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COMMENT

PREVENTING ABUSE OF DISCOVERY IN FEDERAL COURTS

The discovery provisions of the Federal Rules of Civil Procedure[1] permit civil litigants in federal court to find out both the factual basis of an opponent's case and pertinent data in an opponent's hands that may lead to evidence supportive of their case. These provisions authorize an extremely broad approach to discovery, allowing a party to discover any matter that is relevant to the subject matter of the suit regardless of whether the matter relates to the party's own claim or defense or to that of his opponent.[2] The rules enable the parties to identify and refine the issues of their controversy. Consequently, litigants should be able to reach a just disposition of their action quickly and inexpensively, whether by settlement or adjudication.[3]

But the extensive scope of the discovery rules renders them vulnerable to abuse by the parties. Overbroad discovery requests can be designed primarily to harass opponents by forcing them to expend considerable time

1. FED. R. CIV. P. 26-37. These rules provide for discovery through oral or written depositions, written interrogatories, production of documents and things, physical and mental examinations, and requests for admission. FED. R. CIV. P. 26(a). *See* notes 28-34 *infra*.

2. FED. R. CIV. P. 26(b)(1). *See, e.g.*, Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978); Stevenson v. Melady, 1 F.R.D. 329, 330 (S.D.N.Y. 1940).

The rules, however, do not allow for discovery of privileged material. FED. R. CIV. P. 26(b)(1). The term "privileged" in Rule 26(b)(1) refers to those privileges available in the law of evidence. United States v. Reynolds, 345 U.S. 1, 6 (1953). *See* FED. R. EVID. 501 ("[I]n civil actions and proceedings . . . the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law"). *See also* Hickman v. Taylor, 329 U.S. 495, 511-12 (1947) (memoranda, statements, and mental impressions prepared, or obtained from interviews with witnesses, by counsel in preparing for litigation are privileged materials immune from discovery).

Although the discovery rules apply to the United States government in civil actions, United States v. Proctor & Gamble Co., 356 U.S. 677, 681 (1958), the government enjoys unique privileges exempting it from compliance with certain discovery requests. *See, e.g.*, United States v. Reynolds, 345 U.S. 1 (1953) (discovery requests in Federal Torts Claim Act suit denied where requested material dealt with military secrets). *See generally* Note, *Preferential Treatment of the United States Under Federal Civil Discovery Procedures*, 13 GA. L. REV. 550 (1979).

3. *See* FED. R. CIV. P. 1. *See also* Schlagenhauf v. Holder, 379 U.S. 104, 114-15 (1964); Hickman v. Taylor, 329 U.S. 495, 501 (1947).

and money complying with unnecessary requests.[4] Conversely, a litigant's failure to comply fully and promptly with legitimate discovery requests can result in an opponent's inability to obtain information otherwise rightfully discoverable under the rules.[5] These abuses have fostered cries for reform of the discovery rules, and several such proposals have been introduced.[6]

This Comment will not analyze the merits of these proposals. It is submitted here that the rules themselves contain devices that should suffice to prevent discovery abuses. Rule 26(c),[7] for example, permits district courts to enter orders protecting litigants from the harassment of overbroad discovery. Rule 37[8] permits the imposition of sanctions upon parties who fail to comply with discovery requests. Used properly, these built-in safeguards are sufficient to prevent abuse. Moreover, unlike suggested reforms, these rules suit the modern purpose of discovery and of the Federal Rules of Civil Procedure to produce the just and efficient disposition of cases in federal courts.

I. The Development of the "Broad and Liberal Treatment" of the Discovery Rules

In 1934, Congress enacted the Rulemaking Statute,[9] giving the Supreme Court "the power to prescribe, by general rules, for the district courts of the United States . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law."[10] The statute also permitted the Court to "unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both."[11] Pursuant to this power, the Court adopted the

4. *See, e.g.*, Global Maritime Leasing Panama, Inc. v. M/S North Breeze, 451 F. Supp. 965 (D.R.I. 1978); *In re* U.S. Financial Sec. Litigation, 74 F.R.D. 497 (S.D. Cal. 1975).

5. *See, e.g.*, National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976); Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2d Cir. 1979).

6. *See generally* ABA Proposed Rules, *reprinted in* Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 ARIZ. ST. L.J. 475, 506-21 apps; Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253 (1979); Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation*, 48 FORDHAM L. REV. 907 (1980). *See generally* FEDERAL JUDICIAL CENTER, SURVEY OF LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS (1978).

7. FED. R. CIV. P. 26(c), *quoted in* text accompanying note 61 *infra*.

8. FED. R. CIV. P. 37. *See* notes 119-26 and accompanying text *infra*.

9. Act of June 19, 1934, ch. 651, §§ 1, 2, 48 Stat. 1064 (formerly codified in 28 U.S.C. §§ 723b, 723c (1934)).

10. *Id.* § 1.

11. *Id.* § 2. At the time, procedure in equity was governed by the Equity Rules of 1912,

Federal Rules of Civil Procedure,[12] which became effective on September 16, 1938.[13]

The rules thus merged actions at law and actions in equity into one form of action known as a "civil action."[14] This merger did not, however, abolish the differences between legal and equitable rights and remedies; rather, it abolished the procedural differences between bringing an action at law and one in equity.[15] The rules were designed to eliminate the procedural

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Fed. Eq. R. 1-81, 226 U.S. 627 (1912), promulgated by the Supreme Court pursuant to the Act of August 23, 1842, ch. 188, § 6, 5 Stat. 518 (formerly codified in 28 U.S.C. § 730 (1934)). Procedure in actions at law, however, varied considerably from district to district due to the command of the Conformity Act that procedure in all civil cases in federal district courts other than equity and admiralty proceedings "conform, as near as may be, to the . . . modes of proceeding existing at the time in like causes in the courts . . . of the State within which such district courts are held, any rule of court to the contrary notwithstanding." Conformity Act, ch. 255, § 5, 17 Stat. 197 (formerly codified in 28 U.S.C. § 724 (1934)). *See, e.g.*, Quirk v. Bank of Commerce & Trust Co., 244 F. 682 (6th Cir. 1917); Martin v. Zurich Gen. Accident & Liab. Ins. Co., 16 F. Supp. 897 (D.R.I. 1936).

12. FED. R. CIV. P. 1-86. The original Rules are found at 308 U.S. 653 (1939).

13. *See* 2 MOORE'S FEDERAL PRACTICE ¶ 1.03[1] n.4 (2d ed. 1979). *See also* FED. R. CIV. P.86(a).

14. This concept is embodied in Rule 2: "There shall be one form of action to be known as a 'civil action.'" FED. R. CIV. P. 2. *See also* FED. R. CIV. P. 1: "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity . . . ."

The obvious effect of Rule 1, coupled with the Rulemaking Statute's command that "all laws in conflict [with the Rules] shall be of no further force and effect," Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064, was to supersede both the Equity Rules of 1912 and the Conformity Act, discussed *supra*, at note 11. *See* Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (a party has a right to an order compelling physical examination under Rule 35 notwithstanding state practice to the contrary since the rules supersede the Conformity Act). *See also* Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 262 (1939); Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5 (1938).

The Conformity Act and the Act of 1842 allowing the Court to promulgate equity rules, along with the Rulemaking Statute, were officially repealed in the 1948 revision of the Judicial Code, ch. 646, §§ 1-2906, 62 Stat. 869 (1948). The Rulemaking Statute was replaced, without substantial change, by the Rules Enabling Act, ch. 646, § 2072, 62 Stat. 961 (1949) (current version at 28 U.S.C. § 2072 (1976)).

15. Fleming v. Peavy-Wilson Lumber Co., 38 F. Supp. 1001, 1002 (W.D. La. 1941); Williams v. Collier, 32 F. Supp. 321, 323 (E.D. Pa. 1940). *See generally* 2 MOORE'S FEDERAL PRACTICE ¶ 2.02[1] (2d ed. 1979).

It is well beyond the scope of this comment to discuss those types of cases which warrant treatment of law and those which are to be decided on equitable principles with the attendant and traditional equitable remedies. Stated simply, however, actions at law generally include a claim for damages, either in the form of money or property, whereas actions in equity seek a personal command against the defendant requiring him to pursue, or prohibiting him from pursuing, a particular course of action. *See* Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970). *See generally* F. JAMES, CIVIL PROCEDURE 21 (1965); 5 MOORE'S FEDERAL PRACTICE ¶ 38.11[5,6] (2d ed. 1979). The important distinction remains, however, that in an action at law either party has a right to trial by jury, while this right generally is not available in an equitable action. *See* U.S. CONST. amend. VII ("In suits at common law, where

"booby-traps" that could, under common law pleading, prevent unwary and unsophisticated litigants from ever having their day in court.[16] Probably the most common technical obstacle that undermined a party's attempt to have his claim adjudicated on the merits was the meticulous "code pleading" requirement that a plaintiff "state facts constituting a cause of action" lest his complaint be dismissed.[17] This practice under state codes was followed in federal courts in actions at law[18] and often resulted in the dismissal of a meritorious claim because the plaintiff failed to clear the

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the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.") *Cf.* Kimberly-Clark Corp. v. Kleenize Chem. Corp., 194 F. Supp. 876, 879 (N.D. Ga. 1961) (the right to trial by jury does not extend to cases in equity). Section 2 of the Rulemaking Statute provided that "in such union of the law and equity rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate." Act of June 19, 1934, ch. 651, § 2, 48 Stat. 1064. Rule 38(a) reiterates this sentiment, and Rule 38(b) allows a party to demand a trial by jury only on any issues triable of right by a jury. FED. R. CIV. P. 38(a), (b).

In addition to providing that the Supreme Court could not promulgate rules limiting litigants' seventh amendment right to trial by jury in actions at law, the Rulemaking Statute dictated that the rules promulgated by the Court "shall neither abridge, enlarge, nor modify the substantive rights of any litigant . . . ." Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064. Rule 1, which outlines the scope of the Rules, accomplishes this by stating that "[t]hese rules govern . . . procedure . . . ." FED. R. CIV. P. 1. *Cf.* Hanna v. Plumer, 380 U.S. 460 (1965).

16. One commentator, a member of the original Advisory Committee to the Supreme Court on the promulgation of the Rules, stated:

> The purpose which [the Rules seek] to accomplish is to eliminate technical matters by removing the basis for technical objections, to make it as difficult as impossible [*sic*] for cases to go off on procedural points, and to make litigation as inexpensive, as practicable and as convenient, as can be done.

Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 30 (1938). *See also* Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966) ("If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should nearly as possible guarantee, that bona fide complaints be carried to an adjudication on the merits.")

