

University of Michigan Journal of Law Reform

Volume 40

2006

Just Say "No Fishing": The Lure of Metaphor

Elizabeth G. Thornburg

Southern Methodist University Dedman School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Civil Procedure Commons](#)

Recommended Citation

Elizabeth G. Thornburg, *Just Say "No Fishing": The Lure of Metaphor*, 40 U. MICH. J. L. REFORM 1 (2006).

Available at: <https://repository.law.umich.edu/mjlr/vol40/iss1/2>

This Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

JUST SAY “NO FISHING”: THE LURE OF METAPHOR

Elizabeth G. Thornburg*

The phrase “fishing expedition” is widely used in popular culture and in the law. In the legal setting, reliance on the metaphor can act as a substitute for rigorous analysis, disguising the factors that influence the result in a case. At best, it is uninformative. Worse, the fishing metaphor may itself shape the court’s attitude toward the issue or claim in a lawsuit.

This Article begins by tracing the development of the “fishing expedition” metaphor in civil cases, demonstrating how its changing uses reflect and contribute to the legal controversies of each era. The policies that originally supported limited use of the metaphor have long been rejected. The drafters of the Federal Rules of Civil Procedure tried to overcome the metaphor. Nevertheless, in contemporary cases the prohibition of “fishing” is omnipresent.

In an overwhelming proportion of modern cases, it is plaintiffs who are said to be “fishing,” and the metaphor’s concentration in certain types of cases reflects and reinforces an anti-plaintiff bias. The Article concludes by suggesting that we reject the fishing metaphor. It has been trite for more than two hundred years. More important, the fishing metaphor may camouflage reasoning that violates the letter or spirit of the Federal Rules of Civil Procedure.

“No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying [the] opponent’s case.” (1947)¹

“Plaintiffs may not conduct a fishing expedition” (2002)²

INTRODUCTION

Someone speaking to the news media declares an inquiry to be a “fishing expedition” nearly every day.³ This legal metaphor has

* Professor of Law, Southern Methodist University Dedman School of Law. I’m grateful to Steve Subrin, Marc Galanter, Paul Carrington, Tom Rowe, Jeff Gaba, Rick Marcus, Mary Spector, Ronnie Conway, Kate Thornburg, and the participants in SMU’s faculty forum for their helpful comments. I also thank Greg Ivy for his invaluable help in researching early uses of the fishing metaphor.

1. Hickman v. Taylor, 329 U.S. 495, 507 (1947).

2. *In re Ski Train Fire*, 230 F. Supp. 2d 392, 400 (S.D.N.Y. 2002).

3. See, e.g., *Librarians Assail Record ‘Fishing Expeditions’*, MSNBC.COM, June 21, 2005, <http://msnbc.msn.com/id/8304018>; Press Release, Louis P. Sheldon, Traditional Values Coalition, Judge John Roberts Deserves Up or Down Vote in Senate (July 26, 2005) (on file

become a cultural cliché, so often repeated that many people no longer recognize it as a metaphor at all. It nevertheless remains a staple of judicial opinions that condemn a discovery request or a lawsuit as a “fishing expedition.” In civil cases, the fishing metaphor is far from new; it appears in opinions as early as the eighteenth century.⁴ Through years of procedural change, the metaphor clings tenaciously to legal discourse. Its meaning has changed, and the policy behind it has changed, but it has remained an iconic symbol of ‘now you’ve gone too far’ for more than two hundred and fifty years.

This phenomenon would be interesting, but not important, if metaphors were merely pretty figures of speech. Metaphors, however, are fundamental to the way people think.⁵ Legal language, not surprisingly, is full of metaphors: lawyers speak of a “wall of separation” between church and state, of litigants having “standing,” and of a “marketplace of ideas.” Lawyers live in a world in which “liens float, corporations reside, minds hold meetings, and promises run with the land.”⁶ Such metaphors help illuminate abstract legal concepts by associating them with something more familiar and concrete. They go further, however, by shaping the way we think about those concepts.⁷ For example, the war and sports metaphors used to describe the adversary system emphasize the competitive win-or-lose aspect of litigation and mask opportunities for cooperation.⁸ The metaphor that treats a corporation as a “person” makes it easier to accord it attorney-client privilege⁹ and to look for its “nerve center.”¹⁰ When a metaphor dominates the discussion of an area of law, it structures our perception of the

with the University of Michigan Journal of Law Reform), available at <http://www.traditionalvalues.org/print.php?sid=2358>.

4. See *Buden v. Dore*, (1752) 28 Eng. Rep. 284 (Ch.).

5. HAIG BOSMAJIAN, *METAPHOR AND REASON IN JUDICIAL OPINIONS* 38 (1992); GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 3 (1980); SUSAN SONTAG, *ILLNESS AS METAPHOR AND AIDS AND ITS METAPHORS* 5 (1988) (“Of course, one cannot think without metaphors.”); Linda L. Berger, *What Is the Sound of a Corporation Speaking? How Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS’N. LEGAL WRITING DIRS. 169, 170 (2004) (“In cognitive theory, metaphor is not only a way of seeing or saying; it is a way of thinking and knowing, the method by which we structure and reason, and it is fundamental, not ornamental.”).

6. Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1053 (1989).

7. Bernard J. Hibbits, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 234 (1994).

8. See Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN’S L.J. 225 (1995) (canvassing metaphors and suggesting changes).

9. See *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981) (analogizing corporation to human client).

10. See *Teal Energy USA, Inc. v. GT, Inc.*, 369 F.3d 873, 876 (5th Cir. 2004).

law's meaning and impact.¹¹ As Lord Mansfield said, "nothing in law is so apt to mislead as a metaphor."¹²

In the case of "fishing," reliance on the metaphor can replace rigorous analysis, disguising the factors that influence the result in a case. When used by the court, it is uninformative. Even worse, the fishing metaphor may shape the court's attitude toward the issue or claim in a lawsuit. Accusations of "fishing" also affect the position of the litigants. Parties arguing against pleadings or discovery employ the metaphor as a rhetorical weapon, stigmatizing their opponents, instead of addressing and proving the merits of burden, harassment, or cost.

This Article traces the development of the "fishing expedition" metaphor in civil cases, demonstrating how its changing uses reflect and contribute to the legal controversies of each era.¹³ After surveying the fishing metaphor in culture generally, Part I examines the shifting legal uses of the "fishing" label in six time periods: (1) in eighteenth-century England; (2) in the pre-Civil War United States; (3) in the United States shortly before the advent of the Federal Rules of Civil Procedure; (4) during the drafting of the Rules; (5) during the early implementation of the Rules; and (6) in contemporary cases. For most of its life, the metaphor has been used to condemn "fishing." During the period of the New Deal and for several years afterward, "fishing" was acceptable.¹⁴ Recent cases, however, have reverted to a more skeptical view of certain types of discovery and litigation, so cases decrying "fishing expeditions" have returned with a vengeance.

Part II of this Article examines the impact of the fishing metaphor. Calling a complaint or a request for discovery a "fishing expedition" makes the court's decision sound easy and obvious; the 'no fishing' sign purports to be encrusted with generations of accrued legal wisdom. Facile use of the metaphor thereby

11. GEORGE LAKOFF & MARK TURNER, *MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR* 63 (1989) ("Anything that we rely on constantly, unconsciously, and automatically is so much part of us that it cannot be easily resisted, in large measure because it is barely even noticed. To the extent that we use a . . . conceptual metaphor, we accept its validity. Consequently, when someone else uses it, we are predisposed to accept its validity. For this reason, conventionalized . . . metaphors have *persuasive* power over us.").

12. *Knox v. Gye*, (1872) 5 L.R.E. & I. App. 656, 676 (H.L.) (quoting Lord Mansfield, and attributing error in a case to the metaphoric use of the word "trustee"). See also *Engel v. Vitale*, 370 U.S. 421, 445 (1962) ("[T]he Court's . . . task is not responsibly aided by the uncritical invocation of metaphors like the 'wall of separation' . . .") (Stewart, J., dissenting).

13. While the metaphor is also used in criminal cases, and in cases involving administrative subpoenas, they are beyond the scope of this Article.

14. "Fishing" may have had a narrower technical meaning in this context than one would suppose, however. See *infra* text accompanying notes 148–155.

obscures the policy tradeoffs underlying decisions about pleadings and discovery. In an overwhelming proportion of modern cases, it is plaintiffs who are said to be “fishing,” and the metaphor’s concentration in certain types of cases reflects and reinforces an anti-plaintiff bias.

The Article concludes by suggesting that the legal profession reconsider and reject the fishing metaphor. It has been trite for more than two hundred years.¹⁵ It leads to mangled thoughts like “the trial court [should not] allow plaintiffs to embark on a wide-ranging fishing expedition in hopes that there may be gold out there somewhere.”¹⁶ More important, the fishing metaphor may camouflage reasoning that violates the letter or spirit of the Federal Rules of Civil Procedure.

I. A HISTORY OF THE FISHING METAPHOR

A. *The Fishing Metaphor in its Non-Legal Context*

Literally, “fishing” means traveling to a body of water and trying to catch the fish that live there. The history of fishing dates back to ancient times, when people began fishing for food using bones as hooks and lengths of vine as line.¹⁷ Even Plato discussed fishing, noting that one could fish with nets, baskets, hooks, or spears.¹⁸ The prioress of an English abbey documented sport fishing in a late fifteenth-century treatise,¹⁹ and in 1653 Izaak Walton published his famous work, *The Compleat Angler, or the Contemplative Man’s Rec-*

15. *Renison v. Ashley*, (1794) 30 Eng. Rep. 724, 725 (Ch.) (“This is *another* of the fishing bills, that I do not like to see in this Court.”) (emphasis added).

16. *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1365 (Fed. Cir. 2001) (allowing limited further discovery regarding plaintiffs’ claim that they loaned money to a secret agent of the United States to support a clandestine CIA operation, but that the money was never repaid). See also *Forthmann v. Boyer*, 118 Cal. Rptr. 2d 715, 721 (Ct. App. 2002) (“The trial court cannot be faulted for slamming the door on this transparent fishing expedition.”); Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 818 (2003) (“This allows a product liability plaintiff to go on a ‘fishing expedition’ in the defendant’s records in the mere hope of finding a ‘smoking gun.’”).

17. Jay H. Cassell, *History of Fishing*, <http://www.activeangler.com/articles/beginners/articles/history/> (last visited Sept. 17, 2006) (on file with the University of Michigan Journal of Law Reform).

18. WILHELM H. WUELLNER, *THE MEANING OF “FISHERS OF MEN”* 13 (1967) (citing PLATO, *THE SOPHIST*, available at <http://classics.mit.edu/Plato/sophist.html> (on file with the University of Michigan Journal of Law Reform)).

19. JULIANA BERNERS, *A TREATYSE OF FYSSHYNGE WYTH AN ANGLE BY DAME JULIANA BERNERS: BEING A FACSIMILE REPRODUCTION OF THE FIRST BOOK ON THE SUBJECT OF FISHING PRINTED IN ENGLAND BY WYNKYN DE WORDE AT WESTMINSTER IN 1496* (London, Elliot Stock 1880), cited in Cassell, *supra* note 17.

recreation.²⁰ Whether for food or for sport, fishing generally has positive cultural associations. The phrase "fishing expedition," typed into Google, retrieves advertisements for companies offering exotic fishing trips.²¹ Literal references to fishing often have a reverent quality, whether they come from journalists, philosophers, or presidents. Tom Brokaw declared: "If fishing is a religion, fly fishing is high church."²² Henry David Thoreau once pondered: "Shall I go to heaven or a-fishing?"²³ And Herbert Hoover affirmed on his ninetieth birthday: "Fishing is much more than fish. . . . It is the great occasion when we may return to the fine simplicity of our forefathers."²⁴ Further, fishing at its best is not a random, baseless toss of hook into water but an activity requiring knowledge and hard work. "My father was very sure about certain matters pertaining to the universe. To him all good things—trout as well as eternal salvation—come by grace, and grace comes by art, and art does not come easy."²⁵

How, then, did the metaphoric use of fishing become so negative? From ancient times "fishing" also had a potential dark side. Oppian, the second-century Greek poet, wrote of the "crafty devices of the cunning fisher's art."²⁶ Ancient Near East literature distinguished between good and bad "fishers," associating undesirable fishing with images like the "net of Hades" or the "four evil fishers of men."²⁷ Writers in the Middle Ages perceived a danger of sneaky indirection in metaphorical fishing. The Middle English Dictionary defines "fishen" as:

(a) To lure or win (souls); to catch as with bait or in a net, to hunt (for something); (b) to seek or find (an excuse, etc.).
[Ex:] "Hem that . . . preche us povert and distresse, And fis-

20. IZAAK WALTON, *THE COMPLEAT ANGLER, OR THE CONTEMPLATIVE MAN'S RECREATION* (Random House 1939) (1653).

21. See, e.g., Belize Flats Fishing Expeditions, <http://www.belizeflatsfishing.com> (last visited Feb. 2, 2006); Louisiana Fishing Expeditions, <http://louisiana-fishing-expeditions.com> (last visited Feb. 2, 2006).

22. Quotation from Tom Brokaw, *The Columbia World of Quotations*, <http://www.bartleby.com/66/47/8347.html> (last visited Nov. 7, 2006) (attributing original citation to INT'L HERALD TRIB., Sep. 10, 1991).

23. HENRY DAVID THOREAU, *WALDEN 198* (Ernest Rhys ed., J.M. Dent & Sons, Ltd. 1916) (1854).

24. Quotation from Herbert Hoover, *Simpson's Contemporary Quotations*, <http://www.bartleby.com/63/55/8855.html> (last visited Sept. 20, 2006); see Herbert Hoover, Wikipedia, http://en.wikiquote.org/wiki/Herbert_Hoover (listing quote as "attributed") (last visited Sep. 23, 2006).

25. NORMAN MACLEAN, *A RIVER RUNS THROUGH IT* 4 (1976) ("In our family, there was no clear line between religion and fly fishing.")

26. OPIAN, *HALIEUTICA [ON FISHING]* reprinted in WUELLNER, *supra* note 18, at 16.

27. WUELLNER, *supra* note 18, at 64–88.

shen hemsilf gret richesse With wily nettis that they caste"
[and] "Anon thei can .. Fisshe and fynde out in their enten-
cioun A couert cloude to shadwe ther tresoun."²⁸

Such metaphorical references to fishing continued in popular literature. In Shakespeare's *Merchant of Venice*, one character chides another for trying to pry speech from him by saying "fish not."²⁹ In fact, by Shakespeare's time the fishing metaphor was so well established that it could be employed without actually using the word "fishing." In *Hamlet*, for example, Polonius gives advice about how a man can "worm" out information about his son by making false statements. Polonius says:

Your bait of falsehood takes this carp of truth:
And thus do we of wisdom and of reach,
With windlasses and with assays of bias,
By indirections find directions out³⁰

In Samuel Richardson's *Pamela*, written in 1741, a character asks: "Why . . . is all this fishing about for something when there is nothing?"³¹ Small wonder, then, that the Oxford English Dictionary lists as a figurative meaning of fishing: "of an accusation, inquiry, etc.: Preferred or put forward in order to elicit information which cannot be gained directly."³² This negative version of fishing, rather than the positive one, wormed its way into legal thought.

28. MIDDLE ENGLISH DICTIONARY 594 (Hans Kurath et al. eds., 1954).

29. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act I, sc. i, l. 101 (Jay L. Halio, ed., Clarendon Press 1993). See also WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING* act II, sc. iii, l. 100 (Sheldon P. Zitner ed., Clarendon Press 1993) ("Bait the hook well. This fish will bite."). See SARA PARETSKY, *FIRE SALE* 289 (2005) ("You have nothing on me, not one goddamn thing. You're fishing without worms."), for a contemporary example.

30. WILLIAM SHAKESPEARE, *HAMLET* act II, sc. i, ll. 62–65 (G.R. Hibbard ed., Clarendon Press 1987).

31. SAMUEL RICHARDSON, *PAMELA* 203 (Chadwyck-Healey 1996) (1741). In 1608, "to go fishing" could also mean "to rob on the highways." V OXFORD ENGLISH DICTIONARY 968 (2d ed. 1989) [hereinafter OED]. The OED supports this definition with the following quotation: "Soldiers, that have no means to thrive by plain dealing . . . go a-fishing on Salisbury Plain." *Id.* (quoting Thomas Middleton, *The Pennyless Parliament*, in III *THE HARLEIAN MISCELLANY* 78 (J. Malham ed. 1808–1811)).

32. OED at 969.

B. The Fishing Metaphor in the Law

1. Eighteenth-Century England and Bills of Discovery

a. The Courts

Common law actions did not permit discovery.³³ At law, pleadings served as a vehicle to prepare cases for trial by narrowing the issues, and in pleading lawyers characterized the legal effect of allegations rather than revealing facts.³⁴ Because the pleadings revealed so little information, litigants resorted to equity courts, which permitted an equitable bill of discovery.³⁵ The bill of discovery provided access to evidence that otherwise might be unavailable at trial.³⁶ Equity courts required the plaintiff's pleadings to be quite detailed,³⁷ and the rules required the defendant to respond to the pleadings and attached questions.³⁸ As equity jurisdiction developed, interrogatories assumed a separate status from the pleadings, but they still required the same factual specificity as equity pleadings.³⁹

Litigants could acquire only very limited kinds of information through an equitable bill of discovery. The bill could be filed only against parties, not "mere witnesses."⁴⁰ It could not ask a party to give information that would incriminate him.⁴¹ The bill could ask a party to disclose "facts," but not "evidence."⁴² Parties could not discover documents unless the discovering party described the document with particularity and the interrogated party admitted to

33. See Fleming James, Jr., *Discovery*, 38 YALE L.J. 746, 746 (1929).

34. *Id.* at 746-47.; C. C. LANGDELL, A SUMMARY OF EQUITY PLEADING § 34, at 25-26 (2d ed. 1883); GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 1-17 (1932).

35. This practice dates back to at least the mid-fifteenth century. RAGLAND, *supra* note 34, at 12.

36. THOMAS HARE, A TREATISE ON DISCOVERY OF EVIDENCE BY BILL AND ANSWER IN EQUITY vii-viii (1st ed. 1836).

37. RAGLAND, *supra* note 34, at 6 ("Pleadings were supposed to present the facts of the case in so complete a fashion that the court would be able to render its decision thereon.").

38. *Id.* at 15.

39. *Id.* at 16. See also Robert Wyness Millar, *The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure*, 32 U. ILL. L. REV. 424, 437-42 (1937-38) (tracing development of discovery in chancery pleadings).

