

Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions

Wayne D. Brazil

Contents

I. INTRODUCTION	875
II. TOWARD A THEORY OF DISCOVERY REFORM	879
III. CASE MANAGEMENT AND THE PROPOSED REVISION OF RULE 16	890
A. A Model for Judicial Management of the Pretrial Development of Civil Actions	890
B. Suggestions for Improving Proposed Rule 16	916
IV. THE SANCTIONS PROVISIONS	921
A. Shortcomings of Current Provisions for Sanctions	921
B. The Proposed Amendments to Rule 26	937
C. The Entitlement Theory of Expense Awards	940
D. Toward Comprehensive Reformulation of Sanctions Rules	953
APPENDIX A: A MODEL RULE FOR PRETRIAL MANAGEMENT OF CIVIL ACTIONS	956
APPENDIX B: ADVISORY COMMITTEE'S PROPOSED AMENDMENT TO FEDERAL RULES OF CIVIL PROCEDURE 16	961

Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions

Wayne D. Brazil

This article follows two earlier pieces in which the author reported the findings of a pilot empirical exploration of how well the discovery system in civil litigation is functioning. Brazil begins by focusing on the principal problems his field studies exposed and by suggesting a theory of discovery reform which responds to the nature and sources of those problems. His principal thesis is that too often neither judges nor attorneys assume sufficient responsibility for the discovery system as a system. Most of this article is devoted to two major proposals that are designed to promote in the judiciary and in counsel a sense of responsibility for the pretrial system and to equip the judiciary to convert that sense into action. Brazil proposes a comprehensive model rule that courts could use to manage the pretrial development of civil actions. He then uses his model as a background for suggesting modifications to and extensions of the proposed revision of Rule 16 that the Advisory Committee on Civil Rules has circulated for comment. He also offers a critique of current provisions for sanctions and advances an alternative sanctions rule that acknowledges a right to compensation for damages caused by an opponent's breach of pretrial obligations and that reduces the scope of judicial discretion to refuse to impose compensatory awards.

I. INTRODUCTION

Thoughtful efforts to design improvements in civil discovery must begin by identifying the character and sources of the discovery system's problems. In 1979 the American Bar Foundation began supporting field work designed to help meet this need. During structured interviews of 180

Wayne D. Brazil is Associate Professor of Law, Hastings College of the Law, University of California, San Francisco; Affiliated Scholar, American Bar Foundation. B.A., 1966, Stanford University; M.A., 1967, Ph.D., 1975, Harvard University; J.D., 1975, University of California, Berkeley.

The author would like to thank the American Bar Foundation for continuing its support of the research whose results are reflected in this series of articles. He also would like to acknowledge the valuable research assistance provided by Barbara Bock, Mary Williams, and Mark Petersen, and the careful preparation of the manuscript for publication by Stephen R. Lothrop, Evelyn Baron, Bea Spelker, and Lisa Stringfellow.

Chicago area litigators the project director and his research associate¹ gathered data about the nature and the severity of the system's problems² and asked attorneys to suggest ways to improve the discovery process. During the summer of 1981 the project director returned to the field to interview selected judicial officers and practitioners³ about causes of the system's ills and about possible remedies.

I focus in this article primarily on the needs of the discovery process in larger, more complex cases. I do so even though it is not possible, with currently available data, to locate the exact boundaries of the category of lawsuits that should be considered "larger, more complex cases" for purposes of analyzing discovery problems and shaping reform proposals. Different authorities have offered overlapping but not identical lists of characteristics which could be used to identify "complex" or "potentially protracted" actions.⁴ It also is important to acknowledge that some kinds of discovery problems are shared by a wide range of types and sizes of cases.⁵ It is clear from our data, however, that the severity of the problems afflicting the discovery process is quite likely to intensify as the size and complexity of lawsuits increase.⁶ Moreover, the number of matters

1. The author served as project director. His research associate was Janna Dee Bounds (now Mrs. Janna Tetzlaff), who at the time was completing her last year of law school.

2. I have described the data these interviews produced about the nature and severity of the system's problems in two earlier articles in this series: Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 A.B.F. Res. J. 217 (cited hereinafter as Brazil, *Views*); and *id.*, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 A.B.F. Res. J. 787 (cited hereinafter as Brazil, *Civil Discovery*). I will use this article and a subsequent piece to describe some of the suggestions for improving the discovery system that were made by the lawyers we interviewed.