17. *See, e.g.*, CAL. CIV. PRO. CODE § 426 (Deering) (1909); MO. REV. STAT. § 1794 (1909); N.C. GEN. STAT. § 1-122 (1953) (repealed 1970). *See generally* Cook, *Statements of Fact in Pleading under the Codes*, 21 COLUM. L. REV. 416 (1921).

The cardinal requirement of such code pleading statutes was that the plaintiff set out facts constituting a cause of action, not the plaintiff's legal conclusions. A cause of action consisted of facts, whereas legal conclusions were assumed to be known to the parties and the court and were therefore worthless in the absence of facts to which they could be applied. *See, e.g.*, Stivers v. Baker, 87 Ky. 508, 9 S.W. 491, 492 (1888):

> A statement of facts constituting a cause of action is not only necessary to enable the opposite party to form an issue, and to inform him of what his adversary intends to prove, but to enable the court to declare the law upon the facts stated. It cannot do so if a mere legal conclusion is stated.

See also Gillespie v. Goodyear Serv. Stores, 258 N.C. 487, 128 S.E.2d 762 (1963); POMEROY, CODE REMEDIES 560-61 (4th ed. 1904), *quoted in* Cook, *supra*, at 417 n.11.

18. *See* note 11 *supra*. *Cf.* Fed. Eq. R. 25, 226 U.S. 655 (1912) ("[A] bill in equity shall contain . . . a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.")

initial hurdle of stating facts sufficient to constitute a cause of action.[19]

The implementation of the rules, however, operated to remove the procedural difficulties that arose under code pleading. For example, instead of requiring a statement of facts constituting a cause of action, the rules demand only "a short and plain statement of the claim showing that the pleader is entitled to relief."[20] The differences between the two pleading systems were clarified by the Supreme Court in *Conley v. Gibson*.[21] In that case, the plaintiff-petitioners brought suit in federal district court alleging that the respondents had discriminated against them in violation of the Railway Labor Act.[22] The respondents argued that because the complaint did not set forth specific facts to support its general allegations of discrimination, the action should be dismissed for failure to state a claim upon which relief could be granted.[23] The Supreme Court disagreed, saying the Rules do not require a party to set out in detail the facts upon which he bases his claim: all that is required under Rule 8(a)(2) is "a short and plain statement of the claim" giving the defendant fair notice of the substance and basis of the plaintiff's claim.[24] Following the rule 8(f) guide that "all pleadings shall be so construed as to do substantial justice,"[25] the Court found that the petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis.[26] The Court added: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on

19. An example of rigid adherence to code pleading can be found in Lyons v. Reinecke, 10 F.2d 3 (7th Cir. 1925). In that case the plaintiff sued the Collector of Internal Revenue to recover taxes paid under protest on the ground that he was exempt from such payment. The district court dismissed the suit for failure to state facts constituting a cause of action. The Seventh Circuit affirmed, saying the pleadings were so indefinite and uncertain that they failed to show what work the plaintiff was employed to do, what work he in fact did, or whether his employment was such as to bring him within the exemption under consideration. *Id.* at 7. *See also* Jack v. Armour & Co., 291 F. 741, 745 (8th Cir. 1923) (antitrust action dismissed where allegation that plaintiff was injured by defendant's conduct was unsupported by facts showing the manner or extent of the injury and was insufficient to state a cause of action).

20. FED. R. CIV. P. 8(a)(2).

21. 355 U.S. 41 (1957).

22. 45 U.S.C. §§ 151-188 (1976).

23. Rule 12(b)(6) allows a party to move to dismiss his opponent's claim for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

24. 355 U.S. at 47.

25. FED. R. CIV. P. 8(f). *Cf.* FED. R. CIV. P. 1: The rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

26. 355 U.S. at 48.

the merits."[27]

"Notice pleading" alone, however, fails to inform the opposing party or the court of the precise matters to be adjudicated at trial. The discovery provisions of the rules are designed to accomplish that. Rule 26(a)[28] provides that parties may obtain discovery by one or more of the following methods: depositions upon oral examination[29] or written questions,[30] written interrogatories,[31] production of documents or things or permission to enter upon land,[32] physical and mental examinations,[33] and requests for admissions.[34] Use of these devices represents a significant change from discovery practices available in federal court prior to 1938.[35] Their pur-

27. *Id. See also* Littleton v. Berbling, 468 F.2d 389, 393 (7th Cir. 1972), *cert. denied*, 414 U.S. 1143 (1974); Dearman v. Woodson, 429 F.2d 1288, 1289 (10th Cir. 1970).

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

29. FED. R. CIV. P. 30(a) provides: "After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination." Leave of the court is generally not required. *Id.*

30. FED. R. CIV. P. 31(a) provides: "After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions." The use of both oral and written depositions in court is outlined in Rule 32. *See, e.g.*, Salsman v. Witt, 466 F.2d 76, 79 (10th Cir. 1972) (testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is unavailable to testify in person).

31. FED. R. CIV. P. 33(a) provides: "Any party may serve upon any other party written interrogatories to be answered by the party served . . . who shall furnish such information as is available to the party."

32. FED. R. CIV. P. 34(a) provides:

> Any party may serve on any other party a request (1) to produce and permit the party making the request . . . to inspect and copy, any designated documents . . ., or to inspect and copy, test, or sample any tangible things . . . which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon. . . .

33. FED. R. CIV. P. 35(a) provides: "When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician . . . . The order may be made only on motion for good cause shown . . . ."

34. FED. R. CIV. P. 36(a) provides:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters . . . set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.

See FED. R. CIV. P. 36(b): "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

35. Prior to 1938, the discovery devices available in actions at law were contained in chapter 17 of the Judicial Code, 28 U.S.C. §§ 631-738 (1934). The discovery provisions of the Federal Rules superseded those sections governing discovery in 1938 and chapter 17 was repealed in its entirety in 1948. *See* note 14 *supra*. There were limited provisions for deposi-

pose is to allow the parties to ascertain the facts relevant to the claims raised in the pleadings, thereby narrowing and clarifying the basic issues so that civil trials in federal court need not be carried on "in the dark."[36] The availability of discovery under Rules 26 through 37 thus vitiates the argument that the notice-pleading provisions of the rules fail to inform the parties and the court as to the precise bounds of the subject matter being litigated. The relevant facts and the resulting formation of the scope of the subject matter at issue are still revealed before trial. The difference between practice under code pleading and the present system, however, is that the latter allows the facts and issues to be developed in a manner more conducive to effectuating just results.[37] The plaintiff will not suffer dismissal of a meritorious claim for failing to recite all the facts necessary to constitute a cause of action, but rather, with the sanction of the rules, is afforded time and the tools to uncover facts necesary to sustain his action.

In order to be effective, however, the scope of discovery must necessarily be broad. Rule 26(b)(1) provides that litigants "may obtain discovery regarding any matter, not privileged, which is *relevant* to the subject matter involved in the pending action," whether such matters relate to the claim or to the defense of any party, including the identity and location of "per-

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tions, *see* 28 U.S.C. §§ 639-646 (1934), but there was no authority upon which a party could base a demand for interrogatories, production of documents, or physical examinations. *See, e.g.*, National Cash-Register Co. v. Leland, 94 F. 502, 505 (1st Cir. 1899) (the taking of depositions in a manner not authorized by federal statute is not allowable nor may a party obtain proof by interrogatories addressed to the other party in an action at law). *See also* Fed. Eq. R. 47, 226 U.S. 661 (1912); Fed. Eq. R. 58, 226 U.S. 665 (1912).

36. Schlagenhauf v. Holder, 379 U.S. 104, 114-15 (1964); Hickman v. Taylor, 329 U.S. 495, 501 (1947). *See also* United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958) (the discovery rules "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent"); Carlson Companies, Inc. v. Sperry and Hutchinson Co., 374 F. Supp. 1080, 1100 (D. Minn. 1974) (purpose of the discovery rules is to clarify and confine the issues to be litigated and to reveal to the parties and the court the existence or whereabouts of facts relevant to those issues). *See generally* C. WRIGHT & A. MILLER, 8 FEDERAL PRACTICE AND PROCEDURE § 2001 (1970); Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation*, 48 FORDHAM L. REV. 907, 908 (1980); Pike & Willis, *The New Federal Deposition-Discovery Procedure*, 38 COLUM. L. REV. 1179 (1938).

37. *See* Conley v. Gibson, 355 U.S. 41, 47-48 (1957) (the "simplified 'notice pleading' [of Rule 8(a)(2)] is made possible by the liberal opportunity for discovery and other pretrial procedures established by the rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues"). The Rules engendered this interpretation from the beginning. *See, e.g.*, Coca Cola v. Dixi-Cola Laboratories, Inc., 30 F. Supp. 275, 277 (D. Md. 1939) (purpose of the new rules was to require simplicity and brevity in the pleadings, but with ample provisions for discovery of facts before trial, in order to prevent surprise at trial and possible miscarriage of justice). *See also* Mahon v. Bennett, 6 F.R.D. 213, 214 (W.D. Mo. 1946); New England Terminal Co. v. Graver Tank & Mfg. Corp., 1 F.R.D. 411, 413 (D.R.I. 1940).

sons having knowledge of any discoverable matter."[38] The courts have consistently read this relevancy requirement liberally. Indeed, the Supreme Court stated recently:

> The key phrase in this definition—"relevant to the subject matter involved in the pending action"—has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. . . . Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. . . . Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.[39]

The broad scope of discovery is necessary both to ensure that the parties know all the relevant facts and to secure the "just, speedy, and inexpensive

38. FED. R. CIV. P. 26(b)(1) (emphasis added). Rule 26(b)(1) also provides: "It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id. See, e.g.*, Burns v. Thiokol Chem. Corp., 483 F.2d 300, 304 n.8 (5th Cir. 1973); Freeman v. Seligson, 405 F.2d 1326, 1335 (D.C. Cir. 1968). *See also* FED. R. CIV. P. 33(b) ("Interrogatories may relate to any matter which can be inquired into under Rule 26(b) . . . ."); FED. R. CIV. P. 34(a) (any party may obtain discovery, by use of production of documents and things and entry upon land for inspection and other purposes, of any matters "within the scope of Rule 26(b)"); FED. R. CIV. P. 36(a) (requests for admission may be made of the truth of any matters "within the scope of Rule 26(b)").

39. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (citations and footnote omitted). *See also* Stevenson v. Melady, 1 F.R.D. 329, 330 (S.D.N.Y. 1940).

In a footnote to the material quoted in the text the *Oppenheimer* opinion went on to say: "For example, where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues." 437 U.S. at 351 n.13. *See, e.g.*, Investment Properties Int'l, Ltd. v. IOS, Ltd., 459 F.2d 705, 708 (2d Cir. 1972). *See generally* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2009 n.34 (1970); Note, *The Use of Discovery to Obtain Jurisdictional Facts*, 59 VA. L. REV. 533 (1973).

