts and the basis of objection to disputed evidence should also be recorded. After evidence has been exchanged, the judge determines the major disputed issues. The schedule of exchange may be negotiated by parties and then approved by the People's Court, or the schedule may be set up by the court.⁶⁷ In practice, the court schedules the majority of evidence exchanges.⁶⁸

B. Advantages and Disadvantages of the Evidence Discovery System in China

The most distinctive feature of evidence discovery in Chinese civil litigation is that the judge controls the development of the entire evidence investigation process.⁶⁹ The judge has the leading power over collection, preservation, offering, and examination of the evidence. This system, therefore, can be referred to as a discovery model led by judges.

⁶⁴ See Zhonghua Renmin Gongheguo Minshi susong fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 133(4) (2012).

⁶⁵ See *id.*

⁶⁶ See Paul J. Schmidt, *A Review of China's New Civil Evidence Law*, 12 PAC. RIM L. POLY. 291, 310 (2003).

⁶⁷ See generally Hui et al., *supra* note 24 (explaining the process of evidence exchange, with particular emphasis on intellectual property cases).

⁶⁸ See *id.*

⁶⁹ See Capowski, *supra* note 35, at 469.

1. The Advantages of This Model

a. Judge-led Discovery Is More Effective in Time Control and in Preventing Prolonged Litigation

A judge's proactive intervention into the discovery process with his judicial power helps to reduce some party actions resulting from pettiness and bickering, both before and during the trial, which prevents parties from prolonging the litigation process.⁷⁰ The Civil Procedure Law clearly regulates the time limit for the trial; judges must conclude the litigation prior to the end of the time limit.⁷¹ This also prompts judges to monitor the progress proactively and to set a time limit for presenting the evidence, which further prevents the prolonging of the case.

b. Judge-led Discovery Maintains a Certain Degree of Balanced Footing for Both Parties in the Litigation

Because of the judge's neutral stance in all civil lawsuits, the court should collect evidence in a manner that is fair to both the plaintiff and the defendant when it is necessary to do so.⁷² This action may prevent, to a certain degree, the inherent unfairness caused by the unequal capabilities of litigants. The action may also help to balance the sharp contrast of the litigants' strengths and weakness. On the other hand, many civil lawyers act as the incarnated representative of their clients. The lawyers come from the perspective of protecting their clients' legal rights and benefits; they only seek to gather evidence favorable to their clients. In a nation that does not practice a mandatory legal representation system, such as China, many litigants cannot hire a lawyer, or at least not a competent lawyer, to represent them either due to economic factors or to their own unwillingness.⁷³ This leads to some litigants, who do hire competent lawyers, having a greater ability to present evidence than their opponent. As only one party may be presenting evidence, facts critical to the entire case may remain un-

⁷⁰ See *id.* at 469–71.

⁷¹ See *Zhonghua Renmin Gongheguo Minshi susong fa* (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 149 (2012). Article 149 of the Civil Procedure Law states:

A People's Court shall complete the adjudication of a case to which ordinary procedure is applied within six months after the case is accepted. Where an extension of the term is necessary for special circumstances, a six-month extension may be given upon the approval of the president of the court. Any further extension shall be reported to the People's Court at a higher level for approval.

Article 161 states: "The People's Court shall complete the adjudication of a case to which the summary procedure is applied within three months after the case is accepted."

⁷² See Capowski, *supra* note 35, at 484.

⁷³ See *id.* at 469–71; Zhang & Zwier, *supra* note 26, at 440 n.111.

known. Some of the key evidence needed for the case may not be collected because one party's litigation ability is weaker, or the party does not know how to collect evidence. In this situation, the judge will be able to tilt the balance appropriately by initiating the collection of certain evidence or by requesting a party to provide comparable evidence after exercising the right of explanation.⁷⁴ These types of actions will benefit the examination of the facts, and could prevent, to a certain degree, any unfairness that could result from economic inequality.

c. Judge-led Discovery Is Better Targeted and Prevents Waste

Judges have the responsibility and the obligation to examine the facts, and, even more so, the power to clearly investigate and examine all relevant evidence. In particular, evidence should be focused on, and material to, the points of dispute. Evidence collection should proceed mainly around the focal points of the dispute raised by the parties, as well as according to the nature of the facts in the case. In contrast, when one party expands its evidence collection by gathering irrelevant evidence, time and money is wasted.

2. The Disadvantages of This Model

a. Judge-led Discovery Misplaces the Judge's Role

Since the Chinese civil litigation system places great emphasis and responsibility in the hands of the judge to determine the facts, the judge's function in evidence discovery has surpassed that of the parties involved. This kind of evidence discovery contributes to the misplacement of the judge's role.⁷⁵ First, the role of the judge shifts from judging facts to collecting facts.⁷⁶ Because of the judge's active involvement in evidence collection, it is inevitable that he will favor one of the parties, thus causing imbalance between the two parties, and destabilizing the foundation of the adversarial system.⁷⁷ Therefore, the parties and the general public could easily question the judge's neutral judicial stance and fair judgment. Second, judge-led discovery violates the principles of the separation of prosecution and trial and of the judge being a neutral party in a trial.⁷⁸ To have the judge himself make a judicial judgment on the case after the court collects evidence on its own or guides litigants to collect relevant evidence obviously casts a suspicion on the judge who is acting both as an athlete and a referee. Also, if a judge coordinates the collection of evidence for one of the par-

⁷⁴ See Capowski, *supra* note 35, at 469–71.

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *id.*

ties before listening to both parties' arguments, it is unavoidable for the judge to be influenced by his first impression. The judge's first impression may cause a biased understanding on the nature of the case before the trial preparation.⁷⁹

b. Judge-led Discovery Does Not Provide Adequate Methods for Parties to Collect Evidence

The Civil Procedure Law makes the court the main body of the evidence investigation process.⁸⁰ The court's evidence collection according to its functions and power is stated more comprehensively and it can be compulsorily enforced. Article 67 of the Civil Procedure Law entitles the People's Courts to the right to collect evidence from relevant units and individuals, who cannot refuse.⁸¹ At the same time, Article 114 of the Civil Procedure Law states that the courts have the obligation to reprimand or impose a fine upon units or individuals who refuse to abide by or hinder a court's evidence gathering process.⁸² In addition, the courts

⁷⁹ See Baisheng Yang, *The Court's Right to Inquiry and Right to Obtain Evidence Should Be Cancelled*, 6 J. ADULT EDUC. COLL. OF HUBEI UNIV. 52, 52–55 (2008).

⁸⁰ See Capowski, *supra* note 35, at 470–71 (“[T]he goal of the Chinese civil process is to seek ‘objective truth’ beyond any doubt; that is, the truth ascertained by the court must be completely consistent with the fact. The court must ascertain all the facts relevant to the case, even those that are not claimed or undisputed. If any party cannot prove a specific fact, the court should investigate and collect the evidence to prove it.”) (quoting Jianhua Zhong & Guanghua Yu, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved This Goal?*, 13 J. TRANSNAT'L L. & POL'Y 393, 400–01 (2004)).

⁸¹ *Zhonghua Renmin Gongheguo Minshi susong fa* (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 67 (2012). (“[The] People's Court shall have the authority to obtain evidence from any relevant units or individuals, and such units or individuals may not refuse to provide evidence.”).

⁸² *Id.* art. 114. Article 114 of the Civil Procedure Law states:

If a unit that has an obligation to assist in judicial investigation or enforcement commits any of the following acts, the People's Court may order the unit to perform its obligation but also impose a fine on the unit:

- (1) Refusing or obstructing a People's Court from investigation or collecting evidence;
- (2) The relevant entity refuses to assist in inquiring, freezing, or transferring funds after receiving a notification form the People's Court for Enforcement Assistance;
- (3) The relevant entity refuses to assist in withholding the income of the party against whom enforcement is sought, handling the transfer of a relevant property right certificate, or delivering a relevant bill, certificate or license or any other relevant property, after receiving a notice of enforcement assistance from the people's court.
- (4) The relevant entity refuses to assist in enforcement . . . Where an entity commits any of the conduct in the preceding paragraph, the people's court may impose a fine on the primary person in charge or directly liable persons of the entity; and . . . may detain such persons and offer judicial recommendations to the supervisory authority or other relevant authorities regarding disciplinary actions against such persons.

have the right to compel units or individuals to carry out their obligation to assist the courts.⁸³ Courts may fine either the directly responsible officials or their supervisors.⁸⁴ Furthermore, courts have the right to detain those who fail to carry out their duties to assist the court and to give judicial suggestion of disciplinary punishment to either its supervisory department or relevant institution.⁸⁵

The rights of litigants and lawyers, on the contrary, have not received the attention they deserve. Although the litigants' responsibility to offer proof has been emphasized, their rights to collect evidence are not protected by a commensurate system. Article 49 and Article 61 of the Civil Procedure Law stipulate that litigants and lawyers have the right to collect evidence and to review relevant materials of the case.⁸⁶ Article 35 of the Lawyers Law states that, depending on the need of the case, lawyers may petition the People's Court or the People's Procuratorate⁸⁷ to help collect evidence or to petition the People's Court to officially notify witnesses to testify in courts.⁸⁸ Lawyers who investigate and collect evidence on their own may investigate or carry out relevant tasks to related units or individuals by showing their lawyer certificate or a certificate from their law firms.⁸⁹ Although the Lawyers Law provides general principles, no details are available on how the litigant's representatives are to collect and preserve evidence, on what kind of procedure they need to follow, or on how their rights to collect evidence could be appropriately protected.⁹⁰ Therefore, it is difficult for lawyers to fully exercise their functions. For example, the Lawyers Law does not require a third party to provide evidence to any litigating party or his agent.⁹¹

Id.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* art. 49, §§ 1–2 (“The parties shall have the right to appoint representatives, request recusals of adjudicating personnel, collect and provide evidence, engage in debate, request mediation, file an appeal, and apply for an enforcement of judgments. The parties may consult the materials relating to the court proceedings of the case and copy the materials and other legal documents pertaining to the case. The scope and rules for consulting and copying thereof shall be specified by the Supreme People's Court.”).

⁸⁷ Another acceptable translation of the Chinese word for “Procuratorate” is “Prosecutor's Office.”

⁸⁸ Zhonghua Renmin Gongheguo lushi fa (中华人民共和国律师法) [Law of the People's Republic of China on Lawyers] (promulgated by the Standing Committee Nat'l People's Cong., Oct. 28, 2007, effective Jun. 1, 2008), art. 35, § 1 (2008) (“The retained lawyer may apply to the People's Procuratorate or the People's Court to collect or subpoena the evidence, or apply to the court to summon the witness when necessary.”).

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See id.*

Also, a third party can refuse to provide evidence by giving various excuses.⁹² For example, a government institution could refuse to provide evidence by alleging it is confidential material. Similarly, a bank and hospital may refuse to provide account information and medical record by reason of confidentiality. Moreover, parties and agents are prohibited from taking punitive action when the third party refuses to provide evidence without any good cause.⁹³ This flawed discovery procedure leads to incomplete collection of evidence.

c. Judge-led Discovery Increases the Judge's Burden And Hinders the Mission of a Complete Examination of All Evidence

Because the judge has the responsibility and the obligation to examine all the facts, the parties are dependent on the judge.⁹⁴ The Civil Procedure Law stipulates that, “for the evidence that cannot be obtained by any parties or their litigation representatives because of some realistic reasons,” parties may petition for an investigation by the court based on the court’s function and power.⁹⁵ Since it is difficult to define “realistic reasons,” in practice litigants file numerous petitions for court investigation to the civil trial department.⁹⁶ The petition for court investigation has almost become a norm for most parties and their lawyers. In addition to their workload, judges bear the added pressure of facing discipline if they make mistakes.⁹⁷ To fulfill the responsibility of conducting a complete examination of the facts, judges tend to lean toward proactively collecting evidence.⁹⁸ In the litigation process, the burden of evidence collection should fall on the parties originally involved, but instead the judge bears the burden under the current model. It is not realistic, or even possible, for a judge to spend the

⁹² Chen Yiou, *On the Development and Current Status of Chinese Lawyer's Right to Investigate and Collect Evidence*, MODERN COMMERCE INDUSTRY, 2011.17, at 236 <http://mall.cnki.net/magazine/article/XDSM201117148.htm> (last visited Apr. 16, 2014).

