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Proposed Federal Discovery Rules for Complex Civil Litigation

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Proposed Federal Discovery Rules for Complex Civil Litigation

Cover Page Footnote

Member of the New York Bar. A.B. 1962, Yale University; LL.B. 1965, Harvard University. The author wishes to thank Ms. JoAnn Cory for her assistance and encouragement in the preparation of this Article.

PROPOSED FEDERAL DISCOVERY RULES FOR COMPLEX CIVIL LITIGATION

MARTIN I. KAMINSKY*

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INTRODUCTION

THE discovery provisions of the Federal Rules of Civil Procedure¹ were initially designed to expedite the litigation process by ensuring that each party would have the ability to learn its adversary's position, as well as the evidentiary basis for that position, prior to trial.² The theory underlying the rules was that a broad pretrial inquiry into the facts would result in a greater measure of justice at trial by "transforming the sporting trial-by-surprise into a more reasoned search for truth."³ Later amendments to the discovery rules, particularly those enacted in 1970,⁴ sought to simplify the discovery process and to overcome abuses arising from technical interpretations of the rules by those bent on thwarting rather than advancing the rules' underlying purposes.⁵ Thus, the discovery rules are intended to

1. Fed. R. Civ. P. 26-37, 45. See generally W. Glaser, *Pretrial Discovery and the Adversary System* 29-37 (1968).

2. *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947); cf. *Mackerer v. New York Cent. R.R.*, 1 F.R.D. 408, 410 (E.D.N.Y. 1940) (The rules' purpose "is to cut through the maze of technicalities which have heretofore existed, and to enable the court to do a greater measure of moral justice under the law.")

3. *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1063 (2d Cir. 1979); see *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (the discovery rules are intended to "make a trial less a game of blindman's buff [*sic*] and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent"); Comment, *Federal Discovery in Concurrent Criminal and Civil Proceedings*, 52 Tul. L. Rev. 769, 770 (1978). See also *Herbert v. Lando*, 441 U.S. 153, 177 (1979). *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964); *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

4. Amendments to Rules of Civil Procedure for the United States District Courts, Order of the Supreme Court of the United States, Mar. 30, 1970, 398 U.S. 979 (1970) (effective July 1, 1970).

5. Professor Cohn has aptly summarized the 1970 amendments: "In 1970, the discovery rules were overhauled to reflect the experience of the preceding three decades. One purpose was to reduce the time that judges were to spend on discovery matters. Objections to interrogatories no longer go automatically to a judge for a 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. Also, the good cause requirement for motions to force the production of documents and other tangible things has been replaced by a mere request of another party for the production of such items. Again, a court becomes involved only when the party requesting discovery seeks an order compelling production that was refused or objected to. Thus, the mold of federal discovery, particularly as recast in 1970, is to leave the discovery process to counsel." Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 Minn. L. Rev. 253, 254 (1979) (footnotes omitted). See also Committee on Rules of Practice and Procedure of the

make a reality of the policy expressed in rule 1 of the Federal Rules of Civil Procedure that all litigants are entitled to "the just, speedy, and inexpensive determination of every action."⁶

The present discovery rules function adequately in noncomplex cases in which few parties and witnesses are involved and the pertinent documentary evidence is of reasonable proportions.⁷ Nevertheless, although the rules have opened the door to truth in many actions, they have not succeeded in preventing obstructive and abusive tactics by attorneys whose intentions run counter to the spirit of rule 1. Nowhere is the problem more apparent and the abuse more flagrant than in complex civil litigation, particularly class actions and multiparty securities and antitrust cases.⁸ When the issues, potential evidence and, accordingly, the scope of discovery are broad, the rules cease to be self-executing and become dependent in large measure upon the good faith and reasonableness of counsel.⁹ Unfortunately, counsel have often failed to demonstrate a commendable level of good faith and reasonableness in complex litigation.¹⁰

Although the sheer size of complex civil actions is sometimes to blame for the difficulty of conducting efficient and uncontroversial discovery,¹¹ counsel themselves are more frequently the cause of

Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts Relating to Deposition and Discovery (1967), reprinted in 43 F.R.D. 211, 218-19 (1968) [hereinafter cited as Preliminary Draft of 1970 Amendments].

6. Fed. R. Civ. P. 1; see *In re Fertilizer Antitrust Litigation*, [1979-2] Trade Cas. (CCH) ¶ 62,894, at 79,180 (E.D. Wash. 1979); *Hill v. Greer*, 30 F.R.D. 64, 66 (D.N.J. 1961), *Renfrew, Discovery Sanctions: A Judicial Perspective*, 67 Calif. L. Rev. 264, 264 (1979).

7. See note 39 *infra*.

8. Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 222 (1978); see Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition*, 78 F.R.D. 267, 269-71 (1978); Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 79, 199, 202-05 (1976) [hereinafter cited as Pound Conference]; Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 Ariz. St. L.J. 475, 476-77.

9. *Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc.*, 54 F.R.D. 551, 552-53 (S.D.N.Y. 1972); *In re New York City Mun. Sec. Litigation*, MDL No. 314, at 2 (S.D.N.Y. Dec. 20, 1979) (Raby, Magis.); see note 452 *infra*.

10. See, e.g., *CFTC v. Rosenthal & Co.*, 74 F.R.D. 454, 455 (N.D. Ill. 1977), *appeal dismissed*, 605 F.2d 559 (7th Cir. 1979); *SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp.*, 72 F.R.D. 110, 111-13 (N.D. Tex. 1976).

11. Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497, 505-08 (1979). This difficulty arises in complex litigation because of the large number of documents and witnesses typically involved, requiring massive review of papers, extensive attention paid to administrative detail, frequent travel and the examination and reexamination of witnesses by several counsel. For a discussion of the discovery process that often develops in complex litigation, see *Second Circuit Unit Asks Comment on Proposed Discovery Rule*, N.Y.L.J., Nov. 15, 1978, at 1, col. 2 [hereinafter cited as *Second Circuit Commission Proposal*]. Even the mere scheduling of discovery in a multiparty case involving several different counsel can become a difficult task

discovery problems.¹² Often, inquiring counsel do not tailor discovery requests to the issues. Nor are their requests always motivated by a desire for discovery alone. Responding counsel obfuscate issues, bury facts and pertinent documents amidst irrelevancies, object irresponsibly, or simply block or refuse to answer patently proper discovery requests.¹³ Indeed, because experienced counsel know that the courts rarely have either the time or the will to become embroiled in the details of a particular discovery dispute,¹⁴ harassment and obstruction are all too often the order of the day. Realizing the expense and delay entailed by discovery motions, obstructing counsel in effect challenge their adversaries to indulge in costly motions for rulings, or to compromise potentially important aspects of their discovery.

Opposing counsel—the victims of discovery abuse—are confronted with a pragmatic choice: either move on to another topic or risk becoming bogged down in a procedural morass that can derail discovery indefinitely.¹⁵ Moreover, unless the movant reveals its entire theory of the case in its papers—a course of action it may be reluctant

12. See, e.g., *CFTC v. Rosenthal & Co.*, 74 F.R.D. 454, 455 (N.D. Ill. 1977), *appeal dismissed*, 605 F.2d 559 (7th Cir. 1979); *Shapiro v. Freeman*, 38 F.R.D. 308, 312 (S.D.N.Y. 1965). See also Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. Chi. L. Rev. 619 (1977) [hereinafter cited as *Court Sanctions*].

13. Cf. *Falk v. United States*, 53 F.R.D. 113, 115 (D. Conn. 1971) ("The spirit of the discovery rules does not in any case support meticulous objections and evasive answers from experienced counsel."). See also *United States v. IBM Corp.*, 79 F.R.D. 378, 380-81 (S.D.N.Y. 1978); *Powerlock Sys., Inc. v. Duo-Lok, Inc.*, 56 F.R.D. 50, 52 (E.D. Wis. 1972).

14. See, e.g., *Bell v. Automobile Club*, 80 F.R.D. 228, 231 (E.D. Mich. 1978), *appeal dismissed*, 601 F.2d 587 (6th Cir. 1979). This problem has prompted a call for more active judicial supervision of discovery, particularly in complex civil actions. See *Manual for Complex Litigation* § 1.10, at 14 (1978) (footnote omitted): "The Federal Rules of Civil Procedure contemplate that discovery in the ordinary case will be directed by counsel with infrequent intervention by the judge when counsel are unable to agree. This usual pattern, however, may be ineffective in complex cases if they are to be processed expeditiously. Both the bench and bar have long been in nearly unanimous agreement on the fundamental principle that a complex case must be managed by a judge with a firm hand." See also Pollack, *supra* note 8, at 223-25; Rifkind, *Are We Asking Too Much of Our Courts?*, Pound Conference, *supra* note 8, at 107-09.

15. Doskow, *Procedural Aspects of Discovery*, Ninth Annual Postgrad. Conference of the Columbia Law School Alumni Ass'n, Changes Ahead in Federal Pretrial Discovery, 45 F.R.D. 479, 498, 503-04 (1968) [hereinafter cited as *Columbia Conference*]. Frequently, discovery disputes are referred to United States magistrates for supervision and rulings pursuant to 28 U.S.C. § 636(b) (1976). The binding effect of their rulings appears clear. *Uniroyal, Inc. v. Jetco Auto Serv., Inc.*, No. 75 Civ. 921 (S.D.N.Y. Mar. 18, 1976) (Goettel, Magis.). For a detailed study of the use of magistrates, see Committee on the Federal Courts, *The Magistrate System in the Southern District of New York*, 33 Rec. A. B. City of New York 212, 215-22 (1978). Prior to the development of the magistrate system, the use of special masters in complex cases had been growing. See, e.g., *Budget Dress Corp. v. Joint Bd. of Dress & Waistmakers' Union*, 24 F.R.D. 506, 509 (S.D.N.Y. 1959); *Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc.*, 21 F.R.D. 347, 351-53 (S.D.N.Y. 1958); Kaufman, *Use of Special Pre-Trial Masters in the 'Big' Case*, 23 F.R.D. 572, 575, 580 (1959); Weinstein, *Standing Masters to Supervise Discovery in the Southern District, New York*, 23 F.R.D. 36 (1959).

to take at an early stage of the litigation—the court may misinterpret the pertinence or nature of the discovery involved. If the latter occurs, the court may not only deny the relief requested, but may also comment unfavorably on material issues, which can affect the ultimate disposition of the case.¹⁶ Finally, counsel are well aware that the courts have demonstrated an extraordinary reluctance to impose substantive sanctions for discovery abuse;¹⁷ judges are hesitant to deprive litigants of their day in court simply because of errors by counsel that are not directly related to the merits of the case.¹⁸

To counter the most blatant and chronic of these discovery abuses, this Article develops and explains an alternative system of discovery rules applicable solely to complex civil litigation—the Federal Discovery Rules for Complex Civil Actions (Proposed Rules), set forth in full in the Appendix.¹⁹

I. HISTORICAL AND PHILOSOPHICAL BASES FOR NEW DISCOVERY RULES APPLICABLE TO COMPLEX CIVIL LITIGATION

The drafters of the Federal Rules of Civil Procedure envisioned that the trial judge would play a major role in the development of discovery.²⁰ The latitude permitted both questioner and responder was to be circumscribed by the court's ever-watchful eye.²¹ Thus, certain discovery requests could not be undertaken unless first approved by the court.²² Moreover, a party objecting to a discovery request could not

16. See *In re Colocotronis Tanker Sec. Litigation*, 449 F. Supp. 828 (S.D.N.Y. 1978). In *Colocotronis*, an action based on an alleged breach of a fiduciary relationship, the defendant asserted the attorney-client privilege in response to the plaintiff's request for certain documents. *Id.* at 829. In the course of upholding the attorney-client privilege assertion, the court stated in dicta that "[t]he fact the [defendant] occupied a central position in these transactions and that [the defendant] managed the loans whose profitability would inure to the benefit of the plaintiffs does not mean that these agreements established a special fiduciary or trust relationship. . . . Rather, these agreements are arms-length contracts between relatively sophisticated financial institutions and do not establish fiduciary relationships" *Id.* at 833 (citation omitted). This remark clearly addressed the ultimate issue in the case, a result counsel for the plaintiffs could not have anticipated. See also *In re Penn Cent. Commercial Paper Litigation*, 61 F.R.D. 453 (S.D.N.Y. 1973).

17. See notes 374-75 *infra* and accompanying text.

18. See *Gill v. Stalow*, 240 F.2d 669, 670 (2d Cir. 1957); Renfrew, *supra* note 6, at 273-74; Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 Harv. L. Rev. 1033, 1034 (1978) [hereinafter cited as *Emerging Deterrence*]; Note, *Standards for Imposition of Discovery Sanctions*, 27 Me. L. Rev. 247, 253 (1975) [hereinafter cited as *Discovery Sanctions*]; notes 374-75 *infra* and accompanying text. *But see* *Ali v. A & G Co.*, 542 F.2d 595 (2d Cir. 1976). See also *Link v. Wabash R.R.*, 370 U.S. 626, 637 (1962) (Black, J., dissenting).

19. See pp. 997-1004 *infra*.

20. See Pollack, *supra* note 8, at 221.

21. See Kaufman, *Judicial Control Over Discovery*, Proceedings of the Seminar on Practice and Procedure Under the Federal Rules of Civil Procedure, 28 F.R.D. 37, 111, 118-21 (1960).

22. See, e.g., Fed. R. Civ. P. 34 (1938).

unilaterally decline to respond; rather, he was compelled to move first for a protective order.²³ Unfortunately, these procedures proved unwieldy in actual practice. The courts spent too much time sorting out discovery disputes that should and could have been resolved by counsel.²⁴ Concurrently, too much of the litigant's time and money was being expended on discovery motions.

The 1970 amendments to the discovery rules of the Federal Rules of Civil Procedure,²⁵ therefore, sought to reduce drastically the role of the courts in developing and scheduling discovery.²⁶ The 1970 amendments thrust the burden upon counsel to attempt, in the first instance, to reach accommodations and practical agreements on discovery matters.²⁷ Only after that attempt failed would the court entertain a discovery matter, principally upon motion of the inquiring party seeking to test objections asserted by the respondent.²⁸ But, just as the pre-1970 rules proved too confining, the 1970 amendments have proved too liberal, at least insofar as complex civil litigation is concerned.²⁹ The general lack of judicial supervision has led to overly-broad discovery requests, obstructive tactics and continual bickering over what will or will not be answered or produced.³⁰

Recognizing these problems, the American Bar Association (ABA) established, in 1976, a Task Force of its Section of Litigation to study discovery abuses and to recommend a course of action to alleviate them.³¹ The Task Force proposed a series of detailed changes in the federal discovery rules, primarily designed to narrow the scope of

23. *Id.* 30(b).

24. See, e.g., Advisory Comm. Notes to Fed. R. Civ. P. 33(a) and 34(a), Preliminary Draft of 1970 Amendments, *supra* note 5, at 252, 256-57. See also Speck, *The Use of Discovery in United States District Courts*, 60 Yale L.J. 1132, 1151 (1951).

25. Amendments to Rules of Civil Procedure for the United States District Courts, Order of the Supreme Court of the United States, Mar. 30, 1970, 398 U.S. 979 (1970) (effective July 1, 1970).

26. Preliminary Draft of 1970 Amendments, *supra* note 5, at 219.

27. See Brown, *Proposed Changes to Rule 33 Interrogatories and Rule 37 Sanctions*, 11 Ariz. L. Rev. 443, 446-47 (1969); Rosenberg, *Changes Ahead in Federal Pretrial Discovery*, Columbia Conference, *supra* note 15, at 490-91 (1968); note 24 *supra*.

28. See Fed. R. Civ. P. 37(a). Several federal district courts, in an effort to reduce their motion calendars, had adopted local rules so providing even before the 1970 amendments. E.g., N.D. Cal. Civ. R. 230(-4); S.D. Fla. Gen. R. 10(I)(2); N.D. Ill. Gen. R. 12(d); E.D. Mich. R. IX(k); S.D.N.Y. Gen. R. 9(f). Indeed, 55 of the 94 federal districts have such a rule. See Cohn, *supra* note 5, at 262 n.52. Several states have the same requirement. See, e.g., Rules of Supreme Court, State of New York, County of New York, § 660.8(b)(6)(ii).

29. See Pollack, *supra* note 8, at 221-23.

30. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 289-90 (1978); see *Herbert v. Lando*, 441 U.S. 153, 176 (1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975). See generally Perlman, *The Federal Discovery Rules: A Look at New Proposals*, 15 New England L. Rev. 57 (1979).

31. See American Bar Association, Section of Litigation, Report of the Special Committee for the Study of Discovery Abuse (1977) [hereinafter cited as ABA Task Force Report].

discovery,³² discourage evasive answers³³ and provide for "early judicial control" of discovery by means of a pretrial conference at which discovery would be framed and scheduled.³⁴ More recently, the Judicial Conference of the United States³⁵ issued its own set of proposed amendments to the federal discovery rules, partially accepting and partially rejecting the Task Force proposals. In March 1978, the Judicial Conference circulated its proposed amendments for public comment,³⁶ in February 1979, following receipt of those comments, the Conference issued a revised set of proposed amendments.³⁷

The proposals of the ABA Task Force and the Judicial Conference are meritorious. Indeed, the Proposed Rules set forth in this Article reflect several of their proposals. But the Task Force and Judicial Conference proposals are not specifically tailored to complex civil actions and, therefore, inadequately address many troublesome discovery abuses peculiar to such litigation.³⁸ In addition, because they attempt to encompass all types of litigation, certain aspects of those proposals are necessarily vague and generalized. To the contrary, the Proposed Rules recognize that different types of actions spawn different discovery problems and thus require different responses. The Proposed Rules are based upon the theory that special rules should be adopted for complex civil actions because it is in these actions that the

32. *Id.* at 3.

33. *Id.* at 24-25.

34. *Id.* at 5-8.

35. Congress established the Judicial Conference in 1922, Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 838, to "carry on a continuous study of the operation and effect of the general rules of practice and procedure . . . prescribed by the Supreme Court." 28 U.S.C. § 331 (1976). The Judicial Conference is comprised of federal judges from each circuit and is chaired by the Chief Justice. *Id.* The Judicial Conference's primary responsibility is to recommend amendments to the federal procedural rules which, under *id.* § 2072, are transmitted by the Supreme Court to Congress and become law unless rejected by Congress. See 374 U.S. 861, 870 (1963) (statement of Black, J., and Douglas, J.); Editorial, *Black-Robed Secrecy*, N.Y. Times, Mar. 19, 1980, § A, at 26, col. 1. The Judicial Conference's standing Committee on Rules of Practice and Procedure (Advisory Committee) drafts all proposed changes in the Federal Rules of Civil Procedure. See, e.g., Preliminary Draft of 1970 Amendments, *supra* note 5. See generally Annual Report of the Proceedings of the Judicial Conference of the United States 6-7 (1958).

36. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (1978), reprinted in 77 F.R.D. 613 (1978) [hereinafter cited as Preliminary Judicial Conference Amendments].

37. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (1979), reprinted in 80 F.R.D. 323 (1979) [hereinafter cited as Revised Judicial Conference Amendments]. The Judicial Conference's proposed amendments have recently been approved by the Supreme Court and transmitted to Congress to take effect August 1, 1980. Order of Apr. 29, 1980, 48 U.S.L.W. 3707, 4497 (U.S. May 6, 1980); see note 35 *supra*. Three justices dissented, believing that the amendments are not sufficiently far-reaching to effect positive change. 48 U.S.L.W. at 4499 (Powell, J., dissenting).

38. See Becker, *supra* note 8, at 276.

principal abuses arise and recur.³⁹

Some commentators, however, have expressed doubt that new rules are necessary or appropriate to meet this particular problem.⁴⁰ They reason that the current rules are flexible enough to permit increased judicial supervision, and recommend that the courts require pretrial conferences and issue discovery orders to maintain tight control of discovery from start to finish.⁴¹ In addition, doubt has been cast upon the ability of draftsmen to formulate rules that cannot be circumvented by crafty counsel.⁴² This philosophy led to the development of the

39. Pollack, *supra* note 8, at 222 ("Although widespread, the dissatisfaction with the discovery process is directed at a limited field of cases. Few, if any, abuses of discovery exist in connection with ordinary litigation. A vast majority of the civil cases filed do not have any discovery at all—not even one 'exchange' of discovery. . . . It has been estimated that almost one of every nine cases tried does *not* use some discovery. Nonetheless, the field of cases in which discovery is subject to abuse is limited only in terms of number of filings. The cases subject to abuse predominate in their demands for judicial attention. The rub occurs in the so-called complex cases."); see Schwab, *Discovery in Complex Securities Litigation*, in *New Directions in Securities Litigation* 421, 423 (1976) ("Discovery in complex securities litigation is, of course, subject to the same discovery rules as other litigation. But simply to look upon discovery issues in securities litigation as a variant of issues encountered in other cases is to miss opportunities and to overlook problems which are largely unique to the complex cases."). See also Revised Judicial Conference Amendments, *supra* note 37, at 332. Discovery problems relating particularly to complex litigation have troubled commentators for years. See, e.g., McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 Harv. L. Rev. 27, 28 (1950); Yankwich, "*Short Cuts*" in *Long Cases*, 13 F.R.D. 41, 63-64 (1951); Note, *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 1000-07 (1961) [hereinafter cited as *Discovery Developments*]. Yet, to date, no new rules specially designed for such cases have been proposed.

40. Pollack, *supra* note 8, at 221-24, 227; Schroeder & Frank, *supra* note 8, at 480-81, 492.

41. See, e.g., Pollack, *supra* note 8, at 223; cf. *Herbert v. Lando*, 441 U.S. 153, 177 (1979) ("[U]ntil and unless there are major changes in the present Rules of Civil Procedure, reliance must be had on what in fact and in law are ample powers of the district judge to prevent abuse.").

42. Pollack, *supra* note 8, at 223. Similar debate exists as to whether discovery abuse is really such a prevalent problem at all. Chief Justice Burger has opined that "there is a widespread belief that pretrial procedures are being used excessively and that the process is lengthening litigation." Interview, *How to Break the Logjam in the Courts*, U.S. News & W. Rep., Dec. 19, 1977, at 24. See also Goldstein, *Business and The Law: Big Business and Antitrust*, N.Y. Times, Mar. 23, 1979, § D, at 4, col. 1. In 1976, this problem was discussed at a National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice held in St. Paul, Minnesota. 70 F.R.D. 79 (1976). As a result of the conference, dubbed "the Pound Conference" in honor of former Harvard Law School Dean Roscoe Pound, the ABA designated a Follow-Up Task Force to continue the dialogue and study begun at the conference. The Follow-Up Task Force issued this report on civil litigation discovery: "Substantial criticism has been leveled at the operation of the rules of discovery. 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 lawsuit." American Bar Association, Report of the Pound Conference Follow-Up Task Force, 74 F.R.D. 159, 191 (1976) (footnote omitted) [hereinafter cited as Pound Conference Follow-Up]. But this view is not universal. See Goldstein, *Lawsuits and Privacy*, N.Y. Times, June 28, 1978, § A, at 15, col. 1, quoting one leading commercial litigator, as follows: "The practice in many areas of the law has been to make discovery a sporting match and an endurance contest." The author quoted a high Justice Department official, however, as cautioning: "Certainly that is true in some places. But the dimensions are not fully known." *Id.* Finally, the author noted the dissenting views of other

Manual for Complex Litigation by the Federal Judicial Center.⁴³ The *Manual* emphasizes orderly administration of civil litigation through designated "waves" of discovery, beginning with what might be called the identification stage, progressing to a substantive discovery—or discovery-on-the-merits—phase, and culminating in an issue determining and narrowing phase. Each discovery phase is to be directed by the court in a regimented series of pretrial conferences and orders.⁴⁴

The difficulty with the latter analysis is two-fold: first, not every case requires the kind of judicial supervision that it envisions; and second, it does not address or provide mechanisms for the prevention or deterrence of abuses.⁴⁵ In short, the problem is not the scheduling, but the conduct of discovery. Although the *Manual for Complex Litigation* recognizes the need for special procedures for complex actions, it neither articulates specific procedures nor attempts to illustrate the conduct to be prevented. In addition, to rely upon judicial supervision alone erroneously assumes that all judges are capable of decisive and swift management of pretrial proceedings.⁴⁶ Many federal

experienced judges and litigators. *Id.* Similarly, a 1978 study of the problem concluded: "Abuse, like the story of Mark Twain's death, is greatly exaggerated." Schroeder & Frank, *supra* note 8, at 476. This discrepancy seems to be due to the distinction between the average case and the complex case. *See* Pollack, *supra* note 8, at 222.

43. *Manual for Complex Litigation*, *supra* note 14. Congress established the Federal Judicial Center in 1967, Pub. L. No. 90-219, 81 Stat. 664, "to further the development and adoption of improved judicial administration in the courts of the United States." 28 U.S.C. § 620(a) (1976). The Center conducts research on procedures of court administration, recommends improvements for the conduct of litigation and provides continuing education for federal judicial personnel. *Id.* § 620(b).

44. *Manual for Complex Litigation*, *supra* note 14, §§ 1.00, 1.50-1.70, 2.00, 2.20-2.50, 3.00, 3.11, 3.21, 4.00, 4.21-4.23, 5.22.

45. For example: "The suggested procedures of this *Manual* will prevent abuse of discovery in complex cases by any and all parties if the judge fairly, speedily, and firmly employs the procedures described hereinafter.

"If the judge assumes special judicial control of the case, ascertains counsel's current views of the issues, denies improper or unnecessary use of the class action, firmly controls and expedites the schedules for class action issue discovery, allows early discovery to narrow the issues, schedules early submission and determination of preliminary legal questions to narrow issues, and denies requests for abusive discovery, it will be impossible for any party to engage in abusive discovery." *Manual for Complex Litigation*, *supra* note 14, § 0.60, at 28-29 (citations omitted). Several judges have praised this aspect of the *Manual*. *See, e.g.*, Becker, *supra* note 8, at 270-71. *See also* CFTC v. Rosenthal & Co., 74 F.R.D. 454, 455 (N.D. Ill. 1977), *appeal dismissed*, 605 F.2d 559 (7th Cir. 1979). Nevertheless, the experience of many counsel in complex actions indicates that specific rules of conduct are needed to prevent abuses in such litigation. *See, e.g.*, *In re* United States Financial Sec. Litigation, 74 F.R.D. 497, 498 (S.D. Cal. 1975); *In re* New York City Mun. Sec. Litigation, MDL No. 314 (S.D.N.Y. Dec. 20, 1979) (Raby, Magis.) (*Manual for Complex Litigation's* procedures failed to curb serious abuses in discovery).

46. Association of the Bar of the City of New York, Comm. on the Federal Courts, Report Evaluating the Individual Assignment System in the Southern District of New York After Three Years Experience, *reprinted in* 69 F.R.D. 493, 503, 507-08 (1976) [hereinafter cited as S.D.N.Y. Report]; *see* United States v. DeLeo, 422 F.2d 487, 495-96 (1st Cir.), *cert. denied*, 397 U.S. 1037 (1970). *See generally* Kaminsky, *Available Compromises For Continued Judicial*

judges are struggling just to keep current with their trial calendars.⁴⁷ Others, despite having exceptional talent for other aspects of their job, fail to understand the peculiar characteristics of complex cases.⁴⁸ Moreover, a discovery conference or other form of supervision conducted by a hesitant or arbitrary judge, or one who lacks a true appreciation for what is transpiring outside the courtroom, can exacerbate, rather than alleviate, discovery abuses.

It is submitted that, to alleviate discovery abuses effectively, the abuses must first be openly acknowledged. A set of specific ground rules must then be prescribed that leave no doubt as to the proper procedures for counsel to follow when those situations arise.⁴⁹ The Proposed Rules articulate such ground rules together with a revival of judicial supervision and control, rather than merely suggesting one course of action to the exclusion of the other. They emphasize that counsel for all the litigants involved should endeavor to work out discovery procedures and plans privately, but always subject to the possibility of specific instructions from and prompt intervention and control by the court. Admittedly, it is embarrassing for the Bar that such minute details and essentially elementary moral principles must be codified. Counsel should honor the spirit rather than merely the letter of the Federal Rules of Civil Procedure; of course, many do. Nevertheless, during the past four decades, too many attorneys have failed in this respect, tainting the conduct of complex litigation for those who have succeeded.

II. RULE 1: DESIGNATION OF "COMPLEX CIVIL ACTIONS"

Once the premise that there should be special discovery rules for complex litigation is accepted, the next task is to ascertain whether a particular civil action is "complex." Rule 1 of the Proposed Rules establishes a methodology for designating complex actions and explains the significance of such a designation.

A. *How An Action Is Designated*

Rule 1(a) of the Proposed Rules permits any party, or the court on its own motion, to initiate an inquiry into whether an action should be designated a "complex civil action." Although a court can make such a

Selection Reform, 53 St. Johns L. Rev. 466, 471-72 (1979). *But see* *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

47. *See* S.D.N.Y. Report, *supra* note 46, at 503-05.

48. *See* note 46 *supra*.

49. *Cf.* Rosenberg, *Devising Procedures That Are Civil to Promote Justice That is Civilized*, 69 Mich. L. Rev. 797, 797 (1971) ("the road to court-made justice is paved with good procedures").

designation "at any time after commencement of the action," the rule seeks to ensure that all parties that have appeared have an opportunity to be heard before the court reaches its decision. It is expected that the parties will have a general notion of the scope of the discovery contemplated and of the claims or defenses likely to be tried. Thus, their input into the designation decision is desirable.

The question of possible designation is normally expected to arise after joinder of issue in the pleadings and the serving of the initial discovery requests, because the nature of the defendant's answer and the scope of each party's requests will shed light on whether the discovery process will indeed be complex. Counsel's differing approaches to the issues may affect the complexity of an action,⁵⁰ or the parties may simply not wish to finance or authorize extensive discovery. Some actions, however, may be so obviously complex and detailed that, merely upon a review of the complaint, the complex designation will be a foregone conclusion.⁵¹

B. Which Actions Should Be Designated

Rule 1(c) of the Proposed Rules gives a court the power, "in the exercise of its discretion," to determine whether the complex civil action designation should apply, "taking into account such factors as the court deems appropriate in the particular circumstances presented." Rule 1(c) obviously grants a court wide latitude in making the complex designation. This latitude appears necessary to preclude complex designations for potentially complex actions in which discovery is not handled in a "complex" manner. In addition, it ensures the inclusion of otherwise simple actions that have been made "complex" by extensive or complicated discovery requests.⁵² Also, because the

50. For example, given the apparent ability of defense counsel to seek discovery of class members, *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1003-04 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); see *Freeman, Current Issues in Class Action Litigation*, Proceedings of the Judicial Conference of the Eighth Judicial Circuit of the United States, 70 F.R.D. 247, 251, 277-80 (1974), the defendant's discovery plans can convert even the narrowly conceived class action into a complex civil action. See, e.g., *1050 Tenants Corp v Jakobson*, 503 F.2d 1375 (2d Cir. 1974).

51. As discussed at notes 55-56 *infra* and accompanying text, the approach of the Manual for Complex Litigation and several of its supporters has been that some types of cases, such as antitrust actions or class actions, are necessarily complex. This is an erroneous assumption. Private antitrust actions under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (1976), such as dealer termination actions, sometimes involve only two or three parties and a very discrete and confined subject for discovery. Likewise, although class actions frequently involve many parties and broad claims, they too sometimes involve only one or two defendants and a narrow question or trial period. See, e.g., *Uniroyal, Inc. v. Jetco Auto Serv., Inc.*, 461 F. Supp. 350, 352, 354 (S.D.N.Y. 1978) (scope of the antitrust action was limited, even though the potential liability was one million dollars).

52. In addition to the example previously mentioned, note 50 *supra*, impleading extra parties

Proposed Rules, as outlined below, provide for extensive judicial supervision of the discovery process, a potential exists for further burdening the federal courts' overcrowded dockets unless the responsibility for applying those controls is placed upon the courts only when necessary; that is, in complex actions, not all actions.⁵³

The second sentence of rule 1(c) enumerates certain factors that a court should consider in deciding whether to designate a case a complex action. It provides:

In general, but without limitation of the court's discretion in this regard, the designation "complex civil action" is intended to apply to those civil actions in which any of the following . . . exist: production of voluminous documents has been or is expected to be requested from any party; or more than five (5) pretrial depositions have been noticed or are expected to be conducted by any party; or more than twenty-five (25) interrogatories have been or are expected to be propounded by any party.

By placing the word "or" between the examples in this sentence, the rule emphasizes that the existence of any one may suffice to create a complex discovery situation.⁵⁴ The court's discretionary inquiry, however, is not limited to the factors expressed; they are simply guideposts exemplifying the spirit that should underly the court's analysis.

The *Manual for Complex Litigation* gives similarly broad latitude to the court in identifying complex actions. The *Manual* defines "complex litigation" as encompassing "one case 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.'"⁵⁵ In addition, the *Manual* seeks to amplify upon this rather generic definition by listing several common examples of complex actions:

as third-party defendants under Fed. R. Civ. P. 14, and the ability to bring in extra parties as defendants-by-counterclaim under Fed. R. Civ. P. 13(h), can convert an otherwise simple action into a complex action. *See, e.g., In re Penn Cent. Sec. Litigation*, 325 F. Supp. 309, 311-12 (J.P.M.L. 1971); *Third-Party Complaint, Hartford Accident & Indem. Co. v. Allyn*, No. 74 Civ. 4372 (S.D.N.Y., filed Mar. 28, 1979).

53. As then President of the ABA Laurence E. Walsh, a former federal judge, stated at the 1976 Pound Conference: "There [is] a great deal of talk about judicial supervision of discovery, yet, I always wonder how it is going to be accomplished in a busy court. I know that with the pressures on the judge to do that which only he can do, it seems unduly burdensome to ask him to deal with this more mechanical problem of discovery." Pound Conference, *supra* note 8, at 228.

54. The examples specified are mere rules of thumb based on the experience that discovery is more likely to become a complicated and time-consuming matter when they occur. Indeed, as has been observed in past studies, more than half of the civil actions pending in the federal courts involved no discovery at all and, of those that involved discovery, only 15% had five or more discovery events. P. Connolly, E. Holleman & M. Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery 28-29* (1978); Pollack, *supra* note 8, at 222; *see* Schroeder & Frank, *supra* note 8, at 476-77. *But cf.* Rosenberg, *supra* note 27, at 488 (use of discovery found to be broad in all private civil actions).

55. *Manual for Complex Litigation*, *supra* note 14, § 0.10. *See also* Becker, *supra* note 8, at 270.

