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Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules

Sherman L. Cohn*

I. INTRODUCTION

Traditionally, except for the limited role played by pleadings and bills of particulars, the attorney in a law court did not disclose evidentiary matters until trial.¹ "A judicial proceeding was a battle of wits rather than a search for the truth,"² and thus, each side was protected to a large extent against disclosure of his case until counsel chose to disclose it at trial. This philosophy changed some forty years ago with the introduction of discovery in the Federal Rules of Civil Procedure. In the words of Mr. Justice Murphy, the discovery rules meant that "civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."³ Or, as another observer saw it, "[m]odern instruments of discovery . . . together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."⁴

The 1938 federal discovery rules maintained the basic premise of the adversary system. It was left to counsel to determine how to proceed in discovery matters. A matter came before a judge only when there was an objection or a failure to carry out discovery. Thus,

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This Article was written under a contract with the Federal Judicial Center, and draws upon data obtained in a survey of the federal courts conducted by the Center, noted throughout the Article. A staff paper prepared by Thad M. Guyer of the Federal Judicial Center was also a fundamental aid in the preparation of this Article. T. GUYER, *SURVEY OF LOCAL CIVIL DISCOVERY PROCEDURES* (FJC Staff Paper 77-1, 1977).

The conclusions reached and opinions expressed in this Article are solely those of the author, and are not attributable to the Federal Judicial Center.

The author wishes to express his special appreciation for the valuable assistance of Daniel R. Kane, Esq., and Keith R. Fisher, in the compilation of materials used in the Article.

1. Although the law courts had no discovery in a sense recognizable today, an attorney could file a "bill of discovery" in an equity court for use in a law court, but the device was cumbersome. See *Pressed Steel Car Co. v. Union Pac. R.R.*, 241 F. 964, 966-67 (S.D.N.Y. 1917). Equity courts did provide much more discovery. See generally F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 171-73 (2d ed. 1977).

2. 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2001 (1969).

3. *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

4. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682-83 (1958) (Douglas, J.).

a deposition was to operate without the intervention of a judge unless the deponent or a party sought a protective order,⁵ or unless a deponent failed to appear for a deposition or refused to answer a question and a sanction was requested.⁶ Interrogatories were to operate extrajudicially unless an objection was made, whereupon the matter was automatically set down for court ruling.⁷ Requests for documents and for physical or mental examinations were exceptions; they were to go to a judge upon motion and good cause shown.⁸

In 1970, the discovery rules were overhauled to reflect the experience of the preceding three decades.⁹ One purpose was to reduce the time that judges were to spend on discovery matters.¹⁰ Objections to interrogatories no longer go automatically to a judge for ruling, but await the interrogator's decision as to whether the objection is well taken, whether the information might be obtained by some other means, and whether the matter is important enough to warrant judicial intervention.¹¹ Also, the good cause requirement for motions to force the production of documents and other tangible things¹² has been replaced by a mere request of another party for the production of such items.¹³ Again, a court becomes involved only when the party requesting discovery seeks an order compelling production that was refused or objected to.¹⁴ Thus, the mold of federal discovery, particularly as recast in 1970, is to leave the discovery process to counsel. As then District Judge Kaufman observed, "the whole discovery procedure contemplates an absence of judicial intervention in the run-of-the-mill discovery attempt."¹⁵ A court becomes involved only when a dispute arises between counsel and a motion for a protective order¹⁶

5. FED. R. CIV. P. 30(b) (1938). Citations to the Federal Rules of Civil Procedure as originally enacted in 1938 are indicated by that date. Many of these have since been renumbered and otherwise altered by the amendments discussed in the text accompanying notes 9-14 *infra*.

6. FED. R. CIV. P. 37(a) (1938).

7. FED. R. CIV. P. 33 (1938).

8. FED. R. CIV. P. 34 (1938).

9. See, e.g., COLUMBIA LAW SCHOOL PROJECT FOR EFFECTIVE JUSTICE, FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY (1964) (study conducted under the direction of Professor Maurice Rosenberg of Columbia Law School, referred to in the Explanatory Statement Concerning the 1970 Amendments of the Discovery Rules, United States Judicial Conference) [hereinafter cited as FIELD SURVEY].

10. See, e.g., FED. R. CIV. P. 33(a), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 455 (1976); FED. R. CIV. P. 34(a), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 458 (1976); Brown, *Proposed Changes to Rule 33 Interrogatories and Rule 37 Sanctions*, 11 ARIZ. L. REV. 443, 446-47 (1969).

11. FED. R. CIV. P. 33(a).

12. FED. R. CIV. P. 34 (1938).

13. FED. R. CIV. P. 34(b).

14. FED. R. CIV. P. 37(a).

15. Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 116 (1960).

16. FED. R. CIV. P. 26(c).

or a request to compel discovery or for sanctions is brought.¹⁷

While discovery appears to work well in the vast majority of cases,¹⁸ serious problems have arisen. Chief Justice Burger has noted that "there is a widespread belief that pretrial procedures are being used excessively and the process is lengthening litigation."¹⁹ In particular, he observed, "[e]xcessive use of pretrial discovery can be used as a weapon against a financially weak litigant."²⁰ The press has characterized discovery as being "insanely expensive and very nearly endless."²¹ A task force established by the American Bar Association (ABA) as a follow-up on the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in April 1976, stated:

Substantial criticism has been leveled at the operation of the rules of discovery.^[22] It is alleged that abuse is widespread, serving to escalate the cost of litigation, to delay adjudication unduly and to coerce unfair settlements. Ordeal by pretrial procedures, it has been said, awaits the parties to a civil law suit.²³

These abuses are attributed to counsel who use discovery for fishing expeditions, who roam widely under a discovery scheme that permits inquiry generally into any matter within the "subject matter involved in the pending action,"²⁴ who delay completion of discovery, and who force undue expense on opposing counsel by extensive interrogatories, by requests for production of unnecessarily large numbers of documents, and by production of documents in large, unorganized lots in response to interrogatories and production requests.²⁵

17. FED. R. CIV. P. 37.

18. The first finding we brought back from the field was that Federal discovery is on the whole working well and doing the main work it was intended to do

. . . .

. . . [O]n the whole there is no sign of major disenchantment or disastrous malfunctioning in the pretrial discovery system as it now operates.

Rosenberg, *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 479, 488, 490 (1968)(commenting upon FIELD SURVEY, *supra* note 9).

19. *How to Break Logjam in Courts*, U.S. NEWS & WORLD REP., Dec. 19, 1977, at 21, 24 (interview with Chief Justice Burger).

20. *Id.*

21. Editorial, *Pretrial Punishment*, BUS. WEEK, Dec. 12, 1977, at 162.

22. Here the task force cites to Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 202-04 (1976); Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 107 (1976).

23. ABA, REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE 27 (1976). See Griffin, *Discovery: A Criticism of the Practice*, 1 FORUM 11, 13 (1966) (published by the ABA Section of Insurance, Negligence, and Compensation Law) ("The aim [of discovery] is admirable . . . [b]ut it has not been achieved. Open-book discovery is an albatross around the neck of the trial bar").

24. FED. R. CIV. P. 26(b)(1).

25. Although an unlimited number of examples of discovery abuses could be shown, two illustrations will suffice:

As the abuses in discovery have surfaced, proposals for reform have again been made. Two major proposals for changes in the Federal Rules of Civil Procedure are those of the Advisory Committee on Civil Rules of the United States Judicial Conference,²⁶ and of a Special Committee for the Study of Discovery Abuse of the ABA Section of Litigation.²⁷ Still other proposals have emerged from a Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation.²⁸

I recall that on one occasion when we were representing a taxi company, counsel for the plaintiff served us with a printed set of interrogatories asking the defendant corporation whether it had a driver's license, where it learned to drive, whether it was married or divorced, and even asked the taxi company whether it had any children.

Savell, *Basic Use of Discovery Procedures—Some Practical Problems*, 3 FORUM 197, 199-200 (1968) (published by the ABA Section on Insurance, Negligence and Compensation Law). A similar problem was noted in *Blanchard Lumber Co. v. S.S. Polyrover*, 224 F. Supp. 601 (S.D.N.Y. 1963), where Judge Weinfeld described a set of 150 interrogatories as "of a drag-net nature, which not only are unduly burdensome and oppressive, but seek information irrelevant to the fundamental issue in this suit." *Id.* at 602.

Two major aspects of the problem should be noted. First, the adversary system gives a dual role to counsel. Counsel is torn between often irreconcilable obligations: to ultimate justice, in his capacity as an officer of the court, and to his client, to whom the desire for triumph is paramount even at justice's expense. It is in the defending party's interest to utilize those tactics which will cause delay or extra expense to the opponent. Conversely, it is often in the plaintiff's interest to make discovery so extensive and so expensive as to make a "good" settlement appear cheap in comparison. Second, there is the search for the proper role of the trial judge in a system overburdened with cases. As noted earlier, the philosophy of modern discovery is premised upon minimizing judicial involvement in the discovery process. Even with the current rules, however, there is a feeling on the part of some that too much judicial time is now being consumed in discovery matters. Yet, if courts are to become further involved in controlling counsel's action or inaction in the use of discovery, in order to work toward the ultimate goal of "just, speedy, and inexpensive" determination of controversies, FED. R. CIV. P. 1, more court time necessarily will have to be devoted to policing discovery.

26. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (Mar. 1978), reprinted in 77 F.R.D. 613 (1978) [hereinafter cited as 1978 PROPOSED DRAFT]. A revised draft was issued by the Advisory Committee in February 1979, reprinted with separate pagination in 588 F.2d (Supp. No. 2, Feb. 12, 1979) and 461 F. Supp. (Supp. No. 2, Feb. 12, 1979) [hereinafter cited as 1979 REVISED DRAFT].

As of this writing, the Revised Preliminary Draft is before the bar for comment. If finally adopted by the Advisory Committee on Rules and Practice to the United States Judicial Conference, and in turn by the Judicial Conference to the United States Supreme Court, the proposed change may be promulgated in early 1980. Should this timetable succeed, the effective date of any changes probably will be July 1, 1980.

27. ABA SECTION OF LITIGATION, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE (pamphlet Oct. 1977) [hereinafter cited as ABA COMMITTEE].

28. In November 1977, Chief Judge Kaufman of the Second Circuit Court of Appeals appointed a private commission of jurists, attorneys, and legal scholars to consider proposals to "bring reason and measure to the opening rites of a trial."

Although serious attention must be paid to each of these major proposals, there is another source that should also be considered in deciding what, if any, changes in procedure should be made. Some federal district courts, and many individual judges, have used their local rulemaking authority under Rule 83 to meet perceived problems in discovery.²⁹ This Article examines these local attempts to limit the consumption of judicial resources, to expedite the discovery process, to curb abuses in the use of discovery methods and to provide for more effective sanctions. A comparison is made between these local practices and the reforms that have been proposed by the Advisory Committee, the ABA, and the Second Circuit Commission.

This Article is based on an examination of the local rules of the district courts³⁰ and an informal survey of federal district courts by the Federal Judicial Center.³¹ In January 1977, questionnaires were

Telephone Interview with Commission Secretary Robert D. Lipscher (Oct. 28, 1978). The other members of the Commission are: Hon. Irving R. Kaufman; Alan J. Hruska and Michael I. Sovern, Co-chairmen; and Hon. Arnold Bauman; Hon. Charles L. Brieant, Jr.; John Doar; Leonard Garment; James C. Goodale; Fannie J. Klein; Arthur L. Liman; James M. Nabrit, III; Hon. Edward R. Neaher; Hon. Jon O. Newman; Hon. James L. Oakes; Hon. Lawrence W. Pierce; Hon. Simon H. Rifkind; Whitney North Seymour; Hon. Harold R. Tyler, Jr.; and William E. Willis.

29. The rule gives each court the discretionary power to "make and amend rules governing its practice not inconsistent with [the federal] rules." FED. R. CIV. P. 83. This power is by no means a novelty, for federal courts have possessed local rulemaking power almost since the federal judiciary was first organized:

[I]t shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation and otherwise in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings.

Act of March 2, 1793, ch. 22, § 7, 1 Stat. 335 (1793). Nor is Rule 83 unique in statutorily granting such power. "The Supreme Court and *all courts established by Act of Congress* may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court" 28 U.S.C. § 2071 (1976) (emphasis added).

For a discussion of the federal rulemaking power, see Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976). See also Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251 (1967); Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011.

30. The source used in this examination was the looseleaf service published by Callaghan & Co., updated through June 1978. FEDERAL LOCAL COURT RULES (Callaghan 1978).

31. Information gathered through the efforts of the Federal Judicial Center is

sent to the clerk of each federal district court. Responses were received concerning the practices of approximately ninety percent of those courts, and some follow-through inquiry has been made. Although what is reported here is not represented as a complete index of current practices, the survey has uncovered a fair sampling of current practices and should therefore be of value in solving the problems of modern federal discovery.

II. CONSUMPTION OF JUDICIAL RESOURCES IN THE DISCOVERY PROCESS

Judge time has been called "our most precious judicial resource."³² Many district judges have attempted to conserve that resource by reducing the time they must spend in supervising the discovery process. Yet, the need to ensure that the discovery process works, that discovery does not inordinately delay the flow of litigation, and that the discovery process is not abused calls for additional investment of judge time. These competing themes are apparent both in the district judges' responses to discovery problems and in the current proposals for reform.

In 1968, Congress passed the Federal Magistrates Act,³³ as an attempt to conserve judge time. The Act authorized judges to "designate a magistrate to hear and determine any pretrial matter pending before the court" in a civil case, except for certain matters.³⁴

cited in this Article as SURVEY. References to the practices of individual judges mentioned in this Article are current with respect to the position and activities of the judges as of the time of the survey—winter 1977.

32. Becker, *Efficient Use of Judicial Resources*, 43 F.R.D. 421, 422 (1967).

33. Federal Magistrates Act, Pub. L. No. 90-578, tit. I, § 101, 82 Stat. 1107 (1968) (codified at 28 U.S.C. §§ 631-39 (1976)) (expanding areas in which magistrates may be used). Further expansion of permissible magistrate jurisdiction is provided in S. 1613, which passed the Senate by voice vote on July 22, 1977, 123 CONG. REC. S12647 (daily ed. July 22, 1977), and was approved for consideration by the House on September 29, 1978, 124 CONG. REC. H11181 (daily ed. Sept. 29, 1978) (consideration was granted upon adoption of House Resolution 1322). As the House version differed from that of the Senate, the bill went to a conference committee. See 124 CONG. REC. H11283-87 (daily ed. Oct. 2, 1978) (bill reported by the Committee of the Whole; discussion ended and no resolution made thereon). The Conference Committee made no report before the adjournment of Congress, and the bill died.

34. 28 U.S.C. 636(b)(1)(A) (1976). The magistrate's determination of pretrial matters shall be "final," subject only to ultimate right of review by a district court judge. See H.R. REP. NO. 1609, 94th Cong., 2d Sess. 9-10, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6162.

