

Sanctions Under Amended Rule 26— Scalpel or Meat-ax? The 1983 Amendments to the Federal Rules of Civil Procedure

I. INTRODUCTION

Most lawyers begin their careers with an oath of office that includes a pledge never to “delay any man’s cause for lucre or malice, *So Help Me God.*”¹ The recent amendments to the Federal Rules of Civil Procedure (FRCP or Rules)² demonstrate, however, that the drafters believed many lawyers often breach this oath. Sometime between their swearing-in ceremony and the swearing-in of their first witness, many lawyers utilize discovery devices to delay proceedings and harass adversaries to the point of settlement or even dismissal.³ A critique of such tactics has led to mixed reviews, condoned by some as merely “zealous representation of clients,”⁴ and criticized by others as the leading cause of inefficient administration of justice.⁵

Amended Rule 26,⁶ along with Rules 7, 11, and 16, was designed to reduce

1. *E.g.*, SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR OF OHIO, Rule 1, § 7(A).

2. The Federal Rules were amended on August 1, 1983. For the complete text of the Amendments as they were proposed and adopted, see *Amendments to the Federal Rules of Civil Procedure*, 97 F.R.D. 165 (1983).

3. See generally P. CONNOLLY, E. HOLLEMAN, & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978); Brazil, *Civil Discovery: Lawyers’ Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RESEARCH J. 798; Lundquist & Flegal, *Discovery Abuse—Some New Views About an Old Problem*, 2 REV. LITIGATION 1 (1981); Renfrew, *Discovery Sanctions: A Judicial Perspective*, 2 REV. LITIGATION 71 (1981); Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 ARIZ. ST. L.J. 475; C. Ellington, A Study of Sanctions for Discovery Abuse (May 11, 1979) (report submitted to the Office for Improvements in the Administration of Justice, United States Department of Justice).

4. Renfrew, *supra* note 3, at 83.

5. FED. R. CIV. P. 26 advisory committee note; *Amendments to the Federal Rules of Civil Procedure*, 97 F.R.D. 165, 216–17 (1983); see also Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 95 (1976).

6. Amended Rule 26 appears as follows. (Bracketed material has been deleted from and italicized material has been added to the original rule.)

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

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

(b) [SCOPE OF DISCOVERY] DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. 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. *The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).*

discovery abuse and to expedite litigation by encouraging judges to impose, and lawyers to seek, sanctions for improper use of discovery.⁷ This Comment will explore the need for and effect of new Rule 26(g) and evaluate whether the drafters applied "a scalpel [or] meat-ax"⁸ to the problem of discovery abuse. This Comment also will discuss the problems most likely to plague Rule 26(g)'s policy of promoting sanctions for discovery abuse. These problems include: whether the type and extent of abuse warrants the stringent provisions of the new Rule; whether the sanctioning process itself will engender so much satellite litigation that the second purpose of the amendments, expediting litigation, will be nullified; whether the standards of reasonableness and due process are sufficiently circumscribed to prevent abuse of judicial discretion in imposing sanctions; and whether the Rules can succeed despite the continuing adversarial nature of the American litigation system.

Amended Rule 26 assumes that imposing sanctions will deter discovery abuse and thus produce more effective and efficient administration of civil justice. If these assumptions are correct, the new Rule may prove a beneficial tool to judges in their efforts to trim the ever-increasing costs of litigation. If, however, attorneys twist the tenor of the amendments or if judges fail to accept the new responsibilities imposed by the Rules, new Rule 26(g) could provide merely another weapon of harassment and delay.

A. History of Amendments

In 1947, less than ten years after the Rules first were enacted, the Supreme Court, in *Hickman v. Taylor*,⁹ opened what has become a Pandora's box of discovery abuse by declaring that the federal rules were to be "accorded a broad and liberal treatment."¹⁰ The Court defended the discovery mechanism provided by Rules 26

(Subdivisions (b)(2)-(4), (c), (d), (e), and (f) were not affected by the 1983 Amendments and are not reproduced here.)

(g) SIGNING OF DISCOVERY REQUESTS, RESPONSES AND OBJECTIONS. *Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.*

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

7. See Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure, Report from the Chairman of the Advisory Committee, *Appendix C*, 97 F.R.D. 165, 190-94 (1983).

8. Sherman & Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 2 REV. LITIGATION 9, 36 (1981).

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

10. *Id.* at 507.

through 37 as “one of the most significant innovations”¹¹ of the relatively new rules of civil procedure and confidently declared that:

No longer can the time-honored cry of “fishing expedition” serve to preclude a party from inquiring into the facts underlying his opponent’s case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.¹²

Despite hopes that “[t]he combination of simplified pleading and extensive discovery [would] expediate dispositions,”¹³ the *Hickman*¹⁴ decision instead gave impetus to the “expansion of the scope of discovery and . . . relaxation of controls over the frequency and timing of discovery requests.”¹⁵ As a result, litigants learned to use the language in *Hickman* as a lever to open doors to discovery abuses of which the drafters of the Rules never dreamed.

In recent years, however, the Court has recognized that discovery has “not infrequently [been] exploited to the disadvantage of justice.”¹⁶ In *National Hockey League v. Metropolitan Hockey Club*,¹⁷ the Court acknowledged the harm caused by discovery abuse and enunciated a new purpose for awarding sanctions against litigants who misuse the discovery mechanism—deterrence of future abuse. In *National Hockey League*, the Court upheld the district court’s decision under FRCP 37 to dismiss the respondent’s antitrust action for failing to comply with the district court’s discovery order.¹⁸ The district court found that respondent’s failure to answer written interrogatories for more than seventeen months in the face of repeated admonitions by the court to comply with its orders constituted flagrant abuse of the discovery process.¹⁹ In affirming the dismissal, the Supreme Court emphasized that the purpose of imposing sanctions for discovery abuse is not only to penalize offenders, but also to deter others from similar conduct in the future.²⁰

Commentators also argued that discovery abuse had grown to such proportions that the purposes of discovery no longer were served.²¹ At the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, Chief Justice Burger reported that “after more than 35 years’ experience with pretrial procedures, we hear widespread complaints that they are being misused and over-

11. *Id.* at 500.

12. *Id.* at 507.

13. P. CONNOLLY, E. HOLLEMAN, & M. KUHLMAN, *supra* note 3, at 8; *see also* W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 79 (1968).

14. 329 U.S. 495 (1947).

15. P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *supra* note 3, at 9.

16. *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring).

17. 427 U.S. 639 (1979) (per curiam).

18. *Id.* at 643.

19. *Id.* at 640.

20. *Id.* at 643. The Court emphasized that “the most severe in the spectrum of sanctions provided . . . must be available . . . not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.” *Id.* *See generally* Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978).