40. EDWARD BRAY, THE PRINCIPLES AND PRACTICE OF DISCOVERY 39 (1885). Discovery was necessary to obtain evidence from parties because parties were not allowed to testify at trial, based on a belief that their bias made them unreliable witnesses. Non-party witnesses, on the other hand, could testify. HARE, *supra* note 36, at vii-viii.

41. *Id.* at 104. Because of the early overlap between criminal and tort liability, there was "some doubt as to the extent to which a court of equity would interfere to give discovery in aid either of the prosecution of or the defense to actions for tort." *Id.* at 346-47.

42. *Id.* at 444-48.

having the document.⁴³ Nevertheless, the bill of discovery was far superior to the limited utility of the bill of particulars in an action at law.⁴⁴

Cases concerning bills of discovery are the earliest civil cases in which the fishing metaphor appears. The earliest cases involve disputes about ownership of real property. In the first, *Buden v. Dore*, the plaintiff claimed title to land, and the defendant relied on a title inconsistent with the plaintiff's.⁴⁵ The plaintiff complained that the defendant's answer did not set out the deeds and writings that the *defendant* relied on to prove his title. The Lord Chancellor ruled that the defendant did not have to disclose them, saying "you cannot come by a fishing bill in this court, and pray a discovery of the deeds and writings of defendant's title."⁴⁶ On the other hand, if the defendant possessed deeds and writings showing the *plaintiff's* title, the court could require their disclosure.⁴⁷ The label "fishing bill" thus represented what came to be known as the "own case" rule: a party could discover information that would support his own case but not information that would support his opponent's case.⁴⁸

"Fishing bill" continued to appear in land-title disputes. In *Renison v. Ashley*, the plaintiffs were the great-granddaughters of one John Izzard, and they claimed to have inherited certain of his properties.⁴⁹ They brought suit against the woman in possession of that property, the step-daughter of one of their deceased cousins. The plaintiffs sought to discover the deeds and other documents under which the step-daughter claimed title. She offered to produce a deed showing her own title but denied having any documents that would show the plaintiffs' title. The Lord Chancellor declined to order pretrial production: "This is another of the fishing bills, that I do not like to see in this Court. A spirit of prying into titles has got into the Court, that is highly dangerous to the title of every man in England."⁵⁰

43. *Id.* at 151–53.

44. *See, e.g.*, Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 *YALE L.J.* 863, 865 (1933) (arguing that the bill of particulars—a request for more specific pleading—fell short of forcing real disclosure of evidence and was a "feeble and restricted" contribution to discovery).

45. *Buden v. Dore*, (1752) 28 Eng. Rep. 284, 284 (Ch.).

46. *Id.*

47. *Id.*

48. *See also* JULIUS BYRON LEVINE, *DISCOVERY: A COMPARISON BETWEEN ENGLISH AND AMERICAN CIVIL DISCOVERY LAW WITH REFORM PROPOSALS* 76, 141 n.14 (1982) (arguing that the "fishing" objection is synonymous with the "own case" rule).

49. *Renison v. Ashley*, (1794) 30 Eng. Rep. 724, 724 (Ch.).

50. *Id.* at 725.

The next year brought another condemnation of a "fishing bill," again enforcing the "own case" limitation on discovery. In *Ivy v. Kekewick*, the plaintiff claimed title to an estate by descent from the mother (*ex parte materna*) and asserted that there was no heir from the father (*ex parte paterna*).⁵¹ The defendant, on the other hand, claimed title by descent from the father. The plaintiff prayed that the defendant "might set forth, in what manner he is heir *ex parte paterna*, and all the particulars of the pedigree, and the times and places or particulars of the births, baptisms, marriages, deaths or burials, of all the persons, who shall be therein named."⁵² The Lord Chancellor firmly rejected this request for pre-trial disclosure: "This is a fishing bill to know, how a man makes out his title as heir. He is to make it out: but he has no business to tell the Plaintiff, how he is to make it out."⁵³

Other "fishing bill" cases demonstrate that litigants also employed the "fishing" label to fight discovery. For example, *Ryves v. Ryves* was a title dispute brought by the son of a first marriage against his step-mother and half brother.⁵⁴ The plaintiff's bill alleged the sources of his title and the extent of his estate. He prayed that the defendants "be compelled to produce all such settlements, deeds, indentures, wills, instruments, and writings, or such settlement, deed, [etc.], as they or either of them may have in their, his or her, custody or power"⁵⁵ In response, the defendants argued that "this is one of those vexatious fishing bills, which have always received the disapprobation of the Court."⁵⁶

To a certain extent, the cases also protect the lawyer's privacy in trial preparation. For example, *Ivy* insisted that the defendant's evidence was not discoverable before trial and that the defendant need not "tell the Plaintiff, how he is to make [his case] out."⁵⁷ Another early case rejected an interrogatory that asked: "What case do you intend to set up at the trial of this action as entitling you to recover against the defendants therein?"⁵⁸ This request was improper because "a party is not to make a fishing application as to the manner in which his adversary intends to shape his case, and as to the evidence by which he intends to support it."⁵⁹ The

51. *Ivy v. Kekewick*, (1795) 30 Eng. Rep. 839, 839 (Ch.).

52. *Id.*

53. *Id.*

54. *Ryves v. Ryves*, (1797) 30 Eng. Rep. 1044, 1044 (Ch.).

55. *Id.* at 1045.

56. *Id.* at 1046.

57. *Ivy v. Kekewick*, (1795) 30 Eng. Rep. 839, 839 (Ch.).

58. *Edwards v. Wakefield*, (1856) 119 Eng. Rep. 937, 938 (Q.B.).

59. *Id.* at 939.

eighteenth-century cases, then, all involved title to land, and all invoked the fishing metaphor to enforce the “own case” rule.

b. The Commentators

Early treatises reflecting on this case law describe the fishing metaphor as a limit on the bill of discovery. In 1836, Story reported:

[N]o discovery will be compelled, except of facts material to the case, stated by the plaintiff; for, otherwise, he might file a bill, and insist upon a knowledge of facts wholly impertinent to his case In such a case his bill would most aptly be denominated a mere fishing bill.⁶⁰

An influential nineteenth-century treatise on discovery identifies “fishing actions” primarily with these land-title fights.⁶¹ It also suggests that the condemnation of “fishing” rests on concerns about invasion of privacy, the sanctity of property, and fear of improper motives of the plaintiffs:

Allusion has already . . . been made to fishing actions It is mainly in connection with the title to land that actions of this kind have been instituted. So great is the temptation to a person with some fancied claim to another person’s land to get an opportunity of ransacking his title deeds in the hope of discovering some defect in the title that the most shadowy cases have frequently been launched with the view of finding out something about the title through the machinery of discovery.⁶²

While it might seem strange to us now to think of property records as private, England did not have a general public title registration system until the twentieth century. Deeds and other

60. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 1497, at 712 (6th ed. 1857).

61. BRAY, *supra* note 40, at 516.

62. *Id.* Bray notes that the “mischief of the exposure of documents of title extends beyond the particular action: for though the title might not be defective as against the particular adversary in the action, the documents might reveal defects of which other persons might take advantage.” *Id.* He cites *Buden*, *Renison*, and *Ryves* to support his observation that in “early times the judges frequently expressed their strong disapprobation of actions of a fishing character.” *Id.* at 517. *See also* HARE, *supra* note 36, at 184–85 (expressing similar concerns).

documents reflecting title were "handed from purchaser to purchaser and were usually kept in boxes in the office of the owner's solicitor."⁶³ Disputes of this kind could also lead to an airing of the family's secrets, such as allegations of extramarital children or ugly disputes between step-siblings. In sum, the commentators saw the "fishing" complaints as a limited but important check on discovery. They were also the first to express concern about speculative litigation.

2. "Fishing" in the Pre-Civil War United States

a. The Courts

The fishing metaphor traveled to the United States with the common law.⁶⁴ Its earliest expression in this country came in collection cases, usually suits on notes or attempts by creditors to reach assets through an allegation of a fraudulent conveyance.⁶⁵ Discovery was still governed by the limited nature of the equity rules.⁶⁶ These cases identified "fishing" with the "own case" rule, and they also began to criticize a perceived speculation in the plaintiffs' requests. In these cases, the limits on discovery were closely intertwined with requirements for particularized pleadings.

63. JESSE DUKEMINIER & JAMES KRIER, *PROPERTY* 688 (3d ed. 1993).

64. The metaphor is alive and well in other common law countries, too. *See, e.g.*, B.C. CAIRNS, *AUSTRALIAN CIVIL PROCEDURE* 321 (5th ed. 2002) ("A fishing interrogatory inquires after a cause of action or defence not pleaded in the hope of discovering something that can then be alleged as a claim or defence. It is an attempt to drag a party's files to seek out what is there without any ground for believing that they contain relevant information.") (Australia); ARCHIBALD MACSPORRAN & ANDREW R.W. YOUNG, *COMMISSION AND DILIGENCE* 53 (1995) ("Indeed, it is seldom that the courts hear an opposed motion for commission and diligence in which the phrase ['fishing diligence'] does not feature.") (Scotland); DAVID STOCKWOOD, *CIVIL LITIGATION* 71 (4th ed. 1997) (noting in regard to production of documents from non-parties that "[t]he courts will not allow the rule to be used to permit a 'fishing expedition'") (Canada). Other countries may recognize limits on discovery, but it seems to be metaphor-free. *See, e.g.*, KUO-CHANG HUANG, *INTRODUCING DISCOVERY INTO CIVIL LAW* 48 n.32 (2003) ("The principle of the prohibition of probing, *Verbot des Ausforschungsbeweises* in German, is clearly established under German civil procedure.").

65. English bill of discovery cases also began expanding into this area. *See, e.g.*, *Lush v. Wilkinson*, (1800) 5 Ves. 384, 387 (Ch.) ("It is very extraordinary for a subsequent creditor to come with a fishing bill, in order to prove antecedent debts.").

66. Some states, like Alabama, had passed a statute allowing interrogatories in law cases rather than forcing plaintiffs to bring a separate suit in equity, but this step did not expand the scope of discovery. *The Branch Bank at Montgomery v. Parker*, 5 Ala. 731, 733 (1843). Mississippi (in 1828), Missouri (in 1835), Arkansas (in 1837), Connecticut (in 1836), Virginia (in 1831), Georgia (in 1847), and Massachusetts (in 1851) all enacted measures allowing at least some use of interrogatories in actions at law. Millar, *supra* note 39, at 446-47.

The earliest case was *Newkirk v. Willett*, in which a widow filed a bill of discovery against a creditor who had sued her in a law court for money allegedly owed by her late husband.⁶⁷ The widow claimed she had no personal knowledge of the debt, and she believed it to be unjust because the creditor had never tried to collect his claim during her husband's lifetime and he did not have written proof of the debt. The widow asked that the creditor give her all of the facts regarding the origin of the debt so that she could "safely proceed to a trial" of the action at law. The court held that she was not entitled to the information and that her request was a "mere fishing bill" because it did not seek to substantiate her own defense.⁶⁸

The plaintiff in *Spence v. Duren* had a similar problem.⁶⁹ He had paid two men for land, and the men were supposed to convey good title to him. After he had purchased the land, however, he discovered that the sellers were not the sole owners of the land. The plaintiff sued in equity to compel the other alleged owners to disclose whether they claimed an interest in the land and, if so, what their interest was. The plaintiff admitted in his bill that he did not personally know what the interests might be. The court refused to grant relief to the plaintiff:

[T]he bill deals in suspicions and conjectures, and on belief founded in rumor and hearsay. Bills of this vague and uncertain character, which call for a disclosure without positive and certain allegations, have been denominated fishing bills; such is the character of this. The rules of chancery practice require, that the facts, as to which a discovery is sought . . . should be stated with reasonable certainty and precision; that the allegations should be direct and positive, and not uncertain and inconclusive, before the defendant can be called on to answer.⁷⁰

In both of these cases, the plaintiffs' lack of information about the defendants' claims left them without recourse in equity. Their pleadings were rejected as insufficiently specific, and they were not allowed to inquire into the facts supporting the claims against them.⁷¹

67. *Newkirk v. Willett*, 2 Johns. Cas. 413, 413 (N.Y. 1800).

68. *Id.* at 416.

69. *Spence v. Duren*, 3 Ala. 251 (1841).

70. *Id.* at 253.

71. *See also* *Goodwin v. Wood*, 5 Ala. 152, 152-53 (Ala. 1843). In this action on a promissory note, the defendant sent interrogatories asking the plaintiff about payments on the

A number of the early nineteenth-century cases involve creditors' attempts to reach assets by claiming that the debtor transferred those assets fraudulently. Under the substantive law during that period, indebtedness in any amount at the time of a transfer would render the transfer void both as to existing and subsequent creditors. Based on this law, unpaid creditors would try to discover any and all amounts that the debtor might have owed at the time of transferring a valuable asset. The courts referred to these attempts as "fishing bills," and they generally rejected them unless the creditor could identify some specific antecedent debt.⁷²

b. The Commentators

When explaining cases such as these, nineteenth-century treatises focused on the inadequacy of the pleadings. Story's *Commentaries on Equity Pleadings*, for example, discusses *Newkirk* to illustrate that "the Bill [of discovery] should set forth in particular the matters, to which the discovery is sought; for the other party is not bound to make answer to vague and loose surmises."⁷³ Similarly, Bray's treatise connects the right to discovery with the sufficiency of the discovering party's allegations. He emphasizes that a discovering party should already have enough evidence to state a case with particularity before equity will assist:

There is a class of actions which stand, to a certain extent, by themselves, namely, what are called fishing actions. Discovery is given in courts of equity to assist a plaintiff in proving a known case, and not to assist him in a mere roving

note. The trial court ruled that the interrogatories did not need to be answered because the defendant did not state the precise amount of the several payments. *Id.* at 155. The same argument was used by a litigant in *Smith v. Ramsey*, 6 Ill. 373 (1844), a suit by a partner against the heir of two former partners for his share of the land that had been conveyed to the partnership. The lawyer for the heir argued: "The bill is wholly uncertain as to what he claimed . . . This does not even rise to the dignity of a fishing bill." *Id.* at 375.

72. See, e.g., *Toole v. Stancill*, 41 N.C. 501, 503 (1849) ("This bill is in the nature of what are called fishing bills, which are filed to find out a creditor, whose debt existed at the time of the execution of the conveyance, to subject the fund to all the creditors, as well those subsequent as antecedent."); *Fisk v. Slack*, 38 Mass. 361, 364 (1838) (alleging a bill in equity for an accounting of certain transactions to be a "fishing bill"); *Parks v. Jewlett*, 36 Va. 511, 521 (1838) (discussing the problem of creditors going after emancipated slaves by a "fishing bill"); *Hoke v. Henderson*, 14 N.C. 12, 14–15 (1831) ("It is upon this foundation, that what are called *fishing bills* are filed in Equity, to find out a creditor at the time of the conveyance, and to bring the whole fund into subjection to general creditors, including subsequent creditors, and *a fortiori*, other creditors at the time.").

73. STORY, *supra* note 60, § 325, at 336.

speculation, the object of which is to see whether he can fish out a case.⁷⁴

Otherwise, according to Bray, anyone might discover

all the particulars of any transaction however secret and important with which he had no manner of concern merely by introducing into his pleadings the false allegation that he had an interest therein. . . . It would be a monstrous thing that a man merely by alleging that he had a share in the concern . . . could get the accounts of a defendant's private business and of his dealings with other people."⁷⁵

The fishing metaphor saturated both the "own case" limits and the requirement that a party have enough evidence to prove a case before filing it, in order to protect rights to property and privacy.⁷⁶

Nineteenth-century commentators added another policy argument supporting the prohibition on fishing for an opponent's evidence: fear of perjury. Writers (but not courts) expressed a concern that if a litigant could discover his opponent's evidence in advance, a dishonest person might procure evidence to undermine it. Bray explained:

If you give one side the opportunity of knowing the particulars of the evidence that is to be brought against him, then you give a rogue an enormous advantage: he may then be able although he has no evidence in support of his own case to shape his case and his evidence in such a way as to defeat entirely the ends of justice.⁷⁷

Others suggested that mutual discovery might actually be beneficial, but they regarded the "own case" rule as too well established to change.⁷⁸ This 'fear of perjury' explanation for the prohibition

74. BRAY, *supra* note 40, at 16.

75. *Id.* at 25.

76. Fleming James' survey of discovery in 1927 confirmed this two-pronged version of the fishing metaphor. James, *supra* note 34, at 759. He referred first to the prohibition of "fishing expeditions" that "pry into an adversary's case." *Id.* He then added that "there are other . . . types of 'fishing expeditions.' The scope of an examination, an interrogation, or an order for inspection of documents may be so broad as to amount to what some courts call a 'roving commission.'" *Id.*

77. BRAY, *supra* note 40, at 445.

78. JAMES WIGRAM, POINTS IN THE LAW OF DISCOVERY ¶ 148 (1836) ("If it were now, for the first time, to be determined—whether, in the investigation of disputed facts, truth would best be elicited by allowing each of the contending parties to know, before the trial, in what manner, and by what evidence, his adversary proposed to establish his own case;

on fishing was a precursor to the argument that attorney work product should be protected from discovery.⁷⁹

3. Pre-1938 State and Federal Cases

a. Fishing is Still Forbidden

The late nineteenth and early twentieth centuries witnessed considerable procedural ferment, especially in the areas of pleading and discovery.⁸⁰ The most significant changes began in New York in 1848 with the adoption of the Field Code.⁸¹ The Field Code merged law and equity, eliminated the forms of action, and directed parties to plead "[f]acts constituting the cause of action" in "ordinary and concise language."⁸² The Code also eliminated equitable bills of discovery and interrogatories as part of the equitable bill.⁸³ Instead, the Code provided for more informative pleadings, some limited document production, and depositions of parties (but only in lieu of calling them as witnesses at trial).⁸⁴ More than half of the states adopted changes modeled on the Field Code by the turn of the century.⁸⁵ At the same time, states began to introduce more discovery devices and broaden the scope of discovery. For example, by 1932 seven states allowed depositions from witnesses as well as parties, forty-two made some provision for the production of documents, and ten permitted written interrogatories.⁸⁶

arguments of some weight might *a priori* be adduced in support of the affirmative of this important question.").

79. See, e.g., Donna Denham & Richard Bales, *The Discoverability of Surveillance Videotape Under the Federal Rules*, 52 BAYLOR L. REV. 753, 767 (2000) (noting that defendants argue for work-product protection for surveillance video because disclosure "may obviate the videotape's value as an impeachment tool since the plaintiff can structure her testimony according to the evidence presented on the tape").