3. The interviews I conducted in 1981 were unstructured (unlike the interviews in 1979). I presented them as essentially brainstorming sessions, designed to gather ideas and insights and to give judges, magistrates, and litigators opportunities to offer thoughts about several different kinds of reform proposals that lawyers had suggested during the interviews in 1979. In 1979 we conducted all of our interviews in person; in 1981 I used the telephone to conduct 42 of the 55 interviews so I could expeditiously reach judicial officers and lawyers from several parts of the country. I selected respondents who I knew had knowledge about and experience with particular procedures or reform devices in which I was interested, for example, the use of special masters to supervise discovery. I made absolutely no effort to structure a sample group or to assure that the people I interviewed were in any sense (e.g., situationally or philosophically) representative of any larger group. In short, the interviewing process in 1981 was an unstructured exercise in exploration—with no scientific pretensions. The group interviewed included 15 federal district court judges (from San Francisco, San Diego, Seattle, Portland, New York, Philadelphia, and Washington, D.C.), 4 full-time United States magistrates, 6 state court trial judges (all from California), 2 state court commissioners, 3 lawyers who had substantial experience as special masters, 3 clerk-administrators, and 22 litigators.

4. I describe some of the criteria developed for this purpose by different authorities *infra*, at pp. 902-3.

5. For example, delay and evasion are significant obstacles to completing discovery in both smaller cases (i.e., those in which \$25,000 or less is in dispute) and larger cases (i.e., those in which \$1,000,000 or more is in dispute). See Brazil, *Civil Discovery*, *supra* note 2, at 832-39.

6. See, e.g., Brazil, *Views*, *supra* note 2, at 223-35; *id.*, *Civil Discovery*, *supra* note 2, at 869-73.

that would be classified large and complex under virtually any criteria seems to have increased dramatically in recent decades.⁷

There are additional reasons for focusing here primarily on the problems encumbering larger lawsuits. One is that the conceptual hurdles to identifying effective remedies for discovery problems are measurably lower for smaller cases than they are for larger lawsuits. Many of the smaller case attorneys we interviewed are convinced that implementing *one* reform, providing early and firm trial dates, would go a long way toward correcting the more consequential problems besetting discovery in smaller matters. If that reform were accompanied by procedures affording litigants quick and inexpensive access to a neutral person empowered to resolve their discovery disputes, there is reason to hope that two of the biggest problems in small case discovery, delay and cost,⁸ would become manageable.⁹ During the past few years, moreover, the need to increase the efficiency and speed of dispute resolution for smaller and mid-size matters has attracted considerable attention, provoked a variety of proposed solutions and procedural innovations, and spawned several ambitious experiments. Thorough assessments of the needs of small case discovery probably should await reaction to these innovations and completion of these experiments.¹⁰

7. See, e.g., American College of Trial Lawyers, Recommendations on Major Issues Affecting Complex Litigation (February 27, 1981), in 90 F.R.D. 205, 209-10 (1981) (cited hereinafter as ACTL, Recommendations).

8. See Brazil, Civil Discovery, *supra* note 2, at 825-33.

9. See, e.g., Test Project in Delay Reduction Favorable, 1 Kan. Judicial Branch Employee Newsletter 2 (October 1980), and Larry L. Sipes *et al.*, Managing to Reduce Delay 53 (Williamsburg, Va.: National Center for State Courts, 1980).

10. No attempt is made here to catalog all of the recent thinking, innovation, and experimentation that focuses on expediting dispute resolution for smaller and mid-size matters. The references that follow are to some of the more visible contributions and more promising experiments. The literature includes: Thomas W. Church, Jr., *et al.*, Pretrial Delay: A Review and Bibliography (Williamsburg, Va.: National Center for State Courts, 1978); Seth Hufstедler & Paul Nejelski, ABA Action Commission Challenges Litigation Cost and Delay, 66 A.B.A.J. 965 (1980); Earl Johnson, Jr., *et al.*, Access to Justice in the United States: The Economic Barriers and Some Promising Solutions, in 1 Mauro Cappelletti & Bryant Garth, eds., Access to Justice: A World Survey 913 (Alphenaan-den-rijn, Netherlands: Sitjhoff & Noordhoff, 1978); Justice Delayed: The Pace of Litigation in Urban Trial Courts (Williamsburg, Va.: National Center for State Courts, 1978); F. R. Lacy, Discovery Costs in State Court Litigation, 57 Or. L. Rev. 289 (1978); Ronald E. McKinstry, Civil Discovery Reform, 14 Forum 790, 801-3 (1979); Paul Nejelski, Court Annexed Arbitration, 14 Forum 215 (1978); *id.*, With Justice Affordable for All, 19 Judges' J. 4 (Summer 1980); *id.* & Russell R. Wheeler, Wingspread Conference on Contemporary and Future Issues in the Field of Court Management (a reflective report on conference sponsored by Institute for Court Management in cooperation with The Johnson Foundation, with additional support from American Bar Endowment) (Racine, Wis.: Johnson Foundation, 1980); Note, Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes, 29 Hastings L.J. 475 (1978); Sipes *et al.*, *supra* note 9; Steven Weller, John C. Ruhnka, & John A. Martin, The Rochester Answer to Court Backlogs, 20 Judges' J. 36 (Fall 1981); Alexander B. Yakutis, Judicial Arbitration, California Style, 18 Judges' J. 33 (Winter 1979); *id.*, Reform of Civil Procedure: A Quick Look at a Partial Picture, 56 Cal. St. B.J. 116 (1981). Notable experiments with streamlined procedures, reduced discovery, and/or mandatory disclosure requirements in civil actions are currently under way or being