21. *E.g.*, Sherman, *The Judge’s Role in Discovery*, 3 REV. LITIGATION 89, 195–97 (1982) (“Judge Goettel: Discovery was intended to be a domesticated bird dog to help flush out evidence. It has become, instead, a voracious wolf roaming the countryside, eating everything in sight.” *Id.* at 196–97.).

used."²² The Chief Justice concluded that "[t]he responsibility for correcting this lies with lawyers and judges, for the cure is in our hands."²³

Two major criticisms were leveled at the discovery provisions. The first criticism is that they are susceptible to misuse. Attorneys regularly delay responding to interrogatories and document requests until their adversary threatens to move for an order compelling production. When a response finally is made, attorneys are careful to construe every request as narrowly or as broadly as necessary to provide their opponent with the least possible amount of useful information.²⁴ The alternative, promptly and willingly providing all the information requested, is considered by most attorneys to be a breach of their ethical duty to represent their client zealously.²⁵

Depositions provide another example of the Rules' susceptibility to misuse. In deciding whether a person should be deposed, attorneys often consider geographic locations or business and personal relationships to a party more important than knowledge of relevant information.²⁶ The location and timing of a deposition can be a tactical weapon designed to harass or annoy an opponent.²⁷ Practicing attorneys probably would not consider such tactics misuses of discovery, yet these tactics clearly do not comport with the Rules' general aim to "secure the just, speedy, and inexpensive determination of every action."²⁸

The second criticism stems from the ease with which the discovery provisions can be overused. Overuse occurs when attorneys, who are often people with perfectionist-compulsive tendencies,²⁹ become so anxious about discovering every possible piece of information, whether relevant or not, that they submit colossal discovery requests. An extraordinary number of depositions are scheduled, vast document requests are sent, and thousand-page interrogatories are filed by attorneys demonstrating an "insensitivity to cost and an inability to leave even the most remote stone unturned."³⁰

In 1980, a divided Supreme Court responded to these criticisms by amending, among others, "the cluster of Rules authorizing and regulating discovery gener-

22. Burger, *supra* note 5, at 95.

23. *Id.* at 96; see also Report of Pound Conference Follow-Up Task Force, 74 F.R.D. 159 (1976); Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 932 (1970).

24. See generally Brazil, *supra* note 3, at 832-59.

25. See *infra* text accompanying notes 176-79.

26. See generally Brazil, *supra* note 3, at 832-59.

27. One well-respected legal services attorney reported scheduling a client's deposition to be taken at the attorney's storefront offices. The offices were located in an area with a very high crime rate, and the attorney scheduled the deposition shortly before sundown in hopes of persuading his wealthier, suburban opponent to cancel the deposition, or at least to make it a short session so they would be finished before dark. Conversely, the same attorney complained of an opponent in a wife-beating case who insisted on discovering the new address and telephone number of the attorney's battered client, in hopes that the client would drop the assault charges rather than reveal her new whereabouts. Conversation with a legal services attorney, Fall, 1983.

28. FED. R. CIV. P. 1.

29. This phenomenon is described by Professor Wayne Brazil in his 1979 American Bar Foundation study of discovery abuse and is attributed to the fact "that people with 'perfectionist-compulsive' tendencies often perform very well in law school . . . and are likely to be attracted by the challenges and rewards . . . of big case litigation." Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RESEARCH J. 219, 239. The theory is that "[b]ecause litigators with these psychological characteristics are especially anxious about making errors of omission . . . they are particularly prone to develop elaborate systematic procedures for attacking all litigation problems." *Id.*

30. Schroeder & Frank, *supra* note 3, at 489.

ally,"³¹ but Justices Powell, Stewart, and Rehnquist, along with a host of legal commentators,³² were unimpressed. The amendments were described as the application of "a Band-Aid where outright surgery was called for"³³ and Justice Powell doubted they would "have an appreciable effect on the acute problems associated with discovery."³⁴ Powell summarized his dissatisfaction by warning that "acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms"³⁵ and "will create complacency"³⁶ that "could postpone effective reform for another decade."³⁷

Even before the furor over the 1980 Amendments receded, the Advisory Committee on the Civil Rules began work on a new set of revisions.³⁸ In early September, 1982, the Advisory Committee proposed and the Committee on Rules of Practice and Procedure approved for submission to the Judicial Conference, further changes in the Rules.³⁹ The Judicial Conference adopted the proposals on September 26, 1982 and submitted them to the United States Supreme Court.⁴⁰ On April 28, 1983, the Court adopted the proposed amendments and forwarded the changes to Congress.⁴¹ Under the provisions of 28 U.S.C. Section 2072, amendments to the Rules take effect automatically within ninety days after they are submitted to Congress unless both Houses act to block their passage.⁴² Despite a last-ditch effort by the House of Representatives to delay the effective date until December,⁴³ through Congressional inaction, the amendments to Rules 7, 11, 16, and 26 became effective on August 1, 1983.⁴⁴

B. Description of the 1983 Amendments

"Aggressive judicial control" over the management of civil cases is the common thread tying the 1983 amendments to Rules 7, 11, 16, and 26 together.⁴⁵ The drafters apparently believed that assigning increased managerial duties to federal

31. Amendments to the Federal Rules of Civil Procedure, 446 U.S. 995, 997 (1980).

32. *Id.* (Powell, J., dissenting). See generally Section of Litigation, American Bar Association, Second Report of the Special Committee for the Study of Discovery Abuse (Jan., Nov. 1980), 92 F.R.D. 137-48 (1980).

33. Marcus, *Abuses Curbed? Court OKs Changes in Discovery—But Dissenters Argue Reforms in Civil Rules Don't Go Far Enough*, Nat'l L.J., May 12, 1980, at 1, col. 4.

34. Amendments to the Federal Rules of Civil Procedure, 446 U.S. 995, 998 (1980) (Powell, J., dissenting).

35. *Id.* at 1000.

36. *Id.*

37. *Id.*

38. Proposed Amendments to the Federal Rules of Civil Procedure (Preliminary Draft 1981), 90 F.R.D. 451 (1981).

39. JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN; AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 97 F.R.D. 165, 189 (Sept., 1982).

40. *Id.* at 189 (1983).

41. 97 F.R.D. 165 (1983).

42. For a general description of the amendment process and its history, see Nordenberg, *The Supreme Court and Discovery Reform: The Continuing Need for An Umpire*, 31 SYRACUSE L. REV. 543 (1980).

43. H.R. 3497, 98th Cong., 1st Sess., 129 CONG. REC. 4895, 5560 (1983); see also Pike, *Federal Rules Delay Expected—Bill May Hold Up Amendments for Six Months*, Nat'l L.J., August 8, 1983, at 7, col. 2; Legal Times, July 4, 1983, at 2, col. 1.

44. Amendments to the Federal Rules of Civil Procedure, 103 S. Ct. No. 16, at 1 (Apr. 28, 1983) (yellow pages). Rules 6(b), 52(a), 53(a), (b), and (c), and 67 also were amended, and new Rules 53(f), 72-76 and new Official Forms 33 and 34 were added.