80. This was also a time of significant procedural reform in English courts, particularly with the Judicature Acts of 1873 and 1875, which merged law and equity, clearly separated interrogatories from pleadings, and provided sanctions for failure to comply with discovery. See Millar, *supra* note 39, at 444–45.

81. See Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 931–39 (1987).

82. *Id.* at 932–39 (internal citations omitted).

83. *Id.* at 938.

84. *Id.*

85. *Id.* at 939 n.170 (noting that twenty-seven states had adopted similar procedures by 1897).

86. RAGLAND, *supra* note 34, at 51, 88, 92.

The federal courts maintained a more conservative approach to discovery.⁸⁷ While two statutes permitted depositions in cases at law, they did so only to provide testimony for trial when the witness was likely to be absent.⁸⁸ In equity cases, Equity Rule 58 provided for limited discovery. A party could send interrogatories to opposing parties to discover “facts and documents material to the support or defense of the cause.”⁸⁹ Documents could be produced and inspected on judicial order.⁹⁰ In law cases, on the other hand, production would be ordered only at trial.⁹¹ In addition, although federal courts in common law matters generally followed state procedural rules under the Conformity Act,⁹² the Supreme Court interpreted the Act to prohibit federal courts from adopting the discovery devices of the states in which they sat.⁹³

Federal courts and most state courts during this period continued to condemn “fishing.” Some cases used “fishing bill” to mean that a party could not discover information supporting its opponent’s case. This was criticized as both an invasion of privacy and property rights and as interference in opposing counsel’s trial strategy. In 1911 the Supreme Court affirmed the continued vitality of the “own case” rule in *Carpenter v. Winn*.⁹⁴ Plaintiff Winn had obtained an order from the trial court requiring defendant Carpenter to produce certain books and papers regarding a particular brokerage transaction in cotton in 1905 and 1906. The Court found this discovery to be improper:

[A] bill of discovery cannot be used merely for the purpose of enabling the plaintiff . . . to pry into the case of his adversary to learn its strength or weakness. A discovery sought upon suspicion, surmise, or vague guesses is called a ‘fishing bill,’ and will be dismissed. . . . Such a bill must seek only evidence which is material to the support of the complainant’s own

87. See James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure: I*, 38 COLUM. L. REV. 1179, 1190 (1938). During this period, the federal courts were generally seen as protective of corporate interests. See generally Edward A. Purcell, Jr., *The Story of Erie*, in CIVIL PROCEDURE STORIES 24–32 (Kevin Clermont ed., 2004).

88. 28 U.S.C. § 639 (1938) (permitting depositions “when the witness lived more than one hundred miles from the place of trial, or was on a voyage at sea, or about to go out of the United States, or when the witness was aged and infirm”); 28 U.S.C. § 644 (1938) (allowing depositions only when “necessary to prevent a failure or delay of justice”).

89. FED. EQUITY R. 58 (1912), in GEORGE FREDERICK RUSH, EQUITY PLEADING AND PRACTICE 224 (1913).

90. *Id.*

91. *Carpenter v. Winn*, 221 U.S. 533, 544–45 (1911).

92. Act of June 1, 1872, ch. 255, §§ 5–6, 17 Stat. 196, 197.

93. *Ex parte Fisk*, 113 U.S. 713, 721 (1885).

94. *Carpenter*, 221 U.S. at 540.

case, and prying into the nature of his adversary's case will not be tolerated.⁹⁵

Federal courts also used the term "fishing expedition" to criticize plaintiffs who sued before having a sufficiently detailed case. After discussing the "own case" limit, the court in *Goodrich Zinc Corp. v. Carlin* went on to condemn speculative litigation: "[E]ven in an inquiry as to your own case, the questions asked must not be 'fishing'; that is, they must refer to some definite and existing state of circumstances, and not be put merely in the hopes of discovering something which may help the party interrogating to make out some case."⁹⁶ The Supreme Court had earlier criticized a creditor's attempt to reach a wife's assets to pay her husband's debts in a fraudulent transfer case.⁹⁷ The creditor could not describe the assets with particularity "because all particular information is refused by the [husband] and his wife and the persons managing the property for them, and because the same has been invested for income, and often changed in form by reinvestment and in pursuance of devices for more effectual concealment."⁹⁸ Rather than taking pity on the creditor, the Court called his suit a "fishing bill" because "the substance of what they say is, that they have received certain information which excites their suspicion; and this information is . . . vague, . . . uncertain and indefinite."⁹⁹

During this period most state cases used "fishing" in similar ways. Some referred to discovery requests seeking information about an adversary's case as "fishing expeditions."¹⁰⁰ Others rejected discovery requests from plaintiffs believed to be suing without a sufficient factual basis. In *Phillips v. Curtis*, for example, the plaintiffs alleged that the defendants had entered into an agreement to secure a monopoly on selling calves in certain stockyards in New York City.¹⁰¹

95. *Id.* at 540.

96. *Goodrich Zinc Corp. v. Carlin*, 4 F.2d 568, 569 (W.D. Mo. 1925) (internal quotation marks omitted). *See also* *Stokes Bros. Mfg. Co. v. Heller*, 56 F. 297 (C.C.D.N.J. 1893). In this patent-infringement case, the court refused to allow the plaintiffs to inspect the defendants' manufacturing plant because the plaintiffs had not produced "a particle of evidence" to sustain their claims. *Id.* at 298. The court stated: "Under these circumstances, to compel the defendants to open their manufactory to hostile inspection of rivals in business, and to disclose the character of the machines and the process by which for so many years they have made a successful article of merchandise, would be unjust and inequitable. The motion is too obviously the excuse for a 'fishing excursion' . . ." *Id.* at 298.

97. *Huntington v. Saunders*, 120 U.S. 78 (1886).

98. *Id.* at 79.

99. *Id.* at 80–81. The Court went on to explain that this policy was needed to protect wives' separate estates. *Id.*

100. *See, e.g., DeLacy v. Walcott*, 13 N.Y.S. 800, 802–03 (Sup. Ct. 1891).

101. *Phillips v. Curtis*, 75 N.Y.S. 581, 583 (App. Div. 1902). *See also* *McCleod v. Griffis*, 8 S.W. 837 (Ark. 1888). *McCleod* involved a bill in chancery to impeach the settlement of an

The defendants admitted to an agreement but denied that they intended to monopolize. The plaintiffs tried to discover a copy of the agreement, the defendants objected, and the court refused to order discovery:

[T]his application is a mere expedient for the purpose of seeing whether they may or may not have a cause of action They desire to make amongst the private papers of these defendants an experimental voyage of discovery in the hope that perhaps they may be able to fish out something they may turn to their advantage. It does not seem to us that such a mere fishing expedition should be countenanced by the court¹⁰²

The creditor (Solomon) in *George v. Solomon* also lost because he lacked sufficient pre-suit information.¹⁰³ He alleged that he had paid his rent twice, once to Mr. Ragsdale and then to Mrs. Ragsdale, and there was a dispute over whether Mr. Ragsdale had been acting as his wife's agent when collecting the \$1,000 rent. Solomon knew that either Mr. or Mrs. Ragsdale owed him a refund, but he needed more information to know who should repay him. The court described Solomon's attempt to find out as "a pure and simple fishing bill, and complainant angles in the broadest water."¹⁰⁴ Since the unhappy payor could not plead which defendant owed him the money, he received no relief from the court.

An example illustrates the required degree of specificity—and consequent limits on the scope of discovery—that were common during this period:

[I]t may be part of a party's case to prove that his adversary's title is defective, so that an interrogatory such as "Is there not an outstanding mortgage to A on this land?" would be proper. Yet to allow a party to require his adversary simply to set out his title might be undesirable. At any rate, the courts evince a

administrator in probate court, a kind of collateral attack on the probate court judgment requiring a showing of fraud, accident, or mistake. The plaintiffs had identified certain frauds and mistakes and sought to inspect the books to find others. The court refused to allow it: "In the language of ancient jurisprudence, 'the court of chancery will not entertain a fishing bill.'" *Id.* at 841.

102. *Phillips*, 75 N.Y.S. at 582–83.

103. *George v. Solomon*, 14 So. 531, 533 (Miss. 1893).

104. *Id.* The court suggested that if equity afforded relief in this situation, "we see no reason why the owner of lost or stolen property might not implead in one suit the residents of a city or county upon the averment that some one of them—which one, the complainant is not informed—has converted his property, and is liable for its value." *Id.*

strong tendency to discountenance such broad interrogation.¹⁰⁵

Courts permitted discovery, then, only to enable a party to access from the opponent otherwise unavailable but known evidence to support its own case. Information exchange took place primarily at trial, and plaintiffs were not supposed to file suit unless they already had enough evidence to prove a prima facie case. Attempts to deviate from these principles were labeled "fishing."

b. Fishing Allowed

A few state decisions during this period, however, declared that "fishing" could be a good thing. The Kansas Supreme Court in 1874 was asked to decide whether a party could compel a witness to give his deposition before trial for discovery purposes.¹⁰⁶ The court approved of the practice: "It is . . . said that this permits one to go on a 'fishing expedition' to ascertain his adversary's testimony. This is an equal right of both parties, and justice will not be apt to suffer if each party knows fully beforehand his adversary's testimony."¹⁰⁷ A later Kansas case reached the same result and ran with the metaphor: "Even if they were fishing—for it is permissible in a case of this kind—they must exercise as much cunning and circumspection as if whipping the trout streams, while trying to establish their alleged commercial frauds. We think this case presents a justifiable fishing expedition."¹⁰⁸

New York courts were split on the issue. Although the courts in *Phillips* and *DeLacy* criticized plaintiffs for "fishing," one trial court rejected a complaint about fishing in 1899.¹⁰⁹ The court explained:

105. James, *supra* note 34, at 759; *see also* Terry v. Stull, 169 A. 739, 741 (Del. Ch. 1933) (in a case alleging fraud on the deceased, rejecting as a "fishing expedition" interrogatories that "call[ed] on Philip B. Stull to say whether he ever turned over any money to his father, asking for the amounts, if paid by check the names of the banks, the nature of the transactions, whether he ever received any power of attorney from his father of any kind, whether he ever acted in any way as agent for his father, and things of that sort. . . . Interrogatories of that type appear to me to be shots in the dark fired in the hope that they may hit a mark.").

106. *In re Abeles*, 12 Kan. 451, 452 (1874). Justice David Brewer, who wrote this opinion, later became a Justice of the United States Supreme Court. Sunderland, *supra* note 44, at 871.

107. *In re Abeles*, 12 Kan. at 453.

108. *In re Merkle*, 19 P. 401, 402 (Kan. 1888). When the deponent was a witness rather than a party, however, Kansas continued to forbid the use of depositions to fish. *In re Davis*, 16 P. 790, 792 (Kan. 1888).

109. *Compare* Phillips v. Curtis, 75 N.Y.S. 581, 583 (App. Div. 1902), and *DeLacy v. Walcott*, 13 N.Y.S. 800, 802-03 (Sup. Ct. 1891), with *Hay v. Zeiger*, 61 N.Y.S. 647 (Sup. Ct. 1899).

It is said in decisions, and is now said by counsel for the defendant, that [depositions] must not be 'fishing excursions.' If a party wants to use the testimony of an opposite party to prove a certain fact within his knowledge, I do not know why he should not be permitted to probe his conscience for it, or 'fish' for it if the phraseology of certain decisions on appeal must be followed. What the courts are after is the truth, and a system of technicalities and pitfalls should not be put in the way.¹¹⁰

Despite this occasional acceptance of fishing, the "own case" rule persisted.¹¹¹ Professor Sunderland suggested that the chancery bar did not try very hard to change the rule, for reasons of its own. First, the restrictions on discovery "produced an enormous amount of lucrative litigation over the application of the rules."¹¹² Second, the discovery limits created enough uncertainty at trial that "a lawyer might always feel confident of having a fighting chance of success no matter what side of any case he might be employed to represent."¹¹³ The forces of reform would soon attempt to overcome this inertia.

4. Drafting the Federal Rules of Civil Procedure

By the early 1930s, the Advisory Committee on the Federal Rules of Civil Procedure (FRCP) was engaged in drafting what would become the new pleading and discovery rules.¹¹⁴ The Advisory Committee did this against a background of scholarly work calling for liberalization of pleading rules and expansion of discovery rights. Charles Clark, the Dean of Yale Law School and Reporter to the Advisory Committee, had condemned the wastefulness of de-

110. *Hay*, 61 N.Y.S. at 648; see also Pike & Willis, *supra* note 87, at 1194 ("The objection to pre-action discovery on the ground that it will allow 'fishing out a case' is not particularly sound (if the plaintiff *has* a case he should be aided in fishing it out) . . .").

111. Sunderland, *supra* note 44, at 869–70. Courts did sometimes liberalize the "own case" rule so that one's own case included negating the opponent's case. Sunderland noted in 1933 that twelve states "make discovery available not only for attack but for defense—not merely to aid parties in assembling their own proof but to protect them from surprise and to relieve them from taking unnecessary and useless precautions to meet evidence that will never be offered." *Id.* at 870 (listing Alabama, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Missouri, Nebraska, New Hampshire, Ohio, Texas, and Wisconsin).

112. *Id.* at 868.

113. *Id.*

114. For a more complete historical account of the drafting of the federal discovery rules, see Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C.L. REV. 691 (1998).

tailed pleadings and pleading disputes.¹¹⁵ Edson Sunderland, who would become the drafter of the federal discovery rules, had also criticized pleadings as insufficient to reveal the facts that lawyers needed to prepare cases and advise their clients regarding settlement.¹¹⁶ With respect to discovery, in 1929 Fleming James of Yale Law School had recommended eliminating the "own case" rule, allowing depositions and more expansive document production, and permitting the trial court to handle overbroad "fishing" at its discretion.¹¹⁷ Robert Millar of Northwestern had also written shortly before the adoption of the federal rules, comparing numerous systems of civil procedure and recommending the adoption of oral depositions.¹¹⁸

Criticism of the pre-FRCP discovery limits included criticism of the "fishing expedition" metaphor. Sunderland wrote:

False and fictitious causes and defenses thrive under a system of concealment and secrecy in the preliminary stages of litigation followed by surprise and confusion at the trial All this is well recognized by the profession, and yet there is a wide-spread fear of liberalizing discovery. Hostility to 'fishing expeditions' before trial is a traditional and powerful taboo.¹¹⁹

Pike and Willis complained in 1938 of the "shibboleth—repeated to the point of nausea—that the court would not sanction 'fishing expeditions.'"¹²⁰ George Ragland, a student of Sunderland's, wrote an influential book promoting the expansion of discovery, with examples from contemporary state practices. He noted that "the epithet 'fishing excursion for the adverse party's evidence' has been employed against the taking of depositions for discovery in

115. CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING *passim* (1928); Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure II: Pleadings and Parties*, 44 YALE L.J. 1291 *passim* (1935).

116. Sunderland, *supra* note 44, at 863–65.

117. James, *supra* note 34, at 773.

118. Millar, *supra* note 39, at 455.

119. Edson R. Sunderland, *Foreword to RAGLAND*, *supra* note 34, at iii.

120. Pike & Willis, *supra* note 87, at 1436–37. The Biblical use of "shibboleth" is found in *Judges* 12:5–8, literally meaning a difference in pronunciation to determine whether one was a member of the favored tribe. In modern usage, a shibboleth is an arbitrary test to prove membership in a group. See Answers.com, *Shibboleth*, <http://www.answers.com/topic/shibboleth> (last visited Sept. 18, 2006). It is not unusual for critics to associate the metaphor with such quasi-religious language. Cf. *supra* text accompanying notes 22–25 (reflecting that religious language is used to describe actual fishing).

every state where it has been attempted. . . . Judicial opinion, however, has been opposed to restriction.”¹²¹

The “fishing expedition” metaphor appears in the Advisory Committee’s discussion of the discovery rules. Committee members seemed more concerned about the potential for speculative litigation than about the “own case” rule.¹²² What the Committee meant by the fishing metaphor, however, is not always clear. Committee Chairman William De Witt Mitchell warned: “I feel very strongly . . . [that we] are going to have an outburst against this discovery business unless we can hedge it about with some appearance of safety against fishing expeditions.”¹²³ A member of the Advisory Committee’s legal staff told the Fourth Circuit Judicial Conference that the proposed discovery rules had been amended to

be a protection to defendants against fishing expeditions, in that an unscrupulous plaintiff cannot file a complaint alleging any sort of claim which occurs to him, take a deposition of the defendant, as a result of which he discovers a claim which he thinks he might sustain, and then amend his complaint asserting the claim.¹²⁴

On the other hand, Committee member Senator George Wharton Pepper commented: “Mr. Chairman, I am not worried about the fishing-expedition aspect of this thing.”¹²⁵ What is clear, however, is

121. RAGLAND, *supra* note 34, at 120. Ragland quotes William Howard Taft, when Taft was an Ohio judge, as opposing this “own case” version of the prohibition on fishing: “There is no objection that I know, why each party should not know the other’s case.” *Shaw v. Ohio Edison Installation Co.*, 9 Ohio Dec. Reprint 809, 812 (Super. Ct. 1887).

122. A number of jurisdictions (including New York) retained the most restrictive version of the “own case” rule, which directed that a party could discover information only about issues on which they had the burden of proof under the pleadings. This requirement tended to restrict defendants’ discovery unless they filed affirmative defenses, while plaintiffs could discover information supporting their claims. Eliminating the “own case” rule in these jurisdictions actually helped defendants more than plaintiffs. *See* RAGLAND, *supra* note 34, at 32.

123. Subrin, *supra* note 114, at 722 (citing Proceedings of the Meeting of the Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States (Feb. 22, 1935), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES CI-206-59 (1991) [hereinafter Proceedings of the Advisory Committee]).

124. Edward H. Hammond, *Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure*, 23 A.B.A. J. 629, 631 (1937). Hammond was referring to the provision that depositions could not normally be taken until after an answer had been filed. *Id.* He also mentioned a provision that enabled the court to confine the examination to issues raised by the pleadings. *Id.*

125. Proceedings of the Advisory Committee, *supra* note 123, at CI-209-59-CI-209-60. Pepper went on to voice a new concern:

that the Committee did not endorse a blanket condemnation of "fishing."