The cases indicate that relevancy is to be accorded a broad and liberal interpretation, allowing discovery of any information that may lead to admissible evidence. *See, e.g.*, Miller v. Doctor's Gen. Hosp., 76 F.R.D. 136, 138-39 (W.D. Okla. 1977); Smith v. FTC, 403 F. Supp. 1000, 1013 (D. Del. 1975). One district court has gone so far as to say that discovery "requires the disclosure of material which may be *neither relevant* nor admissible at trial, since it may lead to the discovery of relevant evidence." Reliance Ins. Co. v. Barron's, 428 F. Supp. 200, 202 (S.D.N.Y. 1977) (emphasis added).

This broad treatment of relevance was further expanded in 1970 when Rule 34 was amended by deleting the showing of good cause required for requests for production of documents and things, incorporating instead the general relevance standard of Rule 26(b)(1). *Compare* Verrazzano Trading Corp. v. United States, 349 F. Supp. 1401 (Cust. Ct. 1972) *and* FED. R. CIV. P. 34(a) *with* Guilford Nat'l Bank of Greensboro v. Southern Ry., 297 F.2d 921 (4th Cir. 1962) *and* Fed. R. Civ. P. 34, 308 U.S. 707 (1939) (rule no longer in force).

determination of every action."[40] The time-honored cry of "fishing expedition" cannot operate to preclude a party from inquiring into the facts underlying his opponent's case; the discovery provisions simply advance the stage at which disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.[41]

Like all other matters of procedure, discovery has ultimate and necessary boundaries.[42] Recently, in *Herbert v. Lando*, the Supreme Court pointed out that the Rule 1 directive that the rules "be construed to secure the just, speedy, and inexpensive determination of every action" requires that the Rule 26(b)(1) relevance standard be firmly applied. The Court warned that district courts should not neglect their power to restrict or limit discovery whenever justice requires protection for a party or person from "annoyance, embarrassment, oppression, or undue burden or expense. . . ."[43] Although the courts enforce the relevancy requirement of

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40. FED. R. CIV. P. 1.

41. Hickman v. Taylor, 329 U.S. 495, 507 (1947). *See, e.g.*, Shelak v. White Motor Co., 581 F.2d 1155, 1159 (5th Cir. 1978) (reversible error where plaintiff failed to reveal his claim of injury precipitating a heart attack in view of defendant's prior interrogatory requesting information on all "parts of the plaintiff's body" claimed to have been injured as a result of an accident involving defendant's truck); Stark v. Photo Researchers, Inc., 77 F.R.D. 18, 20 (S.D.N.Y. 1977) (discovery is designed to accomplish full disclosure of the facts, eliminate surprise, and promote settlement). *See also* FED. R. CIV. P. 26(e):

> 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 required, except as follows:
>
> . . . .
>
> (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

That a request for discovery might be interpreted as a "fishing expedition" does not allow a party to escape compliance with this request. *See* Banco Nacional de Credito v. Bank of America Nat'l Trust & Sav. Ass'n, 11 F.R.D. 497, 498-99 (N.D. Cal. 1951); Bergstrom Paper Co. v. Continental Ins. Co., 7 F.R.D. 548, 550 (E.D. Wis. 1947); Laverett v. Continental Briar Pipe Co., Inc., 25 F. Supp. 80, 82 (E.D.N.Y. 1938). *But see* Schweinert v. Insurance Co. of North America, 1 F.R.D. 247, 248 (S.D.N.Y. 1940).

42. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947).

43. Herbert v. Lando, 441 U.S. 153, 177 (1979) (*quoting* FED. R. CIV. P. 26(c)). *See* notes 61-119 and accompanying text *infra*.

In *Herbert*, the Court held that a journalist's thoughts, opinions, and conclusions were discoverable by a "public figure" libel plaintiff in spite of the first amendment's guarantee of freedom of the press where that matter would produce evidence material to the proof of a critical element of the plaintiff's cause of action. *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Thus, the Court's admonition that the relevance standard be firmly applied was *dictum*, but it is representative of the Court's belief that discovery has necessary bounds

Rule 26(b)(1) where it is obvious that the requested matters cannot possibly lead to admissible evidence,[44] the scope of discovery remains broad, notwithstanding the Supreme Court's caveat.

The broad scope of discovery is perhaps the major contributing factor to its abuse. Coupled with the fact that the discovery rules are to be utilized with minimal intervention by the courts,[45] the broad scope of discovery creates a situation in which counsel operate in an important area of pretrial procedure with largely unfettered discretion. This independence of counsel in the discovery area, however, serves to accentuate the dual role of the attorney in an adversary system: an attorney is torn between his obligation to seek ultimate justice in his capacity as an officer of the court and his obligation to his client, "to whom the desire for triumph is paramount even at justice's expense."[46]

It is in the interest of the party opposing a discovery request to utilize whatever tactics are available so as to cause delay or extra expense to the opponent. Conversely, it is often in the interest of the party requesting discovery to make discovery so expensive that a good settlement seems cheap by comparison.[47] The broad scope of the discovery rules, the limited judicial supervision of the process, and the importance of discovery in

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which must be respected in order to prevent discovery abuse. *See also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975).

44. *See, e.g.*, American Nat'l Bank & Trust Co. v. Aetna Ins. Co., 447 F.2d 680 (7th Cir. 1971) (trial court properly sustained objections to plaintiff's interrogatories asking for evidence of other roof collapses as that had no bearing on cause of plaintiff's roof collapse); Wood v. McCullough, 45 F.R.D. 41 (S.D.N.Y. 1968) (objections to plaintiff's interrogatories sustained because evidence of other legal proceedings against physician-defendants was irrelevant to the plaintiff's malpractice issues in the case at hand).

45. Harlem River Consumers Coop. v. Associated Grocers of Harlem, Inc., 54 F.R.D. 551, 553 (S.D.N.Y. 1972). *See* Advisory Committee Notes to 1970 Amendments to Rule 34, 28 U.S.C. 457 app. (1976) ("Rule 34 is revised [by deleting the 'good cause' requirement from requests for production of documents and things] to accomplish the following major changes in the existing rule; . . . (2) to have the rule operate extrajudicially"). *Cf.* Manual for Complex Litigation § 1.10 (1978); Kaufman, *Judicial Control Over Discovery*, 28 F.R.D. 111, 116-17 (1962).

46. Cohn, *supra* note 6, at 255-56 n.25. *Compare* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4 (1978) ("The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail") *with id.* EC 7-25 ("[W]hile a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them"). *See also id.* DR 7-102(A) ("A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.")

47. Cohn, *supra* note 6, at 255-56 n.25. *See also* Amendments to the Federal Rules of Civil Procedure, 48 U.S.L.W. 4497, 4500 (1980) (Powell, J., dissenting) ("Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate").

a particular case thus afford ample opportunity and incentive to abuse discovery.

Moreover, in complex civil litigation, where the issues, the potential evidence, and, accordingly, the scope of discovery are extremely broad, the potential for abuse of discovery is that much greater.[48] Difficulties emerge in complex litigation because of the large number of documents and witnesses typically involved, requiring massive review of papers, meticulous attention to administrative detail, frequent travel, and the examination and reexamination of witnesses by several counsel.[49] The number of documents accumulated from extensive discovery in a complex case and the resulting costs are enormous.[50] Many matters in complex cases fall within the relevance standard the courts have applied under Rule 26(b)(1).[51] For example, in *United States v. IBM*,[52] part of the Government's celebrated antitrust case against IBM, the Government moved for an order compelling discovery pursuant to Rule 37.[53] IBM countered by moving for a Rule 26(c)[54] protective order limiting discovery, requesting that the depositions of IBM witnesses be limited to material relevant to the subject matter of the action. The district court granted the Government's order compelling discovery and refused to grant the protective order, in whole or in part, ruling that any matter requested is relevant, and therefore discoverable, "where there is *any possibility* that the information sought may be relevant to the subject matter of the action."[55] The court issued the following general instructions to the parties: "All objections to requests for discovery predicated on the ground that the item or answer sought is irrelevant to the subject matter of this action are to be noted, but the item

48. Complex litigation often arises in the following areas: antitrust; class actions; cases involving requests for injunctive relief affecting the operations of a large business entity; common disaster cases, such as those arising from aircraft crashes; stockholder derivative actions. *See* Manual for Complex Litigation § 0.22 (1978).

49. Kaminsky, *supra* note 6, at 909 n.11; Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497, 505-08 (1980).

50. One example is Control Data Corporation's expenditure of $12,000,000 to obtain and another $3,000,000 to computerize documents before trial in its private antitrust case against IBM. S. REP. NO. 498, 94th Cong., 1st Sess. 4 (1975). *See also In re* IBM Antitrust Litigation, 328 F. Supp. 509, 510 (J.P.M.D.L. 1971), wherein the Judicial Panel on Multidistrict Litigation stated that Control Data's action against IBM would result in the production of hundreds of millions of documents and that discovery would take several years.

51. *See* note 39 and accompanying text *supra*.

52. 66 F.R.D. 180 (S.D.N.Y. 1974).

53. FED. R. CIV. P. 37. *See* notes 119-59 and accompanying text *infra*.

54. FED. R. CIV. P. 26(c). *See* notes 61-118 and accompanying text *infra*.

55. 66 F.R.D. at 185 (quoting C. WRIGHT, LAW OF FEDERAL COURTS 359 n.47 (2d ed. 1970)) (emphasis in original).

sought or answer requested shall be given."[56] The order compelling discovery was issued in 1974. In fiscal year 1975, transcripts and travel costs accrued by the Justice Department's Antitrust Division, in the *IBM* case alone, amounted to $500,000.[57] The total cost of the case, as of 1975, was $4,000,000, and the case has yet to come to trial six years later.[58]

The *IBM* case is noted here not because it is representative of cases in which discovery abuse occurs, but because it is representative of the scale of discovery in a complex case.[59] The relevance standard, as applied by the courts, allows a party to request vast amounts of information via depositions, interrogatories, and requests for production of documents. The power to acquire such information carries with it the ancillary power to use discovery merely as a weapon for increasing costs and delaying the administration of justice to the opposing party, or as a device to support the mere suspicion of a claim or defense when in fact none exists. Alternatively, a party faced with a discovery request may utilize the process to obfuscate issues, conceal facts and pertinent documents among irrelevant material, raise irresponsible objections, or improperly refuse to comply with legitimate discovery demands.[60] There exist, however, within the discovery rules themselves, procedures for combatting the abuses of discovery which plague both litigants and the courts.