Cases of the following types may require special treatment in accordance with the procedures in this *Manual*: (a) antitrust cases; (b) cases involving a large number of parties or an unincorporated association of large membership; (c) cases involving requests for injunctive relief affecting the operations of a large business entity; (d) patent, copyright, and trademark cases; (e) common disaster cases, such as those arising from aircraft crashes; (f) individual stockholders', stockholders' derivative and representative actions; (g) products liability cases; (h) cases arising as a result of prior or pending Government litigation; (i) multiple or multidistrict litigation; (j) class actions or potential class actions; or (k) other civil and criminal cases involving unusual multiplicity or complexity of factual issues.⁵⁶

In contrast, rule 1 of the Proposed Rules is premised on the concept that cases cannot be defined as complex merely because they are "big" or because they raise certain federal questions. Certainly these are characteristics that a court should consider in determining whether to designate a civil action as complex. More important, however, a court must balance these characteristics against the other factors involved to determine whether the controls and supervision contemplated and required by the new rules will actually expedite or will merely add to the burdens of pretrial discovery.⁵⁷

C. *Significance of Complex Civil Action Designation*

Under the Proposed Rules, designation of a case as a "complex civil action" simply triggers application of the enumerated controls for the discovery process.⁵⁸ The Proposed Rules are designed to be used in tandem with the discovery rules of the Federal Rules of Civil Procedure, but the former rules "shall be deemed controlling" when a conflict exists between the two.⁵⁹

Rule 1(d) of the Proposed Rules further provides that the complex designation "shall have no effect upon the merits of the action and the conduct of the trial," except as may be expressly provided in the rules themselves. The second sentence capsulizes the policy of the rules: "Such designation and these rules are intended to expedite, simplify and economize the conduct of pretrial discovery, in order to advance the policy of rule 1 of the Federal Rules of Civil Procedure that all litigants are entitled to a just, speedy and inexpensive determination of every action." It is, of course, assumed that the courts will construe the Proposed Rules to achieve this purpose. The rules are, to a large extent, self-executing and absolute in their directives. Nevertheless, as

56. *Manual for Complex Litigation*, *supra* note 14, § 0.22. See also McDonald, *Identification of "Big Case" and Assignment to a Single Judge*, 23 F.R.D. 587 (1958).

57. Cohn, *supra* note 5, at 287; see Schroeder & Frank, *supra* note 8, at 483-86.

58. Rule 1(b) provides that "all discovery in [a complex civil] action shall be conducted pursuant to these rules, together with the Federal Rules of Civil Procedure."

59. For example, rule 4(d) of the Proposed Rules requires that identifying interrogatories be answered within 14 days rather than the 30 days permitted by Fed. R. Civ. P. 33(a). See pt. VI(C) *infra*.

with all statutory rules, judicial interpretation will set the tone for counsel's voluntary adherence to them.⁶⁰

III. RULE 2: SCOPE OF DISCOVERY IN COMPLEX CIVIL ACTIONS

The controversy surrounding discovery under the Federal Rules of Civil Procedure has centered, to a great extent, around the determination of the proper scope of discovery. The basic issue is whether discoverable matter should encompass all matter that is "relevant," or whether the test should be somewhat more limited. In addition, once a proper test is adopted, it must be determined whether it should be made applicable to "the subject matter of the action," or "the issues," or "the claims or defenses raised in the action."⁶¹ The choice of one of these alternatives, or a combination of them, will undoubtedly affect the conduct of discovery proceedings and influence the course of litigation.

A. *The "Reasonable Bearing" Standard*

As originally adopted in 1938, rule 26(b) of the Federal Rules of Civil Procedure provided for discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action."⁶² Thus, "relevance" was the test, and "subject matter of the action" the bounds for discovery. Furthermore, early judicial interpretation made it clear that "relevance" was to be broadly construed.⁶³ In

60. The provision of rule 1(b) that the Proposed Rules predominate over the Federal Rules of Civil Procedure would set a tone for construction of the new rules and is intended to apply to situations of direct conflict between the two sets of rules. But it is not intended to strip the courts of their important power to control unanticipated abuses under or misapplications of the Proposed Rules by, for example, the "protective orders" provision of Fed. R. Civ. P. 26(c). The latter rule provides that "the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.*

61. The views of many commentators and judges on the question of the scope of discovery are affected by their belief in the importance of notice pleadings, Fed. R. Civ. P. 7-16, and their concern about the effect that specific discovery scope standards would have on the status of such pleadings. See, e.g., Becker, *supra* note 8, at 274-75; Pollack, *supra* note 8, at 222-23; Schroeder & Frank, *supra* note 8, at 481. "Notice pleading" refers to the philosophy underlying Fed. R. Civ. P. 8 that pleadings should be brief and state only the "ultimate" facts necessary to give notice to one's adversary of the nature of the claim being asserted, rather than detail all evidentiary facts. Development and disclosure of evidentiary facts is left to pretrial discovery. See, e.g., Conley v. Gibson, 355 U.S. 41, 47 (1957); Nagler v. Admiral Corp., 248 F.2d 319, 322-23 (2d Cir. 1957). One report on discovery concluded, however, that "abuses are not so much in the subject matter scope of discovery . . . but in its practical administration." Report of the ASU Discovery Conference on the Advisory Committee's Proposed Revision of the Rules of Civil Procedure (Discovery) (1978), reprinted in Schroeder & Frank, *supra* note 8, at 495 app.

62. Fed. R. Civ. P. 26(b) (1938).

63. See, e.g., Engl v. Aetna Life Ins. Co., 139 F.2d 469, 472 (2d Cir. 1943); Pezza v. Williams-Bauer Corp., 3 F.R.D. 355, 356 (S.D.N.Y. 1942); Newcomb v. Universal Match

1946, a sentence was added to rule 26(b) which, although not intended to alter the relevance standard,⁶⁴ has in fact done just that. That sentence provides: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."⁶⁵ Thus, in the context of pretrial discovery, "relevant" does not mean "admissible" as "relevant" is construed at trial. Rather, "relevant" matter, in effect, means any matter "reasonably calculated to lead to the discovery of admissible evidence." This phrase has become the talismanic watchword for counsel conducting discovery.⁶⁶

The "reasonably calculated to lead to . . . admissible evidence" test has proved to be a generally useful and acceptable one. Although a particular matter may not bear directly on the claims in a case, and might thus be inadmissible at trial, it may provide counsel with important background information during discovery, enhancing counsel's understanding of the context in which the issues arose.⁶⁷ Commentators, however, have concluded that the scope of discovery under the present rules provides a vehicle for abusive requests and for undue protraction and proliferation of discovery.⁶⁸ Former Attorney General Griffin Bell, for example, has often offered the following anecdote:

Corp., 25 F. Supp. 169, 171-72 (E.D.N.Y. 1938); *accord*, Hickman v. Taylor, 329 U.S. 495, 505 (1947).

64. Fed. R. Civ. P. 26(b) (1946); *see* 4 J. Moore Federal Practice, ¶ 26.56[1], at 26-116 (1979). Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, *reprinted in* 5 F.R.D. 433, 454 (1946) [hereinafter cited as 1946 Advisory Comm. Notes].

65. Fed. R. Civ. P. 26(b) (1946).

66. *See* Reliance Ins. Co. v. Barron's, 428 F. Supp. 200, 202 (S.D.N.Y. 1977); Miller v. Doctor's Gen. Hosp., 76 F.R.D. 136, 138-39 (W.D. Okla. 1977); Quaker Chair Corp. v. Litton Business Sys., 71 F.R.D. 527, 530-33 (S.D.N.Y. 1976); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1158-59 (D.S.C. 1974); La Chemise Lacoste v. Alligator Co., 60 F.R.D. 164, 170-71 (D. Del. 1973). *See also* Heathman v. United States Dist. Court, 503 F.2d 1032, 1035 (9th Cir. 1974).

67. *See, e.g.*, Milner v. National School of Health Tech., 73 F.R.D. 628, 631-32 (E.D. Pa. 1977); Laufman v. Oakley Bldg. & Loan Co., 72 F.R.D. 116, 120 (S.D. Ohio 1976); Vollert v. Summa Corp., 389 F. Supp. 1348, 1349-50, 1351 (D. Hawaii 1975); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78, 82 (E.D.N.Y. 1975); Dow Corning Corp. v. Surgitek, Inc., 61 F.R.D. 578, 579-81 (E.D. Wis. 1973); Mallinckrodt Chem. Works v. Goldman, Sachs & Co., 58 F.R.D. 348, 352-53 (S.D.N.Y. 1973).

68. Justice Erickson of the Colorado Supreme Court recently summarized this view: "There is a very real concern in the legal community that the discovery process is now being overused. Wild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm. Unnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers' trial strategy." Erickson, *supra* note 30, at 288. That view, interestingly, is similar to the fears expressed when the Federal Rules of Civil Procedure were amended in 1946 to broaden the scope of discovery. *See, e.g.*, Armstrong, *Report of the Advisory Committee on the Federal Rules of Civil Procedure Recommending Amendments*, 5 F.R.D. 339, 353 (1946).

"When I left the practise in 1961 to go on the bench, the familiar statement of a trial lawyer was that 'I am on trial' or 'I will be on trial.' Upon returning last year [1977] it had changed to 'I am on discovery' or 'I will be on discovery.'"⁶⁹ Indeed, many experienced litigators in complex cases, particularly commercial cases, have never or rarely tried cases; discovery itself has become a full time occupation.

Because of the broad scope of discovery in complex litigation, the process consumes so much time that cases sometimes cannot be synthesized for effective trial presentation.⁷⁰ The discovery process has become, for both sides, a litigation weapon to discourage and prevent prosecution of claims, to force a settlement or merely to wear down an adversary.⁷¹ Counsel, regrettably, often look upon discovery as a meal ticket or annuity rather than as a quick and inexpensive quest for evidence.⁷² These were obviously not the intentions of the draftsmen of the Federal Rules of Civil Procedure,⁷³ and should not be permitted to thwart the right of litigants to their day in court.

When the ABA Task Force reviewed the discovery rules in the mid-1970s, it concluded that narrowing the scope of discovery under rule 26(b) was "the most significant" revision it could suggest to counter discovery abuses in civil cases.⁷⁴ The Task Force proposed that the first sentence of rule 26(b)(1) be rewritten to limit discovery to "any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party."⁷⁵ The Task Force offered the following rationale for the change:

[S]weeping 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.

69. Pollack, *supra* note 8, at 222; see Goldstein, *supra* note 42, at col. 2.

70. In one antitrust case, the court was confronted with requests for production of literally "hundreds of millions of documents." Kirkham, *supra* note 8, at 203; see *Xerox Corp. v. IBM Corp.*, 75 F.R.D. 668 (S.D.N.Y. 1977). The problem of ineffective trial presentation is illustrated by the Justice Department's antitrust suit against IBM, presently in its fifth year of trial. See *In re IBM Corp.*, [1980-1] Trade Cas. (CCH) ¶ 63,202, at 77,970-71 (2d Cir. 1980).

71. Former Federal Judge Rifkind has observed: "The theory [of the discovery rules] was that [they] would prevent pleading from being a 'game of skill' and prevent trials from becoming 'sporting matches.' The practice—in many areas of the law—has been to make *discovery* the 'sporting match' and an endurance contest. Is this a luxury which an overtaxed judicial system can afford?" Rifkind, *Are We Asking Too Much of Our Courts?*, Pound Conference, *supra* note 8, at 107 (footnote omitted).

72. In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the Supreme Court decried the practice of placing the burden of discovery in complex cases upon associates and paralegals to build expenses, without regard for the need to do so. *Id.* at 741. The Court also condemned the use of protracted and *in terrorem* discovery tactics to force settlement of meritless claims. *Id.*; see *SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp.*, 72 F.R.D. 110, 113 (N.D. Tex. 1976).

73. See Fed. R. Civ. P. 1.

74. ABA Task Force Report, *supra* note 31, at 2-3.

75. *Id.* at 2 (emphasis added).

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.⁷⁶

Although the Task Force acknowledged that the line between "issues" and "subject matter" is indistinct, it hoped that the recommended change would induce the courts "not to continue the present practice of erring on the side of expansive discovery."⁷⁷ Similarly, the Task Force explained that it left the last sentence of rule 26(b)(1) intact because it assumed "that the rubric 'admissible evidence' contained in that sentence [would] be limited by the new relevancy which emerges from the term 'issues,' rather than from the more comprehensive term 'subject matter.'" ⁷⁸

The Judicial Conference, however, found the Task Force proposal unacceptable. When the Conference issued its Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure in March 1978, it proposed that the scope of discovery be limited to matters "relevant to the claim or defense,"⁷⁹ rather than to matters "relevant to the issues raised by the claims or defenses."⁸⁰ The Conference explained its rejection of the ABA Task Force proposal as follows:

The [Judicial Conference] doubts that replacing one very general term [subject matter] with another equally general one [issues] 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.⁸¹

Noting that the ABA Task Force acknowledged the difficulty of distinguishing "issues" from "subject matter," the Conference concluded that the latter term "should be eliminated."⁸²

Unfortunately, it is no easier to determine what matter is relevant to a "claim or defense" than it is to determine what matter is relevant to an "issue" in a case. Both terms apparently represent a narrowing of "subject matter," but neither term is ever defined. Perhaps because of this inadequacy, the Judicial Conference dropped its proposed changes for rule 26(b) when it issued its revised draft in 1979, leaving the rule exactly as presently formulated.⁸³ In short, the Task Force and the

76. *Id.* at 3.

77. *Id.* The Task Force also reported its belief that "the parties should be able to agree upon [the] definition" of the issues. *Id.*

78. *Id.*

79. Preliminary Judicial Conference Amendments, *supra* note 36, at 623.

80. See note 75 *supra* and accompanying text.

81. Preliminary Judicial Conference Amendments, *supra* note 36, at 627.

82. *Id.* at 627-28.

83. See Revised Judicial Conference Amendments, *supra* note 37, at 330-32.

Judicial Conference efforts have not helped to clarify the scope of discovery. The real problem is to define "relevant" and "reasonably calculated to lead to the discovery of admissible evidence," because that phraseology of rule 26(b) represents the language most counsel refer to when disputes arise.⁸⁴

Concededly, the Proposed Rules do not provide a foolproof solution to this problem. But the rules do adopt an approach that should be easier to implement than that of the Judicial Conference. Rule 2(a) provides:

Discovery in any action designated as a complex civil action . . . shall be permissible as to any matter, not privileged, that has a reasonable bearing upon any issue in the action. . . . Discovery shall be permissible beyond, and shall not be limited to, the tests of relevance or admissibility of evidence at trial.

The phrase "reasonable bearing upon any issue" is, of course, new and will present its own definitional problems. Yet, some change in language is necessary to accomplish a reassessment of the scope of discovery. Otherwise, past interpretations will likely inhibit any improvement in the presently unacceptable state of affairs. The test in rule 2(a) is intended to reflect two concepts: first, that "issues" is the more appropriate general standard and second, that although a "reasonable bearing" test will continue to include within the scope of discovery matter that is not strictly relevant, it will nevertheless close the floodgates to unreasonable requests opened under present rule 26(b).⁸⁵

First, "issues" is a more appropriate standard than "claim or defense" because, by pleading virtually anything as a claim or defense, a litigant can easily defeat the purpose of the latter phrase, which is to narrow the scope of discovery. Further, the issues of a case are more pertinent in the determination of the litigation, and courts have extensive experience in issue-finding, which, under certain other pro-

84. See Preliminary Judicial Conference Amendments, *supra* note 36, at 624.

85. The Supreme Court, in effect, suggested a "reasonable bearing upon any issue" standard in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (discovery is permissible as to "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue"); accord, *Quaker Chair Corp. v. Litton Business Sys., Inc.*, 71 F.R.D. 527, 530-31 (S.D.N.Y. 1976); *Parion Theatre Corp. v. RKO Theatres Inc.*, 319 F. Supp. 378, 379-80 (S.D.N.Y. 1970); *K.S. Corp. v. Chemstrand Corp.*, 203 F. Supp. 230, 234-35 (S.D.N.Y. 1962). Authority for this standard can also be found in the 1946 Advisory Committee Note to rule 26(b)(1) when the Judicial Conference broadened the scope of discovery beyond "relevant to the subject matter" to include relevant matter "reasonably calculated to lead to . . . admissible evidence": "Of course, matters entirely without bearing . . . as direct evidence . . . are not within the scope of inquiry. . . ." 1946 Advisory Comm. Notes, *supra* note 64, at 454. A special standard for the scope of discovery in complex litigation is not an entirely novel concept. In some federal districts, the scope of discovery is subject to local rule. *E.g.*, N.D. Ohio Complex Litigation R. 4(a); see *Cohn*, *supra* note 5, at 273-74. See also *In re Fertilizer Antitrust Litigation*, [1979-2] Trade Cas. (CCH) ¶ 62,894, at 79,180-81 (E.D. Wash. 1979) (examples of the types of controls on the scope of discovery that courts may exert in complex litigation).

cedural rules, is a task they must undertake.⁸⁶ Moreover, by requiring the parties and the court to focus upon the issues in defining the parameters of permissible discovery, the proposed rule can aid in crystalizing the issues for trial, which should expedite both discovery and the trial itself.

Second, the "reasonable bearing" test would replace the confusing "relevant" test, which has one meaning for discovery and another for trial.⁸⁷ The courts should determine the limits of "reasonable bearing" as it applies specifically to the scope of discovery. This determination may, in some cases, be somewhat arbitrary and subjective, but the Proposed Rules, in any event, contemplate increased judicial supervision of complex litigation "to ensure adherence . . . to this 'reasonable bearing' standard";⁸⁸ it is an underlying premise of the rules that more judicial oversight is needed in such actions. The parties have it within their power to reduce the court's oversight and potentially harsh rulings by agreeing privately to limit discovery; failing that, however, the court should accept this responsibility.⁸⁹

B. *Privilege Objections*

Rule 2(b) of the Proposed Rules grapples with the chronic problem of abusive objections to discovery for evidentiary privileges. Both rule 2(a)⁹⁰ and rule 26(b)(1) of the Federal Rules of Civil Procedure⁹¹ expressly recognize the right to assert such objections. Under rule 26(b)(1), however, parties often assert objections, based on the broadest possible construction of a privilege, solely to block inquiry into sensitive areas.⁹² Also, disputes have arisen concerning the extent

86. See, e.g., Fed. R. Civ. P. 56 (summary judgment); see *United States v. Allen*, 578 F.2d 236, 237 (9th Cir. 1978); *Hanover Ins. Co. v. Liberian Oceanway Corp.*, 398 F. Supp. 104, 109 (D.P.R. 1975).

87. See notes 64-66 *supra* and accompanying text.

88. Rule 2(a), Appendix.

89. Cf. note 77 *supra* (ABA Task Force agrees with this conclusion).

90. Rule 2(a) provides: "Discovery . . . shall be permissible as to any matter, not privileged"

91. Fed. R. Civ. P. 26(b)(1) provides: "Parties may obtain discovery regarding any matter, not privileged" Privileged matter, under the discovery rules, is that covered by "'privileges' as that term is understood in the law of evidence." *United States v. Reynolds*, 345 U.S. 1, 6 (1953) (citing Fed. R. Civ. P. 34). Most state evidentiary privileges are available in federal civil litigation. Fed. R. Evid. 501. The Federal Rules of Evidence require a balancing test to determine whether a particular privilege should be recognized in a particular case. *Apicella v. McNeil Laboratories*, 66 F.R.D. 78, 81-86 (E.D.N.Y. 1975); 2 J. Weinstein & M. Berger, *Evidence* ¶ 501[02], at 501-19 (1978). See generally Kaminsky, *State Evidentiary Privileges in Federal Civil Litigation*, 43 *Fordham L. Rev.* 923 (1975). See also *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173 (1942); *Baker v. F & F Inv. Co.*, 339 F. Supp. 942, 944-45 (S.D.N.Y.), *aff'd*, 470 F.2d 778, 781-82 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

92. This problem also arises with respect to work product objections under Fed. R. Civ. P. 26(b)(3). See *Brennan v. Engineered Prods., Inc.*, 506 F.2d 299, 303-04 (8th Cir. 1974), *Duplan*

to which a party asserting a privilege objection must reveal the basis for and the factual circumstances of the privilege, in order that his adversary may challenge the assertion and obtain a court order to disclose the information.⁹³ When a litigant claims, for example, that the attorney-client privilege protects a particular conversation, the question arises whether he must identify the subjects discussed and the documents seen, or whether these are matters covered by the privilege.⁹⁴ Although many privilege objection disputes are bona fide, counsel too often take an extreme position by refusing to allow revelation of even the mere fact that a privileged communication occurred.

Rule 2(b) of the Proposed Rules establishes a framework for analyzing privilege objections, without invading the privileged communications themselves. The rule provides that the responding party must state the basis for the claim of privilege and identify the matter to which the claim purportedly applies, thus enabling the inquiring party to test the claim if it wishes.⁹⁵ The required identification would include the nature of the matter—for example, a discussion, letter or memorandum—and the date, persons involved, place and, in the case of a document, the title or other pertinent description.

Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 483-84 (4th Cir. 1973); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 557-58 (2d Cir. 1967); Midland Inv. Co. v. Van Alstyne, Noel & Co., 59 F.R.D. 134 (S.D.N.Y. 1973). It also arises with respect to anticipated expert testimony. See Fed. R. Civ. P. 26(b)(4); Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. Ill. L.F. 895; Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal*, 1977 U. Ill. L.F. 169, 188-90; Comment, *Discovery of Expert Information Under Rule 1.280 of the Florida Rules of Civil Procedure*, 26 U. Fla. L. Rev. 566, 568-69 (1974).

93. See, e.g., Commercial Union Ins. Co. of America v. Talisman, Inc., 69 F.R.D. 490, 491* (E.D. Mo. 1975); Olmert v. Nelson, 60 F.R.D. 369, 370 (D.D.C. 1973); Sun Oil Co. v. United States, 514 F.2d 1020, 1024-25 (Ct. Cl. 1975). See also W.R. Grace & Co. v. Pullman Inc., 74 F.R.D. 80, 84-85 (W.D. Okla. 1977).

94. The classic statement of the attorney-client privilege is contained in Judge Wyzanski's opinion in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950): "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *Id.* at 358-59; see *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 515-17 (D. Conn.), *appeal dismissed per curiam*, 534 F.2d 1031 (2d Cir. 1976); *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1033 (S.D.N.Y. 1975); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 Harv. L. Rev. 424 (1970).

95. This statement must be made "on the record of his deposition if the privilege was asserted there or otherwise in writing promptly after the privilege is asserted." Rule 2(b), Appendix; see *In re Anthracite Coal Antitrust Litigation*, 82 F.R.D. 364, 370 (M.D. Pa. 1979).

The rationale of rule 2(b) is that the inquiring party is entitled to know that a privileged communication took place. In most circumstances, adverse inferences cannot be drawn at trial against the responding party from its assertion of the privilege.⁹⁶ Thus, harm should not result from revealing the fact of the privileged communication. Furthermore, disclosure of the circumstances surrounding the communication will facilitate a court's review of the claim of privilege because most privileges are available only if certain conditions existed at the time of the communication. For example, the attorney-client privilege is lost if the matter is disclosed to a person not a party to the attorney-client relationship.⁹⁷ Rule 2(b) compels the party asserting the privilege to reveal the fact of disclosure to a third party in order to deter assertion of an unfounded privilege when such disclosure has occurred. Presumably, because counsel and litigants, under other provisions of the Proposed Rules, would face sanctions for willfully thwarting discovery⁹⁸—in this case, failing to reveal the fact of disclosure—they will be less inclined to assert strained privilege objections the true purpose of which is to block legitimate inquiry.

The last sentence of rule 2(b) provides: "Counsel may agree among themselves that, to facilitate pretrial discovery, information to which a privilege is claimed shall be disclosed in discovery without waiver of either the privilege or the rights of the responding party to assert it and any other party to contest it thereafter." Such private understandings among counsel are common under the present rules, and should be encouraged to facilitate full disclosure. Some counsel are, however, uncertain as to the binding nature and validity of such an understanding;⁹⁹ rule 2(b) would eliminate such doubt and make clear the official

96. See, e.g., *Bruton v. United States*, 391 U.S. 123, 126 (1968); *Griffin v. California*, 380 U.S. 609, 613-15 (1965); *Courtney v. United States*, 390 F.2d 521, 527 (9th Cir. 1968); *Tallo v. United States*, 344 F.2d 467, 468-70 (1st Cir. 1965); *Pennsylvania R. Co. v. Durkee*, 147 F. 99, 101-02 (2d Cir. 1906). This rule does not apply, however, in the case of certain privileges, such as the privilege against self-incrimination in civil cases. See *United States v. Mammoth Oil Co.*, 14 F.2d 705, 729 (8th Cir. 1926), *aff'd*, 275 U.S. 13 (1927); Kaminsky, *Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis*, 39 Brooklyn L. Rev. 121, 144-49 (1972).

97. See, e.g., *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 459-60 (N.D. Cal. 1978); *In re Penn Cent. Commercial Paper Litigation*, 61 F.R.D. 453, 463-64 (S.D.N.Y. 1973) (holding that the defendant's prior production of documents constituted waiver of attorney-client privilege); see C. McCormick, *Handbook of the Law of Evidence* § 93 (2d ed. 1972). Interesting waiver questions are presented when the disclosure occurred at a "joint defense" conference. See, e.g., *Continental Oil Co. v. United States*, 330 F.2d 347, 348-49 (9th Cir. 1964); *cf. Hunydec v. United States*, 355 F.2d 183, 184-85 (9th Cir. 1965) (admission at a joint conference held to be within attorney-client privilege). See also *In re Grand Jury Subpoena Duces Tecum*, 406 F Supp. 381 (S.D.N.Y. 1975); Note, *The Attorney-Client Privilege in Multiple Party Situations*, 8 Colum. J. L. Soc. Prob. 179 (1972).

98. See pt. VII *infra*.

99. This uncertainty is due to the strict view of the waiver of a right to claim a privilege. As

approval of this informal procedure.¹⁰⁰ For example, counsel sometimes inquire into a privileged communication for particular information, the disclosure of which is harmless. Thus, the responding party will not object to disclosing the particular information, but may fear a later challenge that it has waived its right to claim the privilege as to the rest of the communication. Rule 2(b) would enable litigants to avoid such dilemmas. By encouraging fuller disclosure, this provision may also alleviate some of the suspicion surrounding claims of privilege¹⁰¹ and eliminate unnecessary motions to test privilege claims concerning insignificant information.

The latter provision is made voluntary rather than mandatory, so as not to compel a party claiming the privilege to surrender its protections arbitrarily. It is intended that no negative inference be drawn from a refusal to enter into the type of agreement provided for by the last sentence of rule 2(b). Counsel, therefore, should endeavor to promote both use of the provision and the spirit of disclosure that it seeks to stimulate.

C. Confidential Information

Rule 2(c) of the Proposed Rules addresses the situation in which assertedly confidential, but not privileged, information is requested.

explained by the Advisory Committee Notes to the Supreme Court's proposed, but not enacted, rule 511 of the Federal Rules of Evidence: "[I]n the confidential privilege situations, once confidentiality is destroyed through voluntary disclosure, no subsequent claim of privilege can restore it . . ." Advisory Committee Notes to Rule 511, Proposed Rules of Evidence for United States Courts and Magistrates, *reprinted in* 56 F.R.D. 183, 259 (1972).

100. Authority for this provision of rule 2(b) can be found in the provision of Fed. R. Civ. P. 26(c)(8) that permits the court to review the allegedly privileged matter *in camera* and then determine its nature. This procedure is the most common method of testing a claim of privilege. See *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 792 (D.C. Cir. 1971); *Barr Marine Prods. Co. v. Borg-Warner Corp.*, 84 F.R.D. 631, 633 (E.D. Pa. 1979); *SEC v. National Student Marketing Corp.*, 18 Fed. R. Serv. 2d 1302, 1304 (D.D.C. 1974). The existence of this procedure negates the contention that, in the context of counsel's private resolution of discovery disputes, restricted disclosure constitutes a waiver of the privilege even though the parties agree that disclosure will not have that effect. Nevertheless, the use of the *in camera* procedure has been criticized on the ground that disclosure to the court may constitute such a waiver. Cf. *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 947 (Ct. Cl. 1958) (to require submission of documents to a judge for *in camera* inspection may compromise the purpose of a privilege, the open expression of opinion); Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Colum. L. Rev. 142, 168-70 (1976) (same) [hereinafter cited as *Government Discovery*].

101. This suspicion may be traced to Professor Wigmore's view that all persons must give testimony and that testimonial privileges should be severely restricted. 8 J. Wigmore, *Evidence* §§ 2285, 2290 (McNaughton ed. 1961); see, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 690-92 (1972); *C. McCormick*, *supra* note 97, § 77, at 156. *But see Baker v. F & F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972) (newsman not required to disclose confidential sources during civil discovery), *cert. denied*, 411 U.S. 966 (1973). See generally 4 J. Moore, *supra* note 64, ¶ 26.60[3].

When business competitors are parties to a case, whether on the same or opposing sides, they may be reluctant to reveal confidential information about their respective businesses.¹⁰² Such information, however, generally does not qualify as a trade secret¹⁰³ and frequently is only marginally confidential. Yet, as a practical and financial matter, the litigants may view its disclosure as a serious threat to their businesses. Under the present discovery rules, much time is lost in the motion practice generated by such confidentiality objections. Frivolous claims of confidentiality have been asserted to cause delay and disruption, to drive up discovery expenses and to make it difficult for opposing counsel to assimilate and understand the information being sought.¹⁰⁴ Confidentiality orders, limiting disclosure to counsel and preventing counsel from revealing the information to their clients, are often requested in the hope of depriving opposing counsel of their clients' assistance, rather than out of a genuine fear of business harm.¹⁰⁵

Rule 2(c) seeks to prevent confidentiality objections from disrupting

102. See, e.g., *Chesa Int'l Ltd. v. Fashion Assocs., Inc.*, 425 F. Supp. 234, 236-37 (S.D.N.Y.), *aff'd mem.*, 573 F.2d 1288 (2d Cir. 1977); *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, 71 F.R.D. 388, 389-90 (N.D. Cal. 1976); *Maritime Cinema Serv. Corp. v. Movies En Route, Inc.*, 60 F.R.D. 587, 589 (S.D.N.Y. 1973); *National Util. Serv., Inc. v. Wisconsin Centrifugal Foundry, Inc.*, 49 F.R.D. 30, 31-32 (E.D. Wis. 1970); *Trinagle Mfg. Co. v. Paramount Bag Mfg. Co.*, 35 F.R.D. 540, 541 (E.D.N.Y. 1964). See also 9 Conn. L. Rev. 326 (1977).

103. The cases provide only limited protection for trade secrets, as contemplated by Fed. R. Civ. P. 26(c)(7). See *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965); *Triangle Ink & Color Co. v. Sherwin-Williams Co.*, 61 F.R.D. 634, 636 (N.D. Ill. 1974); *Julius M. Ames Co. v. Bostitch, Inc.*, 235 F. Supp. 856, 857 (S.D.N.Y. 1964). *But cf.* *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 411 (N.D.N.Y. 1973) (limited protective order granted); *International Nickel Co. v. Ford Motor Co.*, 15 F.R.D. 392, 394 (S.D.N.Y. 1954) (determination of whether information was a trade secret deferred until trial) Confidential information should be granted protection similar to, but not greater than, that afforded to trade secrets.

104. In addition, new types of privileges are constantly being claimed and litigated. See, e.g., *United States v. IBM Corp.*, 83 F.R.D. 92, 95-96 (S.D.N.Y. 1979), which denied the existence of a "scholar's privilege" and emphasized the general rule that it is "the duty of every person to give evidence pursuant to lawful process." *Id.* at 95; see *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972) (denying the existence of a journalist's privilege). *Contra*, *Richards of Rockford, Inc. v. Pacific Gas & Elec. Co.*, 71 F.R.D. 388, 390-91 (N.D. Cal. 1976) (claim of scholar's privilege upheld). This is not to say that all such "new" privileges are frivolous or improper. A witness is entitled to litigate the question of privilege if acting in good faith. See, e.g., *Baker v. F & F Inv.*, 470 F.2d 778, 780-81 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *United States v. Liddy*, 354 F. Supp. 208, 213-14 (D.D.C. 1972). Unfortunately, unlike the privilege claimed in *Baker*, not all such claims are asserted in good faith. See cases cited note 105 *infra*.

105. See, e.g., *United States v. IBM Corp.*, 67 F.R.D. 40, 47-49 (S.D.N.Y. 1975); *Xerox Corp. v. IBM Corp.*, 64 F.R.D. 367, 374 (S.D.N.Y. 1974); *Printing Plate Supply Co. v. Curtis Publishing Co.*, 11 Fed. R. Serv. 2d 818, 818-19 (E.D. Pa. 1967); *United States v. Lever Bros.*, 193 F. Supp. 254, 257-58 (S.D.N.Y. 1961), *appeal dismissed*, 371 U.S. 207 (1962). *But see* *American Oil Co. v. Pennsylvania Petroleum Prods. Co.*, 23 F.R.D. 680, 684-85 (D.R.I. 1959)

the orderly progress of discovery, while preserving the right to protection of bona fide confidential information. Although rule 26(b)(1) of the Federal Rules of Civil Procedure, which covers the scope of discovery,¹⁰⁶ contains no exception for confidential information as such, rule 26(c)(7) contemplates such protection in appropriate circumstances.¹⁰⁷ Rule 2(c) requires litigants to reveal confidential information, but a two week confidentiality "order" would automatically attach. During that period, only those persons present at the deposition or who received the written response in which the confidential information was revealed can make use of it, and their use is limited to the prosecution or defense of the case. In addition, during the two week period, any person or party wishing to extend the confidentiality order may apply to the court for a confidentiality order of whatever length of time it deems necessary. This provision does not prevent any party that anticipates a confidentiality problem from moving for a ruling, *before* the problem arises,¹⁰⁸ on whether certain information should be subjected to a confidentiality order of limited or permanent application. Such an anticipatory motion should not delay discovery, but should be made expeditiously as soon as counsel perceives the problem.¹⁰⁹

Under rule 2(c), counsel may also apply to the court for relief from the automatic two week period if the period is oppressive or prejudicial. For example, counsel may need the assistance of a non-participant to evaluate the effect of the disclosed matter on other discovery scheduled to take place within or immediately following the two week period. Under these circumstances, if the court finds that the

106. Fed. R. Civ. P. 26(b)(1); see pt. II(A) *supra*.

107. Fed. R. Civ. P. 26(c)(7) authorizes an order that "confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way" if "good cause" is shown. Cf. *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21, 23 (S.D.N.Y. 1971) (rejecting the analogy to trade secrets).

108. Questions of confidentiality commonly arise during depositions. See, e.g., *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958); *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505 (E.D. Va. 1976). See also *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973). Therefore, when feasible, the anticipatory motion should be made prior to the deposition session at which it is expected to arise. It is worth noting that simply because a party claims a privilege in discovery does not bar it from obtaining discovery from its adversary. *United States v. 47 Bottles*, 26 F.R.D. 4 (D.N.J. 1960), *aff'd and rev'd in part*, 320 F.2d 564 (3d Cir. 1962), *cert. denied*, 375 U.S. 953 (1963).