45. FED. R. CIV. P. 11, 16, & 26 advisory committee notes.

exhorting them to exercise greater control over the cases and litigants appearing before them will lead to reduced abuse of discovery and the civil judicial process generally. To this end, the Rules have been amended to hold attorneys to a higher standard of culpability in judging the reasonableness of their conduct and judges to a stricter standard in enforcing the new requirements of the Rules.

A new subsection requiring all motions to "be signed in accordance with Rule 11"⁴⁶ has been added to Rule 7, and the Advisory Committee Notes to Rule 7 refer explicitly to the "amplified" sanctions in Rule 11.⁴⁷ Rule 11 itself requires an attorney or a party not represented by an attorney to sign every pleading, motion, or other paper filed with the court.⁴⁸ This signature certifies that the attorney has read the pleading, has made reasonable inquiry to ensure the pleading is "well grounded in fact and is warranted by existing law or a good faith argument" of what the law should be, and that the attorney is not filing the pleading for purposes of harassing, delaying, raising the cost of litigation, or for any other "improper" purpose.⁴⁹ Most importantly, the Rule now provides that if any pleading or other paper is signed in violation of the above requirements, the court shall impose sanctions on either the signer, the client, or both.⁵⁰ The Advisory Committee Notes state the drafters' intention "to reduce the reluctance of courts to impose sanctions . . . by emphasizing the responsibilities of the attorney . . ." and add that the "rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney."⁵¹ Although discovery motions are covered under Rule 11, the Advisory Committee Notes explain that all other discovery papers relating to discovery are to be governed by Rule 26(g).⁵²

New Rule 16 has been renamed "Pretrial Conferences; Scheduling; Management" and requires a judge to issue a scheduling order, including a discovery schedule, within 120 days after a complaint is filed, unless the suit falls within narrow local district court exemptions.⁵³ The Rule lists the objectives of and subjects to be discussed at pretrial conferences.⁵⁴ Like Rules 11 and 26, Rule 16 provides for the imposition of sanctions.⁵⁵ The drafters expressly stated that "scheduling and case management" are the goals of "pretrial procedure"⁵⁶ and emphasized that "explicit

46. FED. R. CIV. P. 7(b)(3).

47. FED. R. CIV. P. 7 advisory committee notes.

48. FED. R. CIV. P. 11.

49. *Id.*

50. *Id.*

51. FED. R. CIV. P. 11 advisory committee notes. For a discussion of the effects of amended Rule 11, see generally Goodman, *The New Discovery Rules: Sanctions Mandated for Pleading and Discovery Abuse*, 31 R.I.B.J. 3 (Apr. 1983); Hall, *New Rules Amendments Are Far Reaching*, 69 A.B.A. J. 1640 (Nov. 1983); Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363 (Mar. 1983); Sussman, *Changes in Federal Rules Create Risks, Opportunities*, Legal Times, Sept. 19, 1983, at 34, col. 1; Pike, *supra* note 43; Patton, *Discovery Rule Changes May Open the Door for New Litigation*, L.A. Daily J., May 24, 1983, at 4, col. 3; Patton, *New Rules Intended to Streamline Pretrial Process*, Legal Times, May 16, 1983, at 14, col. 1; Lerner & Schwartz, *Why Rule 11 Shouldn't Be Changed—The Proposed Cure Might Exacerbate the Disease*, Nat'l L.J., May 9, 1983, at 13, col. 1; Dombroff, *Objective Procedures Could Curb Discovery Abuse*, Legal Times, Sept. 6, 1982, at 15, col. 1.

52. FED. R. CIV. P. 11 advisory committee notes.

53. FED. R. CIV. P. 16(b).

54. FED. R. CIV. P. 16(a), (c).

55. FED. R. CIV. P. 16(f).

56. FED. R. CIV. P. 16(a) advisory committee notes.

reference to sanctions reenforces [sic] the rule's intention to encourage forceful judicial management."⁵⁷

Although all the amendments are designed to reduce the delays and expenses associated with civil suits by encouraging greater judicial involvement in the litigation process, the three changes in Rule 26 directly attack what often is considered the greatest cause of expense and delay—discovery abuse. Significantly, the final sentence in 26(a), which stated that “[u]nless the court orders otherwise . . . , the frequency of use of these methods is not limited,” has been deleted.⁵⁸ Instead, Rule 26(b), now subtitled “Discovery Scope and Limits,” includes a new paragraph providing that the “frequency or extent” of discovery “shall be limited by the court” whenever certain circumstances exist.⁵⁹ Rule 26(b)(1)(i) directs the court to limit any discovery that is found to be “unreasonably cumulative or duplicative” or that can be obtained from a more convenient, less burdensome, or less expensive source.⁶⁰ Likewise, under subdivision (b)(1)(ii), the court must limit discovery when the discoveror “has had ample opportunity” through previous discovery efforts “to obtain the information sought.”⁶¹ The Advisory Committee Notes explain that the new standards are designed to reduce repetitiveness while adjuring lawyers to consider the comparative costs of different discovery methods.⁶²

Of all the 1983 Amendments, however, subdivision (b)(1)(iii) of Rule 26 appears likely to produce the most litigation as parties and judges struggle to apply its disproportionality standard.⁶³ Under this section, a judge is to limit “unduly burdensome or expensive” discovery requests after considering “the needs of the case, the amount in controversy, . . . the parties’ resources, and the importance of the issues at stake.”⁶⁴ Although the standards seek to prevent “discovery . . . disproportionate to the individual lawsuit,” the Advisory Committee Notes warn courts not to limit “discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.”⁶⁵

The addition of subdivision (g), entitled “Signing of Discovery Requests, Responses and Objections,” to Rule 26 parallels the language in amended Rule 11.⁶⁶ Every attorney or unrepresented party must certify, by signing every discovery document, that the discovery request, response, or objection is:

- (1) consistent with [the Federal Rules of Civil Procedure] and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
- (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
- (3) not unreasonable or unduly burdensome or expensive, given the needs of the

57. FED. R. CIV. P. 16(f) advisory committee notes.

58. FED. R. CIV. P. 26(a).

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

60. FED. R. CIV. P. 26(b)(1)(i).

61. FED. R. CIV. P. 26(b)(1)(ii).

62. FED. R. CIV. P. 26(b) advisory committee notes.

63. *Id.*

64. FED. R. CIV. P. 26(b)(1)(iii).

65. FED. R. CIV. P. 26(b) advisory committee notes.

66. FED. R. CIV. P. 26(g).

case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.⁶⁷

The rule requires a judge to impose "appropriate" sanctions for violations of the above certification requirements "including a reasonable attorney's fee."⁶⁸ Thus, amended Rule 26 provides the court with two important weapons against discovery abuse. First, Rule 26(b) authorizes the court to limit discovery whenever certain conditions are found, and second, Rule 26(g) directs the court to impose sanctions on either the attorney, the party, or both, if any of its requirements are not met. Whether these weapons will prove effective, or even necessary, remains to be seen.