II. Overbroad Discovery Requests: The Need for Increased Judicial Supervision

The tools to prevent the abuse of discovery already exist. Rule 26(c) provides that:

> Upon motion by a party *or* by the person from whom discovery is sought, *and for good cause shown*, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .[61]

Further, the rule lists the orders the court may make, including, but not limited to: that discovery not be had, that it be had only on terms and

56. 66 F.R.D. at 186.

57. S. Rep. No. 498, 94th Cong., 1st Sess. 4 (1975).

58. *Id.*

59. *See also* Burns v. Thiokol Chem. Corp., 483 F.2d 300 (5th Cir. 1973).

60. *See, e.g.*, Bell v. Auto Club of Mich., 80 F.R.D. 228 (E.D. Mich. 1978). *See generally* Kaminsky, *supra* note 6, at 910; Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 222 (1978).

61. Fed R. Civ. P. 26(c) (emphasis added).

conditions set by the court, or that discovery be conducted by a method other than that selected by the party seeking discovery.[62] Rule 26(c) not only permits a party to move for a protective order but also allows any person from whom discovery is sought to apply for such an order.[63] The purpose of the rule is plain on its face: to prevent abuse of the discovery rules by parties who utilize the process to impose financial and temporal burdens on their opponents unrelated to the merits of a case in order to delay or even prevent adjudication or settlement.

A. The "Good Cause" Requirement

The immediate obstacle in obtaining a protective order pursuant to Rule 26(c) is the requirement that the party or person moving for the order show "good cause" before the order will issue. The courts have insisted that protective orders will not issue upon general allegations and conclusory statements asserting that the request will result in significant financial burden. Rather, the courts have required that the determination of whether good cause exists be based upon appropriate testimony and other factual data. For example, in *Kiblen v. Retail Credit Co.*,[64] the plaintiff moved for a protective order to prevent the defendant from discovering evidence relating to its counterclaim of fraud. The district court, without discussing the grounds upon which the motion was made, refused to grant it, claiming that a motion for a protective order is a "disfavored motion" requiring a showing of good cause. Thus, the burden was on the party seeking relief to show some "plainly adequate reason" for the order.[65] The court continued: "The courts have insisted on a particular and specific demonstration of fact, as distinguished from conclusory statements, in order to establish good cause. . . . As a disfavored motion, it will be denied if there is any set of circumstances under which the pleaded affirmative defense of fraud could succeed."[66]

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62. *Id. See, e.g.*, Fishman v. A. H. Riise Gift Shop, Inc., 68 F.R.D. 704, 705 (D.V.I. 1975) (protective order entered directing party to proceed by way of deposition rather than by written interrogatories).

Rule 30(d) provides that during the taking of a deposition, on a motion of a party or the deponent and upon a showing that the deposition "is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress" the party or the deponent, the court may terminate the deposition or limit the scope or manner of its taking "as provided in Rule 26(c)." FED. R. CIV. P. 30(d).

63. FED. R. CIV. P. 26(c). *See also* Caisson Corp. v. County W. Bldg. Corp., 62 F.R.D. 331, 334 (E.D. Pa. 1974); Monticello Tobacco Co. v. American Tobacco Co., 12 F.R.D. 344, 345 (S.D.N.Y.), *aff'd*, 197 F.2d 629 (2d Cir. 1952), *cert. denied*, 344 U.S. 875 (1958).

64. 76 F.R.D. 402 (E.D. Wash. 1977).

65. *Id.* at 404.

66. *Id.*

Similarly, in *Grinnell Corp. v. Hackett*,[67] the plaintiff corporation sued to enjoin the Rhode Island Director of Employment Security from distributing unemployment compensation to its striking employees. The employees' union intervened as a defendant and sought to depose the plaintiff's expert witnesses and the plaintiff moved for a protective order. A magistrate[68] issued the order after finding that the likelihood of harassment was "more probable than not." On review, the district court reversed the magistrate's order. The court said that a showing that the likelihood of harassment was "more probable than not" was insufficient to warrant issuance of a protective order absent a concomitant showing that the information sought was "fully irrelevant and could have no possible bearing on the issues."[69] Although the court was hesitant to find error in the magistrate's conclusion that harassment was in fact one of the purposes for seeking the particular depositions, it refused to accept the magistrate's finding that the depositions were not intended to uncover evidence relevant to the litigation.[70]

When a clear showing of good cause is made courts will issue protective orders limiting discovery. In *Global Maritime Leasing Panama, Inc. v. M/S North Breeze*,[71] the defendants' liability had already been adjudicated and a special master had been appointed to ascertain damages. Eight months after the master's appointment and just before the parties were to appear before him, the defendants made lengthy discovery requests. The district court granted the plaintiff's motion for a protective order, ruling that good cause existed since the defendants' requests, made for the first time, came almost eight years after commencement of the action and the defendants had never before exhibited a need for discovery of the requested material.[72] Further, the court pointed out that the requests sought materials which might no longer have been in existence and whose production would have placed the plaintiff in an "unfairly burdensome position" at a time just prior to the hearing before the master.[73]

Similarly, a showing of good cause was made in *Keyes v. Lenoir Rhyne*

67. 70 F.R.D. 326 (D.R.I. 1976).

68. On the use of magistrates to preside over discovery motions, *see* 28 U.S.C. §§ 631-639 (1976) and note 117 *infra*.

69. 70 F.R.D. at 334.

70. *Id. See also* United States v. IBM Corp., 453 F. Supp. 194, 195 (S.D.N.Y. 1977) (defendant's motion for a protective order covering twenty-four deponents was denied where the apprehension of discovery abuse was merely speculative and where the record did not indicate that the depositions were requested in bad faith).

71. 451 F. Supp. 965 (D.R.I. 1978).

72. *Id.* at 966.

73. *Id.* at 967.

College.[74] A teacher brought suit against her former employer alleging that sex and age discrimination resulted in her mandatory retirement. The district court entered a protective order prohibiting discovery of the defendant's confidential evaluations of each faculty member. The plaintiff lost and appealed, asserting that entry of the protective order was erroneous. The Fourth Circuit affirmed, noting that the scope of a protective order lies within the discretion of the trial court and that the order would be reversed only if there had been an abuse of discretion.[75] The circuit court pointed out that the college required assurance of confidentiality in its evaluations to enable it to receive honest and candid appraisals of the abilities of its faculty members by their peers. As a result, it was necessary for the district court to balance this legitimate interest of the defendant against the plaintiff's need for the material.[76] The court went on to say that if the college had sought to justify any male-female disparity on the basis of the evaluations, the plaintiff should have been granted the opportunity to use them to demonstrate that the justification was a mere pretext. Since the college did not resort to the evaluations for that or any other purpose at trial, however, and absent a showing by the plaintiff that her need for the material outweighed the college's countervailing interest in confidentiality, the district court's protective order did not amount to an abuse of discretion.[77]

In addition, unreasonable breadth and excessive expense have sometimes contributed to a showing of good cause. For example, in *In re U.S.*

74. 552 F.2d 579 (4th Cir. 1977).

75. *Id.* at 581.

76. *Id.*

77. *Id. See also* Cooke v. New Mexico Junior College Bd., 579 F.2d 568 (10th Cir. 1978). In *Cooke*, the plaintiff sued his employer alleging violation of his first amendment rights stemming from his dismissal as a teacher. After the plaintiff refused to produce copies of his diary for the time period in issue, the defendants obtained an order compelling him to do so because part of his recollection of the facts was based on diary entries. The plaintiff had previously offered to produce copies of entries directly related to the suit, but this did not satisfy the defendants. The district court later dismissed the plaintiff's action for failure to comply with its order compelling production. On appeal the Tenth Circuit reversed. After discussing the plaintiff's initial offer, the court said:

> This, then, is not an instance of stonewalling, and his offer to produce relevant entries should be amply sufficient to satisfy the defendants in their discovery efforts. Surely the defendants do not want to waste valuable time in reading entries in [the plaintiff's] diary which are purely personal in nature and in no manner relate to his dispute with the College. The only possible reason the defendants would want to inspect and copy non-relevant entries would be to cause embarrassment. Rule 26(c) permits a trial judge to enter protective orders which will protect a party from annoyance, embarrassment, oppression, or undue burden.

Id. at 570.

Financial Securities Litigation,[78] a complex case involving alleged securities law violations, the defendants served plaintiffs with a set of interrogatories two inches high and 381 pages long, containing 2,736 questions. The cost of answering them was conservatively estimated at $24,000. The district court held, *sua sponte*, that the requests were burdensome and oppressive. It issued an order striking them, granting defendants leave to file "reasonable" interrogatories calculated to discover important facts rather than numerous and minor evidentiary details.[79] The court recognized that although unfettered discovery of all materials relevant to the case should be permitted, and that discovery is not limited to facts admissible at trial, its use must nonetheless "be tailored to discover only what is reasonable and necessary to the litigation at hand."[80]

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78. 74 F.R.D. 497 (S.D. Cal. 1975).

79. *Id.* at 498. Although Rule 26(c) requires a protective order to be entered "[u]pon motion by a party or by the person from whom discovery is sought," the district court's *sua sponte* imposition of the order highlights an important but often overlooked power of the district courts to achieve the orderly and expeditious disposition of cases. A court may act voluntarily without the suggestion of any party, "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs . . . ." Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962). Although *Link* was an affirmance of a district court's *sua sponte* dismissal for failure to prosecute, one commentator, himself a district court judge, has suggested that the Federal Rules of Civil Procedure "were not intended to circumscribe this essential power, and courts have the authority to deal with litigants and lawyers who undermine the litigation process that the Federal Rules were intended to facilitate." Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 268 (1979). *See also*, Dolgow v. Anderson, 53 F.R.D. 661, 664 (E.D.N.Y. 1971) (while ruling, *sua sponte*, that no further discovery would be allowed by either party, the court said that "[a]lthough caution should be exercised in order not to foreclose any legitimate avenue of inquiry prematurely, where the issues have been explored and sharply defined, the court is competent to decide what evidence may be of possible relevance.").

80. 74 F.R.D. at 498. Indiscriminate use of large numbers of written interrogatories has prompted several district courts to restrict their availability. Rule 83 provides in part: "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice *not inconsistent* with these rules." FED. R. CIV. P. 83 (emphasis added). Pursuant to this power, at least two district courts have promulgated rules limiting the number of interrogatories a party may serve on another party. *See, e.g.*, M.D. FLA. GEN. R. 3.03(a) (unless permitted for "cause shown" no party shall serve more than 50 interrogatories); N.D. ILL. GEN. R. 9(g) (no party shall serve more than twenty interrogatories without establishing "good cause" for more).