109. Motions of this type should not have to be made through formal channels. As Judge Pollack has counseled: "The Judge must make himself regularly available in Chambers to mediate any dispute that arises between counsel. He should arrange to see them in the next day or two after a request for a meeting—informally, without papers—and listen to the controversy. In the vast majority of cases he will resolve the matter orally and on the spot. The lawyers will take care of memorializing the resolution by a simple letter between them—if the oral direction is inadequate in the circumstances. If the question is more formal and requires papers, the conference will have identified the issue to be submitted and briefed. Experience will prove this route to be a rare occurrence." Pollack, *supra* note 8, at 225.

confidentiality objection was asserted to thwart such other discovery, rather than in good faith, sanctions should be imposed against the objecting party, its counsel, or both.¹¹⁰

D. *Duplicative Discovery Requests*

Rule 2(d) of the Proposed Rules attempts to control the practice of using interrogatories, depositions and even document requests to seek identical information, either to harass opposing counsel or because of a lack of confidence in the effectiveness of a single request.¹¹¹ Controlling such abuse is not a new concept; indeed, some state procedural rules contain provisions to the same effect.¹¹²

Because it is not always possible at the time of the request to determine which method will best elicit the requested information,¹¹³ rule 2(d) should not be construed to bar duplication altogether. The rule's directive, however, is clear: counsel should avoid harassing and unduly burdensome discovery methods. Moreover, the courts should not hesitate to strike unnecessarily duplicative discovery requests, even if the requests are not technically improper.¹¹⁴ For example, counsel sometimes pose interrogatories requesting narrative or chronological information that is more appropriately provided by deposition.¹¹⁵ Under rule 2(d), parties are encouraged to avoid such questions if a knowledgeable deponent is available.¹¹⁶

Nevertheless, situations may arise in which an interrogatory is an

110. See *Center on Corporate Responsibility, Inc. v. Shultz*, 368 F. Supp. 863, 873 (D.D.C. 1973); pt. VII *infra*. See also *Government Discovery*, *supra* note 100, at 172-73.

111. See, e.g., *In re United States Financial Sec. Litigation*, 74 F.R.D. 497, 498 (S.D. Cal. 1975); *Fishman v. A.H. Riise Gift Shop, Inc.*, 68 F.R.D. 704, 705 (D.V.I. 1975); *Boyden v. Troken*, 60 F.R.D. 625, 626 (N.D. Ill. 1973). Fed. R. Civ. P. 26(c)(3) provides that the court may direct, on motion for a protective order, "that . . . discovery . . . be had only by a method of discovery other than that selected by the party seeking discovery." Rule 2(d) of the Proposed Rules would eliminate the need for such a motion by making the concept of nonduplicative discovery a general guideline for complex actions.

112. Ill. Rev. Stat. ch. 110A, § 201(a) (1975) provides, for example: "Duplication of discovery methods to obtain the same information should be avoided." See Kiely, *Re-discovering Discovery: A Fresh Look At the Old Hound*, 10 J. Mar. J. Prac. & Procedure 197, 198 n.4 (1977).

113. The courts have made it clear that, generally, the different methods of discovery are complimentary and not mutually exclusive. *Stonybrook Tenants Ass'n v. Alpert*, 29 F.R.D. 165, 167 (D. Conn. 1961); see *United States v. National Steel Corp.*, 26 F.R.D. 603, 606 (S.D. Tex. 1960); *Bullard v. Universal Millwork Corp.*, 26 F.R.D. 144, 145 (E.D.N.Y. 1960). *But see Franchise Programs, Inc. v. Mr. Aqua Spray, Inc.*, 41 F.R.D. 172, 174 (S.D.N.Y. 1966).

114. See cases cited note 111 *supra*.

115. See, e.g., *Alliance to End Repression v. Rochford*, 75 F.R.D. 428, 429 (N.D. Ill. 1976). See also *Triangle Mfg. Co. v. Paramount Bag Mfg. Co.*, 35 F.R.D. 540, 542-43 (E.D.N.Y. 1964).

116. For example, a participant at a series of meetings would be a knowledgeable deponent to trace a certain discussion running through those meetings.

appropriate prelude or companion to a deposition,¹¹⁷ and rule 2(d) is not intended to bar the use of both methods in those situations. Similarly, as discussed in the next section, duplication of discovery is sometimes appropriate to obtain admissions and to preempt dispute at trial over facts learned in discovery.¹¹⁸ For example, deposition questions should be permitted as to whether certain transactions are reflected in books and records that have been produced in response to a document request, to obtain simple, usable admissions of those matters at trial.¹¹⁹ Similar questions as to the contents of documents should also be permitted, because they may expedite the trial and obviate the need to introduce the documents into evidence at trial.¹²⁰

Because duplication of discovery is appropriate under some circumstances, rule 2(d) is drafted as a suggestive rather than a mandatory rule. Rule 6 of the Proposed Rules nonetheless provides the potential "hammer" of sanctions for unreasonable violations of the rule, and is expected to deter flagrant violations of its spirit as well as of its letter.

E. *Facts Already Known to Inquiring Party*

Although not expressly provided for in the Federal Rules of Civil Procedure, courts generally permit discovery of facts known by the inquiring party and of facts known to the public generally.¹²¹ Use of discovery with respect to such facts has two recognized and approved purposes: to obtain sworn admissions for use at trial, and to preempt later dispute over the pertinent facts and issues.¹²² Questioning into such matters, however, can be overly broad, and is sometimes used solely to protract discovery and to harass an adversary. For example, a

117. See *Spencer v. Northwest Orient Airlines, Inc.*, 201 F. Supp. 504, 507-08 (S.D.N.Y. 1962). See also *O'Brien v. IBEW*, 443 F. Supp. 1182, 1186-87 (N.D. Ga. 1977).

118. See, e.g., *Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc.*, 21 F.R.D. 347, 352-53 (S.D.N.Y. 1958).

119. See, e.g., *Shank v. Associated Transp., Inc.*, 10 F.R.D. 472, 473-74 (M.D. Pa. 1950); Lay, *Plaintiff's Practical Uses of Discovery Techniques*, in *The Practical Lawyer's Manual of Pretrial Discovery* 99, 101-02 (1973).

120. See, e.g., *Mitchell v. Savini*, 25 F.R.D. 275, 276 (D. Mass. 1960); *Baim & Blank, Inc. v. Philco Distribs., Inc.*, 25 F.R.D. 86, 87-88 (E.D.N.Y. 1957).

121. *Cohn v. Dart Indus., Inc.*, 21 Fed. R. Serv. 2d 792, 793 (D. Mass. 1976); *United States v. Beatrice Foods Co.*, 52 F.R.D. 14, 19 (D. Minn. 1971); *Blau v. Lamb*, 20 F.R.D. 411, 415 (S.D.N.Y. 1957), *rev'd on other grounds*, 314 F.2d 618 (2d Cir.), *cert. denied*, 375 U.S. 813 (1963).

122. 4 J. Moore, *supra* note 64, ¶ 26.59. "The simple method of proof afforded by admissions of facts which his opponent could not in honesty deny should not be unavailable to a party simply because these facts may be within his own knowledge. . . . Inquiry as to matters within the party's own knowledge or of general public knowledge is valuable also for the purpose of tying down the adverse party or witness to a definite story and defining the issues." *Id.* at 26-220 (footnote omitted).

prior discovery request may have already elicited the information sought. In these circumstances, a protective order is appropriate.¹²³

Rule 2(e) of the Proposed Rules codifies the permissibility of discovery of known facts. It also prohibits questioning if its purpose or usefulness is counter-productive, and is intended to discourage obstructive objections to proper questions. For example, the contents of records may not be in dispute, but the questioner may still need or wish to know the extent of a witness's knowledge about them at different times, or that his opponent does not contest their accuracy.¹²⁴ Likewise, general facts about an industry, location or product at issue may be mutually known,¹²⁵ yet, the questioner may need admissions about such facts for trial. Although a notice to admit¹²⁶ can often achieve the same result, the freedom to inquire granted by rule 2(e) should achieve the result with less delay and paper work, an especially desirable goal in complex civil litigation.

When there is a factual dispute between the parties, however, it cannot be said that the opposing party's or witness's version of the facts is "known" to the questioner. Thus, rule 2(e) would not apply; the opposing party is permitted to elicit the degree of dispute and test the basis for, and propriety of, his opponent's or the witness's version of the facts.¹²⁷

F. *Other Aspects of Scope of Discovery*

The principal trouble areas under the present discovery rules with respect to complex civil litigation are addressed in the Proposed Rules, but the Proposed Rules are not intended to replace the Federal Rules of Civil Procedure altogether; the latter rules have many specific, workable aspects.¹²⁸ Thus, rule 2(f) of the Proposed Rules provides that, "except as otherwise specifically provided," the scope of discovery

123. See, e.g., *Hikel v. Abousy*, 41 F.R.D. 152, 155 (D. Md. 1966), *Klein v. Leader Elec. Corp.*, 81 F. Supp. 624, 625 (N.D. Ill. 1948); *United States v. American Locomotive Co.*, 6 F.R.D. 35, 37 (N.D. Ind. 1946).

124. See, e.g., *Wilmington Country Club v. Horwath & Horwath*, 46 F.R.D. 65, 66-67 (E.D. Pa. 1969).

125. See, e.g., *Needles v. F.W. Woolworth Co.*, 13 F.R.D. 460, 461 (E.D. Pa. 1952).

126. See Fed. R. Civ. P. 36.

127. See, e.g., *Carlson Cos. v. Sperry & Hutchinson Co.*, 374 F. Supp. 1080, 1101-04 (D. Minn. 1974). See also *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968). Justice Brennan has explained: "Pretrial discovery . . . can truly be employed as a scalpel to lay bare the true factual controversy, and therein lies the basic worth of the procedures toward the attainment of the ideal of dispositions according to right and justice." Brennan, *The Continuing Education of the Judiciary in Improved Procedures*, 28 F.R.D. 42, 49 (1960).

128. Rule 1(b), however, provides that, in the event of conflict between these two sets of rules, the provisions of the Proposed Rules shall control. See note 59 *supra* and accompanying text.

under the Proposed Rules shall be the same as is permitted under the Federal Rules of Civil Procedure.¹²⁹

IV. RULE 3: DEPOSITIONS IN COMPLEX CIVIL ACTIONS

Complex civil litigation normally involves extensive depositions, often protracted both in length and number.¹³⁰ Rule 3 of the Proposed Rules is designed to control abuses occurring in connection with such depositions.

A. *Deposition Scheduling*

Rule 3(a) of the Proposed Rules requires the prompt determination of a detailed deposition schedule, either by private agreement among the parties or, when they cannot agree, by the court.¹³¹ This deposi-

129. An example of a discovery scope dispute which has been adequately resolved by the 1970 amendments to the Federal Rules of Civil Procedure is the one which existed over whether and when discovery of contentions is appropriate. Several decisions illustrate the pre-1970 disparity of views on this matter. *Compare* *United States v. Carter Prods., Inc.*, 28 F.R.D. 373, 377 (S.D.N.Y. 1961); *Beirne v. Fitch Sanitarium, Inc.*, 20 F.R.D. 93, 94 (S.D.N.Y. 1957) and *Katz Exclusive Millinery, Inc. v. Reichman*, 14 F.R.D. 37, 38 (W.D. Mo. 1953) with *United States v. Aluminium, Ltd.*, 268 F. Supp. 758, 763 (D.N.J. 1966); *Lunn v. United Aircraft Corp.*, 25 F.R.D. 186, 189-90 (D. Del. 1960) and *United States v. 23.76 Acres of Land*, 32 F.R.D. 593, 595-96 (D. Md. 1963). *See also* *Anderson v. United Air Lines, Inc.*, 49 F.R.D. 144, 149 (S.D.N.Y. 1969); *United States v. 284,392 Square Feet of Floor Space*, 203 F. Supp. 75, 78 (E.D.N.Y. 1962). Fed. R. Civ. P. 33(b) now provides that contentions are appropriately discoverable through use of interrogatories, rather than depositions. *See* *Sargent-Welch Scientific Co. v. Ventron Corp.*, 59 F.R.D. 500, 502 (N.D. Ill. 1973). *But cf.* 4 J. Moore, *supra* note 64, ¶ 26.56[3], at 26-169 ("Rule 33 should not be taken as introducing a technical objection to the mode of inquiry."). Rule 33(b) wisely provides for the court to oversee this form of discovery to ensure that it is used at a time when the responding party has had a sufficient opportunity to gather his other proof, and that the question is not merely a device to harass. During depositions, it remains permissible to ask questions on opinions as to facts. *Babcock & Wilcox Co. v. Foster Wheeler Corp.*, 54 F.R.D. 474, 477-78 (D.N.J. 1971), *aff'd per curiam*, 457 F.2d 1307 (3d Cir. 1972); *Falk v. United States*, 53 F.R.D. 113, 115 (D. Conn. 1971); *Umphres v. Shell Oil Co.*, 15 Fed. R. Serv. 2d 1116, 1116-17 (S.D. Tex. 1971). Cases decided subsequent to adoption of the 1970 amendments have generally construed rule 33(b) broadly, while sensibly limiting it to opinions and conclusions that bear on the issues in the case. *Carlson Cos. v. Sperry & Hutchinson Co.*, 374 F. Supp. 1080, 1101-04 (D. Minn. 1974); *Union Carbide Corp. v. Travelers Indem. Co.*, 61 F.R.D. 411, 413-14 (W.D. Pa. 1973); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 59 F.R.D. 500, 502-03 (N.D. Ill. 1973). *See also* *Xerox Corp. v. IBM Corp.*, 64 F.R.D. 367, 371-72 (S.D.N.Y. 1974). Because these considerations are consistent with the purposes of rule 2 of the Proposed Rules, there is no need for a new rule addressing these issues.

130. *See* *Kirkham*, *supra* note 11, at 505-07.

131. The proposed amendment to Fed. R. Civ. P. 26(f) is not drastically different in concept. It would authorize any party to request a "discovery conference" with the court at any time "after commencement of an action." Following the conference the court would enter an order *inter alia* "establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action." As a prelude to that order, the new rule would require that the request for the conference include "a [proposed] plan and schedule of discovery"

tion schedule is to be fixed no later than twenty days after the action is designated a complex civil action. Counsel are encouraged to reach agreement among themselves¹³² to reduce the likelihood of dispute over other aspects of the depositions. Absent such agreement, each party is required to submit their suggested schedules to the court to coordinate and finalize. The twenty days allotted for this process may, in some instances, prove too brief, particularly if the action is designated a complex civil action at its commencement.¹³³ But it should allow sufficient time for counsel to review the issues and basic facts and to meet and discuss their respective views and schedules. If, after some time elapses, counsel finds the deposition schedule deficient, rule 3(a) expressly permits each side to alter or add to the deposition schedule, subject to the court's review and approval, either by agreement or notice of deposition. Thus, a requirement of prompt initial scheduling should not prejudice the parties, but will rather stimulate prompt discovery and prevent undue delay in the initiation of discovery.

The last sentence of rule 3(a) also permits the parties to schedule depositions either "by name of deponent or, if the identity of the proposed deponent is not known, by such job or other description as is possible." This aspect of the rule is taken from rule 30(b)(6) of the Federal Rules of Civil Procedure,¹³⁴ but unlike the latter, it is not

and a statement of any limitations and other orders proposed with respect to discovery. Revised Judicial Conference Amendments, *supra* note 37, at 330-32. See also ABA Task Force Report, *supra* note 31, at 4-6. The balance of rule 3(a) provides many of these powers to the court.

132. The Proposed Rules adopt the rationale of the ABA Task Force in this regard: "The Committee is also aware . . . that judicial time is precious and should be husbanded. The suggested Rule attempts a compromise among these conflicting themes. It continues to impose principal responsibility upon the litigating Bar for the preparation of a case. Accordingly, in the great majority of cases, opposing counsel should be able, without judicial intervention, to formulate an appropriate plan and schedule of discovery in relation to issues readily defined by agreement. Good practice would then dictate that counsel reduce their agreement to writing to permit ascertainment if a dispute arises later. In addition, a court may well require that it be informed of such an agreement.

"In those instances, however, where the parties cannot agree either upon the definition of issues or upon a plan and schedule of discovery, the court should be available upon the request of either party to resolve differences." ABA Task Force Report, *supra* note 31, at 5-6.

133. It is anticipated that the complex designation will normally be made only after initial discovery requests are served, because such requests will generally have a bearing on whether the action should be so designated under rule 1. When that is not the case, the court can, in its discretion, briefly extend the 20 day period of rule 3(a).

134. Fed. R. Civ. P. 30(b)(6) provides: "A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to

limited to corporations, associations and partnerships. Rule 3(a) encompasses all situations in which the examining party does not know the name of the person it wishes to examine, but can accurately describe the job or position that the deponent holds—for example, the margin clerk in a brokerage firm, the doctor or nurse who treated an airline accident victim or the particular sales representative in an antitrust action.¹³⁵ Rule 30(b)(6), however, permits the deposed organization to choose the person to testify and to select the specified category of information with respect to which the witness will testify, allowing the organization to pick among its employees and thereby to hold back the particular knowledgeable person the examining party would want to depose.¹³⁶ Under rule 30(b)(6), therefore, if the examining party insists on examining a particular witness, it will be confronted with the prospect of further expense and delay and a possible motion by the deposed organization for a protective order to prevent duplication of discovery.¹³⁷ Rule 3(a) closes the loophole contained in rule 30(b)(6) by not permitting the organization to choose its witness or to select the subject matter.

To a certain extent, "identifying interrogatories"¹³⁸ can avoid this entire problem by bringing forth the names and positions of all knowledgeable witnesses. The last sentence of rule 3(a), however, gives the examining party the ability to schedule depositions even before such interrogatories are answered, or even without having to resort to them. This ability can save time and expense for all parties and the court.

matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules." General descriptions based solely on identifications such as "having knowledge of the facts" or "the transaction at issue," have been held insufficient. *See, e.g., Amato v. Barber S.S. Lines, Inc.*, 30 F.R.D. 69, 69-70 (S.D.N.Y. 1962); *Williams v. Lehigh Valley R.R.*, 19 F.R.D. 285, 285-86 (S.D.N.Y. 1956); *Park & Tilford Distillers Corp. v. Distillers Co.*, 19 F.R.D. 169, 171-72 (S.D.N.Y. 1956).

135. *See, e.g., Shenker v. United States*, 25 F.R.D. 96, 98 (E.D.N.Y. 1960) (the "captain" or "master" of a vessel), *aff'd*, 322 F.2d 622 (2d Cir. 1963), *cert. denied*, 376 U.S. 907 (1964); *Aston v. American Export Lines*, 11 F.R.D. 442, 442 (S.D.N.Y. 1957) ("master" of a vessel).

136. For an illustration of how narrowly and carefully drawn designations can reduce the potential for abuse in this area, see *V.O. Machinimport v. Clark Equip. Co.*, 11 F.R.D. 55 (S.D.N.Y. 1951).

137. It has also been held under Fed. R. Civ. P. 30(b)(6) that the witness designated by the corporation is the only witness considered to be the corporate party, so that other corporate employees or representatives, besides officers or agents, of course, are to be treated as non-parties for the purposes of depositions. *See, e.g., W.R. Grace & Co. v. Pullman Inc.*, 74 F.R.D. 80, 83 (W.D. Okla. 1977). This has potential significance for the use of depositions at trial, *see Fed. R. Civ. P. 32*, and, thus, is an important factor to resolve before trial. *See also Terry v. Modern Woodmen*, 57 F.R.D. 141, 143 (W.D. Mo. 1972).

138. For a definition of "identifying interrogatories," see rule 4(a) of the Proposed Rules, Appendix and pt. V(A) *infra*.

B. Control of Deposition Procedure

Rule 3(b) of the Proposed Rules grants the court broad powers when scheduling depositions to determine how, where and on what matters depositions can and will be taken. Included within the scope of the court's powers would be everything from the sequence of questionings, to the length of the depositions, to the manner in which they will be conducted—for example, stenography, telephone or videotape.¹³⁹ The court is empowered to strike any proposed deposition entirely, or, less drastically, to limit its scope or subject matter.

It is also intended under rule 3(b) that counsel raise all anticipated objections and problems at the time the depositions are scheduled pursuant to rule 3(a).¹⁴⁰ Such objections might include, for example, proposed time-frame limitations, territorial restrictions, industrial restrictions and confidentiality objections. Requiring the anticipated objections to be set forth early would enable the court to rule on them before controversies arise in the midst of depositions.¹⁴¹ If the court finds that a party has unreasonably failed to raise an anticipated objection at the time of scheduling, it would have the power, which it should not hesitate to exercise, to deny relief on the matter or to order sanctions against that party.¹⁴²

In ruling at the outset of discovery on the scope of discovery to be covered in the depositions, the court must carefully avoid prejudicing the case or otherwise preventing its full development.¹⁴³ The court should permit reasonably broad latitude in discovery, as contemplated by rule 2(a).¹⁴⁴ Arbitrary cut-off dates or other such restrictions suggested by counsel should normally be overruled. The court should

139. The Judicial Conference's amendment to Fed. R. Civ. P. 30(b) provides for possible depositions by telephone, or other non-stenographic means, by stipulation of the parties or order of the court. Revised Judicial Conference Amendments, *supra* note 37, at 332-36; see ABA Task Force Report, *supra* note 31, at 9-17. See also *Lucas v. Curran*, 62 F.R.D. 336 (E.D. Pa. 1974); *Jarosiewicz v. Conlisk*, 60 F.R.D. 121 (N.D. Ill. 1973).

140. See pt. IV(A) *supra*.

141. This is consistent with the type of powers which the court would have at the discovery conference envisioned by the Judicial Conference's and ABA Task Force's proposed amendments to Fed. R. Civ. P. 26(f). See note 131 *supra*. In appropriate circumstances, the court would still have the power to limit or even terminate an on-going deposition to prevent harassment or unreasonable conduct. Fed. R. Civ. P. 30(d); see, e.g., *Russo v. Merck & Co.*, 21 F.R.D. 237, 239-40 (D.R.I. 1957); *Miller v. Sun Chem. Corp.*, 12 F.R.D. 181, 182 (D.N.J. 1952); *Krier v. Muschel*, 29 F. Supp. 482, 482 (S.D.N.Y. 1939); cf. *Paiewonsky v. Paiewonsky*, 50 F.R.D. 379, 380 (D.V.I. 1970) (motion to terminate the examination denied because facts did not indicate that examination was "annoying, embarrassing or oppressing"); *Clark v. Chase Nat'l Bank*, 2 F.R.D. 94, 96 (S.D.N.Y. 1941) (same), *modified*, 137 F.2d 797 (2d Cir. 1943).

142. See rule 6(a), (c) of the Proposed Rules, Appendix; pt. VII *infra*.

143. See, e.g., *Continental Fed. Sav. & Loan Ass'n v. Delta Corp.*, 71 F.R.D. 697, 701-02 (W.D. Okla. 1976); *United States v. Lomar Discount Ltd.*, 61 F.R.D. 420, 423 (N.D. Ill. 1973), *aff'd*, 498 F.2d 1404 (7th Cir. 1974).

144. See pt. III(A) *supra*.

not, however, permit unreasonably broad or boundless discovery requests and should enforce adherence to the reasonable bearing test of rule 2(a).¹⁴⁵ In any event, as the depositions progress, the court can and should reconsider and reopen the issue of the proper scope of the depositions upon a showing of good cause or abuse.¹⁴⁶

C. Interruption of Depositions

Depositions in complex civil actions are often left uncompleted for further questioning or for review of documents requested or learned of for the first time during the initial deposition. For the most part, the Proposed Rules should help minimize open depositions by requiring, for example, that document requests with respect to each deposition be made and complied with, whenever possible, prior to the deposition.¹⁴⁷ Occasions will inevitably arise, however, in which matters are left unresolved during a deposition—for instance, when a witness agrees to check on a matter or to look for a record not readily available at the site or at the time of the deposition.

Under the present rules, open and uncompleted depositions have led to disputes as to whether the next scheduled deposition should be conducted before the open deposition is completed.¹⁴⁸ A questioner may prefer to finish deposing each witness before beginning the next deposition, fearing that the next deposition or depositions will alert the witness to matters that will influence his testimony, or to unrealized pitfalls in it. Also, the deposed party may want subsequent witnesses to have the benefit of reading the full testimony of prior witnesses before testifying on the same matters. Implicit in these observations is the reality that a witness's recollection is often refreshed or reshaped by other events in the case and by what he or she hears. In addition, counsel schedule depositions strategically and, in preparing witnesses for deposition, generally call prior testimony to their attention. On the one hand, the deposed party attempts to schedule its witnesses with a view to who will be a strong lead-off witness, who can best tell the "party-line" and who will perform better as a follow-up witness. On the other hand, the questioner will schedule witnesses in terms of

145. See notes 85-89 *supra* and accompanying text.

146. See note 141 *supra*.

147. See rule 3(d) of the Proposed Rules, Appendix; pt. IV(D) *infra*.

148. The 1970 amendment creating Fed. R. Civ. P. 26(d) does not address the problem of uncompleted depositions. Compare *Henry v. First Nat'l Bank*, 50 F.R.D. 251, 264 (N.D. Miss. 1970), *vacated on other grounds*, 444 F.2d 1300 (5th Cir. 1971), *cert. denied*, 405 U.S. 1019 (1972); and *Armstrong Cork Co. v. Niagara Mohawk Power Corp.*, 16 F.R.D. 389, 390 (S.D.N.Y. 1954) (denying priority of completions) with *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245, 249 (2d Cir. 1961); *Sanib Corp. v. United Fruit Co.*, 19 F.R.D. 9, 9-10 (S.D.N.Y. 1955) and *Fox v. Warner Bros. Pictures, Inc.*, 12 F.R.D. 202, 203-04 (D. Del. 1951) (adopting a rule that one deposition must be completed before the next is begun).

whose story he believes he can best penetrate or who has the most detailed knowledge. In a corporate case, for example, the timing of an executive officer's deposition relative to those of his subordinates is a matter of careful planning and forethought, so that one side or the other may refuse to proceed until a particular witness has been deposed. This causes delay in the completion of discovery and may result in the protraction of a deposition merely to stall discovery and derail the case.¹⁴⁹

Rule 3(c) of the new rules will eliminate this practice by providing that "[t]he failure to complete any deposition within the time period scheduled or allotted for it . . . shall not affect or defer the conduct of any other deposition [in the schedule]"; further, "[t]he uncompleted deposition shall be completed as soon as practical within the schedule of depositions on a date or dates to be agreed upon by counsel or, failing that, fixed by the court." The theory underlying rule 3(c) is that facilitating prompt completion of discovery in a complex civil action is more important than the strategy of deposition sequences.¹⁵⁰ Rule 3(c) will, in some cases, favor the questioner and in others the deposed party. It should, however, force all parties to make realistic assessments, at the time the deposition is scheduled, of how long each deposition will last and what the sequence of witnesses will be. It should also provide incentive to the party that believes the sequence of depositions is important to work against its delay. Rule 3(c) should, in any event, prevent the case from becoming bogged down because of a few unfinished depositions.

Rule 3(c), on first reading, may seem prone to the abuses it seeks to correct. Deposing counsel may attempt to schedule an inordinate amount of time for certain witnesses to protect against an uncompleted deposition. Also, counsel wishing to delay may try to stall the deposition on preliminary matters to use up the allotted time period before the questioner reaches the heart of his inquiry. Finally, if one counsel uses the full time period to examine a witness, there may be no time left in the session for cross-examination, frustrating the cross-examining counsel's planned inquiry and forcing him to prepare again to cross-examine at a later session. Nevertheless, determined control by the court under rule 3(a) and the judicious use of sanctions under rule 6¹⁵¹ should counter these practices and prevent serious abuse. As

149. A description of such tactics under the old priority rules can be found in *Caldwell-Clements, Inc. v. McGraw-Hill Publishing Co.*, 11 F.R.D. 156, 158 (S.D.N.Y. 1951). See Fowler, *Discovery Under the Federal Rules of Civil Procedure*, 26 Tenn. L. Rev. 475, 477 (1959); *Discovery Developments*, *supra* note 39, at 955.

150. *But cf.* *Midland Inv. Co. v. Van Alstyne, Noel & Co.*, 50 F.R.D. 46, 48 (S.D.N.Y. 1970) (taking a contrary view of the relationship between depositions, priority and expedition in a complex action).

151. See pt. VII *infra*.

previously explained, the rationale of the Proposed Rules is that, as a general matter, increased judicial control is necessary in complex civil actions.¹⁵² This control should be used to check any new abuses that arise under the Proposed Rules, as well as those abuses the rules are designed to correct.¹⁵³

D. Document Requests for Depositions

One of the chronic delaying aspects of present discovery procedure in complex civil actions is counsel's inability or failure to coordinate depositions with document productions.¹⁵⁴ Depositions are conducted in piecemeal fashion to uncover the existence of relevant documents and, because rule 34(b) of the Federal Rules of Civil Procedure permits parties to take up to thirty days to respond to a document request,¹⁵⁵ then left open to await production of these documents for use in questioning. Counsel ask endless questions concerning the existence of documents, driving up the cost of the depositions and wasting the time of all concerned. In short, those determined to delay can easily play the game of document "cat-and-mouse" to frustrate and wear down their adversaries in endless depositions.¹⁵⁶

152. See pt. I *supra*.

153. In this respect, the Proposed Rules agree with the Judicial Conference's comment that "abuse can best be prevented by intervention by the court as soon as abuse is threatened." Revised Judicial Conference Amendments, *supra* note 37, at 332. The importance of broad supervisory powers of the courts in discovery matters has often been demonstrated. See, e.g., *Stark v. Photo Researchers, Inc.*, 77 F.R.D. 18, 20-21 (S.D.N.Y. 1977); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 82 (E.D.N.Y. 1975); *Corbett v. Free Press Ass'n*, 50 F.R.D. 179, 180 (D. Vt. 1970).

154. Fed. R. Civ. P. 30(b)(5) provides that a deposition notice "may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition." See *Marcoux v. Mid-States Livestock*, 66 F.R.D. 573, 580 (W.D. Mo. 1975). Such a request, however, is subject to the provisions of Fed. R. Civ. P. 34, including its 30 day production period. The rule was amended in 1970 to overrule the prior rule that forbade a deposition notice to compel production of documents. See *Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968). The pre-1970 party seeking such productions had to serve a subpoena duces tecum with his or her deposition notice, and was subject to the requirement of Fed. R. Civ. P. 45 (1946) that "good cause" be shown for the documents to be produced. *Samoff v. Williamsport Bldg. & Constr. Trades Council*, 313 F. Supp. 1105, 1108 (M.D. Pa. 1970), *aff'd*, 451 F.2d 272 (3d Cir. 1971). See also *United States v. IBM Corp.*, 83 F.R.D. 97 (S.D.N.Y. 1979); *United States v. IBM Corp.*, 81 F.R.D. 628 (S.D.N.Y. 1979). The Advisory Committee Note to the 1970 amendment made it clear, however, that the new procedure was intended for production of "few and simple" documents *only* and that, if "many and complex documents" are sought, it might be appropriate for the deponent to seek a protective order remitting the examiner to rule 34 alone for that phase of his or her document discovery. Preliminary Draft of 1970 Amendments, *supra* note 5, at 244-45.

155. Fed. R. Civ. P. 34(b).

156. Under current practice, although the witness can be compelled to disclose the existence of documents at his deposition, he cannot be compelled to produce them there merely an oral request. *Samoff v. Williamsport Bldg. & Constr. Trades Council*, 313 F. Supp. 1105, 1108 (M.D.

Documents play a crucial role in the conduct of depositions in complex civil actions; thus, better coordination between document requests and depositions is essential if discovery in such actions is to be expedited and its costs controlled. Rule 3(d) of the Proposed Rules attempts to minimize this problem by requiring the parties, whenever possible, to make and respond to all document requests with respect to a planned deposition *prior* to the deposition. At present, this procedure is sometimes used by counsel on a voluntary basis, invariably with positive results.¹⁵⁷ Rule 3(d), therefore, does not contemplate that depositions await the expiration of the usual thirty days between a document request and the response thereto. Instead, the second sentence of rule 3(d) provides:

Whenever possible, counsel who plan to question at a deposition shall request those specific documents that he or she believes are needed for the orderly, complete and uninterrupted flow of the deposition . . . ; whenever possible, such documents shall be provided to such counsel (subject to objection, if any) at least three (3) days before the deposition.

Rule 3(d)'s procedure is not intended to permit overly broad document requests; hence, it refers only to "specific documents." If extensive requests are necessary for the efficient conduct of a deposition, however, they should be made in accordance with rule 5 of the Proposed Rules¹⁵⁸ and rule 34 of the Federal Rules of Civil Procedure.¹⁵⁹ The court should take those requests into account when fixing the deposition schedule under rule 3(a) of the Proposed Rules.

The phrase "specific documents" refers not only to individually designated documents, but also applies to specific, readily identifiable documents or groups of documents, such as memoranda written by the deponent, that are obviously pertinent to the deponent's testimony. If the depositions take place after the general document production under proposed rule 5 and present rule 34, the likelihood is that these "specific documents" will have been included and produced. Rule 3(d) enables discovery of those documents that may not have been produced in response to the general requests or the existence of which has only come to light in other, more recent, discovery. If depositions are proceeding prior to the general document production, such as when the questioner already knows which specific document or documents relate to the witness and wishes to proceed with the deposition limited to

Pa. 1970), *aff'd*, 451 F.2d 272 (3d Cir. 1971). This causes additional paperwork and needless delay in obtaining documents.

157. The Manual for Complex Litigation, *supra* note 14, § 2 20, specifically endorses this procedure: "[P]reliminary first wave discovery may include the documents necessary for an efficient examination of witnesses at depositions"

158. See pt. VI *infra*.

159. Fed. R. Civ. P. 34.

those specific documents, rule 3(d) would enable the latter more expeditious form of deposition-document discovery.¹⁶⁰

Rule 3(d) is not intended to restrict any party from seeking discovery of other documents. Because its purpose is to expedite the conduct of depositions, the rule's last sentence provides that other documents can be requested during or after the deposition, or, if the deposition is left open, pending resumption. Rule 3(d) also permits questions at the resumed deposition session relating to newly produced documents, the existence or pertinence of which were, in good faith, first discovered at the earlier deposition session.¹⁶¹ Thus, if a deposition has been left uncompleted, the parties are encouraged to complete any document productions logically related to it that were not anticipated when the deposition was begun. Prompt request for and production of such documents is needed to ensure a fair deposition. Permissible document requests during or after the deposition are subject, however, to the qualification that additional document requests that could readily have been but were not made before the deposition cannot be the basis for an adjournment of the deposition.¹⁶² Because the parties will know that they run the risk of waiving or losing their right to ask questions relating to such documents, this qualification should provide incentive to litigants to make their document requests promptly and thoroughly, rather than to attempt to use such requests to delay the depositions.