5. Reactions to Procedural Reform

a. Fishing Allowed

Whatever the Committee meant, admirers of the new federal discovery rules had no use for flimsy discovery objections such as "I object; this is fishing." For this group of the legal elite, fishing was an acceptable practice. Its members hoped that the rules would develop a new norm of deciding cases on the merits, not on the pleadings, and that information exchange would come through the discovery process. Writing a year after the rules went into effect, Pike and Willis emphasized (in a section titled "Fishing Expeditions") that fishing was permissible: "When the new rules went into effect it was assumed that an end was put to the time-honored stricture on 'fishing expeditions' imposed by the rule that a party might not discover facts concerning his opponent's case."¹²⁶ Similarly, Holtzoff wrote: "That the proceeding may constitute a 'fishing expedition' is not a valid objection to interrogatories. As a matter of fairness, if there appears to be a reasonable probability or even possibility that there may be fish in the pond, there is no reason why the litigant should not be permitted to endeavor to catch them."¹²⁷

[I]n the part of the country I come from, I know perfectly well that this sort of power given to a plaintiff [referring to depositions] is simply going to be used as a means of ruining the reputation of responsible people. You bring a suit against a man, without any ground whatever — the president of some important company . . . You take his deposition, have the reporters present, and grill him in the most unfair way, intimating that he is a burglar or a murderer, or this, that, and the other. He has no redress, and the next morning the papers have a whole lot of front-page stuff. The case never goes any further. That is all that was intended.

Id. Chairman Mitchell responded: "It is too much like some of these Senate committees you used to sit on." *Id.*

126. James A. Pike & John W. Willis, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297, 301 (1939–40).

127. Alexander Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 215 (1942–43).

Most of the earliest post-Rule cases embraced broad discovery¹²⁸ and rejected the “fishing” objection. Judge Moskowitz of the Eastern District of New York became famous for pointing out that “[l]imitations which have been placed upon deposition-taking by state courts, such as the necessity of having the affirmative upon the issue on which examination is sought, find no basis in the new Rules. It will not avail a party to raise the familiar cry of ‘fishing expedition.’ ”¹²⁹ It seemed for a while that the fishing metaphor was finally going away.

b. Fishing Still Forbidden

Some areas of concern remained, however, and continued to receive the pejorative label “fishing expedition.” The metaphor often signaled that plaintiffs needed more evidence before they could file suit. Some courts rejected general pleading, particularly in cases tinged with fraud allegations.¹³⁰ In *Cohen v. Beneficial Industrial Loan Corporation*, a stockholder sued for an accounting of funds, based on allegations that members of the board of directors had fraudulently diverted the funds for their personal gain.¹³¹ He claimed that the corporation improperly paid substantial sums of money to an affiliate unsupported by proper documentation.¹³² The court dismissed those allegations, announcing:

128. Two weeks after the rules went into effect, a court ruled that the discovery provisions had eliminated many of the old limitations on discovery:

[T]he distinction between discovery of ‘evidentiary’ facts and ‘ultimate or material’ facts is abolished, as is the holding . . . that discovery could be obtained only of matters exclusively . . . within the knowledge . . . of the adverse party . . . and further, it is now established that parties may also be interrogated as to the identity and location of persons having knowledge of relevant facts. . . . Under the present rule discovery may be had now to ascertain facts relating not only to the party’s own case but his adversary’s also.

Nichols v. Sanborn Co., 24 F. Supp. 908, 910 (D. Mass. 1938).

129. *Laverett v. Cont’l Briar Pipe Co.*, 25 F. Supp. 80, 82 (E.D.N.Y. 1938). See also *Glick v. McKesson & Robbins, Inc.*, 10 F.R.D. 477, 479 (W.D. Mo. 1950) (“‘Fishing expeditions’ for evidentiary facts are permitted under the Federal Rules of Civil Procedure.”); *Gutowitz v. Pa. R.R. Co.*, 7 F.R.D. 144, 146 (E.D. Pa. 1945) (“‘Fishing expeditions’ for evidentiary facts are permitted under the rules.”); *Pezza v. Williams-Bauer Corp.*, 3 F.R.D. 355, 355–56 (S.D.N.Y. 1942) (“[E]xaminations before trial frequently are permissible ‘fishing expeditions’ under the federal practice.”).

130. Even under the Federal Rules, allegations of the circumstances constituting fraud must be plead with particularity. FED. R. Civ. P. 9(b).

131. *Cohen v. Beneficial Indus. Loan Corp.*, 69 F. Supp. 297, 298–300 (D.N.J. 1946).

132. *Id.*

The plaintiff's charge that many payments were illegal and improperly made, without further enlargement, is insufficient to meet even the bare requirements of the rules of pleading. The further averment by plaintiff that "an examination of officers and directors" will disclose which payments were illegal and ultra vires, stamps this alleged cause of action as one disclosing an aspiration rather than a claim upon which recovery may be had. . . . "I do not understand that the Federal Rules of Civil Procedure . . . will . . . permit the plaintiff to call witnesses in a fishing expedition, with the hope that somewhere or somehow it may develop that a defendant has some liability."¹³³

Similarly, in a case involving an insolvent bank, the court rejected depositors' claims that the Comptroller had paid out unreasonably large amounts.¹³⁴ The court proclaimed: "[T]he allegations of the complaint . . . conclude with the revelation that appellant does not even know the amounts and details of such fees and expenses. The conclusion is obvious that the preceding allegations upon information are pure guesswork and the suit a fishing expedition."¹³⁵

Discovery cases also provided a home for the fishing metaphor, which was still used to limit discovery. Sometimes the courts expressed a generalized feeling that the requested discovery was unlikely to yield relevant information. One court terminated the deposition of corporate officers, explaining:

[T]he court has examined the depositions so far as taken. The transcript contains about 1,000 pages. His examination progressed from interest to boredom, and thence to a certain amount of shock. . . . Granting that Rule No. 26 has a tendency somewhat to encourage fishing expeditions, still the fishing is subject to some license and limit, and should not be continued day after day when the catch is composed of minnows.¹³⁶

133. *Id.* at 301 (quoting the "fishing" language from *Mebco Realty Holding Co. v. Warner Bros. Pictures*, 44 F. Supp. 591, 592 (D.N.J. 1942)). *Mebco* was an antitrust case involving movie theaters, in which one defendant had loaned money to construct a new, competing theater. *Mebco*, 44 F. Supp. at 592. The court expressed considerable skepticism about the plaintiff's claim and granted summary judgment to the defendants. *Id.*

134. *Lucking v. Delano*, 122 F.2d 21, 26 (D.C. Cir. 1941) (dismissing class action).

135. *Id.* at 26. *See also* *United States ex rel. Schiff v. Atlantic Basin Iron Works*, 53 F. Supp. 268, 271 (E.D.N.Y. 1943) (granting motion for bill of particulars).

136. *Heiner v. N. Am. Coal Corp.*, 3 F.R.D. 64, 65 (W.D. Pa. 1942).

Other courts used “fishing” to criticize the language of document production requests. One much-cited case denied a motion to produce documents, determining that the words “any and all” did not sufficiently describe the documents sought.¹³⁷ The court justified its decision, reasoning: “Undoubtedly the rules are to be liberally construed (Rule 1), but it was never intended by these Rules to revolutionize the practice by allowing fishing excursions.”¹³⁸

Courts also used the fishing metaphor to distinguish the amount of probing allowed by the various discovery devices. In the most common version, depositions and interrogatories could be used to fish,¹³⁹ but requests for document production could not.¹⁴⁰ Some courts thus rejected production requests as insufficiently specific in designating the desired documents. *Welty v. Clute*, for example, required the discovering party to take depositions first to identify the documents that existed, and only then to request the documents themselves.¹⁴¹ The court contended: “[T]he motion seems to partake much of the nature of a ‘fishing expedition.’ This was not the intent of [Rule 34].”¹⁴² A few years later, another court maintained that “[f]rom Rule 34 . . . there has evolved the frequent repeated legal holding that roving and fishing expeditions into an adversary’s files will not be permitted.”¹⁴³ Holtzoff, although he approved of fishing with depositions and interrogatories, also thought that document requests should be more limited and only employed to obtain material evidence. He asserted: “A roving inspection or a

137. *Thomas French & Sons v. Carleton Venetian Blind Co.*, 30 F. Supp. 903, 905 (E.D.N.Y. 1939). See also *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corp.*, 4 F.R.D. 328, 330 (W.D. Pa. 1940) (“[T]he use of the word ‘all’ in connection with these minutes and this correspondence would seem to indicate that the plaintiff is engaged in a fishing excursion rather than the production of specified documents.”).

138. *Thomas French & Sons*, 30 F. Supp. at 905.

139. *Byers Theaters, Inc. v. Murphy*, 1 F.R.D. 286, 288 (W.D. Va. 1940) (“A general objection, that the interrogatories constitute a ‘fishing expedition’, is of no avail.”). But see *The J.L. Jr.*, 64 F. Supp. 185, 185–86 (E.D.N.Y. 1945) (acknowledging that the Federal Rules of Civil Procedure had not broadened the scope of interrogatories, and thus they could not be used to “pry into [the] adversary’s case”).

140. This belief is not surprising: at that time document production still required a motion and showing of good cause, and old equity cases had placed particular limits on document production. See BRAY, *supra* note 40, at 151 (noting that equity courts were less inclined to order documents produced than interrogatories answered).

141. *Welty v. Clute*, 29 F. Supp. 2, 2 (W.D.N.Y. 1939).

142. *Id.* at 2.

143. *H-P-M Dev. Corp. v. Watson-Stillman Co.*, 71 F. Supp. 906, 914 (D.N.J. 1947). Interestingly, the court cited no cases to demonstrate the “frequent repeated legal holding.” *Id.* See also *Archer v. Cornillaud*, 41 F. Supp. 435, 436 (W.D. Ky. 1941) (holding that plaintiff must request particular books and records and also state facts showing that the information is relevant to the case).

dragnet, or a fishing excursion is not permitted under Rule 34."¹⁴⁴ Other courts disagreed, declaring that fishing was appropriate for document production. An often quoted case, *Golden Arcadia Mutual Casualty Co.*, rejected the defendant's "fishing" argument, stating that the discovery rules, including Rule 34, "permit 'fishing' for evidence, as they should. If documents in defendant's possession tend to sustain plaintiff's claim, plaintiff is entitled to inspect them and have the use of them as evidence."¹⁴⁵ The fishing metaphor, then, did not disappear completely even in the early FRCP years.

c. Fishing for Trial Preparation Materials

The greatest split of authority occurred over trial preparation materials.¹⁴⁶ The authorities debated whether parties could fish for copies of statements taken by an opponent in preparation for trial. Under the old equity practice, this issue did not tend to arise. The "own case" rule, the notion that one could discover "facts" but not "evidence," and the requirement that documents be admissible in order to be discoverable prohibited discovery of such information.¹⁴⁷ Under the new discovery rules, however, such information was potentially discoverable (unless protected under the rubric of "privilege") because it was relevant and the "own case" rule had disappeared.

This issue reached its climax in the Supreme Court's opinion in *Hickman v. Taylor*, which, not surprisingly, included references to "fishing."¹⁴⁸ The Third Circuit, in creating a new protection of the "work product of the lawyer," rejected arguments that would have returned to pre-Rule sensibilities: "As we approach the question we must discard some favorite craft notions of the advocate. . . . We must . . . discard the notion that questions from the other side can

144. Holtzoff, *supra* note 127, at 219.

145. *Golden Arcadia Mut. Cas. Co.*, 3 F.R.D. 26, 26 (N.D. Ill. 1942). See also *Olson Transp. Co. v. Socony-Vacuum Oil Co.*, 7 F.R.D. 134, 136 (D. Wis. 1944).

146. Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments (June, 1946), 5 F.R.D. 433, 457-60 (citing cases); *Hickman v. Taylor*, 153 F.2d 212, 217 n.6 (3d Cir. 1945) (citing cases), *aff'd*, 329 U.S. 495 (1947); Holtzoff, *supra* note 127, at 211-12 (citing cases); *Pike & Willis*, *supra* note 126, at 303-07 (citing cases).

147. Together, these doctrines prevented discovery of the trial preparation materials now protected by the Federal Rules of Civil Procedure. FED. R. CIV. P. 26(b)(3). Work product was previously protected by the 'own case' and admissibility rules because much of it was information that supported the opponent's case or 'mere evidence,' and many documents would have been inadmissible due to the rule against hearsay.

148. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

be fended off on the ground that the opponent's lawyer is simply engaged in a fishing expedition."¹⁴⁹

Justice Murphy's majority opinion for the Supreme Court contains what is undoubtedly the best-known example of the metaphor. He noted the splits in the case law, discussed the roles of pleading and discovery under the new rules, and affirmed the importance of disclosure:

We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the *facts underlying his opponent's case*. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.¹⁵⁰

In dismissing the "time honored cry," Justice Murphy cited Pike and Willis's article about discovery which, as noted earlier, identified the "fishing expedition" objection with the "own case" rule.¹⁵¹ He also borrowed language from Judge Moskowitz's 1938 opinion, which also referred to the "own case" rule.¹⁵² The Court was, in effect, overruling its former decision in *Carpenter v. Winn*, which had embodied the "own case" limit on discovery.¹⁵³ What was the Supreme Court rejecting as an objection to discovery? In the context of *Hickman* itself, the issue was not a claim that the suit itself was speculative, or that the interrogatories were too generally worded. It was, rather, an attempt to discover the basis of an opponent's case, as the statements in question were taken from tug company employees by the tug company's lawyer.¹⁵⁴ Thus, this much-quoted endorsement of liberal discovery may have had a narrower meaning than previously thought.¹⁵⁵

149. *Hickman v. Taylor*, 153 F.2d 212, 216-17, 223 (3d Cir. 1945).

150. *Hickman*, 329 U.S. at 507 (emphasis added).

151. *Id.* at 5087 n.8 (citing Pike & Willis, *supra* note 126, at 303).

152. *Laverett v. Cont'l Briar Pipe Co.*, 25 F. Supp. 80, 82 (E.D.N.Y. 1938) ("It will not avail a party to raise the familiar cry of 'fishing expedition.'"). See *supra* text accompanying note 129.

153. *Carpenter v. Winn*, 221 U.S. 533, 540 (1911).

154. *Hickman*, 329 U.S. at 498.

155. Even if *Hickman* referred only to the "own case" rule, however, it is clear that the drafters of the federal rules intended to permit "fishing," in the sense of deemphasizing pleadings and using discovery to gather information about a case. See, e.g., Charles E. Clark, *Experience Under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 497, 502 (1948) (noting that the 1946 discovery rule revisions allowed discovery of information "reasonably calculated to lead to the discovery of admissible evidence" in order to clarify that the Rules intended to eliminate complaints about fishing) (quoting FED. R. CIV. P. 26(b)(3)); Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS. 144, 157

d. The Federal Courts React to Hickman

Whatever Justice Murphy's intent, federal courts after *Hickman* latched onto his language, and a number of courts quickly noted the propriety of fishing expeditions. Courts cited the *Hickman* language to show that: the scope of discovery was measured by "subject matter" rather than pleadings;¹⁵⁶ a party had demonstrated good cause for production of documents;¹⁵⁷ a party must provide factual answers, even if the information came through his attorneys;¹⁵⁸ a party need not depose witnesses before requesting production of documents;¹⁵⁹ a party may discover information within its own knowledge;¹⁶⁰ and a party's designation of documents was sufficiently specific.¹⁶¹ In short, federal courts used *Hickman*'s rejection of the "fishing expedition" to support decisions that ended the old equitable bill of discovery limitations and to endorse the policy of mutual sharing of relevant information.

e. State Courts Remain Largely Hostile to Fishing

Meanwhile, state court discovery reform had only just begun, and so the "fishing expedition" metaphor still reinforced traditional limits on pleading and discovery. Judges employed a prohibition on fishing to limit the discovering party to information about its own case,¹⁶² refuse discovery that would identify additional parties,¹⁶³ and conclude that a request for documents did not plead

(1948) (noting that by repudiating the objection to "fishing expeditions," courts allow discovery by all litigants of all features of a case).

156. *Chem. Specialties Co. v. CIBA Pharm. Prods., Inc.*, 10 F.R.D. 500, 501-02 (D.N.J. 1950); *Dusha v. Pa. R.R.*, 10 F.R.D. 150, 151-52 (N.D. Ohio 1950).

157. *Paramount Film Dist. Corp. v. RAM*, 91 F. Supp. 778, 780 (E.D.S.C. 1950); *Lindsay v. Prince*, 8 F.R.D. 233, 235 (N.D. Ohio 1948); *Michel v. Meier*, 8 F.R.D. 464, 476 (W.D. Pa. 1948); *Hirshhorn v. Mine Safety Appliances Co.*, 8 F.R.D. 11, 21 (W.D. Pa. 1948). *But see* *Dulansky v. Iowa-Ill. Gas & Elec. Co.*, 10 F.R.D. 146, 150 (S.D. Iowa 1950) (holding that some document requests were insufficiently specific).

158. *O'Donnell v. Breuninger*, 9 F.R.D. 245, 246-47 (D.D.C. 1949) (holding, in an alienation of affections case, that plaintiff husband was required to answer a question about his knowledge of his wife and defendant sharing a hotel room).

159. *Hawaiian Airlines v. Trans-Pacific Airlines*, 8 F.R.D. 449, 450-51 (D. Haw. 1948); *Lindsay v. Prince*, 8 F.R.D. 233, 235 (N.D. Ohio 1948).

160. *Brown v. Dunbar & Sullivan Dredging Co.*, 8 F.R.D. 107, 108 (W.D.N.Y. 1948).

161. *Henz v. United States*, 9 F.R.D. 291, 295 (N.D. Cal. 1949).

162. *See, e.g., Chandler v. Taylor*, 12 N.W.2d 590, 595 (Iowa 1944); *State ex rel Laughlin v. Sartorius*, 119 S.W.2d 471, 473 (Mo. Ct. App. 1938); *Tremblay v. Lyon*, 29 N.Y.S.2d 336, 340-41 (Sup. Ct. 1941).

163. *Monroe v. Superior Court*, 218 P.2d 136, 138 (Cal. Ct. App. 1950) (holding that wife could not compel husband to divulge names of adultery "accomplices"); *Rost v. Kessler*,

sufficient facts to demonstrate that the documents contained material evidence.¹⁶⁴ The fishing metaphor was common in election contests,¹⁶⁵ business owners' requests to inspect books and records,¹⁶⁶ attempts by creditors to find assets,¹⁶⁷ and requests to question jurors about misconduct.¹⁶⁸

The Alabama case of *Ex parte Brooks* illustrates the gap between discovery theory in the state courts then and now.¹⁶⁹ Alabama law at the time allowed deposition of women before trial to spare them the embarrassment of appearing in court. The issue in *Brooks* was whether this law could be used to force a female litigant to give pre-trial deposition testimony in place of the normal interrogatory replies. The court said no:

Can we imagine that the legislature meant to authorize the practice of allowing a woman to be harassed with experimental fishing expeditions in anticipation of the trial, and to make the statute an instrument of annoyance to her or even of oppression when such right does not exist when [the] opposing party sought to be examined is a man?¹⁷⁰

As states began to amend their pleading and discovery rules to mirror the federal rules, commentators on those changes noted that the "fishing" objection was no longer valid. An Arizona lawyer, urging a modern mindset to match the modern rules, commented that the scope of depositions was "practically unlimited and the old cry of 'fishing expedition' is no longer a valid objection—fishing expeditions are encouraged for they tend to bring out the facts."¹⁷¹ The Chair of Alabama's Commission for Judicial Reform in 1957 described the problems posed by the old rules:

39 N.Y.S.2d 863, 865 (Sup. Ct. 1943) (holding that plaintiff could not examine defendant regarding whether he was acting in scope of employment at time of accident).