The exceptions to the authority of a judge to designate a magistrate to hear and determine any pretrial matter include

a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit

Of particular note is the statutory authorization for a judge to designate a magistrate to handle discovery matters. Congress has also expressly invited the federal courts to make use of magistrates in matters short of the trial itself.³⁵

The congressional invitation has not, however, met with universal acceptance. Of the 94 federal district courts surveyed, only fourteen reported that the entire court has provided for the use of magistrates in discovery proceedings through either a local rule or a general court directive.³⁶ In some other districts, magistrates are used in discovery matters by individual judges in the absence of a local rule or general court directive. For example, although the Southern District of New York has no local rule or general court directive providing for the use of magistrates in discovery matters, 15 of the 31 judges on the court reported making use of magistrates to assist in discovery matters.³⁷ Similarly, several of the fifteen judges on the District Court of the District of Columbia use magistrates for this purpose.

Where magistrates are used in discovery matters, their actual duties appear to vary. In some districts, all civil discovery matters are routinely assigned to magistrates.³⁸ In two others, "most" civil discovery was reported to be routinely routed to magistrates.³⁹ In at least

maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

28 U.S.C. § 636(b)(1)(A) (1976).

35. If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, . . . there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal Court.

S. REP. NO. 371, 90th Cong., 1st Sess. 26 (1967).

36. S.D. FLA. GEN. R. 25(C)(2); N.D. & S.D. IOWA MAGIS. R. 37(c)(3)(d); D. KAN. R. 36(I)(a)(1); E.D. LA. R. 20.5(a); W.D. LA. R. 28(B)-(C); E.D. MICH. R. XXVIII(c)(2)(a); D. NEB. R. 41(C)(2); D.N.H.R. 10(a); D.P.R.R. 13(B), General Order of Referral to the Magistrate; D.R.I.R. 32 (a)(2); S.D. TEX. R., 24(C)(2); E.D. WASH. R. 27. The Chief Deputy Clerk for the District of Maine notes, "In the District of Maine an attempt is made to refer most discovery pleadings to the Magistrate for resolution and not to the court." SURVEY, *supra* note 31. Judge Doyle of the Western District of Wisconsin states, "In most routine cases, the full-time Magistrate or occasionally the clerk-magistrate supervises as needed the operation of discovery." *Id.*

37. These are Judges Bonsal, Brieant, Cannella, Carter, Duffy, Frankel, Goettel, Haight, Knapp, Lasker, Owen, Ryan, Stewart, Weinfeld, and Wyatt. See SURVEY, *supra* note 31.

38. D. KAN. R. 36(I)(2); D.N.H.R. 10; N.D.N.Y.R. 43(c)(3); D.P.R.R. 13(B), General Order of Referral to the Magistrate; E.D. WASH. GEN. R. 9(d), 27(a)(7); SURVEY, *supra* note 31 (W.D. La.).

39. These are the District of Maine and the Western District of Wisconsin. See SURVEY, *supra* note 31.

one district, the practice is to refer discovery matters to a magistrate only in simple cases, such as tort and contract matters, while discovery in more complex cases—such as those involving civil rights, copyright, patent, or antitrust—is reserved for direct judge supervision.⁴⁰ Even within a single jurisdiction, the practice may vary. The Southern District of New York is illustrative. Three of fifteen judges who reportedly use magistrates do so in all cases,⁴¹ while eleven of the remaining twelve do so only when discovery is expected to be protracted, complex, or unusual, or when counsel do not cooperate with one another.⁴²

When a magistrate handles discovery matters, it is generally as part of a reference of all or most pretrial matters involved in the particular case.⁴³ Some jurisdictions even have the magistrate handle the final pretrial order.⁴⁴ In others, the final pretrial conference and order are specifically reserved for the judge.⁴⁵

A magistrate's decision may be reversed by the trial judge to whom the case is assigned.⁴⁶ Although some local rules and standing orders address this point, most do not. The Northern and Southern Districts of Iowa, for example, provide by local rule that a party adversely affected by an order of a magistrate may appeal to the district judge by filing a motion to review within ten days of the magistrate's order.⁴⁷ Former District Judge Frankel of the Southern District of New York limited the right to judicial review by providing that magistrates' discovery orders are final unless appealed within ten days.⁴⁸ Of course, a court always has the inherent power to make an exception in order to review a magistrate's ruling in the interest of justice, no matter how final the local rule or standing order attempts to make the magistrate's order.⁴⁹

40. This is the District of Maine. See SURVEY, *supra* note 31.

41. These are Judges Carter, Stewart, and Wyatt. *Id.*

42. These are Judges Bonsal, Brieant, Cannella, Duffy, Geottel, Haight, Knapp, Lasker, Owen, Ryan, and Weinfeld. *Id.* Judge Frankel, however, refers all but complex and protracted cases to a magistrate. *Id.*

43. See, e.g., D.P.R.R. 13(B), General Order of Referral to the Magistrate.

44. See, e.g., U.S. MAGIS. R. 1(f)(1); D. ALASKA GEN. R. 30(e)(2); D. CONN. R. 11(e); D.D.C.R. 3-8(b).

45. See, e.g., D.N.H.R. 10(b).

46. See note 34 *supra*.

47. N.D. & S.D. IOWA MAGIS. R. 37(C)(3). A similar rule, providing only a five-day limit, is E.D. LA. R. 20.11(a).

48. Under Judge Frankel's standing order, in all but unusual civil cases, counsel are ordered that pursuant to 28 U.S.C. § 636(b)(1)(A) (1976), a magistrate's decision on discovery motions "shall become final unless within ten (10) days following issuance of such decision, a motion is made for review upon the asserted ground that the Magistrate's order is clearly erroneous or contrary to law." SURVEY, *supra* note 31.

49. H.R. REP. NO. 1609, 94th Cong., 2d Sess. 8-10, reprinted in [1976] U.S. CODE

Thus, various district judges have used magistrates in an attempt to reduce the drain on judge time occasioned by the discovery process. While use of magistrates is undoubtedly cheaper than the use of federal district judges,⁵⁰ there clearly is a cost in terms of salaries, support staff, space, and other factors. The Second Circuit Commission has, however, proposed an experiment which, if successful, would furnish additional judicial resources at no direct cost to the federal budget. The Commission proposed in April 1978 that a pilot project be undertaken in the Southern District of New York to use attorneys to serve, without compensation, as "volunteer masters" in civil cases.⁵¹ The volunteer master would convene a meeting of counsel or the parties early in the case. The master would analyze the pleadings and other papers, review the pertinent documentary materials, explore the possibility of mediating and settling the controversy, assist the parties in the preparation of a statement of the issues that appear to be involved, seek to clarify and narrow those issues, seek stipulation of facts on which the parties agree at that stage, and endeavor to work out with the parties a plan of discovery. At the termination of these proceedings, the volunteer master would make a written report to the trial judge on the matters agreed upon and those on which agreement could not be reached.

Certainly such a system, if successful, would aid the discovery

CONG. & AD. NEWS 6162. See *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). See generally Sear, *Proceedings of Seminar for Newly Appointed United States District Judges*, 75 F.R.D. 89, 254 (1976).

50. Increasing the number of magistrates is also a somewhat easier task. Their number may be increased, and magistrates assigned to specific federal districts, by the United States Judicial Conference under 28 U.S.C. § 633(b)-(c) (1970). Although Congress exercises ultimate control over magistrates' appointments through the appropriation process, this method is undoubtedly more expeditious than authorizing the creation of additional federal district judgeships.

51. The Commission stated:

The Commission is mindful of the fact that at the very time the courts are obliged to devote a progressively larger portion of their efforts to criminal litigation, there have been substantial increases in the number, magnitude and complexity of civil suits. Less judicial time spent on civil litigation means less judicial control, lengthening delays, burgeoning expenses, fewer opportunities for mediation and settlement—in a highly practical sense, diminished access to the court for litigants who cannot afford these burdens, expenses and delays.

There is a considerable possibility that these problems could be alleviated if a large number of highly qualified trial lawyers were brought into the system to perform a variety of para-judicial functions. One means of gauging whether such volunteer masters could effectively and fairly discharge responsibilities of this nature would be to try the program on a small, experimental scale.

Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation, Volunteer Masters Pilot Program (Apr. 10, 1978) (unpublished report).

process. By narrowing and defining disputed issues at a preliminary stage, and by stipulating as to facts on which there clearly is no disagreement, the amount of discovery needed would be reduced. Moreover, the Second Circuit Commission proposal is intriguing in allowing for greater involvement of the bar in policing itself, as well as for its potential of furnishing additional resources at little or no cost to the taxpayer. There is no reason, however, why these tasks could not now be assigned to magistrates. But no evidence was uncovered in the Survey that any district judge—including those who are members of the Commission—is now using magistrates in the manner suggested by the Commission.

Another device used by district courts to conserve judicial time is a requirement that, before a discovery motion is filed, counsel must confer and attempt to resolve the problem. Fifty-five of the 94 federal districts have adopted rules requiring that an attorney making a discovery motion must first attempt to resolve the discovery problems without court intervention.⁵² These rules vary from court to court. Some consist of merely a requirement that counsel confer in an attempt to resolve differences prior to submission of a discovery motion or prior to a hearing on that motion.⁵³ Other courts require a comprehensive certification or affidavit to the court. The local rule of the District of Puerto Rico is illustrative:

With respect to all motions and objections relating to discovery . . . counsel for each of the parties shall meet and confer in advance of the hearing in a good faith effort to narrow the areas of disagreement to the greatest possible extent. It shall be the responsibility of counsel for the movant to arrange for the conference. To curtail undue delay in the administration of justice, this Court hereinafter refuses to hear any and all motions for discovery and production of documents unless moving counsel shall first advise the Court, in writing, that after personal consultation and attempts to resolve

52. D. ARIZ. CIV. R. 42(A)(2)[b]; C.D. CALIF. R. 3(1); E.D. CALIF. CIV. R. 114(c); N.D. CALIF. CIV. R. 230(4); S.D. CALIF. R. 3(e)9; D. COLO. R. 5(g); M.D. FLA. GEN. R. 3.04(a); N.D. FLA. GEN. R. 8(A); S.D. FLA. GEN. R. 10(I)(2); N.D. GA. R. 91.62; E.D. ILL. R. 4(e); N.D. ILL. GEN. R. 12(d); S.D. ILL. R. 11; N.D. IND. R. 7(e); S.D. IND. R. 11; N.D. & S.D. IOWA CIV. R. 16(E); E.D. LA. R. 3.11; M.D. LA. GEN. R. 5(D); W.D. LA. R. 10(1); D. ME. R. 15(b); D. MD. GEN. R. 34; D. MASS. R. 15(e); E.D. MICH. R. IX(k); D. MINN. R. 5; E.D. MO. R. VII(c)(5); D. NEB. R. 20(J); D. NEV. CIV. R. 17(A)(4)(b); D.N.H.R. 14(c); D.N.J. GEN. R. 12(G); D.N.M.R. 10(c); E.D.N.Y. GEN. R. 9(f); S.D.N.Y. GEN. R. 9(f); N.D.N.Y. GEN. R. 46; M.D.N.C. CIV. R. 21(k); W.D.N.C. GEN. R. 8(A); D.N.D.R. IV(F)(3); N.D. OHIO CIV. R. 3(d)(6); S.D. OHIO R. 3.7.1; N.D. OKLA. R. 14(d); W.D. OKLA. R. 13(d); D. ORE. CIV. R. 12(b); E.D. PA. R. 25(d); M.D. PA. R. 301.02(e); W.D. PA. R. 4(a)(2); D.P.R.R. 8(M); D.R.I.R. 13(e); W.D. TENN. R. 9(d); S.D. TEX. R. 16(G); W.D. TEX. R. 14(n); E.D. VA. R. 11(K); E.D. WASH. GEN. R. 9(b); W.D. WASH. CIV. R. CR 37(g), (h); E.D. WIS. R. 6, § 6.02; W.D. WIS. R. 8(d).

53. See, e.g., D. ME. R. 16; E.D. MICH. R. IX(k); S.D. OHIO R. 3.7.

differences, counsel are unable to reach an accord. This statement shall recite, in addition, the date, time and place of such conference, and the names of all parties participating therein.⁵⁴

The local rules requiring counsel to consult do not seem to be wholly successful. Some courts have found it necessary, upon the filing of a discovery motion, automatically to mail a form order directing counsel to meet in advance of the hearing and to confer in a good faith effort to settle all objections and opposed matters.⁵⁵ Other courts routinely send a memorandum to counsel, detailing the court's philosophy that counsel are to work discovery matters out on their own.⁵⁶ One district judge, moreover, despite the existence of a local rule requiring counsel to confer and to certify to the court that the conference has taken place,⁵⁷ has found it necessary to notify counsel in civil actions that 25% of all motions filed in civil cases in that division involve discovery controversies, to admonish counsel that most of these disputes could have been avoided by a realistic attitude toward discovery, and to insist that counsel cooperate to prevent a waste of the court's time.⁵⁸

It is noteworthy that both the ABA Committee and the Advisory Committee, in proposing a discovery conference procedure, require that a request for such a conference be accompanied by a statement that requesting counsel has made "a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the request" for the conference.⁵⁹ In both proposals, as well, there are explicit provisions permitting the imposition of sanctions for failure

54. D.P.R.R. 8(M). See also D. ARIZ. CIV. R. 42(2)[b]; C.D. CAL. R. 3(k).

55. See, e.g., E.D. MICH. R. IX(k), and the standing order of Judge Pratt ordering counsel to meet and stipulate whatever issues remain in dispute, as required by local rule IX(k). This order is sent whenever a motion relating to discovery is filed. See SURVEY, *supra* note 31.

56. These districts include the Central District of California, the Eastern District of Louisiana, and the Western District of Pennsylvania. See SURVEY, *supra* note 31. The California memo quotes from *Hickman v. Taylor*, 329 U.S. 495, 507-08 (1947):

[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the 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. To that end, either party may compel the other to disgorge whatever he has in his possession.

57. S.D. FLA. GEN. R. 10(1)(2).

58. Chief Judge C. Clyde Atkins, Southern District of Florida, "Notice to Counsel." See SURVEY, *supra* note 31.

59. 1979 REVISED DRAFT, *supra* note 26, at 3 (proposal for new Federal Rule of Civil Procedure 26(f)(5)). The ABA Committee proposal for new Federal Rule of Civil Procedure 26(c)(5) requires "a certification that counsel has conferred, or made reasonable effort to confer, with opposing counsel concerning the matters set forth in the request." ABA COMMITTEE, *supra* note 27, at 4.

to confer in a good faith effort to reach agreement.⁶⁰ It appears, however, that no court has imposed a sanction for failure to confer in good faith prior to taking a discovery matter to court as required by local rules. Perhaps the committee proposals, if adopted, may lead to serious attempts to reduce the burden of what one judge has termed "silly discovery motions."⁶¹ Past experience, however, must lead to some skepticism. Only further experience will tell.