E. *The Role of Counsel at Depositions*

Of all the discovery abuses addressed in the Proposed Rules, perhaps the most distressing are those committed by witnesses' counsel at depositions. Counsel have demonstrated a stubborn disregard for the spirit of the deposition discovery rules as a quest for the truth. Interruptions, obstruction, thinly-veiled coaching and instructions not to answer thwart discovery and demean the profession. Of course, not all counsel are guilty of such abuses and, to be sure, it is sometimes the questioner's provocative conduct or grossly improper questions that elicit these responses. Unfortunately, the smooth functioning of the discovery process can no longer rely upon judicial admonition on a

160. Rule 3(d)'s initial phrase "unless otherwise ordered by the court" is intended to permit the court to alter this procedure if abused. It is expected that the rule 3(d) procedure will normally be implemented without difficulty, but there may be exceptional circumstances requiring more direct judicial control over it; this phrase in rule 3(d) is intended to encompass those exceptional circumstances. The phrase is not, however, intended to be interpreted as opening a loophole to avoid rule 3(d)'s required procedures.

161. See, e.g., *Fitzmaurice v. Calmar S.S. Corp.*, 26 F.R.D. 172, 173 (E.D. Pa. 1960). See also *Richland Wholesale Liquors, Inc. v. Jos. E. Seagram & Sons, Inc.*, 40 F.R.D. 480 (D.S.C. 1966).

162. Cf. *Neugebauer v. A.S. Abell Co.*, 77 F.R.D. 712 (D. Md. 1978) (regarding the present relation between document requests and depositions).

case-to-case basis.¹⁶³ Abuses by witnesses' counsel are sufficiently prevalent and unwarranted to require express prohibition by rule.

1. Directions Not to Answer

Perhaps the paradigm example of obstruction is counsel's instruction to the witness not to answer a question that counsel fears or simply does not like when the witness is confronted with the ultimate direct question or his version of events is penetrated by persistent questioning. Knowing that there is no judge present, the witness's counsel may reason that he can rehabilitate the witness either by preventing a crucial admission or by challenging the questioner to interrupt the flow of questioning to seek a judicial ruling.¹⁶⁴ More often than not, by the time a ruling is obtained, the witness has a prepared, coached answer with which to respond.

Directions not to answer in these circumstances violate the basic principles of the discovery rules¹⁶⁵ and are nothing but a veiled obstruction of justice. Litigation is not a sporting event in which the adage "winning isn't everything, it's the only thing" can be tolerated. Recognizing this, some courts have issued express rulings prohibiting counsel from instructing witnesses not to answer, with successful results.¹⁶⁶ Particularly in multi-party or multi-district actions, such rulings have expedited depositions considerably and have reduced the cost of discovery.¹⁶⁷

In *Shapiro v. Freeman*,¹⁶⁸ the court aptly synthesized the problem

163. *Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc.*, 54 F.R.D. 551, 553 (S.D.N.Y. 1972).

164. This practice is so common that, despite Fed. R. Civ. P. 30(c)'s explicit requirement that "[e]vidence objected to shall be taken subject to the objections," certain commentators brazenly recommend it. See, e.g., Kornblum, *The Oral Civil Deposition: Preparation and Examination of Witnesses*, in *The Practical Lawyer's Manual of Pre-trial Discovery* 3, 17-18 (1973). Professor Moore suggests that a deponent may decline to answer a question that he believes "is not relevant to the subject matter of the pending action." 4A J. Moore, *supra* note 64, ¶ 37.02[2], at 37-32; see *id.* ¶ 30.59, at 30-111. The authorities cited by Professor Moore for this view do not, however, address this question. In addition, Professor Moore's view appears to have been squarely rejected by the courts. See cases cited note 166 *infra*.

165. See INTRODUCTION *supra*.

166. See, e.g., *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 973 (4th Cir. 1977); *United States v. IBM Corp.*, 79 F.R.D. 378 (S.D.N.Y. 1978); *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518 (E.D. Tenn. 1977); *Shapiro v. Freeman*, 38 F.R.D. 308, 311 (S.D.N.Y. 1965); *In re New York City Mun. Sec. Litigation*, MDL No. 314 (S.D.N.Y. Dec. 20, 1979) (Raby, Magis.); *In re Colocotronis Tanker Sec. Litigation*, MDL No. M-21-19 (S.D.N.Y. Mar. 13, 1978) (Tenney, J.) (pretrial order); see *Preyer v. United States Lines Inc.*, 64 F.R.D. 430, 431 (E.D. Pa. 1973), *aff'd*, 546 F.2d 418 (3d Cir. 1976); Pollack, *supra* note 8, at 226; cf. *W.R. Grace & Co. v. Pullman Inc.*, 74 F.R.D. 80, 83-84 (W.D. Okla. 1977) (deponent who objects to questions on ground of relevancy must answer the question and note his objection on the record).

167. See cases cited note 164 *supra*.

168. 38 F.R.D. 308 (S.D.N.Y. 1965).

and the correct response. A private plane had crashed into the home of a young girl, allegedly causing her psychiatric shock and leading to a negligence suit against the pilot's estate.¹⁶⁹ When the defense sought discovery of the child's prior behavior at school from school officials, the plaintiff's counsel instructed the officials not to confer with the defense counsel. Subsequently, when the officials were deposed, they were instructed by the plaintiff's counsel not to answer questions posed.¹⁷⁰ Finding the conduct of the plaintiff's counsel obstructive, the court imposed sanctions against them, stating:

Rule 26 of the Federal Rules of Civil Procedure . . . clearly permit[s] a liberal examination of Sherrill Shapiro's teachers. In addition, Rule 30(c) of the Federal Rules unequivocally mandates that during depositions upon oral examination "evidence objected to shall be taken subject to the objections." Thus, even if the plaintiffs' attorney believed the questions to be without the scope of the [prior] order, he should have done nothing more than state his objections. It is not the prerogative of counsel, but of the court, to rule on objections. Indeed, if counsel were to rule on the propriety of questions, oral examinations would be quickly reduced to an exasperating cycle of answerless inquiries and court orders. Alternatively, if the plaintiffs' attorney believed that the examination was being conducted in bad faith, that the information sought was privileged, or that the deponents were being needlessly annoyed, embarrassed, or oppressed, he should have halted the examination and applied immediately to the *ex parte* judge for a ruling on the questions, or for a protective order, pursuant to Rule 30(d). He had no right whatever to impose silence or to instruct the witnesses not to answer, especially so when the witnesses were not even his clients.¹⁷¹

Unfortunately, other courts have not consistently followed this ruling, and it has not gained the widespread acceptance necessary to induce counsel to adhere to its dictates as a matter of voluntary practice.¹⁷²

Rule 3(e) of the Proposed Rules converts the rationale espoused in *Shapiro v. Freeman* into a firm directive applicable to all complex civil litigation: "Unless otherwise ordered by the court, counsel in a complex civil action may not instruct a witness not to answer a question except on the ground of privilege; all testimony shall be taken subject to and over the objection of the witness or his counsel." The preamble clause "[u]nless otherwise ordered by the court," is intended to allow some latitude for the responding counsel to seek a ruling in extreme cases of impropriety by the questioner. The phrase is not intended, however, to create a loophole for obstruction by repeated or unnecessary interruption of the deposition on frivolous and insignificant matters; the courts

169. *Id.* at 309.

170. *Id.* at 309-10.

171. *Id.* at 311-12 (footnotes omitted).

172. *Cf. Macrina v Smith*, 18 F.R.D. 254, 256-57 (E.D. Pa. 1955) (defendant osteopath could properly refuse to answer questions he claimed were outside his field of training or practical experience). *But see Drew v. International Bhd. of Sulphite & Paper Mill Workers*, 37 F.R.D. 446, 448-50 (D.D.C. 1965). *See also de Antonio v. Solomon*, 41 F.R.D. 447, 449-50 (D. Mass. 1966).

should swiftly impose sanctions when the provision is being so abused.¹⁷³

2. Coaching of Witnesses

Rule 3(f) of the Proposed Rules addresses a more subtle aspect of counsel abuse: coaching of witnesses in the midst of questioning. Rarely is outright coaching the problem; counsel in complex civil actions tend to use more sophisticated, less obvious methods. Usually, the problem arises through off-the-record "asides" or at breaks in the questioning.¹⁷⁴ Sometimes, hand or voice-modulation signals are also employed.¹⁷⁵

Questioning counsel are helpless to defend against this obstruction by the witness's counsel. The questioner can have a reference inserted in the record as to what is transpiring, but that never adequately captures the true flavor of the events or their significance. For obvious reasons, stenographically recorded testimony reads dryly, and the abusing counsel can simply insert a denial on the record to confuse it. More important, however, a protest on the record cannot cure the damage that results from such abuse, such as distortion of the witness's testimony and possible concealment of the truth.¹⁷⁶

Rule 3(f) is not designed to bar all conferences between counsel and witnesses at depositions. Counsel, after all, attend the deposition to advise their clients and protect their rights.¹⁷⁷ The question is when, to what extent and in what manner appropriate conferences should be allowed. Rule 3(f), in addressing four situations, two rather specific and two more general in nature, seeks to retain the witness's important right to counsel while curbing abuse of that right by counsel.

First, rule 3(f) bars counsel from "interrupt[ing] the questioning in any deposition to confer with a witness off the record between the imposition of a question and the answer to be given." Whether or not

173. See pt. VII *infra*.

174. See, e.g., *In re* New York City Mun. Sec. Litigation, MDL No. 314, at 8 (S.D.N.Y. Dec. 20, 1979) (Raby, Magis.).

175. That practice has been improperly recommended by some commentators. See, e.g., Kornblum, *supra* note 164, at 18 ("You should sit next to your client and lightly place your hand on the client's arm as soon as the objectionable question is asked. This should be a prearranged signal to the client to refrain from answering the question."); cf. Ratner, *Plaintiffs' Attorneys Hows and Whys of Plaintiffs' Depositions*, in *The Practical Lawyer's Manual of Pre-Trial Discovery* 33, 35 (1973) (witness should be instructed prior to testifying not to answer questions that his counsel objects to).

176. Although counsel may note on the record that the witness has been coached or that his counsel has obstructed the normal flow of question and answer, the witness's coached response will remain on the record and the questioner will have been deprived of an admission which might have been obtained but for the obstructive conduct.

177. Fed. R. Civ. P. 30(c), for example, specifically contemplates objections during depositions.

innocently intended, such interruptions create the disturbing inference that counsel is coaching his witness.¹⁷⁸ To assure the integrity of the deposition, interruptions should not be tolerated. Counsel can always confer with the witness on the record or, following the answer, off the record, but the questioner is entitled first to hear an untainted answer from the witness. The witness is permitted to add to an answer after such an off the record conference, but the questioner is entitled to have the sequence and the substance of the original answer-conference-revised answer apparent on the record.

Second, rule 3(f) prohibits counsel from "confer[ing] with the witness about the questioning . . . during any temporary break in that questioning during a deposition session." This provision is directed at the short recesses called by the witness or counsel in the midst of questioning at a single deposition session; for example, the five minute "lavatory recess" that becomes a cram session conducted by the witness's counsel.¹⁷⁹ Recesses should be requested for valid purposes only, and should be confined to such purposes, particularly when the questioning has reached a sensitive area of the interrogation.

A deposition should approximate, as nearly as possible, the steady flow of questioning at a trial; it is not designed to be a forum for counsel's "canned" testimony. The second prohibition of rule 3(f), therefore, seeks to assure each questioner an uninterrupted flow of his or her questioning. Indeed, during short recesses at a trial, it is generally understood and commonly directed by the court that counsel should not confer with a witness currently on the stand;¹⁸⁰ this procedure should apply during depositions as well. The provisions of rule 3(f), however, should not affect lunch breaks or day-to-day breaks in the deposition. Presumably, the questioner will agree to such breaks only after completing a discrete area or subject of testimony; thus, any additions or changes by the witness following extended breaks will be readily apparent in the record.¹⁸¹ Because such conferencing occurs at trial, it is consistent to afford that right in the midst of extended breaks in the deposition. Nor does the rule prohibit conferencing during breaks between questioning by different questioners—for example,

178. Magistrate Raby discussed such conduct in *In re New York City Mun. Sec. Litigation*, MDL No. 314, at 8 (S.D.N.Y. Dec. 20, 1979) ("[S]uch a tactic is both discourteous and improper. . . . Further conduct of this variety will not be tolerated . . .").

179. To prevent such cram sessions, questioning counsel are sometimes compelled to perform the unpleasant and embarrassing task of "shadowing" the witness and the witness's counsel to the lavatory during the break.

180. *Cf. Geders v. United States*, 425 U.S. 80, 83-85 (1976) (counsel may confer with witness but may not coach him); *United States v. Leggett*, 326 F.2d 613, 614 (4th Cir.) (counsel may confer with witness for purpose of obtaining exhibit with respect to which witness was to be questioned), *cert. denied*, 377 U.S. 955 (1964).

181. For a discussion of how and when to create a complete record of off-the-record events, see Kornblum, *supra* note 164, at 15-16.

between direct examination and cross-examination. Cross-examination is generally the appropriate time to clarify earlier testimony; changes made through questioning by a different counsel will be apparent on the record, so that the original questioner can point out the change and put forth any appropriate argument.

Third, rule 3(f) prohibits the "suggest[ion] [of] answers to the witness by counsel's objections or any other means in the course of the questioning." This proscription is designed to make explicit the impropriety of counsel's telling the witness what to say, whether overtly or by covert signals. The most common such abuse is the conversational objection, in which counsel purports to comment on the question's purpose or ask the questioner if he means a particular thing, but in the process alerts the witness to the response that counsel hopes he or she will give.¹⁸² If an extended discourse on the objection is necessary, which is rare, it should be conducted outside the presence of the witness.

There is no justification for counsel's use of signals to the witness; it is a form of cheating. Rule 3(f), coupled with the threat of sanctions for failure to heed its dictates,¹⁸³ will impress that message upon all counsel. Although the rule concededly cannot completely eliminate such conduct, it should, by making an express pronouncement, deter counsel who might otherwise believe that their actions are not necessarily improper.

Finally, rule 3(f) requires that counsel not "otherwise disrupt or interfere with the orderly and fair conduct of the deposition." This omnibus clause codifies what should be a basic policy of cooperation among counsel for the conduct of depositions in complex civil actions, and provides the court with sufficient latitude to curb any other abuses by counsel that flout or depart from this policy. Thus, the last portion of rule 3(f) should be given broad construction to achieve the goal of adherence to the rule's basic purpose to promote, in depositions, a good faith search for truth.

182. Many judges refuse to allow discussions of objections before the witness and jury at trial, requiring those matters to be taken up with the court at side-bar, in the robing room, or in closed session at court. The purpose of this procedure is to prevent witnesses from being influenced by matters extraneous to their testimony. See *United States v. Whiteside*, 404 F. Supp. 261 (D. Del. 1975); R. Keeton, *Trial Tactics and Methods* § 5.5 (2d ed. 1973). *But cf.* *United States v. Brown*, 547 F.2d 36 (3d Cir. 1976) (witnesses not excluded during prosecutor's opening statement because no prior showing of why failure to exclude might prejudice defendant), *cert. denied*, 431 U.S. 905 (1977). This rationale is similar to that underlying Fed. R. Evid. 615 which permits the court to exclude witnesses from the trial until their testimony is taken. See, e.g., *Geders v. United States*, 425 U.S. 80, 87 (1976); *Taylor v. United States*, 388 F.2d 786, 788 (9th Cir. 1967); *Braswell v. Wainwright*, 330 F. Supp. 281, 283 (S.D. Fla. 1971), *modified*, 463 F.2d 1148 (5th Cir. 1972). This exclusion rule also applies at depositions. *Williams v. Electronic Control Sys., Inc.*, 68 F.R.D. 703 (E.D. Tenn. 1975).

183. See pt. VII *infra*.

F. *Deposition Corrections and Execution of Transcript*

Last minute, unexplained transcript alterations are an occasional, yet annoying problem in complex civil litigation.¹⁸⁴ Most witnesses and counsel hesitate to make major changes in deposition answers, but circumstances sometimes require even the most conservative persons to alter an answer.¹⁸⁵ Although transcript corrections or changes usually are not of major significance to the case, sometimes they can alter the entire meaning of an answer.¹⁸⁶ Rule 30(e) of the Federal Rules of Civil Procedure affords a witness the opportunity to make corrections or alterations in the transcript of a deposition before signing it, and requires that the witness also state the reasons for the changes;¹⁸⁷ the courts have consistently required the witness to include a justifying explanation for such alterations.¹⁸⁸ In practice, the questioner is permitted to read aloud the original answer and the corrected answer to call the change to the court's or jury's attention. The stated reason for the change is also usually read to counter any unfair inference from the mere fact of change.¹⁸⁹ The court and jury can then weigh the change and determine for themselves the effect it should be given.

Basic fairness is and should remain the standard for such alterations. As long as the examiner has a chance to confront the witness as to the change, the examiner can raise little objection to it.¹⁹⁰ This does

184. A witness is entitled to consult privately with his or her counsel regarding the transcript and any alterations he or she wishes to make in it. *Rogers v. Roth*, 477 F.2d 1154, 1159 (10th Cir. 1973); *Erstad v. Curtis Bay Towing Co.*, 28 F.R.D. 583, 584 (D. Md. 1961).

185. For example, the stenographic reporter may make errors that change the meaning of an answer. Compare "I did it. Sometimes it seemed proper" with "I did it sometimes. It seemed proper."

186. *See, e.g., Turchan v. Bailey Meter Co.*, 21 F.R.D. 232, 233 (D. Del. 1957) ("yes" changed to "no").

187. Fed. R. Civ. P. 30(e) states, in pertinent part: "When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign."

188. *See, e.g., Architectural League v. Bartos*, 404 F. Supp. 304, 311 n.7 (S.D.N.Y. 1975); *Colin v. Thompson*, 16 F.R.D. 194, 195 (W.D. Mo. 1954).

189. *See Rogers v. Roth*, 477 F.2d 1154, 1158-60 (10th Cir. 1973) (illustrating the proper procedure to follow at trial regarding deposition changes). *See also Usiak v. New York Tank Barge Co.*, 299 F.2d 808, 810 (2d Cir. 1962).

190. Often, the deposition will be reopened to permit further questioning with respect to the changes. *See, e.g., Erstad v. Curtis Bay Towing Co.*, 28 F.R.D. 583, 584 (D. Md. 1961); *De Seversky v. Republic Aviation Corp.*, 2 F.R.D. 113 (E.D.N.Y. 1941). *But cf. Allen & Co. v. Occidental Petroleum Corp.*, 49 F.R.D. 337, 341 (S.D.N.Y. 1970) (further cross-examination not needed because the changed testimony was consistent with original testimony).

not suggest that the right to confront will satisfy an examiner who elicited an admission during the deposition that the witness has since changed. Only if the examiner is denied the right to confront, however, will the significance of the change, no matter how dramatic, be perhaps too prejudicial to allow into evidence at trial.¹⁹¹ The standard of fairness affords the proper balance: it permits the examiner a maximum opportunity to test the alteration and emphasize it.

*Allen & Co. v. Occidental Petroleum Corp.*¹⁹² illustrates the current status of the law on these points. A plaintiff's witness from Europe, who was questioned for more than a week,¹⁹³ made extensive changes and corrections in his deposition answers by annexing a sworn statement consisting of twelve pages. In the annexed statement, he detailed the changes and corrections, and gave reasons for each. The defendant claimed that seventy-three changes were "material matters of substance" and moved to disallow them on various grounds, arguing that the witness did not have the right to make material changes and that, in any event, changes could not be made by a separate statement. The defendant also argued that the changes were so material that the deposition was rendered useless, requiring the witness to be recalled and reexamined.¹⁹⁴ The court rejected all of these contentions, holding that "the Rule places no limitations on the type of changes that may be made by a witness before signing this deposition. . . . [T]he witness may make changes of any nature, no matter how fundamental or substantial."¹⁹⁵ The court further stated:

The Rules are to be liberally construed. Here the witness appeared before the notary before whom the deposition had been taken, stated the changes he had made, initialed them, and gave the reasons for the changes. He then swore to his changes and the reasons therefor. Under these circumstances, we find that Rule 30(e) has been adequately complied with.¹⁹⁶

The court reasoned that, although a recall is sometimes appropriate, the nature of the particular corrections in the case before it was not so material as to require a recall.¹⁹⁷

Allen demonstrates the propriety of changes of any sort when made in a manner reasonably complying with the dictates of rule 30(e). It also shows, however, that the rule can thwart an examiner who, in good faith, seeks to probe the reason for the changes by recalling the witness, especially when there is a substantial likelihood that the

191. See Fed. R. Evid. 403.

192. 49 F.R.D. 337 (S.D.N.Y. 1970).

193. *Id.* at 339. The deposition transcript totalled 1,200 pages.

194. *Id.*

195. *Id.* at 340.

196. *Id.* at 341.

197. *Id.*; see note 190 *supra*.

witness will be unavailable at trial. The former aspects of *Allen* appear entirely proper; the latter, however, may be too restrictive, particularly when the changes are substantive.¹⁹⁸

Rule 3(g) of the Proposed Rules attempts to retain the benefits of the *Allen* rationale while resolving its deficiencies. It recognizes the right of a witness to change a deposition answer. Changes are not necessarily nefarious or untruthful,¹⁹⁹ and the witness should be given a chance to justify the change if so desired. But, unlike rule 30(e), rule 3(g) additionally requires promptness in making the change and provides an absolute "right to recall" the witness for further examination regarding the change. The right to recall is designed to ensure that the examiner has an opportunity to confront the witness, to test the witness's resolve in making the change and to inquire into other matters that the change makes pertinent, but which the questioner had deferred investigating because of the original answer. Additionally, to assure all sides a full opportunity to see that the truth is probed and explained, rule 3(g) grants the right to recall a witness to any party participating in the deposition, including the witness's own counsel.

To prevent a wholesale reopening of the deposition, rule 3(g) expressly limits the right to recall to "the subject matter of the change or correction." Use of the phrase "subject matter" recognizes that the change or correction may refer to new areas or require questions beyond the express language of the change or correction. This phrase does not suggest, however, that any remotely pertinent topic may be examined in the recall session. A reasonable nexus to the transcript alteration must be shown; and, of course, counsel must avoid repetition of questions previously asked.²⁰⁰

The right to recall is optional and must be requested under rule 3(g) "within twenty (20) days of receipt of [the] correction or change." Also, the rule requires that the transcript be presented to the witness "for review and signature . . . promptly after the deposition session" and be signed and returned "within twenty (20) days of receipt thereof or . . . be deemed to have [been] signed . . . as transcribed without correction or change."²⁰¹ These provisions should ensure promptness in complet-

198. The courts sometimes *do* bar deposition changes if the changes are substantive and the witness is unavailable at trial. *See, e.g., Architectural League v. Bartos*, 404 F. Supp. 304, 311 n.7 (S.D.N.Y. 1975) (court refused to allow the changes by a non-party witness who was unavailable at trial, even though the opposing counsel had cooperated in attempting to secure the witness's presence at trial).

199. *See, e.g., Rogers v. Roth*, 477 F.2d 1154, 1159 (10th Cir. 1973) (changes in deposition transcripts are "contemplated and on occasion . . . obviously necessary").

200. Otherwise, the deposition may be terminable under Fed. R. Civ. P. 30(d) for harassment and annoyance. *See* note 141 *supra*.

201. Although the court may not order the deposition to be signed, *Mortensen v. Honduras Shipping Co.*, 18 F.R.D. 510, 511 (S.D.N.Y. 1955), it can deem the deposition signed or admit it

ing the deposition and resolving the matter of changes so that the deposition process does not unduly delay discovery.

A potential loophole in the rule is the absence of a specific time limitation for presentation of the transcript to the deponent. This ambiguity is unavoidable, however, simply because the examiner cannot control the stenographic reporter or the reporter's business schedule. Nevertheless, it is expected that the transcript will be prepared by the reporter and submitted to counsel within two to three weeks and no later than thirty days following the testimony. If a longer delay is the fault of the questioner, rather than of the reporter, sanctions are appropriate.²⁰² If the reporter is at fault, presumably the court could take appropriate action to rectify the problem. Counsel are expected to raise this matter with the court promptly, and the court should encourage its quick resolution.

Recognizing the profound effect transcript alterations can have upon the case, rule 3(g) also codifies the existing rule that the questioner may read the original answer and the corrected answer at trial,²⁰³ and, if "a portion of a deposition . . . is corrected or changed for a reason other than grammatical or transcription error," the stated reason for the change must be read. This provision seeks to achieve uniformity in the manner in which deposition transcript changes are handled at trial.²⁰⁴ Counsel's knowledge at trial of the practical consequences of transcript changes will enable them to reach early decisions on other aspects of discovery, such as whether to seek a witness recall, or which other documents or depositions they should investigate on the point in issue.

The final phrase of rule 3(g) preserves all evidentiary objections arising out of transcript corrections and the stated reasons therefor. If the transcript correction or the reason therefor runs afoul of the Federal Rules of Evidence, a proper objection will lie, preventing hearsay and other improper evidence from finding its way into the case through the vehicle of transcript changes. The court should not, however, permit the responding party to abuse this provision by making a significant transcript objection, justifying it with an objectionable reason, and then allowing that party to object to the reading of the reason at trial. The Federal Rules of Evidence afford the court sufficient latitude to admit into evidence otherwise inadmissible evidence, or to exclude otherwise admissible evidence when justice requires,²⁰⁵ and the courts are expected to utilize these provisions to achieve the purposes underlying rule 3(g).

into evidence unsigned, *Porter v. Seas Shipping Co.*, 20 F.R.D. 103, 109 (S.D.N.Y. 1956). See also *Trade Dev. Bank v. Continental Ins. Co.*, 469 F.2d 35 (2d Cir. 1972).

202. See pt. VII *infra*.

203. See note 189 *supra*.

204. *Id.*

205. Fed. R. Evid. 403, 803(24), 804(b)(5).

G. *Scope of Cross-Examination*

Counsel sometimes raise a technical but troublesome objection during depositions when a party interposes questions on cross-examination that go beyond the scope of the direct examination without having first served notice that it wishes to depose that particular witness.²⁰⁶ The present law is not entirely clear on who should prevail when this occurs. Rule 30(c) of the Federal Rules of Civil Procedure provides that "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence."²⁰⁷ Rule 611(b) of the Federal Rules of Evidence provides: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."²⁰⁸ On their face, these rules limit a cross-examining party to the scope of direct examination, but leave open the possibility for the court, in its discretion, to broaden the inquiry. Significantly, both former rule 43(b) of the Federal Rules of Civil Procedure²⁰⁹ and the federal courts prior to adoption of the Federal Rules of Evidence,²¹⁰ took a restrictive view on the permissible scope of cross-examination at depositions.

There was and still is, however, nearly universal condemnation of the restrictive rule by commentators on federal procedure and evidence. Professor Moore has noted that the restrictive rule was easily and regularly avoided because of the broad provisions of rule 32 of the Federal Rules of Civil Procedure²¹¹ regarding the use of depositions at trial or elsewhere.²¹² He has also criticized the rule for requiring the wasteful service of cross-notice of deposition.²¹³ Judge Weinstein and Professor Berger, after noting the disapproval of the rule by both Professors Wigmore²¹⁴ and McCormick,²¹⁵ have found the rule im-

206. See Fed. R. Civ. P. 30(b)(1).

207. *Id.* 30(c).

208. Fed. R. Evid. 611(b).

209. Fed. R. Civ. P. 43(b) (1938) provided that "the witness . . . may be cross-examined by the adverse party only upon the subject matter of his examination in chief." The rule was repealed when the Federal Rules of Evidence were adopted in 1975.

210. See, e.g., *Moyer v. Aetna Life Ins. Co.*, 126 F.2d 141, 143 (3d Cir. 1942); *Spray Prods., Inc. v. Strouse, Inc.*, 31 F.R.D. 211, 212 (E.D. Pa. 1962); cf. *Hood v. United States*, 365 F.2d 949, 951-52 (D.C. Cir. 1966) (trial court correctly compelled witness to answer on cross-examination).

211. Fed. R. Civ. P. 32(a).

212. Fed. R. Civ. P. 32(a)(2) permits any party to use a deposition of an adverse party "for any purpose." Fed. R. Civ. P. 32(a)(4) provides that if only part of a deposition is read at trial, "any party may introduce any other parts." See 4A J. Moore, *supra* note 64, ¶ 30.58, at 30-105.

213. 4A J. Moore, *supra* note 64, ¶ 30.57, at 30-78.1-102.

214. 3 J. Wigmore, *supra* note 101, §§ 1885-1890.

215. C. McCormick, *supra* note 97, § 24, at 50-51.

practical and a cause of unnecessary and counter-productive controversy over the proper scope of cross-examination.²¹⁶ They argue persuasively that the quest for truth, not mere gamesmanship, should be the aim of examination at deposition and trial.²¹⁷ Judge Weinstein has concluded:

Why then, despite the disapprobation of most legal writers and its tendency to promote discord does the restrictive rule endure as the majority rule and the rule which will continue to apply in federal courts? Probably primarily because it represents an approach to litigation which was formerly in vogue and has not yet fallen completely into disrepute, an approach which viewed litigation as a game between the parties which could only be won by strict adherence to the rules regardless of whether the rules promoted the ascertainment of truth. Such an approach is at variance with the aims of the federal rules of evidence expressed in Rule 102, the emphasis in Rule 401 on the reception of all relevant evidence, and the provisions in Article VI which implement the policy of admissibility by abolishing incompetencies in Rule 601 and by abrogating the rule against impeaching one's own witness in Rule 607.²¹⁸

Nevertheless, the consensus is that the restrictive rule still governs²¹⁹ and that the adoption of rule 611(b) and the repeal of rule 43(b) have made "very little change in the practice" on this matter.²²⁰

A restrictive interpretation of the right of cross-examination during a deposition appears to misconceive the deposition's basic purposes and requires formalism and gamesmanship to too great a degree. The other parties do not know, when they receive the deposition notice, what the scope of direct examination will be; they learn this only at the deposition. Opposing counsel's planned inquiry on cross-examination can be curtailed merely by the questioner's limiting direct examination to selected topics. Yet, under the rationale of depositions, if a witness has general knowledge of import to the case, all parties should be permitted to probe it. On the one hand, it can be argued that the strategy of limiting cross-examination by limiting direct examination can be avoided by the simple expedient of serving a cross-notice of deposition to protect one's right to broaden cross-examination; the other parties have a right to know beforehand which counsel are anticipating extensive questioning of the witness. On the other hand, the cross-notice procedure leads to unnecessary and time-consuming paperwork. To allow the search for truth to proceed without unnecessary expense and technical interruption, more flexibility is needed.

216. 3 J. Weinstein & M. Berger, *supra* note 91, ¶ 611[02]. See also Degnan, *Non-Rules Evidence Law: Cross-Examination*, 6 Utah L. Rev. 323, 336 (1959).

217. 3 J. Weinstein & M. Berger, *supra* note 91, ¶ 611[02], at 611-24 to 611-31.

218. *Id.* at 611-29 to 611-30 (footnote omitted).

219. See, e.g., *United States v. Ellison*, 557 F.2d 128 (7th Cir.), *cert. denied*, 434 U.S. 965 (1977). See also *Lis v. Robert Packer Hosp.*, 579 F.2d 819, 825 (3d Cir.), *cert. denied*, 439 U.S. 955 (1978).

220. 4A J. Moore, *supra* note 64, ¶ 30.58, at 30-105.

Rule 611(b) of the Federal Rules of Evidence²²¹ permits the court, even at trial when the parties presumably know from prior discovery what matters the witness will cover in his or her testimony, to loosen the restraints on cross-examination.²²² Certainly, no less latitude should be granted in discovery.

Proposed rule 3(h) would end this debate in complex civil actions by providing that cross-examination during a deposition "shall not be limited in scope to the subject matter covered on direct examination, regardless of whether a cross-notice of deposition has been served by the cross-examining party." Of course, if counsel attempts to complicate an otherwise simple deposition with an unduly extended or irrelevant cross-examination, the present discovery rules permit resort to the court for a protective order terminating the deposition.²²³ A deposition should not be the battlefield for the determination of the extent to which cross-examination during a deposition will be admissible at trial. Rule 32 of the Federal Rules of Civil Procedure²²⁴ and the Federal Rules of Evidence²²⁵ will control that issue.²²⁶ For example, although rule 30(a) of the Federal Rules of Civil Procedure permits a party to notice and take its own deposition,²²⁷ rule 32(a) limits the right of a party to read aloud its own deposition at trial.²²⁸ This limitation would continue under the Proposed Rules. In complex civil actions, however, rule 3(h) of the Proposed Rules is intended to supercede that portion of rule 32 that permits an objection at trial to the admissibility of a deposition cross-examination on the ground that the scope of the cross-examination went beyond the scope of the direct examination.²²⁹

221. Fed. R. Evid. 611(b).

222. *United States v. Drake*, 542 F.2d 1020, 1022 (8th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977).

223. Fed. R. Civ. P. 30(d); *see note 141 supra*.

224. Fed. R. Civ. P. 32.

225. Fed. R. Evid. 402-411, 602, 608-610, 701-704, 802-805, 1007.

226. *See United States v. Beechum*, 582 F.2d 898, 907 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

227. Fed. R. Civ. P. 30(a) provides that "any party may take the testimony of any person, including a party, by deposition upon oral examination." *See, e.g., Richmond v. Brooks*, 227 F.2d 490, 492-93 (2d Cir. 1955); *Van Sciver v. Rothensies*, 122 F.2d 697, 699 (3d Cir. 1941).

228. Fed. R. Civ. P. 32(a) allows the use of depositions by any party for impeachment, *id.* 32(a)(1), but otherwise restricts depositions to use by an "adverse party," *id.* 32(a)(2); *see, e.g., Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 308 (5th Cir. 1978); *Lassiter v. United States Lines, Inc.*, 370 F. Supp. 427, 430 (E.D. Va. 1973), *aff'd*, 490 F.2d 1407 (4th Cir. 1974); *cf. Pike & Willis, The New Federal Deposition-Discovery Procedure: II*, 38 Colum. L. Rev. 1436, 1445-46 (1938) (a "party testifying on his own behalf [is] subject to the same limitations as other witnesses").

229. *See note 59 supra* and accompanying text.