II. THE PRE-AMENDMENT SANCTIONING PROCESS

The stated purpose for Rule 26(g)'s "explicit" sanctioning authority is to overcome the historical reluctance of many federal judges to involve themselves in the discovery process or to impose sanctions for even clear abuses of that process.⁶⁹ In *Société Internationale Pour Participations Industrielles et Commerciales v. Rogers*⁷⁰ the Supreme Court stated that a court's "power to dismiss a complaint because of noncompliance with a production order depends entirely upon Rule 37. . . . Reliance upon . . . 'inherent power' . . . only obscure[s] analysis of the problem."⁷¹ Many courts mistakenly construed the decision as indicating that only sanctions expressly mentioned in Rule 37 were appropriate for punishing discovery infractions and further, as supporting their reluctance to impose any sanctions.⁷² The Advisory Committee Notes to Rule 26(g) rest this authority firmly on "Rule 37, 28 U.S.C. Section 1927, and the court's inherent power,"⁷³ thus silencing the debate raised by *Société Internationale*.

The "asserted reluctance"⁷⁴ on which the drafters relied has been amply described by the commentators. In 1978, Paul Connolly, Edith Holleman, and Michael Kuhlman from the Federal Judicial Center⁷⁵ surveyed six metropolitan courts and reported that motions for sanctions were made in fewer than one percent of the cases in which requests for discovery were made.⁷⁶ Of these, less than forty percent were granted.⁷⁷ Similarly, a 1979 study for the Federal Justice Research Program of the Department of Justice found that judges surveyed in the Northern District of Georgia and the Northern District of Illinois assigned a low priority to using sanctions to deter

67. *Id.*

68. *Id.*

69. FED. R. CIV. P. 26(g) advisory committee notes.

70. 357 U.S. 197 (1958).

71. *Id.* at 207.

72. See generally Note, *Federal Procedure: Due Process Limitations on Discovery Sanctions*, 46 CAL. L. REV. 836, 838-39 (1958); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 633-36 (1977) [hereinafter cited as Note, *Sanctions Imposed*].

73. *Id.* For a discussion of the sanctioning authority of 28 U.S.C. § 1927, see *infra* note 110.

74. FED. R. CIV. P. 26(g) advisory committee notes.

75. P. CONNOLLY, E. HOLLEMAN, & M. KUHLMAN, *supra* note 3.

76. *Id.* at 34.

77. *Id.* at 18-26.

discovery abuse.⁷⁸ Over eighty-five percent of the judges said they “seldom” or “never” awarded expenses in motions brought under Rule 37(a).⁷⁹

The withdrawal of courts from the frontlines of discovery battles has drawn criticism from lawyers and judges alike. One federal judge blamed the courts “for much of the abuse, in the sense that they do nothing about it”⁸⁰ and claimed that “[m]any judges see themselves in the role of an umpire who simply sits there and lets the players play the game.”⁸¹ Professor Wayne Brazil’s⁸² study of approximately 180 Chicago-area lawyers⁸³ indicates, however, that most of the players would like a bit more attention from the umpires.⁸⁴ Professor Brazil found that most of the lawyers surveyed believed the courts “fail[ed] to deliver effective assistance in solving discovery problems” and that most were “transparently reluctant to impose sanctions.”⁸⁵ The lawyers complained that even “when sanctions are imposed they . . . are too mild to serve as significant deterrents”⁸⁶ and several lawyers reported judges who “require[d] at least three failures to respond to the same clearly legitimate discovery request before . . . consider[ing] . . . a motion for sanctions.”⁸⁷

One of the reasons for this apparent abdication of authority may be that some courts are unaware that the “power to impose money awards . . . has long been a weapon available. . . .”⁸⁸ As Judge John F. Grady, District Judge for the Northern District of Illinois, noted in a 1982 interview: “Believe it or not, there are judges who don’t know they already have [the] power” to curb discovery abuse.⁸⁹ Because the new Rule itself confers no new authority, its purpose has been described as encouraging “practices that have been employed by many judges for years . . . [by] . . . stimulat[ing] . . . substantially increased activity on the part of judges who have not used their existing power to the utmost.”⁹⁰ The drafters recognized that the amended Rule reflect[s] the existing practice of many courts’ but emphasized that “[o]n the whole, however, district judges have been reluctant to limit the use of the discovery devices.”⁹¹ Many commentators expect Rule 26(g) “to stimulate all courts to begin doing what the activist courts have already been doing for some time.”⁹²

78. C. Ellington, *supra* note 3.

79. *Id.* at 55.

80. Huffman, *Protracted Litigation, Abuses of Discovery Targeted by Judge*, *Legal Times*, July 26, 1982, at 1, col. 1, at 32 (interview with Judge John F. Grady, N.D. Ill.).

81. *Id.*

82. Wayne D. Brazil is Professor of Law, Hastings College of Law, University of California, San Francisco; Affiliated Scholar, American Bar Foundation. B.A., 1966, Stanford University; M.A., 1967, Ph.D., 1975, Harvard University; J.D., 1975, University of California, Berkeley. Professor Brazil was the project director of the American Bar Foundation pilot study that assessed the effectiveness of the civil discovery system.

83. Brazil, *supra* note 29.

84. *Id.* at 247.

85. *Id.*

86. *Id.*

87. *Id.* at 248.

88. Batista, *New Discipline in Old Game—Sanctions for Discovery Abuse*, *N.Y.L.J.*, Aug. 16, 1982, at 1, col. 2.

89. Huffman, *supra* note 80.

90. Marcus, *supra* note 51, at 364.

91. Fed. R. Civ. P. 26(b) advisory committee notes.

92. Marcus, *supra* note 51, at 364.

Another explanation for the dearth of judicial activity in this area is “[t]he enormous reluctance of judges to evaluate the merits of cases before trial.”⁹³ As a Committee Report to the New York City Bar Association explained, judges seldom utilize sanctions that “adversely affect the substance of a party’s claims or defenses . . . [because they] are reluctant to dismiss meritorious claims or defenses as a penalty for” discovery abuse.⁹⁴ As one commentator noted, however, a party’s right to have its action decided on the merits “is not unqualified.”⁹⁵ There is “a corresponding right to have a prompt and inexpensive determination. . . . When one party abridges the rights of the other, courts should not hesitate to impose sanctions such as dismissal, default, or preclusion that affect the ultimate result.”⁹⁶