⁹³ Daimao Hua, “Lawyers Law” *New Right of Investigation and Evidence Collection*, 21 J. HUBEI CORRESPONDENCE UNIVERSITY 63, 63 (2008).

⁹⁴ Zhonghua Renmin Gongheguo Minshi susong fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 64 § 2 (2012). (“For the evidence that cannot be obtained by any parties or their litigation representatives because of some realistic reasons or for the evidence that the People’s Court considers necessary for adjudicating the case, the People’s Court shall investigate and collect such evidence.”).

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ *See* He Wen-yan & Yung-an Liao, *The Reflection on the System of Enforcing the Accountability of Mistrial*, in THE EXPLORATORY STUDY OF THE THEORY AND THE REFORM OF THE CIVIL LITIGATION 412, 412–22 (2002). The court will discipline the judge if it thereafter proves the verdict false or finds the judgment legally wrong. *See id.*

⁹⁸ *See* Capowski, *supra* note 35, at 469–71.

necessary energy to investigate and to collect the evidence for every single case, given the many cases over which each judge presides.

C. Necessary Considerations and Suggestions to Better Evidence Collection

1. Necessary Considerations to Better Evidence Collection

Before further improving the system, considerations should be given to, at the least, the following three elements:

a. Considerations Concerning China's National Litigation and Cultural Tradition

Any reform and improvement of a legal system must be compatible with the national historical tradition, legal practice, and litigation culture. Even what legal experts deem the best system will not have any vitality if there is no public acceptance. Justice is not a decoration for any one individual to enjoy alone. Consequently, reformers need to fully consider the Chinese reality and Chinese tradition.

For a long time, the Chinese civil litigation system was inquisitorial.⁹⁹ The court and the judge both played a major role in collecting evidence. Parties were heavily dependent on the court to a certain extent. Because China does not practice a system requiring compulsory legal representation by lawyers, the parties' ability to collect evidence has often been weak. Meanwhile, China has always stressed that a trial should clarify the facts, and the judge should be responsible for determining the facts of the case. In order to clarify the facts, the courts have to consider each party's strengths and weaknesses regarding offering evidence and be flexible where appropriate. Therefore, the entry point of the reform should focus upon the ability of parties to collect and offer evidence. By gradually strengthening the parties' ability to present evidence, courts may gradually withdraw from being involved in evidence investigation and collection.

b. Lessons From Other Countries and Regions

As a Chinese proverb goes, "stones from other mountains may help to polish a piece of local jade." In considering the foundations of litigation tradition and the current legal system in China, reformers may find a better solution by utilizing the essences of foreign or other regional legal systems. Parties and law-

⁹⁹ See Peter K. Yu, *An Action Plan to Reinvent U.S.-China Intellectual Property Policy*, in 2 COMMENTARIES ON LAW & PUBLIC POLICY 77, 152 (Robert McGee ed., 2002).

yers in many countries and regions are entitled to employ more comprehensive methods of collecting evidentiary material to assure full evidence discovery.¹⁰⁰

Some countries and regions within the tradition of the Continental Law System have, similar to the U.S. discovery process, relevant measures to assure that the parties can investigate and collect evidence.¹⁰¹ For example, based on a revision of the Civil Litigation Law in Germany, which took effect in 2002, the rules clarified that a party who bears no burden of proof and a third party have the obligation of rendering documents when requested by the other party.¹⁰² In 1996, Japan revised its Civil Litigation Law to expand the method of collecting evidence for parties, with such important and substantial changes as requiring evidentiary disclosure for both parties to prevent possible difficulties in presenting litigation materials which would favor any one party.¹⁰³ The Civil Litigation Law in Japan requires a party to present its claims within a confirmed time frame, and to prepare necessary requests for evidence to the opponent, so the other party may provide a written response.¹⁰⁴ This system follows the U.S. discovery procedures.¹⁰⁵ There is no doubt that the above mentioned references are good models, and are worthy of research and study.

c. Summary of Judicial Practice and Reform Taking Place in China

Many regions across China are exploring some systems of investigating and collecting evidence today. Reformers should study these explorations and reforms so that effective, mature, and experienced practices may be elevated to the legislative level and become law. For example, one common current practice is for a representing law firm to send out a letter with questions by the lawyer.¹⁰⁶ This practice is similar to the process of interrogatories in the U.S. legal system.¹⁰⁷ China can affirm this practice from a legal point of view and advance it to be a better and more complete practice. Another practice which recently surfaced in China is that of evidence collection conducted by a private investigator.¹⁰⁸ Because of a lack of clear legal regulation on the subject, there is an on-

¹⁰⁰ See Capowski, *supra* note 35, at 492–93.

¹⁰¹ See Yuemin Xiong, *An Analysis on the Evidence Gathering System of Civil Procedure in the Continent Law System*, J. GANSU POL. SCI. & L. INST. 1, 3 (2004).

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ See Craig P. Wagnild, *Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation*, 3 ASIAN-PAC. L. & POL'Y J. 1, 15 (2002).

¹⁰⁵ *See id.*

¹⁰⁶ See INGEN-HOUSZ, *supra* note 17, at 1 (explaining demand letters in Chinese civil litigation).

¹⁰⁷ *See id.*; see also FED. R. CIV. P. 33 (interrogatories).

¹⁰⁸ *Private Investigators Debated*, CHINA.ORG (Sept. 5, 2001), <http://www.china.org.cn/english/2001/Sep/18678.htm> (last visited Apr. 16, 2014).

going controversy on how to treat any evidence collected by a private investigator.¹⁰⁹ Regulators must clear this hurdle to better improve China's legal system.

2. Suggestions to Improve Evidence Discovery

When it comes to the revision of Chinese civil litigation law, it is necessary to enhance the parties' ability to offer evidence. In particular, the law should grant lawyers the right to investigate and collect evidence. Otherwise, parties can only resort to the court for help, in which case the judge ends up collecting evidence and is trapped in the dual roles of evidence collector and evidence examiner. At the same time, the parties' obligation to offer evidence should be emphasized.

a. Techniques to Improve the Methods for Parties to Collect Evidence

i. Establish the Petition System of Investigation Orders for Parties and Their Attorneys.

The law should allow parties and lawyers to apply for investigation orders when they are investigating and collecting evidence. The court should issue investigation orders immediately after reviewing a petition and finding it necessary to do so. The court should deliver investigation orders to both the petitioner and the party who is being investigated. The law should clearly state that the investigated party cannot refuse investigation. For those units and individuals who violate the obligation of investigation, sanction and/or punishment should be strictly enforced as if the party committed a civil litigation violation.

ii. Establish That a Court Can Order Evidence Production

When an opponent or a third party possesses written documents, video and audio materials, and other physical evidence, the law should allow a requesting party to apply for a court order to render such evidence. The court should issue an order for the submission of such evidence after examining the application and determining that the request is within reason. When requested parties refuse to provide evidence without justifiable reasons, the court should declare the statement claimed by the requesting petitioner to be true. If a third party, who has no connection with the subject litigation, refuses to provide requested evidence listed in the order, the court should take compulsory measures such as imposing a fine or detaining the refusing party commensurate to that of an obstructive action against civil litigation.

¹⁰⁹ *See id.*

iii. Establish a Questioning Process for Both Parties

Currently, lawyers ask questions to the opposition party by means of a lawyer's letter.¹¹⁰ Due to a lack of specific regulations in the law, the opponent does not have any obligation to respond.¹¹¹ Before any further improvement of evidence discovery procedure can take place, the law should affirm the following practice: when one party delivers a questioning letter to his opponent directly, they must file a copy of this letter with the court for the record. The law should regulate a maximum number of questions that may be listed in a questioning letter. Should the opponent refuse to answer, the requesting party may petition the court to compel the answer, either through notification or through a court order. Otherwise the court may make an unfavorable assessment against the opponent. The opponent may petition the court for non-action with a justifiable cause.

iv. Fully Utilize the Functions of Notary Agencies

A notary agency is a certification entity specializing in certifying the authenticity and legality of a certain civil legal action or certain facts with legal implications.¹¹² The notary deals with pre-trial evidence preservation, which is also one of the aspects of evidence discovery.¹¹³ Because of the special features of the notary, such as legality and professional self-discipline, the notarization that a notary agency renders is generally viewed with overwhelming credibility.¹¹⁴ The law should fully utilize the role of notary agencies in evidence discovery. In addition to the pre-lawsuit evidence preservation, when the parties and their lawyers need to investigate and collect evidence they can also employ a notary officer to notarize aspects of the evidence collected to prove the authenticity of investigated items. When a party requests an assessment or appraisal, the court should hire a notary agency to handle the request because it is not appropriate for court personnel to do so. On a party's petition, the law should also allow a court to appoint a qualified notary agency to the case.

¹¹⁰ See Kelly Bai, *Demand Letters Matter in China*, R&P LAWYERS (Jun. 4, 2013), available at <http://www.rplawyers.com/articles/demand-letters-matter-in-china/> (last visited Apr. 16, 2014).

¹¹¹ See *id.*

¹¹² See *China's Judiciary: Public Notary System*, CHINA.ORG, <http://www.china.org.cn/english/Judiciary/31141.htm> (last visited Apr. 16, 2014).

¹¹³ See *id.*; Zhonghua Renmin Gongheguo Minshi susong fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 67 (2012).

¹¹⁴ See Zhonghua Renmin Gonghe Guogong zheng fa Ying Wenban [Notarization Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2005, effective Mar. 1, 2006), art. 5 (2006).

v. Regulate the Power of Private Investigators to Collect Evidence

Private detectives often possess professional investigative technology and advanced investigation equipment.¹¹⁵ Approving evidence collection by private detectives enhances litigants' ability to offer evidence.¹¹⁶ Because private detectives often use some secretive methods, such as tracking, photographing, or recording, to obtain evidence needed by their clients, such behavior tends to easily invade an individual's personal right to privacy.¹¹⁷ Therefore, appropriate laws and regulations must be put in place to prevent any invasion of personal privacy by private detectives; this should ensure that they are required to act in compliance with relevant regulations and that they carry out the commensurate obligation of confidentiality. The law should prohibit private detectives from making improper use of the material produced by their investigation and they should shoulder all commensurate responsibility for any violation of such regulations.

b. Further Improve the Evidence Exchange System

The Chinese civil litigation system can only reach objective judgments when parties themselves conduct evidence exchange, regardless of how complex the case is or how much evidence the parties collect. The law should require evidence exchange to take place in all cases. At the same time, there should be a regulation to synchronize the evidence exchange process with the trial court. Further, the validity of evidence exchange should be clearly regulated. The evidence introduction should end when the parties complete the last evidence exchange. With exception for extraordinary reasons, the parties should not be able to offer any additional evidence. The law should also clearly state that the court may not deny any facts which the parties stipulate during the evidence exchange process, with exceptions permitted, such as when the parties stipulate under duress, coercion, or a major misunderstanding that distorts the facts. Lastly, there should be a commensurate penalty imposed when any party is in violation of the regulated evidence exchange process. For instance, the court may detain or fine those who disobey the court order or interfere with the process of evidence exchange. Undisclosed evidence should be prohibited from presentation as trial evidence unless it is with good reason. Should the failure to disclose certain evidence be caused by error and not by a deliberate act, the party should be able to petition the court to use the undisclosed evidence and the judge may accept the evidence. When this situation occurs, however, the opponent should also petition

¹¹⁵ See James T. Arredy, *Private Investigators Face Risks in China*, WALL ST. J. (Jul. 31, 2013), <http://online.wsj.com/news/articles/SB10001424127887323971204578629511362589362> (last visited Apr. 16, 2014).