Rule 33, however, does not limit the number of interrogatories a party may serve. FED. R. CIV. P. 33. The only restriction upon interrogatories is that they "relate to . . . matters which can be inquired into under Rule 26(b). . . ." FED. R. CIV. P. 33(b). It remains to be seen whether such local rules as those in the Northern District of Illinois and the Middle District of Florida are invalid as inconsistent with the Federal Rules. On the other hand, they do not limit the scope of discovery, but merely the manner in which discovery is made, and they may be amenable to interpretation as a sort of standing 'quasi-protective' order that interrogatories be of limited length or that discovery may be had only by a method other than written interrogatories absent circumstances warranting the use of more than the

Nonetheless, motions for protective orders are disfavored and courts require a moving party to make a strong showing of good cause before a protective order will issue. This is not surprising since Rule 26(c) does not protect a party or person from burdensome or expensive discovery requests, but rather is designed to protect a party from discovery requests that foster *undue* burden or expense. Thus, the determination of whether compliance with a discovery request would involve undue burden or expense depends upon whether the party requesting the order can show that the need for protection outweighs the need for discovery. Consequently, the courts employ a balancing test to determine the need for a protective order.

B. Good Cause v. Relevance: Tipping the Scale in Favor of Discovery

The decision to issue or deny a protective order requires a detailed review by the trial court of the importance of the material sought and the burden accompanying its production. The problem facing the courts is how to permit a litigant to obtain the information necessary to prepare adequately for the issues that may develop, without imposing a prohibitive and unjust burden of information gathering on his adversary. Accordingly, in considering a request for a protective order, a court must balance one party's interest in protection from burdensome and expensive discovery requests against another party's need for the material. The courts must also allow discovery broad enough to guarantee the expeditious and fair determination of every action.

In *Richards of Rockford, Inc. v. Pacific Gas & Electric Co.*,[81] the court used such a balancing test and refused to compel a non-party to produce documents the plaintiff had requested. The documents, prepared for the defendant, were not made in preparation for trial but were based on interviews with the defendant's employees and related to equipment that was the subject of the plaintiff's contract action. In denying the plaintiff's motion to compel production of the interview transcripts, the district court noted its responsibility to balance the interests of the defendant in obtaining the information against the costs of providing it.[82] The court found that the costs of compelling discovery far outweighed the plaintiff's asserted interest in the information sought. The court explained that the proceeding was civil rather than criminal, that the person from whom the

specified number. *See* FED. R. CIV. P. 26(c)(3). *See also* Schroeder & Frank, *supra* note 6, at 486-87.

81. 71 F.R.D. 388 (N.D. Cal. 1976).

82. *Id.* at 389.

material was requested was not a party, that the information in question was available from other sources, and that the information sought did not go to the heart of the plaintiff's claim or defense.[83]

Although the *Richards* court found the availability of the requested information from independent sources to be important,[84] this factor was unpersuasive to the court in *Blankenship v. Hearst Co.*,[85] an antitrust action against a newspaper. During discovery, the district court entered a protective order preventing the plaintiff from deposing the newspaper's publisher because the information to be elicited from him had already been gathered from other sources. The court later granted summary judgment in favor of the defendants. On appeal, the Ninth Circuit reversed. The court said that under the liberal discovery principles of the Federal Rules the defendants had to carry a heavy burden in showing why discovery should be denied. The defendants failed to do so, in part because the plaintiff had suggested that the newspaper's publisher had information the other deponents did not.[86] The court directed that, on remand, in the absence of a better showing by the defendant that its publisher did not have any unique knowledge regarding the case, the plaintiff should be permitted to proceed with his deposition.[87] Similarly, in *Anderson v. Air West, Inc.*,[88] the late Howard Hughes was unsuccessful in obtaining a protective order preventing his deposition by the plaintiffs in a suit alleging securities law violations. Hughes claimed that he had no knowledge of the transactions at issue. The district court, however, found that Hughes "probably had some knowledge" of the transactions and refused to issue the requested order. On review, the Ninth Circuit considered the finding to be supported by the record.[89]

In both *Blankenship* and *Anderson* the courts found a shred of evidence

83. *Id.* at 390-91. *See also* Baker v. F & F Inv., 470 F.2d 778, 783 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

84. Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. at 390.

85. 519 F.2d 418 (9th Cir. 1975).

86. *Id.* at 429.

87. *Id. See also* NAACP, Western Region v. Hodgson, 57 F.R.D. 81, 83 (D.D.C. 1972) (a protective order will not issue where it would result in denying one party access to proof necessary to withstand summary judgment).

88. 542 F.2d 1090 (9th Cir. 1976).

89. *Id.* at 1092-93. *See also* Amherst Leasing Corp. v. Emhart Corp., 65 F.R.D. 121, 123 (D. Conn. 1974) (plaintiffs' motion for protective order against taking the deposition of their controlling stockholder on ground that he had no knowledge of the transactions at issue denied); Overseas Exch. Corp. v. Inwood Motors, Inc., 20 F.R.D. 228 (S.D.N.Y. 1956) (conclusory affidavits that defendant's officers do not have knowledge of the case are not grounds for issuance of protective order). *But see* Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979) (where the defendant's president had given substantially the same testimony in a Senate committee hearing, and had directed the plaintiff to persons with more direct

that the reluctant deponents had information *relevant* to the cause of action. Therefore, under the relevance standard enunciated in Rule 26(b)(1), and as interpreted by the courts,[90] their information was discoverable notwithstanding their claim that they had no knowledge relating to the action, or that others had "better" knowledge. Thus, in ruling on motions for protective orders, consideration of whether the requested material is relevant pervades the balancing test and is often the determinative factor in deciding whether to issue a protective order.

For example, in *Burns v. Thiokol Chemical Corp.*,[91] the plaintiffs brought a class action against their employer alleging that its employment practices discriminated on the basis of race and sex in violation of Title VII.[92] The plaintiffs served interrogatories upon the defendant requesting detailed listings of its past and present employment practices. Compliance would have required a considerable amount of statistical compilation by the defendant. The trial court found that much of the requested material was burdensome and irrelevant and therefore not discoverable. Judgment was ultimately had for the defendant. On appeal, the Fifth Circuit reversed. After noting that in sex and race discrimination cases "statistics often tell much and the courts listen,"[93] the circuit court held that the information requested was relevant.[94] As for the defendant's argument that compliance would be unduly burdensome, the court said: "The point is that open disclosure of all *potentially* relevant information is the keynote of the Federal Discovery Rules. In this case, that focal point has been ignored."[95]

Similarly, in *Culp v. Devlin*,[96] the court rescinded a partial protective

knowledge, the trial judge did not abuse his discretion in entering a protective order preventing the plaintiff from deposing the president).

90. *See, e.g.*, note 39 and accompanying text *supra*.

91. 483 F.2d 300 (5th Cir. 1973).

92. 42 U.S.C. § 2000e-2000e-17 (1976).

93. 483 F.2d at 305.

94. *Id.* at 305-06.

95. *Id.* at 307 (emphasis added). In a case factually similar to *Burns*, a different result was reached. In Jones v. Holy Cross Hosp. Silver Spring, Inc., 64 F.R.D. 586 (D. Md. 1974), another Title VII action, the plaintiff served a set of 70 interrogatories on the defendant, some containing up to 23 subparts. Although the court did not discuss the substance of the material requested, it found that the defendant was "clearly" entitled to a protective order against such overbroad interrogatories, and struck them, allowing the plaintiff leave to file a "reasonable set." *Id.* at 591. The only expressed justification for the order was that preparation of answers to the interrogatories would require the defendant to expend an unreasonable amount of time and money to comply. If, in fact, the information requested was similar to that in *Burns*, it would seem that the court in *Jones* erred by preventing the disclosure of all potentially relevant information.

96. 78 F.R.D. 136 (E.D. Pa. 1978).

order it had entered in favor of the defendants. In a civil rights action against police and other officials of the city of Philadelphia, the plaintiffs served an interrogatory requesting defendants to state the details of all alleged instances of police brutality over a three-year period. The district court rescinded its prior partial protective order, even though it had found that the production of documents necessary to answer the interrogatory was burdensome to the defendants, because, "when weighed against the plaintiff's need for this information to establish his case, that burden placed upon the defendants does not seem undue."[97]

In *Frost v. Williams*,[98] however, the district court issued a protective order in a civil action arising out of an automobile collision after the plaintiff served the defendant with a set of 200 interrogatories. The information requested included the color of defendant's hair and eyes, his place of birth, the names and addresses of his parents and spouse, and the date and place of his marriage and of any divorce. The court said that although it was committed to the liberal use of interrogatories for legitimate purposes, the use of 200 interrogatories, most of which came from a form book, was oppressive and frivolous, and the court reprimanded plaintiff's counsel for failing to exercise judgment in conducting discovery.[99]

The balancing test used by the courts in *Burns, Culp*, and *Frost* is fairly typical and requires a court, when entertaining a motion for a protective order, to view good cause and the need for discovery in relation to the facts and issues present in each individual case. For example, although a protective order was warranted in *Frost*, the court in *Burns* properly denied one where the requested statistical compilation, although expensive and time-consuming, would arm the plaintiffs with important proof necessary to sustain their action. This illustrates the difficulty in determining whether the costs and time involved in complying with a discovery request warrant a protective order. What financial and temporal burdens are undue and will justify the issuance of a protective order depend, as the *Culp*

97. *Id.* at 140. *See also* General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974) (protective order will not extend to blanket refusals to answer interrogatories based on the privilege of self-incrimination). White v. Wirtz, 402 F.2d 145, 148 (10th Cir. 1968) (if objections to discovery are not plain and specific to show a basis in fact for conclusory statements that compliance would be burdensome, trial court is entitled to deny motion for protective order); Flood v. Margis, 64 F.R.D. 59, 61 (E.D. Wis. 1974) (mere fact that interrogatories are lengthy or that the party would be put to some trouble and expense in preparing the requested answers is not alone sufficient to warrant the granting of a protective order).

98. 46 F.R.D. 484 (D. Md. 1969).

99. *Id.* at 485.

court pointed out, on a party's need for the information to establish his case.