164. *Marietta Mfg. Co. v. Hedges-Walsh-Weidner Co.*, 2 A.2d 922, 927 (Del. Super. Ct. 1938); *E. States Corp. v. Eisler*, 30 A.2d 867, 869 (Md. 1943).

165. *People ex rel. Harper v. City of Pueblo*, 126 P.2d 339, 341 (Colo. 1942); *Landry v. Ozene*, 195 So. 14, 19, 22 (La. 1940).

166. *Dandini v. Superior Court*, 100 P.2d 535, 537 (Cal. Ct. App. 1940) (director); *News-Journal Corp. v. State ex rel. Gore*, 187 So. 271, 272 (Fla. 1939) (shareholder); *Chandler v. Taylor*, 12 N.W.2d 590, 595 (Iowa 1944) (partner); *E. States Corp. v. Eisler*, 30 A.2d 867, 869 (Md. App. 1943) (shareholder).

167. *State ex rel. Bostelmann v. Aronson*, 235 S.W.2d 384, 388 (Mo. 1950); *Bilrite Bldg. Co. v. Adams*, 7 S.E.2d 857, 859 (S.C. 1940).

168. *Christensen v. Boucher*, 24 N.W.2d 782, 790 (Iowa 1946); *Thompson v. Ry. Express Agency*, 206 S.W.2d 134, 136 (Tex. Civ. App. 1947).

169. *Ex parte Brooks*, 32 So. 2d 534 (Ala. 1947).

170. *Id.* at 536.

171. Lyle Roger Allen, *The New Rules in Arizona*, 16 F.R.D. 183, 189 (1954).

Any effort by interrogatories, or otherwise, to obtain a clear picture of the factual situation in any case was met with the ancient hue and cry of 'fishing expedition' with the result that each party and the court were required to enter upon the trial of the case without any knowledge of the factual contentions of the parties.¹⁷²

6. Contemporary Cases

Given the early enthusiasm for notice pleading and broader discovery, and for less technicality in both, the "fishing expedition" metaphor was for a time on the decline, or applied only to issues on the margins.¹⁷³ As Professor Marcus has so ably demonstrated, however, by the 1970s there was a shift in the other direction in both pleading particularity and scope of discovery.¹⁷⁴ For example, a legal commission appointed by then-Chief Justice Warren Burger claimed: "Wild fishing expeditions . . . seem to be the norm."¹⁷⁵ Along with this change, negative invocations of the "fishing expedition" metaphor reappeared. Courts still cite *Hickman* as supporting liberal discovery, but they often immediately follow it with a qualifier that prohibits fishing.¹⁷⁶

In terms of subject matter, a large cluster of the state cases using the fishing metaphor involve personal injury claims,¹⁷⁷ shareholder disputes,¹⁷⁸ disputes with insurance

172. Thomas E. Skinner, *Alabama's Approach to a Modern System of Pleading and Practice*, 20 F.R.D. 119, 129–30 (1957).

173. For a discussion of federal cases in the period immediately following the adoption of the Federal Rules of Civil Procedure, see *supra* text accompanying notes 128–147.

174. See Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 752 (1998); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 444–45 (1986).

175. William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978).

176. See, e.g., *Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189, 192–93 (1st Cir. 2001); *Martinez v. Cornell Corr. of Tex.*, 229 F.R.D. 215, 218 (D.N.M. 2005).

177. See, e.g., *Rehm v. Pence*, No. G028059, 2002 Cal. App. Unpub. LEXIS 11699, at *18–19 (Ct. App. Dec. 17, 2002); *Kaplan v. Allen*, 837 So. 2d 1174, 1176 (Fla. Dist. Ct. App. 2003); *McPherson v. Church of Scientology Flag Serv. Org., Inc.*, 813 So. 2d 1032, 1034 (Fla. Dist. Ct. App. 2002); *Scotsdale Ins. Co. v. Camara de Comercio Latino-Americana de Los Estados Unidos, Inc.*, 813 So. 2d 250, 252 (Fla. Dist. Ct. App. 2002); *Vermette v. Bridges*, No. CV-99-187, 2000 Me. Super. LEXIS 2, at *6 (Super. Ct. Jan. 4, 2000); *Hiller v. Volkman*, No. CX-00-2035, 2001 Minn. App. LEXIS 796, at *7 (Ct. App. July 17, 2001); *Price v. County of Suffolk*, 756 N.Y.S.2d 758, 759 (App. Div. 2003); *Jerome v. A-Best Prods. Co.*, Nos. 79139, 79141, 79142, 2002 Ohio App. LEXIS 1879, at *21 (Ct. App. Apr. 18, 2002); *In re Whiteley*, 79 S.W.3d 729, 735 (Tex. App. 2002); *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003).

178. See, e.g., *Cal. Pub. Employees' Ret. Sys. v. Coulter*, No. 19191-NC, 2004 Del. Ch. LEXIS 64, at *3 (Ch. May 26, 2004); *Oliver v. Boston Univ.*, No. 16570-NC, 2004 Del. Ch.

companies,¹⁷⁹ and employment discrimination claims.¹⁸⁰ State cases use the “fishing expedition” metaphor to criticize discovery requests that the court believes to be broader than the allegations in the complaint.¹⁸¹ The metaphor also appears when a court overrules a request seeking more time for discovery that is filed in opposition to a motion for summary judgment.¹⁸² Occasionally, courts use the metaphor to distinguish the allowable breadth of discovery under different devices.¹⁸³

Federal fishing metaphors also occur more frequently in certain types of cases. Actions governed by the Private Securities Litigation Reform Act (PSLRA) are common, particularly since the legislative history of that Act claims that securities fraud actions often “resemble[] a fishing expedition.”¹⁸⁴ Some of these cases challenge the sufficiency of the pleadings, while others consider a request to lift the Act’s discovery stay.¹⁸⁵ Cases alleging employment discrimination are also home to cries of “fishing expedition.”¹⁸⁶ Cases

LEXIS 51, at *10 (Ch. Apr. 26, 2004); *In re Fuqua Indus. Inc. Shareholder Litig.*, No. 11974, 2002 Del. Ch. LEXIS 52, at *18–19 (Ch. May 2, 2002); *In re Best Lock Corp. Shareholder Litig.*, No. 16281, 2000 Del. Ch. LEXIS 175, at *15 (Ch. Dec. 18, 2000); *Marsalis v. Wilson*, 778 N.E.2d 612, 618 (Ohio Ct. App. 2002); *Wolffington v. Wolffington Body Co.*, 47 Pa. D. & C.4th 225, 242 (Ct. C.P. 2000); *In re Ernst & Young*, No. 05-02-00352-CV, 2002 Tex. App. LEXIS 2986, at *3 (App. Apr. 30, 2002).

179. *See, e.g.*, *Ramon v. Aries Ins. Co.*, 769 So. 2d 1053, 1055 (Fla. Dist. Ct. App. 2000); *Reusswig v. Erie Ins.*, 49 Pa. D. & C.4th 338, 346 (Ct. C.P. 2000); *In re United Serv. Auto. Ass’n*, 76 S.W.3d 112, 116 (Tex. App. 2002).

180. *See, e.g.*, *Everts v. Salvation Army Harbor Light Multi-Services Ctr.*, No. C8-02-1728, 2003 Minn. App. LEXIS 696, at *17–18 (Ct. App. June 10, 2003); *Samide v. Roman Catholic Diocese*, 773 N.Y.S.2d 116, 118 (App. Div. 2004).

181. *See, e.g.*, *Vanvorous v. Burmeister*, 687 N.W.2d 132, 139 (Mich. App. 2004); *In re United Servs. Auto. Ass’n*, 76 S.W.3d 112, 116 (Tex. App. 2002); *Saratoga Harness Racing, Inc. v. Roemer*, 711 N.Y.S.2d 603, 605 (App. Div. 2000); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995).

182. *See, e.g.*, *Vanvorous*, 687 N.W.2d at 139; *Rowlette & Assoc. v. Calphalon Corp.*, No. C8-99-1667, 2000 Minn. App. LEXIS 364, at *28 (Ct. App. Apr. 18, 2000).

183. *See, e.g.*, *Biloff v. Biloff*, No. A-99-033, 2000 Neb. App. LEXIS 185, at *17 (App. June 20, 2000) (allowing fishing with interrogatories and depositions but not with document production requests); *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989) (also allowing fishing with interrogatories and depositions but not with document production requests). *But see* *K-Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) (rejecting “the notion that any discovery device can be used to ‘fish’”).

184. *See, e.g.*, *In re Carnegie Int’l Corp. Sec. Litig.*, 107 F. Supp. 2d 676, 679 (D. Md. 2000) (citing S. REP. NO. 104-98, at 14 (1995), as reprinted in 1995 U.S.C.C.A.N. 679, 683).

185. *See In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL-1500, 2003 U.S. Dist. LEXIS 2731, at *1 (S.D.N.Y. Feb. 28, 2003); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. MDL-1446, 2002 U.S. Dist. LEXIS 26261, at *30 (S.D. Tex. Aug. 16, 2002); *Fazio v. Lehman Bros., Inc.*, No. 1:02CV157, 2002 U.S. Dist. LEXIS 15157, at *1–2 (N.D. Ohio May 16, 2002); *In re Worldcom, Inc. Sec. Master File Litig.*, 234 F. Supp. 2d 301, 301–02 (S.D.N.Y. 2002); *In re Campbell Soup Co. Sec. Litig.*, 145 F. Supp. 2d 574, 595 (D.N.J. 2001).

186. *See, e.g.*, *Torres v. White*, No. 00-4146, 46 F. App’x 738, 750 (6th Cir. 2002) (national origin discrimination); *Grayson v. O’Neill*, 308 F.3d 808, 817 (7th Cir. 2002) (race discrimination); *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1169 (10th Cir. 2000) (age

challenging the factual specificity of antitrust allegations produce a number of "fishing" objections,¹⁸⁷ as do discovery requests in intellectual property cases.¹⁸⁸

In terms of procedural posture, fishing metaphors appear most often in motions demanding more detail in pleadings,¹⁸⁹ disputes about discovery,¹⁹⁰ and cases involving Rule 56(f) motions to allow more discovery before ruling on a motion for summary judgment.¹⁹¹ In addition, plaintiffs seeking to discover forum contacts

and national origin discrimination); *Treat v. Garrett County Mem. Hosp.*, No. AMD 03-1937, 2004 U.S. Dist. LEXIS 25869, at *15 (D. Md. Dec. 23, 2004) (gender and sexual orientation discrimination); *Cooper v. John D. Brush & Co.*, 242 F. Supp. 2d 261, 266 (W.D.N.Y. 2003) (race discrimination); *Adams v. Giant Foods, Inc.*, 225 F. Supp. 2d 600, 607 (D. Md. 2002) (race discrimination); *Boyd v. Am. Airlines, Inc.*, No. 3-01-CV-2230-D, 2002 U.S. Dist. LEXIS 19937, at *4 (N.D. Tex. Oct. 17, 2002) (race discrimination); *Pedraza v. Holiday Housewares, Inc.*, 203 F.R.D. 40, 42 (D. Mass. 2001) (national origin and sexual orientation discrimination); *Hill v. Motel 6*, 205 F.R.D. 490, 493 n.2 (S.D. Ohio 2001) (age discrimination); *Garcia-Vazquez v. Frito Lay Snacks Caribbean, Inc.*, No. 97-1313(SEC), 2001 U.S. Dist. LEXIS 1699, at *5, 8 (D.P.R. Feb. 16, 2001) (hostile work environment).

187. See, e.g., *DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999); *Network Computing Servs v. Cisco Sys.*, 223 F.R.D. 392, 395 (D.S.C. 2004); *Fare Deals, Ltd. v. Glorioso*, 217 F. Supp. 2d 670, 671 (D. Md. 2002); *DJ Mfg. Corp. v. Tex-Shield, Inc.*, 275 F. Supp. 2d 109, 120 (D.P.R. 2002); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 77 F.R.D. 39, 42 (N.D. Cal. 1977). RICO cases, also disfavored, find similar uses for the fishing metaphor when requiring heightened pleading specificity. See, e.g., *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1327 (7th Cir. 1994).

188. See, e.g., *Moore U.S.A., Inc. v. Standard Register Co.*, 229 F.3d 1091, 1116 (Fed. Cir. 2001) (patent infringement); *Transclean Corp. v. MotorVac Tech., Inc.*, No. 01-287 (JRT/FLN), 2002 U.S. Dist. LEXIS 19312, at *7 (D. Minn. Sep. 30, 2002) (patent infringement); *Ronald A. Katz Tech. Licensing, L.P. v. Verizon Commc'n., Inc.*, No. 01-5627, 2002 U.S. Dist. LEXIS 19691, at *4, 8 (E.D. Pa. Oct. 16, 2002) (patent infringement); *Spring Windows Fashions LP v. Novo Indus.*, 249 F. Supp. 2d 1111, 1113 (W.D. Wis. 2002) (patent infringement); *Automated Tech., Inc. v. Eller*, 160 F. Supp. 2d 915, 926 (N.D. Ill. 2001) (theft of trade secrets).

189. See, e.g., *DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999); *Duggan v. Terzakis*, 275 F. Supp. 2d 968, 973 (N.D. Ill. 2003); *DJ Mfg. Corp. v. Tex-Shield, Inc.*, 275 F. Supp. 2d 109, 120 (D.P.R. 2002).

190. See, e.g., *Higgason v. Hanks*, 54 F. App'x 448, 450 (7th Cir. 2002); *McGee v. Hayes*, 43 F. App'x 214, 217 (10th Cir. 2002); *Ignatiev v. United States*, 238 F.3d 464, 466-67 (D.C. Cir. 2001); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1365 (Fed. Cir. 2001); *Abram v. Cargill*, No. 01-CV-1656 (JMR/FLN), 2003 U.S. Dist. LEXIS 7027, at *7, 8 (D. Minn. Feb. 10, 2003); *Bowen v. Parking Auth. of Camden*, 214 F.R.D. 188, 195 (D.N.J. 2003); *One Thousand Friends of Iowa v. Mineta*, 250 F. Supp. 2d 1075, 1079 (S.D. Iowa 2002); *Garcel, Inc. v. Hibernia Nat'l Bank*, No. 01-0772, 2002 U.S. Dist. LEXIS 2390, at *8 (E.D. La. Jan. 24, 2002); *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 206 F.R.D. 78, 93 (S.D.N.Y. 2002); *McGrath v. Nassau Health Care Corp.*, 209 F.R.D. 55, 61 (E.D.N.Y. 2002); *Boyd v. Am. Airlines, Inc.*, No. 3-01-CV-2230-D, 2002 U.S. Dist. LEXIS 19937, at *4 (N.D. Tex. Oct. 17, 2002); *Automated Techs., Inc. v. Eller*, 160 F. Supp. 2d 915, 926 (N.D. Ill. 2001); *Hill v. Motel 6*, 205 F.R.D. 490, 493 n.2 (S.D. Ohio 2001); *Livingston v. Assoc. Fin. Inc.*, 2002 U.S. Dist. LEXIS 12047, at *17 (S.D. Ill. June 25, 2001); *Pedraza v. Holiday Housewares, Inc.*, 203 F.R.D. 40, 42 (D. Mass. 2001); *Orleman v. Jumpking Inc.*, No. 99-2522-CM, 2000 U.S. Dist. LEXIS 11081, at *6 (D. Kan. July 22, 2000).

191. See, e.g., *Grayson v. O'Neill*, 308 F.3d 808, 817 (7th Cir. 2002); *Moore U.S.A. v. Standard Register Co.*, 229 F.3d 1091, 1116 (Fed. Cir. 2001); *Dunkin' Donuts Inc. v. N.A.S.T.*,

that might establish personal jurisdiction over defendants, especially foreign nationals, are periodically accused of “fishing.”¹⁹² In virtually all of the federal cases, the court might or might not find a party to be fishing, but fishing is clearly prohibited.

Occasionally a contemporary judge bucks the trend and recognizes a limited but legitimate role for fishing. Judge Scheindlin, for example, discussed at length the reasons for requiring fraud to be pled with particularity.¹⁹³ Nevertheless she went on to note:

So-called ‘fishing expeditions’ may not be all bad, however. For one thing, the threat of being sued, even if the plaintiff is still digging for facts, may serve to deter fraud. Moreover, the balance of harms may tip in favor of a fishing expedition rather than an undiscovered fraud. This may be so, even though the victim of a fishing expedition who has *not* committed any harm is forced to serve as the unwilling fish.¹⁹⁴

Judges also signal acceptance of fishing in discovery: “In short, fishing expeditions *are* permissible, and the discovery statutes must be liberally construed.”¹⁹⁵

The pleading and discovery scheme of the Federal Rules also provides at least a limited “fishing license.” Rule 11(b)(3), govern-

Inc., No. 02 C 1272, 2003 U.S. Dist. LEXIS 6179, at *12 (N.D. Ill. Apr. 9, 2003); *Cooper v. John D. Brush & Co.*, 242 F. Supp. 2d 261, 266 (W.D.N.Y. 2003); *Fare Deals, Ltd. v. Glorioso*, 217 F. Supp. 2d 670, 671 (D. Md. 2002); *Butler Corp. v. Gen. Motors Acceptance Corp.*, No. 00-30003-MAP, 2002 U.S. Dist. LEXIS 25012, at *13–14 (D. Mass. Dec. 27, 2002); *Spring Windows Fashions LP v. Novo Indus.*, 249 F. Supp. 2d 1111, 1113 (W.D. Wis. 2002).

192. See, e.g., *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 403 (4th Cir. 2003); *Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory”*, 283 F.3d 208, 216 (4th Cir. 2002); *Metro.Antiques & Gems, Inc. v. Beaumont*, No. 02 CIV. 3937 (DLC), 2002 U.S. Dist. LEXIS 24679, at *12–13 (S.D.N.Y. Dec. 27, 2002); *In re Ski Train Fire*, 230 F. Supp. 2d 392, 400 (S.D.N.Y. 2002); *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 45, 50, 54, 56 (D.D.C. 2000).