¹¹⁶ See *id.*

¹¹⁷ See *Private Investigators Debated*, *supra* note 108.

for a postponement, as well as to request the other party to pay relevant costs of missed wages, travel expenses, etc.

c. Issuing a Time Limit on Evidence Submission

To better implement the law, sanctions should be available for a court to consider imposing on a party who did not timely provide evidence and fails to show good reason for the delayed production of evidence. For a long period of time, the Chinese legislature has adopted a theory of “introducing evidence at any time.”¹¹⁸ The Civil Procedure Law does not set forth any time limit for introducing evidence; thus, the parties are allowed to bring in new evidence at any stage.¹¹⁹ Due to the inadequate enforcement of a system which does not put a limit on presenting evidence and does not practice consolidating evidence, the courts are forced to conduct many sessions.¹²⁰ The entire litigation process is bogged down by discovering evidence, sorting out points of dispute, and conducting a trial all at the same time. It is difficult to have all evidence ready before trial under these circumstances. Therefore, parties often petition for collecting, assessing, certifying, surveying, exploring, examining, and requesting new evidence by the court long after the trial has begun.¹²¹ This phenomenon is prevalent and serious. Sometimes parties do not present evidence in the first trial, but offer the evidence in the second trial or in the retrial.¹²² This causes the original trial to stay in an unstable position which could be reversed by new evidence at any time. The court has to reopen the trial to question the evidence or witness to ensure truthfulness, thus creating a waste of litigation.

The Civil Procedure Law imposed some limit as to when the parties should provide evidence.¹²³ According to the law, the parties shall timely produce evi-

¹¹⁸ JIN YO-CHEN, *THE STUDY OF THE REFORM OF CIVIL LITIGATION SYSTEM* 159 (2001).

¹¹⁹ See *Zhonghua Renmin Gongheguo Minshi susong fa* (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 65 (2012).

¹²⁰ See *id.*; YO-CHEN, *supra* note 118.

¹²¹ See Zhang & Zwier, *supra* note 26, at 430.

¹²² See *id.* at 430–31, 447.

¹²³ Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 65, § 2 (2012). Article 65 Section 2 of the Civil Procedure Law states:

[T]he People's Court shall, in accordance with the claims of the parties and the situations of the trial, determine the evidence that the parties should provide and the time limit thereof. If the parties have genuine difficulty in providing evidence within the time limit, they may apply to the people's court for a prolongation; the people's court may prolong the time limit properly according to the application of the parties. Where a party provides evidence beyond the time limit, the people's court shall order him to explain the reasons; if he refuses to do so or the reasons are untenable, the people's court

dence to support their claims.¹²⁴ The court shall rule on the contents of evidence and time limit according to the claims and circumstances of the case.¹²⁵ If the party has difficulties producing evidence within the time limit, it may apply to the court for an extension, and the court may extend the limit when it sees fit.¹²⁶ If the party produces evidence after the time limit, the court shall ask for an explanation; if there is no justification, the court may decide not to admit the evidence or admit the evidence with a warning or fine according to the circumstance.¹²⁷

To better implement the law, it should impose strict sanctions on parties offering evidence after the due date. In principle, judges should not trust such belated evidence. Second, since China does not practice a system which requires parties to be represented by a lawyer in court, and since parties often lack the ability to offer evidence, there must be an exception allowed for parties to offer new evidence beyond the time limit under certain circumstances. There must be objective reasons for parties to offer new evidence after the time limit expires, including, for example, when parties could not gather evidence because of an irresistible force, malicious interference against the evidence-gathering party, intimidation or threats to witnesses, or removal or concealment of evidence. Moreover, parties should demonstrate good will by continuously offering new evidence after the time limit has expired. Such good will may include failing to obtain evidence despite having done their best to obtain evidence within the time limits.¹²⁸

d. Establishing a Civil Perjury Law

For a long period of time, Chinese civil legislation and the judiciary have failed to pay adequate attention to the act of perjury. In addition to a litigants' false statements, it is sometimes common for witnesses to give false testimony, and for agency and other professional personnel to present false certificates.¹²⁹

may, according to different situations, not accept the evidence, or accept the evidence but impose an admonition or fine upon him.

Id.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See Junlin Peng, *The Improvement of China's Evidence Exchange System for Civil Cases*, J. HUNAN INST. SOCIALISM 110, 111 (2006).

¹²⁹ See, e.g., Ian Johnson, *Trial in China Tests Limits of Legal System Reform*, N.Y. TIMES (Apr. 19, 2011), http://www.nytimes.com/2011/04/20/world/asia/20china.html?_r=0 (discussing allegations of false testimony in a high profile case) (last visited Apr. 16, 2014); Jeremy Page, *Prosecutors Wrap Up Case Against Bo Xilai*, WALL ST. J. (Aug. 25, 2013), <http://online.wsj.com/news/articles/SB>

There was even a situation where the same witness gave contradictory testimony for both the plaintiff and defendant.¹³⁰ All of this contributes to the prevalence of low credibility for both the parties' statements and the witnesses' testimony. This low quality evidence, in turn, affects the ultimate judgment on the facts of the case.

The perjury law stated in Article 305 of the Criminal Law of the People's Republic of China 1997 is only applicable to perjury committed during a criminal proceeding.¹³¹ Article 305 does not apply to perjuring parties in civil litigation, only in criminal cases.¹³² Consequently, the cost of violating the law is lower than that of complying with the law, exacerbating this perjury phenomenon. Therefore, it is necessary to establish the crime of civil perjury and to impose criminal penalties against those who obstruct the civil litigation enforcement policy. The parties and witnesses who purposely give false statements or testimony should be prosecuted criminally for their perjury. This will emphasize the seriousness and sanctity of litigation; all participants in civil litigation must be required to give true statements, and not be allowed to make false statements.

II. THE PROCESS OF CIVIL DISCOVERY IN MASSACHUSETTS

Discovery in all cases pending in state and federal courts is conducted by the attorneys, not by the judge. Judges generally do not get involved in discovery until one of the attorneys files a motion concerning discovery. Attorneys are free to use every discovery tool available in the jurisdiction where the lawsuit is pending, including interrogatories, depositions, motions, requests for documents and for admissions, physical examinations of items and of a party.

An attorney handling a civil case is free to conduct his own research concerning his client's claims. He can do this himself or hire a paralegal and/or an investigator. The attorney or person he hires can, for example, take photographs of the scene, interview witnesses, and do whatever investigation of his client's claim that the attorney deems necessary.

10001424127887324619504579033901415990172 (indicating use of fake medical certificates) (last visited Apr. 16, 2014).

¹³⁰ *Civil Action for Doubtful Testimony of Witness Shall be Finalized Separately*, 110 (Mar. 16, 2012), <http://www.110.com/ziliao/article-280246.html> (last visited Apr. 16, 2014).

¹³¹ *Zhonghua Renmin Gongheguo Xingfa* (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (promulgated by Order No. 83 of the President of the People's Republic of China, Mar. 14, 1997), art. 305 (1997) ("During the course of criminal procedures, any witness, expert witness, recorder, translator who purposely makes false testimony, makes expert evaluation, records, translates with an intention to frame others or conceal criminal evidence in the circumstances which have an important bearing on a case is to be sentenced to not more than three years of fixed-term imprisonment or criminal detention; when the circumstances are severe, to not less than three years and not more than seven years of fixed-term imprisonment.").

¹³² *See id.*

The process of discovery in a civil case refers to the process of how the opposing side learns of this investigation as well as the facts of the opponent's claims and defenses.

The law of the jurisdiction (the state where the lawsuit is brought and whether the lawsuit is filed in state or federal court) must be considered before discovery even begins. In Massachusetts, the plaintiff must be able to identify the person(s) who acted or failed to act before she may file suit.¹³³ In *June Lee v. Hawthorne*, until the plaintiff has identified the person who caused the board to drop, substantive discovery is unlikely to even begin.¹³⁴

A. Written Discovery Tools

The Massachusetts Rules of Civil Procedure (Massachusetts Rules) were modeled after the Federal Rules of Civil Procedure. Massachusetts Rule 26(b)(1) affords broad latitude in the discovery of relevant information and is not limited to the merits of the case or to the issues raised in the pleadings. As long as the "information sought appears reasonably calculated to lead to the discovery of admissible evidence," a court generally will find the request proper.¹³⁵ Relevant discoverable information includes documents, electronic discovery,¹³⁶ and medical records; in short, whatever is relevant and material to the claims and defenses. In *June Lee v. Hawthorne*, the court would consider the wooden board discoverable if it could be located and retained.

¹³³ See MASS R. CIV. P. 26(b)(1); *Alphas Co. v. Kilduff*, 888 N.E.2d 1003, 1013–14 (Mass. Ap. Ct. 2008).

¹³⁴ The plaintiff could sue John Doe/Jane Doe as a placeholder defendant until she is able to identify the resident she believes is responsible for her injury.

¹³⁵ See MASS R. CIV. P. 26(b)(1).

¹³⁶ *Id.* MASS R. CIV. P. 26 deals generally with discovery. See *id.* The Federal Court has amended Rule 26(f) to provide a procedure for electronically-stored information (ESI) discovery; Massachusetts has adopted amendments to Rules 16, 26, 34, 37 and 45, effective January 1, 2014, to address ESI. In cases involving vast amounts of ESI or ESI that is not available from reasonably accessible sources, the cost of production of ESI can be excessive. The producing party has to locate the ESI, as well as review it for relevance and privilege. But the cost to copy and transport ESI is basically eliminated and the cost to search can be dramatically reduced because the searching can be done electronically. When ESI is extensive, often one of the parties will initiate a motion to compel so that the ESI is preserved and so that the costs of locating ESI can be shared/reduced. The filing of this motion to compel in a civil case will often trigger judicial involvement in the discovery process. Electronic discovery, or e-discovery, is one of the biggest contributors to the costs of discovery. See ABA SECTION ON LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 60 (2009), http://americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report_aba_report.authcheckdam.pdf; Beisner, *supra* note 3, at 547.

1. Interrogatories

Massachusetts' discovery rules provide for interrogatories, which are essentially written questions that any "party may serve upon any other party."¹³⁷ Compared with other discovery mechanisms, interrogatories are limited in reach since "they may not be propounded to persons who are not parties."¹³⁸ The rules also restrict parties, without leave of court, to serving no more than thirty interrogatories upon another party.¹³⁹ Upon motion and a showing of good cause, however, a court may allow additional interrogatories. The requested party may also simply agree to answer additional questions, although this occurs infrequently.¹⁴⁰

In responding to written interrogatories, each party must "answer [the interrogatory] separately and fully in writing under the penalties of perjury."¹⁴¹ A reviewing court can treat answers that appear to be "evasive or incomplete . . . as a failure to answer."¹⁴² The requested party has a duty to consult available records, and to inquire of their "agents, servants and attorneys," in order to provide "full and true answers to the questions."¹⁴³ Unless a court grants a request for an extension, requested parties have no more than forty-five days after a party serves them with interrogatories to provide answers, or make relevant objections.¹⁴⁴

Should a party object to a specific interrogatory, the reasons for the objection must "be stated in lieu of the answer."¹⁴⁵ When a party objects to an interrogatory,¹⁴⁶ the opposing party may file a motion to compel, and a judge will decide whether to issue a court order that the party must provide an answer.¹⁴⁷

As a discovery tool, interrogatories can be instrumental in allowing one party to "explore [another] party's theory of the case."¹⁴⁸ In formulating interrogatories, a requesting party tries to design questions to learn material facts in

¹³⁷ MASS R. CIV. P. 33(a).

¹³⁸ JOSEPH R. NOLAN & BRUCE R. HENRY, 9 MASS. PRACTICE *Civil Practice* § 23.1 (2004).

¹³⁹ MASS R. CIV. P. 33(a)(2).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* 33(a)(3). Since answers are "signed by the party under oath, they may be used for any purpose, including being read into evidence at the time of trial." Nancy A. Newark & Laura R. Studen, *Preparing Discovery*, in MASS. SUP. CT. CIV. PRAC. MANUAL 8–21 (Hon. Paul A. Chernoff & Bruce T. Eisenhut, eds. 2008).

¹⁴² MASS R. CIV. P. 37(a)(3).

¹⁴³ See NOLAN & HENRY, *supra* note 138, § 23.2.

¹⁴⁴ MASS R. CIV. P. 33(a)(3)

¹⁴⁵ *Id.* Stated objections may be that the interrogatory is "irrelevant to the subject matter, not reasonably calculated to lead to admissible evidence, burdensome, oppressive, [attorney] work product privilege, attorney-client privilege and trade secret privilege." Newark & Studen, *supra* note 141, at 8–20.

¹⁴⁶ Often a party will assert an objection but, without waiving the objection, also provide a substantive answer to the interrogatory. In that case, the other party need not file a motion to compel.

¹⁴⁷ MASS R. CIV. P. 37(a)(2).