V. RULE 4: INTERROGATORIES IN COMPLEX CIVIL ACTIONS

No discovery device has been characterized by more controversy than written interrogatories under rule 33 of the Federal Rules of Civil Procedure.²³⁰ The ABA Task Force has commented that “[n]o [other] single rule was perceived by the Bar at large . . . as engendering more discovery abuse.”²³¹ The abuses range from the service of voluminous interrogatories filled with nitpicking questions, on the part of the questioning party, to evasive answers, blanket objections and refusals to respond, on the part of the answering party.²³² Moreover, the very usefulness of interrogatories has been openly challenged. For example, Judge Pollack, formerly a leading trial lawyer in complex litigation, has observed: “Interrogatories as commonly utilized today in nearly every instance are a device to shirk preparation of a case—they are more often than not ‘a lazy lawyer’s way to obtain evasive answers’. The use of the product of interrogatories at trial is virtually nil.”²³³

In order for interrogatories to serve as an efficient discovery device in complex civil litigation, their use must be governed by a new set of guidelines. Rule 4 of the Proposed Rules attempts to provide such guidelines; no other rule is more crucial to achieving the overall purposes of the Proposed Rules.

A. *Types of Interrogatories*

Rule 4 first distinguishes between the different types of interrogatories according to their various purposes; “identifying,” “expert” and “substantive.”²³⁴ Because each type serves a different purpose, rule 4 makes each subject to discrete requirements. And, to keep the use of interrogatories under control, rule 4(d) requires that they be served “in separate sets, each limited to one type and titled to indicate which such type of interrogatories are involved.”

Rule 4(a) defines identifying interrogatories as “those which elicit merely the names and addresses of witnesses and potential witnesses or the file description or title, location and custodian of documents and other physical evidence.”²³⁵ Normally, counsel would serve such inter-

230. Fed. R. Civ. P. 33; see Kirkham, *supra* note 8, at 203.

231. ABA Task Force Report, *supra* note 31, at 20; see Preliminary Draft of 1970 Amendments, *supra* note 5, at 252; Cohn, *supra* note 5, at 276; Rosenberg, *supra* note 27, at 490; Schroeder & Frank, *supra* note 8, at 478. *But cf.* Doskow, *supra* note 15, at 500 (arguing that depositions engender the most controversy).

232. See Kirkham, *supra* note 8, at 203.

233. Pollack, *supra* note 8, at 224.

234. Fed. R. Civ. P. 26(e)(1) similarly distinguishes between different types of interrogatories, with respect to required supplementation of prior complete responses.

235. See, e.g., *Olmert v. Nelson*, 60 F.R.D. 369, 371-72 (D.D.C. 1973); *Cleo Wrap Corp. v. Eisner Eng'r Works*, 59 F.R.D. 386, 388 (M.D. Pa. 1972).

rogatories prior to other discovery requests, such as depositions or document requests, to help set the scene and reveal the cast of characters.²³⁶ If the responding party is a large public corporation, use of identifying interrogatories to obtain this type of information is preferable to seeking the information through depositions of individual officers, no one of whom will know all the desired information. Expert interrogatories are "those seeking the information discoverable under rule 26(b)(4) of the Federal Rules of Civil Procedure." Such information includes (1) the identity of the expert expected to testify, (2) "the subject matter on which the expert is expected to testify," (3) "the substance of the facts and opinions to which the expert is expected to testify," and (4) "a summary of the grounds for each opinion" the expert is expected to state.²³⁷ Rule 26(b)(4)(A)(i) specifically recognizes that interrogatories are a suitable, indeed preferable, device for eliciting this information, at least in the first instance.²³⁸ Substantive interrogatories are characterized in rule 4(a) as "all other interrogatories, such as those asking for the factual circumstances of the underlying transactions involved in the action, those directed at the merits of the action and those seeking to amplify upon the contentions of the parties."²³⁹ Because interrogatories of this type commonly lead to abuse and are of only questionable value, rule 4 attempts to curb both their excessive use and the evasive answers given in response to proper interrogatories.

It is not always easy to distinguish between identifying and substantive interrogatories: for example, in a case involving the alleged misappropriation of the clients of a business, an interrogatory that requests an identification of all such clients misappropriated, or an interrogatory that requests specification of the documentary evidence of a particular allegation, is arguably both identifying and substantive. Because they seek a listing of persons or documents, these interrogatories will normally fall within the category of identifying interrogatories, but follow-up interrogatories seeking details of the acts of misappropriation, for example, would be substantive interrogatories,

236. Cf. *Bowman v. General Motors Corp.*, 64 F.R.D. 62, 66, 69 (E.D. Pa. 1974) (illustrating how such interrogatories can become abusive when not reasonably confined in scope). See also *Shang v. Hotel Waldorf-Astoria Corp.*, 77 F.R.D. 468 (S.D.N.Y. 1978) (mem.).

237. Fed. R. Civ. P. 26(b)(4)(A)(i); see, e.g., *Weiner v. Bache Halsey Stuart, Inc.*, 76 F.R.D. 624 (S.D. Fla. 1977).

238. Fed. R. Civ. P. 26(b)(4)(A)(i). The court may thereafter permit other discovery of the expert's opinions and testimony by, for example, deposition. *Id.* 26(b)(4)(A)(ii); see, e.g., *Herbst v. International Tel. & Tel. Corp.*, 65 F.R.D. 528, 530-31 (D. Conn. 1975); cf. *Wilson v. Resnick*, 51 F.R.D. 510, 511 (E.D. Pa. 1970) (production of reports denied because requesting party was adequately informed as to nature and substance of expert physician's testimony). See also *Graham*, *supra* note 92.

239. See, e.g., *In re Folding Carton Antitrust Litigation*, 76 F.R.D. 417 (N.D. Ill. 1977); *Johnson v. W. H. Stewart Co.*, 75 F.R.D. 541 (W.D. Okla. 1976).

which must be propounded separately from the identifying interrogatories.²⁴⁰ If the nature of an interrogatory is truly unclear, rule 4 deems it a substantive interrogatory and therefore subject to the greater judicial control and limitations envisioned for such interrogatories.²⁴¹

B. *Permissible Number of Interrogatories*

To a great extent, the controversy over interrogatories concerns their use as tools of harassment. Interrogatories may subject a party to endless and overly-particular questions, chiefly designed to make the prosecution of a claim or the assertion of an affirmative defense a costly and painful experience.²⁴² Further, debates inevitably arise as to the sufficiency of answers to interrogatories, yet very few of the answers are ever consulted at trial.²⁴³ In addition, interrogatories frequently contain extensive and confusing definitions and answering instructions which serve to complicate further the process of responding and objecting. Consider, for example, the published lament of one attorney in the multidistrict *Beef Industry Antitrust Litigation*:²⁴⁴

[T]here is presently on file a first set of plaintiffs' joint consolidated interrogatories comprising 176 pages. The 155 numbered interrogatories are subdivided into about 1,800 separate parts. Because of extensive cross-referencing among the interrogatories, the total number of questions posed for the defendants runs into the tens of thousands. Some interrogatories, for example, each ask thirty-five questions about eleven different beef products. Thus, these interrogatories actually represent over 12,000 separate questions. Further, the interrogatories cover the time span of the last fourteen years. In some cases information is sought dating back to the year 1940 and even back to the early years of the century. In one interrogatory the defendant is asked to "identify" each and every telephone call made or received by its employees since 1963 while the particular defendant, engaged in the business of publication of news concerning the meat industry, was about its work in gathering such industry news. Another interrogatory even demands identification of all personnel of the defendant company since the year 1940, whose spouse or other relatives within the second degree, as defined by civil law, have held stock in, made loans to, or have served as an officer, director, or employee of another company in the beef industry.²⁴⁵

In a word, such a situation is absurd. Yet, it is not at all uncommon in

240. See rule 4(b), (c), Appendix.

241. *Id.*; see, e.g., *Professional Adjusting Sys. of America, Inc. v. General Adjustment Bureau*, 373 F. Supp. 1225 (S.D.N.Y. 1974); *Williams v. Thomas Jefferson Univ.*, 343 F. Supp. 1131 (E.D. Pa. 1972).

242. See, e.g., *SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp.*, 72 F.R.D. 110, 113 (N.D. Tex. 1976). See also *Halder v. International Tel. & Tel. Corp.*, 75 F.R.D. 657 (S.D.N.Y. 1977); *Krantz v. United States*, 56 F.R.D. 555 (W.D. Va.), *vacated*, 64 F.R.D. 732 (W.D. Va. 1972) (upon joint oral motion for good cause shown).

243. Pollack, *supra* note 8, at 224; see cases cited note 278 *infra*.

244. 419 F. Supp. 720 (J.P.M.L. 1976).

245. McElroy, *Federal Pre-Trial Procedure in an Antitrust Suit*, 31 Sw. L.J. 649, 682 (1977).

complex civil actions,²⁴⁶ although, fortunately, the abuse does not often rise to the level found in the *Beef Industry* case.

The problem has not gone unnoticed. The Supreme Court has remarked on the "social cost" of such abuses,²⁴⁷ and there is a growing, albeit reluctant, trend in the federal judiciary toward the use of sanctions to deter such harassment.²⁴⁸ The Federal Judicial Center's *Manual for Complex Litigation* also takes specific note of the problem but, unfortunately, passes the responsibility to the district courts:

In the absence of exceptional circumstances, the number of written, carefully drawn interrogatories that are required in a complex case is very limited. To eliminate the loss of time and expense resulting from unnecessary and redundant written interrogatories, a court may by local rule or order limit the number of interrogatories that may be propounded by a party to a prescribed number, in the absence of special leave of court.²⁴⁹

Some district courts have adopted such local rules.²⁵⁰ State courts have adopted similar rules, placing a duty on counsel to "avoid undue detail, and to avoid the imposition of any unnecessary burden or expense" by their use of or response to interrogatories.²⁵¹

The history of rule 33 of the Federal Rules of Civil Procedure mirrors the initial high expectations for the value of written interrogatories, and the harsh reality that their unlimited use has spawned. As originally adopted in 1938, rule 33 merely established the right to serve interrogatories and the time and procedure for responses to interrogatories; if there were objections, no response was required until the court had ruled on them.²⁵² In 1946, the rule was substantially

246. See, e.g., *In re United States Financial Sec. Litigation*, 74 F.R.D. 497 (S.D. Cal. 1975); *Jarosiewicz v. Conlisk*, 60 F.R.D. 121 (N.D. Ill. 1973); *Krantz v. United States*, 56 F.R.D. 555 (W.D. Va.), *vacated*, 64 F.R.D. 732 (W.D. Va. 1972) (upon joint oral motion for good cause shown); cf. *Alexander v. Parsons*, 75 F.R.D. 536, 539 (W.D. Mich. 1977) (mere fact that discovery is burdensome is not sufficient to bar such discovery, provided information sought may lead to discovery of admissible evidence).

247. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975).

248. See *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1067-68 (2d Cir. 1979); *Associated Radio Serv. Co. v. Page Airways, Inc.*, 73 F.R.D. 633, 636 (N.D. Tex. 1977); Epstein, Corcoran, Krieger & Carr, *An Up-Date on Rule 37 Sanctions After National Hockey League v. Metropolitan Hockey Clubs, Inc.*, 84 F.R.D. 145 (1979); *Emerging Deterrence*, *supra* note 18, at 1034-35; notes 432-38 *infra* and accompanying text.

249. *Manual for Complex Litigation*, *supra* note 14, § 1.501, at 107-08.

250. See, e.g., N.D. Ill. Gen. R. 9(g). This rule has been recommended as a model by the *Manual for Complex Litigation*, *supra* note 14, § 1.501. See also M.D. Fla. Gen. R. 3.03(a); Cohn, *supra* note 5, at 277-78 (noting that other districts have instead prescribed uniform interrogatories for certain cases).

251. See, e.g., Ill. Sup. Ct. R. 213(b), Ill. Rev. Stat., ch. 110A, § 213(b) (1975); Kiely, *supra* note 112, at 204.

252. Fed. R. Civ. P. 33 (1938) provided: "Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in

revised to provide, *inter alia*, a new procedure to cope with the growing number of objections to interrogatories.²⁵³ The objecting party now either had to answer or, on its own motion, seek judicial relief.²⁵⁴ This procedure reflected the then-prevailing view that the growing interrogatory problem was primarily attributable to the responding party.²⁵⁵ Indeed, the Advisory Committee to the Judicial Conference expressed its continued faith in interrogatories as an inexpensive alternative to depositions, and rejected any notion of limiting the permissible number of interrogatories:

There is no reason why interrogatories should be more limited than depositions, particularly when the former represent an inexpensive means of securing useful information. . . . [T]he number of or number of sets of interrogatories to be served may not be limited arbitrarily or as a general policy to any particular number, but . . . a limit may be fixed only as justice requires to avoid annoyance, expense, embarrassment or oppression in individual cases.²⁵⁶

By 1970, disillusionment had begun to set in. The Advisory Committee took special note of the excessive bickering that characterizes interrogatories:

There is general agreement that interrogatories spawn a greater percentage of objections and motions than any other discovery device. . . . [A]lthough half of the litigants

its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party." *See, e.g., Kingsway Press Inc. v. Farrell Publishing Co.*, 30 F. Supp. 775 (S.D.N.Y. 1939); *Tudor v. Leslie*, 1 F.R.D. 448 (D. Mass. 1940).

253. *See* 1946 Advisory Comm. Notes, *supra* note 64, at 461.

254. Fed. R. Civ. P. 33 (1946) provided: "Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined." *See, e.g., Luey v. Sterling Drug, Inc.*, 240 F. Supp. 632 (W.D. Mich. 1965); *Pressley v. Boehlke*, 33 F.R.D. 316 (W.D.N.C. 1963).

255. *See* 1946 Advisory Comm. Notes, *supra* note 64, at 461-62.

256. *Id.* (citations omitted).

resorted to depositions and about one-third used interrogatories, about 65 percent of the objections were made with respect to interrogatories and 26 percent related to depositions.²⁵⁷

The Advisory Committee also acknowledged that a "tardy response to interrogatories is common, virtually expected."²⁵⁸ Reflecting the new view that the questioning party was responsible for much of the problem, rule 33 was further amended in 1970. The new rule revises the procedure for stating objections and, if the parties are unable to resolve privately the responding party's objection, now requires the questioning party to take the initiative in seeking a court ruling.²⁵⁹

The application of the 1970 version of rule 33, however, has not been encouraging, at least insofar as complex civil actions are concerned. Although motion practice over interrogatories has apparently decreased, their effective use has seriously diminished.²⁶⁰ Rather than risk an adverse ruling or endure the delay and expense of a motion, the recipient of inadequate answers or groundless objections generally ignores the response,²⁶¹ and turns to depositions or documents to uncover the information that the interrogatories have failed to elicit. The result has been an ever-growing sense of frustration and lack of confidence in the utility of interrogatories for other than ministerial matters or general identification purposes. Rarely do broadly-worded interrogatories addressed to the merits evoke useful answers. On matters of substance, simple answers generally are given only in response to precisely drafted interrogatories, limited to a particular factual issue or evidentiary item.²⁶²

In an effort to resolve these problems, the ABA Task Force proposed new, strict limitations on the use of rule 33. The Task Force recommended that rule 33(a) be amended to provide:

Any party may serve as a matter of right upon any other party written interrogatories not to exceed thirty (30) in number to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or government-

257. Preliminary Draft of 1970 Amendments, *supra* note 5, at 252. See also Speck, *supra* note 24, at 1157.

258. Preliminary Draft of 1970 Amendments, *supra* note 5, at 252.

259. Fed. R. Civ. P. 33(a) currently provides, in pertinent part: "Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. . . . The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory." The Advisory Committee explained this provision as follows: "If objections are made, the burden is on the interrogating party to move under Rule 37(a) for a court order compelling answers, in the course of which the court will pass on the objections. The change in the burden of going forward does not alter the existing obligation of an objecting party to justify his objections." Preliminary Draft of 1970 Amendments, *supra* note 5, at 253.

260. See note 233 *supra* and accompanying text.

261. See Doskow, *supra* note 15, at 503-04.

262. Such interrogatories are also known as "pin-point" or "rifle-shot" interrogatories.

tal agency, by any officer or agent, who shall furnish such information as is available to the party. *Each interrogatory shall consist of a single question.* Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. *Leave of court, to be granted upon a showing of necessity, shall be required to serve in excess of thirty (30) interrogatories.*²⁶³

The Task Force asserted that a "numerical limitation on interrogatories filed as a matter of right [is] the soundest approach to limiting interrogatory abuse and to enhancing better use of interrogatories as a discovery mechanism."²⁶⁴ Its selection of a limit of thirty interrogatories "was based on direct Committee experience with existing practice in certain jurisdictions."²⁶⁵

In its proposed amendment of rule 33(a), the Judicial Conference has rejected the Task Force's numerical limitation concept, explaining that "[i]n the judgment of the [Advisory] Committee, such a general, nationwide limitation is unwise. . . . [T]he limitation, subject to leave of court, will involve the courts in endless disputes without guidelines for their resolution."²⁶⁶ The Judicial Conference would prefer to leave the matter to the federal district courts for promulgation of individual local rules, reasoning that "a district familiar with the generality of its business and the habits of its bar" can best determine what "a reasonable number of questions" should be for its area.²⁶⁷ Its amendment would, therefore, merely empower the district courts "by action of a majority of the judges thereof" to limit the number of interrogatories as that majority sees fit.²⁶⁸

The problem with the approaches of both the Judicial Conference and the ABA Task Force is that they attempt to prescribe remedies on the basis of geography rather than type of litigation. Not every case requires the same controls on interrogatories. Special rules for complex civil actions can begin to curb abuses in those cases without disrupting the utility of interrogatories in other, less complex cases.²⁶⁹ Rule 4 of the Proposed Rules is premised on the theory that substantive interrogatories are effective in complex civil litigation only when limited in size and scope.²⁷⁰ Also, rule 4(a) distinguishes substantive inter-

263. ABA Task Force Report, *supra* note 31, at 18 (amendments in italics).

264. *Id.* at 20.

265. *Id.* The Task Force did not, however, explain what its experience consisted of or identify the jurisdictions involved. *Id.*

266. Preliminary Judicial Conference Amendments, *supra* note 36, at 648-49. This language in the Advisory Committee Note was deleted from the 1979 revised amendments. Revised Judicial Conference Amendments, *supra* note 37, at 326.

267. Preliminary Judicial Conference Amendments, *supra* note 36, at 649; *see* note 250 *supra*.

268. Preliminary Judicial Conference Amendments, *supra* note 36, at 646.

269. *See* *Frost v. Williams*, 46 F.R.D. 484, 485 (D. Md. 1969).

270. *Id.*; *Breeland v. Yale & Towne Mfg. Co.*, 26 F.R.D. 119, 120-21 (E.D.N.Y. 1960); Note, *Limiting the Scope of Litigation*, 1979 U. Ill. L.F. 211, 225-29.

rogatories from identifying and expert interrogatories, recognizing that different considerations are involved with respect to each.

Because identifying and expert interrogatories provide a relatively inexpensive and efficient method of pretrial disclosure for the limited topics they cover,²⁷¹ rule 4(b) permits any party to propound whatever number of identifying and expert interrogatories as "are necessary to enable it to prepare for trial or conduct other permissible pretrial discovery," subject only to the proviso that they must be "reasonable in number, scope and subject matter." Also, under rule 4(d), identifying and expert interrogatories must be answered within fourteen days, rather than the thirty days applicable to substantive interrogatories, so as to shorten the waiting period for such preliminary information.²⁷² Identifying information is often a necessary precondition to other discovery requests and, consequently, should be supplied as soon as practicable. In the rare instances in which such information is truly too difficult to obtain within the fourteen day period, an extension of time can be granted by opposing counsel or the court.²⁷³ Moreover, under rule 26(e) of the Federal Rules of Civil Procedure, the responding party may supplement or amend its response, if necessary, after first answering to the best of its ability.²⁷⁴

The procedures governing substantive interrogatories are more restrictive. Rule 4(c) of the Proposed Rules limits counsel to thirty-five separate substantive interrogatories, subject to the right to apply for the court's permission to serve further interrogatories of the same type.

271. See Thompson, *How to Use Written Interrogatories Effectively*, in *The Practical Lawyer's Manual of Pretrial Discovery* 72 (1973); notes 235-38 *supra* and accompanying text.

272. The pre-1970 version of rule 33(a) required that all interrogatory answers be served within 15 days. Fed. R. Civ. P. 33 (1946); note 254 *supra*. The Advisory Committee to the 1970 amendments noted that this provision had proved too short a time period for most interrogatories. Preliminary Draft of 1970 Amendments, *supra* note 5, at 252. This criticism appears well taken only as to substantive interrogatories; thus, proposed rule 4(d) still provides 30 days for answers to them.

273. See, e.g., *EEOC v. New Enterprise Stone & Lime Co.*, 74 F.R.D. 628, 630 (W.D. Pa. 1977); cf. *Mid-America Facilities, Inc. v. Argonaut Ins. Co.*, 78 F.R.D. 497, 498 (E.D. Wis. 1978) (responding party should object to interrogatory rather than request the court by motion to permit a deferred response).

274. Fed. R. Civ. P. 26(e) provides: "A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired . . ." See, e.g., *Havenfield Corp. v. H & R Block, Inc.*, 509 F.2d 1263, 1271-72 (3th Cir.), *cert. denied*, 421 U.S. 999 (1975). Rule 26(e) further provides, however, that supplementation is required for identifying and expert interrogatories, Fed. R. Civ. P. 26(e)(1), and that a party must amend an answer that he knows was incorrect or is no longer true, Fed. R. Civ. P. 26(e)(2). The court can also order supplementation, or the interrogating party can serve a specific request for supplementation, prior to trial, to require it. Fed. R. Civ. P. 26(e)(3). Several district courts have local rules providing directives on the matter of supplementation. Cohn, *supra* note 5, at 279; cf. *Matlack, Inc. v. Hupp Corp.*, 57 F.R.D. 151, 160-61 (E.D. Pa. 1972) (demonstrating the limitations on the right to amend prior interrogatory answers).

The rule also directs all parties and the court to "ensure that duplicative substantive interrogatories are not served," and that those substantive interrogatories which are served "represent good faith inquiries into matters of substance in the action." If substantive interrogatories fail to comply with these provisions, the court should strike them and, when appropriate, direct sanctions against counsel.²⁷⁵

If the thirty-five interrogatory limit is exceeded, irrespective of the good faith of counsel, "the court shall strike the entire set of interrogatories and the interrogating party shall be deemed to have forfeited the right to serve interrogatories as of right." Also, "[i]n determining whether more than thirty-five (35) substantive interrogatories have been propounded, the court may deem the subparts of an interrogatory to be separate interrogatories." These provisions are designed to deter counsel from the current, often abusive, practice of serving interrogatories with sundry subparts, each of which seeks an extensive, sometimes duplicative, response.²⁷⁶ Because long narratives or discourses are better sought on deposition, substantive interrogatories should ask only simple and direct questions. Rule 4(d) encourages this goal by expressly providing that "[e]ach interrogatory shall be separately stated and numbered and shall ask a single question without unnecessary or excessive subparts." Thirty-five direct questions should be sufficient to elicit the essence of any claim or defense and the basic factual contentions underlying it.²⁷⁷ The knowledge that only thirty-five substantive interrogatories will be permitted as of right should induce counsel to propound "rifle-shot" rather than "scatter-shot" interrogatories. Finally, when application is made for leave to serve further substantive interrogatories, the court should consider the nature of the substantive interrogatories previously served; if counsel failed to heed the dictates or spirit of rule 4, the court should ordinarily not permit him to serve any further interrogatories.

C. *Answers to Interrogatories*

A common obstacle to the effective use of interrogatories is that the responses they elicit are often little more than self-serving verbiage that thwarts the purpose of the question.²⁷⁸ The responding counsel views

275. See pt. VII *infra*.

276. At present, the courts, after striking burdensome interrogatories, generally permit counsel to rephrase and again propound interrogatories. See, e.g., *In re United States Financial Sec. Litigation*, 74 F.R.D. 497, 498 (S.D. Cal. 1975). This knowledge too often encourages counsel to attempt abusive interrogatories, because they will almost always receive a second chance to serve proper questions.

277. Thirty-five questions are more than most local comparable rules provide. See note 250 *supra*.

278. See, e.g., *Liquidometer Corp. v. Capital Airlines, Inc.*, 24 F.R.D. 319, 323-25 (D. Del. 1959); *Gellman v. Friedman*, 143 F. Supp. 383, 384 (S.D.N.Y. 1956).

the answer as a vehicle to expound on other irrelevant matters which dilute the question's pertinence, or to explain away an admission that the interrogatory seeks and is entitled to elicit. Although the questioning party can, of course, seek a court ruling to strike the answer's extraneous matter,²⁷⁹ there is no guarantee its motion will be granted. Thus, the costly and burdensome alternative of seeking a pretrial ruling on the matter is not a reasonable solution for this abuse.²⁸⁰

The last sentence of rule 4(d) would make explicit what should be an obvious rule, providing: "Answers [to interrogatories] shall be confined to the questions asked and shall respond directly to them, without evasion, obfuscation or unnecessary self-serving matter." If enforced by the sanction provisions of proposed rule 6,²⁸¹ this provision should curtail most abuses in answering interrogatories. Using interrogatories at all is of questionable utility unless counsel seriously undertake to improve the quality of answers. Simple direct answers should be the rule, not the exception.²⁸²

D. *The Option to Produce Business Records*

The 1970 amendments to the Federal Rules of Civil Procedure added a new concept to rule 33. An interrogatory that seeks information contained in discrete, identifiable documents from which the questioner can easily extract the information can now be responded to by answering the interrogatory or by specifying and producing the documents.²⁸³ There are two essential predicates to the right to exercise this option. First, the burden of ascertaining the answer from the documents must be substantially the same for both sides,²⁸⁴ and

279. Fed. R. Civ. P. 33(a), 37(a).

280. Doskow, *supra* note 15, at 503-04. Doskow states: "Of course most of the disputes over discovery are resolved without court rulings. Many of those resolutions are genuine and satisfactory compromises. Many of them, however, are really abject surrenders to the persistent adversary or the stubborn one. As Professor Rosenberg said, the lawyers lick their wounds and bear them. This is a matter of simple economics. There is a great temptation on the part of the wealthy litigant—and also of the not so wealthy lawyer with plenty of time on his hands—to wear down his opponent because it is simply too burdensome and expensive to seek a ruling. That temptation will exist as long as the making of a motion and seeing it through to a decision becomes in itself a 'federal case.'" *Id.*

281. See pt. VII *infra*.

282. To achieve this goal, the better rule under present case law is that, when it is reasonably feasible for the respondent to research or ascertain the necessary information to answer the interrogatory, it must do so and cannot simply disclaim knowledge in its answer. *Flour Mills of America, Inc. v. Pace*, 75 F.R.D. 676, 680 (E.D. Okla. 1977); *cf. La Chemise Lacoste v. Alligator Co.*, 60 F.R.D. 164, 171 (D. Del. 1973) (respondent must provide "readily available" facts).

283. Fed. R. Civ. P. 33(c).

284. *Id.*; see *United States v. 58.16 Acres of Land*, 66 F.R.D. 570, 573 (E.D. Ill. 1975); *Foster v. Boise-Cascade, Inc.*, 20 Fed. R. Serv. 2d 466, 470 (S.D. Tex. 1975); *Budget*

second, the responding party must specifically identify the pertinent documents from which the answer can be obtained.²⁸⁵ The Advisory Committee directed the responding party not to "impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records."²⁸⁶ Counsel in complex litigation have, nevertheless, flagrantly ignored these directives.

*In re Master Key Antitrust Litigation*²⁸⁷ illustrates the problem as it commonly arises in complex civil litigation. The plaintiff's counsel asked each of several defendants whether it had entered into any contract or agreement with their distributors for the sale of master keys and, if so, to specify the date, parties and terms of those agreements. One group of defendants responded that "if and to the extent" there was any such agreement, the information requested could be found in "defendant's files maintained at its Berlin, Connecticut plant."²⁸⁸ Finding that this response violated the express dictates of rule 33(c), the court held it insufficient.²⁸⁹ The court's opinion aptly captures the intended purpose of the rule:

It would be antipathetic to the spirit of the discovery rules to assume that the newly added Rule 33(c) was intended to diminish the duty of the parties to provide all information requested. Since a respondent is required to answer proper interrogatories, it is not plausible to assume that a response that an answer may (or may not) be found in its records, accompanied by an offer to permit their inspection is sufficient. This is little more than an offer to play the discredited game of blindman's [bluff] at the threshold level of discovery. The challenged answers furnish no information whatever.

[T]he option afforded by Rule 33(c) is not a procedural device for avoiding the duty to give information. It does not shift to the interrogating party the obligation to find

Rent-A-Car, Inc. v. Hertz Corp., 55 F.R.D. 354, 357 (W.D. Mo. 1972); *Thomason v. Leiter*, 52 F.R.D. 290, 290-91 (M.D. Ala. 1971). Another essential aspect of rule 33(c) is that the information is readily ascertainable from the documents. As the court stated in *Budget Rent-A-Car*: "[A] broad statement that the information sought is ascertainable generally from documents and that those documents are available for inspection is not a sufficient answer under Rule 33(c). Rather, the interrogated party must state specifically and precisely identify *which* documents will provide the information to be elicited." The court noted that "Rule 33 cannot, therefore, be used as a procedural device for avoiding the duty to give information by shifting the obligation to find out whether information is ascertainable from the records which have been tendered." 55 F.R.D. at 357 (citations omitted).

285. Fed. R. Civ. P. 33(c); see *In re Professional Hockey Antitrust Litigation*, 63 F.R.D. 641, 645 (E.D. Pa. 1974), *rev'd on other grounds*, 531 F.2d 1188 (3d Cir.), *rev'd sub nom.* *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Budget Rent-A-Car v. Hertz Corp.*, 55 F.R.D. 354, 357 (W.D. Mo. 1972); *In re Master Key Antitrust Litigation*, 53 F.R.D. 87, 90 (D. Conn. 1971). Also implicit under this requirement is that the documents actually contain the answer to the question. See, e.g., *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. 115, 117 (N.D. Ga. 1972).

286. Preliminary Draft of 1970 Amendments, *supra* note 5, at 255.

287. 53 F.R.D. 87, 88-89 (D. Conn. 1971).

288. *Id.* at 89.

289. *Id.* at 90.

out *whether* sought after information is ascertainable from the files tendered, but only permits a shift of the burden to dig it out once the respondents have specified the records from 'where the answer' can be derived or ascertained. If the answers lie in the records of the defendants, they should say so²⁹⁰

Unfortunately, this standard has rarely been followed in complex litigation since *Master Key*.

Both the ABA Task Force and Judicial Conference recognized the continuing nature of abuse under rule 33(c). To correct the problem they have proposed to add the following sentence to the rule: "The specification provided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained."²⁹¹

This proposal, however, is insufficient to prevent abuse of the option to produce business records in complex civil litigation. Rule 4(e) of the Proposed Rules, therefore, suggests a broader revision.²⁹² First, to curb the misuse of rule 33(c) by those litigants who avoid providing basic factual information by substituting voluminous business records, rule 4(e) strictly limits the use of the rule 33(c) option to situations in which "the interrogatory calls for computations, statistical data, sum-

290. *Id.* Similarly, in *In re Professional Hockey Antitrust Litigation*, 63 F.R.D. 641 (E.D. Pa. 1974), *rev'd on other grounds*, 531 F.2d 1188 (3d Cir.), *rev'd sub nom.* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976), the court stated: "[I]n contravention of Fed. R. Civ. P. 33(c), the documents adverted to were wholly unspecified. . . . By the most liberal construction imaginable of the discovery provisions of the Federal Rules of Civil Procedure Metropolitan's 'answer' after four months fell drastically short of any minimal good faith compliance." *Id.* at 645.

291. ABA Task Force Report, *supra* note 31, at 19-20; Preliminary Judicial Conference Amendments, *supra* note 36, at 645-48; Revised Judicial Conference Amendments, *supra* note 37, at 340-41. The Task Force explained that its recommendation was "designed to eliminate the mechanical response of an invitation to 'look at all my documents.'" ABA Task Force Report, *supra* note 31, at 20. The Advisory Committee of the Judicial Conference further explained: "The Committee is advised that parties upon whom interrogatories are served have occasionally responded by directing the interrogating party to a mass of business records or by offering to make all of their records available, justifying the response by the option provided by this subdivision. Such practices are an abuse of the option. A party who is permitted by the terms of this subdivision to offer records for inspection in lieu of answering an interrogatory should offer them in a manner that permits the same direct and economical access that is available to the party." Revised Judicial Conference Amendments, *supra* note 37, at 341.

292. *See, e.g.*, *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 611 F.2d 32, 35-36 (3d Cir. 1979); *Budget Rent-A-Car, Inc. v. Hertz Corp.*, 55 F.R.D. 354, 357 (W.D. Mo. 1972); *Thomason v. Leiter*, 52 F.R.D. 290, 290-91 (M.D. Ala. 1971). This provision also comports with the apt rule that the burden of showing that the rule 33(c) option has been appropriately invoked is on the responding party; the interrogating party need not show its inappropriateness. *See Daiflon, Inc. v. Allied Chem. Corp.*, 534 F.2d 221, 227 (10th Cir.), *cert. denied*, 429 U.S. 886 (1976). As the *Thomason* court explained, regarding the creation of the rule 33(c) option in 1970: "The theory behind the amendment is to protect against abusive use of Rule 33. However, it is clear that the new amendment is not designed to impose on an interrogating party a mass of records and thereby make the ascertaining of the answers to the questions even more burdensome or expensive on the interrogating party." 52 F.R.D. at 291.

maries or other such abstracts of documents." The proposed rule intentionally emphasizes computations and statistical data—for example, prices and sales—because it is more likely that abstracting information from such documents will truly be equally burdensome for both sides. It does, however, permit use of the rule 33(c) option for "summaries or other such abstracts of documents," because circumstances may arise in which the latter are also equally accessible to both sides.²⁹³

Second, rule 4(e) amplifies the requirements for use of the option when the interrogating party seeks "narrative or other factual summar[ies]," for example, chronological summaries of events, conferences or communications. By requiring that the answer identify each principal event in the narrative or other summary and then key each event to specific, "individually identified" documents that provide a full answer to the question, rule 4(e) should prevent the practice of massive dumping of documents on an adversary solely to avoid revealing even a bare framework for the facts at issue.²⁹⁴ For example, an interrogatory may ask that the respondent list and summarize all meetings between two entities on a particular subject during the pertinent time period. If there are particular documents that detail events at the meetings, the answer might give the dates and other identifying information of the meeting and then refer to the specific notes, memoranda, minutes or other papers that describe what transpired. The responding party can, of course, also add further detail to its answer to supplement the documents, but it need not extract or retype them in making its response. By keying the events to particular documents, the interrogating party will receive the details necessary to ascertain the requested information and will have a readable answer for use at trial, without having to prove or debate at trial which particular documents provided the answer to the question.