Of course, motions for protective orders do not arise only when a requested party asserts that compliance will be burdensome or that a discovery request is made primarily to annoy or harass a party. But the balancing test is applied in the same manner. In *Johnson Foils, Inc. v. Huyck Corp.*,[100] for example, the defendant sought a protective order to prevent the plaintiff from discovering materials that the defendant alleged were trade secrets, and therefore subject to protection under Rule 26(c)(7).[101] The court refused to grant the order on the ground that a party had neither an automatic nor an absolute right to hinder the discovery process merely because sensitive information was involved in litigation. Both parties should have meaningful access to the information sought where it can be shown to be relevant to the prosecution or defense of a claim.[102] The court continued:

> Any protective order inhibiting liberal discovery must issue only upon a specific showing that the information in question is of the nature that its disclosure should be restricted and that the party disclosing will indeed be harmed. . . . Moreover, the protective order may only minimize the potential ill-effects to the party making disclosures, e.g., limiting access to certain persons or the public in general, but it should not prohibit the full disclosure of all facts necessary to the litigation. This paramount concern limits the discretion of the court to encumber the discovery process except where good judgment dictates to the contrary.[103]

This is not to suggest that the courts do not issue protective orders. They do.[104] But in the required balancing, the courts usually rule in favor of preventing any limitations on discovery. This result is not suprising in view of the broad and liberal treatment the discovery rules are accorded,

100. 61 F.R.D. 405 (N.D.N.Y. 1973).

101. The court "may make any order which justice requires, . . . including one or more of the following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." FED. R. CIV. P. 26(c)(7).

102. 61 F.R.D. at 409.

103. *Id.* at 409-10. *See also* Lewis v. Capital Mortgage Investments, 78 F.R.D. 295, 311 (D. Md. 1978); United States v. IBM Corp., 67 F.R.D. 40, 46 (S.D.N.Y. 1975) (a protective order will issue only when disclosure of allegedly confidential information will work a "*clearly defined* and very serious injury" to a party's business).

104. *See, e.g.*, notes 65-74 and accompanying text *supra*. *See also* Brennan v. Local 639, Int'l Bhd. of Teamsters, 494 F.2d 1092 (D.C. Cir. 1974); Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973); Beacon v. R.M. Jones Apartment Rentals, 79 F.R.D. 141 (N.D. Ohio 1978); Econo-Car Int'l., Inc. v. Antilles Car Rentals, Inc., 61 F.R.D. 8 (D.V.I. 1973); Balistrieri v. Holtzman, 52 F.R.D. 23 (E.D. Wis. 1971).

fostering discovery of any matter that bears on, or that reasonably could lead to other matters that could bear on, any actual or potential issue in a case.[105] This tendency, however, enables litigants to make discovery requests designed not to seek evidence supportive of their case, but to harass and burden their opponents in order to obtain whatever advantages may accrue from this tactic. And in attacking a motion for a protective order, the party requesting discovery will often be successful merely by asserting that the information sought is relevant to the prosecution or defense of its claim and therefore discoverable.

This problem is exacerbated by the fact that judges often do not or cannot take the time to familiarize themselves with the issues and facts of a case at its pretrial stages. Thus a judge is likely to deny a request for a protective order when the party seeking discovery merely asserts that the information is relevant to an actual or potential issue in the case.[106] This heightens the potential for abuse of the discovery process. For example, in *General Telephone & Electronics Laboratories, Inc. v. National Video Corp.*,[107] the defendant served an interrogatory on the plaintiff requesting identification of all documents concerning phosphors produced within a seventeen-month period. Phosphors are materials used in the production of color television tubes, the subject matter of the defendant's antitrust counterclaim in a patent infringement suit. The plaintiff asked for a protective order because the interrogatory as served could have involved thousands of documents that did not relate to color television tubes. After confessing to a lack of any expertise regarding the scientific matters addressed by the interrogatory,[108] the court denied the protective order. The court reasoned that the Federal Rules of Civil Procedure provide for the broadest possible discovery and found that the plaintiff failed to meet the

105. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).

In 1978 the Federal Judicial Center conducted a survey of discovery practices in 3,000 randomly selected cases in the federal courts. The study found that 56.9% of motions for protective orders succeeded. But what most interested the authors was the relative paucity of such motions. Motions for protective orders were made in less than 5% of the discovery "events." The authors suggested that two alternative inferences could be made about overbroad discovery requests: either requesting parties do not often harass in using their rights to obtain discovery, or requesting parties often harass in using requests, but requested parties seldom use protecting motions to constrain harassment. FEDERAL JUDICIAL CENTER, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 106 (1978). The authors could not say which inference was more reasonable, but did say that certain factors restrict the use of protecting motions: the rule provisions governing the use of protecting motions are "quite narrow" and the " 'broad liberal treatment' to be accorded the discovery rules . . . may deter expansive judicial interpretations of the preventing provisions." *Id.*

106. *See Developments in the Law - Discovery*, 74 HARV. L. REV. 940, 983 (1961).

107. 297 F. Supp. 981 (N.D. Ill. 1968).

108. *Id.* at 984.

burden of showing that the defendant's interrogatory was "so annoying or burdensome that it [could] not in justice be required to be answered even in the face of the permissive rules of discovery. . . ."[109]

This is not to suggest that the court in *General Telephone* erred in denying the protective order, or that the defendant requested discovery solely to harass or burden the plaintiff. Rather, the point is that a trial judge's relative lack of familiarity with a case—whether due to the complex technology involved or to incomplete examination of the issues in the case—prevents the judge from properly balancing the respective interests of all parties when ruling on a motion for a protective order.[110]

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109. *Id.*

110. An additional problem facing litigants is the inability to appeal a judge's ruling on a motion for a protective order because such rulings lack the necessary "finality" that is required before a circuit court of appeals may assert jurisdiction. 28 U.S.C. § 1291 (1976). Such rulings are characterized as interlocutory and, therefore, not appealable under § 1291 because they are "necessarily only a stage in the litigation and almost invariably involve no determination of the substantive rights involved in the action." Borden Co. v. Sylk, 410 F.2d 843, 845 (3d Cir. 1969). *See, e.g.*, Hudak v. Curators of Univ. of Mo., 586 F.2d 105 (8th Cir. 1978), *cert. denied*, 440 U.S. 985 (1979); Dow Chem. Co. v. Taylor, 519 F.2d 352 (6th Cir.), *cert. denied*, 423 U.S. 1033 (1975); Gialde v. Time, Inc., 480 F.2d 1295 (8th Cir. 1973); United States v. Anderson, 464 F.2d 1390 (D.C. Cir. 1972). *See generally* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2006 (1970). *See also* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949). *But see* David v. Hooker, Ltd., 560 F.2d 412 (9th Cir. 1977); Dixon v. 80 Pine St. Corp., 516 F.2d 1278 (2d Cir. 1975). The result is that there is rarely an effective remedy for an erroneous denial of a protective order. The rationale for such a result is that the risk "must be balanced against the need for efficient federal judicial administration as evidenced by the Congressional prohibition of piecemeal appellate litigation" contained in section 1291. Borden Co. v. Sylk, 410 F.2d at 846.

A denial of a Rule 26(c) motion often results in a Rule 37(a) order compelling production of the contested material. Notes of Advisory Committee on 1970 Amendments to Rule 26(c), 28 U.S.C. 7781 app. (1970). An unsuccessful movant may then refuse to comply with that order and risk the imposition of civil contempt sanctions, which are sometimes appealable before final disposition of an action. *See, e.g.*, Grinnell Corp. v. Hackett, 519 F.2d 595, 598 (1st Cir.), *cert. denied*, 423 U.S. 1033 (1975). The difficulty with this approach is that failure to obey a Rule 37(a) order compelling discovery may result in dismissal of the action or in a default judgment. FED. R. CIV. P. 37(b)(2)(C). *See* notes 119-59 and accompanying text *infra*. And appellate review in such an instance does not focus on any clearly defined standards delineating when dismissal or default is indeed proper, but only on whether the district court abused its discretion. *See* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976).

Section 1292(b) of Title 28 allows for appeals to be taken from interlocutory orders upon certification by the district court judge when he is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion *and* that an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ." 28 U.S.C. § 1292(b) (1976) (emphasis added). Because discovery motions rarely involve controlling questions of law, however, certification of interlocutory appeals relating to discovery occurs rarely. *But see* Cine Forty-Second St. Theatre Corp. v. Allied Artists Picture Corp., 602 F.2d 1062 (2d Cir. 1979); Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

The approach most often suggested to remedy discovery abuse is to limit discovery to more narrowly drawn categories of specific material, thus making it easier for litigants and judges to determine what material is discoverable. Unlike the present standard that allows discovery of any material relevant to the subject matter involved in the action,[111] this proposed reform would limit discovery to material that is relevant "to the issues raised by the claims or defenses of any party."[112] The difficulty with this approach, however, is that under the present system of notice pleading engendered by the Rules, discovery is often used to frame the issues.[113] At least in some cases, there can be no meaningful determination of the issues without broad discovery, and without a complete determination of the issues there can be no just disposition of an action. Further, the myriad of issues and fact patterns present in cases in the federal courts prevents the development of rigid standards that would be easily applicable in deciding motions for protective orders in particular types of cases. What might be grounds for issuing a protective order in one case would perhaps be wholly inapposite in another case where there existed even the slightest variation in the facts or issues presented.

Reform of the discovery rules will not decrease the frequency of discovery abuse unless the legal profession is prepared for drastic changes that would reshape the application of the Federal Rules of Civil Procedure. In lieu of that, prevention of abusive, overbroad discovery requests designed solely to harass or burden party-opponents must be based upon "what in fact and in law are the ample powers of the district judge to prevent abuse."[114] The liberal discovery provisions of the Federal Rules of Civil Procedure are unquestionably broad and form an integral part of the overall scheme of litigation in federal courts. It is for this very reason that the application of the discovery rules must be subject to the strict supervisory discretion of the trial judge, "whose duty it is to ensure that the quest for discovery does not subsume other important issues."[115] Despite the oft-stated principle that the discovery rules are to be utilized with minimal intervention by the courts,[116] whenever a motion for a protective order is

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

112. ABA Proposed Rule 26(b)(1), *reprinted in* Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 ARIZ. ST. L.J. 475, 507-08. *See also* Kaminsky, *supra* note 6, at 998 (Discovery "shall be permissible as to any matter, not privileged, that has a reasonable bearing upon any issue in the action.").

113. *See* note 39 and accompanying text *supra*.

114. Herbert v. Lando, 441 U.S. 153, 177 (1979).

115. Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388, 391 (N.D. Cal. 1976). *See also* Manual for Complex Litigation § 1.10 (1978).