¹⁴⁸ See JAMES W. SMITH & HILLER B. ZOBEL, 6 MASS. PRACTICE *Rules Practice* § 33.4 (2006).

advance of depositions and the trial. Substantive interrogatories tailored to the case generally produce substantive answers. Answers to interrogatories could include material facts of the case such as the identity of witnesses and experts and any relevant knowledge or opinion they have related to the claims and defenses asserted. Parties may also learn the content of documents during the discovery process through answers to interrogatories.¹⁴⁹ The general background information gathered by answers to interrogatories can also create a “base of knowledge from which to formulate questions for oral depositions.”¹⁵⁰

In *June Lee v. Hawthorne*, the plaintiff would typically send interrogatories to each defendant and each defendant would send interrogatories to the plaintiff. These latter interrogatories would ask the plaintiff how, when, and where the accident happened, the details of her injuries and medical treatment, her pre-existing physical and medical conditions, and what investigation she has conducted: essentially the defendants would ask her about all the details of her claims. She, in turn, would ask each of the defendants what they know about how her accident occurred. For example, she would ask where they were at the time of her accident, what investigation each had done since learning of her accident and her claims, if they knew anything about the wooden board, what construction was being done, the building’s maintenance and inspection procedures, and the identity of any personnel involved in any maintenance or construction work at the relevant time.

2. Requests for Production of Documents

Another discovery method often utilized is a request for production of documents. Again, this particular request may only be served by a party upon another party.¹⁵¹ While the rules permit multiple and unlimited requests for documents/items, each must properly state the items sought for inspection by describing “each item and category with reasonable particularity.”¹⁵² By the document response, the designated documents can then be inspected, examined, and copied.¹⁵³ Requested documents could include any “writings, drawings, graphs, charts, photographs, phone-records, and other data compilations from which in-

¹⁴⁹ *Id.*

¹⁵⁰ SEE HON. WILLIAM G. YOUNG & HON. RALPH D. GANTS, LITIGATORS’ SUMMER CAMP 79 (2008).

¹⁵¹ MASS R. CIV. P. 26(a). The limited scope of such requests can be somewhat overcome. The rule entitles a party to subpoena a witness, who is not a party, to a deposition and to require that witness to bring his documents to that deposition. *Id.* 45.

¹⁵² *Id.* 34(b). The request must also “specify a reasonable time, place, and manner of making the inspection and performing the related acts.” *Id.* 34(a).

¹⁵³ NOLAN & HENRY, *supra* note 138, at § 24.1.

formation can be obtained”¹⁵⁴ The documents requested must also be in the “possession, custody or control” of the party served with the request.¹⁵⁵ There is no limit on the number of documents or categories of documents that a party can request.

In response to a request for documents, the party served may assert objections related to the request. The requested party may object on the grounds that the documents sought are not “relevant to the subject matter involved in the pending action.”¹⁵⁶ Courts often broadly construe relevancy to a pending action to allow production of documents in circumstances even when the “information sought will be inadmissible at the trial”¹⁵⁷ Documents requested, although relevant, may be objected to if privileged, prepared in anticipation of litigation, or if inspection and/or production would cause an undue burden.¹⁵⁸

In *June Lee v. Hawthorne*, each party would serve the other side with at least one request for documents. The plaintiff would likely ask the building management for all documents related to her accident including photographs of the scene, statements of any person interviewed, reports of any investigation of this accident or other similar incidents at least within a five year time frame. The plaintiff would likely also seek maintenance records, especially those concerning any construction work done with wooden boards at the time of her accident.

The defendants would likely request similar documents from the plaintiff; these would generally include reports of her investigation, witness statements, the clothes she wore (if torn by the board), photographs of the scene, photographs of her injuries, all medical records relating to treatment for injuries she sustained in this accident, her medical records for at least a ten year period preceding the accident, the board (if available), and any documentation from her employer of lost wages (if any are claimed).

3. Depositions

Besides written answers to interrogatories and document responses, depositions are probably the most important method of obtaining discovery. Depositions, or oral examinations, are broader than interrogatories because “any party may take the testimony of any person,” rather than just being able to seek discovery from a “party.”¹⁵⁹ The Massachusetts discovery rules govern deposition procedures. First, one party serves notice on the party or witness (called depo-

¹⁵⁴ MASS R. CIV. P. 34(a).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* 26(b)(1).

¹⁵⁷ *Id.*

¹⁵⁸ YOUNG & GANTS, *supra* note 150, at 86.

¹⁵⁹ MASS R. CIV. P. 30(a).

nent) they wish to depose.¹⁶⁰ Attorneys for all parties receive written notice of the deposition.¹⁶¹ At the deposition, each party, or that party's counsel, is given an opportunity to question the deponent except as to privileged information. The deponent is sworn and therefore obliged under law to give truthful answers to each question, and, on request, to produce authentic documents.¹⁶² A stenographer records and transcribes the entire deposition and the parties generally afford the deponent time to review, correct and sign the transcript under the pains and penalties of perjury. In Massachusetts, there is no limit, absent a court order, to the number of depositions that a party can take, and there are few practical constraints on depositions as a discovery tool.

If someone shows, however, that another party conducted a deposition "in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party," a court, upon motion, "may limit the scope and manner of the taking of the deposition."¹⁶³ Any party or deponent who believes that the deposition is being conducted in bad faith or to annoy, embarrass or oppress the deponent may seek court intervention to limit or cease the scope and manner of taking the deposition.

Each side can purchase the deposition transcript, which can be used during trial to examine the deponent. The attorney who noticed the deposition questions the deponent first. Once that attorney has finished his questions of the deponent, each other attorney/party may also question the deponent. The deposition concludes once each attorney/party has had two opportunities to ask questions of the deponent.

There are important differences between the Massachusetts Rules of discovery and the Federal Rules concerning discovery. The Federal Rules place inherent limitations on the number of depositions that may be taken, absent court approval.¹⁶⁴ Most important is that in cases filed in federal courts, the rules mandate certain initial discovery that must be automatically provided by all parties to a lawsuit.¹⁶⁵

¹⁶⁰ In rare instances a party can accomplish the deposition by serving written questions on the deponent and recording his answers verbatim.

¹⁶¹ MASS. R. CIV. P. 30. Notice of the deposition must be given pursuant to MASS R. CIV. P. 30(b). *Id.* The deposition may, by agreement or by leave of court, be audiovisually recorded. *Id.* A party desiring to take a deposition "shall give at least seven days' notice in writing to every other party to the action," stating the time and place of the deposition and the name and address of the deponent. *Id.* 30(b)(1).

¹⁶² *See id.* 30(b)(1). Massachusetts Rule 30(b)(1) states in pertinent part: "If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice." *Id.*

¹⁶³ *Id.* 30(d).

¹⁶⁴ *See* FED. R. CIV. P. 30.

¹⁶⁵ *See* Christine L. Childers, *Keep on Pleading: The Co-Existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26 (B)(1)*, 36 VAL. U. L. REV.

In *June Lee v. Hawthorne* the defendants would likely depose the plaintiff as well as all witnesses she has identified. Though plaintiffs often choose, for reasons of financial economy, to not take any depositions, she could also notice and take the depositions of any defendant or any witnesses identified by the defendants or depose any maintenance manager or under Rule 30(b)(6)¹⁶⁶ “person most knowledgeable” at Hawthorne about any prior similar incidents, if any, of “board droppings,” or any construction at that site close in time to July 4, 2009.

4. Requests to Enter Land and Other Inspections

Massachusetts Rule 34 permits any party to request the entry onto land for purposes of inspection.¹⁶⁷ In this case the defendants could seek either voluntary permission to enter into the premises and inspect how the board could have fallen or, if permission to enter is not granted, seek leave of court to so enter and inspect at least the grounds of the apartment building, any portion of the apartment building from which the board could have dropped, and the location where the plaintiff was at the time the board allegedly hit her. The inspection can include “measure[ing], survey[ing], photograph[ing], test[ing], or sampl[ing] the property or any designed object or operation on it,” within the parameters of reasonable discovery.¹⁶⁸ In cases involving equipment or product liability claims, and in *June Lee v. Hawthorne*, inspections may be made of the board, if it is still available, or of the piece of equipment at issue or a similar piece if the allegedly defective piece is no longer available. The party seeking this discovery needs only to serve a request for this discovery on the opposing side; the party seeking this inspection and entry onto land must obtain a court order only if a party objects to the request.¹⁶⁹

5. Physical and Mental Examination of Parties

Massachusetts Rule 35 permits a party to seek to have the opposing party, whose mental or physical condition is at issue in the case, examined by a doctor at the requesting party’s expense.¹⁷⁰ In *June Lee v. Hawthorne*, the plaintiff’s mental and physical condition is “at issue” as she is claiming a concussion, per-

677, 689–90 (2002). Since December 1, 2009, FEDERAL RULE 26(1) has required automatic “discovery of any non-privileged matter that [is] relevant . . . whether it [is] relate[d] to the claim or defense . . . of any . . . party.” *See id.*

¹⁶⁶ MASS. R. CIV. P. 30(b)(6). Massachusetts Rule 30(b)(6) allows a party to notice the deposition of a public or private corporation, partnership, association, or governmental agency and describe with particularity the matters on which examination is requested. *See id.*

¹⁶⁷ *See id.* 34.

¹⁶⁸ *See id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See id.* 35.

manent impairment in her memory, and various cognitive deficits. In considering whether to order the exam, the court must first determine both that the motion has “good cause” and that the person to be examined has been given notice of the motion.¹⁷¹ If it allows the motion, the court shall describe the time, place, manner, conditions and scope of the exam and the person(s) doing the exam.¹⁷² The person being examined has a right to receive the examiner’s report of the exam.¹⁷³ Failure of the examiner to provide the requested report may be cause to exclude the examiner from testifying at trial.¹⁷⁴

Prior to having the plaintiff examined by a doctor, the defendants are also allowed to first obtain and provide plaintiff’s medical records to one or more expert(s) to review and to obtain the expert’s preliminary opinion before seeking to have plaintiff examined.¹⁷⁵ This may permit the defendants a better basis for obtaining an expert opinion which, in all likelihood, will minimize any head trauma causally related to the board hitting the plaintiff on the head.

In *June Lee v. Hawthorne*, the defendant/owners of apartments may file a motion to have the plaintiff examined because she is claiming substantial injury as a result of the board hitting her. After first obtaining all of the plaintiff’s medical records and providing them to their expert physician(s) for review, the defendants will likely want to have the plaintiff examined both as to her physical and mental condition, since she is claiming both mental and physical injury.

6. Requests for Admission

Pursuant to Massachusetts Rule 36(a), any party may serve on any other party a written request for admission of the truth of any matter that relates to statements of opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.¹⁷⁶ The responding party must either admit or deny the request, file a written objection, seek a protective order from the court or assert, giving reasons, that he cannot admit or deny the matter.¹⁷⁷ This tool of discovery is not used nearly as often as interrogatories and requests for production of documents.¹⁷⁸

¹⁷¹ *See id.*

¹⁷² *See id.*

¹⁷³ *See id.*

¹⁷⁴ *See id.*

¹⁷⁵ *See id.*

¹⁷⁶ *See id.* 36(a).

¹⁷⁷ *See id.*

¹⁷⁸ Parties rarely answer requests for admission in a way that is productive or even meaningful and, as a result, is rarely used as a discovery tool.

Requests for admission often serve the function of judicial economy by saving precious trial time in narrowing the areas of controversy.¹⁷⁹ Requests for admission may be considered less of a “discovery tool” where a “moving party knows the facts and has the documents.”¹⁸⁰ In those circumstances, the moving party may simply wish to “eliminate the time and expenses entailed in proving these facts or in establishing the genuineness of the documents at trial.”¹⁸¹

7. Expert Witnesses

In Massachusetts and throughout the United States, civil litigants and their counsel typically determine whether one or more expert witness will be necessary at trial and, if so, the party must select and retain their own expert.¹⁸² As part of discovery, each side generally serves the other with interrogatories, including an expert interrogatory used to discover the expert’s opinions.¹⁸³ Massachusetts Rule 26(b)(4)(A)(i) requires a party receiving an expert interrogatory to “identify” each expert, “the subject matter on which the expert [will] testify,” and “the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.”¹⁸⁴ The discovery rules¹⁸⁵ with respect to experts serve to apprise the parties of what the evidence is likely to be at trial; in short, it prevents trial by ambush.