193. *In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281, 324–26 (S.D.N.Y. 2003).

194. *Id.* at 326 n.46.

195. *FSR Brokerage, Inc. v. Super. Ct.*, No. B156982, 2002 Cal. App. Unpub. LEXIS 94, at *11 (Cal. Ct. App. Apr. 16, 2002). See also *Ill. Coalition Against Handgun Violence v. Ill. Council Against Handgun Violence*, No. 02 C 4130, 2003 U.S. Dist. LEXIS 3945, at *5 (N.D. Ill. March 18, 2003) (“I allowed the Coalition to go on a brief fishing expedition.”); *United States v. Dentsply Int’l, Inc.*, No. 99-5 MMS, 2000 U.S. Dist. LEXIS 6925, at *13–14 (D. Del. May 10, 2000) (“Liberal discovery is particularly appropriate in a government antitrust suit because of the important public interest involved.”); *Garamendi v. Golden Eagle Ins. Co.*, 10 Cal. Rptr. 3d 724, 741 n.8 (Ct. App. 2004) (“([C]ontrary to popular belief), fishing expeditions are permissible in some cases.”) (internal citation omitted). Accord, 8A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE: CIVIL* § 2206 (1994) (“[A]n objection that a request for inspection is a fishing expedition should be given short shrift. It is true that the party seeking discovery must still designate what it wishes to inspect, but all this obstacle means is that the would-be angler must have a general idea of what kind of fish he or she is hoping to catch.”).

ing good faith in pleadings, specifically allows plaintiffs to make claims that "if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."¹⁹⁶ Assuming that plaintiffs are willing to self-identify claims as currently lacking support, this rule surely allows plaintiffs to use discovery to fish for information that will support their contentions.¹⁹⁷

Despite such occasional relief from the metaphor, the prohibition of fishing expeditions is very much alive. Its original meaning—limiting discovery to facts supporting one's own case—is dead, but limits on discovery of an opponent's trial preparation materials survive to some extent in the work product exemption.¹⁹⁸ The types of discovery once rejected as "fishing" are accepted without controversy under even the narrowest current concepts of discovery. Pleadings once dismissed for "fishing" would satisfy modern notice pleading requirements. The concept remains, but the line has moved.

The primary function of the fishing metaphor is to express disapproval of a party who is thought to have insufficient information to bring, or continue with, a lawsuit. The "fishing expedition" metaphor now inhabits the center of a crucial policy decision about civil litigation: where courts will draw the line between rectifying informational imbalance and protecting defendants from non-meritorious lawsuits. The condemnation of fishing has morphed from a means of protecting a party's privacy and property rights¹⁹⁹ to an argument about protecting parties from the costs of

196. FED. R. CIV. P. 11(b)(3). See also Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 21–22 (2001) ("The rule's apparent tolerance of claims that plaintiffs identify as likely to have support after discovery seems to me to be—along with generally broad notice pleading under the Federal Rules, plus American reliance on private litigation for much enforcement of our public-law norms—part of the round hole into which the square peg of scope narrowing does not fit.").

197. See *Hous. Rights Ctr. v. Sterling*, No. CV 03-859 DSF (Ex), 2004 U.S. Dist. LEXIS 28877, at *14 n.6 (C.D. Cal. Dec. 6, 2004) (citing FED. R. CIV. P. 11(b)(3) in overruling objection to discovery). But see *Ferluga v. Eickhoff*, No. 05-2338-JWL, 2006 U.S. Dist. LEXIS 40915, at *16–17 (D. Kan. June 19, 2006) (ruling that merely alleging plaintiff might discover evidentiary support is inadequate to justify discovery).

198. FED. R. CIV. P. 26(b)(3) (codifying work product exemption, which precludes discovery of an opponent's trial materials, including material that supports the opponent's case).

199. Some "fishing expedition" cases still do concern privacy or property rights. See, e.g., *Automated Tech., Inc. v. Eller*, 160 F. Supp. 2d 915, 926 (N.D. Ill. 2001) (protecting trade secrets); *Garcia-Vazquez v. Frito Lay Snacks Caribbean, Inc.*, Civil No. 97-1313(SEC), 2001 U.S. Dist. LEXIS 1699 (D.P.R. Feb. 16, 2001) (protecting certain of plaintiff's psychiatric records).

litigation. In an overwhelming majority of cases, the fishing metaphor is used on behalf of defendants to limit claims by plaintiffs.

II. "FISHING EXPEDITION" AS STRATEGY: THE IMPACT OF METAPHOR

The pervasive use of the fishing metaphor affects more than individual cases. It creates an environment in which litigants and courts treat certain kinds of claims and certain procedural devices as suspect. Defendants who demand particularity in pleading or resist discovery sometimes muddy the waters with accusations of "fishing," which can distract the courts from the parties' proper burdens. Courts also use the fishing metaphor as a rhetorical flourish in cases that were destined to lose anyway, either because of horrible facts, inept lawyering, or an information gap the court refuses to fill. The metaphor is unlikely to change the result in very weak cases, but its association with dubious litigation adds a rotten smell to any metaphorical fishing expedition. In that way, whenever litigants or courts use the metaphor it insinuates that the "fisher" is acting improperly or ineptly. When the metaphor attaches to an entire line of cases, it spawns and reinforces a presumption of impropriety, forcing plaintiffs in all of the disfavored cases to swim upstream. This section examines the way these metaphorical strategies combine to bias the legal system as a whole, whether individual decisions containing the fishing metaphor reach correct or erroneous conclusions.

A. "Fishing" as a Verbal Attack

Litigants opposing litigation or discovery have consistently used the metaphor as a verbal weapon. This tradition goes back to the earliest days of the legal metaphor, as when a defendant in 1797 was already arguing that "this is one of those vexatious fishing bills."²⁰⁰ Instead of just addressing the merits of the discovery dispute (e.g., the discovery request is overbroad, compliance would be burdensome, the requested information is not relevant), the opponent calls it a "fishing expedition." In some cases, one can almost hear the sneer in the tone of the argument:

200. *Renison v. Ashley*, (1794) 30 Eng. Rep. 724, 725 (Ch.) ("This is *another* of the fishing bills, that I do not like to see in this Court.") (emphasis added).

- “If a party, at the instance of his adversary, can be compelled to give his deposition . . . such a method of preparing for the trial would be tantamount to a fishing excursion for evidence to support a doubtful cause.”²⁰¹
- “This does not even rise to the dignity of a fishing bill.”²⁰²
- “[D]espite a massive fishing expedition regarding [defendant’s] alleged ‘patterns and practices’ concerning the sale of credit life insurance policies, [plaintiff] ultimately failed to disclose any pattern or practice witnesses.”²⁰³
- “Plaintiff is attempting to engage in an expensive fishing expedition under the guise of further discovery, as Plaintiff has failed to state what facts beyond mere speculation that she intends to discover.”²⁰⁴
- “The plaintiffs Nike and adidas . . . have extended their deep-pocketed tentacles on a fishing expedition in hope of catching violators.”²⁰⁵
- “[P]laintiffs are ‘attempting . . . to use discovery as a fishing expedition . . . in the desperate hope of finding something to justify their unfounded claim.’”

Sometimes courts are well aware of the almost-scripted nature of these barbs, noting the “familiar designation of professedly indignant respondents, ‘a fishing expedition’”²⁰⁶ or referring to the metaphor as “hackneyed and meaningless.”²⁰⁷ Nor does the name-calling always work.²⁰⁸ In such cases the metaphor may have served only as a

201. *Wheeler v. Burckhardt*, 56 P. 644, 645 (Or. 1899) (defendant opposing discovery depositions).

202. *Smith v. Ramsey*, 6 Ill. 373, 376 (1844) (defendant objecting to bill of discovery).

203. *Bostic v. Am. Gen. Fin., Inc.*, 87 F. Supp. 2d 611, 613 (S.D.W. Va. 2000) (defendant opposing plaintiff’s fee request).

204. *Madrid v. Chronicle Books*, 209 F. Supp. 2d 1227, 1236 (D. Wyo. 2002) (defendant opposing discovery).

205. *Nike, Inc. v. Top Brand Co.*, 216 F.R.D. 259, 263 (S.D.N.Y. 2003) (defendant opposing sanctions).

206. *In re Kevill*, 2 N.Y.S.2d 191, 194 (Surrogate Ct. 1938). *See also* *McClatchy Newspapers Corp. v. Super. Ct.*, 159 P.2d 944, 950 (Cal. 1945) (referring to the “familiar contention that the object is a mere ‘fishing expedition’ through his private papers”).

207. *SEC v. Oakford Corp.*, No. 00 Civ. 2426 (JSR)(HBP), 2001 U.S. Dist. LEXIS 2818, at *5 (S.D.N.Y. Feb. 26, 2001).

208. *See, e.g.*, *Sorensen v. City of New York*, No. 98 Civ. 3356 (HB), 2003 U.S. Dist. LEXIS 962, at *13 (S.D.N.Y. Jan. 22, 2003); *Rhythm & Hues, Inc. v. Terminal Mktg. Co.*, No. 01 Civ.

distraction, re-routing the discussion from the applicable legal test to the question of whether someone was trying to fish.

In other cases, however, the “fishing” objection, which is tantamount to an accusation of bad faith, puts the accused party on the defensive. If the issue is pleading specificity, the party seeking heightened detail should have to justify a departure from Rule 8’s notice pleading regime.²⁰⁹ If the issue is discovery, the party opposing discovery has the burden to substantiate its objection by introducing evidence of burden, privilege, or immateriality.²¹⁰ Instead, the rhetorical impact of the cry of “fishing expedition” is to force the pleading or discovering party (usually the plaintiff) to justify its actions. In this context, courts’ words in earlier cases become ammunition for the verbal attack.²¹¹

B. Weak Individual Cases

Cases that have serious problems on the merits, or serious lawyering deficiencies, attract fishing metaphors. Sometimes the facts surrounding a plaintiff’s claim are so unappealing that it is surprising a lawyer took the case, assuming the court has accurately narrated both strengths and weaknesses of the parties’ claims. In other cases the lawyers have done such a poor job litigating that one wonders why they failed to approach discovery more diligently. Sometimes the courts’ refusal to allow discovery makes a case untenable, because without the requested information the plaintiff has no evidence. Calling these cases “fishing expeditions” probably does not hasten their doom, but it does add a connotation of bad behavior to anything placed in the fishing category. This section examines some of the weak cases that add to the taint of a “fishing” accusation.

4697 (AGS), 2002 U.S. Dist. LEXIS 10908, at *23 (S.D.N.Y. June 18, 2002); *Boutvis v. Risk Mgmt. Alternatives, Inc.*, No. CIVIL 3:01 CV 1933 (DJS), 2002 U.S. Dist. LEXIS 8521, at *4 n.2 (D. Conn. May 3, 2002) (“The court further finds that defendant’s dismissive description of plaintiff’s discovery requests as an ‘improper fishing expedition’ is factually and legally incorrect.”).

209. FED. R. CIV. P. 8(a) (requiring only a “short and plain statement of the claim”).

210. This is true to some extent even in Rule 56(f) cases, in which plaintiffs have the burden to demonstrate how the additional requested discovery would disclose a genuine issue of material fact. In responding to a “fishing” objection, they are defending against a claim of wrongdoing, not just specifying the link between the discovery and the issues in the case.

211. See *supra* Part I.

1. Bad Facts

Some cases, assuming the court's opinion fairly describes uncontested facts, seemed destined to lose with or without being criticized for "fishing." The "fishing" objection does not help to resolve the case itself, and adds weight to the pejorative nature of the metaphor. One such case is *Grayson v. O'Neill*, a race-discrimination case brought against the Secret Service by the first African-American to be Special Agent in Charge of the Chicago office.²¹² The court began by noting that the Service "received in excess of 100 complaints" against plaintiff Grayson, and that an investigation "revealed that Grayson not only intimidated and harassed his own employees, but also solicited favors from the public he was charged to protect."²¹³ In addition, the opinion details numerous specific accusations, prefacing them with: "The extent of Grayson's improprieties cannot be fully appreciated without a sampling of his numerous condemnable behaviors."²¹⁴

It is not surprising, then, that the trial court granted summary judgment (and the appellate court affirmed) despite denying the plaintiff's request for discovery regarding Service members' participation in "Good Ole' Boy Roundups," which included extremely racist conduct. Grayson argued that white Special Agents in Charge who had participated in such events were not disciplined, thus demonstrating that his punishment for misconduct was discriminatory. The court responded: "Without any evidentiary support, his request amounts to nothing more than a fishing expedition and we decline to rule that the trial judge abused her discretion in denying Grayson the opportunity to extend discovery a fifth time."²¹⁵

The fishing metaphor does not add clarity to the court's analysis. The ruling turns on the court's decision that the requested information was not legally relevant. The court held that, even if the Roundups could justify an inference of racism on the part of some employees who did not supervise Grayson, or even systemic racism on the part of the Secret Service, that evidence would not be enough to show that race-neutral reasons for Grayson's treatment were pretextual.²¹⁶ Instead, by adding Grayson's situation to the

212. *Grayson v. O'Neill*, 308 F.3d 808, 811 (7th Cir. 2002).

213. *Id.*

214. *Id.* at 812.

215. *Id.* at 817. One of the discovery extensions was at the request of the Service. *Id.*

216. The court recited Seventh Circuit law that "[e]vidence of generalized racism directed at others is not relevant unless it has some relationship with the employment decision in question." *Id.* at 816 (citing *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997)).

“fishing” corpus, it associates all those who “fish” with a plaintiff who abused his power and wasted the courts’ time with a meritless attempt at self-justification.

2. Bad Lawyering

The result in some “fishing” cases appeared to be influenced by poor lawyering on behalf of the losing party. Using the “fishing” label, though, adds an accusation of bad behavior to help justify the court’s belief about the merits. Often the problem is failure to pursue the claim aggressively. One patent case, for example, faulted the defendant’s counterclaim:

[D]efendant’s pursuit of these counterclaims has been half-hearted and dilatory. It amended its complaint to add the counterclaims although it could readily have asserted them in its original answer. It has not proceeded promptly to pursue discovery of the issue If defendant wants to justify a fishing expedition it should at least have baited its hooks.²¹⁷

In another case, several inadequacies led to the “fishing” objection. Whether this was poor advocacy, or a lawyer with a losing case, is not clear. In this Title VII hostile work environment case, the court considered the plaintiff’s opposition to summary judgment:

Here, plaintiff’s Rule 56(f) affidavit is deficient for several reasons. First, plaintiff makes no attempt to show how the facts sought are reasonably expected to create a genuine issue of material fact. Instead, he states in a conclusory fashion that obtaining the sworn statements [of two other African-American employees] is ‘necessary to prove [his] case, to show discrimination and an issue of material fact.’ . . . Second,

217. *Spring Windows Fashions LP v. Novo Indus.*, 249 F. Supp. 2d 1111, 1113 (W.D. Wis. 2002). *See also Metro. Antiques & Gems, Inc. v. Beaumont*, No. 02 CIV. 3937 (DLC), 2002 U.S. Dist. LEXIS 24679, at *12 (S.D.N.Y. Dec. 27, 2002) (“Nor is Metropolitan entitled to discovery to try to develop a factual showing [of personal jurisdiction]. During the months between the filing of the motion to dismiss and the plaintiff’s opposition paper, the plaintiff did not request the opportunity to take discovery. Given the inadequate factual and legal presentation in Metropolitan’s papers, it would appear that any discovery would be little more than a fishing expedition.”).

plaintiff has not offered a reasonable explanation for his failure to obtain this discovery sooner.²¹⁸

The plaintiff also failed to file a memorandum of law or any other written response in opposition to the motion for summary judgment.²¹⁹ Cumulatively, these failings convinced the court that the plaintiff was merely fishing. Quoting an earlier case, the court stated: "Rule 56(f) discovery is specifically designed to enable a plaintiff to fill material evidentiary gaps in its case [I]t does not permit a plaintiff to engage in a 'fishing expedition.'"²²⁰ This line of cases lumps together lawyers whose cases are lost after their own procedural default, and those who are diligently pursuing cases in which most of the relevant information is in their opponents' hands. They are not just fishing, they are fishing poorly.

3. Lack of Evidence

Other weak individual cases use the fishing metaphor based on the plaintiff's concession that he lacks evidence. A California appellate case affirmed the dismissal of the plaintiff's discrimination complaint, after discovery, because he:

admitted that no one at the Bureau or the Department ever made any comments or statements to him about his race, national origin, religion, ethnicity, color, or any other category of group bias. He testified that his claims and actions were founded on nothing other than speculation that statistical evidence might prove that the Bureau tended to discriminate in its hiring selections. To the extent plaintiff was permitted by the charade of this meritless action to fish in the lake of discovery, his speculations were disappointed.²²¹

218. *Cooper v. John D. Brush & Co.*, 242 F. Supp. 2d 261, 266 (W.D.N.Y. 2003) (race discrimination and hostile work environment case) (noting also that the court had already given plaintiff an extension to do this discovery, and plaintiff had failed to do so).

219. *Id.* at 265.

220. *Id.* at 266 (quoting *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 725 F. Supp. 669, 680 (N.D.N.Y. 1989)). Some of these cases also fit in the 'bad facts' pattern.

221. *Singh v. Bureau for Private Post Secondary and Vocational Educ.*, No. E030056, 2003 Cal. App. Unpub. LEXIS 502, at *13-14 (Ct. App. Jan. 16, 2003) (noting that plaintiff Singh had not been hired because of his past serious misconduct as the director of a school under defendant Bureau's jurisdiction). *See also* *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160 (10th Cir. 2000). In that case, the plaintiff doctor had received extensive negative reviews as an intern that would justify the defendant hospital's hiring decision. *Id.* at 1169. The

Other courts use the “fishing” label because they simply doubt that the information needed by the plaintiff exists, and therefore deny requests to try to find it. For example, in one case, employees sued to recover on an alleged oral promise of additional pay for sales that exceeded a quota.²²² After ruling that the oral contract was unenforceable under the statute of frauds, the court dismissed the case despite the plaintiffs’ request for production of letters evidencing the promise in company files, even though the plaintiffs needed a writing to overcome the statute of frauds. The court reasoned: “It is improbable that the files of the defendant contain memoranda or letters subscribed by defendant. It would seem that plaintiffs have no knowledge of any such memoranda, but are merely indulging in wishful expectations and are hoping to stave off the dismissal of their complaint by applying for an examination and inspection of the defendant’s files which would be in the nature of a fishing expedition.”²²³ If no signed memorandum exists, the court has saved the defendant from the expense of continued litigation. If it does exist, the court has barred the plaintiffs from accessing evidence that is crucial to prove their case. In neither event does use of the fishing metaphor make it more appropriate to cut off discovery in the case.²²⁴ And it again links the fishing metaphor to frivolous litigation and questionable behavior.

court refused plaintiff’s request for discovery of negative reviews of others over a five year period:

When, as is apparent here, a plaintiff brings an initial action without any factual basis evincing specific misconduct by the defendants and then bases extensive discovery requests upon conclusory allegations in the hope of finding the necessary evidence of misconduct, that plaintiff abuses the judicial process. Therefore, the magistrate judge appropriately recognized that defendants’ compliance was sufficient and the likely benefit of any further attempted fishing expedition would be negligible.”