III. ENCOURAGING COUNSEL TO BEGIN AND TO TERMINATE DISCOVERY AS EXPEDITIOUSLY AS POSSIBLE

A frequent criticism of discovery is that it drags on for an inordinate amount of time. When one considers that, in at least one district, the median time for substantial completion of discovery is 434 days for an average of only 5.4 discovery requests per case, there appears to be some objective basis for this criticism.⁶² The Federal

60. See ABA COMMITTEE, *supra* note 27, at 23-25 (proposal for new Federal Rule 37(e)); 1979 REVISED DRAFT, *supra* note 26, at 19 (Advisory Committee proposal for same). The ABA version makes explicit reference to 28 U.S.C. § 1927 (1976), which now provides a basis for a personal cost sanction against counsel. The Advisory Committee proposal provides for a personal cost sanction against a party or counsel without a reference to 28 U.S.C. § 1927.

61. SURVEY, *supra* note 31 (note of Judge Grady, N.D. Illinois).

62. The validity of the criticism that discovery consumes an inordinate amount of time has been challenged by a recent study, at least as the criticism applies to ordinary litigation. This conclusion results from a Federal Judicial Center study of approximately 500 cases from each of six metropolitan federal districts: Central District of California, Southern District of Florida, Eastern District of Louisiana, District of Maryland, District of Massachusetts, and Eastern District of Pennsylvania. Each case selected had been terminated during fiscal 1975. FEDERAL JUDICIAL CENTER, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 18 (1977) (part of the District Court Study Series) [hereinafter cited as CASE MANAGEMENT STUDY].

Examining some 890 cases filed in these federal districts, the study revealed that of those cases in which discovery was substantially completed before the case was terminated, an average of only 6.26 discovery requests were made. *Id.* at 26, table 11. The average number of discovery requests per case varied from 4.48 in the Eastern District of Louisiana, to 8.61 in the Southern District of Florida. Discovery requests included *all* depositions, interrogatories, requests for admission, requests for production of documents, and motions for physical or mental examination noticed or made by all parties; it did not include informal discovery. *Id.* The study concluded:

[A]ll the figures on discovery events per case are remarkably small, considering the widespread perception that federal civil discovery has gotten out of hand and become "a rich man's tool." A maximum of 8.61 discovery initiatives per completed case . . . hardly seems excessive, especially since this is a total of initiatives by all parties. . . . [F]igures in the ranges shown suggest that relatively little needless discovery is conducted in the typical case. Of course it is quite possible that a large volume of needless discovery is conducted in a small number of complex or protracted cases, a possibility entirely consistent with these figures.

Id. at 27 (footnote omitted).

Rules of Civil Procedure, moreover, do not set forth any time limit within which discovery procedures must begin and end, leaving this question to the individual courts and judges. In the "hope of assuring that discovery is completed in what they consider a timely fashion,"⁶³ a majority of district courts have adopted local rules prescribing almost automatic time limits on discovery.

One third of the federal districts calculate a time limit on discovery from the occurrence of an event. Most of these, some nineteen districts, use the joinder of issue—the filing of an answer—as the moment at which discovery time begins to run. Eight of those districts specify that all discovery is to be completed within three months of joinder of issue.⁶⁴ Other courts place the cutoff time at four months,⁶⁵ five months,⁶⁶ and two at six months,⁶⁷ from issue. Some of these courts provide expressly for a longer time period for certain complex cases, including patent, antitrust, and trademark cases.⁶⁸

At least ten districts now provide for a "preliminary"⁶⁹ or "initial"⁷⁰ pretrial conference to be held early in the litigation process.⁷¹ One of these districts, the Eastern District of Pennsylvania,

Yet, there is a perceived need to move discovery along so that cases are ready for trial at an earlier date, and the study does indicate that some efforts on this behalf produce results. The study found that the interval between filing of the complaint and the substantial completion of discovery varied from 182 days in the Southern District of Florida, to 434 days in the District of Massachusetts; the average interval being 306.3 days. *Id.* at 26. This wide divergence indicates the utility of a survey of local practices.

63. *Id.* at 25.

64. *See, e.g.*, S.D. MISS. R. 11; W.D.N.C.R. 10; D.N.J. GEN. R. 15(A); D.N.D.R. IV(F)(1); W.D. TEX. R. 26(e); CASE MANAGEMENT STUDY, *supra* note 62, at 41 (New Mexico District Court judge); SURVEY, *supra* note 31 (Judge Stafford's standing order in the Northern District of Florida).

65. N.D. GA. R. 181-11; S.D. GA. R. 7.1; D. KAN. R. 17(a); E.D.N.C. CIV. R. 7(E); S.D. TEX. R. 15(e); N.D.W. VA. CIV. R. 2.08(b).

66. N.D. IND. R. 12(d); W.D. MO. R. 20(D)(1); D. NEV. CIV. R. 17(A)(2)(a).

67. M.D. PA. R. 301.07; D.P.R.R. 7.

68. *See, e.g.*, N.D. IND. R. 12(d); E.D.N.C. CIV. R. 7(E); S.D. TEX. R. 15(E); W.D. TEX. R. 26(e). *See also* M.D.N.C. CIV. R. 22(h).

69. *E.g.*, E.D. ILL. R. 9(b).

70. *E.g.*, S.D. IND. R. 19(d).

71. In addition to the Eastern District of Illinois and Southern District of Indiana, the following local rules provide for such pretrial conferences: N.D. & S.D. IOWA CIV. R. 18(A)(1); D. MONT. R. 11(b); M.D.N.C. CIV. R. 22(a)-(d); D.N.H.R. 10(a); N.D. OHIO CIV. R. 17; E.D. PA. R. 7(b); E.D. VA. R. 12(3). This is also the practice of Judges Boyle, Cassibry, Rubin, Schwartz, Sear, and West in the Eastern District of Louisiana. SURVEY, *supra* note 31. Although the local rule for the District of Maryland makes no such provision and the Survey did not uncover a general directive on the matter, the Federal Judicial Center study results show that all judges on the District Court of Maryland have such a conference. *See* CASE MANAGEMENT STUDY, *supra* note 62, at 21. In addition, some courts encourage counsel to meet at an early discovery conference. *See, e.g.*, W.D. TENN. R. 9(a).

provides that this initial pretrial conference be held within 45 days following the filing of the complaint.⁷² Two districts require that the initial pretrial conference be held not more than sixty days after the filing of the answer.⁷³ The other seven districts provide for an initial pretrial hearing, but no mandatory time for that conference is set forth. In each instance, the principal purpose of the preliminary or initial pretrial conference is to establish a schedule for discovery, including a time for its completion. This pretrial conference culminates in a court order containing such a schedule. Some districts follow a variation of this procedure. Without requiring a preliminary pretrial conference, they provide that the court shall issue an order setting a date by which all discovery is to be completed.⁷⁴

Another popular approach is to permit the continuation of discovery until the occurrence of a particular event. In at least fourteen districts, discovery may continue until the time of the pretrial conference.⁷⁵ In two others, discovery may continue until the pretrial order

72. E.D. PA. R. 7(b).

73. N.D. & S.D. IOWA CIV. R. 18(A)(1); D.N.H.R. 10(a). The Districts of Iowa have adopted a standard pretrial order to be issued by the clerk "forthwith" upon the joining of issue, directing counsel to meet within sixty days of issue and to reach agreement as to many specific items in an attached check list. One of those items is an estimated date of completion of discovery. Within ten days after this preliminary pretrial conference, counsel are to submit a report to the clerk setting forth its results. Upon receipt of this report, the clerk issues a second standard pretrial order directing the completion of discovery by a day certain.

74. See, e.g., N.D. MISS. CIV. R. C-10(h). Other districts provide for an order to be entered by the court or magistrate, or a letter of notification from the clerk, as to when discovery is to be completed. See, e.g., D. NEB. R. 25(A)(4) (providing that as soon as is practical after filing of a civil suit, the court "with or without consultation with counsel" may issue such an order); D. NEV. CIV. R. 17(A); D.N.H.R. 10(a).

The "Rules of Practice" of Judge Mahon of the Northern District of Texas provide that, within "about 10 days" after issue has been joined, the court will enter an order setting a date for the completion of discovery. The Rules set forth that "in the normal case" that date will be "approximately six months" after issue is joined. That order will also set a date for a final pretrial conference and for trial, which "in the normal case" will be eight months after issue. See SURVEY, *supra* note 31.

75. See E.D. & W.D. ARK. R. 9(e); C.D. CAL. R. 9(c); S.D. CAL. R. 9(d); D. CONN. R. 11(a); D. DEL. R. 11(A); D. IDAHO R. 10(c); W.D. LA. R. 23(h)(3); D. ME. R. 21; D. MD. SUPP. R. 35(b); E.D. OKLA. R. 17(b); N.D. OKLA. R. 17(b); W.D. OKLA. R. 16(b); E.D. TENN. R. 9(c).

Eastern District of California Rule 103(b) is a slight variation on this theme: Any party who is ready to proceed to pre-trial conference and trial may serve and file a motion to have the case set for pre-trial conference or for trial, or both. Said motion shall be accompanied by a Certificate of Readiness stating that:

.....

(2) The party has completed all desired depositions, other discovery and pre-trial motions, except specified discovery or motions, if any, which could

is entered,⁷⁶ although ordinarily that will occur on the day of the pretrial conference. A variation on this theme is found in the Western District of Pennsylvania. There, in all cases involving personal injuries, pretrial is "invoked" by a written notice from a judge or from a clerk of the court. All discovery is to be completed within fifty days "after pretrial has been invoked."⁷⁷ The Southern District of Florida provides that discovery is to be completed no later than five days prior to the date of the pretrial conference.⁷⁸ The Middle District of Florida provides for the completion of discovery before counsel are to meet to confer regarding pretrial, which is ordinarily ten days before the pretrial conference.⁷⁹ Finally, in some districts providing for termination of discovery prior to pretrial, the pretrial conference is set automatically. For example, the Central District of California provides that the pretrial shall be scheduled approximately sixty days after joinder of issue,⁸⁰ and that all discovery shall be completed prior to the pretrial conference.⁸¹

One might assume that the existence of a rule or court policy requiring early preliminary conferences or setting deadlines for discovery would be enough to ensure that discovery is concluded in a timely fashion. This assumption is, however, open to question. The median time for the completion of discovery in the Southern District of Florida, for example, which does not require a preliminary pretrial conference⁸² and which permits discovery to continue until five days before final pretrial,⁸³ is only 182 days.⁸⁴ In contrast, the median time for the completion of discovery in the Eastern District of Pennsylvania, which requires a preliminary pretrial conference to be held within 45 days of the filing of the complaint,⁸⁵ is 305 days.⁸⁶ The

not have been completed in the exercise of due diligence.

E.D. CAL. CIV. R. 103(b).

76. See D.D.C. CIV. R. 1-15(d); SURVEY, *supra* note 31 (District of Vermont).

77. W.D. PA. R. 5(II)(C)(1). The rule applies explicitly to "civil cases involving personal injuries . . ." While Rule 5(II)(A) provides that there will be pretrial "on every civil case," unless a court otherwise orders, the point at which discovery is to terminate in civil cases not involving personal injury is not clear from the local rules.

78. S.D. FLA. GEN. R. 14(F).

79. M.D. FLA. GEN. R. 3.05(b), 3.06(b). Rule 3.06(b) provides that in some cases counsel may be ordered to meet to prepare a pretrial stipulation without a pretrial conference.

80. C.D. CAL. R. 9(a).

81. C.D. CAL. R. 9(b)(3).

82. S.D. FLA. GEN. R. 14(F).

83. *Id.*

84. See CASE MANAGEMENT STUDY, *supra* note 62, at 26, Table 11 (considering 96 cases).

85. E.D. PA. R. 7(b).

86. See CASE MANAGEMENT STUDY, *supra* note 62, at 26, Table 11 (considering 194 cases).

longest median time for completion of discovery, 434 days, is found in the District of Massachusetts,⁸⁷ which permits discovery to continue for up to two years after issue is joined.⁸⁸ The wide range of median discovery time strongly suggests that it is exercise of court control over discovery, rather than the existence of a court rule, that determines the length of discovery.⁸⁹

One cannot say, of course, that a prolonged discovery period is bad. Those cases that are ordinarily thought of as complex—antitrust, securities fraud, stockholders' derivative, patents, products liability—may require longer discovery periods. Even in simpler cases, there are circumstances that make exceptional treatment appropriate.⁹⁰ To retain the necessary flexibility, courts have

87. See *id.* (considering 154 cases).

88. The District of Massachusetts has no local rule or standing order of the district governing this point. Operating on an individual calendar basis, each judge follows his own procedure. At least three of the six active judges send out pretrial orders specifying that all discovery is to be completed within six months after issue is joined. But because the district has a tremendous backlog of cases—caused by a series of long-term vacancies in the past decade plus the tremendous time that Judge Garrity has had to put in on the Boston School case and a few other big cases—for most of the judges, civil trials are long delayed. For this reason, extensions and continuances of discovery completion deadlines are liberally granted by at least three of the judges. For one, discovery completion two years after issue has been joined is now considered typical. See SURVEY, *supra* note 31.

89. It is of interest to note the method of control exercised by the Southern District of Florida, which enjoyed the shortest period for discovery of any district studied by the Federal Judicial Center. See text accompanying notes 82-83 *supra*. At a median time of 18 days after answer, a notice is sent out to counsel scheduling a pretrial conference in preparation for trial. See CASE MANAGEMENT STUDY, *supra* note 62, at 20, 35, Table 21 (considering 250 cases). This conference is often set some 30 to 45 days later and rarely more than 90 days later. *Id.* at 20. As noted earlier, note 78 *supra* and accompanying text, discovery in Southern Florida is to terminate five days before pretrial. S.D. FLA. GEN. R. 14(F). This appears to be effective for at approximately the time that the pretrial conference is set, the trial date is also set. See CASE MANAGEMENT STUDY, *supra* note 62, at 34, Table 20. And the Southern District of Florida grants few continuances. See *id.* at 36.

In contrast, the Central District of California, which similarly sets an early final pretrial conference and requires that discovery be completed by the time of the conference, sets the trial date at the time of the pretrial conference. See *id.* at 34. The district is also very liberal with continuances. See *id.* at 36-37. The result appears to be reflected in the contrast in median time for disposition of all civil cases, whether tried or not—seven months in Central California and four months in Southern Florida, *id.* at 2, Table 1—and in the median time to go to trial—476 days in Central California and 254 days in Southern Florida. *Id.* at 34, Table 20.