In addition to each side selecting one or more expert witnesses, Federal Rule of Evidence 706¹⁸⁶ (Rule 706) provides a basis for a federal trial judge’s

¹⁷⁹ See NOLAN & HENRY, *supra* note 138, § 25.2.

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

¹⁸² MASS R. CIV. P. 26.

¹⁸³ STEPHEN N. SUBRIN & MARGARET Y.K. WOO, *LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT* 138 (2006).

¹⁸⁴ MASS R. CIV. P. 26(b)(4)(A)(i).

¹⁸⁵ In addition to interrogatories in a personal injury case, where a person’s physical or mental condition is in dispute, the Massachusetts discovery rules under Massachusetts Rule 35(b), require the party who intends to use the examining physician’s report of a litigant’s physical or mental examination (pursuant to Rule 35(a)) to provide that report, if requested, to the opposing party. MASS R. CIV. P. 35(b)

¹⁸⁶ FED. R. EVID. 706. Rule 706 states that:

(a) Appointment Process. On a party’s motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert’s Role. The court must inform the expert of the expert’s duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

- (1) must advise the parties of any findings the expert makes;
- (2) may be deposed by any party;

appointment of an independent expert. In addition to Rule 706,¹⁸⁷ “the inherent power of the court” explicitly allows federal trial judges, and implicitly Massachusetts trial judges, to retain neutral experts. Both federal and Massachusetts judges may do so even when the parties have their own experts.¹⁸⁸ The federal courts have the inherent authority to also retain technical advisors who simply advise the court.¹⁸⁹ Appointing “disinterested expert witnesses by the Court is one of the expedients employed for reforming the defects of the partisan system of providing testimony.”¹⁹⁰

A trial judge’s “power to call witnesses generally and expert witnesses particularly seems fairly well recognized in this country.”¹⁹¹ “Appellate courts no longer question the inherent power of a trial court to appoint an expert under proper circumstances, to aid it in the just disposition of a case.”¹⁹² Because they are required to be zealous advocates for their clients, attorneys need to retain one or more experts in a case where the trial issues concern technical matters not within the knowledge of the average person. These experts charge fees, often high hourly rates, for their work, including for their time spent testifying. It sometimes appears that an attorney is readily able to find and hire an expert who will testify to whatever the lawyer needs for his case. It is in large measure because the expert testimony is so partisan and biased, that trial judges need the ability to retain, when appropriate, an independent, neutral expert witness.

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court.

(e) Parties’ Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

Id.

¹⁸⁷ Massachusetts Rule of Evidence 706 has language similar to Federal Rule 706 and has been approved by the Supreme Judicial Court in Massachusetts. *See* MASS. R. EVID. 706.

¹⁸⁸ *See* Jeffrey L. Snow & Andrea R. Reed, *Technical Advisors and Tutorials: Educating Judges*, 21 INTELL. PROP. LITIG. 1, 1 (2009); *Commonwealth v. Aponte*, 462 N.E.2d 284, 287 (Mass. 1984); *Commonwealth v. Lykus*, 327 N.E.2d 671 (Mass. 1975).

¹⁸⁹ *Reilly v. United States*, 863 F.2d 149, 154 (1st Cir. 1988) (stating that the District Court has “inherent authority” to appoint an expert as a technical advisor for the judge). Expert witnesses, including those appointed by the judge, testify in court and are subject to cross-examination. In the federal system, technical advisors do not testify but only advise and assist the court.

¹⁹⁰ 9 WIGMORE, EVIDENCE § 2486 (3rd. ed. 1940); *see also* 2 WIGMORE, EVIDENCE § 563 (setting forth statutes in various jurisdictions establishing procedures for the use of expert witnesses by the courts.); *Hart v Cmty. Sch. Bd. of Brooklyn*, 383 F. Supp. 699, 762–64 (E.D.N.Y. 1974).

¹⁹¹ Charles T. McCormick, *Some Observations upon the Opinion Rule and Expert Testimony*, 23 TEX. L. REV. 109, 131 (1945).

¹⁹² *Scott v. Spanjer Bros, Inc.*, 298 F.2d 928, 930 (2d. Cir. 1962) (affirming the District Court’s authority to appoint impartial medical expert to instruct the jury and the judge where neither of the parties’ experts were available to testify when the case was ready for trial).

In addition to appointing experts who provide testimony in court and are cross-examined, federal trial judges have the “inherent authority” to retain technical advisors.¹⁹³ Unlike experts who testify and are subject to cross-examination, technical advisors do not provide testimony but only advise the court.¹⁹⁴ One such case is *Reilly v. U.S.*, a medical malpractice jury-waived case involving the birth of a child at a U.S. naval hospital.¹⁹⁵ As the government conceded liability, the only issue at trial was the amount of damages; the award depended on the judge’s assessment of the nature and extent of the plaintiff’s severely brain-damaged child’s injuries. Without the knowledge or consent of the parties, the trial judge appointed a non-testifying neutral technical advisor to assist him in assessing the “calculation of a damage award.”¹⁹⁶ The First Circuit Court of Appeals in *Reilly* affirmed the district court judge’s appointment.¹⁹⁷ The court reasoned that in addition to their authority under Rule 706(a) to appoint neutral expert witnesses, judges have authority to appoint a neutral technical advisor based on the “inherent power [of the court] to provide themselves with appropriate instruments required for the performance of their duties.”¹⁹⁸ This includes the power to “appoint persons unconnected with the court to aid judges in the performance of [their] specific judicial duties” although the parties should be advised of the court’s appointment of an advisor.¹⁹⁹

Because of the partisan nature of each party retaining one or more expert witnesses, the ability of a judge to obtain impartial, neutral expert opinions in a civil case can, at least initially, appear very advantageous; a main constraint, however, is how to pay for the impartial expert.²⁰⁰ In at least some of the cases

¹⁹³ See *Reilly*, 863 F.2d at 154.

¹⁹⁴ See *id.* at 156.

¹⁹⁵ See *id.* at 153.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.* at 157.

¹⁹⁸ See *id.* (internal quotations omitted).

¹⁹⁹ See *id.* (internal quotations omitted).

²⁰⁰ See MASS. GEN. LAWS ch. 123 § 19; MASS GEN. LAWS ch. 231 § 60B. In Massachusetts, two statutes empower the court to retain an independent expert in a civil case. First, “[i]n order to determine the mental condition of any party or witness before any court of the commonwealth, the presiding judge may, in his discretion, request the department [of Mental Health] to assign a qualified physician or psychologist, who, if assigned shall make such examinations as the judge may deem necessary.” MASS. GEN. LAWS ch. 123 § 19. While this statute applies to both civil and criminal cases, a judge does not have any explicit authority to hire an expert but only to ask a clinician from the Department of Mental Health to examine the party or witness and advise the court as to that person’s competency to testify. The second statute which authorizes a judge in Massachusetts to retain an independent expert is MASS GEN. LAWS ch. 231 § 60B, which states that at the tribunal stage in a medical malpractice action, the tribunal is authorized to “appoint an impartial and qualified physician or surgeon or other related professional person or expert to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report or to testify as a witness thereto.” See MASS. GEN. LAWS ch. 231 § 60B.

where the court appointed an independent expert, the court imposed the burden to pay the fees of the court-appointed expert on the parties, often with the parties' agreement.²⁰¹

In addition to these two statutory bases concerning experts, case law of the Supreme Judicial Court (SJC), the highest appellate court in Massachusetts, also suggests that, when necessary, the judicial appointment of an independent expert is appropriate and within the inherent power of the court.²⁰² This implicit "inherent power of the court" to retain neutral, non-partisan, expert witnesses is necessary to ensure that trial judges have all the tools necessary to be able to perform their jobs.²⁰³ Though none of these cases explicitly refer to "the inherent power of the court" to appoint experts to testify, that power and authority is implicit in the SJC's language in the few appellate cases in Massachusetts to deal with this issue.

On initial review, the ability of a judge to hire a neutral expert in a civil case is appealing because the court's inquiry is also a search for truth. The American method of trying cases, however, imposes a burden on the plaintiff's side to prove her case by a preponderance of the evidence.²⁰⁴ Where the case involves one or more issues of a technical nature that is beyond the knowledge of the average person, it is up to each of the parties and their counsel to identify and retain an expert for each of the disputed technical issues. The expert must also be capable of being a good witness at trial, i.e., able to withstand cross-examination. In the U.S. system of advocacy, attorneys are invested in convincing the fact finder of their claims and/or defenses. Given the burden of proof, the frequency

²⁰¹ See *Brodie v. Jordan*, 857 N.E.2d 1076, 1078 (Mass. 2006).

²⁰² See, e.g., *Commonwealth v. Aponte*, 462 N.E.2d 284, 288 (Mass. 1984); *Commonwealth v. Lykus*, 327 N.E.2d 671, 683 (Mass. 1975). (Kaplan, J., writing separately); *Munshani v. Signal Lake Venture Fund II, LP.*, 805 N.E.2d 998, 1001 (Mass. App. Ct. 2004); *Commonwealth v. O'Brien*, 673 N.E.2d 552, 562 n.24 (Mass. 1996).

²⁰³ See *Reilly v. United States*, 863 F.2d 149, 175 (1st Cir. 1988); *Aponte*, 462 N.E.2d at 288 (approving the trial judge's reliance on a qualified court-appointed expert statistician who assisted the court in evaluating the competing experts' opinions); *Lykus*, 327 N.E.2d at 683 (Kaplan, J., writing separately) ("It was open to the trial judge [to call independent experts], and might have been of help to him in the quandary in which he found himself."); *Munshani*, 805 N.E.2d at (approving the trial court's appointment of an expert to determine authenticity of an electronic communication; relying on this expert's opinion that the plaintiff filed in court a false email, the trial court dismissed the plaintiff's lawsuit which dismissal was affirmed by the Appeals Court. Plaintiff, who had committed the fraud on the court, was ordered to pay the costs of the expert.); *O'Brien*, 673 N.E.2d at 562 n.24 ("We note, however, that a judge engaging in extra record communications with court-appointed experts must exercise special care. Rule 706(a) of the Federal Rules of Evidence, on which proposed Massachusetts Rule of Evidence 706 is based, requires that appointed expert witnesses be informed of duties in writing or at a conference in which the parties shall have the opportunity to participate. While the proposed rule does not explicitly contain this requirement, such a rule would prevent confusion and ensure that all parties are aware of the expert's assignments and instructions and could make timely objections if they wished.")

²⁰⁴ See 9 WIGMORE, EVIDENCE § 2498.

with which experts testify in civil cases, and well-prepared and zealous advocates for each side, it is the very rare case when it is necessary for a trial judge to retain a neutral expert.

In *June Lee v. Hawthorne*, the plaintiff and defendant would typically each retain an expert to testify on the plaintiff's medical and physical condition. The plaintiff would likely retain the plaintiff's treating physician, who would testify as to the plaintiff's head injury, resulting medical condition, and the prognosis for her condition. The defendants would likely have the plaintiff examined by the physician of their choice. That physician must write a report of his examination of the plaintiff, which report must be provided by the defendants to the plaintiff's counsel. Unless the case is resolved short of trial (i.e. either by settlement, dismissal, or summary judgment), both experts would likely testify at trial.

*B. Discovery Motions*²⁰⁵

1. Motion for a Protective Order

An individual or party facing discovery, or even a motion to compel discovery, where the information should be protected can respond by seeking a motion for a protective order.²⁰⁶

Protective orders can be helpful at any stage during the various methods of discovery. For instance, the responding party may find information "sought by interrogatory, document request, or request for admission" to be objectionable.²⁰⁷ The purpose of a protective order is to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."²⁰⁸

In considering a Motion for a Protective Order, a court has several options including ordering "that the discovery not be had."²⁰⁹ Alternatively, a court can order discovery to take place "only on specified terms and conditions," or by a different method than what was selected by the party seeking discovery.²¹⁰ Moreover, a court can also require "certain matters not be inquired into," and can also limit the scope of discovery to "certain matters."²¹¹

²⁰⁵ In rare instances, the filing of a Motion for a More Definite Statement or a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted can be used as a discovery tool. As such use as a discovery tool is so rare, they are not here addressed.