The purpose of the section following is to develop a modest theoretical framework for evaluating proposals to improve the discovery system in larger cases by describing the character and exploring the causes of the principal problems that encumber the system. In a subsequent section of this article I will describe a model system of pretrial case management that integrates suggestions from many of the judges and lawyers we have interviewed and whose adoption, in my judgment, could significantly reduce discovery problems. Flexibility is designed into the management system I propose; while it could be used to expedite the processing of routine cases with relatively little judicial effort, it also could serve as a basis for imposing substantially more elaborate controls over the pretrial development of major lawsuits. After developing the management model, I will use it as a backdrop for evaluating the revision of Rule 16 of the Federal Rules of Civil Procedure that the Advisory Committee has proposed.¹¹ Then in the final major section of this piece I will analyze the shortcomings of the parts of the current and proposed rules that authorize courts to impose sanctions for breaches of pretrial duties. Working from that analysis, I will propose alternative formulations of sanctions rules that would (1) recognize a right to compensation for expenses incurred as a consequence of another person's violation of pretrial rules and (2) toughen the standards under which pretrial behavior would be evaluated.

planned in state courts in Maricopa County, Arizona; Colorado (see C.R.C.P. Proposed New Rules and Amendments, 10 Col. Law. 249 (1981)); Campbell County, Kentucky; Maine; and California (see John T. McDermott, *The California Economical Litigation Project* (Los Angeles, Cal.: Loyola Law School, 1981). In June 1981, the ABA's Action Commission to Reduce Court Costs and Delay decided to try to find courts that would adopt, for experimental analysis, the streamlined procedures for resolving mid-size disputes that are described in Maurice Rosenberg, Peter F. Rient, & Thomas D. Rowe, Jr., *Expenses: The Roadblock to Justice*, 20 *Judges' J.* 16 (Summer 1981). The United States District Courts for the Western District of Washington and for the Southern District of New York have conducted interesting experiments in which private attorneys have served as volunteer (uncompensated) mediators to try to facilitate settlement and information exchange in mid-size cases. I will describe the nature and results of these programs in a subsequent article. An experiment to encourage settlements in federal court in Connecticut features the use of an "advocate master" for each party. For a very brief description of these experiments, see Report of the Ad Hoc Committee to Study the High Cost of Litigation to the Seventh Circuit Judicial Committee and the Bar Association of the Seventh Federal Circuit (May 7, 1979), 86 *F.R.D.* 267, 293-96 (1980). This report also briefly describes arbitration alternatives. Federal district courts in Cleveland and Boston have been experimenting with versions of an early "summary jury trial" procedure that appears to hold considerable promise of expediting case evaluation and settlement in modest-size cases. The Federal Judicial Center has sponsored an evaluation of this approach; preliminary assessments are positive. See the brief description in *Jury Trials That Can Save Time and Money*, *Bus. Week*, July 20, 1981, at 166.

11. Advisory Committee on Civil Rules of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (June 1981) (cited hereinafter as *Advisory Committee, Proposed Amendments*). The Advisory Committee has published this preliminary draft in pamphlet form; it also is bound with 101 S. Ct. (July 15, 1981) and 514 & 515 F. Supp. (July 27, 1981).

II. TOWARD A THEORY OF DISCOVERY REFORM

Understanding the problems that beset the discovery process in big cases requires recognition at the outset of some fundamental facts about large, complex litigation. By definition, big cases require the processing of tremendous amounts of information. The sheer volume of the documents and other sources of data that must be located, organized, digested, screened for privileged communications and trade secrets, and then exchanged, redigested, and reanalyzed imposes a significant threshold level stress on the system. There are other facts of complex litigation life that add measurably to that already considerable base-line stress. One important additional source of stress is the complexity of the legal theories that major lawsuits regularly involve. A complex or subtle theory of liability for damages often compels counsel to expand the scope of discovery into uncharted and unpredictable areas. Moreover, an attorney who is trying to develop a novel theory, or who is litigating in an area of substantive law that the courts have not coherently developed or whose borders remain broad and gray, may not be sure what kind of evidence will be considered probative or sufficient to establish or to escape liability.¹² One reaction to these kinds of uncertainties that was reported by lawyers we interviewed is to pursue everything that might conceivably be useful. Novel theories or approaches also increase the likelihood that opposing counsel will not perceive the possible relevance of discovery probes and, therefore, will resist them. Even when the premises of liability and damages are relatively straightforward, the basic requirements of proof in big cases can create needs for immense amounts of discovery. In antitrust actions, for example, acquiring enough evidence about a large company to establish its market share and its patterns of commercial behavior may require massive discovery efforts.