Id.

222. *McCants v. Emerol Mfg. Co.*, 81 N.Y.S.2d 770, 771 (Sup. Ct. 1948).

223. *Id.* Because the plaintiffs needed a “writing” to make the contract enforceable, other kinds of discovery such as a deposition of the defendant would not have been helpful. *See also Addison v. Allstate Ins. Co.*, 97 F. Supp. 2d 771, 775 (S.D. Miss. 2000) (refusing to allow discovery from competitors’ customers to try to show improper steering by Allstate); *Keaggy v. Lightcap*, 181 A. 474 (Pa. 1935) (refusing to order discovery and an accounting).

224. *See also Higgason v. Hanks*, 54 F. App’x 448, 449 (4th Cir. 2002) (rejecting plaintiff’s challenge to prison discipline, characterizing plaintiff Higgason as “a frequent litigant in this court,” and referring to the “shopworn arguments that we have rejected repeatedly in Higgason’s previous appeals”).

C. Disfavored Cases—Pleading Facts in Detail

"Fishing expedition" is not a form of analysis; it is code language. And the code has the potential to lead the court's analysis astray. Whether headed that way on their own initiative or directed there by a litigant, courts may follow lines of "fishing" cases that cast a whole area of law in a negative light. Used often enough, the fishing metaphor can influence (or reinforce) the attitudes of the bench and bar enough to affect resolution on the merits in certain types of litigation. The particular types of claims that are disfavored vary over time. Currently it is antitrust, securities fraud, and employment discrimination cases that are treated as suspect in the federal courts, while products liability cases are most likely to draw the label in state courts.

1. Early Cases Threatening Family Privacy and Property Rights

The earliest uses of the metaphor occurred in equity cases that were labeled "fishing bills." The eighteenth-century land title cases depicted the plaintiffs as threatening property, invading privacy, and disturbing the status quo. As noted earlier, Lord Chancellor Loughborough lamented: "A spirit of prying into titles has got into the Court, that is highly dangerous to the title of every man in England."²²⁵ Similarly, the fraudulent transfer cases initially involved the somewhat unappealing principle that allowed subsequent creditors to benefit from an insolvency that had not affected them—so unappealing that the law later changed to require actual fraud.²²⁶ These "fishing bills" threatened the party in possession of property and required the disclosure of private information, often to the detriment of widows and other surviving family members.²²⁷ The courts were more solicitous of the asset holders than of the

225. *Renison v. Ashley*, (1794) 30 Eng. Rep. 724, 725 (Ch.). See also BRAY, *supra* note 40, at 521 ("Rules are laid down for the protection of persons who are in possession of estates to protect them against attacks from persons who hoping to find some blot in their title sometimes bring actions against them without reasonable cause."); HARE, *supra* note 36, at 184 ("It is often of the highest importance to the defendant that he be not compelled to disclose documents which relate to the property in dispute, for the effect of such a disclosure may be detrimental to that beneficial enjoyment of the property to which, as the party in possession, he is entitled . . .").

226. See, e.g., *Clement v. Cozart*, 17 S.E. 486 (N.C. 1893) (tracing development of the law regarding subsequent creditors and fraudulent conveyances).

227. See, e.g., *Newkirk v. Willett*, 2 Johns. Cas. 413, 413 (N.Y. 1800); *Ryves v. Ryves*, (1797) 30 Eng. Rep. 1044, 1044 (Ch.); *Ivy v. Kekewick*, (1795) 30 Eng. Rep. 839, 839 (Ch.).

creditors.²²⁸ In one case, the plaintiff alleged that an insolvent husband had wrongfully transferred property to his wife, and the court replied by describing the danger of fishing:

Such a proposition would be a very unjust one to the wife still under the dominion, control, and personal influence of the husband. In receiving favors at his hands, which she supposed to be the offerings of affection, or a proper provision for her comfort, she would be subjecting that which was her own, or which might afterwards come to her from other sources, to unknown and unsuspected charges, of the amount and nature of which she would be wholly ignorant.²²⁹

In the early days, then, the fishing metaphor appeared in certain types of litigation, and that litigation was openly limited for policy reasons. The same is true in contemporary times: “fishing expedition” claims cluster in certain types of controversial cases, though the policy arguments often seem less candid. Sometimes the heightened pleading requirement that fuels the fishing metaphor is statutory or rule-based, as in PSLRA and fraud cases. Other times, however, the court is inventing its own pleading requirements and then reinforcing those requirements by way of the fishing metaphor.

2. Statutory Heightened Pleading Requirements

Increased judicial scrutiny is statutorily mandated in some cases. Securities fraud actions falling under the PSLRA, for example, require heightened pleading, and discovery is stayed during the pendency of a motion to dismiss.²³⁰ Congress designed the Act to discourage litigation that it believed to be speculative, and so the

228. Cf. BANKR. R. 2004 (allowing examination of any entity regarding “the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor’s estate, or to the debtor’s right to a discharge”). Bankruptcy courts regularly hold that Rule 2004 examinations may properly be used as “fishing expeditions.” See, e.g., *In re Fearn*, 96 B.R. 135, 137 (Bankr. S.D. Ohio 1989).

229. *Huntington v. Saunders*, 120 U.S. 78, 81 (1886) (quoting *Phipps v. Sedgwick*, 95 U.S. 3, 9–10 (1877)).

230. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.). In addition, fraud claims have long required that the plaintiff plead the circumstances of fraud with particularity. FED. R. CIV. P. 9(b). At least in theory, the plaintiff can generally plead the defendant’s condition of mind in a fraud case. *Id.* But see *Ross v. A.H. Robins Co.*, 607 F.2d 545, 558 (2d Cir. 1979) (requiring heightened pleading of facts showing defendant knew its statements were false).

"fishing expedition" metaphor appears repeatedly.²³¹ Sometimes courts accuse plaintiffs of fishing and dismiss the cases before allowing any discovery.²³² Other times, particularly when the government has preceded the private plaintiffs in investigating the defendant, courts allow the cases and discovery to proceed.²³³ But in either case, the metaphor marks "fishing" as the undesirable norm in securities fraud litigation. As the Ninth Circuit noted in approving of one case's particularized pleadings, "this complaint contains sufficient 'particularity' and 'incriminating facts' to distinguish the allegations from the countless 'fishing expeditions' which the PSLRA was designed to deter."²³⁴

In disfavored types of litigation, the "fishing expedition" cases feed on each other. Courts weave chains of citation to other cases accusing plaintiffs of fishing, so that a presumption of bad faith settles over the cause of action generally. For example, *In re Campbell Soup Company Securities Litigation*²³⁵ quotes *In re Theragenics Corporation Securities Litigation*²³⁶ to support a prohibition on fishing, with *Theragenics* in turn citing *Parnes v. Gateway 2000*²³⁷ for its suspicion of fishing, all in securities fraud cases. Sometimes the string cites include additional kinds of disfavored cases. For instance, *Fishman v. Meinen*, a securities fraud case,²³⁸ quotes *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, a RICO case,²³⁹ which in turn

231. Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 600 (2002) (noting courts' tendency to assume that securities fraud cases are frivolous). Determining whether most cases are in fact frivolous is very difficult because very few private securities class actions proceed to trial. See Charles M. Yablon, *A Dangerous Supplement? Longshot Claims and Private Securities Litigation*, 94 NW. U. L. REV. 567, 572 (2000).

232. See, e.g., *Ross*, 607 F.2d at 558.

233. See *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL-1500, 2003 U.S. Dist. LEXIS 2731, at *3 (S.D.N.Y. Feb. 28, 2003) (quoting *In re WorldCom Inc. Sec. Litig.*, 234 F. Supp. 2d 301, 306 (S.D.N.Y. 2002)). In both cases, the plaintiffs secured a partial lifting of the discovery stay to access documents already turned over to the executive and legislative branches of government. Both plaintiffs could therefore be absolved: they were not "fishing." See also *In re Enron Corp. Sec. Litig.*, No. MDL-1446, 2002 U.S. Dist. LEXIS 26261, at *31 (S.D.N.Y. Aug. 15, 2002) (permitting discovery of documents already provided to government investigators).

234. *In re Daou Sys. Inc. Sec. Litig.*, 411 F.3d 1006, 1024 (9th Cir. 2005).

235. *In re Campbell Soup Co. Sec. Litig.*, 145 F. Supp. 2d 574, 595 (D.N.J. 2001).

236. *In re Theragenics Corp. Sec. Litig.*, 105 F. Supp. 2d 1342, 1349 (N.D. Ga. 2000).

237. *Parnes v. Gateway*, 122 F.3d 539, 549 (8th Cir. 1997).

238. *Fishman v. Meinen*, No. 02 C 3433, 2003 U.S. Dist. LEXIS 2527, at *12 (N.D. Ill. Feb. 21, 2003).

239. *Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 777 (7th Cir. 1994). RICO cases, also disfavored, often use the fishing metaphor when requiring heightened pleading specificity. See, e.g., *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1327 (7th Cir. 1994) (RICO predicate act of mail fraud).

quotes securities cases that express fear of strike suits (but not of “fishing”).²⁴⁰

Courts dismissing cases for “fishing” do more than indicate that the plaintiffs lacked sufficient factual foundation to meet the pleading requirements. The metaphor implies that the plaintiffs acted irresponsibly and with impure motive.²⁴¹ Countless PSLRA plaintiffs must begin by rebutting the “fishing expedition” label, and careful judges have to consciously note that the Act “was not enacted to raise the pleading burdens . . . to such a level that facially valid claims, which are not brought for nuisance value or as leverage to obtain a favorable or inflated settlement, must be routinely dismissed on Rule 9(b) and 12(b)(6) motions.”²⁴²

3. Judge-Made Heightened Pleading Requirements

Other categories of suspect cases are judge-made, and they require particularized pleading without statutory or rule-based justifications for doing so. These cases frequently use fishing metaphors. Private antitrust claims, for example, fall into this category.²⁴³ Like the securities fraud cases, antitrust cases often cite to earlier “fishing” cases when using fishing metaphors. For example, *DJ Manufacturing Corp. v. Tex-Shield, Inc.*²⁴⁴ quotes *DM Research, Inc. v. College of American Pathologists*.²⁴⁵ Similarly, *Network Computing*

240. This is not surprising, since the prohibition of “fishing” stems from a fear of abusive litigation like “stricke suits.” See e.g., *Migdal v. Rowe Price-Fleming Int’l*, 248 F.3d 321, 326 (4th Cir. 2001). *Migdal*, a suit brought under the Investment Company Act, quotes *DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999), a much-cited antitrust “fishing” case.

241. This implication in securities fraud cases seems particularly unfortunate given the courts’ serious splits over the required degree of detail and given the fact that evidence of intent is often in the defendant’s hands and available only after at least limited discovery. See Fairman, *supra* note 231, at 608. See also Joseph A. Grundfest & A.C. Pritchard, *Statutes With Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 634, 674–80 (2002) (arguing that the theoretically procedural heightened pleading standard in the PSLRA actually has the substantive result of increasing the scienter requirement).

242. *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 354 (5th Cir. 2002) (noting with a “cf.” signal the observation in *In re Campbell Soup Co. Sec. Litig.*, 145 F. Supp. 2d 574, 595 (D.N.J. 2001), that “the PSLRA’s goal [is to] flush out suits which are built on mere speculation and conclusory allegations and which aim to use discovery as a fishing expedition to substantiate frivolous claims”).

243. See, e.g., *DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999); *Network Computing Servs. Corp. v. Cisco Sys.*, 223 F.R.D. 392, 395 n.5 (D.S.C. 2004); *Fare Deals, Ltd. v. Glorioso*, 217 F. Supp. 2d 670, 671 (D. Md. 2002); *DJ Mfg. Corp. v. Tex-Shield, Inc.*, 275 F. Supp. 2d 109, 120 (D.P.R. 2002); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 77 F.R.D. 39, 4–42 (N.D. Cal. 1977).

244. *DJ Mfg. Corp.*, 275 F. Supp. at 120.

245. *DM Research, Inc.*, 170 F.3d at 55.

*Services Corp. v. Cisco Systems*²⁴⁶ quotes *In re IBM Peripheral EDP Devices Antitrust Litigation* for its extended fishing metaphor: "Even if one is entitled to embark on a fishing expedition, one must at least use 'rod and reel, or even a reasonably sized net[; not] drain the pond and collect the fish from the bottom."²⁴⁷ As with the securities fraud cases, the "fishing" label marks antitrust claims as suspect. Unlike securities fraud claims, however, antitrust cases have little support for the heightened pleading requirement.

In antitrust cases, courts requiring great factual specificity believe they are authorized to do so by a Supreme Court footnote in *Associated General Contractors of California v. California State Council of Carpenters*.²⁴⁸ Even after the Supreme Court generally rejected judge-made heightened pleading rules in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*²⁴⁹ and again in *Swierkiewicz v. Sorema N.A.*,²⁵⁰ heightened pleading practice continues to thrive in antitrust cases, aided by the "fishing expedition" metaphor.²⁵¹

D. Disfavored Cases—Limiting Discovery Relevance

In addition to reinforcing decisions that require greater specificity in pleading, 'no fishing' also appears as a reason to limit or deny discovery. This is particularly true when the plaintiff must establish some level of knowledge or intent by the defendant. Lacking a "smoking gun," the plaintiffs in these cases seek broad background information to establish a pattern of behavior, and defendants perceive such requests as excessive. Two of the best examples are employment discrimination cases and products liability cases.

246. *Network Computing Servs. Corp.*, 223 F.R.D. at 395 n.5.

247. *In re IBM*, 77 F.R.D. at 42. See also *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 138 F. Supp. 2d 25, 28 (D. Me. 2001) (quoting *DM Research, Inc.*, 170 F.3d at 53).

248. *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).

249. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

250. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 507 (2002).

251. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1011-21 (2003). The Court has recently granted certiorari to review a heightened pleading issue in an antitrust case. *Twombly v. Bell Atl. Corp.*, 425 F.3d 99 (2d Cir. 2005), cert. granted, No. 05-1126, 2006 U.S. LEXIS 4911 (June 26, 2006).

1. Employment Discrimination

The discovery-related “fishing” cases often raise issues of discovery relevance. More specifically, they tend to consider how similar the requested information must be to the plaintiff’s claims before it will be discoverable. For example, in *Pedraza v. Holiday Housewares, Inc.*, the plaintiff sued his employer, Holiday Housewares, for discrimination based on national origin and sexual orientation.²⁵² Holiday Housewares shared a president and management employees with a related company, Plastican.²⁵³ The plaintiff learned during a deposition that at least five lawsuits had been filed against Plastican based on national origin or sexual harassment.²⁵⁴ The plaintiff asked to take additional depositions in order to discover whether those claims were similar to his, either in the identity of the accused wrongdoers or in the nature of the allegations, so that he could establish a pattern and practice of discrimination.²⁵⁵ The court denied this request, remarking that the plaintiff’s motion “bespeaks of a possible fishing expedition into what appear to be largely irrelevant issues of discrimination complaints made against a third party.”²⁵⁶

Plaintiffs making claims of discriminatory treatment, as opposed to disparate impact, often find their discovery requests rejected as “fishing.” In *Hill v. Motel 6*, an age discrimination case, the plaintiff was fired from his position as an area manager.²⁵⁷ He alleged that corporate management had discriminated against him, and he asked to discover the personnel files of all Motel 6 area managers and all complaints or charges of age discrimination filed with the government or other agencies.²⁵⁸ The court limited discovery to employees supervised by the plaintiff’s immediate supervisor.²⁵⁹ To do otherwise, the court believed, would be disturbing “the balance struck between a party’s right to discovery with the need to prevent ‘fishing expeditions.’”²⁶⁰ If the court’s decision was merely about logical relevance, which it appears to be, the use of the fishing metaphor confuses rather than clarifies its analysis.

252. *Pedraza v. Holiday Housewares, Inc.*, 203 F.R.D. 40, 41 (D. Mass. 2001).

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 42.

257. *Hill v. Motel 6*, 205 F.R.D. 490, 493 (S.D. Ohio 2001).

258. *Id.* at 492.

259. *Id.* at 495.

260. *Id.* at 492 n.2 (quoting *Bush v. Dictaphone Corp.*, 161 F.3d 363, 367 (6th Cir. 1998)) (internal quotations omitted).

Likewise, the court in *Boyd v. American Airlines, Inc.* limited discovery in a racial harassment and discrimination suit.²⁶¹ The plaintiff sought to discover complaints of racial harassment or racially hostile work environment throughout the continental United States, but the court only allowed discovery of complaints originating from the places where the plaintiff's alleged harassment occurred.²⁶² The plaintiff sought the information about American's nationwide operations to rebut the defense that the company used reasonable care to prevent and correct harassing behavior.²⁶³ The court, however, held: "Plaintiff's request in the instant matter is merely a fishing expedition."²⁶⁴ The plaintiff was thereby deprived of information she might have used to show that American's efforts in the Dallas area were inadequate.

As was true with the securities fraud and antitrust cases, "fishing" citations in employment discrimination cases build on each other. In addition to the examples noted above, *Adams v. Giant Food, Inc.*²⁶⁵ quotes an earlier employment case, *Morrow v. Farrell*.²⁶⁶ The case of *Pleasants v. Allbaugh*, which claimed race discrimination in federal employment,²⁶⁷ quotes *Hardrick v. Legal Services Corp.*, another race discrimination case.²⁶⁸ Decisions in cases alleging other types of discrimination also cite to strings of "fishing" cases to imply bad faith.²⁶⁹

261. *Boyd v. Am. Airlines, Inc.*, No. 3-01-CV-2230-D, 2002 U.S. Dist. LEXIS 19937, at *5 (N.D. Tex. Oct. 17, 2002).

262. *Id.* at *1-5.

263. *Id.* at *2.