²⁰⁶ MASS. R. CIV. P. 26(c).

²⁰⁷ PETER M. LAURIAT ET AL., 49 MASS. PRACTICE *Discovery* § 3:12 (2013).

²⁰⁸ MASS. R. CIV. P. 26(c).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

2. Motion to Compel Discovery and/or for Sanctions

A party who believes the other side or a witness has avoided discovery may file a Motion to Compel, seeking a court order that the party or witness provide the requested discovery.²¹² In circumstances where a requested party actually does answer a discovery request, but provides “evasive or incomplete” answers, this is essentially treated by the court “as a failure to answer” as well.²¹³ Unless the party indicates in its discovery responses that it has provided all that it has in its possession, custody or control, the party seeking discovery can “apply for an order compelling discovery,” and can seek a court order to compel answers to interrogatories, document production, an inspection, or completion of a deposition.²¹⁴

In considering a motion to compel discovery, a reviewing court will also take into account any justifications the opposing party has for not fully complying with discovery requests. Justifications by the opposing party could include that the “discovery request called for irrelevant or privileged information and is therefore beyond the scope of discovery.”²¹⁵ Although information sought during the discovery process could be “inadmissible at the trial,” an opposing party should not use this as a grounds to withhold discovery.²¹⁶ “Discovery” is much broader than “admissible evidence.”²¹⁷ So long as the “information sought appears reasonably calculated to lead to the discovery of admissible evidence,” a court generally authorizes discovery to be provided.²¹⁸ If a court orders a party or witness to provide discovery, the party or witness must comply with the court order or risk sanctions.²¹⁹

In *June Lee v. Hawthorne*, the plaintiff may file a Motion to Compel if she has reason to believe the defendants are not turning over to her all the relevant information. Certainly if she learns of a prior “board dropping” and defendants have not produced any written investigation or reports concerning it, she would move to compel such. The defendants also may file a Motion to Compel if they have reason to believe plaintiff has not provided full and complete discovery responses, including providing all her medical and employment information.

A party who believes a party or witness has failed to comply with a court order concerning discovery may file a Motion for Sanctions.²²⁰ Massachusetts

²¹² *Id.* (a)(3).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ HOWARD J. ALPERIN, 14 MASS. PRACTICE *Summary of Basic Law* § 3:116 (2006).

²¹⁶ MASS. R. CIV. P. 26(b)(1).

²¹⁷ *See id.*

²¹⁸ *See id.*

²¹⁹ *Id.* 37(b)(2).

²²⁰ *Id.* 37(a).

Rule 37(b)(2) authorizes a judge, when confronted with a party or witness who fails to obey an order to provide discovery, to “make such orders in regard to the failure as are just, and among others . . . (C) [a]n order striking out pleadings or parts thereof. . . or rendering a judgment by default against the disobedient party.”²²¹ This means that a plaintiff who fails to comply with a court order to provide discovery may have her case dismissed; it also means that a defendant who fails to comply with discovery may be found liable so that the only remaining issue is an assessment of damages.²²² Once the default judgment enters for the plaintiff and against the defendant, the fact finder, judge or jury, awards damages if the plaintiff claimed them.²²³ In *Ayash v. Dana-Farber Cancer Inst.*, for example, the trial judge’s default sanction for failure to comply with a discovery order and the jury’s \$2.1 million award for economic losses and emotional distress were both affirmed on appeal.²²⁴

Not only are courts empowered to sanction parties for failure to comply with court orders, courts can also sanction parties in the rare instance when a party provides false discovery.²²⁵ Litigants who provide false documents commit fraud on the court and can have their claim dismissed.²²⁶

Holding a party in civil contempt of court is another sanction a court may impose, although they rarely do.²²⁷ “Civil contempt proceedings are ‘remedial and coercive,’ intended to achieve compliance with the court’s orders,” but are rarely used.²²⁸ The court order must be a “clear and unequivocal command” which provides “all who are subject to an order’s command [with] fair notice of the conduct the order prohibits” or requires.²²⁹ If the court holds a party in civil contempt, the sanction can include a prospective, coercive fine (i.e. monetary value per day until the party complies, so long as the party has the ability to pay), an order to pay the opposing party’s attorney’s fees or costs incurred as a result of the party’s violation of a court order, and even the possibility of deten-

²²¹ *Id.* 26(b).

²²² *See Ayash v. Dana-Farber Cancer Inst.*, 822 N.E.2d 667, 695 (Mass. 2005) (finding no abuse of discretion where trial judge entered a default judgment against defendants who, after earlier order of contempt and imposition of monetary sanctions had not succeeded in securing the defendants’ compliance with discovery orders); *see also Keene v. Brigham & Women’s Hosp.*, 726 N.E.2d 824, 840 (Mass. 2003) (indicating that appellate courts review trial court’s discovery sanction using an abuse of discretion standard.).

²²³ *See Ayash*, 443 Mass. at 402–06.

²²⁴ *Id.*

²²⁵ *See Rockdale Mgmt. Co. v. Shawmut Bank, N.A.*, 638 N.E.2d 29, 31–32 (Mass. 1994).

²²⁶ *See id.* (finding that the trial court properly dismissed plaintiff’s case where plaintiff company’s president forged letter in response to interrogatories and testified under oath that letter was genuine, and where that president later recanted earlier testimony and admitted forgery).

²²⁷ *See SMITH & ZOBEL*, *supra* note 148, § 37:11.

²²⁸ *Furtado v. Furtado*, 402 N.E.2d 1024, 1030 (Mass. 1980) (citing *Cherry v. Cherry*, 148 N.E. 570 (Mass. 1925)).

²²⁹ *Sax v. Sax*, 762 N.E.2d 888, 893 (Mass. App. Ct. 2002) (internal quotations omitted).

tion.²³⁰ The contemnor “carries the keys [to] his prison;” this means, a court does not sentence him for a fixed term but only until he complies with the court order.²³¹ If the court sentences a litigant to a fixed term, the proceedings are criminal.²³²

In the rare event that a party intentionally destroys evidence so that another party cannot discover it, also known as spoliation of evidence, a judge has a spectrum of available remedies.²³³ The court must consider whether to sanction the party responsible for destroying the evidence and to correct any unfairness caused by the destruction of evidence. The sanctions available include “allowing the party who has been aggrieved by the spoliation to present evidence about the preaccident condition of the lost evidence and the circumstances surrounding the spoliation . . . as well as instructing the jury on the inferences that may be drawn from spoliation.”²³⁴ Lest there be any misunderstanding, the various sanctions permitted under Massachusetts Rule 37 are possible, though, as a practical matter, rarely occur. As a general rule, “a judge should impose the least severe sanction necessary to remedy the prejudice to the nonspoliating party,” and to the party who has not received discovery.²³⁵ Furthermore, “[judges] should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms.”²³⁶ Additionally, “the extreme sanction of dismissal [for a non-compliant plaintiff] or default judgment [for a non-compliant defendant must] be predicated on a finding of willfulness or bad faith”²³⁷ because “[t]he law strongly favors a trial on the merits of a claim.”²³⁸

²³⁰ See *Demoulas v. Demoulas Super Mkts., Inc.*, 677 N.E.2d 159, 203–04 (Mass. 1997).

²³¹ *In re Birchall*, 913 N.E.2d 799, 810 (Mass. 2009) (citing *Int’l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 828 (1994)) (internal quotations omitted).

²³² See *Commonwealth v. Steinberg*, 536 N.E.2d 606, 610 (Mass. 1989).

²³³ *Gath v. M/A-Com, Inc.*, 802 N.E.2d 521, 527 (Mass. 2003) (“Massachusetts affords a greater range of remedies for spoliation than the majority of jurisdictions, which limit relief to permitting an adverse inference against the responsible party.”) (citing *Fletcher v. Dorchester Mut. Ins. Co.*, 773 N.E.2d 420, 425–26 (Mass. 2002)).

²³⁴ *Id.* In this case, when a defendant owner removed, replaced, and destroyed a gate that had blown open and struck bicyclist causing severe brain injury, the judge correctly allowed jury to hear evidence of the defendant’s knowing destruction of the offending gate as “it assists the jurors in deciding whether to draw a negative inference against the spoliator and the weight they will give such an inference.” See *id.* at 490.

²³⁵ *Keene v. Brigham & Women’s Hosp., Inc.* 786 N.E.2d 824, 834 (Mass. 2003) (“[Sanction for spoliation should be] addressed to the precise unfairness that would otherwise result.”) (citing *Fletcher*, 773 N.E.2d at 425) (internal quotations omitted).

²³⁶ *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395 (1st Cir. 1990).

²³⁷ See *Keene*, 786 N.E.2d 834.

²³⁸ *Id.* (citing *Monahan v. Washburn*, 507 N.E.2d 1045, 1048–49 (Mass. 1987)).

C. Advantages/Disadvantages of the U.S. Civil Discovery Process

1. Advantages of the U.S. Civil Discovery Process

The main advantage of the civil discovery process in the United States is that it is conducted by the attorneys for the parties involved in the lawsuit, not the court.²³⁹ Since the attorney has a vested interest in obtaining the best result for his client, he will likely be zealous in obtaining all available discovery. Attorneys' substantial interest in winning the case drives their efforts to obtain or withhold discovery (until required to do so by the court), as well as the nature of the discovery undertaken. In most civil cases, the plaintiff's attorney works based on a written contingent fee agreement with his client, the plaintiff, whereby the attorney will generally receive one third (often increased to forty percent if an appeal is necessary) of any successful recovery received by the plaintiff.²⁴⁰ Thus the plaintiff's attorney has a financial incentive to be thorough in discovery so as to ensure the plaintiff's success either by settlement or trial. In contrast, defense attorneys typically bill by the hour.²⁴¹ This may be an incentive to defense counsel to increase the nature and scope of discovery requests in the hopes of prolonging the litigation. Despite their different motivations, the financial incentives for both the plaintiff and defendant typically result in the advantage of thorough discovery in civil cases; unfortunately these same financial incentives also result in civil discovery often being very expensive.

The length of time courts allow for discovery typically depends on the complexity of the civil case.²⁴² Even when the discovery period is one or more years, courts will usually grant extensions of time for discovery when all attorneys request it. Very often discovery takes several years, resulting in the trials occurring several or more years after the incident alleged in the complaint. Conducting discovery over the course of several years can be a real advantage because it permits the parties and lawyers to become very familiar with all the factual circumstances of the case. This length of time, however, can also be a disad-

²³⁹ STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1–19 (1988).

²⁴⁰ John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 477 n.22 (1981).

²⁴¹ See generally William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1 (1991) (explaining the full implications of the hourly billing system).

²⁴² In Massachusetts, the "Accelerated Track" Tracking Order allows for six months of discovery in simple cases, including breach of contract cases. The "Fast Track" Tracking Order allows for twelve months of discovery in an average case, such as a typical automobile accident or a slip/trip and fall case. More complicated cases, such as medical malpractice, products liability and wrongful death cases, permit discovery to be conducted over a three year time period (also referred to as an "Average Track" case).

vantage as the trial will be that many years later and the witnesses' memories may well be affected.

Since the lawyer for each party conducts the discovery, he learns first-hand from both his own client and the opposing party exactly what each side alleges the facts in the case are. With the knowledge of his client's factual position, the lawyer can tailor his written discovery requests to the particular case. Similarly, this knowledge also allows the lawyer to identify those witnesses likely to provide the most (and least) favorable deposition testimony and to obtain the client's medical, employment or other records pertinent to the case.

Another advantage of attorneys conducting discovery is that both sides can develop a real sense of the case's monetary value and the potential risks of the case.²⁴³ This is true for both plaintiff and defense attorneys; through discovery each realizes the value and risks of his case. For example, when defense counsel meets the plaintiff and takes the plaintiff's deposition, he learns what kind of witness the plaintiff is likely to be and what kind of impact the plaintiff will likely have on the jury. These meetings will help the attorney evaluate the merits of the claim, and can be invaluable when consulting with his client regarding settlement options. Having the lawyers conduct the discovery increases the thoroughness of the discovery that is obtained, which serves to improve the client's and the lawyers' appreciation of both the monetary value and pitfalls of their claims and defenses.