116. *See* note 45 and accompanying text *supra*.

made, a court must engage in a searching inquiry and become more familiar with the facts and issues in order to determine whether a requesting party's need for the material outweighs the burden and expense borne by his opponent in complying with the request.[117] Rule 26(c) is more than adequate to prevent discovery abuse, if the judge or magistrate forthrightly applies it to the facts and issues present in the particular case at hand. Only then can the balancing test currently employed under the discovery rules and the good cause requirement of Rule 26(c) operate efficiently and justly in preventing abuse of discovery.[118]

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117. *See* Pollak, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 227 (1978):

> The faults of modern discovery methods and devices lie not with the Rules—they can be left flexible. We face a device susceptible to mischief and harassment with concomitant expense, that has been cut loose from judicial case management. That should be remedied. This will not increase the burdens laid on the trial Judge—it will transfer time from other functions in the case and collapse non-litigable issues. The judge should get involved in the process early, sufficiently and informally. There is no substitute for the regular involvement of the judge. . . . [J]udicial case management calls upon us to steer discovery away from the dangers of rigidity, on the one hand, and formlessness, on the other.

An important aid to district court judges in effectuating control over, and understanding of, the issues and facts present in a case is the Federal Magistrates Act, 28 U.S.C. §§ 631-639 (1976). Section 636 provides in part: "Notwithstanding any provision of law to the contrary—(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court," except for several matters not including pretrial motions relating to discovery. *Id.* § 636(b)(1)(A). *See* Mathews v. Weber, 423 U.S. 261, 268 (1976) (§ 636(b) was enacted to permit the district courts to increase the scope of responsibilities that magistrates can undertake upon reference as part of the congressional plan "to establish a system capable of increasing the overall efficiency of the Federal judiciary. . . ."). *See also* Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2d Cir. 1979).

Another tool available to judges is Rule 26(f), newly adopted and effective August 1, 1980:

> At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. . . .
>
> Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any. . . .

FED. R. CIV. P. 26(f). *Cf.* Manual for Complex Litigation §§ 1.50-1.80 (1978); N.D. OHIO COMP. LIT. R. 2.04.

118. Of course, the primary blame for discovery abuse lies not with judges but with the attorneys, and the provisions of Rule 26(c) do little to deter them. There are, however, other tools which if properly used can operate as effective deterrents. For example, a lawyer who takes action on behalf of his client violates a disciplinary rule of the American Bar Association Code of Professional Responsibility when he knows, or should know, that his actions serve merely to harass or injure another party. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1). The appropriate sanctions would depend on the egregiousness of an attorney's conduct during discovery, but bar associations should not be hesitant to act against those who abuse the process.

Further, § 1927 of Title 28 provides that any attorney "who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required to satisfy

III. Rule 37 and a Fair Day in Court

While Rule 26(c) governs when a requested party is attacking a discovery request viewed as overbroad and burdensome, Rule 37 applies when a requesting party is unable to secure compliance from a recalcitrant opponent. That rule allows a party to move for an order compelling discovery.[119] Often a party will move for such an order in response to his opponent's motion for a protective order.[120] The rule further requires that the losing party on a Rule 37(a) motion, or his attorney,[121] pay the successful party the reasonable expenses incurred in making or opposing the motion, including attorney's fees. The court will not award these costs, however, if it finds that making or opposing the motion was "substantialy justified or that other circumstances make an award of expenses unjust."[122]

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personally such excess costs." 28 U.S.C. § 1927 (1976). In at least one case, a court has ordered costs taxed against an attorney where the attorney "unreasonably and vexatiously" prolonged the taking of depositions by excessive cross-examination, and obstructed the examination of a witness by instructing him not to answer proper questions. Toledo Metal Wheel Co. v. Foyer Bros. & Co., 223 F. 350, 358 (6th Cir. 1915). *But see* Roadway Express, Inc. v. Piper, 100 S. Ct. 2455, 2461 (1980) (§ 1927 "costs" do not include attorneys' fees). *See generally* Comment, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. Chi. L. Rev. 619 (1977).

119. Rule 37(a) provides in part:

> A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:
>
> . . . .
>
> (2) *Motion*. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. . . .
>
> . . . .
>
> (3) *Evasive or Incomplete Answer*. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

Fed. R. Civ. P. 37 (a)(2), (3).

120. *See, e.g.*, Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir.), *cert. denied*, 439 U.S. 833 (1978). *See also* Fed. R. Civ. P. 37(a)(2): "If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c)."

121. *See, e.g.*, Szilvassy v. United States, 71 F.R.D. 589, 594 (S.D.N.Y. 1976).

122. Fed. R. Civ. P. 37(a)(4). *See, e.g.*, Hayden Stone, Inc. v. Brode, 508 F.2d 895, 897 (7th Cir. 1974). Prior to 1970, an award of expenses could be made only if the winning party could show that the losing party acted without substantial justification. The 1970 amendments to Rule 37(a)(4), however, shifted the burden to the losing party. The rule now requires an award of expenses unless the court finds that the losing party's conduct was substantially justified. "[T]he change in language is intended to encourage judges to be

Failure to comply with a Rule 37(a) order compelling discovery can have severe consequences. Subdivision (b) of Rule 37 allows a court, in its discretion, to make such orders "as are just," including: an order that designated facts relating to the disobeyed order shall be taken as established for the purposes of the action;[123] an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing certain evidence;[124] or an order treating the failure to obey as contempt of court.[125] The most drastic sanctions a court can impose, however, are contained in subdivision (b)(2)(C), which permits a court to make an order "*striking out pleadings* or parts thereof, or staying further proceedings until the order is obeyed, *or dismissing the action* or proceeding or any part thereof, *or rendering a judgment by default* against the disobedient party."[126]

Cases applying Rule 37(b)(2)(C) have often viewed the propriety of a dismissal or default judgment in terms of whether the sanctioned party's disobedience was willful. If it was, dismissal or default would be proper. If failure to comply stemmed merely from negligence or oversight, dismissal or default would not be proper in view of the availability of less extreme sanctions designed to result in compliance with the previously entered discovery order. For example, in *Bon Air Hotel, Inc. v. Time, Inc.*,[127] the district court had dismissed plaintiff's libel action for failure to comply with a court order requiring it to produce an officer for deposition. But the Fifth Circuit reversed, finding that dismissal of an action is such a drastic remedy that it should be applied only in extreme circumstances.[128] The court also said that although Rule 37(b) applies to all failures to comply, whether willful or not, the presence of willfulness in a party's disobe-

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more alert to abuses occurring in the discovery process." Notes of Advisory Committee to 1970 Amendments of Rule 37, 28 U.S.C. 464 app. (1976).

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

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

125. FED. R. CIV. P. 37(b)(2)(D).

126. FED. R. CIV. P. 37(b)(2)(C) (emphasis added). *Cf.* FED. R. CIV. P. 37(d) (sanctions available under subdivision (b)(2) are applicable when a party fails to appear for a deposition, to answer interrogatories, or to respond to requests for inspection, even though no order compelling discovery had been made). ***But see*** Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 996 (8th Cir. 1975) (where defendants had not sought an order compelling discovery, imposition of sanction in the nature of deeming allegations of counterclaim as admitted for plaintiff's failure to respond to discovery was improper).

Dismissal under Rule 37 operates as an adjudication on the merits and prevents a plaintiff from reinstituting that part of his action that was dismissed. FED. R. CIV. P. 41(b). The same result holds true for any part of a defendant's counterclaim dismissed under Rule 37. FED. R. CIV. P. 41(c).

127. 376 F.2d 118 (5th Cir. 1967), *cert. denied*, 393 U.S. 859 (1968).

128. *Id.* at 121.

dient conduct is relevant in determining the sanctions that should be applied.[129] Absent a finding of willfulness, dismissal was improper.

The emphasis in such cases has been on procuring eventual compliance with the original order compelling discovery.[130] But in 1976, the Supreme Court altered this viewpoint when it placed its imprimatur on the use of dismissal and default not merely to penalize those whose conduct warranted the imposition of such sanctions, but to deter those who might be tempted to engage in such conduct in the absence of a deterrent. In *National Hockey League v. Metropolitan Hockey Club, Inc.*,[131] the district court had dismissed respondents' antitrust action for failure to promptly answer petitioner's interrogatories as ordered by the court. The district court concluded that respondents' conduct exemplified "flagrant bad faith" and "callous disregard of the responsibilities counsel owe to the Court and to their opponents."[132] The Third Circuit reversed, holding that the district court had abused its discretion by dismissing the case where there was insufficient evidence to support a finding that respondents' failure to comply "was in flagrant bad faith, willful or intentional."[133] The Supreme Court reversed the court of appeals, saying that the question was not

129. *Id.* at 122. *See also* Vac-Air, Inc. v. John Mohr & Sons, Inc., 471 F.2d 231, 234 (7th Cir. 1973) (default judgment was too harsh a sanction where failure to comply was partially due to counsel's ill health and less extreme steps were available to effectuate compliance); Gill v. Stolow, 240 F.2d 669, 670 (2d Cir. 1957) (only a serious showing of willful default can justify denial of a party's fair day in court).

Cf. Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212 (1958): "Rule 37 should not be construed to authorize dismissal . . . because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not willfulness, bad faith, or any fault of petitioner." In an action brought to recover assets that were seized by the United States during World War II, the plaintiff's action was dismissed for its failure to comply with a Rule 37 order although compliance would have subjected it, as a Swiss corporation, to criminal liability under Swiss law. The Supreme Court reversed the circuit court's affirmance of dismissal because noncompliance stemmed from the plaintiff's inability to comply; reversal was not mandated for lack of willfulness, but for lack of "willfulness, bad faith *or any* fault" on the plaintiff's part. *Id.* (emphasis added). *But cf.* Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1373 (10th Cir. 1978), *cert. denied*, 439 U.S. 833 (1979) (Rule 37(b) award of costs and attorney's fees upheld where defendant's claims of inability to comply with order compelling discovery because of Swiss secrecy laws were found to be no more than diversionary tactics).

130. *See, e.g.*, Vac-Air, Inc. v. John Mohr & Sons, Inc., 471 F.2d 231, 234 (7th Cir. 1973).

131. 427 U.S. 639 (1976) (per curiam).

132. *In re* Professional Hockey Antitrust Litigation, 63 F.R.D. 641, 656 (E.D. Pa. 1974), *rev'd*, 531 F.2d 1188 (3rd Cir.), *rev'd per curiam sub nom.* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976).

133. *In re* Professional Hockey Antitrust Litigation, 531 F.2d 1188, 1195 (3rd Cir.), *rev'd per curiam sub nom.* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976).

whether it or the circuit court would have dismissed the action, but rather "whether the District Court abused its discretion in so doing."[134] The Court found that the district court's findings of "callous disregard" and "flagrant bad faith" were supported by the record,[135] and said that:

> [H]ere, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, 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. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. 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.[136]

Shortly after *National Hockey League*, the Ninth Circuit relied on the Supreme Court's decision to uphold a district court's default judgment against the defendants for the failure of one defendant, the sole owner of the corporate defendants, to appear as ordered at a deposition. The case, *Anderson v. Air West Inc.*,[137] arose out of an action alleging violations of securities laws. The court said that default was appropriate since the record supported the district court's finding that the defendant's failure to comply was due to his bad faith and willful disregard of judicial process.[138] In addition, the court affirmed application of the default order to the corporate defendants, noting that a district court has the power to enter a default judgment against corporate defendants based on the failures of their representatives.[139]

Similarly, in *Margolis v. Johns*,[140] the Seventh Circuit upheld dismissal of plaintiff's slander action after he failed to comply with a discovery order. The plaintiff argued on appeal that the district court ignored the ad-

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134. 427 U.S. at 642.