Third, rule 4(e) requires the party invoking the rule 33(c) option to assist the interrogating party in deriving the answer from the documents produced, and to present the documents in readily comprehensible form.²⁹⁵ This provision is intended to facilitate discovery of certain documents commonly found in complex civil litigation, such as reviews of computer outputs, invoices, ledgers and other documents with symbolic references and abbreviations incomprehensible to the untutored eye. Thus, rule 4(e) would not only obviate fears that such documents will be misunderstood, but would also eliminate the need

293. *But cf.* *Concept Indus., Inc. v. Carpet Factory, Inc.*, 59 F.R.D. 546 (E.D. Wis. 1973) (responding party permitted to exercise rule 33(c) option even though the summaries were not equally accessible to both sides).

294. *See, e.g.*, *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 342-45 (10th Cir. 1975).

295. *But cf.* *United States ex rel. Schneider, Inc. v. Rust Eng'r Co.*, 72 F.R.D. 195 (W.D. Pa. 1976) (not necessary to cross reference documents with available index).

for questioners to serve further interrogatories or conduct depositions merely to comprehend the documents provided and to decipher their contents. This provision will also make narrative memoranda and correspondence containing complicated details or technical matters more easily understandable.

E. *Identification of Persons Participating in Response*

Interrogatories served upon a large corporation or association frequently require the assistance of several persons to respond to different aspects of the different questions.²⁹⁶ Yet, only one officer need sign the responses returned by the organization.²⁹⁷ Thus, interrogating counsel cannot determine who prepared which portion of the responses, and are left to guess which witnesses to depose or to call at trial, leading to further discovery and delay.

Rule 4(f) of the Proposed Rules³ resolves this problem by requiring that each set of answers to interrogatories contain "a statement identifying which persons (other than counsel) participated in making the answer to which interrogatories."²⁹⁸ The exclusion for counsel reflects an intent not to undermine the attorney-client privilege. Rather, rule 4(f) is intended to achieve the simple goal of enabling counsel to identify those persons whose knowledge is relevant to the issues in the case.²⁹⁹ The same goal has been sought in the past through the use of a separate, final interrogatory requesting identification of persons participating in the preparation of the response.³⁰⁰ Many attorneys find

296. For example, an interrogatory may ask for information about different departments of a corporation or with respect to meetings attended by two or more persons from the same company. If a completely accurate response is to be obtained, all persons involved should be consulted regarding the questions posed.

297. See *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 508 n.34 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978); *cf. General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204 (8th Cir. 1973) (a corporation must designate a person to answer on its behalf), *cert. denied*, 414 U.S. 1162 (1974).

298. Rule 4(f) is consistent with the general provisions of Fed. R. Civ. P. 26(b)(1) which expressly permit discovery of "the identity and location of persons having knowledge of any discoverable matter." Thus, it does not represent a departure from the present rule, but rather a codification of prior practice and a reaffirmation of the propriety of interrogatories that have sought such information in the past. See, e.g., *CFTC v. Rosenthal & Co.*, 74 F.R.D. 454, 456 (N.D. Ill. 1977); *Lloyd v. Cessna Aircraft Co.*, 434 F. Supp. 4, 8 (E.D. Tenn. 1976); *Uinta Oil Ref. Co. v. Continental Oil Co.*, 226 F. Supp. 495, 505 (D. Utah 1964); *Banana Distribs., Inc. v. United Fruit Co.*, 19 F.R.D. 493, 494 (S.D.N.Y. 1956).

299. It has been held, however, that a party cannot ask for a list of its adversary's trial witnesses. *EEOC v. Metropolitan Museum of Art*, 80 F.R.D. 317, 318 (S.D.N.Y. 1978); *United States v. 216 Bottles*, 36 F.R.D. 695 (E.D.N.Y. 1965). *But cf. Fidelis Fisheries, Ltd. v. Kristina Thorden*, 12 F.R.D. 179 (S.D.N.Y. 1952) (party may request identity and location of persons having knowledge of relevant facts).

300. See, e.g., *Defendant's First Set of Interrogatories (No. 41)*, *Berman Enterprises, Inc. v. Local 333, United Marine Div.*, No. 77 Civ. 272 (S.D.N.Y., filed Feb. 9, 1977) (on file with the

such interrogatories objectionable because, as commonly phrased,³⁰¹ they conceivably require a listing of all persons who were consulted about the language of the answer or who simply read it before it was served.³⁰² This objection is overcome by rule 4(f)'s reference to persons who participate in *making* the answer, rather than to persons *preparing* or *drafting* it. This is more than a semantic difference. The provision seeks to elicit the names of those with knowledge of the facts and those who actually contributed that knowledge to the answer being served; it does not seek the names of other executives who were consulted on the wording of the answer or who merely proofread it.

In essence, the provisions of rule 4 are premised on the philosophy that interrogatories should ask simple questions and elicit direct and clear answers. Interrogatories and answers to interrogatories should be tools of discovery and disclosure, not litigation weapons. If the Proposed Rules are adopted, counsel and the courts should accord them the necessary construction to achieve this purpose.

VI. RULE 5: DOCUMENT PRODUCTIONS IN COMPLEX CIVIL ACTIONS

Document productions under rule 34 of the Federal Rules of Civil Procedure have also become a vehicle for serious discovery abuse in complex civil actions. As in the case of written interrogatories, the abuses occur on both sides of the discovery request, ranging from unreasonably broad document requests to concealment, and even suppression, of important documentary evidence.³⁰³ Rule 5 of the Proposed Rules addresses the most chronic of these abuses.

A. Framing Discovery Requests

Document requests in complex civil litigation almost invariably call for voluminous file searches and productions, far in excess of that needed for the effective preparation of the requesting party's claim or

Fordham Law Review) ("Identify, by name, all persons who participated in or provided information for the preparation of the answers to these interrogatories.").

301. See, e.g., Plaintiff's Answer to First Set of Interrogatories (No. 20), Uniroyal, Inc. v. Jetco Auto Serv. Inc., No. 75 Civ. 921 (S.D.N.Y., filed Sept. 5, 1975) (on file with the *Fordham Law Review*) ("Identify each person other than outside counsel who participated in the preparation of [the plaintiff's] responses to these interrogatories and, for each, list which interrogatories he or she participated in the preparation of responses to.").

302. Putting aside any legitimate debate with respect to this objection, proper procedure requires the responding party nevertheless to answer that portion of the interrogatory which is not objectionable and to decline to answer only the portion which is specifically objected to, pending a ruling. See 4A J. Moore, *supra* note 64, ¶ 33.27, at 33-150. See also *Dollar v. Long Mfg. N.C. Inc.*, 561 F.2d 613, 617 (5th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978); *Floyd v. Margis*, 64 F.R.D. 59, 61 (E.D. Wis. 1974); *White v. Beloginis*, 53 F.R.D. 480, 481 (S.D.N.Y. 1971); *Wurlitzer Co. v. EEOC*, 50 F.R.D. 421, 424 (N.D. Miss. 1970).

303. Erickson, *supra* note 30, at 287.

defense.³⁰⁴ Sometimes, such requests are designed chiefly to harass and delay by bogging an adversary down in a morass of paperwork.³⁰⁵ Often, however, the problem derives from counsel's good faith, but overly-cautious, preparation of a case. In 1978, the Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation summarized the problem:

[S]ince the party making the demand typically lacks sufficient information to describe the documents with specificity and knows only the subject matters as to which he expects the opposing party's documents to relate, his Rule 34 demand calls for all documents relating to those subject matters. Since he also expects that the opposing party will narrowly construe the language of his demand so as to avoid producing damaging materials, he attempts, in the first instance, to make that language all-encompassing, and considerable time and expense is generally expended in the very drafting of those requests.³⁰⁶

Regardless of the motive underlying such excessive requests, they must be controlled. The costs and difficulty of document discovery have become intolerable and cannot be justified by attempted "carefulness" or "completeness."³⁰⁷

In response to this condition, the Second Circuit Commission proposed a rule that would offer the litigants the alternative of using rule 34's current procedures,³⁰⁸ or exchanging lists of the topics to be covered and the available files with respect thereto before each document review takes place. The requesting party would then decide which of the documents it wishes to review.³⁰⁹ This rule might be

304. See *In re Folding Carton Antitrust Litigation*, 76 F.R.D. 420, 425-27 (N.D. Ill. 1977); *Sealand Terminal Corp. v. NLRB*, 414 F. Supp. 1085, 1088 (S.D. Miss. 1976); *Uitts v. General Motors Corp.*, 62 F.R.D. 560, 562-63 (E.D. Pa. 1974); *M.S.A. Constr. Co. v. Crafts, Inc.*, 58 F.R.D. 215, 216 (E.D. Wis. 1973).

305. Such purposes clearly undermine the proper goals of discovery under Fed. R. Civ. P. 34. See *Zucker v. Sable*, 72 F.R.D. 1, 3 (S.D.N.Y. 1975); *Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc.*, 64 F.R.D. 459, 461-62 (S.D.N.Y. 1974); *United States v. Ling-Temco-Vought, Inc.*, 49 F.R.D. 150, 152 (W.D. Pa. 1970).

306. *Second Circuit Commission Proposal*, *supra* note 11, at cols. 3-4.

307. *Id.*

308. Under Fed. R. Civ. P. 34, a party may serve a written request for documents which must be responded to within 30 days. Generally, responding parties merely indicate in a written answer whether they will produce the documents or object, in whole or in part, to the request; if there is an objection, the ground is also stated in the response. Either simultaneously with the written answer or shortly thereafter, the documents are produced for the requesting party's review and copying. The written response does not list, categorize or comment upon the documents. This task is left to the requesting party, as is the task of determining the pertinence of the documents produced to any particular subject referred to in the request.

309. The rule, currently being revised following receipt of comments from the Bar, would provide: "Any party seeking document production pursuant to Fed. R. Civ. P. Rule 34 shall give notice at the time of serving his document request of his election to proceed by one of the following two methods:

Option 1

1. The party seeking production shall serve a list of subject matters as to which he desires production; such list to be as brief and concise as the issues allow.

expected to reduce the expense of discovery, but not the scope of requests or volume of objections. In addition, it presupposes that counsel can determine which documents are pertinent from a list of file folder titles. Although this proposal may work successfully with respect to some files and documents, it is not likely to satisfy overly-cautious counsel who would prefer to review virtually all of the files to ferret out a lurking "smoking gun."³¹⁰

Rule 5(a) of the Proposed Rules attempts to alleviate the problem of harassing requests by requiring that document requests "attempt in good faith to avoid broadside verbiage, duplication and subject matter not actually believed pertinent to discovery in the action," and that counsel frame such requests as specifically as possible. Together with rule 2(a)'s "reasonable bearing" standard for the scope of discovery,³¹¹ this provision should induce counsel to draft their document requests more carefully and with greater particularity. If counsel fails to heed these dictates, the court should strike the offending request or requests

2. The party opposing production shall state his objection, if any, to any listed subject matter, such objections to be limited to the relevancy of the subject.

3. After rulings on relevancy objections, if any, the party making production shall:

(a) list the location of all files relating to those subject matters;

(b) identify the persons knowledgeable as to the organization and maintenance of the files at each such location; or

(c) describe in detail the categories of documents at each such [sic] location; or

(d) supply a list of the legends appearing on each file folder referring or relating to the subject matters involved (such list may be made by xerographic or photographic copy of such file folder legends).

4. If deemed necessary or desirable by the court, magistrate or master, interviews or depositions may be conducted of file personnel, and (where lists of the legends of file folders have not been provided) further description may be required of the content of the files.

5. A magistrate or master may also elect to conduct an on-site inspection of the files or interviews of the appropriate personnel.

6. The party seeking production shall give notice(s) of the sequence in which he desires to inspect the contents of files and may commence such inspection after having given the party making production a reasonable opportunity to review those files initially for privileged, proprietary or other confidential materials.

7. A list of any materials withdrawn from the files on grounds of privilege or confidentiality shall be furnished to the party seeking production; and rulings on the production of such materials may be sought by motion made pursuant to Fed. R. Civ. P. Rule 37.

Option 2

1. Production may be sought, and objections may be interposed, in the manner provided by Fed. R. Civ. P. Rule 34.

2. In ruling on objections, the court may impose limitations on the extent of the burden to be incurred by the party making production, consistent with the fact that the party seeking production has elected not to assume the burden of the file search but to cast that burden upon his opponent." *Second Circuit Commission Proposal, supra* note 11, at cols. 2-3.

310. The rule was also criticized as impractical for ordinary litigation. Cohn, *supra* note 5, at 287. Drafted by counsel who were primarily involved in complex civil litigation, the rule was tailored to such actions without sufficient consideration of its implications for and effects on noncomplex cases. *Id.*

311. See notes 85-89 *supra* and accompanying text.

and, when appropriate, impose sanctions for any unreasonable burden that resulted from such request or requests.³¹²

Broad document requests are appropriate in certain types of litigation. Monopolization antitrust cases, for example, demand an extensive knowledge of both the industry and the scope of the defendant's business.³¹³ Even in these cases, however, a substantial narrowing of the scope of document production is usually possible.³¹⁴ Rule 5(a) directs counsel to make such narrowing the rule rather than the exception.

Although rule 5(a) attempts to ensure greater specificity, and thus narrower scope, in document requests, it expressly permits requests by category of document; for example, all correspondence, minutes or contracts on a particular matter.³¹⁵ This provision recognizes that the volume of documents involved in complex civil litigation makes it unrealistic to require specification of individual documents.³¹⁶ To do so would unduly disrupt the normal discovery routine in complex actions by requiring extensive depositions and interrogatories before document requests could be served.³¹⁷ Complex civil litigation normally proceeds in precisely the opposite fashion.³¹⁸ Thus, although

312. See pt. VII *infra*.

313. In a monopolization case brought pursuant to § 2 of the Sherman Act, 15 U.S.C. § 2 (1976), the court must determine the relevant product and geographic markets in which the monopolization is claimed to have occurred. *United States v. Grinnell*, 384 U.S. 563, 571 (1966); see *Heattransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 979-80 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978); *Bowen v. New York News, Inc.*, 366 F. Supp. 651, 674-75 (S.D.N.Y. 1973), *aff'd and rev'd in part*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976); *Woods Exploration & Prod. Co. v. Aluminum Co. of America*, 304 F. Supp. 845, 849-50 (S.D. Tex. 1969), *aff'd and rev'd in part*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). See also *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 58 (D. Minn. 1971), *modified*, 410 U.S. 366 (1973).

314. See, e.g., *In re Fertilizer Antitrust Litigation*, [1979-2] Trade Cas. (CCH) ¶ 62,894, at 79,180 (E.D. Wash. 1979) (scope narrowed by limiting time frame and geographic area); *FTC v. Lukens Steel Co.*, 444 F. Supp. 803, 806-07 (D.D.C. 1977) (time frame limited); *Professional Adjusting Sys. of America, Inc. v. General Adjustment Bureau, Inc.*, 373 F. Supp. 1225, 1228 (S.D.N.Y. 1974) (geographical area limited); *William Goldman Theatres, Inc. v. MGM, Inc.*, 54 F.R.D. 201, 202 (E.D. Pa. 1971) (same). *But cf.* *Quonset Real Estate Corp. v. Paramount Film Dist. Corp.*, 50 F.R.D. 240, 242 (S.D.N.Y. 1970) (time frame limited if request in bad faith).

315. Fed. R. Civ. P. 34(b) also permits a request for document inspection to designate the documents by "item" or "category" with the proviso that they be described "with reasonable particularity." What constitutes "reasonable particularity" depends on the particular facts of the particular case. *Mitsui & Co. (USA) v. Puerto Rico Water Resources Auth.*, 79 F.R.D. 72, 81-82 (D.P.R. 1978); *Mallinckrodt Chem. Works v. Goldman, Sachs & Co.*, 58 F.R.D. 348, 353 (S.D.N.Y. 1973).

316. Some states require such specification. See, e.g., N.Y. Civ. Prac. Law § 3120 (McKinney 1970). See generally *Rios v. Donovan*, 21 A.D.2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964); *Johnson, Drake & Piper, Inc. v. State*, 57 Misc. 2d 846, 293 N.Y.S.2d 728 (Ct. Cl. 1968); *Mustapich v. Huntington Union Free School Dist.* 3, 46 Misc. 2d 439, 260 N.Y.S.2d 39 (Sup. Ct. 1965).

317. Thus, for example, the New York courts hold that document productions should be the taking of depositions at which an identification of pertinent specific documents can be obtained. *Kenford Co. v. County of Erie*, 41 A.D.2d 587, 340 N.Y.S.2d 303 (4th Dep't 1973); *Quirino v. New York City Transit Auth.*, 60 Misc. 2d 634, 303 N.Y.S.2d 991 (Sup. Ct. 1969).

identifying interrogatories are often served early in the discovery process,³¹⁹ document productions usually precede the depositions because depositions frequently delve into the details of documents produced by the witness or otherwise for purposes of his deposition. The use of depositions to identify individual documents is far more limited in complex civil actions than in other forms of civil litigation. In negligence cases, for example, only a few pertinent documents are usually involved and the oral testimony is not substantially keyed to the documentary evidence.³²⁰ Rule 5(a) seeks to accommodate the special requirements of complex litigation without sacrificing the need to limit the currently unbridled document demands that prevail in such actions.

Rule 5(a) also rejects, as did the ABA Task Force and the Judicial Conference,³²¹ a return to the pre-1970 mode of document productions. The former rule 34 required the requesting party to make a motion and show "good cause" to obtain documents from its adversary.³²² In 1967, the Advisory Committee to the Judicial Conference found the latter procedure unduly restrictive and cumbersome for the court and the litigants.³²³ Today, as then, document productions are too essential in complex litigation to be made a matter of permission rather than right. Within reason, the court and the discovery rules should err on the side of full disclosure, not restrictive disclosure. Rule 5(a) is intended to deter unreasonable requests, but not alter the basic right of litigants to obtain all documents having a reasonable bearing on the issues in the case.

B. *Nature of Responses and Document Productions*

1. Manner of Response

Subparts (b) through (e) of rule 5 of the Proposed Rules grapple with the reverse side of the document production problem in complex

318. Federal procedure permits document discovery prior to depositions. *Buckley v. Vidal*, 50 F.R.D. 271, 274 (S.D.N.Y. 1970).

319. *See, e.g., Fitzmaurice v. Calmar S.S. Corp.*, 26 F.R.D. 172, 173 n.3 (E.D. Pa. 1960). Under current procedure, interrogatory answers can compel an identification of documents, but a separate request is necessary to compel their production. *Miller v. Doctor's Gen. Hosp.*, 76 F.R.D. 136, 140 (W.D. Okla. 1977); *Kirkland v. Morton Salt Co.*, 46 F.R.D. 28, 30 (N.D. Ga. 1968). In actual practice, however, it is not unusual for responding parties to attach specific documents to their interrogatory answers as part of them.

320. *See Schroeder & Frank, supra* note 8, at 476-77.

321. ABA Task Force Report, *supra* note 31, at 22; Preliminary Draft of 1970 Amendments, *supra* note 5, at 256-57.

322. Fed. R. Civ. P. 34 (1946); *see, e.g., Straughan v. Barge MVL No. 802*, 291 F. Supp. 282, 284 (S.D. Tex. 1968). For a discussion of what constituted "good cause," *see National Util. Serv., Inc. v. Northwestern Steel & Wire Co.*, 426 F.2d 222, 226-27 (7th Cir. 1970); *Southern Ry. v. Lanham*, 403 F.2d 119, 126 (5th Cir. 1968). The 1970 amendments abandoned this requirement. *Stark v. Photo Researchers, Inc.*, 77 F.R.D. 18, 20 (S.D.N.Y. 1977).

323. Preliminary Draft of 1970 Amendments, *supra* note 5, at 256-57.

litigation: responses to document requests. In some instances, responding counsel simply refuse to produce pertinent documents, necessitating needless motion practice and injustices.³²⁴ But this is not the principal area of concern; indeed, rule 6 of the Proposed Rules would provide the most realistic possible curb on such conduct: sanctions against counsel and litigant.³²⁵ More problematical are the abuses in which the responding party attempts to drown its adversary in a sea of documents, scrambled together in an unmapped mass, or to bury key documents in the pile by "shuffling the deck," rather than producing documents in their original form or in an otherwise orderly state.³²⁶

The ABA Task Force took specific note of this "chicanery"³²⁷ and recommended that rule 34(b) of the Federal Rules of Civil Procedure be amended to provide: "When producing documents, the producing party shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request that call for their production."³²⁸ Unfortunately, this proposal does not go far enough to cure such abuses. The responding party must be subject to more specific requirements of fairness and candor. Rule 5 of the Proposed Rules provides such specificity.

Rule 5(b) directs the responding party to state "which documents or categories of documents respond to which particular requests, with sufficient specificity and identification to enable the requesting party to ascertain readily the documents being referred to." In addition, rule 5(c) incorporates the ABA Task Force's recommendation by requiring that documents be produced either "in the same form and categories as they are kept in the ordinary course of business," or that they be "otherwise organized and labeled to correspond to the particular

324. See, e.g., *DiGregorio v. First Rediscount Corp.*, 506 F.2d 781, 785 (3d Cir. 1974); *Haney v. Woodward & Lothrop, Inc.*, 330 F.2d 940, 945 (4th Cir. 1964); *Bell v. Automobile Club*, 80 F.R.D. 228, 229-30 (E.D. Mich. 1978), *appeal dismissed*, 601 F.2d 587 (6th Cir. 1979). See also *Surg-O-Flex of America, Inc. v. Bergen Brunswick Co.*, 76 F.R.D. 654 (D. Conn. 1977).

325. See pt. VII *infra*.

326. See *Erickson*, *supra* note 30, at 289. Several other response abuses also plague complex actions, such as withholding important documents until the eve of trial or until after pertinent discovery as to them has already been conducted. See, e.g., *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 843 (9th Cir. 1976). See also *Krieger v. Texaco, Inc.*, 373 F. Supp. 108 (W.D.N.Y. 1972); *United States v. Becton, Dickinson & Co.*, 210 F. Supp. 889 (D.N.J. 1962).

327. ABA Task Force Report, *supra* note 31, at 22.

328. *Id.* The Task Force offered the following rationale for its recommendation: "[The proposed] amendment . . . would prescribe the manner of document production and is responsive to a reprehensible practice much discussed by the Committee—the deliberate attempt by a producing party to burden discovery with volume or disarray. It is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring [their] significance." *Id.* The Judicial Conference endorsed the Task Force's proposed addition to rule 34. Preliminary Judicial Conference Amendments, *supra* note 36, at 651; Revised Judicial Conference Amendments, *supra* note 37, at 343.

requests." This provision should protect against shuffling the deck to bury key documents in unlikely places, a practice that misleads an examiner into believing that there are no such documents.³²⁹ Responding counsel should not be able to assuage his conscience by rationalizing that the documents were actually produced but that the examiner simply missed them.

2. Explanation of Documents Produced

At present, the courts generally have not imposed an affirmative obligation upon the responding party to explain the documents produced.³³⁰ For example, in *Broadway Delivery Corp. v. United Parcel Service, Inc.*,³³¹ the plaintiff moved to compel the defendants "to decipher the voluminous documents they [had] made available," claiming that they could not understand or interpret the documents and, thus, could not determine whether the production was complete or adequate. The defendants argued that they had no "responsibility to analyze [the production] for plaintiffs."³³² The court agreed and denied the motion, stating: "The burden is on plaintiffs to make their own case. So long as plaintiffs have access to all the relevant information, I do not believe it is incumbent upon defendants to share this burden any further."³³³ Although it is impossible to determine from the opinion what type of documents had been produced, and why the plaintiff had difficulty understanding them, *Broadway Delivery* appears to adopt an unduly restrictive approach, requiring further time-consuming and expensive discovery solely to interpret the discovery already conducted.³³⁴

If the documents are truly difficult to decipher, judicial economy and fairness to the litigants call for a prompt explanation by the producing party.³³⁵ Accordingly, rule 5(c) requires that

329. See, e.g., *Charron v. Meaux*, 66 F.R.D. 64, 67 (S.D.N.Y. 1975); *CTS Corp. v. Piher Int'l Corp.*, 59 F.R.D. 394, 395 (N.D. Ill. 1973). See also *In re King Resources Co.*, 75 F.R.D. 12 (D. Colo. 1977), *aff'd*, 570 F.2d 1370 (10th Cir.), *cert. denied*, 439 U.S. 833 (1978).

330. See, e.g., *Broadway Delivery Corp. v. United Parcel Serv., Inc.*, [1979-1] Trade Cas. (CCH) ¶ 62,543, at 77,148 (S.D.N.Y. 1979). This is analogous to the predominance of cases declining to require a party to produce the indices and analyses of its production. See, e.g., *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974); *United States v. AT & T Co.*, 461 F. Supp. 1314, 1341 (D.D.C. 1978).

331. [1979-1] Trade Cas. (CCH) ¶ 62,543 (S.D.N.Y. 1979).

332. *Id.* at 77,148.

333. *Id.*

334. Other courts have taken a different approach, viewing the matter more equitably and pragmatically. See, e.g., *Lodge 743 v. United Aircraft Corp.*, 220 F. Supp. 19, 21 (D. Conn. 1963), *aff'd*, 337 F.2d 5 (2d Cir. 1964), *cert. denied*, 380 U.S. 908 (1965). See also *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73 (D. Mass. 1976); *Xerox Corp. v. IBM Corp.*, 64 F.R.D. 367 (S.D.N.Y. 1974).

335. Without such an explanation, discovery through document production can become no more than an endurance contest. The Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation summarized this problem: "The opposing party customarily objects to the breadth

[e]ach document production shall be accompanied by a readily comprehensible written statement listing the groups and types of documents being produced, the titles and folder legends of the files from which they came, the names of the persons and department for whom any specific file was maintained, the location where the files were and are maintained, the persons knowledgeable as to the organization and maintenance of the files involved and (to the extent reasonably feasible) the identity of the persons whose handwriting appears on the documents produced.

To facilitate any further discovery that the requesting party may wish to undertake regarding the subject matter of the documents produced, the rule does not require listing individual documents, but rather general groups of documents: for example, memoranda on topic X, correspondence on topic Y. Thus, the written statement of explanation is expected to take the place of, and remove the necessity for, identifying interrogatories as to those documents.³³⁶ Rule 5(f) requires that the statement be signed under oath, and makes it "admissible at trial in the same manner, for the same purposes and to the same extent as sworn interrogatory answers." Receiving a rule 5(c) written statement, therefore, would give the requesting party the same rights as if it had instead received an answer to an identifying interrogatory. In short, the written statement required by rule 5(c) would provide relief to requesting parties in situations similar to *Broadway Delivery* without placing an undue burden of explanation on the producing party.

3. Production of Copies

Another current abusive response tactic is the production of a massive pile of papers, unstapled or otherwise segregated or categorized, consisting of copies of the responding party's files.³³⁷ The

and burden of the demand—again expending great effort in his submission. Lawyers and company personnel are often dispatched to estimate the volume of documents involved . . . for file searches and production. Negotiations are then held regarding the objections, and the party seeking production files a Rule 37 motion with a supporting (and, again, typically extensive) memorandum. The opposing party files his papers consisting of an equally long memorandum and affidavits particularizing the burdensomeness of the demands. Hearings are held on the objections—often before a magistrate with appeals to the court." *Second Circuit Commission Proposal, supra* note 11, col. 3.

336. Identifying interrogatories would still be possible and available under proposed rule 4, as discussed in pt. V *supra*. Rule 5(c) would, however, attempt to give the requesting party an opportunity to proceed directly to document requests if it believes it already has sufficient information to frame a meaningful request. This is consistent with the current rule that concurrent discovery under Fed. R. Civ. P. 30, 33 and 34 is generally acceptable and that no specific order or sequence of discovery requests is required. See note 113 *supra*.

337. See, e.g., *Lodge 743 v. United Aircraft Corp.*, 220 F. Supp. 19, 20 (D. Conn. 1963), *aff'd*, 337 F.2d 5 (2d Cir. 1964), *cert. denied*, 380 U.S. 908 (1965). Compare *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352-54 (1978) (a class action defendant need not sort out and analyze its files and documents for its adversary when the information is sought to facilitate the sending of notice rather than to define or clarify the issues in the case) with *Kozlowski v. Sears, Roebuck Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976) (a party cannot defeat production by claiming

task of determining what constitutes a single document or a single file can be onerous in itself, debilitating the requesting party even before it reaches the substance of the documents. To end this practice, rule 5(c) makes explicit the common-sense requirement that copies produced in lieu of originals must be legible; further, the copies produced must be "stapled and otherwise copied in such manner as to duplicate the form of the originals in the files of the producing party or witness."

C. *Computer Runs and Summaries*

In the past twenty years, computer technology has progressed significantly. These technological developments have spawned two problems in complex litigation: first, testing the trustworthiness of data processing records and, second, determining their admissibility into evidence. Although the courts, and many commentators, recognize a computer's utility in storing and quickly retrieving large quantities of information, they express the fear that the potential for abuse is great because of the inherent difficulties in verifying the reliability of the records so produced.³³⁸ Also troublesome is the extent to which such evidence should be usable when created specifically for the lawsuit, rather than having been kept in the ordinary course of the parties' business operations.³³⁹ The aura of efficiency that computers create in the lay person's mind can clothe such evidence with an unconscious presumption of verisimilitude beyond the narrow point to which it may relate, or at which it is directed to prove.

With respect to the *trial* phase of complex litigation, the *Manual for Complex Litigation*³⁴⁰ specifically addresses these problems, and espouses precise guidelines that favor the wider use and admissibility of computer runs as well as other forms of voluminous document summaries.³⁴¹ The *Manual* cautions, however, that the producing party

that its files are so disorganized that it is difficult to locate the requested documents). See also *Fisher v. Harris, Upham & Co.*, 61 F.R.D. 447 (S.D.N.Y. 1973), *appeal dismissed mem.*, 516 F.2d 896 (2d Cir. 1975).

338. *United States v. Russo*, 480 F.2d 1228, 1240 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974); *United States v. De Georgia*, 420 F.2d 889, 893 n.11 (9th Cir. 1969); Tapper, *Evidence from Computers*, 8 Ga. L. Rev. 562, 592 (1974); cf. *Sunset Motor Lines, Inc. v. Lu-Tex Packing Co.*, 256 F.2d 495 (5th Cir. 1958) (form comprising punch card for machine accounting inadmissible when not certified as required). See also Comment, *Admissibility of Computer-Kept Business Records*, 55 Cornell L.Q. 1033 (1970); Comment, *Evidence—Admissibility of Computer Business Records as an Exception to the Hearsay Rule*, 48 N.C. L. Rev. 687 (1970).

339. Fed. R. Evid. 1006 contemplates admission of such evidence at trial. See, e.g., *United States v. Dioguardi*, 428 F.2d 1033, 1038 (2d Cir.), *cert. denied*, 400 U.S. 825 (1970). See also Fromholz, *Discovery, Evidence, Confidentiality, and Security Problems Associated With the Use of Computer-Based Litigation Support Systems*, 1977 Wash. U. L.Q. 445, 452; note 338 *supra*.

340. *Manual for Complex Litigation*, *supra* note 14.

341. *Id.* § 2.716, at 155-56.

must provide assurances of their pertinence to the matter at issue and of their trustworthiness, accuracy and completeness.³⁴²

Different problems regarding computer-produced evidence and other such summaries are involved in the *discovery* phase of complex litigation. Because admissibility at trial is not the standard for permissible discovery,³⁴³ requests for computer runs, as well as the tapes and other input from which they are developed, are generally not objectionable.³⁴⁴ Indeed, the Judicial Conference's Advisory Committee has made it clear that the definition of "documents" includes electronic data compilations.³⁴⁵ Discovery of computer programs (software) and the details of computer hardware is also generally permitted and, indeed, essential to enable the discovering party to comprehend the data processing output.³⁴⁶ For example, in *Adams v. Dan River Mills, Inc.*,³⁴⁷ the court directed the defendant in an employment discrimination action to produce its print-outs and related software programs to enable the plaintiff to prove the defendant's prior payroll history. The court explained that "[b]ecause of the accuracy and inexpensiveness of producing the requested documents . . . , this court sees no reason why the defendant should not be required to produce the computer cards or tapes and the W-2 print-outs to the plaintiffs."³⁴⁸

The more perplexing issue has been to what extent a party may be compelled, in pretrial discovery, to generate data processing output which it does not currently possess, but which it can specially create to provide a response to a particular question. Decisions that antedated the development of speedy and inexpensive data processing refused to require preparation of special materials to respond to document requests.³⁴⁹ The growth and widespread availability of such information systems and equipment, however, has engendered a new attitude on the subject.³⁵⁰ Thus, the *Manual for Complex Litigation* states that

342. *Id.* §§ 2.714-2.716.

343. See notes 62-67 *supra* and accompanying text.

344. See, e.g., *United States v. Davey*, 404 F. Supp. 1283, 1284 (S.D.N.Y. 1975), *modified*, 543 F.2d 996 (2d Cir. 1976); *Fisher v. Harris, Upham & Co.*, 61 F.R.D. 447, 450 (S.D.N.Y. 1973), *appeal dismissed mem.*, 516 F.2d 896 (2d Cir. 1975). See also *Manual for Complex Litigation*, *supra* note 14, § 2.715.

345. Preliminary Draft of 1970 Amendments, *supra* note 5, at 257; see Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, *reprinted in* 48 F.R.D. 487, 527 (1970) [hereinafter cited as Revised Draft of 1970 Amendments].

346. See *Adams v. Dan River Mills, Inc.*, 54 F.R.D. 220, 222 (W.D. Va. 1972); *Fromholz*, *supra* note 339, at 455. See also *United States v. Davey*, 404 F. Supp. 1283 (S.D.N.Y. 1975), *modified*, 543 F.2d 996 (2d Cir. 1976).

347. 54 F.R.D. 220 (W.D. Va. 1972).

348. *Id.* at 222.

349. *United States v. United States Alkali Export Ass'n*, 7 F.R.D. 256, 259 (S.D.N.Y. 1946).