90. The Fourth Circuit has emphasized the need for latitude in establishing and maintaining timetables for the discovery process:

A set rule limiting the time within which pretrial discovery may be had may be appropriate for routine cases, indeed, for most cases. The exceptional case requires different treatment, however, and the spirit of the rules does not require that completeness in the exposure of the issues in the pretrial discov-

been given the power to terminate discovery at an earlier date than that provided for in the local rule⁹¹ or to extend that time. The local rules often provide for such an extension "for good cause shown,"⁹² "to prevent manifest injustice,"⁹³ or "for valid cause shown to exist beyond the control of litigants or counsel."⁹⁴ One court states that additional time will be allowed only "[i]n the exceptionally difficult case."⁹⁵ Another insists that for an extension there must be "a factual showing that the moving party has diligently pursued discovery during the period originally specified."⁹⁶ Some courts, while not providing explicitly for the power to extend the time for discovery, permit a trial judge to exercise a broad, general authority in a specific case to modify the application of any local rule "to meet emergencies or to avoid injustice or great hardship."⁹⁷ While many of the court rules contain no explicit statement that the courts retain the power to extend the time for discovery beyond that provided by the local rule, there can be no doubt of the inherent power to do so.⁹⁸

In practice, many judges refuse to adhere blindly to discovery limitations imposed by court rules, preferring to focus upon the peculiar requirements of each case and varying their approach accordingly; close supervision and control, and hence individual treatment, is exercised through conferences with counsel, status calls, and motion hearings.⁹⁹ The practice of a judge of the District of Columbia—where the order and pretrial are set by the judge and the discovery cutoff is at the time of pretrial—is illustrative: he examines all of his civil cases in detail every three or four months, singling out those in which he finds counsel may be delinquent, and setting those cases

ery proceedings be sacrificed to speed in reaching the ultimate trial on the merits. Delay should be avoided to the extent that it is unnecessary or unreasonable but adequate time must be allowed for discovery of the facts and assembly of the proof.

Freehill v. Lewis, 355 F.2d 46, 48 (4th Cir. 1966).

91. Some courts expressly recognize this power. *See, e.g.*, M.D. FLA. GEN. R. 3.05(a).

92. S.D. FLA. GEN. R. 14(F).

93. E.D. & W.D. ARK. R. 9(e).

94. N.D. & S.D. IOWA CIV. R. 18(B)(2). This rule adds that for such an extension the case must require an "extraordinary pre-trial record." *Id.*

95. W.D.N.C. GEN. R. 10.

96. S.D. IND. GEN. R. 19(g).

97. D. KAN. R. 3; *see* D. ME. R. 1(c); D.N.M.R. 34.

98. Indeed, some appellate courts have read local rule time requirements as providing only a guideline for a case-by-case approach, holding that the rule is not dispositive in itself, but dependent upon final determination by the trial judge on each case's peculiar facts. *See* Bardin v. Mondon, 298 F.2d 235 (2d Cir. 1961); Sykes v. United States, 290 F.2d 555 (9th Cir. 1961); Hayden v. Chalfant Press, Inc., 281 F.2d 543 (9th Cir. 1960); Liverpool & London & Globe Ins. Co. v. Nebraska Storage Warehouses, 96 F.2d 30 (8th Cir. 1938).

99. *See* SURVEY, *supra* note 31 (Judge Matsch of the District Court of Colorado).

for a status call. At that meeting, he ascertains the additional time that each side reasonably needs to complete discovery in light of the particular case, and he orders discovery to terminate on a day certain.¹⁰⁰

The three major proposals now before the bar also address the problem of prolonged discovery. Both the Advisory Committee and the ABA Committee propose an amendment to the Federal Rules to make it mandatory for a district court, upon the request of any party, to hold a preliminary pretrial "discovery conference."¹⁰¹ When a request is made for a discovery conference, counsel is to submit a statement of the issues as they appear at that time, a plan and schedule of discovery, and limitations upon discovery that counsel then believes to be necessary or appropriate.¹⁰² Opposing counsel would have ten days to make additions and objections,¹⁰³ and the conference would follow. The ABA Committee urges that this conference be presided over by the trial judge "so that he participates in the early definition of issues."¹⁰⁴ The discovery conference is to terminate in an order identifying the issues, establishing a plan and schedule of discovery, setting limitations on discovery, and determining other pertinent matters.¹⁰⁵ Significantly, the proposed new Rule requires that the party requesting the discovery conference must also furnish the court with a statement that he "has made a reasonable effort to reach agreement with opposing attorneys on the matter set forth in the request."¹⁰⁶ The Advisory Committee has stated that "it is not contemplated that requests for discovery conferences will be made

100. *Id.* (notes accompanying questionnaire of Judge George L. Hart, Jr., of the District Court of the District of Columbia).

101. See ABA COMMITTEE, *supra* note 27, at 4-7 (proposed Rule 26(c)); 1979 REVISED DRAFT, *supra* note 26, at 3-4 (Advisory Committee proposed Rule 26(f)). The Advisory Committee also makes explicit the present inherent power of a court to call such a conference without a request by counsel.

102. See sources cited at note 101 *supra*.

103. See *id.*

104. ABA COMMITTEE, *supra* note 27, at 5-7 (Comments to proposed Rule 26(c)).

105. See 1979 REVISED DRAFT, *supra* note 26, at 3-4 (Advisory Committee proposed Rule 26(f)); ABA COMMITTEE, *supra* note 27, at 4 (proposed Rule 26(c)). The ABA Committee Comments to its proposed new Rule 26(c) are quite specific on the contemplated contents regarding discovery:

The conference will produce an order defining: (a) a "plan" in which the types and subjects of discovery are set forth, *e.g.*, oral depositions of A, B and C; production of contracts and any letters, correspondence or memoranda explaining or modifying them, etc.; (b) a "schedule" for discovery which specifies the time and place for discovery events, *e.g.*, the dates and places for the taking of depositions of A, B and C, or the time within which documents are to be produced; and (c) such "limitations" as might otherwise be employed in protective orders, *e.g.*, the documents of C shall be disclosed only to B's lawyers.

Id. at 6.

106. 1979 REVISED DRAFT, *supra* note 26, at 3 (Advisory Committee proposed Rule 26(f)(5)).

routinely," but that the matter will ordinarily be resolved by counsel conferring with each other.¹⁰⁷ The ABA Committee agrees that the discovery conference with the court should "be the exception rather than the rule"; in the "great majority of the cases" agreement is expected to be reached by counsel without judicial intervention.¹⁰⁸

The Survey indicates that a procedure similar to that proposed by the Advisory Committee and the ABA Committee has been in effect in at least ten districts.¹⁰⁹ In those districts, the conference is mandatory in every civil case. The rules concerning the purpose of the conference are often more general than the provisions of the proposed new Federal Rule. But that is not always the case. In the Northern and Southern Districts of Iowa, for example, the rule is supplemented by a detailed form order and check list automatically sent out by the court.¹¹⁰

As previously suggested, however,¹¹¹ having a rule on the books is not an answer in itself. There must be an intent on the part of the judge to manage a case (either personally or through a magistrate) in order to bring about as speedy, efficient, and inexpensive completion of discovery as possible. When there is such interest, a rule is unnecessary; where there is no such interest, a rule is no help. Where the district judges have felt that the requirement of a discovery conference would be helpful, they have already so provided by local rule or by standing orders or general practices of individual judges.

IV. PREVENTING DISCOVERY ABUSE AND BRINGING MORE EFFICIENCY TO DISCOVERY DEVICES

The line between proper, even properly aggressive, use of discovery and its abuse is difficult to draw. "Perhaps [abuse of discovery] is like pornography—it is very easy to recognize, but it is awfully hard to define."¹¹² Yet, certain problems with the use of discovery have been identified and solutions have been proffered. Some concern perceived abuse of the process. Others involve situations in which the process is seen to be less efficient, or more expensive, than it might be.

This section of the Article examines the local rules of various district courts and the directives, standing orders, and practices of individual judges for their solutions to these problems. First, the

107. See *id.* at 5 (Advisory Committee Note to proposed Rule 26(f)).

108. See ABA COMMITTEE, *supra* note 27, at 4 (Comments to proposed Rule 26(c)).

109. See note 71 *supra*.

110. See note 73 *supra*.

111. See text at notes 82-89 *supra*.

112. Meeting of the Metropolitan Chief Judges Conference (Apr. 19, 1976) (transcript) (comment of unidentified judge).

general scope of discovery is discussed, each of the discovery devices is examined individually, and the courts' filing requirements are studied. Second, comparison is made with the major proposals for Federal Rule changes now before the bar.

A. SCOPE OF DISCOVERY

The scope of permissible discovery is now set forth in Federal Rule 26(b)(1) as "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ."¹¹³ This Rule has been criticized because "sweeping and abusive discovery is encouraged by permitting discovery confined only by the 'subject matter' of a case . . . rather than limiting it to the 'issues' presented."¹¹⁴ The Supreme Court has, in addition, done little to restrict the reach of Federal Rule 26(b)(1):

The key phrase in this definition—"relevant to the subject matter involved in the pending action"—has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case. See *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).^[115] Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. *Hickman v. Taylor*, *supra*, at 500-501. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.¹¹⁶

Since the local rules adopted by the district courts may not be inconsistent with the Federal Rules,¹¹⁷ it is not surprising that there

113. FED. R. CIV. R. 26(b)(1).

114. ABA COMMITTEE, *supra* note 27, at 2-3 (Comments to proposed Rule 26(b)(1)). The Committee Comments go on to explain: "For example, the present Rule may allow inquiry into the practices of an entire business or industry upon the ground that the business or industry is the 'subject matter' of an action, even though only specified industry practices raise the 'issues' in the case." *Id.* at 3.

115. In a footnote, the Court quoted Professor Moore's treatise on Federal Practice: "[T]he court should and ordinarily does interpret 'relevant' very broadly to mean matter that is relevant to anything that is or may become an issue in the litigation." *Oppenheimer Fund, Inc. v. Sanders*, 98 S. Ct. 2380, 2389 n.12 (1978), quoting 4 MOORE'S FEDERAL PRACTICE ¶ 26.56[1], at 26-131 n.34 (2d ed. 1976).

116. *Oppenheimer Fund, Inc. v. Sanders*, 98 S. Ct. 2380, 2389-90 (1978) (footnote omitted).

117. Federal Rule 83 allows district courts to "make and amend rules governing its practice not inconsistent with these rules." FED. R. CIV. P. 83 (emphasis added). A commentator has noted:

The intention of the Committee was to provide a simple, unified system which would be governed by a single, brief body of rules. The Federal Rules of Civil Procedure do not, however, cover all situations. To the extent that the new rules, together with the federal statutes, do not regulate the practice

are no local rules reducing the scope of permissible discovery. Yet, whenever a challenge to relevancy of inquiry is made, a parameter must be drawn. And as pleadings come in, as facts are stipulated or otherwise admitted, as discovery progresses, it becomes possible to define to a greater extent the issues that are or may be in the case. Experience with this limiting process has occurred in complex litigation. The *Manual for Complex Litigation* has been promulgated,¹¹⁸ setting forth certain procedures as guidelines to be followed in complex litigation.¹¹⁹ The *Manual* contains a suggestion for a series of pretrial conferences,¹²⁰ and a recommendation that at the second conference an attempt be made to establish "limits" on the "subject matter for the remaining discovery on the merits" in order "to keep discovery within the bounds of reason and relevancy"¹²¹

Picking up on this theme, the North District of Ohio has established a procedure for limiting issues for discovery in complex cases. That court has promulgated rules for complex litigation as a part of its local rules,¹²² and has provided that in these cases discovery is to be "confined to the genuine issues necessary to a decision of the case."¹²³ Within 180 days after issue is joined, counsel is to submit tentative statements "explaining and clarifying the positions taken in the pleadings."¹²⁴ A pretrial conference is to follow for the purpose

and procedure, the district courts are permitted to formulate their own rules.

Hopkinson, *The New Federal Rules of Civil Procedure Compared with the Former Federal Equity Rules and the Wisconsin Code*, 23 MARQ. L. REV. 159, 160 (1939). See generally note 29 *supra*.

118. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, *MANUAL FOR COMPLEX LITIGATION* (rev. ed. 1977 & Supp. 1978) [hereinafter cited as *MANUAL*]. The *Manual* which is continually revised, is published as 1 Pt. 2 MOORE'S FEDERAL PRACTICE (1978) and as a supplementary pamphlet to C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* (1977 & Supp. 1978).

119. "Complex litigation" is defined as "one or two or more related cases which present unusual problems and which require extraordinary treatment, including but not limited to the cases designated as 'protracted' and 'big.'" *MANUAL*, *supra* note 118 at § 0.10.

120. *Id.* at § 0.40.

121. *Id.* at § 2.40.

122. The rules apply to any case that

- (a) arises under any of the antitrust laws of the United States;
 - (b) involves a prayer for recovery of \$1,000,000 or more;
 - (c) involves a request for injunctive relief affecting the operations of a major business entity;
 - (d) involves a large number of parties of an association of large membership;
 - (e) is patent case involving an unusual multiplicity or complexity of issues;
- or
- (f) may otherwise be a protracted case.

N.D. OHIO COMPLEX LITIGATION R. 1.

123. N.D. OHIO COMPLEX LITIGATION R. 4(a).

124. *Id.*

of "defining the bounds of discovery in accordance with the elaboration and clarification of the issues as a result of the pretrial conferences."¹²⁵ The rule specifically provides that a party is not precluded "from changing his position or amending his pleading, where otherwise proper," but the statement of issues nevertheless serves "as a framework for discovery."¹²⁶

The preliminary pretrial conferences, which a number of districts now require soon after the filing of the complaint or answer,¹²⁷ also provide a vehicle for preliminary issue definition. Some local rules now require that at the preliminary pretrial, and in statements prepared prior to the actual conference, counsel address what then appear to be the issues in the case.¹²⁸ While it is not clear, from information uncovered in the Survey, that judges (or magistrates) actually use this opportunity to define and limit the concept of relevancy for discovery purposes, the potential is clearly present.

The ABA Committee proposes that Federal Rule 26(b)(1) be amended to limit the scope of discovery to "any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party."¹²⁹ The ABA Committee, while recognizing that "[d]etermining when discovery spills beyond 'issues' and into 'subject matter' will not always be easy, recommends the change if only to direct courts not to continue the present practice of erring on the side of expansive discovery."¹³⁰

The Advisory Committee in 1978 rejected the ABA Committee's suggestion of the use of the term "issues" in place of "subject matter of the action" in Federal Rule 26(b)(1):

The [Advisory] Committee doubts that replacing one very general term with another equally general one will prevent abuse occasioned by the generality of language. Further, it fears that the introduction of a new term in the place of a familiar one will invite unnecessary litigation over the significance of the change.¹³¹

The Advisory Committee proposed that Federal Rule 26(b)(1) be amended so as to eliminate the "subject matter involved in the pend-

125. N.D. OHIO COMPLEX LITIGATION R. 4(b).

126. *Id.*

127. *See note 71 supra.*

128. *See, e.g.,* N.D. & S.D. IOWA CIV. R. (18)(A)(1) (as supplemented by standard pretrial orders and clerk's checklist, automatically sent to counsel); D. MONT. R. 11(c)(2); E.D. PA. R. 7(c). The Northern and Southern Districts of Iowa and the District of Montana place rather elaborate requirements on counsel.