There is still another advantage to lawyers conducting civil discovery: attorneys can raise, by motion to the judge, any concerns about the opposing side's failure to provide complete discovery.²⁴⁴ Once a party files a discovery motion seeking judicial input in a discovery dispute, the judge typically gets more involved in the management of the case. Such intervention by the court "helps to narrow the issues," which often "helps to limit discovery."²⁴⁵ The adversarial nature of lawyer-conducted discovery, balanced by judicial intervention, early and repeated when necessary, often leads to more satisfactory results for clients.²⁴⁶

2. Disadvantages of the U.S. Civil Discovery Process

The main disadvantages to the way the United States conducts its civil discovery are that discovery in civil litigation can be tremendously expensive and very time-consuming.

²⁴³ See LANDSMAN, *supra* note 239, at 1–5.

²⁴⁴ See MASS. R. CIV. P. 26(c).

²⁴⁵ ABA SECTION ON LITIGATION MEMBER SURVEY, *supra* note 136, at 3.

²⁴⁶ *Id.*

Both plaintiff and defense attorneys “agree that litigation is too expensive, and specifically, discovery and e-discovery are the biggest contributors to cost.”²⁴⁷ Attorneys “generally agree that shortening the time to final disposition reduces costs” and that “the time required to complete discovery [i]s the biggest cause of delay.”²⁴⁸ The expense of discovery can affect whether the parties litigate a case in a courtroom or whether they resolve it in mediation or arbitration.²⁴⁹

Most U.S. attorneys believe that full disclosure of relevant information is absolutely necessary in order to achieve a just resolution of civil cases.²⁵⁰ Most U.S. lawyers believe that “discovery is now working effectively and efficiently in a majority of cases.”²⁵¹ There certainly are cases, however, in which, instead of promoting fairness and efficiency in the U.S. judicial system, attorneys for both plaintiff and defendants use discovery in an abusive and vexatious manner: sometimes defendants perceive that plaintiff’s attorneys are coercing them into paying a settlement while sometimes plaintiffs’ counsel believe the defendants’ counsel drive up the billable hours.²⁵² The awareness by clients, lawyers, and judges of discovery costs and abuses has already led to client control and supervision of attorneys’ fees as well as increased use of alternative dispute resolution.²⁵³

Numerous attorneys and judges have devised methods to reduce or prevent discovery abuses. For example, the federal courts appoint magistrate judges and also impose mandatory initial discovery to combat abuse.²⁵⁴ The imposition of fees and costs on those who caused them to be incurred has been suggested to reduce these abuses.²⁵⁵

Attorneys’ professionalism and judicial involvement in case management are the two best ways (especially in combination) to reduce, if not prevent, discovery abuses.²⁵⁶ Judges in both state and federal courts typically have broad

²⁴⁷ *Id.* at 9.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 10.

²⁵⁰ See Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 300 (2002).

²⁵¹ *Id.*

²⁵² Beisner, *supra* note 3, at 549.

²⁵³ Subrin, *supra* note 250, at 314.

²⁵⁴ Some assert that the use of magistrates is unlikely to increase abuse in pre-trial discovery. See Richard A. Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2216 (1989). The use of discovery masters, who are paid by the hour, often coincides with “scorched earth” discovery tactics by counsel.

²⁵⁵ Frank H. Esterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 642 (1989).

²⁵⁶ The drafters amended Federal Rules 16 and 26 in 1980, 1983, and 2000 to encourage judges to become involved in case management early in litigation and to control discovery. See Nicola F. Sharpe, *Corporate Cooperation Through Cost Sharing*, 16 MICH. TELECOMM. & TECH. L. REV. 109,

discretion to handle discovery disputes.²⁵⁷ Judges can also design procedures for particular cases. “For example, judges have considerable latitude to shape party and claim structure [and] define the sequence and scope of discovery. . . . The original Federal Rule drafters made a conscious choice to grant broad discretion, based on the assumption that trial judges had the experience and expertise to appropriately tailor procedures to the circumstances of individual cases.”²⁵⁸

The civil rules authorize both federal and state court judges to require the parties to participate in scheduling conferences and 16(b) conferences to combat the probability of delay caused by abusive discovery.²⁵⁹ At a Rule 16(b) conference, after discussions with counsel and determining what discovery is really necessary, the court can set a case schedule, including a date to close discovery, for the filing and hearing of summary judgment motions and the trial date.²⁶⁰ So while the rules provide extended time periods for discovery, attorneys need to conduct that discovery while being mindful of and focusing on getting the trial scheduled. A scheduled firm and fair trial date is the best way to end delays caused by discovery and reduce the cost of litigation.

CONCLUSION

A. Likely Results in June Lee v. Hawthorne

In the U.S. system of jurisprudence, the case of *June Lee v. Hawthorne* would likely not be successful for the plaintiff, at least not against the individual residents. U.S. law does not recognize the idea of collective responsibility. While a party can be jointly and severally liable with other co-defendants, each party must first be individually liable. Unless the plaintiff were willing to settle for an extremely modest sum at the very beginning of the lawsuit, before the defendants paid much in the way of attorneys’ fees, she would not, in all likelihood, receive any compensation.

126–27 & n.101 (2009); Lee, H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 229 (2010).

²⁵⁷ See FED. R. CIV. P. 16(b).

²⁵⁸ Sharpe, *supra* note 256, at 126 n.101.

²⁵⁹ See FED. R. CIV. P. 16(b). MASS. R. CIV. P. 16. Massachusetts Rule 16 states that:

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider: (1) The simplification of the issues; (2) The necessity or desirability of amendments to the pleadings; (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; (4) The limitation of the number of expert witnesses; (5) The advisability of a preliminary reference of issues to a master; (6) The possibility of settlement; (7) Agreement as to damages; and (8) Such other matters as may aid in the disposition of the action.

MASS. R. CIV. P. 16.

²⁶⁰ FED. R. CIV. P. 16(b).

Unless she is able to discover some facts which, if believed, would show a violation of a duty of care to her, each of the individual defendants would likely be successful in moving to dismiss the claims against them.²⁶¹ Even if unsuccessful on a Rule 12 Motion to Dismiss, the individual defendants would likely be successful on a Motion for Summary Judgment under Massachusetts Rule 56.²⁶² This would “avoid the delay and expense of trials in cases where there is no genuine issue of fact.”²⁶³

The plaintiff’s “information and belief” as to the board being thrown from apartment 805 would likely be sufficient to withstand a Motion to Dismiss by unit owner 805 but likely would be insufficient to defend against unit owner 805’s Rule 56 motion.²⁶⁴ As to the plaintiff’s claims against the management company of the apartment building, the plaintiff would likely fare no better. Unless she can discover some facts which, if believed, would establish that an employee of the management company dropped/threw the board or negligently left it out, the management company would likely also be successful in a Motion for Summary Judgment.²⁶⁵

In China, there are two possible outcomes to *June Lee v. Hawthorne*. First, if the plaintiff or the court can identify the perpetrator through investigation, the perpetrator shall pay the damage. Other defendants will not be responsible. Second, after investigation, if the plaintiff or court cannot identify a perpetrator, the Tort Law of China 2009 (Tort Law) shall decide the case. Article 87 of the Tort Law provides that if an object thrown down from a building or objects that fall down from a building hurts a person, and the plaintiff or court cannot identify the perpetrator, all the residents shall pay the damage as potential perpetrators, except the residents who can establish their innocence.²⁶⁶ Therefore, the first possible outcome of *June Lee v. Hawthorne* could be that any resident who can establish that he is not the perpetrator will not be responsible. For example, if a

²⁶¹ See *id.* Rule 12. Massachusetts Rule 12 prescribes the basic timetable for responsive pleadings and the basic mechanisms for raising defenses based solely on the pleadings. See Reporter’s Notes, MASS. R. CIV. P. 12 (1973).

²⁶² Massachusetts Rule 56 (a) and (b) allow both the claimant party and the defending party to move with or without supporting affidavits for a summary judgment in his favor as to any or all of the claims. See MASS. R. CIV. P. 56(a)–(b).

²⁶³ *Albre Marble & Tile Co. v. John Bowen Co.*, 155 N.E.2d 437, 439 (Mass. 1959).

²⁶⁴ See MASS. R. CIV. P. 12, 56.

²⁶⁵ As long as the plaintiff’s complaint establishes a duty of care and alleges violation of that duty, the defendant management company would likely not be successful in a motion to dismiss. This is because the standard of review of a Massachusetts Rule 12(b)(6) motion to dismiss is whether the plaintiff’s allegations plausibly suggest, and are not merely consistent with, “an entitlement to relief.” See *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (Mass. 2008).

²⁶⁶ *Zhonghua Renmin Gongheguo qin Quan Zeren fa* (中华人民共和国侵权责任法) [Tort Law of the People’s Republic of China] (promulgated by PRC Presidential Order No 21, Dec. 26, 2009, effective July 1, 2010), art. 87 (2010).

defendant can establish that he was at work at the time of the incident, and no one was home at that time, the defendant need not pay any damage. If a defendant can establish that the window of the defendant's apartment faces the other direction from the incident, so that the object could not have fallen from their window, then that defendant need not pay any damage. The other possible outcome is that the defendants who cannot sufficiently prove that they are not the perpetrator will all share the payment of the damages awarded to the victim for her injuries.

B. Comparison of Discovery Tools

Some of the discovery tools utilized by China and the United States are similar. For instance, requests to enter onto land or conduct other inspections are permitted in both the United States and China. Further, the physical and mental examination of parties by experts is a basic means of discovery in both court systems.

Both the requests to enter land or other inspection in the United States and the inspection and examination in China permit similar methods, such as measuring, surveying, photographing, and testing the item in question. Moreover, both the examination of parties in the United States and the expert testimony in China allow similar means, such as an inquiry into medical history, health condition, and competency of the parties. By examination or expert testimony, the fact finder can determine the degree of injury and the causal relationship between the injury and the incident. These are very helpful to ascertain the truth of the case.

In contrast, some discovery tools differ between the United States and China. For example, attorneys conduct discovery in the United States; whereas judges primarily execute discovery in China. Additionally, a judge or other court official conducts an inspection and examination in China, while the parties or their representative, lawyer or expert conduct a request to enter land or other inspection in the United States. Further, a U.S. judge can issue orders on the motions of the parties and impose sanctions for violation of discovery proceedings in order to help the parties discover evidence.

The Chinese judge does not typically receive any discovery motions from a party or an attorney in the rare instance when they represent a civil litigant. Lawyers in China may send a letter containing questions to the opposing party in order to obtain answers to the questions posed by the lawyer, which is similar to the interrogatory process in the United States. Conversely, there is no provision of this right in Chinese laws for the lawyer. The purpose of the questioning letter may be to require an explanation for his presence or absence. Therefore, the opposing party may answer the questions, but he can also simply ignore the letter. The Chinese court can do nothing about the party's or witness's failure to respond. In contrast, U.S. law requires that the interrogated party must answer the

questions without excuses, and the court may order him to answer according to the interrogating party's motion; sanctions may be imposed in the United States if a party ignores a court order.

C. Comparison of Expert Witnesses

An in-depth comparison of how experts are used in the civil discovery systems in China and the United States reveals that the main difference is that, in China, the fact finder generally hears from only one expert, whereas in the United States, whenever expert testimony is involved, the fact finder hears generally from at least two experts (one selected by each side). The Chinese Civil Procedure Law 2012 added a provision requiring the expert to attend court, which increased the adversary elements in Chinese civil procedure.

The selection in China of the working unit, which chooses the individual expert, is generally done by agreement of the parties. Judges rarely appoint an expert except on the application of one or both parties. That appointed expert then conducts his examination and submits his report to the court, the court then provides the report to the parties. In the United States, each party selects the experts on which that party relies; thus, the selection and opinions of an expert are quite partisan. But this is countered by the parties' ability to cross-examine the other side's experts so that the weaknesses of the opinions are highlighted for the fact finder.

These differences in the use of expert witnesses likely stem from the cultural traditions of each country in searching for the truth. Thus, China has a lengthy history of mediating disputes, whereas the United States relies on the adversarial system.