264. *Id.* at *4 (quoting *Spina v. Our Lady of Mercy Med. Ctr.*, No. 97 CIV 4661 (RCC), 2001 U.S. Dist. LEXIS 7338, at *7 (S.D.N.Y. June 7, 2001)). *See also Adams v. Giant Food, Inc.*, 225 F. Supp. 2d 600, 607 (D. Md. 2002). In that case, plaintiffs claimed they were discharged on the basis of race, and the employer argued that the plaintiffs had improperly charged for time when they were on break or sleeping. *Id.* at 602. Plaintiffs requested discovery regarding white female employees who also falsified time cards, but the court held that it was not discoverable because those employees—unlike the plaintiffs—were on day rather than night shift and were supervised rather than unsupervised. *Id.* at 603. The court explained: "[T]he purpose of rule 56(f) is not to allow the non-moving party to engage in a fishing expedition." *Id.* at 607.

265. *Id.*

266. *Morrow v. Farrell*, 187 F. Supp. 2d 548, 551 (D. Md. 2002).

267. *Pleasants v. Allbaugh*, 208 F.R.D. 7, 8-9 (D.D.C. 2002).

268. *Hardrick v. Legal Services Corp.*, 96 F.R.D. 617, 618 (D.D.C. 1983).

269. *See, e.g., McGee v. Hayes*, 43 F. App'x 214 (10th Cir. 2002) (alleging discrimination in the denial of a building permit) (quoting *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1169 (10th Cir. 2000) (employment discrimination) (citing *Jarvis v. Nobel/Sysco Food Servs. Co.*, 985 F.2d 1419, 1423 n.4 (10th Cir. 1993) (breach of duty of fair representation))).

2. Products Liability

Products liability discovery disputes have similar patterns in terms of judicial “fishing” accusations. As in the employment setting, discoverability turns on relevance. Here the discovery disputes tend to involve which products are sufficiently similar to the one that allegedly injured the plaintiff, or what time period is sufficiently material to justify the burden of compliance. For example, the plaintiff in *Orleman v. Jumpking, Inc.* suffered a spinal cord injury while using a Jumpking trampoline and sued for negligence, strict liability, and breach of warranty.²⁷⁰ He sought to discover previous lawsuits or claims brought against the defendant as a result of trampoline injuries during the past fifteen years.²⁷¹ The court narrowed the scope of discovery to the particular make of trampoline on which the plaintiff was injured and “substantially similar” models, and to a shorter time period, noting that the generally broad scope of discovery “should not be misapplied to allow a fishing expedition in discovery.”²⁷²

In the same manner, the Texas Supreme Court has narrowed discovery in tort cases. In *Texaco, Inc. v. Sanderson*, the court held that a document production request in a workplace toxic tort case for “all documents written by defendant’s safety director concerning ‘safety, toxicology, and industrial hygiene, epidemiology, fire protection and training’” was too broad, and the court characterized the original request as “an effort to dredge the lake in hopes of finding a fish.”²⁷³ In another Texas mass tort case, 140 plaintiffs claimed asbestos-related injuries and requested documents about all of the defendant’s products.²⁷⁴ Because the request included products that the plaintiffs had not yet claimed to have used and locations at which the plaintiffs had not worked, the court concluded that the plaintiffs’ request “constitute[d] the type of fishing expedition prohibited” by its earlier cases.²⁷⁵

270. *Orleman v. Jumpking, Inc.*, No. 99-2522-CM, 2000 U.S. Dist. LEXIS 11081, at *1 (D. Kan. July 22, 2000).

271. *Id.* at *4.

272. *Id.* at *6–7 (citing *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992)). See also *Anderson v. Farmland Indus., Inc.*, 136 F. Supp. 2d 1192, 1195 (D. Kan. 2001).

273. *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995). See also *Am. Med. Sys., Inc. v. Osborne*, 651 So. 2d 209, 211 (Fla. Ct. App. 1995).

274. *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998).

275. *Id.* Texas is especially enamored of the “fishing expedition” metaphor, and the courts’ string cites reinforce each other. *American Optical*, for example, quotes *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) (premises liability), *Dillard Department Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (1995) (false arrest), and *Texaco*, 898 S.W.2d at 815 (toxic tort).

In essence, the courts are deciding, without knowing what discovery would disclose, that no reasonable factfinder could rely on the information sought to support the inference the plaintiff needs to prove her case, nor could the discovery reasonably be expected to lead to evidence that would do so.²⁷⁶ Given this presumed low degree of materiality, the court may also be concluding that the burden of complying with the request outweighs its probable importance.²⁷⁷

By using the fishing metaphor, the court avoids explaining its reasoning more clearly. The metaphor indicates not only that the court doubts the logical materiality of the information, but also that the requests are frivolous or ethically questionable.²⁷⁸ The cases thus become precautionary tales, warning plaintiffs not to argue that the corporate culture of an employer is relevant to a claim of discrimination, that a company's awareness of potential defects in one product is relevant to those in a similar one, or that a company's knowledge and behavior in one location is relevant to others. Some cases that use the "fishing expedition" metaphor undoubtedly reach the right result, while others are arguable at best. The metaphor is harmful both when it obscures the court's actual reasoning and when it becomes another link in a chain of "fishing" accusations that warp the judicial system's attitude toward entire categories of cases.

III. CAN THE METAPHOR BE SAVED?

The time-honored cry of "fishing expedition" is still more than capable of preventing discovery and heading off lawsuits altogether. Metaphorically speaking, fishing expeditions can be "vexatious,"²⁷⁹ "massive,"²⁸⁰ "burdensome,"²⁸¹ "expensive,"²⁸²

276. Cf. FED. R. EVID. 401 (providing that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); FED. R. CIV. P. 26(b)(1) (providing the discovery relevance standard).

277. Cf. FED. R. CIV. P. 26(b)(3) (providing proportionality considerations).

278. Two of the employment cases also accuse plaintiffs of trying to "roam in the shadow zones of relevancy." *Boyd v. Am. Airlines, Inc.*, No. 3-01-CV-2230-D, 2002 U.S. Dist. LEXIS 19937, at *4 (N.D. Tex. Oct. 17, 2002) (quoting *Spina v. Our Lady of Mercy Med. Ctr.*, No. 97 CIV 4661 (RCC), 2001 U.S. Dist. LEXIS 7338, at *6 (S.D.N.Y. June 6, 2001); *Hill v. Motel 6*, 205 F.R.D. 490, 493 (S.D. Ohio 2001) (quoting *Blum v. Schlegel*, 150 F.R.D. 38, 39 (W.D.N.Y. 1993)).

279. *Ryves v. Ryves*, (1797) 30 Eng. Rep. 1044, 1046 (Ch.).

280. *Bostic v. Am. Gen. Fin., Inc.*, 87 F. Supp. 2d 611, 613 (S.D.W. Va. 2000).

281. *EEOC v. Autozone, Inc.*, 258 F. Supp. 2d 822, 830 (W.D. Tenn. 2003).

282. *Madrid v. Chronicle Books*, 209 F. Supp. 2d 1227, 1236 (D. Wyo. 2002).

“classic,”²⁸³ “invasive,”²⁸⁴ “spurious,”²⁸⁵ “wide-ranging,”²⁸⁶ “transparent,”²⁸⁷ “blind,”²⁸⁸ “old-fashioned,”²⁸⁹ “unbridled,”²⁹⁰ or “experimental.”²⁹¹ Courts also use the ever-popular “mere fishing expedition.”²⁹² The adjectives serve to highlight, in a colorful or dramatic way, the unacceptable behavior of those who fish. In addition, the metaphor portrays the objecting parties (and not the information sought) as the hapless fish: “[W]hen the fish objects . . . the fisherman is called upon to justify his pursuit.”²⁹³ Fishing is clearly a Bad Thing.

On those rare occasions in which courts allow fishing, their tone is permissive but not encouraging. A fishing expedition can be “justifiable”²⁹⁴ or “appropriate.”²⁹⁵ Even the drafters of the federal discovery rules did not create a linguistic system in which fishing was desirable. Instead, they criticized the metaphor.²⁹⁶ Nowhere do we find cases praising fishing expeditions as ‘skillful,’ ‘thorough,’ ‘creative,’ or ‘laudable.’

Over the centuries, the legal fishing metaphor has both changed and stayed the same. The acts condemned as fishing have changed dramatically. Lawsuits no longer require detailed fact pleading to demonstrate that the plaintiff already has all of the necessary evidence. Discovery is no longer limited to a party’s own case, the admission of specific information, or the production of identified

283. *Sorensen v. City of New York*, No. 98 Civ. 3356 (HB), 2003 U.S. Dist. LEXIS 962, at *12 (S.D.N.Y. Jan. 22, 2003).

284. *Wyoming v. USDA*, 208 F.R.D. 449, 453 (D.D.C. 2002).

285. *Fare Deals, Ltd. v. Glorioso*, 217 F. Supp. 2d 670, 671 (D. Md. 2002).

286. *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1365 (Fed. Cir. 2001).

287. *Forthmann v. Boyer*, 118 Cal. Rptr. 715, 721 (Ct. App. 2002).

288. *Smith v. State Farm Mut. Auto. Ins. Co.*, 113 Cal. Rptr. 399, 418 (Ct. App. 2001); *In re Fuqua Indus., Inc. Shareholder Litig.*, No. 11974, 2002 Del. Ch. LEXIS 52, at *18–19 (Ch. May 2, 2002).

289. *In re Best Lock Corp. Shareholder Litig.*, No. 16281, 2000 Del. Ch. LEXIS 175, at *15 (Ch. Dec. 18, 2000).

290. *Saratoga Harness Racing, Inc. v. Roemer*, 711 N.Y.S.2d 603, 605 (App. Div. 2000).

291. *Ex parte Brooks*, 32 So. 2d 534, 536 (Ala. 1947).

292. *See, e.g.*, *Addison v. Allstate Ins. Co.*, 97 F. Supp. 2d 771, 774, 775 (S.D. Miss. 2000); *Terry v. Stull*, 169 A. 739, 741 (Del. Ch. 1933); *Landry v. Ozenne*, 195 So. 14, 19 (La. 1940); *State ex rel Laughoin v. Sartorius*, 119 S.W.2d 471, 473 (Mo. Ct. App. 1938); *Phillips v. Curtis*, 75 N.Y.S. 551, 554 (Sup. Ct. 1902); *Continental Bank of N.Y. v. Myerle*, 51 N.Y.S. 497, 499 (App. Div. 1898); *Phalen v. Roberts*, 47 N.Y.S. 780, 781 (App. Div. 1897); *Newkirk v. Willett*, 2 Johns. Cas. 413, 416 (N.Y. 1800); *Kelly v. Ingersoll*, 1878 Ohio Misc. LEXIS 116 at *2 (Ct. C.P. 1878).

293. *Patterson v. Burge*, No. 03 C 4433, 2005 U.S. Dist. LEXIS 1331, at *5 (N.D. Ill. Jan. 5, 2005) (citing *Nw. Mem. Hosp. v. Ashcroft*, 362 F.3d 923, 931 (7th Cir. 2004)). *See also In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281, 326 n.46 (S.D.N.Y. 2003).

294. *In re Merkle*, 19 P. 401, 402 (Kan. 1888).

295. *United States v. Dentsply Int’l, Inc.*, No. 99-5 MMS, 2000 U.S. Dist. LEXIS 6925, at *13–14 (D. Del. May 10, 2000).

296. *See supra* text accompanying notes 121–123.

documents. Yet the image of the overreaching or unscrupulous fishing expedition remains, harking back to an older way of judging pleadings and discovery.

The fishing metaphor is at best a distraction. Its uses are too tired and formulaic to add new insight to judicial opinions or commentary. Describing the U.S. civil litigation system as one that foolishly allows "fishing" is a harmful caricature.²⁹⁷ As a pervasive legal metaphor, however, it structures the way we think when we consider what it means to file a lawsuit or request information needed to prove legal claims.

Can the legal system instead reclaim the positive aspect of fishing? Such an effort might begin by getting more serious about the nature of literal fishing. Whether one fishes for a living or for sport, fishing is a targeted activity. Those who fish go to places known to have fish, use bait tailored to the expected fish, and employ techniques designed to maximize the quality and quantity of the catch. People fish for a living, and the ones who succeed blend knowledge, hard work, and skill. Devotees of fly fishing would go further and claim that fishing blends skill and art, invoking a

sixth sense that takes human effort to a higher plane. To Think Like a Fish (and therefore know where to find one) is a gift of cultivated instinct. . . . The mind is like a computer crammed with so many fish facts that it suddenly produces an insight that depends on those facts but leaps beyond them.²⁹⁸

Perhaps recognition of the informed targeting, talent, and art involved in fishing could help to neutralize the metaphor.

Even as a metaphor, the concept of fishing is not invariably negative outside the legal context. Christian scriptures describe Jesus as instructing his followers to become "fishers of men."²⁹⁹ Literature contains positive uses of metaphorical fishing. For example, John Donne in *The Bait* portrays his lover as a skilled fisher:

Let others freeze with angling reeds,
And cut their legs with shells and weeds,
Or treacherously poor fish beset,
With strangling snare, or windowy net . . .

297. See Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 301-09 (2002).

298. Holly Morris, *Fumbling After Grace: Fishing and Writing*, N.Y. TIMES, JUNE 8, 1997, available at <http://www.nytimes.com/books/97/06/08/bookend/bookend.html>.

299. *Matthew* 4:19; *Mark* 1:17. See also *Luke* 5:2-11.

For thee, thou need'st no such deceit,
 For thou thyself art thine own bait:
 That fish, that is not catch'd thereby,
 Alas! is wiser far than I.³⁰⁰

Virginia Woolf in *A Room of One's Own* used fishing as a metaphor for thinking.³⁰¹ A recent popular novel³⁰² used fishing (along with hunting) to represent the heroine's "spirited search for true love, self-understanding, and a fulfilling career."³⁰³

Everyday use of the fishing metaphor is more neutral than the legal use. Metaphorical fishing belongs to a larger metaphoric system in which a problem is portrayed as a body of water and solving the problem is characterized as looking for an object in water. For example, investigating a problem is described as an exploration of water ("He dived right into the problem"); the solution is an object in water ("The answer's just floating around out there"); and difficulty in solving a problem is represented by difficulty in exploring water ("The murky waters of the investigation frustrated him").³⁰⁴ In this system, fishing is just an attempt to solve the problem: "He'd been fishing for the answer for weeks." This usage appears in many contexts. For example, job hunting or dating is described as "fishing," with a good result being a "good catch" or "landing" a good job.³⁰⁵ "The one that got away" is generally seen as a desirable and legitimate object of pursuit. Seen in this light, fishing is not subversive or underhanded but the process of finding an answer. A few of the legal metaphors assume this more neutral tone when

300. John Donne, *The Bait*, 1 POEMS OF JOHN DONNE 47 (E.K. Chambers ed., George Rutledge & Sons 1904) (1896). Consider also T.S. Eliot's complex use of the Fisher King image in *The Waste Land*. T.S. Eliot, *The Waste Land*, part V, ll. 424–25 (1922). In a note at the end of the poem, Eliot cited the work of Jessie L. Weston, which explores the religious symbolism of the Fisher King. JESSIE L. WESTON, FROM RITUAL TO ROMANCE ch. 9 (Doubleday 1957) (1920). It is the Fisher King upon whom the health and fertility of the land and people depend. See generally Rickard A. Parker, Exploring *The Waste Land*, <http://world.std.com/~raparker/exploring/thewasteland/explore.html> (last visited August 6, 2006).

301. VIRGINIA WOOLF, A ROOM OF ONE'S OWN 5 (Harcourt Brace Jovanovich 1981) (1929) ("Thought . . . had let its line down into the stream.").

302. MELISSA BANKS, THE GIRLS' GUIDE TO HUNTING AND FISHING (1999).

303. ReadingGroupGuides.com, Book Review, http://www.readinggroupguides.com/guides/girls_guide_to_hunting_and_fishing.asp (last visited Feb. 2, 2006).

304. Conceptual Metaphor Home Page, A Problem Is a Body of Water, http://cogsci.berkeley.edu/lakoff/metaphors/A_Problem_Is_A_Body_Of_Water (last visited Feb. 2, 2006).

305. Tameri Guide for Writers, Figurative Language, <http://www.tameri.com/edit/figurative.html> (last visited Feb. 2, 2006).

describing the activities of lawyers. For example, lawyers attempt to fill their baskets,³⁰⁶ bait their hooks,³⁰⁷ and cast their lines.³⁰⁸

Changing the metaphor's impact, if in fact change is possible, will require a collective act of will.³⁰⁹ If we continue to think of certain litigation conduct as fishing, we should imagine the skilled, artful, efficient fisher, looking for the right things in the right places. The image would be not a "dragnet"³¹⁰ but a skillful cast, and the issue not *whether* parties are fishing but *how well* they fish. "Catching" information that establishes a cause of action would enforce legal norms rather than impose a disfavored transaction cost. Stripped of its pejorative slant, fishing would become a neutral concept rather than a prohibited act. In this way, it might become a more equitable tool in the difficult task of deciding which cases are allowed to go forward.

CONCLUSION

It would be far better, however, to remove the 'No Fishing' sign entirely from the shores of legal discourse. As the Supreme Court noted in *Hickman* back in 1947, it is a "time-honored cry"³¹¹ and too deeply embedded in our collective consciousness to be easily transformed into 'Fisherfolk Welcome.' While the metaphor may have started "as a device to liberate thought," it has ended by "enslaving it."³¹² It is time for the fishing metaphor—with its uncatchable fish—to swim away to inaccessible waters and never raise its head again.

306. *Phalen v. Roberts*, 47 N.Y.S. 780, 781 (App. Div. 1897).

307. *Spring Windows Fashions LP v. Novo Indus.*, 249 F. Supp. 2d 1111, 1113 (W.D. Wis. 2002).

308. *Marsalis v. Wilson*, 778 N.E.2d 612, 618 (Ohio Ct. App. 2002). *See also* *Walter v. Walter*, 127 S.W.3d 396, 399 (Tex. App. 2004) ("Although appellant is a licensed attorney, a law license is not a fishing license.").

309. *Berger*, *supra* note 5, at 207 ("Rather than a wholly new metaphor, cognitive theory . . . suggests ways to re-view a current metaphor.").

310. *Benbow v. Aspen Tech., Inc.*, No. 02-2881, 2003 U.S. Dist. LEXIS 17936, at *11 (E.D. La. Oct. 7, 2003).

311. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

312. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.) (rejecting the metaphor of a "parent" corporation acting through an "alias" or "dummy" subsidiary as a basis for liability).