135. *Id.*

136. *Id.* at 643 (emphasis in original). *Cf.* Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1064 (2d Cir. 1979) ("[U]nless Rule 37 is perceived as a credible deterrent rather than a 'paper tiger,' . . . the pretrial quagmire threatens to engulf the entire litigative process."). *See generally* Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264 (1979); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978).

137. 542 F.2d 1090 (9th Cir. 1976).

138. *Id.* at 1093.

139. *Id.*

140. 587 F.2d 885 (7th Cir. 1978).

monition of a prior Seventh Circuit case that "where an alternative, less drastic, sanction would be just as effective in effectuating compliance it should be utilized."[141] But the circuit court refused to apply its former decision, saying that under *National Hockey League* it was not free to substitute its discretion for that of the district court. The court added that any effort on its part "to promote lenity rather than the harshness of an outright dismissal" would undermine the important objective of preventing discovery abuse that pervades Rule 37.[142]

In *Dellums v. Powell* (*Dellums II*),[143] a civil rights class action, the District of Columbia Circuit went so far as to reverse the district court's reinstatement of a plaintiff against whom the district court had originally dismissed the action for failure to answer interrogatories. The court of appeals held that the district court abused its discretion by reinstating the plaintiff when the record did not disclose any circumstances that could mitigate his failure to discharge his obligations under Rule 37. The circuit court felt that, if for no other reason than the prophylactic considerations identified in *National Hockey League*, the plaintiff's claim should have been dismissed.[144]

But perhaps the furthest extension of the deterrence rationale appeared recently in *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*[145] In an antitrust acton, the plaintiff disobeyed two orders entered by a magistrate compelling discovery by dilatorily filing two sets of "seriously deficient" answers to the defendants' interrogatories. The magistrate recommended preclusion of proof of damages, the effect of which would have been to leave the plaintiff with only a claim for injunctive relief. The district court, however, refused to impose the extreme sanction recommended because it believed there was no willful disobedience of the magistrate's order.[146] The court, however, certified an interlocutory appeal to the Second Circuit.

The question presented on appeal was whether gross negligence amounting to a "total dereliction of professional responsibility," but not a conscious disregard of court orders, permitted the extreme sanction recommended. The court of appeals reversed the district court's failure to implement the magistrate's recommended sanction because, in the final analysis, the question should not turn solely upon definition of the terms "negli-

141. Sapiro v. Hartford Fire Ins. Co., 452 F.2d 215, 216 (7th Cir. 1972).
142. 587 F.2d at 888.
143. 566 F.2d 231 (D.C. Cir. 1977).
144. *Id.* at 236.
145. 602 F.2d 1062 (2d Cir. 1979).
146. *Id.* at 1067.

gent" or "willful." The court concluded that the deterrent policy of *National Hockey League* was best effectuated by requiring strict adherence to "the responsibilities counsel owe to the Court and to their opponents."[147] Negligent as well as intentional wrongs are fit subjects for general deterrence because "gross professional incompetence no less than deliberate tactical intransigence may be responsible for the interminable delays and costs that plague modern complex lawsuits."[148] The court explained that if litigants are allowed to postpone compliance with discovery requests until the judge loses patience with them, the effect will be to embroil the courts in day-to-day supervision of discovery, a result directly contrary to the overall scheme of the Federal Rules of Civil Procedure.[149]

Some circuits continue, however, to require a showing of willfulness on the part of the disobedient party, or "extreme circumstances," before a district court will be justified in dismissing an action or entering a default judgment.[150] Two considerations underlie this seeming reluctance to impose ultimate sanctions. First, judges often cite the policy embodied in the federal rules of deciding cases on the merits rather than on procedural infirmities.[151] Second, discovery abuse is most often the result of counsel's misconduct in an area over which a litigant has little control, if he is even aware of its existence.[152]

Arguably, however, these considerations do not justify judicial reluctance to impose sanctions on parties who abuse discovery. First, concern for a recalcitrant and disobedient party's right to adjudication on the merits ignores similar considerations of fairness to the opposing party. The

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147. *Id.*

148. *Id.*

149. *Id.* at 1068. In a concurring opinion, Judge Oakes pointed out that if the fault for delay lies with the complexity of the interrogatories and the requests of opposing counsel, remedy lies with an application for a protective order under Rule 26(c). *Id.* at 1068-69 (Oakes, J., concurring).

150. Epstein, Corcoran, Krieger, & Carr, *An Up-date on Rule 37 Sanctions after* National Hockey League v. Metropolitan Hockey Club, Inc., 84 F.R.D. 145, 169 (1980) [hereinafter cited as *Up-date*]. *See, e.g.*, Kropp v. Ziebarth, 557 F.2d 142 (8th Cir. 1977); Dudley v. South Jersey Metal, Inc., 555 F.2d 96 (3rd Cir. 1977). *See also* EEOC v. Carter Carburetor Div. of ACF Indus., 577 F.2d 43, 49 (8th Cir. 1978), *cert. denied*, 439 U.S. 1081 (1979) (imposition of sanctions taking certain facts as established and limiting plaintiff's claim was reversible error where the defendant's dilatory tactics were at least the equal of the plaintiff's); Griffin v. Aluminum Co. of America, 564 F.2d 1171, 1173 (5th Cir. 1977) (per curiam) (dismissal of non-lawyer plaintiff's pro se action was reversed since the aim of deterrence would be little served by imposing the sanction of last resort on an unassisted layman).

151. *See, e.g.*, Edgar v. Slaughter, 548 F.2d 770, 772-73 (8th Cir. 1977); Scarver v. Allen, 457 F.2d 308, 310 (7th Cir. 1972).

152. *See, e.g.*, Edgar v. Slaughter, 548 F.2d at 773; Flaks v. Koegel, 504 F.2d 702, 712 (2d Cir. 1974) ("If counsel rather than the client were at fault . . . , then the order entering the default judgment was an abuse of discretion."). *See also* Kaminsky, *supra* note 6, at 984.

discovery rules envision broad discovery in order to promote civil trials conducted with open disclosure.[153] Failure to cooperate in discovery and disobedience of explicit court orders frustrate this objective and prevent the blameless litigant from obtaining *his* fair day in court. As the Ninth Circuit adroitly pointed out in *Anderson v. Air West, Inc.*, a party's failure to comply with orders compelling discovery designed to assist in the determination of the factual issues present in a case should constitute "a forfeiture on his part . . . of the right to contest those factual issues."[154]

Further, there is a reasonable response to the contention that dismissal of a party's claim, or a default judgment against him, because of his counsel's inexcusable and abusive conduct during discovery, imposes an unjust penalty on the often innocent client. In *Link v. Wabash R.R.*,[155] the Supreme Court rejected a similar argument while affirming a district court's *sua sponte* dismissal for failure to prosecute. The Court pointed out that the petitioner voluntarily chose the attorney as his representative in the action, and he therefore could not avoid the consequences of the acts or omissions of such a freely selected agent. The court concluded that any other notion would be inconsistent with a system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered, via that attorney, to have notice of all the facts present in his case.[156]

More importantly, after *National Hockey League*, the mere consideration of such concerns detracts from the important, if not primary, purpose of Rule 37(b) "to deter those who might be tempted to such conduct in the absence of such a deterrent."[157] The rule governs the imposition of *sanctions*. It is therefore punitive, and an important component of punishment is deterrence. Unlike alleged overbroad discovery requests and resulting motions for protective orders, the disposition of which turn on the in-

153. Hickman v. Taylor, 329 U.S. 495, 501 (1947); FED. R. CIV. P. 1.

154. Anderson v. Air West, Inc., 542 F.2d 1090, 1093 (9th Cir. 1976).

155. 370 U.S. 626 (1962).

156. *Id.* at 633-34. *See also Up-date, supra* note 150, at 172-73:

> Although courts seem happier in imposing sanctions where there is an indication that the client participated in the dilatory tactics, they have on occasion visited the fault of negligent attorneys upon innocent clients. In such instances the courts have not been reluctant to suggest that the dilatory tactics have amounted to unprofessional behavior on the part of attorneys whose consequences are justly visited upon their clients. Nor have the courts been reluctant to hint that a client's relief from the imposition of sanctions resulting from the attorney's professional malfeasance or nonfeasance might well be a malpractice claim brought by the client against the attorney. . . . As a corollary, attorneys should also consider withdrawing where cooperation is not forthcoming from their clients.

157. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. at 643.

formed discretion of trial judges intimately involved with the facts and issues unique to the particular cases at hand,[158] failure to comply with a court's discovery order is just that: a failure. Absent excusable inability unrelated to the party's conduct, which precludes the imposition of sanctions,[159] the federal courts must be aware of their responsibility to utilize the sanctions of Rule 37(b) to the fullest extent practicable in order to effectuate full discovery.

IV. Conclusion

The prophylactic terms of Rules 26(c) and 37 are available in almost all instances of discovery abuse in federal courts. Properly applied, they are adequate to combat and deter parties and counsel who would subvert their opponent's right to secure discovery of all material relevant to the subject matter involved in the action, and his equally important right to be free from harassing and overbroad discovery requests designed to create undue burden and expense.

Discovery abuse persists when judges fail to appreciate that the importance of discovery in the federal judicial scheme requires that they be vigilant in preventing abuse. This vigilance requires expenditure of judicial resources to discern what facts and issues exist in particular cases and thus warrant the broad and liberal treatment of the discovery provisions of the Federal Rules of Civil Procedure. Courts cannot be unmindful of the reality that discovery abuse prevents the blameless party from getting his fair day in court. For this reason alone, the courts should not tolerate abuse of discovery and must utilize the several powers they have under Rules 26(c) and 37 to make known their intolerance. Ineffective administration of these rules undermines the safeguards for litigants. Adequate on their face, if they are not properly applied by the courts, their preventive effect may become so diluted as to compel reform in order to preserve the just results they seek to promote.

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158. *See* notes 61-118 and accompanying text *supra*.

159. *See, e.g.*, Societe Internationales pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958), discussed in note 129 *supra*; Kropp v. Ziebarth, 557 F.2d 142 (8th Cir. 1977).