A related explanation for the judicial reluctance lies in the range of sanctions available prior to the adoption of Rule 26(g) and the courts’ perceptions of their purpose and severity. In the past, courts considering sanctions for discovery abuse usually referred to Rule 37. Under 37(d), sanctions may be imposed immediately only for total and complete failure to respond to a discovery request.⁹⁷ If a party has responded at all, a lawyer seeking sanctions must go through a laborious two-step procedure—first, moving under 37(a) for an order compelling the discovery requested, and then, if the order is violated, moving for sanctions against the recalcitrant party.⁹⁸

The range of sanctions available is listed in Rule 37(b)(2) according to their severity, and includes the following: (a) an order designating certain matters or facts established for purposes of the action;⁹⁹ (b) an order refusing to allow the party to support or oppose certain claims or defenses;¹⁰⁰ (c) an order prohibiting a party from introducing certain matters into evidence;¹⁰¹ (d) an order striking pleadings, staying proceedings, dismissing the action, or rendering a default judgment.¹⁰² In addition, the rule indicates that other sanctions may be appropriate.¹⁰³

In the past, courts tended to avoid the sanctions of dismissal or default judgment, usually because they perceived that sanctions were intended to remedy, not deter, misconduct. Courts therefore felt “compelled to choose . . . the least severe sanction necessary to achieve narrow remedial goals.”¹⁰⁴ However, this may reflect the “misconception that [lesser sanctions] are necessarily less severe than dismissal or default judgments.”¹⁰⁵ As one commentator explained:

93. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 6 LITIGATION Winter 1980, at 6.

94. Committee on State Courts of Superior Jurisdiction, *Proposals to Minimize the Need for Court Intervention in the Discovery Process*, 37 REC. N.Y. CITY B.A. 535, 550 (Oct. 1982).

95. Renfrew, *supra* note 3, at 86.

96. *Id.*

97. FED. R. CIV. P. 37(d).

98. FED. R. CIV. P. 37(a), (B).

99. FED. R. CIV. P. 37(b)(2)(A).

100. FED. R. CIV. P. 37(b)(2)(B).

101. *Id.*

102. FED. R. CIV. P. 37(b)(2)(C).

103. FED. R. CIV. P. 37(b)(2).

104. Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1041 (1978).

105. *Id.* at 1041 n.52.

Under certain circumstances "lesser" sanctions can achieve at least equally harsh results. Moderate fines imposed against a party without adequate resources might result in greater hardship than a litigation-ending sanction imposed against a wealthy party. Similarly, taking a fact as established or prohibiting a party from contesting or raising an issue may unavoidably lead to dismissal or default, . . . and thus may be as harsh as the "ultimate" sanction itself.¹⁰⁶

Recently, however, this trend has reversed as federal judges have begun taking a more active role in pretrial case management.¹⁰⁷ Spurred on, perhaps, by the Supreme Court's admonition in *National Hockey League*¹⁰⁸ that sanctions are an appropriate means not only in curbing discovery abuse, but also in deterring it,¹⁰⁹ more and more judges have been using Rule 37, contempt proceedings, 28 U.S.C. Section 1927,¹¹⁰ and their own inherent power to stop excessive and abusive discovery.¹¹¹ In many ways, therefore, the new rules of procedure are reflective, rather than predictive, of efforts by the courts to impose discipline on litigants.

III. SCALPEL OR MEAT-AX?—DISSECTING THE AMENDMENTS

As the Advisory Committee Notes indicate, "The premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor."¹¹² Various studies and commentaries have examined the extent to which discovery abuse occurs, the deleterious effects caused by it, and the potential impact of sanctions on both its causes and effects.¹¹³

Despite the drafters' belief that "[e]xcessive discovery and evasion or resistance to reasonable discovery requests pose significant problems,"¹¹⁴ some disagreement exists over the extent and significance of discovery abuse.¹¹⁵ United States Congressman Peter Rodino, Chair of the House Judiciary Committee, in bringing his bill to

106. *Id.* at 1039 n.44.

107. *See, e.g.,* *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) (court imposed attorney fees directly against counsel for failing to comply with court order to respond to discovery request claiming authority under Rule 37(b) and its inherent power to supervise proceedings before it); *In re Hartford Textile Corp.*, 681 F.2d 895 (2d Cir. 1982) (*per curiam*) (award of double costs and \$5000 against attorney for "repetitive and demonstrably vexatious" conduct); *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365 (9th Cir. 1980) (imposing monetary sanctions on government attorney personally under Rule 37 despite inability to impose them directly against the United States for failure to respond to a discovery order); *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062 (2d Cir. 1979) (gross negligence, short of willfulness, held to support district court order precluding evidence tantamount to a Rule 37 dismissal); Batista, *supra* note 87; Tell, *Magistrate Threatens U.S. Over Delays in Discovery*, Nat'l L.J., Apr. 26, 1982, at 34, col. 3; Tell, *Legal Fee Axed for Litton Case Discovery Abuse*, Nat'l L.J., Oct. 12, 1981, at 2, col. 4; Tybor, *'Runaway Discovery' Draws Appellate Rebuke*, Nat'l L.J., Aug. 24, 1981, at 29, col. 1.

108. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (*per curiam*).

109. *Id.* at 643.

110. Section 1927 of Title 28 of the United States Code provides that: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs." 28 U.S.C. § 1927 (1970). For a discussion of how this section has been used, see Note, *Sanctions Imposed*, *supra* note 72, at 623-29.

111. *See* Note, *Sanctions Imposed*, *supra* note 72.

112. FED. R. CIV. P. 26(g) advisory committee notes.

113. *See generally* P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *supra* note 3; Brazil, *supra* note 29; Brazil, *supra* note 3; Renfrew, *supra* note 3, at 72.

114. FED. R. CIV. P. 26 advisory committee notes.

115. *See* Levine, "Abuse" of Discovery: or Hard Work Makes Good Law, 67 A.B.A. J. 565 (May 1981).

defer the amendments' effective date, told reporters that although the new Rules are "intended to cure perceived abuses in the discovery process . . . 'there is dispute about the extent of any alleged abuse.'"¹¹⁶ The 1976 Report of the Pound Conference Follow-Up Task Force¹¹⁷ emphasized the need for "[e]mpirical data concerning the types of cases in which abuse is most likely to occur, the nature and extent of the abuse, and the utility of remedies which have been tried."¹¹⁸ Studies such as Professor Brazil's¹¹⁹ followed, but commentators argue that the studies fall far short of convincing evidence. Despite Professor Brazil's pronouncement that "it would be difficult to exaggerate the pervasiveness of evasive practices or their adverse impact on the efficiency or effectiveness of civil discovery,"¹²⁰ at least one law professor believes that the reports have been exaggerated.¹²¹ Pointing to the theatrical nature of trial lawyers and their overwhelming desire to litigate in a courtroom instead of in a deposition room, Professor Levine¹²² questioned the pervasiveness of the reported abuses.¹²³ He further emphasized that the empirical studies which show that abuse does occur also show that it occurs mainly in complex, protracted lawsuits.¹²⁴ Professor Levine is not alone. One commentator dryly observed:

These striking changes in the Federal Rules of Civil Procedure are constructed on a rather narrow edifice. . . . Brazil's research, widely relied upon by the Advisory Committee, consisted of interviews of 180 litigators in the Chicago area. Even within that context, the greatest complaints identified discovery abuse in the so-called "big cases."¹²⁵

A trial lawyer, contemplating the need for cheaper and simpler discovery, agreed, noting that "[p]reoccupation with [techniques characteristic of large, complex cases] should not dominate the general effort to reform discovery abuses."¹²⁶

There may be a logical explanation for the lack of hard data proving the extent and amount of discovery abuse. The very nature of discovery abuse renders it difficult, sometimes impossible, to detect or prove.¹²⁷ Even those who believe abuse is a "significant problem" acknowledge that "[r]eal discovery abuse is not common."¹²⁸ Rather, it is "sporadic, but very serious where it occurs."¹²⁹ One of the

116. Pike, *supra* note 43.

117. The Report of the Pound Conference Follow-Up Task Force was a report of a study conducted in response to Chief Justice Burger's remarks at the 1976 Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, commonly referred to as the Pound Conference. The Follow-Up Report is reprinted at 74 F.R.D. 159 (1976). Chief Justice Burger's comments are reprinted in Burger, *supra* note 5.

118. *Report of Pound Conference Follow-Up Task Force*, *supra* note 23, at 192.

119. Brazil, *supra* note 3; Brazil, *supra* note 29; see text accompanying notes 82-87.

120. Brazil, *supra* note 3, at 789.

121. Levine, *supra* note 115, at 565-67.

122. Professor Julius B. Levine is a professor of law at Boston University School of Law.

123. Levine, *supra* note 115, at 565-67.

124. *Id.* at 567.

125. Goodman, *supra* note 51, at 5.

126. Kohn, *Discovery Made Simpler (and Cheaper)*, 6 LITIGATION Winter 1980, at 3.

127. Renfrew, *supra* note 93, at 5 ("My experience in civil litigation has convinced me that abuse . . . while difficult to detect and prove, is widespread. It occurs most often in discovery matters.").

128. Schroeder & Frank, *supra* note 3, at 477.

129. *Id.* at 478.

commentators¹³⁰ upon which the Advisory Committee relied summarized the enigma by explaining that “[t]he extent of discovery abuse is greatly exaggerated. However, where it occurs, discovery abuse is tremendous.”¹³¹ This explanation is reflected in findings by the 1978 Federal Judicial Center study:

Discovery abuse, to the extent it exists, does not permeate the vast majority of federal filings. [A]buse—to the extent it exists—must be found in the *quality* of the discovery requests not in the *quantity*.

. . . .

[It is as] possible for a single discovery request to be abusive, as . . . for sixty-two requests to be appropriate, relevant and facilitative in the just disposition of a . . . case.¹³²

It appears, therefore, that the type or quality of discovery abuse contributes to the delay and expense that the drafters of the amendments were hoping to cure.

Amended Rule 26 reflects not only the drafters’ belief that the extent and amount of abuse that occurs warrant the new provisions, but also the belief that imposing sanctions will both detect and deter the type of abuse that occurs. An examination of different discovery practices reveals, however, that judges and litigators differ in their perceptions of which procedures rise to the level of an abuse. Matching the drafters’, the courts’, and the litigators’ definitions of abuse may prove a high hurdle to overcome in making the new rules work.

One commentator distinguishes between “relatively small abuses . . . [that] cost time and money but not a great deal” and “more serious incidents, in which [the] cost may be very large, justice may be frustrated, and litigation enormously protracted.”¹³³ The former, labeled “vexations,”¹³⁴ usually result from attorneys using discovery forms that are either “wildly inapplicable”¹³⁵ or that request great detail on marginal or unrelated matters.¹³⁶ The latter, defined as “true abuse,”¹³⁷ usually results from “colossal requests” and interrogatory evasion.¹³⁸ Professor Brazil’s 1980 study¹³⁹ identified the most frequently mentioned discovery abuses as “evasive responses, withholding information, or noncompliance; overdiscovery; delay; cost; harassment; interrogatories; incompetence or deficiencies of lawyers; and . . . attorneys’ economic motives.”¹⁴⁰ The most common problem-producing practices were described as:

—meter running (performing unnecessary work primarily for the purpose of milking additional fees from clients)

—overproduction of documents

130. *Id.*

131. *Id.* at 492 (quoting Judge Alvin Rubin).

132. P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *supra* note 3, at 35.

133. Schroeder & Frank, *supra* note 3, at 478.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Brazil, *supra* note 3; Brazil, *supra* note 29.

140. Brazil, *supra* note 3, at 825.

- identifying . . . dozens of people who “have relevant information” when only one or two know anything of real significance
- seeking more information . . . than needed to have “something to compromise with” if the opponent objects
- coaching deponents to wander off on harmless, tangential subjects to distract . . . and consume time
- conducting discovery . . . not to acquire relevant evidence but to pressure an opponent to settle
- using discovery in one lawsuit to serve purposes beyond the pending litigation
- failure to develop early in litigation clear theories of liability or defense to guide discovery efforts.¹⁴¹

Professor Brazil also found three major “tactical purposes” motivating most of the attorneys who admitted to these types of discovery practices.¹⁴² Eighty percent of the attorneys interviewed agreed that “gaining time or slowing down part or all of an action” was a frequent motive; seventy-seven percent said they used discovery to impose “work burdens or economic pressure on another party or attorney;” and eighty-six percent admitted to “distracting another party’s attention from or obscuring the existence of information.”¹⁴³ Clearly, according to Professor Brazil’s survey, a majority of litigators freely admitted to discovery practices that would have prevented them from signing in good faith a discovery request or response under new Rule 26(g).

Surprisingly, however, an informal survey of Sixth Circuit judges in the Northern and Southern Districts of Ohio (Informal Judicial Survey),¹⁴⁴ conducted six months after the new Rules went into effect, revealed not a single instance in which the sanctioning authority of new Rule 26(g) had been used.¹⁴⁵ Although most of the judges agreed that the amendments to Rule 26 are warranted by the type and amount of discovery abuse that they have encountered in the Sixth Circuit, few could point to any specific abuse and at least one judge reported encountering little discovery abuse.¹⁴⁶ Moreover, a majority of the judges responding to the survey said they did not believe sanctions were necessary or appropriate when the attorney was not acting in bad faith.¹⁴⁷ They indicated a belief that it was inappropriate for judges to impose sanctions in cases involving merely non-willful misuse of discovery devices, as opposed to purposeful misuse.¹⁴⁸ The judges also agreed that they did not expect the new discovery rules to change either their caseloads or the conduct of discovery.¹⁴⁹

141. Brazil, *supra* note 29, at 235–36.

142. Brazil, *supra* note 3, at 852.

143. *Id.* at 852–54.