350. See note 334 *supra*. See also *Van Wagner v. National Container Corp.*, 16 Fed. R. Serv. 460 (S.D.N.Y. 1952).

“such processing should be required where programs exist to print out the records in the form desired, or when it would require a minimum of effort to prepare a program to secure the requested information.”³⁵¹

The case of *Lodge 743, International Association of Machinists v. United Aircraft Corp.*³⁵² is illustrative. In response to a union’s discovery request in a complex labor law case, the defendant employer delivered to plaintiff’s counsel “approximately 120,000 photographic copies of selected individual personnel records weighing over 450 pounds.”³⁵³ On the plaintiff’s motion for assistance in interpreting the production, the court directed that the defendant prepare, at its own expense, an electronic analysis of the records via data processing equipment.³⁵⁴

The correct test of when to *require* the creation of such material in connection with a production request is summarized in the Advisory Committee Note to the 1970 amendment of rule 34(a):

[W]hen the data can as a practical matter be made usable by the discovering party only through respondent’s devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data. The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs.³⁵⁵

The other side of the issue, however—the *right* of a party to produce computer print-outs and other summaries in lieu of the voluminous documents from which they are generated—has not as yet been adequately addressed. Accordingly, rule 5(d) of the Proposed Rules authorizes the party responding to a document request to produce “computer print-outs or other comparable or similar summaries” in lieu of producing voluminous documents, provided that (1) the re-

351. Manual for Complex Litigation, *supra* note 14, § 2.715, at 154-55 (footnotes omitted). Using the same rationale, the courts have also expanded the scope of permissible document requests and trial subpoenas for documents, reasoning that “with the advent of office copier technology there is little danger that a substantial document request would denude a corporation of files and records essential to its continued operation.” *United States v. IBM Corp.*, 83 F.R.D. 97, 109 (S.D.N.Y. 1979); *FTC v. Rockefeller*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), *aff’d*, 591 F.2d 182 (2d Cir. 1979). *But cf.* *Hale v. Henkel*, 201 U.S. 43, 77 (1906) (mass production of documents will effectively halt business operations); *In re United Shoe Mach. Corp.*, 6 F.R.D. 347, 348-49 (D. Mass. 1947) (same).

352. 220 F. Supp. 19 (D. Conn. 1963), *aff’d*, 337 F.2d 5 (2d Cir. 1965), *cert. denied*, 380 U.S. 908 (1965).

353. *Id.* at 20.

354. *Id.* at 21. *Lodge 743* does not represent a general rule, however, because the decision has an obvious overtone of sanctions, resulting from the unsegregated and huge mass of the document production. *Id.* at 20.

355. Revised Draft of 1970 Amendments, *supra* note 345, at 527; see Preliminary Draft of 1970 Amendments, *supra* note 5, at 256-57.

sponse is accompanied by "a readily comprehensible written statement" fully explaining the print-out or other summary and any symbols or abbreviations on them, and (2) the underlying documents from which it is generated are "also made available promptly to any party that thereafter requests discovery and inspection thereof." The rule is intended to encourage the voluntary use of such computer or other technologically-created summaries as an alternative to a "sea of paper" production typified in *Lodge 743*, and to avoid the necessity for extraneous additional discovery merely to decipher the significance or meaning of a voluminous document production.

Rule 5(d) derives its rationale from rule 1006 of the Federal Rules of Evidence,³⁵⁶ which permits summaries or charts to be admitted into evidence if the underlying documentation "cannot conveniently be examined in court," provided the producing party makes such documentation available to its adversary to verify the accuracy of the summary or chart.³⁵⁷ Furthermore, as the *Manual for Complex Litigation* observes: "In complex cases, it is necessary to make pervasive use of summaries during the discovery period as well as in the trial of the case. Early and effective use of summaries may result in many foreshortenings of what otherwise might be nearly interminable periods of discovery."³⁵⁸

Although such a rule permitting the responding party to provide a computer run or summary may appear unrealistically altruistic, the practice is already commonplace in complex litigation.³⁵⁹ Responding counsel realize that a great deal of effort and administrative burden can be avoided by such summary material. If counsel wish to use voluminous documentation at trial, they will probably have to produce it in summary form anyway.³⁶⁰ By producing the summary during discovery, therefore, counsel can shortcut the process of organizing its own evidence for trial. Thus, it seems preferable simply to provide the summary or print-out in the first instance.

356. Fed. R. Evid. 1006.

357. Fed. R. Evid. 1006 provides: "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court." See also *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670 (S.D.N.Y. 1963).

358. *Manual for Complex Litigation*, *supra* note 14, § 2.71, at 142.

359. See, e.g., *State Wholesale Grocers v. Great A & P Tea Co.*, 154 F. Supp. 471, 497 (N.D. Ill. 1957), *modified*, 258 F.2d 831 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959); see *Manual for Complex Litigation*, *supra* note 14, §§ 2.711-2.717. See also *Adams v. Dan River Mills, Inc.*, 54 F.R.D. 220 (W.D. Va. 1972); *King v. State ex rel. Murdock Acceptance Corp.*, 222 So. 2d 393 (Miss. 1969); *Transport Indem. Co. v. Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965); *Freed, Computer Print-Outs as Evidence*, in 16 Am. Jur. Proof of Facts 273 (1965).

360. Fed. R. Evid. 1006.

Rule 5(d) also accepts the concept that computer materials are, at least prima facie, reliable³⁶¹ and that print-outs will often precisely detail the point at issue, obviating debate and confusion as to the meaning and content of voluminous documents. The requirement of a further "readily comprehensible written statement," explaining the meaning of the print-out or summary, is designed both to facilitate an investigation of the print-out's reliability and to ensure its easy and correct use by the court and counsel.

D. *Personal Assistance at Document Productions*

To further counsel's comprehension of the massive documents produced in complex civil litigation, rule 5(e) of the Proposed Rules requires the responding party or witness, upon request, to "collect the documents in a single location . . . and arrange for a knowledgeable person to be available at any such production" to assist other counsel in interpreting the documents and any "symbols and other matters" on them.

The rule does not require that a deposition be taken of the "knowledgeable person" present, or that he or she be sworn, or that any record be made of the proceedings. It simply ensures the presence of a guide to answer obvious questions of a non-substantive or identifying nature. Although the requesting party may desire to create a record or take a formal deposition of such a person,³⁶² rule 5(e) intentionally leaves that matter open. Thus, the rule permits a deposition and a record but, because a deposition in most instances will increase the cost of discovery and induce the formal posturing of counsel, the procedure envisioned is a form of informal itinerary. The rule assumes that counsel will volunteer honest and forthright responses, and that the "knowledgeable person" will provide unhesitating assistance, inspired by the relaxed atmosphere of an untranscribed meeting or session. Producing parties generally have someone present at document productions, more as a safety precaution than anything else. Often, however, the person is a paralegal with only limited familiarity with the documents and with strict instructions not to communicate with the inspecting counsel.³⁶³ Under rule 5(e), such a practice could be

361. *Olympic Ins. Co. v. H.D. Harrison, Inc.*, 418 F.2d 669, 670 (5th Cir. 1969); *D & H Auto Parts, Inc. v. Ford Marketing Corp.*, 57 F.R.D. 548, 551 (E.D.N.Y. 1973)

362. As discussed above, Fed. R. Civ. P. 30(b)(5) permits a deposition to be accompanied by a document request, subject to the procedural requirements of rule 34. When used in this manner, a deposition notice is a form of subpoena duces tecum. See pt. IV(D) *supra*

363. Such a "monitor" of the document production is present to ensure that the papers produced are not removed, damaged or disheveled in the inspection process. In some instances, he or she also attempts to collect information with respect to the portions of the production upon which the inspecting party is concentrating.

curtailed without fear of turning document custodians into formal witnesses.

There does not appear to be direct legal authority supporting rule 5(e)'s procedure. By the same token, there is no contrary authority either. A case such as *Broadway Delivery Corp. v. United Parcel Service, Inc.*,³⁶⁴ indicates that not all judges believe that the producing party presently has an obligation to undertake what rule 5(e) would require; but this does not mean that such authority cannot now be created. *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*³⁶⁵ and *Lodge 743, International Association of Machinists v. United Aircraft Corp.*³⁶⁶ provide analogous support for the concepts underlying rule 5(e). In *Pearl Brewing*, the court ordered that the plaintiffs make available two experts to help the defendant comprehend a highly technical computer print-out produced by the plaintiffs.³⁶⁷ In *Lodge 743*, moreover, the court ordered the defendant to prepare an electronic analysis of its voluminous records using its data processing equipment.³⁶⁸ Rule 5(e) is effectively no more than a corollary to the power of the courts to require such assistance.

Although collecting the documents at a single location can greatly aid inspection, rule 5(e) recognizes that there may be circumstances in which it is impractical or too costly for the document production to take place at a single location, such as if the document request requires particularly voluminous productions from many different plants or branches.³⁶⁹ Rule 5(e), therefore, allows an exception to the single location requirement if it is not "reasonably feasible" to fulfill it. The exception applies only to the truly burdensome situation;³⁷⁰ it is not intended to create a loophole for avoiding the purposes of the single location requirement. Rule 5(e) should be interpreted to compel counsel to make the number of productions as few and the inspection sites as conveniently located as possible. Otherwise, the expense of conducting a document inspection could rise drastically, and the inspecting party may be confronted with a massive jigsaw puzzle to assemble, thus undermining the purposes of rule 5(e).

364. [1979-1] Trade Cas. (CCH) ¶ 62,543 (S.D.N.Y. 1979); see notes 331-33 *supra* and accompanying text.

365. 415 F. Supp. 1122, 1138 (S.D. Tex. 1976).

366. 220 F. Supp. 19 (D. Conn. 1963), *aff'd*, 337 F.2d 5 (2d Cir. 1964), *cert. denied*, 380 U.S. 908 (1965).

367. 415 F. Supp. at 1139.

368. 220 F. Supp. at 21.

369. The court can, of course, determine the time and place of the production and direct that the cost be shared or borne by either party. Fed. R. Civ. P. 26(c)(2); see, e.g., *La Chemise Lacoste v. General Mills, Inc.*, 53 F.R.D. 596 (D. Del. 1971), *aff'd*, 487 F.2d 312 (3d Cir. 1973). See also *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968). *But cf.* *GFI Computer Indus. Inc. v. Fry*, 476 F.2d 1, 5 (5th Cir. 1973) (jurisdictional limits on subpoena power of court).

370. See note 304 *supra* and accompanying text.

E. *Use of Written Responses At Trial*

The written responses to document requests required under subparts (c) and (d) of rule 5 of the Proposed Rules may contain important information about the existence of documents or their prior maintenance. Such information may be pertinent to the issues at trial. For example, the response may contain evidence that there exists or does not exist a reply to a particular communication or that certain procedures were or were not followed. Recognizing the potential relevance of these written statements, rule 5(f) provides that they "shall be admissible at trial in the same manner, for the same purposes and to the same extent as sworn interrogatory answers."³⁷¹ Consistent with that concept, and analogous to answers to written interrogatories, rule 5(f) also requires that they be "signed under oath" and identify "which persons (other than counsel) participated in preparing the response to which specific requests." Rule 5(f) will not pose an additional undue burden upon the responding party, and will provide the requesting party with a potentially admissible response. Furthermore, use of the rule's provisions is expected to lead to information that may assist counsel in determining whether to conduct further discovery and in deciding which witnesses to call at trial.

VII. RULE 6: SANCTIONS IN COMPLEX CIVIL ACTIONS

In rule 6, the Proposed Rules declare open warfare on willful discovery abuses. Rule 6 is designed to remove any doubt in the minds of counsel that if they flout the letter or the spirit of the rules sanctions will be imposed. Moreover, the rule is designed to eliminate any judicial reluctance to impose such sanctions. The primary goal of rule 6 is deterrence, not punishment. Nevertheless, the rules are founded on the theory that without the real threat of punishment there can be no effective deterrence.³⁷²

371. Fed. R. Civ. P. 33(b) governs the use of interrogatory answers at trial; it provides simply that they "may be used to the extent permitted by the rules of evidence." See *Treharne v. Callahan*, 426 F.2d 58 (3d Cir. 1970); *Grace & Co. v. City of Los Angeles*, 278 F.2d 771 (9th Cir. 1960); *Bullard v. Universal Millwork Corp.*, 25 F.R.D. 342 (S.D.N.Y. 1960); *Ware v. Garvey*, 139 F. Supp. 71 (D. Mass. 1956).

372. Several courts have noted that the goal of deterrence is particularly important in complex civil litigation "where efficient and effective discovery procedures are essential to orderly adjudication." *In re Professional Hockey Antitrust Litigation*, 63 F.R.D. 641, 655 (E.D. Pa. 1974) (quoting *TWA, Inc. v. Hughes*, 332 F.2d 602, 615 (2d Cir. 1964)) (emphasis deleted), *rev'd on other grounds*, 531 F.2d 1188 (3d Cir.), *rev'd sub nom.* *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); see *Dellums v. Powell*, 566 F.2d 231, 236 (D.C. Cir. 1977); *Philadelphia Hous. Auth. v. American Rad. & Std. San. Corp.*, 50 F.R.D. 13, 18-19 (E.D. Pa. 1970), *aff'd sub nom.* *Mangano v. American Rad. & Std. San. Corp.*, 438 F.2d 1187 (3d Cir. 1971).

Chief Judge Kaufman recently summarized the use in the federal courts of sanctions for discovery abuses:

On their face, the [Federal Rules of Civil Procedure] deal harshly with the recusant deponent and the dilatory answeror. Courts have been reluctant, however, to impose the full range of sanctions available under Rule 37. Preclusion of testimony and dismissal are, to be sure, extreme sanctions, to be deployed only in rare situations. But unless Rule 37 is perceived as a credible deterrent rather than a "paper tiger," . . . the pretrial quagmire threatens to engulf the entire litigative process.³⁷³

Rule 6 seeks to transform the "paper tiger" into one poised to strike, and to instill in all involved in the discovery process the sure knowledge that a judicial response for failure to comply with the new discovery rules will be forthcoming.

Valid considerations underlie the judicial reluctance to impose sanctions. Primarily, judges are hesitant to deny a day in court on the merits to a litigant or to unduly restrict the litigant's ability to present its full case because of a precluded error or failing.³⁷⁴ Secondly, but also important, judges recognize that discovery abuses are most often attributable to counsel's misconduct; courts are reluctant to punish a litigant for acts or omissions over which the litigant is not likely to have control, and about which it may not even be aware.³⁷⁵

Rule 6 does not ignore these considerations, but proceeds on the

373. *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1063-64 (2d Cir. 1979) (footnote omitted). For a comprehensive survey of the standards for the imposition of discovery sanctions being followed in the various federal circuits, see Epstein, Corcoran, Krieger & Carr, *supra* note 248. The authors conclude: "[A][f]inding of willfulness is still, in most circuits, a crucial prerequisite for the imposition of sanctions for dilatory abuse of the discovery process." *Id.* at 169.

374. *Bon Air Hotel, Inc. v. Time, Inc.*, 376 F.2d 118, 121 (5th Cir. 1967), *cert. denied*, 393 U.S. 815 (1968); *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1956); see *Flaks v. Koegel*, 504 F.2d 702, 708 (2d Cir. 1974); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1211 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974).

375. *Britt v. Corporacion Peruana De Vapores*, 506 F.2d 927, 932 (5th Cir. 1975); *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858, 860 (5th Cir. 1970); cf. *Link v. Wabash R.R.* 370 U.S. 626, 633-34 (1962) (no abuse of discretion to dismiss action because of counsel's failure to attend pretrial conference without adequate excuse); *Marshall v. Southern Farm Bureau Cas. Co.*, 36 F.R.D. 186 (W.D. La. 1964) (dismissal with prejudice for disobeying court order), *aff'd*, 353 F.2d 737 (5th Cir.), *cert. denied*, 384 U.S. 910 (1965). See also *In re Sutter*, 543 F.2d 1030, 1037 (2d Cir. 1976). The problem confronting judges is not the exclusive province of the American judicial system. Addressing discovery abuse that has arisen under Canadian procedural rules, a Canadian commentator recently warned: "[Sanctions] are only as effective as courts are willing to make them, and are invoked only with tremendous reluctance. There is reason for this reluctance; to deprive someone of the opportunity to defend or assert his case is to deny him the resort to law; to deprive him of this freedom may well be to punish him out of all proportion to the misdeed. Moreover, such sanctions fail to take into account the lawyer's responsibility for the wrongful activity or inactivity of his client." Gold, *Controlling Procedural Abuses: The Role of Costs and Inherent Judicial Authority*, 9 *Ottawa L. Rev.* 44, 84-85 (1977) (footnotes omitted); see, e.g., *Moffat v. Rawding*, 11 D.L.R.3d 216, 224-28 (N.S. Sup. Ct.), *aff'd*, 14 D.L.R.3d 186 (N.S. Ct. App. 1970). But see *Cook v. Szott*, 68 D.L.R.2d 723, 725-27 (Alta. Ct. App. 1968).

premise that, when the courts afford too much deference to the wrongdoer, it is necessarily at the expense of the victim of the discovery abuse; justice and due process must also be preserved for the latter.³⁷⁶ Imposing sanctions, however, need not deprive the wrongdoer of its day in court. Other more pragmatic sanctions, unrelated to the merits,³⁷⁷ can be invoked in the event of lesser transgressions, to underscore the purposes of the Proposed Rules and to make compliance and good faith the norm in complex civil litigation. Sanctions of a more drastic nature, however, can and should be imposed for the most serious discovery transgressions.³⁷⁸

A. Nature of Sanctions

Subparts (a) and (e) of rule 6 of the Proposed Rules enumerate the sanctions available to the court to remedy failures to abide by the discovery rules. Rule 6(a) allows the court to impose any sanctions set forth in rule 37 of the Federal Rules of Civil Procedure,³⁷⁹ the additional sanctions suggested in rule 6(e) "or any combination thereof." Rule 37 permits a variety of sanctions ranging from monetary fines equivalent to the cost of having to seek court relief to preclusion orders, striking of pleadings, contempt of court, and even entry of a default judgment, depending on the nature of the discovery abuse.³⁸⁰ With respect to certain deposition, interrogatory and document inspection abuses, rule 37(d) gives the court the power to "make such orders in regard to the failure as are just."³⁸¹ The Advisory Committee explained that this provision was intended to afford the court "flexibility" in determining the appropriate relief for discovery abuses.³⁸²

376. See Renfrew, *supra* note 6. "The judicious use of sanctions on litigants and lawyers who abuse the judicial process is one effective way to make justice achievable and affordable for the citizens who turn to the courts for the vindication of their rights." *Id.* at 267.

377. See, e.g., *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 504 (4th Cir. 1977) (sanctions permitted only to the extent necessary to prevent prejudice to movant), *cert. denied*, 434 U.S. 1020 (1978); *Bardin v. Mondon*, 298 F.2d 235, 237-38 (2d Cir. 1961) (court dismissed action but allowed reinstatement of suit contingent on attorney's payment of court costs and fine); *Humphreys Exterminating Co. v. Poulter*, 62 F.R.D. 392, 395 (D. Md. 1974) (penalty of \$250 as attorneys fees); *White v. Beloginis*, 53 F.R.D. 480, 481 (S.D.N.Y. 1971) (award of plaintiff's expenses in obtaining order); *Palma v. Lake Waukomis Dev. Co.*, 48 F.R.D. 366, 369 (W.D. Mo. 1970) (same). See also *SEC v. Research Automation Corp.*, 521 F.2d 585 (2d Cir. 1975).

378. See, e.g., *Affanato v. Merrill Bros.*, 547 F.2d 138, 140-41 (1st Cir. 1977) (default judgment); *Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de P.R., Inc.*, 543 F.2d 3, 5-6 (2d Cir. 1976) (same), *cert. denied*, 430 U.S. 907 (1977). But see *CTS Corp. v. Piher Int'l Corp.*, 59 F.R.D. 394 (N.D. Ill. 1973) (one last opportunity to comply with document production granted before more drastic sanction imposed).

379. Fed. R. Civ. P. 37.

380. *Id.* 37(b)-37(d). Rule 37(f) excludes the United States from possible sanctions.

381. *Id.* 37(d).

382. Preliminary Draft of 1970 Amendments, *supra* note 5, at 271

Despite the broad powers given the courts by rule 37, the ABA Task Force concluded in 1977 that, "[a]s written, present Rule 37 is too narrow, fragmented and cumbersome."³⁸³ The Task Force, therefore, recommended even greater flexibility and new, more serious sanctions.³⁸⁴ It proposed the adoption of a new rule 37(e) which would empower the court to impose "such sanctions as may be just" on any party or counsel who refuses to cooperate in or otherwise abuses discovery, leaving it to the court to determine what form the sanctions should take.³⁸⁵ The Judicial Conference, however, has rejected the Task Force's recommendation.³⁸⁶

The principal shortcoming of rule 37 is that it enumerates neither the different sanctions nor the preconditions to invoking them that, on its face, the rule appears to contemplate. Because of the patch-work manner in which it is drafted,³⁸⁷ its provisions are difficult to reconcile. Rule 6(e) of the Proposed Rules attempts to alleviate this confusion by empowering the court to impose the following specific sanctions, in addition to those available under rule 37, without regard to the nature of the cause of the discovery abuse:

(1) forfeiture of the right to conduct further discovery on any aspect of the case; (2) waiver of the right to tax costs with regard to the discovery involved; (3) payment of reasonable counsel fees or other costs of the discovery involved; (4) contempt of court; and (5) notification to any disciplinary or other supervisory body with respect to any person so involved with a recommendation of professional, administrative or other sanctions by such body.

The court is expected to determine which sanctions are most appropriate under the circumstances.³⁸⁸

383. ABA Task Force Report, *supra* note 31, at 24.

384. *Id.*

385. The Task Force's proposed rule 37(e) would provide: "In addition to the application of those sanctions specified in Rule 26(d) and other provisions of this rule and those authorized under 28 U.S.C. § 1927, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorneys' fees, if any party or counsel (i) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(c), or (ii) otherwise abuses the discovery process in seeking, making or resisting discovery.

"In an appropriate case, the court may, in addition to other remedies, notify the Attorney General of the United States in a public writing that the United States, through its officers or attorneys, has failed without good cause to cooperate in discovery or has otherwise abused the discovery process." *Id.* at 23-24 (emphasis deleted).

386. See notes 413-14 *supra* and accompanying text. Compare Revised Judicial Conference Amendments, *supra* note 37, at 346-47 with Preliminary Judicial Conference Amendments, *supra* note 36, at 652-53.

387. For example, Fed. R. Civ. P. 37(b) provides sanctions for failure to comply with a discovery order, and Fed. R. Civ. P. 37(d) provides sanctions for failure to attend a deposition or serve answers to interrogatories or respond to a document request. But the rule does not explain what difference is intended for mere failures to answer, attend or respond as opposed to failures to comply with an order. Cf. *Norman v. Young*, 422 F.2d 470 (10th Cir. 1970) (default judgment entered for failure to produce documents).

388. See *Von Brimer v. Whirlpool Corp.*, 536 F.2d 838 (9th Cir. 1976); *Hunter v. Interna-*

By particularizing additional sanctions, rule 6(e) broadens the panoply of possible sanctions available in complex civil actions. For example, the imposition of costs or fines is not limited to the costs of a motion for sanctions; the amount could include any and all costs of the discovery involved.³⁸⁹ The court can also order forfeiture of the right to have the costs of discovery assessed against an unsuccessful party after trial, for offenses such as unduly delaying that or other aspects of pretrial discovery.³⁹⁰ Also, the scope of possible preclusion orders is broadened to allow preclusion of discovery in addition to preclusion of proof at trial; the latter, because of its severe nature, is rarely imposed under the present rules anyway.³⁹¹ Finally, the threat of contempt of

tional Sys. & Controls Corp., 56 F.R.D. 617 (W.D. Mo. 1972); *Stricker v. Milwaukee Inn, Inc.*, 285 F. Supp. 133 (E.D. Wis. 1968). See also *Thomas v. United States*, 531 F.2d 746 (5th Cir. 1976) (sanctions to be tailored to the particular situation).

389. These costs would include, but not be limited to, deposition costs, travel expenses and fees paid to experts for their review of documents. Such imposition of broader costs is possible under the omnibus provisions of Fed. R. Civ. P. 37. See *Bell v. Automobile Club*, 80 F.R.D. 228 (E.D. Mich. 1978), *appeal dismissed*, 601 F.2d 587 (6th Cir. 1979); notes 394-96 *infra*. Rule 6, however, would make this an express provision.

390. See *TWA, Inc. v. Hughes*, 515 F.2d 173, 179 (2d Cir. 1975) (unsuccessful party awarded a set-off against costs for expenses incurred in preparation for a deposition of successful party when successful party did not appear for deposition), *cert. denied*, 424 U.S. 934 (1976). As a general rule, the successful party is entitled to an award of costs after trial, pursuant to 28 U.S.C. §§ 1920, 1927, 1929 (1976). *Compania Pelineon de Navegacion v. Texas Petroleum Co.*, 540 F.2d 53, 56-57 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Brown v. Consolidated Fisheries Co.*, 18 F.R.D. 433, 434 (D. Del. 1955). The court, however, has broad discretion whether to allow costs. *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 362 F.2d 799, 801 (2d Cir.), *cert. denied*, 385 U.S. 948 (1966); *Bank of America v. Loew's Int'l Corp.*, 163 F. Supp. 924, 926 (S.D.N.Y. 1958). The Supreme Court has cautioned that "[i]tems proposed by winning parties as costs should always be given careful scrutiny." *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235 (1964). Under rule 6(e) of the Proposed Rules, however, the court can strike or limit any item of taxable costs, even if it does not relate specifically to discovery. Because it is not unusual for such costs in complex litigation to total several thousand dollars, to lose the right to have costs assessed can be a meaningful sanction. Items of taxable costs generally include depositions that are read into evidence or otherwise used at trial, *Lockett v. Hellenic Sea Transps., Ltd.*, 60 F.R.D. 469, 472-73 (E.D. Pa. 1973); *Advance Business Sys. & Supply Co. v. SCM Corp.*, 287 F. Supp. 143, 165 (D. Md. 1968), *aff'd and remanded on other grounds*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *Nationwide Auto Appraiser Serv. v. Association of Cas. & Sur. Cos.*, 41 F.R.D. 76, 77 (W.D. Okla. 1966); *Hancock v. Albee*, 11 F.R.D. 139, 141 (D. Conn. 1951), the cost of the trial transcript, *Galella v. Onassis*, 487 F.2d 986, 999 (2d Cir. 1973); *Advance Business Sys. & Supply Co. v. SCM Corp.*, 287 F. Supp. at 162; *Donato v. Parker Pen Co.*, 7 F.R.D. 148, 149 (S.D.N.Y. 1945), the cost of transcripts of pretrial conferences, *Syracuse Broadcasting Corp. v. Newhouse*, 319 F.2d 683, 690 (2d Cir. 1963); *Bank of America v. Loew's Int'l Corp.*, 163 F. Supp. 924, 931-32 (S.D.N.Y. 1958), and even fees paid to expert witnesses, *Welsch v. Likins*, 68 F.R.D. 589, 596-97 (D. Minn.), *aff'd*, 525 F.2d 987 (8th Cir. 1975). *But cf. TWA, Inc. v. Hughes*, 449 F.2d 51, 81 (2d Cir. 1971) (expert's fees not allowed), *rev'd on other grounds*, 409 U.S. 363 (1973); *Electronic Specialty Co. v. International Controls Corp.*, 47 F.R.D. 158 (S.D.N.Y. 1969) (deposition costs limited); *Oscar Gruss & Son v. Lumbermans Mut. Cas. Co.*, 46 F.R.D. 635 (S.D.N.Y. 1969) (same); *Clapper v. Original Tractor Cab Co.*, 165 F. Supp. 565, 593 (S.D. Ind. 1958) (cost of trial transcript not allowed), *aff'd and rev'd in part*, 270 F.2d 616 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960).

391. *Compare Mangano v. American Rad. & Std. San. Corp.*, 438 F.2d 1187 (3d Cir. 1971) and

court and disciplinary action places the reputations and professional standing of counsel who permit or engage in discovery abuses in jeopardy.³⁹² These sanctions, although they have some isolated support in the case law,³⁹³ become readily available to the court under the Proposed Rules. *Bell v. Automobile Club*³⁹⁴ provides an example of the severe consequences these new sanctions can have. In an action alleging civil rights violations, the defendants concealed the existence of a relocation study and a collection of materials known as the "book of blacks."³⁹⁵ Finding no excuse for the failure to produce these materials and that this failure needlessly provoked further discovery, the court fined the defendants \$52,089.73 for the full cost of the additional discovery as well as for the costs of obtaining the order.³⁹⁶

Under rule 37, a court has the power to impose sanctions on the parties, their attorneys, or both.³⁹⁷ Rule 6 of the Proposed Rules incorporates this provision but, because counsel appear to be the principal cause of discovery abuses in complex litigation,³⁹⁸ the rule contemplates a more vigorous imposition of sanctions against them.³⁹⁹ The power to impose such sanctions is not new,⁴⁰⁰ but it is not often

Black v. Sheraton Corp., 371 F. Supp. 97 (D.D.C. 1974) with *Krieger v. Texaco, Inc.*, 373 F. Supp. 108 (W.D.N.Y. 1973) and *Campbell v. Johnson*, 101 F. Supp. 705 (S.D.N.Y. 1951). See also *Fisher v. Underwriters at Lloyd's*, 115 F.2d 641 (7th Cir. 1940).

392. Compare *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975) and *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), cert. denied, 375 U.S. 985 (1964) with *Bank Line Ltd. v. United States*, 163 F.2d 133 (2d Cir. 1947) and *In re Johnson & Johnson*, 59 F.R.D. 174 (D. Del. 1973). The concept of disciplinary action against counsel is new, but contempt orders against counsel are not new. *In re Serra*, 484 F.2d 947 (9th Cir. 1973).

393. See, e.g., *Edgar v. Slaughter*, 548 F.2d 770, 772 (8th Cir. 1977) (a contempt citation is a form of lesser sanction preferable to an order precluding evidence or dismissing the action); *Flaksa v. Little River Marine Constr. Co.*, 389 F.2d 885, 889 (5th Cir.), cert. denied, 392 U.S. 928 (1968). But cf. *In re Adams*, 505 F.2d 949 (5th Cir. 1974) (error to hold attorney in contempt for negligently overlooking notice of preliminary hearing); *Sykes v. United States*, 444 F.2d 928, 930 (D.C. Cir. 1971) (same). See also *Schleper v. Ford Motor Co.*, 585 F.2d 1367 (8th Cir. 1978); *Crosley Radio Corp. v. Hieb*, 40 F. Supp. 261 (S.D. Iowa 1941).

394. 80 F.R.D. 228 (E.D. Mich. 1978), appeal dismissed, 601 F.2d 587 (6th Cir. 1979).

395. *Id.* at 231.

396. *Id.* at 235. The court explained its holding as follows: "[I]t is clear to the court that if acting in good faith with the court, defendants should have disclosed the existence of these materials. Discovery is not to be treated as a game of hide and seek. It should be a forthright effort to expedite litigation so that there is no unnecessary waste of time or expense. This is particularly important in a complex case such as this one." *Id.* at 231.

397. Fed. R. Civ. P. 37(a)(4), (b), (c), (d).

398. See notes 8-18 *supra* and accompanying text.

399. Judge Oakes recently summarized the philosophical basis for this concept: "[D]ismissal of an otherwise meritorious cause of action for the misconduct of counsel is rarely, if ever, an appropriate remedy Rather, the trial court should first consider the more specific and perhaps even more deterrent remedy of imposing costs personally on the offending attorneys. Imposing a penalty on those responsible for wasting the court's time, while not dismissing a party's potentially valid claim, seems . . . to make the punishment better fit the crime, especially where . . . the opposing party and its counsel have been equally neglectful of their obligations to the court." *Ali v. A & G Co.*, 542 F.2d 595, 597 (2d Cir. 1976) (Oakes, J., dissenting); see *Thomas v. United States*, 531 F.2d 746 (5th Cir. 1976).

400. 28 U.S.C. § 1927 (1976) specifically authorizes the imposition of fines on counsel to make up

used.⁴⁰¹ Thus, in contrast to the typical present situation,⁴⁰² it is intended that the courts more readily invoke any and all of the enumerated sanctions under rule 6(e) and not limit their orders to the costs of making a motion for sanctions. This is not intended to encourage the wholesale sanctioning of counsel for every disputed decision they make, but rather to hold counsel accountable for any plainly unreasonable or frivolous discovery positions they may take and for conduct calculated to obstruct rather than to facilitate discovery. The courts should, when necessary,⁴⁰³ also hold counsel in contempt of court and notify the appropriate disciplinary body with a recommendation of professional discipline.⁴⁰⁴

Finally, rule 6(f) warns parties that they too face sanctions based upon the failures of their counsel. Sanctions against counsel and sanctions against their clients can be equally salutary. In the former situation, the deterrence factor is counsel's fear for their pocketbooks and professional reputations; in the latter, the deterrence factor is counsel's fear that clients that have been penalized will sue their attorneys for malpractice. If counsel know that, either way, they are going to be called to task for discovery abuses, they will likely hesitate before serving abusive discovery demands or blocking the legitimate discovery requests of their adversaries. Of course, parties should not be permitted simply to pass off all responsibility for discovery failures on their attorneys.⁴⁰⁵ Rule 6(f) does not intend that the courts refrain

for any "excess costs" caused by their conduct, when it "so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously." See *Motion Picture Patents Co. v. Steiner*, 201 F. 63 (2d Cir. 1912); cf. *Bone v. Walsh Constr. Co.*, 235 F. 901 (S.D. Iowa 1916) (court only had statutory authority to impose costs on attorneys, not on opposing party as sought by defendant).

401. *United States v. Ross*, 535 F.2d 346, 350-51 (6th Cir. 1976); *Hanley v. Condrey*, 467 F.2d 697, 700 (2d Cir. 1972); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1092 (2d Cir.), cert. denied, 404 U.S. 871 (1971); cf. *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163 (7th Cir. 1968) (intentional conduct amounting to serious breaches of canons of ethics warranted assessment of costs against defense attorney), cert. denied, 395 U.S. 908 (1969). See generally *Court Sanctions*, supra note 12, at 623-29; see also *Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp.*, 78 F.R.D. 192 (E.D. La. 1978).

402. See, e.g., *United States v. Ross*, 535 F.2d 346, 351 (6th Cir. 1976); *1507 Corp. v. Henderson*, 447 F.2d 540, 543 (7th Cir. 1971); *In re Realty Assocs. Sec. Corp.*, 53 F. Supp. 1013, 1014 (E.D.N.Y. 1943), aff'd, 156 F.2d 480 (2d Cir. 1946) (regarding costs imposed under 28 U.S.C. § 1927 (1976)); cf. *Braziller v. Lind*, 32 F.R.D. 367, 368 (S.D.N.Y. 1963) (imposition of costs on counsel pursuant to Fed. R. Civ. P. 37); *Austin Theatre v. Warner Bros. Pictures, Inc.*, 22 F.R.D. 302 (S.D.N.Y. 1958) (same).

403. See pt. VII(B) *infra*.

404. See rule 6(e)(4), (e)(5) of the Proposed Rules, Appendix.

405. In *Link v. Wabash R.R.*, 370 U.S. 626 (1962), the Court states that there is "no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of

from ever imposing the more severe sanctions of preclusion of discovery or proof at trial, or dismissal of the action. Sanctions should be fashioned, justly and appropriately, to meet the circumstances of the case.