129. ABA COMMITTEE, *supra* note 27, at 2.

130. *Id.*, at 3 (Committee Comments to proposed amended Rule 26(b)(1)).

131. 1978 PROPOSED DRAFT, *supra* note 26, at 627 (Advisory Committee Note to proposed Rule 26(b)(1)).

ing action"¹³² language of the current Rule, and that it be made to read: "any matter, not privileged, which is relevant to the claim or defense" of any party.¹³³

After receiving comments on its 1978 proposal, the Advisory Committee receded completely from even this modest change. Its 1979 proposal, presently before the bar, includes no change in Federal Rule 26(b).¹³⁴

Both Committees recommend that the discovery conference, which a party may have as of right upon request, focus on the scope of discovery. The Advisory Committee recommendation is that the request for the discovery conference include a "statement of the issues as they then appear," and that the court order, following the conference, "tentatively identif[y] the issues for discovery purposes," subject to amendment "whenever justice so requires."¹³⁵

It appears that the mechanism to accomplish this end is now present in the local rules of several of the districts. These rules provide for an early conference between court and counsel for the purpose of planning discovery. As noted,¹³⁶ several districts specifically require attention to matters involved in defining relevancy for discovery purposes. Moreover, the Northern District of Ohio now provides expressly for issue definition for discovery purposes.¹³⁷ The difficulty comes in defining the concept of relevancy so as to avoid erring "on the side of expansive discovery." This task is not made any easier by the Supreme Court's recent dicta on the subject.¹³⁸ Even overcoming that difficulty, success will depend upon a federal judge who actively takes charge of a case at its very beginning and assists cooperative counsel in drawing reasonable lines of relevancy for discovery pur-

132. FED. R. CIV. P. 26(b)(1).

133. 1978 PROPOSED DRAFT, *supra* note 26, at 623. The Advisory Committee explained: "If the term 'subject matter' does in fact persuade courts to err 'on the side of expansive discovery,' it should be eliminated, and that is the course recommended by the Committee." *Id.* at 627-28.

134. 1979 REVISED DRAFT, *supra* note 26, at 1.

135. *Id.* at 3-4 (Advisory Committee proposed Rule 26(f)). The ABA Committee recommendation is somewhat different. That Committee recommended that the request for a discovery conference include "a statement of the issues *to be tried*," and that the court "shall enter an order *fixing the issues*," subject, of course, to amendment "[u]pon a showing of good cause . . ." ABA COMMITTEE, *supra* note 27, at 4 (emphasis added) (proposed new Rule 26(c)). The difference in approach is that the ABA Committee appears to propose that the initial discovery conference fix the issues *for trial*, subject to amendment for "good cause." The Advisory Committee, on the other hand, proposes only that the issues be set for *discovery purposes* at the initial conference, leaving issue identification for trial to the final pretrial conference, as is the case now.

136. See note 128 *supra* and accompanying text.

137. See text accompanying notes 122-26 *supra*.

138. *Oppenheimer Fund, Inc. v. Sanders*, 98 S. Ct. 2380, 2389 (1978), *quoted at* text accompanying note 116 *supra*.

poses. No rule, local or federal, can ensure this essential element. But a rule may help to set a tone for both bar and bench to follow.

B. USE OF DISCOVERY DEVICES

Several of the discovery devices have come under fire as being easily subject to abuse. Suggestions have also been made that these devices can be rendered more efficient and economical to use. Again, the district judges have been experimenting.

1. *Interrogatories*

The use of interrogatories, authorized by Rule 33, has received a great deal of attention. The *Field Survey of Federal Pretrial Discovery*, conducted by the Project for Effective Justice of Columbia University Law School a decade and a half ago, found that interrogatories were thought of by attorneys as the discovery device most conducive to friction between parties.¹³⁹ The Advisory Committee and the ABA Committee have noted the existence of discovery abuse attributable to the use of Rule 33 interrogatories.¹⁴⁰

Many district courts have responded to this situation with local requirements. One district judge, for example, has let it be known that the "use of interrogatories is not allowed until other means have been exhausted, and then only upon good cause shown to the Court."¹⁴¹ Another has limited the scope of interrogatories.¹⁴² Several

139. Rosenberg, *supra* note 18, at 490; see FIELD SURVEY, *supra* note 9.

140. The Advisory Committee reported that "[t]here is general agreement that interrogatories spawn a greater percentage of objections and motions than any other discovery device." FED. R. CIV. P. 33, Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 455 (1976). In 1977, the ABA Committee stated that "[n]o single rule was perceived by the Bar at large . . . as engendering more discovery abuse than Rule 33 on interrogatories." ABA COMMITTEE, *supra* note 27, at 20 (Comments to proposed Rule 33).

141. SURVEY, *supra* note 31 (response of Ralph A. Cosenza, Minute Clerk, regarding the practice of Judge Pollack of the Southern District of New York).

These local rules limiting the scope and use of interrogatories seem to be inconsistent with the express language of Rule 26(a). Rule 26(a) instructs that

[p]arties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, *the frequency of use of these methods is not limited.*

FED. R. CIV. P. 26(a) (emphasis added). See also note 117 *supra*.

142. A standard order of Judge Williams of the Northern District of California states that

[i]nterrogatories shall be specifically directed to (1) securing the names, location and probable testimony of witnesses, (2) the existence, location and general description of relevant documents and other physical evidence, and (3) information concerning the transaction(s) upon which the claims for

district courts have enacted maximum limits on the number of interrogatories that may be filed without special court permission.¹⁴³ For example, the Middle District of Florida restricts the number that may be served by any party upon any other party "at one time or cumulatively" to no "more than fifty interrogatories . . . including all parts and subparts."¹⁴⁴ The Northern District of Illinois limits the number to twenty, but counts as a single interrogatory one with subparts that "relate directly to the subject matter of the interrogatory."¹⁴⁵ A few judges limit a party to twenty interrogatories including all subparts.¹⁴⁶ All of these courts and judges permit additional interrogatories on motion for good cause shown. As Rule 33 provides no limitation in number, the validity of such local rules is questionable.

Several districts also "prohibit the filing of mimeographed or otherwise duplicated forms of 'stock' interrogatories except where the nature of the case or the number of the parties makes the use of such forms necessary and feasible."¹⁴⁷ On the other hand, a few districts allow the use of court-approved uniform interrogatories,¹⁴⁸ to be "used only if it is appropriate in the particular case."¹⁴⁹ The efficiency effected is that "[n]o objection to the form or substance" may be

relief are based. Broadly generalized, boilerplate interrogatories will not be permitted.

SURVEY, *supra* note 31.

143. See, e.g., M.D. FLA. GEN. R. 3.03(a); N.D. ILL. GEN. R. 9(2); SURVEY, *supra* note 31 (standard order of Judge Turrentine of the Southern District of California; standard instruction of Judge Owens of the Middle District of Georgia; standard order of Judge McMillan of the Western District of North Carolina; practice of Judge Burns of the District of Oregon, as indicated by the response of Robert M. Christ, Clerk; standing order of Judge Cahn of the Eastern District of Pennsylvania; standard letter instructions of Judge Teitelbaum of the Western District of Pennsylvania).

144. M.D. FLA. GEN. R. 3.03(a).

145. N.D. ILL. GEN. R. 9(g). Other districts also follow this practice. See SURVEY, *supra* note 31 (standard order of Judge Turrentine of the Southern District of California; practice of Judge Burns of the District of Oregon, according to the response of Robert M. Christ, Clerk; standing order of Judge Cahn of the Eastern District of Pennsylvania).

146. See SURVEY, *supra* note 31 (standard instructions of Judge Owens of the Middle District of Georgia; standard order of Judge McMillan of the Western District of North Carolina; standard letter instructions of Judge Teitelbaum of the Western District of Pennsylvania).

147. E.D. ILL. R. 10(b); N.D. IND. R. 8(b). Judge Owens of the Middle District of Georgia, who limits parties to twenty interrogatories—counting parts and subparts—has instructed counsel: "Form, canned interrogatories in excess of twenty are not usually approved." See SURVEY, *supra* note 31. See also E.D. VA. R. 11(D) (prohibiting such interrogatories unless the attorney has deleted all extraneous matter and certifies that he has read the remaining portions and has a good faith belief that the contents are pertinent to the case).

148. See, e.g., D. ARIZ. CIV. R. 37(b)(1); W.D. MO. R. 20(D)(4); E.D. PA. R. (Interrogatories Approved for Asking in Appropriate Cases)(addendum to local rules under letter of Dec. 7, 1956).

149. D. ARIZ. CIV. R. 37(b)(2).

made concerning the approved interrogatory¹⁵⁰ unless it is "not within the scope of permissible discovery in the particular action."¹⁵¹

Efficiency would dictate that each interrogatory propounded and the answer or objection thereto be typed (or otherwise produced) in close proximity to each other. This is required by a great number of districts. But they differ on where they place the burden of conformity. Many insist that the party propounding the interrogatory leave a space immediately following the interrogatory, and that that space be sufficient in size for the answer or objection.¹⁵² Others require that the party to whom the interrogatories have been propounded quote the interrogatory immediately before each answer or objection.¹⁵³ A few place the initial burden on the interrogator but then tell the answerer that, if the space left is insufficient, the answerer must quote the interrogatory immediately prior to each answer or objection.¹⁵⁴

Another problem concerns a practice of using an objection to a part of an interrogatory as an excuse for not answering the remaining portion. A few courts have addressed this problem by providing that, if an objection is made to a part of an interrogatory, the respondent shall answer that part to which there is no objection.¹⁵⁵ One court requires the respondent in such a situation to certify that he has answered all parts of the interrogatory that he does not consider objectionable.¹⁵⁶

Although neither Federal Rule 33 nor Federal Rule 37 imposes a time limit on the use of a motion to compel an answer to an interrogatory, several districts have attempted to prevent delays in answering interrogatories by imposing such time limits. The Southern District of California, for example, has provided that a motion to compel an

150. W.D. Mo. R. 20(D)(4).

151. D. ARIZ. CIV. R. 37(b)(2). Another efficiency mechanism exists in the District of Arizona, where the rules provide that the interrogator need not file approved interrogatories with the court at the time of service, but instead need file only a notice of the identifying numbers of the approved interrogatories that were served. D. ARIZ. CIV. R. 37(b)(3); see text accompanying note 234 *infra* (discussion of filing requirements).

152. See, e.g., D. ARIZ. CIV. R. 37(a)(2); M.D. FLA. R. 3.03(b); N.D. IND. R. 8(a); N.D. & S.D. IOWA CIV. R. 17(c); D. KAN. R. 17(d); D.N.H.R. 14(a)(1); D.N.J. GEN. R. 16; N.D. OHIO CIV. R. 3(d); W.D. PA. R. 4(b); W.D. WASH. CIV. R. CR33(d)(1).

153. See, e.g., D. ALASKA GEN. R. 8(D); E.D. & W.D. ARK. R. 10; E.D. CAL. GEN. R. 6(b); N.D. CAL. CIV. R. 230(1); S.D. CAL. R. 6(c); D. CONN. R. 21; D. DEL. R. 19; D.D.C. CIV. R. 1-9(A); E.D. ILL. R. 10(a); N.D. ILL. GEN. R. 9(c); S.D. IND. R. 12(a); E.D. LA. R. 3.12; D. ME. R. 16(a); D. MASS. R. 15(a)(2); N.D. MISS. CIV. R. C-5; D. MONT. R. 8(e); D.N.D.R. IV(F)(4); N.D. OKLA. R. 10(c); W.D. OKLA. R. 9(c); E.D. PA. R. 25(a); D.R.I.R. 13(a); W.D. TENN. R. 9(f).

154. See, e.g., D. ARIZ. CIV. R. 37(a)(4).

155. S.D. CAL. R. 6(c); D. MASS. R. 15(c); E.D. MICH. R. XIV; W.D. PA. R. 4(c); D.R.I.R. 13(c).

156. E.D. MICH. R. XIV.

answer to an interrogatory is waived if not filed within fifteen days after service of the answer or objection.¹⁵⁷ The District of Massachusetts, in addition, provides that, if the court grants a motion to compel an answer, the answer shall be filed within fifteen days of the order, unless the court otherwise directs.¹⁵⁸ On the other hand, the Massachusetts District also provides a method for an automatic extension of twenty days for the thirty-day time period to answer interrogatories. The propounder of interrogatories not answered in time must apply to the clerk of the court for a Notice of Delinquency, which the clerk is to send to the respondent. No motion to compel answer or sanction may be filed for twenty days thereafter.¹⁵⁹

Three districts have local rules concerning the duty to supplement answers given to interrogatories. The District of Delaware provides that "[a]ll interrogatories and answers thereto shall be deemed to be continuing, unless otherwise ordered by the Court."¹⁶⁰ In the District of Massachusetts, if a response to an interrogatory is complete when made, there is no duty to supplement it without a court order.¹⁶¹ The District of New Hampshire provides that there is a duty to supplement only an interrogatory that seeks information concerning the identification of persons with knowledge of relevant facts.¹⁶² All three local rules appear to be more restrictive than the federal rule,¹⁶³ and therefore appear to be of doubtful validity.¹⁶⁴

Both the ABA Committee and the Advisory Committee have proposed amendments to Federal Rule 33 involving interrogatories. The ABA Committee suggests that Rule 33(a) be amended to limit to thirty the number of interrogatories that one party may serve on another party without a court order "to be granted upon a showing of necessity . . ." ¹⁶⁵ The Committee has commented that, while it had considered numerous solutions to the problems with interrogatories, it had "determined that an initial numerical limitation on interrogatories filed as a matter of right was the soundest approach to limiting interrogatory abuse and to enhancing better use of interrogatories as a discovery mechanism."¹⁶⁶ The ABA Committee proposal includes a provision that "[e]ach interrogatory shall consist of a single question."¹⁶⁷ The Committee would make an exception, how-

157. S.D. CAL. R. 3(c)(9).

158. D. MASS. R. 15(c).

159. D. MASS. R. 15(g).

160. D. DEL. R. 19.

161. D. MASS. R. 13.

162. D.N.H.R. 14(e).

163. See FED. R. CIV. P. 26(e).

164. See notes 29, 117 *supra* and accompanying text.

165. ABA COMMITTEE, *supra* note 27, at 18.

166. *Id.* at 20 (Comments to proposed Rule 33).

167. *Id.* at 18 (proposed Rule 33(a)).

ever: "[I]nterrogatories inquiring as to the names and locations of witnesses or the existence, location and custodians of documents or physical evidence [should] each be construed as one interrogatory. Greater leniency is recommended in these areas because they are well suited to non-abusive exploration by interrogatory."¹⁶⁸

The Advisory Committee has rejected the ABA suggestions. At first, it would have amended Rule 33(a) to permit each district court, by the action of a majority of its judges, to limit the number of interrogatories that may be used by a party. The Advisory Committee noted that some districts now impose limitations on the number of interrogatories that may be served without court permission.¹⁶⁹ It stated that other districts might be deterred from imposing such limits by Federal Rule 26(a), which makes the validity of such local rules doubtful at the present time.¹⁷⁰ By specifically authorizing a local rule in this regard, the Advisory Committee proposal, if adopted, would have removed possible objections to the local rules.