144. The Informal Judicial Survey, conducted by this author, polled Sixth Circuit appellate and district court judges from the Northern and Southern Districts of Ohio concerning the August 1983 amendments. The survey solicited the judges’ opinions on the shift in the Rules to greater court intervention, the purposes of discovery, the extent and types of discovery abuse they have encountered, the standard of reasonableness required by the new Rules, the problem of potential satellite litigation, and their own personal reactions to the amendments. The results of the survey are on file at the editorial offices of the *Ohio State Law Journal*.

145. Informal Survey of Sixth Circuit Judges in the Northern and Southern Districts of Ohio, Feb. 1984 [hereinafter cited as Informal Judicial Survey].

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

One reason for the dearth of Rule 26(g) sanctions in Ohio courts may be that Ohio litigators lag behind their Chicago counterparts in creative abuse of the discovery process. Another possible explanation may be the relatively small sampling of judges who chose to respond to the survey. The low participation level may reflect a defensive posture among judges tired of being blamed for the inefficiencies and abuses of modern litigation. The most likely explanation, however, is that the judges responding to the survey, like many federal judges across the country, do not define abuse as broadly as the commentators.¹⁵⁰

Another problem that could plague the new Rule's effectiveness, and which the drafters themselves anticipated is satellite litigation. The Advisory Committee Notes to Rules 11 and 26(g) admonish courts and litigants "[t]o assure that the efficiencies achieved . . . will not be offset by the cost of satellite litigation over the imposition of sanctions . . . [by limiting] the scope of sanction proceedings to the record."¹⁵¹ Discovery in sanction proceedings brought under Rule 26(g) "normally" will be permitted "only when it is clearly required by the interests of justice."¹⁵² The drafters believed that "[i]n most cases the court will be aware of the circumstances and only a brief hearing should be necessary."¹⁵³

While some legal commentators believe the new Rule contains only the potential for adversaries to threaten each other with suits over sanctions,¹⁵⁴ other commentators are firmly convinced that a "blizzard" of satellite litigation will result.¹⁵⁵ One writer warned that "[o]n a day-to-day basis, the worst effect of the new discovery rules will be an explosion of 'satellite litigation.'"¹⁵⁶ Participants at the Annual Judicial Conference of the Second Circuit in October, 1983 agreed. The consensus was that the new Rules would "generate so-called satellite litigation . . . 'completely corollary' to the original suit. . . ."¹⁵⁷ In complex cases especially, litigants invoking the new Rule's sanctioning device could produce mini-trials over contested items of information that cumulatively could last longer than the original action.

Sixth Circuit judges responding to the Informal Judicial Survey, however, apparently do not believe satellite litigation over the imposition of sanctions is or will be as large an issue as predicted.¹⁵⁸ Most of the survey participants did not expect a large amount of satellite litigation to result from Rule 26(g). One judge believed a significant amount would occur but only in a select percentage of cases.¹⁵⁹ Another judge believed that sanctioning under Rule 26(g) is a serious matter and one that deserves to be litigated. The same judge, however, recognized the potential of having to impose

150. See, e.g., Kohn, *supra* note 126; Pegram, *Discovery Sanctions*, 51 ANTITRUST L.J. 431 (1982); Renfrew, *supra* note 92; Gruenberger, *Discovery Abusers Have Many Bags Full of Tricks*, Legal Times, July 4, 1983, at 18, col. 1.

151. FED. R. CIV. P. 11 advisory committee notes.

152. FED. R. CIV. P. 26(g) advisory committee notes.

153. *Id.*

154. J. UNDERWOOD, A GUIDE TO FEDERAL DISCOVERY RULES 24 (Supp. 1983).

155. Goodman, *supra* note 51, at 4.

156. *Id.* at 5.

157. Alperson, *New York Attorneys Criticize Discovery Reform Proposals*, Legal Times, Oct. 10, 1983, at 3, col. 1.

158. Informal Judicial Survey, *supra* note 145.

159. *Id.*

sanctions on attorneys for abusing the sanctioning process and agreed that such circuitry “gets a little silly.”¹⁶⁰ Most of the judges responding placed their faith in effective and meaningful pretrial conferences and discovery orders to prevent discovery abuse before it occurs, rather than in sanctions.¹⁶¹ Even if, through forceful case management, courts avoid having their attention diverted “from the merits of a case toward the tributary issue of counsel’s conduct,”¹⁶² they will face other hurdles in implementing the new rules.

The most difficult issues raised by the amendments are the standards to be applied under the new Rules. Under Rule 26(g), a court is empowered to impose sanctions against a party or attorney who fails to make a “reasonable inquiry” before signing a discovery request, response, or objection.¹⁶³ In determining whether the duty to make a “reasonable inquiry” has been satisfied, the Advisory Committee Notes state that an “objective standard” is to be applied.¹⁶⁴ The duty is met “if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances.”¹⁶⁵ Applying this objective standard on a case-by-case basis, without varying the standard from district to district and even from judge to judge within a district, appears impossible in practice. A court must decide whether, in light of all the circumstances, an attorney’s discovery activity is (1) supported by an existing or good faith argument of law, (2) not designed for any improper purpose, including harassment and delay, and (3) not unreasonable or unduly burdensome or expensive under a vague, multi-factored, proportionality standard.¹⁶⁶

Even if a court can justly determine whether the first two prongs of this test have been met, the third prong, proportionality, requires a court to use either a crystal ball or a large amount of guesswork. Under the proportionality standard, a court must balance the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation,¹⁶⁷ to decide whether a party’s request for discovery is reasonable and not unduly burdensome or expensive.

The vagueness of the standard expressed in Rule 26(g) leaves many questions unanswered. As Judge Schwarzer, District Judge for the Northern District of California, commented:

Who is to say that some novel theory of claim or defense is so far beyond the pale that it cannot pass the tests of reasonableness and good faith under the newly revised rules 11 and 26(g)? Who can say with assurance that a far-fetched line of discovery may not promise pay dirt for a litigant?¹⁶⁸

160. *Id.*

161. *Id.*

162. J. UNDERWOOD, *supra* note 154, at 24.

163. FED. R. CIV. P. 26(g) advisory committee notes.

164. *Id.*

165. *Id.*

166. *Id.*

167. FED. R. CIV. P. 26(b).

168. Sherman, *supra* note 21, at 120.

Applying the reasonableness standard fairly to all parties may prove to be an impossibility.