B. *Types of Conduct Subject to Sanctions*

A crucial limitation upon the effectiveness of rule 37 of the Federal Rules of Civil Procedure is that it normally applies only to refusals to comply with court orders to make disclosure.⁴⁰⁶ The rule does not apply to excessive or unreasonable discovery requests and other abuses by the discovering party.⁴⁰⁷ Nor does it apply to other forms of obstructive conduct, such as coaching by counsel at depositions⁴⁰⁸ or "shuffling the deck" with documents,⁴⁰⁹ which are among the most serious discovery abuses in complex civil actions. Although other statutory bases for sanctions in such circumstances exist,⁴¹⁰ few attorneys are aware of them, and the courts invoke them even more rarely and hesitatingly than they invoke rule 37.⁴¹¹

The ABA Task Force took special note of this unfortunate limitation, and recommended that rule 37 be altered to permit sanctions "if any party or counsel (i) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(c), or (ii) otherwise abuses the discovery process in seeking, making or resisting discovery."⁴¹² The Judicial Conference initially incorporated that recommendation in its 1978 proposal.⁴¹³ In its 1979 redraft of the amendments, however, the Judicial Conference's Advisory Committee deleted the provision without explanation,⁴¹⁴ rendering bleak the prospect of any significant broadening of rule 37 in the near future.

The concept of imposing sanctions for all failures to abide by the discovery rules is hardly a radical one. Several federal district courts

all facts, notice of which can be charged upon the attorney.' " *Id.* at 633-34 (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).

406. Cohn, *supra* note 5, at 291; ABA Task Force Report, *supra* note 31, at 24. *But cf.* Schroeder & Frank, *supra* note 8, at 487 (criticizing any attempt to broaden rule 37 to cover other than failures to make discovery).

407. See ABA Task Force Report, *supra* note 31, at 24.

408. See pt. IV(E)(2) *supra*.

409. See pt. V(B) *supra*.

410. See note 400 *supra*. See generally *Court Sanctions*, *supra* note 12, at 623-29; see also *Flaksa v. Little River Marine Constr. Co.*, 389 F.2d 885, 888 (5th Cir.), *cert. denied*, 392 U.S. 928 (1968).

411. See cases cited note 401 *supra*.

412. ABA Task Force Report, *supra* note 31, at 23-24 (emphasis deleted).

413. Preliminary Judicial Conference Amendments, *supra* note 36, at 652.

414. Revised Judicial Conference Amendments, *supra* note 37, at 347.

have adopted local rules that so provide.⁴¹⁵ For example, the District of Arizona allows its judges to penalize any failure to comply "in good faith with the rules governing pretrial discovery."⁴¹⁶ Other districts specifically condemn excessive and unreasonable discovery requests, as well as failures to respond.⁴¹⁷ And others, most prominently the Eastern District of New York, permit limited sanctions, such as the imposition of costs, for any failure to comply with court directives "to set a schedule for the case, including for discovery, pre-trial and trial."⁴¹⁸

Drawing on the proposal of the ABA Task Force and on these local court rules, rule 6(a) of the Proposed Rules authorizes sanctions for any "failure to abide by any of the dictates" of the Proposed Rules. Furthermore, rule 6(c) enumerates illustrative, although not exhaustive, examples of the types of conduct, other than outright failure to answer, which are deemed the equivalent of a "failure to abide by . . . the dictates" of the Proposed Rules. Under rule 6(a), any of these abuses triggers the sanction provisions of rule 6(e). Finally, rule 6(c) distinguishes mere failures to abide from willful failures to abide by the rules. As discussed below, under rule 6(a) the nature of the failure affects the likelihood and degree of sanctions imposed.⁴¹⁹

C. *When Sanctions Should Be Imposed*

Subparts (a) and (c) of rule 6 of the Proposed Rules fill the void that currently exists with respect to the types of conduct deserving of judicial reproach. Unfortunately, this will have little discernible effect if the courts are left without guidelines to follow regarding *when* sanctions should be imposed. One observer recently commented on the rare use of existing sanction rules:

[T]he provision of a sanction in a rule is not the whole answer. [One such provision] has been the law since 1813, yet, there are very few reported instances of its utilization. The cost sanctions of pre-1970 Rule 37 were used in only one of fifty cases. And, while no exhaustive research has yet been published, there is reason to believe that the situation has not changed appreciably since 1970.⁴²⁰

415. Cohn, *supra* note 5, at 292-93. Some states also so provide. *See, e.g.*, Kiely, *supra* note 112, at 218-19.

416. D. Ariz. Civ. R. 42(E).

417. D. Alaska Gen. R. 35(D); W.D. Tenn. R. 9(c).

418. E.D.N.Y. Calendar R. 7. Rule 8(b) permits imposition of such costs on counsel who fail to comply with rule 7 or "whose action has obstructed the effective administration of the court's business." *Id.* 8(b). *See also In re Sutter*, 543 F.2d 1030, 1036 (2d Cir. 1976).

419. *See* notes 443-45 *infra* and accompanying text.

420. Cohn, *supra* note 5, at 294-95 (footnotes omitted). Even more recent research on this point concludes that the situation remains substantially unchanged. Epstein, Corcoran, Krieger & Cohen, *supra* note 248, at 147, 169.

Much of the hesitancy over when to impose sanctions is traceable to the Supreme Court's decision in *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*.⁴²¹ The issue in *Societe Internationale* was whether to impose sanctions against a Swiss company that refused to produce documents because a Swiss law made it a criminal offense to disclose their contents.⁴²² The district court dismissed the action pursuant to rule 37.⁴²³ The Supreme Court reversed, holding dismissal to be inappropriate when the producing party's failure to comply with a pretrial production order was "due to inability, and not to willfulness, bad faith, or any fault."⁴²⁴ In the wake of *Societe Internationale*, the courts have correctly searched for willfulness, bad faith or fault on the part of the litigant or counsel against whom sanctions are sought.⁴²⁵ The infrequency of sanction imposition, however, is not due to this search. Rather, it is due to the courts' hesitancy to find much questionable conduct within the parameters of the test, and their overemphasis on preclusion-type sanctions as opposed to other less drastic sanctions, such as costs, discussed above.⁴²⁶ Because of this prevalent attitude of the courts, they rarely invoke the sanction provisions of rule 37 at an early stage of the litigation process in complex civil cases—during discovery—despite the need for sanctions as a deterrent for discovery abuse.⁴²⁷ The previous section of this Article explains the guidelines proposed in rule 6 for identifying the types of conduct that should be sanctioned.⁴²⁸ If the Proposed Rules are adopted, it is intended that the courts interpret these types of conduct as satisfying the *Societe Internationale* test.⁴²⁹ Once this has occurred, the courts can, in turn, address the issue of when to impose sanctions, as discussed below.

The courts, understandably, endeavor to allow counsel every oppor-

421. 357 U.S. 197 (1958).

422. *Id.* at 200.

423. *Id.* at 201-02.

424. *Id.* at 212. The Court explained its holding as follows: "The provisions of Rule 37 . . . must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law . . . [T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations." *Id.* at 209; see *Flaks v. Koegel*, 504 F.2d 702, 709 (2d Cir. 1974); cf. *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977) (corporation prevented from removing atomic energy related documents from Canada).

425. See *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1211 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858, 860 (5th Cir. 1970).

426. See note 389 *supra* and accompanying text.

427. See notes 372-78 *supra* and notes 433-38 *infra* and accompanying text.

428. See pt. VII(B) *supra*.

429. 357 U.S. 197, 209, 212 (1958).

tunity to correct their discovery failings before imposing sanctions.⁴³⁰ Many judges, having been litigators themselves, know the work pressures to which the litigator may be subjected, particularly when juggling voluminous discovery requests in several cases, a deposition schedule, and perhaps even a trial. Unfortunately, this judicial tolerance condones and encourages discovery abuses because counsel know they will have many chances to absolve their defalcations before rule 37's hammer falls. One commentator recently described this process:

The judge will usually order the recusant party to comply with the discovery request; this order leaves open the possibility of continued resistance, necessitating further resort to the court for a more severe sanction. Rule 37, then, generally offers a built-in second chance for parties resisting discovery, and the judge may in effect provide a third chance by conditioning the ultimate sanction upon further noncompliance.⁴³¹

The same commentator nonetheless discerned a developing trend away from excessive judicial indulgence to a more willing use of sanctions, particularly in those courts whose dockets have experienced a rapid increase in civil caseloads.⁴³² In *National Hockey League v. Metropolitan Hockey Club, Inc.*,⁴³³ the Supreme Court encouraged this trend by strongly endorsing the dismissal of an action because of a prolonged failure to answer interrogatories. The Court intended to signal the lower courts that sanctions serve not only to punish, but also to deter future abuses by others: "[I]t might well be that *these* respondents [will] faithfully comply with all future discovery orders But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts."⁴³⁴

The intended effect of *National Hockey League* is reflected in the Second Circuit's opinion in *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*⁴³⁵ The trial court had refused to accept the recommendation of a magistrate that the plaintiff be precluded from proving damages due to its failure to answer defense interrogatories requesting a detailed explanation of the plaintiff's damage theories and evidence.⁴³⁶ The Second Circuit reversed, holding that

430. See *Discovery Sanctions*, *supra* note 18. "Since the discovery process is designed to proceed generally under the control of the parties, the need for supervision of the court can be avoided where the parties themselves agree upon a certain course of conduct. This form of resolution of disputes in the discovery area seems to be an efficient one, and courts have not hesitated to enforce extrajudicial agreements relating to the pre-trial proceedings." *Id.* at 274-75 (footnotes omitted). See also *Haney v. Woodward & Lothrop, Inc.*, 330 F.2d 940 (4th Cir. 1964).

431. *Emerging Deterrence*, *supra* note 18, at 1037 (footnotes omitted); see D. Siegel, *New York Practice* § 367, at 465 (1978).

432. *Emerging Deterrence*, *supra* note 18, at 1034; see Epstein, Corcoran, Krieger & Cohen, *supra* note 248, at 147-49.

433. 427 U.S. 639 (1976).

434. *Id.* at 643.

435. 602 F.2d 1062 (2d Cir. 1979).

436. *Id.* at 1065-66.

although the plaintiff may not have openly and consciously disregarded the magistrate's direction to answer the interrogatories, its responses were so deficient as to constitute "gross negligence amounting to a 'total dereliction of professional responsibility.'"⁴³⁷ Thus, the court authorized severe sanctions without requiring a prior finding of bad faith or willfulness, stating: "[G]ross professional incompetence no less than deliberate tactical intransigence may be responsible for the interminable delays and costs that plague modern complex lawsuits."⁴³⁸

These decisions support the proposition that the courts are becoming more willing to impose sanctions to achieve greater deterrence of discovery abuses and failures, and less willing to be bound by the constraints of prior holdings restricting the use of sanctions. In accordance with these views, rule 6 of the Proposed Rules liberalizes the requirements for when the courts can impose sanctions, thereby encouraging their even more frequent use.

First, as noted above, subparts (a) and (c) of rule 6 authorize sanctions for *any* discovery abuse, not merely failures to answer or make disclosures.⁴³⁹ Second, rule 6(b) permits the court to order sanctions either "on its own motion or upon application of any party." Third, rule 6(a) makes it clear that the court can and should impose sanctions without first having to enter an order directing discovery or permitting correction of the conduct deemed abusive. Even though the latter is technically possible for egregious abuses under rule 37 of the Federal Rules of Civil Procedure,⁴⁴⁰ the courts rarely, if ever, impose sanctions in that manner.⁴⁴¹ Normally, the courts do not impose sanctions until a party, witness or counsel has failed to comply with a prior order.⁴⁴² If, in fact, a prior discovery order has been issued and then violated, rule 6(a) forces the offender to justify its conduct.⁴⁴³ If the court finds that the offender has willfully failed to comply with the order, sanctions are mandatory. Willfulness is to be determined by reference to the standards set forth in rule 6(c), which deems certain

437. *Id.* at 1067.

438. *Id.* (footnote omitted).

439. See notes 418-19 *supra* and accompanying text.

440. Fed. R. Civ. P. 37(d).

441. See 43 Tenn. L. Rev. 124, 128-29 (1975).

442. See, e.g., *Charron v. Meaux*, 66 F.R.D. 64, 68-69 (S.D.N.Y. 1975); *Hendricks v. Alcoa S.S. Co.*, 32 F.R.D. 169, 173 (E.D. Pa. 1963). See also *Kropp v. Ziebarth*, 557 F.2d 142, 146 n.7 (8th Cir. 1977); *SEC v. Research Automation Corp.*, 521 F.2d 585, 587 (2d Cir. 1975). The prior order may be oral. *Henry v. Sneiders*, 490 F.2d 315, 318 (9th Cir.), *cert. denied*, 419 U.S. 832 (1974).

443. See, e.g., *Margoles v. Johns*, 587 F.2d 885 (7th Cir. 1978); *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978); cf. *Dunn v. TWA, Inc.*, 589 F.2d 408 (9th Cir. 1978) (conduct justified because medical records no longer in existence); *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494 (4th Cir. 1977) (manufacturer claimed unavailability of documentary evidence relating to vehicle safety tests), *cert. denied*, 434 U.S. 1020 (1978).

types of conduct, as well as any other "willful or grossly negligent failure," the equivalent of a "willful failure" to abide by the discovery rules, whether or not willfulness was actually involved.⁴⁴⁴ Thus, the court would consider the nature of the prior discovery order and determine whether one of the willful failures enumerated in rule 6(c) was the cause of the failure to comply with the order.

Fourth, if any party, counsel or witness willfully fails to abide by any of the Proposed Rules, rule 6(d) orders the court "not [to] hesitate to impose sanctions." Willfulness under rule 6(d) would again be determined by reference to the illustrative examples in rule 6(c) with the proviso that "[a]ny other willful or grossly negligent failure to comply with [the] rules shall be deemed the equivalent of a willful failure to abide by [the] rules." Although rule 6(d) stops short of requiring mandatory sanctions as provided in rule 6(a), the rule is clearly intended to eliminate any reluctance on the courts' part to invoke the sanction provisions of rule 6(e). Fifth, if any party, counsel or witness fails to abide by the proposed rules, other than by a willful failure to abide, and cannot "provide a reasonable justification" for that failure, the court again should "not hesitate to impose sanctions." The intent is the same as that stated with respect to willful failures to abide by the Proposed Rules.

Finally, rule 6(f) requires that

[i]n determining whether and which sanctions should be ordered or applied, the court shall take into account the prior and causative conduct of the persons involved, the pertinence and importance of the matter at issue to the determination of the action, the need to deter similar defalcations, the purposes of these rules and rule 1 of the Federal Rules of Civil Procedure and the interests of justice.⁴⁴⁵

The flexibility that this provision grants the court should not be mistaken, however, for leniency.

Rule 6 seeks to embody the conclusion of the 1976 Pound Conference Follow-Up Task Force that the best results can be attained by the "creative use of sanctions."⁴⁴⁶ As its report stated: "In our view, such creative use of sanctions offers a significant potential for increased efficiency to the benefit of the litigants immediately involved and to the ultimate benefit of all who depend on the availability of an efficient judicial system."⁴⁴⁷ To be sure, not all judges and litigators agree with this conclusion. Some continue to believe that "[s]trengthening sanctions is again to approach the virus with the wrong antidote."⁴⁴⁸ The

444. See pt. VII(B) *supra*.

445. See cases cited note 388 *supra*. See also Sales, *Pre-Trial Discovery in Texas*, 31 Sw. L.J. 1017, 1031-32 (1977).

446. Pound Conference Follow-Up, *supra* note 42, at 194.

447. *Id.*

448. Pollack, *supra* note 8, at 226.

more prevalent view, however, appears to be that a more ready and innovative use of sanctions will materially reduce discovery abuses. Indeed, one judge, a member of the Pound Conference Follow-Up Task Force, has expressed the view that "[c]reative use of sanctions, as developed and refined by state, local and federal court systems, and the complimentary role of disciplinary proceedings, may be the future means of *eliminating* noncompliance with the spirit of the Federal Rules of Civil Procedure."⁴⁴⁹

Experience has demonstrated that only the sure knowledge that sanctions await all who flout or undermine the discovery rules can ensure compliance with them.⁴⁵⁰ Rule 6 forewarns all concerned that the days of excessive leniency with harassment and evasion will be ended with the adoption of the Proposed Rules. It is hoped that the courts will give the Proposed Rules that interpretation.

CONCLUSION

For years, the courts and the Bar have attempted to achieve the kind of decorous conduct envisioned by the draftsmen of the discovery rules of the Federal Rules of Civil Procedure⁴⁵¹ through ad hoc judicial determinations and general pleas for cooperation. Unfortunately, these determinations and pleas have gone, to too great an extent, unheeded. The time has come for more direct and specific regulation of the discovery process in complex civil litigation.

The approach currently recommended by the Judicial Conference of the United States, which places great emphasis on the court's ability to frame discovery at a pretrial discovery conference, does not go far enough to prevent the abuses that have plagued complex litigation over the past decade.⁴⁵² A discovery conference can be merely the first

449. Erickson, *supra* note 30, at 290 (footnotes omitted) (emphasis added).

450. Associated Radio Serv. Co. v. Page Airways Inc., 73 F.R.D. 633, 635-36 (N.D. Tex. 1977); SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp., 72 F.R.D. 110, 112-13 (N.D. Tex. 1976).

451. See note 452 *infra*.

452. Shortly after enactment of the 1970 amendments to the Federal Rules of Civil Procedure, Judge MacMahon poignantly summarized the problem of discovery abuses in complex litigation: "The purpose of discovery is to provide an orderly, efficient and effective means for ascertaining the truth in order to expedite a determination of the controversy on the merits. . . . The federal rules envision that discovery will be conducted by skilled gentlemen of the bar, without wrangling and without the intervention of the court. The vision is an unreal dream. Regrettably, hostility, and bitterness are more the rule than the exception in unsupervised discovery proceedings. Perhaps this is inevitable, for litigation at all stages and under the best of circumstances is fertile ground for conflict. The opposing self-interest of the parties, as each vies for advantage, often spawns not only bitterness but abuse of the discovery process. . . . The ultimate curtailment of abuse requires the constant vigilance of the bench and bar to insure that any conduct threatening the orderly progress of

step in controlling abuses. The courts, however, are too busy to oversee every phase of discovery in complex cases. New rules of conduct tailored to the specific abuses and characteristics endemic to complex civil litigation, and precise enough to be truly self-executing, are needed. The Federal Discovery Rules for Complex Civil Actions proposed in this Article seek to provide the standards needed to guide both counsel and the courts through complex discovery.

APPENDIX

FEDERAL DISCOVERY RULES FOR COMPLEX CIVIL ACTIONS

Rule 1: Designation of "Complex Civil Actions"

(a) Any party may apply to the court at any time after commencement of an action for designation of the action as a complex civil action. Such application shall be made on notice to all parties that have then appeared in the action; notice thereof shall be given to any party that appears thereafter but before the return date of the application. The court may also so designate an action on its own motion, but only after giving all parties that have appeared an opportunity to be heard on that matter.

(b) Following the court's designation of an action as a complex civil action under subpart (a) of this rule, all discovery in such action shall be conducted pursuant to these rules, together with the Federal Rules of Civil Procedure. To the extent that these rules conflict with the Federal Rules of Civil Procedure, these rules shall be deemed controlling.

(c) The court will decide, in the exercise of its discretion, whether the action should be designated a complex civil action, taking into account such factors as the court deems appropriate in the particular circumstances presented. In general, but without limitation of the court's discretion in this regard, the designation "complex civil action" is intended to apply to those civil actions in which any of the following circumstances appears likely to exist: production of voluminous documents has been or is expected to be requested from any party; or more than five (5) pretrial depositions have been noticed or are expected to be conducted by any party; or more than twenty-five (25) interrogatories have been or are expected to be propounded by any party. In determining whether more than twenty-five interrogatories have been propounded, the court may deem the subparts of an interrogatory to be separate interrogatories.

(d) Designation of an action as a complex civil action under subpart (a) of this rule shall have no effect upon the merits of the action and the conduct of

discovery proceedings is nipped in the bud, lest the efficacy of modern discovery proceedings be destroyed." *Harlem River Consumers Coop. v. Associated Grocers of Harlem, Inc.*, 54 F.R.D. 551, 553 (S.D.N.Y. 1972).

the trial except as specifically provided in these rules. Such designation and these rules are intended to expedite, simplify and economize the conduct of pretrial discovery, in order to advance the policy of rule 1 of the Federal Rules of Civil Procedure that all litigants are entitled to a just, speedy and inexpensive determination of every action.

Rule 2: Scope of Discovery in Complex Civil Actions

(a) Discovery in any action designated as a complex civil action pursuant to these rules shall be permissible as to any matter, not privileged, that has a reasonable bearing upon any issue in the action. The court shall control the conduct of discovery to ensure adherence by all parties and witnesses to this "reasonable bearing" standard. Discovery shall be permissible beyond, and shall not be limited to, the tests of relevance or admissibility of evidence at trial.

(b) Any party or witness claiming a privilege as to any matter inquired into in a complex civil action shall provide the inquiring party with a statement (on the record of his deposition if the privilege was asserted there or otherwise in writing promptly after the privilege is asserted) of the privilege claimed, the basis for such claim of privilege and an identification of the factual circumstances in which the communication occurred and the matter to which the privilege is claimed (that is, in the case of a discussion, the place, date and persons present; or, in the case of a document, the author, recipients, date and title or other description), to enable a court test of the claim of privilege if the inquiring party desires. Counsel may agree among themselves that, to facilitate pretrial discovery, information to which a privilege is claimed shall be disclosed in discovery without waiver of either the privilege or the rights of the responding party to assert it and any other party to contest it thereafter.

(c) If any question is objected to on the ground that the information requested is confidential, the evidence shall be taken subject to such objection. For two weeks after such objection, all such allegedly confidential information shall be kept confidential and shall not be disclosed to anyone who either was not present at the deposition at which such objection was asserted, or was a recipient of the paper in which it was asserted and who is not counsel (or affiliated with counsel for any party in the action) and shall not be used for any purpose other than the prosecution or defense of the action; any person or party seeking an extension of such confidentiality shall make application to the court with respect thereto within such two week period.

(d) Duplication of discovery methods to obtain the same information in a complex civil action should be avoided whenever possible. Counsel requesting discovery should attempt to propound that form of discovery request most likely to elicit the information sought without harassment and undue burden to the responding party or witness.

(e) Discovery may be conducted of facts allegedly already known to the inquiring party if it appears reasonably calculated to establish the admissibility of such facts at trial or the state of the responding party's knowledge about them unless the facts involved are so obvious or so immaterial to the issues that such discovery constitutes harassment.

(f) In all other respects, except as otherwise specifically provided in these rules, the scope of discovery shall be consistent with that permitted under the Federal Rules of Civil Procedure.

Rule 3: Depositions in Complex Civil Actions

(a) As promptly as possible and in no event more than twenty (20) days after the designation of an action as a complex civil action pursuant to these rules, counsel for all parties appearing therein shall agree upon and advise the court (for its approval) of the schedule of depositions to be conducted by either side, failing which, each side shall advise the court (no later than twenty (20) days after designation of the action as a complex civil action) of the schedule of depositions it proposes, in which event the court shall fix the schedule of depositions. Thereafter, the parties may agree upon or notice further depositions (to be conducted in the sequence noticed after the schedule fixed as aforesaid), subject to the right and power of the court, either on application by any party or on its own motion, to alter or strike any such proposed deposition as provided in subpart (a) of this rule. Depositions may be scheduled by name of deponent or, if the identity of the proposed deponent is not known, by such job or other description as is possible.

(b) The court, in fixing a schedule of depositions or receiving an agreed or proposed schedule of depositions in a complex civil action, shall have the right and power to determine that any deposition shall or shall not be taken, the locale and date of the deposition, the subjects and time period to be covered at the deposition and any other matters with regard to the scheduling or conduct of any of the depositions (including, but not limited to, the sequence of questioning to be followed, how long the deposition can last and whether the deposition shall be conducted live or via telephone, videotape or other alternative or reproductive method).

(c) The failure to complete any deposition within the time period scheduled or allotted for it as provided in subparts (a) and (b) of this rule, shall not affect or defer the conduct of any other deposition scheduled in accordance with subparts (a) and (b) of this rule. The uncompleted deposition shall be completed as soon as practical within the schedule of depositions on a date or dates to be agreed upon by counsel or, failing that, fixed by the court.

(d) Unless otherwise ordered by the court, whenever possible, all document requests with respect to any deposition in a complex civil action shall be made and shall be responded to by both written response and production of any documents to be produced prior to the scheduled date and conduct of such deposition. Whenever possible, counsel who plan to question at a deposition shall request those specific documents that he or she believes are needed for the orderly, complete and uninterrupted flow of the deposition at least ten (10) days before the deposition; whenever possible, such documents shall be provided to such counsel (subject to objection, if any) at least three (3) days before the deposition. Although other documents can be requested on or after the deposition, the deposition may not be kept open or delayed for questions relating to or for the production of documents that could readily have been but were not requested prior to the deposition.

(e) Unless otherwise ordered by the court, counsel in a complex civil action may not instruct a witness not to answer a question except on the ground of privilege; all testimony shall be taken subject to and over the objection of the witness or his counsel.

(f) Counsel shall not interrupt the questioning in any deposition to confer with a witness off the record between the imposition of a question and the answer to be given, or confer with the witness about the questioning by any party during any temporary break in that questioning during a deposition session, or suggest answers to the witness by counsel's objections or any other means in the course of the questioning, or otherwise disrupt or interfere with the orderly and fair conduct of the deposition.

(g) The transcript of the deposition shall be presented to the deponent for review and signature (unless waived by the parties) promptly after the deposition session involved. The deponent shall sign and return the transcript within twenty (20) days of receipt thereof or shall be deemed to have signed it as transcribed without correction or change. No change or correction in the transcript of a deposition which is made either without stating the reason therefor as required by rule 30(e) of the Federal Rules of Civil Procedure or after the time period prescribed in this rule shall be permitted or deemed effective at trial. Any deponent who makes any change or correction of substance in its deposition transcript may be recalled for further questioning by any party, but only with respect to the subject matter of the change or correction and only if such recall is requested within twenty (20) days of receipt of such correction or change. Any party may read any deposition correction or change at the trial. When a portion of a deposition that is corrected or changed for a reason other than grammatical or transcription error is read at trial, the party reading the transcript shall read both the original answer and the change and the reason therefor, subject to the right of any party to object to any portion thereof on evidentiary grounds.

(h) Cross-examination by any party on any deposition in a complex civil action shall not be limited in scope to the subject matter covered on direct examination, regardless of whether a cross-notice of deposition has been served by the cross-examining party.

Rule 4: Interrogatories in Complex Civil Actions

(a) Interrogatories in an action designated as a complex civil action pursuant to these rules shall be of three types: (1) identifying interrogatories (that is, those which elicit merely the names and addresses of witnesses and potential witnesses or the file description or title, location and custodian of documents and other physical evidence); (2) expert interrogatories (that is, those seeking the information discoverable under rule 26(b)(4) of the Federal Rules of Civil Procedure); and (3) substantive interrogatories (that is, all other interrogatories, such as those asking for the factual circumstances of the underlying transactions involved in the action, those directed at the merits of the action and those seeking to amplify upon the contentions of the parties).

(b) Any party in a complex civil action may serve such identifying and expert interrogatories as it determines are necessary to enable it to prepare for

trial or conduct other permissible pretrial discovery, provided that they are reasonable in number, scope and subject matter.

(c) Any party in a complex civil action may serve, as of right, a total of thirty-five (35) substantive interrogatories upon any other party; further such interrogatories may be served only with the court's permission following application to the court (accompanied by a copy of the proposed interrogatories) on a showing of reasonable need therefor. The parties and the court shall ensure that duplicative substantive interrogatories are not served upon any party and that substantive interrogatories are not used to burden, harass or delay, but rather represent good faith inquiries into matters of substance in the action. In determining whether more than thirty-five (35) substantive interrogatories have been propounded, the court may deem the subparts of an interrogatory to be separate interrogatories. If the court finds that separate interrogatories have been listed as subparts of an interrogatory to avoid the thirty-five (35) interrogatory limit, the court shall strike the entire set of interrogatories and the interrogating party shall be deemed to have forfeited the right to serve interrogatories as of right.

(d) Identifying interrogatories, expert interrogatories and substantive interrogatories shall be served in separate sets, each limited to one type and titled to indicate which such type of interrogatories are involved. Identifying and expert interrogatories shall be responded to within fourteen (14) days of service; substantive interrogatories shall be responded to within thirty (30) days of service thereof. Each interrogatory shall be separately stated and numbered and shall ask a single question without unnecessary or excessive subparts. Answers shall be confined to the questions asked and shall respond directly to them, without evasion, obfuscation or unnecessary self-serving matter.

(e) A party in a complex civil action may avail itself of the option under rule 33(c) of the Federal Rules of Civil Procedure to produce documents in lieu of providing a discursive answer to an interrogatory only when the interrogatory calls for computations, statistical data, summaries or other such abstracts of documents. When such option is elected by the answering party, the answer shall (1) provide a specific and detailed identification of the documents from which the answer may be obtained so that the interrogating party can readily identify the individual documents from which the answer should be ascertained; (2) supply a clear explanation of how the interrogating party should proceed to obtain the answer from the identified documents; and (3) promptly produce the pertinent documents, in a form that is easy to utilize (that is, segregated by identifying category and tagged or labeled, if necessary to enable their easy use) to obtain the answer in accordance with rule 5 of these rules. The rule 33(c) option may not be used to respond to interrogatories seeking a narrative or other factual summary, except that the answer may identify the principal events involved (for example, chronological events) and refer to individually identified documents for the balance of the answer, provided that each such document is specifically identified and keyed to each specific event to which it relates and that the documents readily provide the other information sought by the interrogatory.

(f) Each set of answers to interrogatories in a complex civil action shall

include a statement identifying which persons (other than counsel) participated in making the answer to which interrogatories.

Rule 5: Document Productions in Complex Civil Actions

(a) Document requests in a complex civil action shall be framed as specifically as feasible, but may call for categories of documents rather than individually identified documents. Document requests should attempt in good faith to avoid broadside verbiage, duplication and subject matter not actually believed pertinent to discovery in the action.

(b) Responses to document requests in a complex civil action shall specify which documents or categories of documents respond to which particular requests, with sufficient specificity and identification to enable the requesting party to ascertain readily the documents being referred to.

(c) Documents shall be produced in complex civil actions in the same form and categories as they are kept in the ordinary course of business or otherwise organized and labeled to correspond to the particular requests. Each document production shall be accompanied by a readily comprehensible written statement listing the groups and types of documents being produced, the titles and folder legends of the files from which they came, the names of the persons and department for whom any specific file was maintained, the location where the files were and are maintained, the persons knowledgeable as to the organization and maintenance of the files involved and (to the extent reasonably feasible) the identity of the persons whose handwriting appears on the documents produced. When copies rather than originals are produced, the producing party or witness shall attempt to ensure that the copies are legible and are stapled and otherwise copied in such manner as to duplicate the form of the originals in the files of the producing party or witness.

(d) Computer print-outs or other comparable or similar summaries may be produced (either in answer to interrogatories or in response to document requests) in lieu of production of voluminous document categories, provided that they are accompanied by a readily comprehensible written statement identifying the matters reflected on the print-out or summary, defining each symbol on the print-out or summary, identifying the underlying documents from which it has been created or generated, and stating the other information normally included in the written statement required under subpart (c) of this rule, and provided further that the underlying documents are also made available promptly to any party that thereafter requests discovery and inspection thereof.

(e) Any party or witness making a voluminous document production in a complex civil action shall, upon request, collect the documents in a single location (to the extent reasonably feasible) and arrange for a knowledgeable person to be available at any such production to help those reviewing the documents understand or learn the identity, nature and location of particular documents or categories of documents and the meaning or identification of symbols and other matters on or regarding the documents being produced.

(f) Each written response to a document request and written statement accompanying a document production (either in answer to interrogatories or response to a document request) shall be signed under oath by the party or

witness making the production and shall include a statement identifying which persons (other than counsel) participated in preparing the response to which specific request. Written responses to document requests and written statements included therein or otherwise supplied therewith shall be admissible at trial in the same manner, for the same purposes and to the same extent as sworn interrogatory answers.

Rule 6: Sanctions in Complex Civil Actions

(a) The court in a complex civil action may impose any sanctions contemplated or provided for in rule 37 of the Federal Rules of Civil Procedure or any other sanctions provided herein or any combination thereof for failure to abide by any of the dictates of any of these rules. A discovery order of the court shall not be necessary before such sanctions may be imposed, but sanctions shall be mandatory for willful failure to comply with a discovery order.

(b) Sanctions may be imposed by the court on its own motion or upon application of any party in a complex civil action. Sanctions may be imposed by the court in which the action is pending or the court in which the discovery involved is conducted, or both.

(c)(1) For purposes of this rule, the following shall be deemed the equivalent of a failure to abide by these rules: an evasive or incomplete response to any question, interrogatory or document request; excessive discovery requests beyond the permissible bounds prescribed by these rules; a failure to answer as defined by rule 37 of the Federal Rules of Civil Procedure.

(2) For purposes of this rule, the following shall be deemed the equivalent of a willful failure to abide by these rules: gross negligence in failing to provide a complete response; a frivolous assertion of privilege or a claim of confidentiality asserted without good cause or in bad faith; discovery requests which the court finds to have been unreasonably excessive or made for purposes of harassment.

(3) For purposes of this rule, any other willful or grossly negligent failure to comply with these rules shall be deemed the equivalent of a willful failure to abide by these rules.

(d) The court shall not hesitate to impose sanctions against any party or witness or counsel who makes a willful failure to abide by these rules in a complex civil action or otherwise fails to provide a reasonable justification for any failure by it to abide by these rules.

(e) In addition to or in lieu of the sanctions provided under rule 37 of the Federal Rules of Civil Procedure, the court in a complex civil action may impose the following sanctions against the party or witness or counsel involved: (1) forfeiture of the right to conduct further discovery on any aspect of the case; (2) waiver of the right to tax costs with regard to the discovery involved; (3) payment of reasonable counsel fees or other costs of the discovery involved; (4) contempt of court; and (5) notification to any disciplinary or other supervisory body with respect to any person so involved with a recommendation of professional, administrative or other sanctions by such body.

(f) In determining whether and which sanctions should be ordered or

applied, the court shall take into account the prior and causative conduct of the persons involved, the pertinence and importance of the matter at issue to the determination of the action, the need to deter similar defalcations, the purposes of these rules and rule 1 of the Federal Rules of Civil Procedure and the interests of justice. Parties shall be responsible for the conduct of their counsel in discovery; and, although the court should not impose punitive sanctions lightly, it should not hesitate to do so when warranted merely because the sanctions may affect the merits of or the parties' rights in the action involved.