D. Fairness Versus Finality

Both states condition a second trial on "new" evidence (i.e. that which was not discovered by due diligence during the first trial). In the United States, courts strictly adhere to this contingency, whereas in China, not only is a new trial possible according to the Trial Supervision Procedure,²⁶⁷ but the parties routinely expect to have a second trial at the appellate court level. Another major differ-

²⁶⁷ See *Zhonghua Renmin Gongheguo Minshi susong fa* (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), c. 16 (2012). Chapter 16 of the Civil Procedure Law concerns trial supervision procedure. *See id.* The official translation of the title to Chapter 16 is "Procedure of Adjudication Supervision." *Id.* In China, according to the Civil Procedure Law, there are three ways to reopen a case: the parties to a civil lawsuit can apply for an order for a retrial which the court decides, a court can reopen a case on its own initiative, or a court can reopen a case if the Procuratorate protests an order or judgment. The Procuratorate has supervisory power over civil cases to ensure the court's judgment is correct. *See infra* notes 268–285 and accompanying text.

ence between the justice systems in China and the United States is that in China, trials occur *de novo* at the appellate levels (intermediate, high and supreme courts), whereas in the United States, trials occur only at the trial court level, not the appellate level (including any retrials ordered by the appellate courts). The Chinese system gives a lot of weight to seeking the truth and less to finality. In contrast, the U.S. system gives more weight to finality than in China, which may be one reason why the United States never has trials on the appellate level and the Chinese system does.

Traditionally, truth is the highest value in China. The guiding principle is to seek the truth through the facts, and to correct any wrong verdict. Chinese jurisprudence requires the truth in the verdict to be the Objective Truth.²⁶⁸ Not only does the court have to decide both the facts and the law in the first instance, but also in the second instance and in the retrial. Usually, the parties can only appeal once and the judgment becomes final after the second instance. But when some circumstances exist, the parties may petition for retrial.²⁶⁹ In addition to petition

²⁶⁸ Objective truth means that the finding in the verdict corresponds with what really happened in the past. See CHEN GUANGZHONG, EVIDENCE LAW 86 (2011).

²⁶⁹ See Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012), art. 200 (2012). Article 200 of the Civil Procedure Law states:

[T]he parties may petition for a retrial, if he believes that following circumstances exist: (1) There is new evidence which is conclusive enough to overrule the original judgment or ruling; (2) The main evidence used in the original judgment or ruling to find the facts was insufficient; (3) The main evidence used in the original judgment or ruling to find the facts was forged; (4) The main evidence used in the original judgment or ruling to find the facts was not cross-examined; (5) Any party to a lawsuit is unable to obtain the main evidence necessary for adjudicating the case because of some realistic reasons and has applied to the People's Court for investigation and collection of such evidence in writing, but the People's Court fails to investigate and collect such evidence; (6) There was an error in the application of the law in the original judgment or ruling; (7) The trial organization was unlawfully formed or the adjudicators that should withdraw have not done so; (8) The person incapable of action is not represented by a legal agent, or the party that should participate in the litigation failed to do so because of the reasons not attributable to himself or his legal agent; (9) The party was deprived of her right to debate in violation of the law; (10) The default judgment in the absence of the party was made whereas that party was not served with summons; (11) Some claims were omitted or exceeded in the original judgment or ruling; (12) The legal document on which the original judgment or ruling was made is cancelled or revised; (13) With respect to a violation of the legal procedure by a People's Court that may have affected the correctness of the judgment or ruling in the case or the situation that adjudicating personnel involved themselves in any conduct of embezzlement, bribery, practicing favoritism for himself or relatives, or twisting the law in rendering judgment.

Id. Article 205 states that "[a]ny retrial petition by a party shall be made within six month after the judgment or ruling becomes legally effective; or be made within six months after the party knew or should have known the circumstances (1), (3), (12) or (13) of Article 200 of this Law, file a petition for retrial within six months from the day when the party knows or should have known." *Id.* art. 205.

by the parties, the prosecutors can protest to the courts for a retrial if certain circumstances exist, and once the protest is filed, the court must retry the case.²⁷⁰ Moreover, the court may also decide to conduct a retrial according to the Civil Procedure Law. The law permits two categories of court ordered retrial. The first allows the higher court to retry the case itself or to order the lower court to retry the case if the higher court finds an error in the judgment. The second permits the court which made the judgment to retry the case if it finds an error in the judgment.²⁷¹

When the case is retried, the court sets aside the original judgment; after the retrial, the court enters a new judgment. This practice weighs heavily on the finality of the verdict, and courts reverse many verdicts because they discover new evidence. Generally, if the verdict is not final, parties will dispute the issue endlessly. As a result, their interests cannot be realized and the social order cannot be sustained. Therefore, it is necessary for China to reconsider carefully the balance between objective truth and the finality of a verdict.

The U.S. justice system also considers similar concepts, especially concerning retrials. Massachusetts Rule 60(b) allows a party who believes the judgment against him is unfair to seek relief from that judgment. Massachusetts Rule 60(b)²⁷² provides all the bases for seeking relief from a final judgment. A party

²⁷⁰ *Id.* art. 208 § 1 (“If the Supreme People’s Procuratorate discovers that a legally effective judgment or ruling made by a people’s court at any level, or if a people’s procuratorate at a higher level discovers that a legally effective judgment or ruling made by a people’s court at a lower level, involves any of the circumstances specified in Article 200 of this Law, the Supreme People’s Procuratorate or the people’s procuratorate at a higher level shall respectively file a protest.”).

²⁷¹ *Id.* art. 198. Article 198 of the Civil Procedure Law states:

If the president of a people’s court at any level finds some definite errors in a legally effective judgment, ruling or mediation rendered by his court and deems it is necessary to have the case re-adjudicated, he shall refer the case to the adjudication committee for discussion and decision. If the Supreme People’s Court finds some definite errors in a legally effective judgment, rulings or mediation rendered by a local people’s court at any level, or if a people’s court at a higher level finds some definite errors in a legally effective judgment, ruling or mediation of a people’s court at a lower level, the Supreme People’s Court or the people’s court at the higher level shall have the power to bring the case up to be re-adjudicated by itself or direct the people’s court at a lower level to conduct a re-adjudication.

Id.

²⁷² MASS. R. CIV. P. 60(b). Massachusetts Rule 60(b), substantially the same as the federal rule, states:

Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepre-

most often brings a Motion for Relief from Judgment under the following bases: (1) mistake, inadvertence, surprise or excusable neglect and/or (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).²⁷³ The bases available also include fraud or other misconduct of a party (Massachusetts Rule 60 (b)(3)) or in Massachusetts Rule 60(b)(6), “any other reason justifying relief.” “The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.”²⁷⁴

Generally whether relief should be granted for any of the reasons in Rule 60(b) requires the court to evaluate the particular facts of the case. The court must consider 1) whether the offending party has acted diligently after entry of judgment to assert his claim for relief; 2) whether the claim has any merit; 3) whether the neglectful conduct occurred before or after trial; 4) whether the conduct was part of a deliberately chosen cause of conduct; 5) whether the other party has been prejudiced; and 6) whether the error is chargeable to the party or the party’s lawyer for “the courts have been reluctant to attribute to the parties the errors of their legal representatives.”²⁷⁵

Rule 60(b)(6) contains the residual clause, “giving the court ample power to vacate a judgment whenever such action is appropriate to accomplish justice.”²⁷⁶ In rare instances and to accomplish justice, Rule 60(b) does not limit the power of a court to entertain an independent action to relieve a party from a judgment. Nonetheless, “[T]he concepts of sound judicial administration suggest

sentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. [The filing of a] motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation [until it is allowed]. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court

Id.

²⁷³ *See id.*

²⁷⁴ *Id.*

²⁷⁵ *See Berube v. McKesson Wine & Spirits Co.*, 388 N.E.2d 309, 312 (Mass. App. Ct. 1979) (quoting *Barber v. Tuberville*, 218 F.2d 34, 36 (D.C. Cir. 1954)) (internal quotations omitted); *see also Ingram v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 371 F.3d 950, 951 (7th Cir. 2004) (“[In evaluating a Rule 60(b)(6) motion, court considers the] interest in finality, the reasons for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and . . . prejudice, if any, to other parties.”) (quoting *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 610 (7th Cir. 1986)) (internal quotation marks omitted).

²⁷⁶ *See Reporter’s Notes, MASS. R. CIV. P. 60* (1973).

that the independent action should ordinarily be brought in the court (subject to statutory venue requirements) which heard the original action.²⁷⁷ Sometimes the fact pattern in a court case best illustrates the court process.²⁷⁸ For instance, in one case almost six years after two plaintiffs obtained a judgment in excess of \$20 million, the defendants filed a Massachusetts Rule 60(b)(6) motion for relief from judgment.²⁷⁹ The basis of the motion was that the entire claim of one plaintiff was based on false information concerning that plaintiff's "phony life story."²⁸⁰ The Appeals Court determined those allegations of falsehoods sufficient to state an "independent action" under Rule 60(b)(6) as the plaintiff committed fraud on the court in her lawsuit.²⁸¹ As a result, the verdict remained in place as to the non-fraudulent plaintiff, but the plaintiff who committed fraud on the court had judgment in her favor vacated.²⁸² There is no time limitation for bringing a motion to set aside a judgment for fraud on the court.²⁸³ The time limitations of Rule 60(b) do not apply to the availability of bringing an independent action to obtain justice, to obtain relief from a judgment so long as the motion is brought within a "reasonable time."²⁸⁴ The language of Rule 60(b)(6) "[i]n essence . . . vests 'power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'"²⁸⁵ Although the system of justice in Massachusetts and throughout the United States does give some weight to "finality" of cases, the overriding goal of the U.S. system is to accomplish substantial justice. Rule 60(b)(6) as well as the availability of an independent action to relieve a party of injustice are both tools a losing party can use to obtain substantial justice.

E. Future Reforms

Because of their different legal systems and cultural traditions, China and the United States have different problems to resolve: China should give more measures and protections to the parties and lawyers to discover and collect the

²⁷⁷ *See id.*

²⁷⁸ *See* Mt. Ivy Press L.P. v. Defonseca, 937 N.E.2d 501, 504–08 (Mass. App. Ct. 2010).

²⁷⁹ *Id.* at 341.

²⁸⁰ *Id.* at 348.

²⁸¹ *Id.* at 349.

²⁸² *Id.* at 349–51.

²⁸³ *See* Sahin v. Sahin, 758 N.E.2d 132, 140 (Mass. 2001).

²⁸⁴ *See* Owens v. Mukendi, 858 N.E.2d 734, 741 (Mass. 2006) (internal quotations omitted) (finding that plaintiff attorney's misrepresentations to defendant did not justify relief under Rule 60(b)(6) nor as an independent action based on the court's equity power); West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702, 704–06 (5th Cir. 1954).

²⁸⁵ *Sahin*, 758 N.E.2d at 140 (citing Parrell v. Keenan, 452 N.E.2d 506, 512 (Mass. 1983)) (internal quotation marks omitted).

evidence, and the United States should reduce the lengthy time and financial cost of the discovery procedures.

In China, the judge has the obligation and duty to ascertain the truth. In most cases, the judge has the burden to discover and collect evidence because the court requests the parties to produce evidence, collects evidence according to parties' motions, and conducts inspections and examinations. Although the evidence collected by the judge is more objective and more efficient because the judge is neutral, the judge is too busy and has too many cases to spend so much energy in every case. Moreover, the judge's role can be confused, and he may lose his neutrality. At the same time, the relevant law does not afford lawyers the effective means to collect evidence, and further, the lawyers have little incentive to collect evidence because they are not rewarded based on the case outcome. Therefore, to improve discovery procedure in China, the first step is to improve the capability of collecting evidence by parties (mainly through their lawyers). At the same time, the court can gradually withdraw from such evidence collection.

In the United States, attorneys and judges have long recognized the problems of delay and expense caused by excessive discovery. In an effort to improve the delivery of justice more quickly and at a reduced cost, the Superior Court in Massachusetts introduced a firm and fair trial date initiative in 2005. A fair trial date is selected by the court with the agreement of the lawyers who know their witnesses' and their own schedules. A firm trial date is one selected in which there is a strong likelihood that the case will be reached for trial on that date or within a few days of that date. Following this firm and fair trial date initiative, the civil case load in the Superior Court has been reduced, especially in the number of aged cases. The combination of professionalism on the part of attorneys and judicial involvement in case management, including scheduling a firm yet fair trial date by which time discovery has finished, are the best ways to control and reduce both the expense and delay in the discovery process in civil cases.