The Advisory Committee, however, has now dropped this proposal. In its 1979 Revised Preliminary Draft, there is no authorization for district courts to limit the number of interrogatories,¹⁷¹ thus retaining the present system.

The proposed revisions of Federal Rule 33 have also addressed a problem that has apparently received no attention in any local district court rule or procedure. Under Federal Rule 33, a party responding to an interrogatory in lieu of answering, may make available to the proponent business materials from which the answer may be derived. Although the Advisory Committee has stated that "[a] respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records,"¹⁷² some parties have used the business records option to force upon the interrogating party a great mass of unorganized documents, sometimes "all of their records."¹⁷³ To alleviate this problem, both

168. *Id.* at 20 (Comments to proposed Rule 33).

169. 1978 PROPOSED DRAFT, *supra* note 26, at 649 (Advisory Committee Note to proposed amended Rule 33); *see* note 143 *supra*.

170. FED. R. CIV. R. 26(a) states, "Unless the court orders otherwise under subdivision (c) of this rule [dealing with protective orders], the frequency of use of these [discovery] methods is not limited."

171. *See* 1979 REVISED DRAFT, *supra* note 26, at 13-14.

172. FED. R. CIV. P. 33(c), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 457 (1976).

173. 1979 REVISED DRAFT, *supra* note 26, at 14 (Comment to proposed Rule

the Advisory Committee and the ABA Committee propose adding to Federal Rule 33(c) a requirement that the responding party, when turning over the records from which the interrogating party is to ascertain the answer, not only is to "specify the records from which the answer may be derived," but also include "sufficient detail as to permit the interrogating party to locate and to identify as readily as can the party served the records from which the answer may be ascertained."¹⁷⁴ The ABA Committee notes that, as a part of the answers to interrogatories, the specification is to be under oath.¹⁷⁵

While this change will do no harm and may do some good, two comments are warranted. If the matter addressed has been a problem of general application, it seems strange that no district court has adopted a local rule on the point and that the Survey discovered no district judge who had included the point in a standard order, instruction, or practice. Second, it is difficult to understand why trial judges, upon proper motion to compel answer in accordance with the current requirement of Federal Rule 33(c)—that the respondent furnishing business records "specify the records from which the answer may be derived,"—do not order "specification [in] . . . sufficient detail" for the interrogator to match the relevant documents to the relevant interrogatory. Perhaps a specific direction will lead counsel to expect, and judges to demand, what should be obvious.

2. Depositions

The local rules and practices concerning depositions, authorized by Rule 30, have been less sweeping than local rules concerning interrogatories. One district judge, in an attempt to hold down the cost of discovery, suggests to counsel that he limit deposition "to information needed under oath."¹⁷⁶ He then offers the following advice: "Interview even hostile witnesses before you depose them and then eliminate possibly unnecessary questions such as life history and names of all relatives since your client is paying you and a court

33(c)); see ABA COMMITTEE, *supra* note 27, at 20 (Comment to proposed Rule 33).

174. 1979 REVISED DRAFT, *supra* note 26, at 13-14 (proposed Rule 33(c)); see ABA COMMITTEE, *supra* note 27, at 19-20 (same) (substantially identical language).

175. See ABA COMMITTEE, *supra* note 27, at 21 (Comment to proposed Rule 33).

176. See SURVEY, *supra* note 31 (standard instruction of Judge Owens of the Middle District of Georgia).

Another practice that could influence counsel to refrain from asking questions of doubtful relevance is the requirement of many judges that counsel offering a deposition at trial excise all irrelevant portions. See, e.g., E.D. VA. R. 21(E), (F); SURVEY, *supra* note 31 (standing orders of Judges Schnacke and Williams of the Northern District of California; standard pretrial order of Judges Guy, Kaess, and Joiner of the Eastern District of Michigan; standing order of Judge Alsop of the District of Minnesota; standing order of Judge Walinski of the Northern District of Ohio; standing order of Eastern Division of the Southern District of Ohio).

reporter. Holding costs down will benefit you and your client." The judge further advises that, "if [counsel] think unnecessary depositions are being taken," counsel should "suggest that to the court and consideration will be given to limiting their taking."¹⁷⁷

Several districts have, in addition, defined the requirement imposed by Federal Rule 30(b) that "reasonable notice" be given of the taking of a deposition. Some require a minimum of five days,¹⁷⁸ others ten days,¹⁷⁹ unless the court orders a shorter time. One district requires a longer time if the deposition is to be taken more than fifty miles away.¹⁸⁰

Two courts, concerned about the inconvenience caused to a non-resident party forced to travel a great distance for the purpose of a deposition, have promulgated a "general policy" that "a non-resident plaintiff may reasonably be deposed at least once in this District during the discovery stages of the case."¹⁸¹ In the Middle District of Florida, a "non-resident defendant who intends to be present in person at trial may reasonably be deposed at least once in this District during the discovery stages of the case or within a week prior to trial as the circumstances seem to suggest."¹⁸² Any other nonresident party may be deposed as a witness pursuant to Rule 45(d) of the Federal Rules.¹⁸³ Thus, in the Northern District of Florida, any nonresident defendant, and in Middle Florida, any nonresident defendant who does not intend to appear in person at trial and any nonresident plaintiff beyond the first deposition, may be deposed in the district where suit is brought *only* if subpoenaed and if the subpoena is served in the district or within forty miles of the district.¹⁸⁴ Although intent to avoid inconvenience may be admirable, these local rules appear to

177. See SURVEY, *supra* note 31 (standard instruction of Judge Owens of the Middle District of Georgia).

178. See, e.g., D. KAN. R. 17(b); E.D. VA. R. 21(G) provides that seven days "shall constitute reasonable notice," but this is to vary "according to the complexity of the contemplated testimony and the urgency of taking the deposition of a party or witness at a particular time and place."

179. See, e.g., M.D. FLA. GEN. R. 3.02; SURVEY, *supra* note 31 (standing order of Chief Judge Nealon of the Middle District of Pennsylvania, para. 4.2).

180. D.D.C. CIV. R. 1-16(b).

181. N.D. FLA. GEN. R. 8(B); M.D. FLA. GEN. R. 3.04(d). The Northern District defines a "non-resident" as a person who lives outside the Northern District of Florida. The Middle District defines "non-resident" as one who lives outside the State of Florida.

182. M.D. FLA. GEN. R. 3.04(d).

183. The corresponding local rules are N.D. FLA. GEN. R. 8(B); M.D. FLA. GEN. R. 3.04(d).

184. See FED. R. CIV. P. 45(d).

be directly contrary to Federal Rules 30(a) and (b)¹⁸⁵ and 37(d)¹⁸⁶ and are of questionable validity.¹⁸⁷

Two other solicitous courts provide for payment of expenses when a deposition is to be taken at a distant place. One provides that, if a deposition is to be taken more than 150 miles from the federal courthouse, the court "may provide" in a protective order that the party noticing the deposition pay the expenses of attending, including the reasonable fees of one attorney for the adverse party.¹⁸⁸ The other provides that, if a deposition that will be used at trial is taken outside the division of the court in which the action is pending, the party noticing the deposition "shall . . . prepay or secure the cost of travel" of one opposing counsel to the place of deposition and return.¹⁸⁹ Although a court may have the power to issue such an order in an individual case, acting under its authority to issue a protective order,¹⁹⁰ it appears to be beyond the court's power to exact such a price as an ordinary matter in every case. The protective order rule contemplates that the court weigh the respective hardships in each individual case and place at least the initial burden on the person seeking the protective order. These local rules make the protective order the norm, with the burden of its non-application on the party seeking discovery. For that reason, these rules are of doubtful validity.

The most frequently adopted rule regarding depositions concerns

185. The relevant portions of Rule 30 state:

After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. . . . The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

FED. R. CIV. P. 30(a).

A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the material to be produced as set forth in the subpoena shall be attached to or included in the notice.

FED. R. CIV. P. 30(b)(1).

186. Federal Rule 37(d) provides that if a party fails to appear before the officer who is to take his deposition, after being served with a proper notice, the court in which the action is pending on motion may take facts to be established as presented by the adverse party, refuse the delinquent party the privilege of supporting certain claims or defenses, strike out all or any part of any pleading of that party, dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party. FED. R. CIV. P. 37(d).

187. See notes 29 & 117 *supra*.

188. N.D. ILL. CIV. R. 4(a). For a similar provision for depositions more than 100 miles from the courthouse, see S.D.N.Y. CIV. R. 5(a).

189. E.D. VA. R. 21(B)-(C). Certain limits are placed on those expenses and fees.

190. FED. R. CIV. P. 26(c).

whether a deposition filed in court is open for all to see and, if not, who may open it. Federal Rule 30(f) now provides that when a deposition is transcribed,¹⁹¹ the officer before whom the deposition was taken is to certify it, "then securely seal the deposition in an envelope" and file it or mail it to the clerk for filing in the court where the action is pending. The Federal Rule makes no mention of unsealing. A few district courts provide that, when the sealed deposition is filed, it shall be opened by the clerk.¹⁹² Most provide that it shall remain sealed. A few then state that to open the seal requires an order of court or a stipulation of the parties.¹⁹³ The vast majority provide that the seal shall be opened upon request of any counsel in the case.¹⁹⁴

The Advisory Committee and the ABA Committee made no recommendations on the matters covered by these local rules. They have, however, proposed certain amendments to the deposition rules that should make depositions somewhat less expensive. Their proposals would authorize the taking of a deposition by other than stenographic means, but the Advisory Committee will require either a stipulation or a court order upon motion.¹⁹⁵ Taking a deposition by telephone would be authorized.¹⁹⁶ But the deposition, if transcribed, would still need to be filed at that time.¹⁹⁷

3. *Requests for Production*

A few local rules and individual judge practices address problems with requests for production under Federal Rule 34. A few discourage

191. FED. R. CIV. P. 30(c) provides that a deposition shall be transcribed "if requested by one of the parties"

192. See, e.g., N.D. & S.D. IOWA CIV. R. 17(A); E.D. LA. R. 7; D. ME. R. 15(b); D. MONT. R. 8(c); N.D. OHIO CIV. R. 6(b); D.R.L.R. 14(b).

193. See, e.g., D. IDAHO R. 17; D. NEV. CIV. R. 17(A)5. Cf. D. ALASKA GEN. R. 8(A)(opened by order of court or "upon request of counsel for either party").

194. See, e.g., N.D. GA. R. 210; E.D. ILL. R. 16; D. MASS. R. 14.

195. 1979 REVISED DRAFT, *supra* note 26, at 7 (proposed amendment to Federal Rule 30(b)(4)). The ABA Committee proposes that non-stenographic taking of a deposition be permitted solely upon notice to that effect in the notice of the deposition. See ABA COMMITTEE, *supra* note 27, at 10-14. While the Advisory Committee at first agreed, see 1978 PROPOSED DRAFT, *supra* note 26, at 640, it has pulled back, stating that it "is not satisfied that a case has been made for a reversal of present practice." 1979 REVISED DRAFT, *supra* note 26, at 10 (Advisory Committee Note to proposed new Federal Rule 30(b)(4)); see *id.* at 7. Yet, the Committee would explicitly authorize electronic recording of depositions by stipulation or order to encourage its use so that "greater experience" might be gained. *Id.*

196. *Id.* (Rule 30(b)(1)).

197. The ABA Committee urged that the present filing requirement for depositions be changed so that they would need to be filed only when used in a court proceeding, unless the court otherwise directs. See ABA COMMITTEE, *supra* note 27, at 1, 15, 17 (proposed amendments to Federal Rules 5(d), 30(f), 31(b)). The Advisory Committee originally concurred as far as oral depositions were concerned. See 1978 PROPOSED DRAFT, *supra* note 26, at 642 (proposed amendment to Rule 31(b)). Without

formal requests, urging counsel to use informal letters¹⁹⁸ or to meet informally soon after the commencement of the action and exchange documents for purposes of inspection and copying.¹⁹⁹ One court suggests that a response to a request for production shall reproduce each request immediately before the response thereto.²⁰⁰ Two others require that, when a response to a request for production contains an objection, it must also contain a certification that the objector has complied with the request to the extent that it is not considered objectionable.²⁰¹ One court, in an apparent attempt to speed discovery, requires that within fifteen days of receipt of a request for production, a party who intends to object to all or part of that request must file, presumably in court, a notice of intention to object to all or part of the request.²⁰² A failure to file the notice "will constitute a waiver of the privilege of objecting."²⁰³ This Rule cuts the time limit provided by Federal Rule 34 by as much as one-half.²⁰⁴ Moreover, by requiring filing in court by the objector, it returns to the structure abandoned by the 1970 amendments.²⁰⁵ For these reasons, this local rule appears to be invalid.

Again, the Advisory Committee and the ABA Committee have addressed none of these concerns. But they do urge one amendment to Federal Rule 34. Addressing what it called the "reprehensible practice [of] . . . the deliberate attempt by a producing party to burden discovery with volume or disarray," the ABA Committee noted that "[i]t is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance."²⁰⁶ Thus, both the ABA Committee and the Advisory Committee recommend the addition of the following to Federal Rule 34 (in the words of the Advisory Committee proposal): "A party who produces documents for inspection shall produce them as they are kept in the usual

comment, the 1979 version dropped all mention of filing depositions, thus retaining the present requirement. See 1979 REVISED DRAFT, *supra* note 26, at 8.

198. See, e.g., SURVEY, *supra* note 31 (practice of Judge Pollack of the Southern District of New York, as indicated by the response of Ralph A. Cosenza, Minute Clerk). The gain in efficiency yielded by use of this local rule is not apparent.

199. See, e.g., *id.* (Notice to Counsel of Judge Nelson of the Central District of California.).

200. N.D. CAL. CIV. R. 230(2).

201. S.D. CAL. R. 6(c); E.D. MICH. R. XIV.

202. W.D. MO. R. 28.

203. *Id.*

204. FED. R. CIV. P. 34(b) provides 30 days in which to object and in certain circumstances 45 days.

205. A purpose of the 1970 amendment to rule 34 was "to have the rule operate extrajudicially," since the "extrajudicial procedure . . . has the potential of saving court time . . ." FED. R. CIV. P. 34(a), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 458 (1976).

206. ABA COMMITTEE, *supra* note 27, at 22 (Comment to proposed amended Rule 34).

course of business or shall organize and label them to correspond with the categories in the request."²⁰⁷

A more significant proposal is being considered by the Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation.²⁰⁸ The Commission, concerned about the cost of producing large masses of documents,²⁰⁹ has proposed that the district courts each adopt a local rule which would allow the discovering party to proceed under one of two options.²¹⁰ Option 1 would require the discoveree, in response to a request, to divulge the location of relevant files, identify individuals knowledgeable as to the organization and maintenance of those files, and supply a description of the categories of documents at each location. Provision is made for a master or magistrate to interview or depose file personnel or even to conduct an inspection of the files himself. The discovering party would be required to give notice of the sequence of proposed inspection of the documents to permit the discoveree an initial review for privileged or other confidential materials. Option 2 is simply to proceed as is now

207. 1979 REVISED DRAFT, *supra* note 26, at 16.