The counter-argument, advanced by the participants of the Informal Judicial Survey, is that few standards can be applied with perfect equity. Many of the judges saw no difference between applying Rule 26(g)'s proportionality standard and determining any other discretionary matter. One judge defended the rule by explaining that making a reasonable inquiry is the "essence of judging."¹⁶⁹ Another judge, who believed he could apply the standard equitably, replied: "In human affairs, identical circumstances never exist. The genius of the common law doctrine of reasonableness is that it does not expect them to."¹⁷⁰

Standards do not have to be applied identically, however, just equally. The guidelines given in Rule 26 may be too amorphous to be understood, let alone applied in an evenhanded manner. For example, nowhere is the term "needs of a case" defined, yet it is one of the four elements a court is required to balance in deciding whether to impose sanctions for abuse of discovery. Given these obscurities, the proportionality standard probably cannot be applied fairly or with any kind of certainty or uniformity of result.

The drafters took a similar approach in determining the standard of due process that must be met in the sanctioning process. The Advisory Committee Notes state that "[t]he kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered."¹⁷¹ Determining the due process requirements to be met when different types of sanctions are imposed is left to the individual court. Again the potential for disparity is tremendous. For example, if a contempt sanction is imposed for its deterrence effect, one judge may decide that criminal contempt proceedings are required, while another may view it as a civil proceeding with merely civil due process requirements.¹⁷² The new Rule leaves unanswered the question whether the imposition of punitive sanctions will require a court to avail the offending party or attorney criminal due process rights.¹⁷³

The responses to the Informal Judicial Survey further illustrate the confusion. Answers to a query concerning due process requirements under the new Rule ranged from "I have no idea how the standard can be fairly applied," to requiring "full notice and an opportunity for a full hearing, including the taking of testimony."¹⁷⁴ Most of the judges agreed the standard is one of fundamental fairness, but could provide no specific answers on the type of due process required by the new Rule. Because the sanctions available to a court vary considerably, the extent of due process provided to those subject to sanctions probably will vary as well.

Even if the courts could devise ways of applying the new standards fairly and effectively, the success of the amendments remains doubtful because the amendments fail to affect the adversarial nature of lawyers. Seventy years ago, Dean Roscoe

169. Informal Judicial Survey, *supra* note 145.

170. *Id.*

171. FED. R. CIV. P. 26(g) advisory committee notes.

172. *See Note, supra* note 20, at 1052-54.

173. *Id.*

174. Informal Judicial Survey, *supra* note 145.

Pound attacked the overbearing contentiousness of the American adversary system by stating that it "was perverting the adversary idea into a sporting contest."¹⁷⁵ Dean Pound's attack appears equally true today. More recently, Professor Brazil has described how "the adversary character of civil discovery, with substantial reinforcement from the economic structure of our legal system, promotes practices that systematically impede the attainment of the principal purposes for which discovery was designed."¹⁷⁶

Despite the heralding of the new Rules "as counterweights to the demand of zealous representation,"¹⁷⁷ it appears that the drafters once again may have underestimated how tenaciously attorneys would cling to the adversarial system. Attorneys are essentially unchanged ethically by the Rules—they remain bound under Canon 7 of the Code of Professional Responsibility to represent their clients "zealously within the bounds of the law. . . ."¹⁷⁸ Their loyalty to a "professional ethic that compels advocates to pursue the best resolution possible for their clients without regard to the merits of the dispute"¹⁷⁹ remains unshaken. Anything less could expose attorneys to malpractice suits and professional disciplinary proceedings, not to mention loss of professional esteem and economic advantages. Professor Brazil's criticism of the 1980 Amendments may apply to the most recent amendments as well since "[n]one of the changes . . . purport to convert adversary attorneys into allies."¹⁸⁰

The adversarial nature of trial lawyers could combine with the new Rule to produce a new kind of discovery abuse—abuse of the sanctioning process itself. Moving for sanctions whenever an opponent serves a discovery request could become standard procedure for attorneys trained to expose every weakness of their adversary's case while endeavoring to hide every flaw of their own. The only restraints on this type of abuse will be the attentiveness of judges and the historical reluctance of lawyers to seek sanctions for fear that they may someday be in their adversary's position. The latter restraint, the traditional reluctance to move for discovery sanctions, probably will erode with time and with increased knowledge of how the new Rule can be manipulated. The success and effectiveness of the former restraint, the attentiveness of the trial judge, is much harder to predict.

Several commentators are already fearful of the wide authority the 1983 amendments gave to trial judges.¹⁸¹ These commentators argue that expanded opportunities for abuse of judicial power will result as the Rules transform judges from adjudicators to administrators. Instead of reducing court congestion and the amount of time judges

175. Burger, *supra* note 5, at 91; see also Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 35 F.R.D. 273 (1964) (originally published in 29 A.B.A. REP. 395 (1906)).

176. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1296 (1978); see also Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713 (1983).

177. Lempert, *Rules Committee Takes Big Bite at Discovery Excess*, Legal Times, July 13, 1981, at 8, col. 1.

178. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1979); cf. MODEL RULES OF PROFESSIONAL CONDUCT 1.3 (1983).

179. Brazil, *supra* note 176, at 1312.

180. *Id.* at 1345.

181. See, e.g., Girdner, *New Rules Would Give More Power to Federal Judges: Opposition Expected*, L.A. Daily J., May 11, 1983, at 1, col. 2.

spend on each case, the Rules could add managerial duties that will detract from the quality of judicial decisions.

Although the judges responding to the Informal Judicial Survey did not agree that the new Rule grants too much authority to district court judges, several believed that the new Rule cuts in the wrong direction. One judge stated flatly that "less judicial time should be spent in discovery disputes."¹⁸² The participants were overwhelmingly pessimistic in their beliefs that the new discovery Rules will not change the way discovery is conducted in the cases they hear.¹⁸³

IV. CONCLUSION

Despite the avalanche of commentary triggered by the 1983 adoption of the amendments to the Federal Rules of Civil Procedure, the new Rules appear to have produced few changes in the way discovery is sought and sanctioned. The residual reluctance of judges to impose sanctions has been helped along in its gradual decline by Rule 26(g) and the Advisory Committee Notes, but no great rush to the courthouse door by lawyers seeking sanctions has begun.

Perhaps the skepticism that greeted earlier efforts to curb discovery abuse is stemming the predicted tidal wave of satellite litigation. Perhaps lawyers and judges are too uncertain of how the new Rule should be applied to risk moving for sanctions under Rule 26(g). Perhaps litigators have not yet learned that the Rule's sanctioning scalpel can be used as a new weapon of harassment against their adversaries. Whatever the reason, it is difficult to predict when, or whether, changes in current discovery practices will occur. It is clear, however, that it is up to the federal judges to make the new Rules work. The Rules will not make themselves work, nor will attorneys make them work. The 1983 amendments require judges to reevaluate their roles and shoulder new managerial burdens. Only if judges are willing to accept these new responsibilities, despite their overcrowded dockets and in the face of strong critical opposition, will the new Rules achieve any effective discovery reform.

Margaret L. Weissbrod

182. Informal Judicial Survey. *supra* note 145.

183. *Id.*