208. See Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation, Proposed Local Rule 34 (Apr. 10, 1978) (unpublished draft and commentary) [hereinafter cited as Second Circuit Draft].

209. The Second Circuit Commission states,

1. In any substantial case, if the lawyers do their jobs, virtually all documents relating to the subject matters of the case will be produced. But to get to that stage often requires an extraordinarily and unnecessarily expensive process of voluminous, detailed requests, almost equally voluminous and detailed objections, extensive motion practice, hearings before the magistrate or the court or both, and quite possibly a series of depositions.

2. After those expenses have been incurred and orders to produce have been issued, the party seeking production assumes the not inconsiderable risk that documents he really wants—the damaging documents—will not be produced. The burden of the initial file search of course falls on the opposing party, but he has the opportunity to review files against specifically worded requests and thus to “construe” those requests in a manner which will avoid the production of damaging materials.

3. Aware of this risk, the party seeking production will tend to draft his request broadly, which results in his calling for large volumes of materials he does not really want. In most instances he will receive precisely such materials—possibly tons of worthless paper—which the party making production has considerable incentive to give him. That is so, because the larger the volume of paper produced, no matter how innocuous, the stronger will be the grounds, as a practical matter, for opposing any further document requests.

4. In a large document case, the amount of work done by the party receiving production—in reviewing and understanding the materials produced—may not be significantly less than the amount of work done by the party making production. In effect, the system occasions a large duplication of expense which . . . may well be unnecessary.

Second Circuit Draft, *supra* note 208, at 5-7.

210. *Id.* at 1-3.

provided by Federal Rule 34, except that the court, in ruling on objections, must take into account that the discoveror has elected *not* to assume the burden and expense of the file search, preferring to delegate that onus to the discoveree.

Under Option 1, the inordinate expense attending the legal profession's version of German chess²¹¹ appears to be effectively eliminated in the area of drafting and litigating detailed document requests and objections. The Commission's answer to the argument that Option 1 enables the discoveror to view greater numbers of irrelevant documents and is therefore a greater invasion of privacy is a pragmatic one: the present system already "generates production of huge quantities of irrelevant materials."²¹² The theory is that under Option 1, the discoveror, being better informed, is likely to be more selective, the more so since he performs his own file search rather than relying on documents selected by his adversary. The Commission counters the argument that Option 2 is virtually forced upon plaintiffs who lack the resources to cope with massive corporate files²¹³ with the obvious fact that Option 2 is in any event no more burdensome than the limited procedures now available under Rule 34.²¹⁴

The Commission's proposal is a thoughtful and realistic attempt to deal with a discovery procedure that, even if not abused, subjects the parties to inordinate expenditures of time and money. But it is designed for the big or complex case and should be so limited. In relatively simple litigation, a party should not have carte blanche under Option 1 to roam about his opponent's files. This procedure should be made a part of local rules that are applicable only to big or complex cases, a precedent that the Northern District of Ohio has already set.²¹⁵ Whether or not that is done, the rule can and should operate only under the close supervision of a magistrate or master, as the Commission's draft would propose, or through early discovery conferences as visualized in the proposed revisions to Federal Rule 26²¹⁶ and in the *Manual for Complex Litigation*.²¹⁷

211. German chess—Kriegspiel—is a variant of chess in which a player sees only his own pieces and must deduce the position of the opponent's forces as the referee removes captured pieces from the board.

212. Second Circuit Draft, *supra* note 208, at 10.

213. The Commission notes, "This argument might have had some appeal in 1946; it does not now." *Id.* at 9.

214. Indeed, those presently able to utilize the current system of document production successfully can only be aided by the proposed local rule. The local rule gives the plaintiff with limited resources who elects Option 1 the ability to control the amount of documentation he reviews, and provides him a better idea of what his opponent possesses than he would be able to form under the present system.

215. See text accompanying notes 122-26 *supra*.

216. See text accompanying notes 101-08 *supra*.

217. See text accompanying note 118 *supra*.

4. *Requests for Admissions*

The Federal Rule 36 requests for admissions procedure seems to be working well. Neither the Advisory Committee nor the ABA Committee proposed any change in Federal Rule 36 and the local rules address only two points. One is a requirement that the person responding to a request quote the request immediately before the response.²¹⁸ Some districts require that the propounder of the request leave sufficient room for a response.²¹⁹ Secondly, two districts require that when a response to a request for admission contains an objection, the response must also contain a certification that the objector answered the request to the extent not considered objectionable.²²⁰

5. *Physical or Mental Examinations*

Unlike other federal discovery rules,²²¹ Federal Rule 35, which provides for orders for physical and mental examinations, requires a motion and a showing of good cause. Although the Advisory Committee Note to the current version of Rule 35 contains some implication that parties should agree on the examination without the need to invoke judicial intervention,²²² only one local rule encourages this, and then only indirectly. The Northern District of Mississippi provides that every motion for such an examination not accompanied by a consent order must be accompanied by an affidavit of movant's counsel stating that efforts to reach an agreement were unsuccessful.²²³ This device is a small step in the direction of saving court time.

Neither the Advisory Committee nor the ABA Committee addressed this rule.

6. *Filing Requirements*

As originally promulgated in 1938, the Federal Rules did not

218. See, e.g., D. ALASKA GEN. R. 8(E); E.D. & W.D. ARK. R. 10; C.D. CAL. R. 6(c); N.D. CAL. CIV. R. 230(3); S.D. CAL. R. 6(c); D.D.C. CIV. R. 1-9(A); D. ME. R. 16(a); D.N.D.R. IV(F)(4); N.D. OKLA. R. 10(c); W.D. OKLA. R. 9(c).

219. See, e.g., D. ARIZ. CIV. R. 37(a)(2); D.N.H.R. 14(a)(1); D.N.J. GEN. R. 16; N.D. OHIO CIV. R. 3(d).

220. S.D. CAL. R. 6(d); E.D. MICH. R. XIV.

221. The only other rule exacting such a requirement is that relating to the taking of depositions before the commencement of an action or pending an appeal. FED. R. CIV. P. 27.

222. The Advisory Committee Note says, "Examinations are very frequently made by agreement and sometimes before the party examined has an attorney. The courts have uniformly ordered that reports be supplied [however], . . . and [the new provision specifically allowing examination by agreement] appears best to fill the technical gap in the [pre-amendment] rule." FED. R. CIV. P. 35(b)(3), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 459 (1976).

223. N.D. MISS. CIV. R. C-2. Of course, other local rules requiring attempts to reach agreement before discovery motions are filed would accomplish the same result if applied to Rule 35 motions. See notes 52-54 *supra* and accompanying text.

require the filing in court of all discovery papers. Depositions, when transcribed,²²⁴ were to be filed,²²⁵ as were notices of depositions and motions concerning discovery.²²⁶ There was no requirement, however, to file interrogatories, answers to interrogatories, requests for admission or responses to such requests. The general filing requirement of Federal Rule 5(d) extended only to "papers . . . required to be served upon a party . . ."²²⁷ As Federal Rule 5(a) did not require that discovery papers be served, it was at least arguable that the filing requirement of Federal Rule 5(d) did not apply.²²⁸ In 1970, however, Federal Rule 5(a) was amended to extend service requirements to "every paper relating to discovery required to be served upon a party unless the court otherwise orders . . ."²²⁹ Thus, the filing requirement of Federal Rule 5(d) was brought into play.

The filing requirement has proven to be quite onerous to district court clerks' offices and an item of significant expense for counsel. These filed papers have little application in resolving matters at trial, since only a small fraction of civil cases that go through discovery are actually tried. Moreover, discovery disputes seldom arise, as evidenced by the fact that certain important papers—motions to compel and for protective orders, for example—are not filed in every case, and when filed often address only specific matters within a particular discovery request. Thus, most filings of discovery documents serve, at best, only the limited purpose of furnishing a relatively official copy of the documents should a question arise as to authenticity.

Some district courts insist that counsel carry out the literal requirement of Federal Rule 5 that all papers relating to discovery be filed.²³⁰ Two districts even prohibit the parties from stipulating that

224. FED. R. CIV. P. 30(c)(1938) provided that a deposition "shall be taken stenographically and transcribed unless the parties agree otherwise." The 1970 amendments changed this to require transcription only if one of the parties so requested.

225. FED. R. CIV. P. 30(f) (1938).

226. FED. R. CIV. P. 5(a), (d)(1938).

227. FED. R. CIV. P. 5(d)(1938).

228. The contrary was also arguable, as Federal Rules 33 and 36 *did* require service of interrogatories and requests for admissions and responses thereto. FED. R. CIV. P. 33, 36 (1938).

229. The purpose apparently was to ensure that in a multiple-party case discovery papers between two of the parties were served on all parties. No attention seemed to be given to the impact this would have on filing. See FED. R. CIV. P. 5(a), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 401 (1976).

230. See, e.g., D.N.H.R. 14; D.N.J.R. 15(C); S.D.N.Y. GEN. R. 6(c). D. ALASKA GEN. R. 8(C), not only insists that interrogatories and answers be filed, but states further that "[a]ll documents, photographs, maps or diagrams attached to such interrogatories or answers shall likewise be filed with the Clerk." D. ALASKA GEN. R. 8(B) also provides that depositions shall be lodged and not filed with the Clerk and "shall be kept separately [from the file folder] and noted in the docket of the case." This rule is apparently to help preserve the secrecy of the deposition, see D. ALASKA GEN. R. 8(A), and not for any reason of efficiency.

a transcribed deposition not be filed.²³¹ The Northern District of Illinois provides a sanction for failure to file: the use of an unfiled deposition "for any purpose" is barred.²³²

Other districts, by contrast, have attempted to ameliorate the requirements of Federal Rule 5(d). Two districts provide that interrogatories and answers thereto shall not be filed except where they become the subject of court consideration through a motion to compel answer, or presumably, a motion to protect.²³³ And two other districts provide that interrogatories shall not be filed when served but that the respondent shall file the interrogatories along with the responses.²³⁴

The District of Puerto Rico supplies an interesting example of the problems encountered by a district court desiring to stay within the letter of the Federal Rules even when a different approach is called for. Its local rule 10 provides that "unless expressly required by the Federal Rules of Civil Procedure, papers relating to any discovery proceedings need not be filed with the Court."²³⁵ Since Federal Rule 5(d) provides that all papers relating to discovery shall be filed, the "unless" clause would seem to nullify the rest of the sentence. Moreover, another portion of Puerto Rico's local rule 10 makes it clear that the filing exemption of the first sentence is meant to apply only to depositions: "However, every time a discovery document is served upon an opposing counsel, proof of service must be filed with the U.S. District Court. The pertinent parts of interrogatories, notices to produce documents or requests for admission, for which rulings are sought, must be included in the motion papers."²³⁶

Both the ABA Committee and, originally, the Advisory Committee recognized that the costs of providing additional copies of discovery materials for court filing can be considerable and the storage problems faced by clerks' offices in some districts are serious. Therefore, both committees recommended an amendment to Federal Rule 5(d) to provide that, unless filing is ordered by the court on motion of a party or upon its own motion, depositions upon oral examination and interrogatories and requests for admission and the answers

231. D. ME. R. 15(b); D.R.I.R. 14(b).

232. N.D. ILL. GEN. R. 18(c); D.N.D.R. X(A) (if a party fails to file any paper required by Federal Rule 5(d) within five days of service, the court may order the paper to be filed forthwith, and, if the order is not obeyed, the court may order the paper stricken and the service to be without effect).

233. S.D. OHIO R. 3.7.1; D.N.M.R. 10(d).

234. M.D. FLA. GEN. R. 3.03(c); W.D. PA. R. 4(b). As both districts provide that the propounder of interrogatories shall leave room after each interrogatory reasonably calculated to be sufficient for the answer or objection, see M.D. FLA. GEN. R. 3.03(b); W.D. PA. R. 4(b), this saves double filing of the interrogatories.

235. D.P.R.R. 10.

236. *Id.*

thereto need not be filed unless and until they are used in the proceedings.²³⁷ The Advisory Committee however, in its 1979 Revised Draft, dropped all reference to filing requirements, thus leaving the current requirement intact. The Committee offered no explanation for its change of view.²³⁸ As in earlier instances, though, some district courts have already acted.²³⁹ In view of the express language of Rule 5(d), and particularly in view of the Advisory Committee's action, one can easily conclude that these local rules exceed the power of the district courts.

V. ENFORCEMENT AND SANCTIONS

Federal Rule 37 provides a full range of sanctions against a party or a nonparty deponent who fails to furnish discovery as required by the rules. But no such sanctions are available for use against a party who overuses or misuses the discovery process.²⁴⁰ It is of interest that this omission was not corrected when the rules were rewritten a decade ago. Indeed, the Advisory Committee found²⁴¹ only "defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed."²⁴² Thus, the 1970 amendments to Rule 37 were really perfecting amendments to remove these

237. See 1978 PROPOSED DRAFT, *supra* note 26, at 622; ABA COMMITTEE, *supra* note 27, at 1.

238. Objection to the proposed amendment to Federal Rule 5(d) on the ground that it will reduce the public's access to materials in civil cases has been made in unpublished statements of Division Four of the District of Columbia Bar, and of the Public Citizen Litigation Group on the proposed amendments to the Federal Rules of Practice and Procedure, U.S. Judicial Conference. This objection rests upon an asserted common-law right "to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (footnote omitted). This, of course, begs the issue as to when discovery documents become public. It seems strange that such a common-law right, which the Supreme Court noted has existed since at least 1894, *see id.* at 597 nn.7 & 8, would arguably attach beyond removal to discovery documents which, prior to July 1970, were not to be filed until used in court, *see* text accompanying notes 224-29 *supra*, and hence were not public until that time.

239. See, e.g., N.D. GA. R. 181; S.D. GA. R. 7; M.D.N.C. Civ. R. 21(m).

240. The Advisory Committee noted in 1978 that "[r]ule 37 now authorizes sanctions only against those who refuse to make discovery without justification. It does not directly reach those who make unreasonable demands for discovery." 1978 PROPOSED DRAFT, *supra* note 26, at 653 (Advisory Committee Note to proposed Rule 37(e)). This language has been dropped from the 1979 Revised Draft now before the bar. See also ABA COMMITTEE, *supra* note 27, at 24-25 (Comment to its proposed Rule 37(e)).

241. FED. R. CIV. P. 37, Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. 463 (1976).

242. *Id.*

difficulties. Of particular interest was language limiting the cost sanction contained within the Rule to discourage the bringing of discovery disputes to court.²⁴³ While the Advisory Committee spoke of this cost device as "intended to encourage judges to be more alert to abuses occurring in the discovery process," the abuses it referred to were those "implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists."²⁴⁴

One district, the Western District of Tennessee, has supplemented Rule 37 by providing that filing of unnecessary deposition or discovery motions, applications, requests, or objections will subject the offender to appropriate sanctions, including imposition of costs and counsel fees.²⁴⁵

Two district courts go further. The District of Alaska, by local rule, warns that any attorney

who presents to the Court unnecessary motions or unwarranted opposition to motions . . . or who otherwise so multiplies the proceedings in any case as to increase the costs thereof unreasonably and vexatiously, may be required by the Court to satisfy personally such excess costs and may be subject to such other discipline as the Court may deem appropriate.²⁴⁶

The District of Arizona provides that failure to comply "in good faith with the rules governing pretrial discovery" will subject a party to a sanction which the court deems appropriate, including dismissal, default, and costs, and the court may "impose upon either counsel further sanctions, including sanctions for contempt of court."²⁴⁷

A few districts have general language in their rules that can form the basis for sanctions applicable to the discovery process. For example, the Central District of California provides that "violation of or failure to conform to any of these local rules"—which include certain matters having to do with discovery²⁴⁸—"shall subject the offending party and his attorney, at the discretion of the court, to appropriate discipline," including costs and attorney's fees.²⁴⁹ The Eastern Cali-

243. FED. R. CIV. P. 37(a)(4).

244. FED. R. CIV. P. 37(a)(4), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app., at 464 (1976). The Advisory Committee referred to the facts that until that time only a handful of reported cases included an award of expenses; and the Columbia Survey, see FIELD SURVEY, *supra* note 9, found that in only two percent of the motions decided under Rule 37(a) did the court award expenses. Whether the 1970 amended version of Rule 37(a)(3) works any better is not known. See notes 262-70 *infra* and accompanying text.

245. W.D. TENN. R. 9(c).

246. D. ALASKA GEN. R. 35(D).

247. D. ARIZ. CIV. R. 42(E).

248. See C.D. CAL. R. 6.

249. See C.D. CAL. R. 28.

fornia district phrases it this way: "Failure of counsel or of a party to comply with these rules shall be ground for any imposition by the Court of any and all sanctions authorized by statute or rule," including fines, costs, and attorney's fees, "as may be within the power of the court."²⁵⁰

All other local rules dealing with sanctions do so in the context of failure to prosecute. Many do no more than repeat the general language of Federal Rule 41(b) that failure to prosecute can lead to dismissal.²⁵¹ Others provide a certain time guide: the case will be dismissed if it is pending "without any substantial proceedings of record having been taken"²⁵² or if "no activity by filing of pleadings, orders of the Court or otherwise"²⁵³ has occurred during the time specified. The time provided varies: three months,²⁵⁴ six months,²⁵⁵ one year,²⁵⁶ and fifteen months.²⁵⁷ Both Iowa districts provide that whenever any deadline set by the Federal Rules, by the local rules, or by order of any federal court is exceeded by more than thirty days and extension has neither been requested nor granted, the action "shall be dismissed by the clerk."²⁵⁸ Each of these Iowa rules provides for notice to counsel in advance of dismissal, though Northern Georgia allows dismissal "with or without notice."²⁵⁹

The Alaska, Arizona, and Eastern Michigan rules providing for sanctions directly against counsel who "multiplies the proceedings . . . [so] as to increase the costs unreasonably and vexatiously" or who fails to comply in good faith with the rules governing pretrial discovery,²⁶⁰ have a statutory foundation. 28 U.S.C. § 1927 provides: "Any attorney . . . who so multiplies the proceedings in any case as to increase the costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."²⁶¹

The Advisory Committee and the ABA Committee have pro-

250. E.D. CAL. GEN. R. 5. See also E.D. MICH. R. XXVII(b) ("If counsel fails to comply with any of these rules," the court may assess costs directly against counsel "whose action has obstructed the effective administration of the Court's business, and subject him to such other discipline as the Court may deem appropriate.").

251. See, e.g., D. COLO. R. 19; D.D.C. CIV. R. 1-14; M.D. FLA. GEN. R. 3.10; D. KAN. R. 26.

252. N.D. GA. R. 131.13.

253. N.D. FLA. GEN. R. 13.

254. See, e.g., N.D. FLA. GEN. R. 13; M.D. LA. GEN. R. 17(B). S.D. FLA. GEN. R. 13 specifies three months before issue.

255. See, e.g., N.D. CAL. CIV. R. 235(11); S.D. CAL. R. 10; N.D. GA. R. 131.13; N.D. ILL. GEN. R. 21(a); E.D. LA. R. 12.

256. See, e.g., D. ARIZ. CIV. R. 38(d); N.D. IND. R. 10; D. MD. SUPP. R. 33.

257. See, e.g., E.D. MO. R. VIII(f).

258. N.D. & S.D. IOWA CIV. R. 24(B).

259. N.D. GA. R. 131.1.

260. D. ALASKA GEN. R. 35D; see D. ARIZ. CIV. R. 38(d); E.D. MICH. R. XXVII(b).

261. 28 U.S.C. § 1927 (1976).

posed an expansion of Federal Rule 37 sanctions so as to apply to failure to "cooperate in" discovery as well as to "failure to make" discovery. In 1978, they each proposed that a new Federal Rule 37(e) be promulgated, authorizing the court, in addition to other sanctions already authorized in Rule 37, to "impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorney's fees," for the following: "(1) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(f), or (2) otherwise abuses the discovery process in seeking, making or resisting discovery."²⁶² Moreover, proposed Federal Rule 37(e) was to make explicit reference to 28 U.S.C. § 1927.²⁶³

The Advisory Committee, however, without explanation or comment, pulled back in its 1979 Revised Draft. While currently proposed new Rule 37(e) explicitly authorizes a court to impose costs on a party or an attorney who "fails to participate in good faith in the framing of a discovery plan by agreement," it fails to provide the same remedy for the abuse of other portions of the discovery process and eliminates all reference to 28 U.S.C. § 1927.²⁶⁴ Presumably section 1927 sanctions are available, but the failure to provide an express reference in Rule 37 will make its use less likely.

It must be noted that the provision of a sanction in a rule is not the whole answer. Section 1927 has been the law since 1813, yet, there are very few reported instances of its utilization.²⁶⁵ The cost sanctions of pre-1970 Rule 37 were used in only one of fifty cases.²⁶⁶ And, while no exhaustive research has yet been published,²⁶⁷ there

262. 1978 PROPOSED DRAFT, *supra* note 26, at 652; see ABA COMMITTEE, *supra* note 27, at 24-25. The Advisory Committee noted: "The new subdivision is offered to make explicit the power of the court to impose sanctions for all forms of discovery abuse." 1978 PROPOSED DRAFT, *supra* note 26, at 653 (Note to proposed Rule 37(e)).

263. 1978 PROPOSED DRAFT, *supra* note 26, at 653 (Note to proposed Rule 37(e)). The Advisory Committee noted that, although the section 1927 sanction has been available to check discovery abuse, it has not been customarily used. *Id.* The explicit reference in Rule 37(c) apparently was designed to encourage district courts to utilize that sanction where appropriate.

264. 1979 REVISED DRAFT, *supra* note 26, at 19.

265. Act of July 22, 1813, ch. 14 § 3, 3 Stat. 21 (1813). See generally Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 47-50 (1976). Professor Risinger notes that the statute did not figure in a reported case for over ninety years after its enactment, and then only peripherally. See Risinger, *supra*, at 47 n.158 (referring to *In re Zier & Co.*, 127 F. 399 (D. Ind. 1904), *aff'd*, 142 F. 102 (7th Cir. 1905)). Professor Risinger describes the number of cases decided under the statute as "few." Risinger, *supra*, at 48. This is consonant with the Advisory Committee's conclusion that the statute is not "customarily used." 1978 PROPOSED DRAFT, *supra* note 26, at 653 (Advisory Committee Note to proposed Federal Rule 37(e)).

266. FED. R. CIV. P. 37(a)(3), Notes of Advisory Committee on 1970 Amendment, 28 U.S.C. app. at 464 (1976).

267. Such a study is now underway, at the direction of Professor Ronald Ellington of the University of Georgia, under the auspices of the Department of Justice's Office for Improvements in the Administration of Justice.

is reason to believe that the situation has not changed appreciably since 1970.²⁶⁸

An analogous situation exists with Federal Rule 11, which requires counsel to sign all pleadings to certify they have "read the pleading, that to the best of [their] knowledge, information and belief there is good ground to support it; and that it is not interposed for delay."²⁶⁹ Professor Risinger has concluded that, since its promulgation in 1938, there have been only eleven reported cases of Rule 11 violations.²⁷⁰

Should the proposed new Federal Rule 37(e) be promulgated, the responsibility for its effectuation will fall on district judges. Only they ensure that sanctions will deter discovery abuses. If the performance of district judges in applying 28 U.S.C. § 1927 and Federal Rule 11 is any guide, the proposed amendment to Rule 37, if adopted, will be no more than an interesting academic exercise.

CONCLUSION

This survey of local rules and of standing orders, instructions, and practices of individual federal judges shows that there has been a significant amount of experimentation designed to make the discovery rules better achieve the goal of "just, speedy, and inexpensive determination of every action."²⁷¹ Such experimentation has not, however, been without cost. As the subject matter of district court rulemaking has continued to expand, many courts have endangered "the principles of simplicity, scarcity and uniformity which guided the formulation of the Federal Rules,"²⁷² and have threatened to create "a kind of procedural Tower of Babel."²⁷³ In an era in which lawyers often practice before federal courts in more than one district, the welter of local rules also increases the possibility that attorneys will not be aware of rules that "might well affect an attorney's trial tactics."²⁷⁴ Moreover, as has been indicated, many of the local rules and practices of individual judges are inconsistent with the Federal Rules and hence are invalid.

The local rules and practice, however, do indicate areas of concern that have developed under the Federal Rules. They also demonstrate attempts to limit the involvement of judges in the discovery process and thus conserve judge time available for trial and more substantive motions. Clearly, this is consonant with the thrust of the

268. See Risinger, *supra* note 265, at 47-48.

269. FED. R. CIV. P. 11.

270. Risinger, *supra* note 265, at 34-42.

271. FED. R. CIV. P. 1.

272. Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1252 (1967)(footnotes omitted). For some concrete examples of this type of rules, see text accompanying notes 141-62, 178-84, 188-89 *supra*.

273. 12 C. WRIGHT & A. MILLER, *supra* note 2, § 220.

274. Weinstein, *supra* note 29, at 958 n.309.

1970 amendments to the Federal Rules.²⁷⁵ Yet, there is a contrary impetus, one that brings federal judges, or federal magistrates, into greater involvement in the discovery process. For, in the views of many, allowing counsel to implement discovery largely on their own has led to too many instances of abuse, foot dragging, and unwarranted expense. Therefore, many local rules and individual judge practices call for greater involvement of judges and magistrates. This tendency may be seen in local rules requiring discovery conferences, delimiting the scope of discovery at an early stage, limiting the number of interrogatories without specific court authorization, and increasing the emphasis on sanctions.

The current proposals of the Advisory Committee, the ABA Committee, and the Second Circuit Commission also propose a significant increased investment in judge time to ensure that the discovery process works more expeditiously and less expensively. Although much of the increased supervision may be performed by magistrates or, as in the case of one Second Circuit Commission proposal, volunteer masters, the current proposals, by calling for increased supervision of counsel, reverses the philosophy behind the 1970 amendments to the federal discovery rules. This fact should be recognized and confronted.²⁷⁶

This survey of local rules and practices demonstrates that many of the proposals for changes in the national rules have been the subjects of experiments on the local level. In evaluating the probable effectiveness, impact, and costs of these proposals, it is therefore necessary to evaluate how similar rules and practices have been working on the local level. It is particularly important to balance the cost of local rules in terms of judge time against their efficacy in solving perceived problems. Apparently, the Federal Judicial Center's Case Management Study²⁷⁷ played a significant role in the Advisory Committee's change of position from its 1978 proposals to its 1979 revised proposals for changes in the federal discovery rules.²⁷⁸ Unfortunately, there is no indication that the Advisory Committee, the ABA Committee, or the Second Circuit Commission went further to evaluate local rules in arriving at the current proposals now before the bar. If such an evaluation was in fact made, its results have not been shared publicly.

275. See text accompanying notes 9-16 *supra*.

276. Compare a suggestion made from time to time that a proposed congressional enactment carry with it a statement projecting its impact on the judiciary. Burger, *State of the Judiciary—1970*, 56 A.B.A.J. 929, 933 (1970).

277. See note 62 *supra*.

278. See 1979 REVISED DRAFT, *supra* note 26, at 5 (Advisory Committee Note to proposed new Federal Rule 26(f)). The Committee reported being impressed by the evaluation of the Case Management Study found in P. CONNOLLY, E. HOLLOWAN & M. KUHLMAN, *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY* (1978).

From this survey and from material gathered in the Case Management Study of the Federal Judicial Center, as well as from common experience of litigators, it is clear that the just administration of the civil discovery rules cannot be accomplished by any simple rubric that relegates discovery to counsel, that involves the court more or less, or that enacts ever more explicit sanctions. The proper implementation of the discovery process must instead be founded on a process of experience. This has been the history of the Federal Rules and of the local rules. Experience has demonstrated that the present scheme of minimal judge involvement in the Federal Rules does not work in the big and complex case. The *Manual for Complex Litigation*²⁷⁹ recognized this failure and accordingly called for greater judicial involvement in complex cases. By emphasizing problems now perceived in the discovery process, particularly in big and complex cases, the Advisory Committee and the Second Circuit Commission have testified that the *Manual for Complex Litigation* has not been applied sufficiently by district judges or has not worked. Yet, they propose more of the same.

Finally, a recurring theme: for any set of rules to work there must be counsel who are willing to make them work, even at the expense of a client's interest. Thus, counsel's duty to the profession and to the litigation process must temper the classic view of devotion to one's client's interest "though the heavens fall."²⁸⁰ Moreover, there must be a trial judge, or magistrate, alert to rules of the game and ready and willing to enforce them when breach occurs. Without these ingredients, no set of rules, federal or local, can be more than exhortation.

279. See note 118 *supra*.

280. M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9 (1975). Professor Freedman quotes Lord Brougham in *Queen Caroline's Case*, 129 Eng. Rep. 976 (1820) (quoting 2 *TRIAL OF QUEEN CAROLINE* 8 (J. Nightingale ed. London 1821) (defense trial reported)):

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

Professor Freedman goes on to state,

Let justice be done—that is, for my client let justice be done—though the heavens fall. That is the kind of advocacy that I would want as a client and that I feel bound to provide as an advocate. The rest of the picture, however, should not be ignored. The adversary system ensures an advocate on the other side, and an impartial judge over both. Despite the advocate's argument, therefore, the heavens do not really have to fall—not unless justice requires that they do.

M. FREEDMAN, *supra* at 9.