The combination of the volume of information and the uncertainties created by the complex requirements of proof inevitably build into the structure of the discovery stage of big cases substantial room for adversarial maneuvering. The size and the complexity of the discovery task, by themselves, create obvious opportunities for litigators to try to manipulate the information exchange process or to use the tools of discovery for purposes other than simply acquiring information. Moreover, the environment in which most big case litigation proceeds is rich in incentives and pressures to capitalize on such opportunities. The stakes involved in big cases usually are high: a great deal of money, significant commercial op-

12. Joseph L. Ebersole & Barlow Burke, *Discovery Problems in Civil Cases 20-22*, 66-67 (Washington, D.C.): Federal Judicial Center, 1980) (cited hereinafter as Ebersole & Burke, *Discovery Problems*).

portunities, or principles of considerable moment to the parties. High stakes breed intense pressures to emerge from the litigation with as little damage or as much gain as possible. And the litigants who feel these pressures usually have ample resources to equip and inspire their lawyers to use each feature of the litigation process to the maximum possible advantage. Thus in big cases there is a powerful convergence of opportunity and incentive to exploit the information exchange process for competitive gain.¹³

It is conceivable, of course, that attorneys would resist the pressures and forgo the opportunities that arise during the discovery stage of big cases. Our data indicate, however, that most attorneys follow the more predictable course. Tactical considerations permeate the pretrial thinking of big case litigators; almost all of those we interviewed reported that tactical purposes affect the way they conduct or respond to discovery in virtually every case.¹⁴ Among the tactical devices we explored, the most pervasive appears to be that form of resistance which consists of evasive or incomplete responses to discovery probes. Attorneys whose practices revolve primarily around larger matters reported, for example, that inadequate responses impeded or wholly frustrated their discovery efforts in four out of every five of their cases. Extended delay in responding to discovery requests is also common: big case lawyers complained that it impairs pretrial preparation in at least half of the actions in which they are involved. Many of these lawyers also expressed concern about the more general problem of litigators procrastinating in the development (e.g., through investigation) and evaluation (for purposes of serious settlement negotiations) of their own cases. Whether caused by the desire to avoid disclosures (on the theory that an attorney cannot produce what he does not know) or simply by work backlogs, such procrastination can frustrate timely discovery and compel wasteful repetition of discovery probes.¹⁵

On the flip side of the tactics coin, overdiscovery and harassment also are common phenomena in the pretrial stage of major litigation. When

13. See, e.g., Sherman L. Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 *Minn. L. Rev.* 253, 255-56 & n.25 (1979) (cited hereinafter as Cohn, *Survey*); Helen H. Stern Cutner, *Discovery—Civil Litigation's Fading Light: A Lawyer Looks at the Federal Discovery Rules After Forty Years of Use*, 52 *Temp. L.Q.* 933, 937-52 (1979) (cited hereinafter as Cutner, *Discovery*); Martin I. Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation*, 48 *Fordham L. Rev.* 907, 909-11 (1980) (cited hereinafter as Kaminsky, *Proposed Federal Discovery Rules*); McKinstry, *supra* note 10, at 793; Mark A. Nordenberg, *The Supreme Court and Discovery Reform: The Continuing Need for an Umpire*, 31 *Syracuse L. Rev.* 543, 560-62 (1980) (cited hereinafter as Nordenberg, *Discovery Reform*); Maurice Rosenberg & William King, *Curbing Discovery Abuse in Civil Litigation: Enough Is Enough*, 1981 *B.Y.U.L. Rev.* 442 (cited hereinafter as Rosenberg & King, *Curbing Discovery Abuse*).

14. Brazil, *Civil Discovery*, *supra* note 2, at 847-50.

15. One of the lawyers we interviewed pointed out that conscientious counsel in big cases have at least one significant incentive to conduct early investigations and to promptly develop their understanding of their clients' files and positions. That incentive is fear that ignorance increases the likelihood of unknowingly disclosing, in responses to discovery requests, trade secrets or information that could expose the client to criminal or civil liability in other actions.

asked in open-end questions to identify the principal problems with or abuses of discovery, about 60 percent of the big case lawyers volunteered complaints about overdiscovery and about 45 percent cited harassment.¹⁶ There were many complaints also about attorneys using discovery for purposes beyond the case in which they were immediately involved, for example, to exert economic pressure on a competitor, to uncover trade secrets, or to acquire information from an unwary nonparty in order to lay the foundation for a subsequent action against it.

In sum, our data portray a system permeated with subtle and overt forms of resistance, a system whose tools often are used inartfully or as means to exert pressure on or secure some tactical advantage over an opponent. This thoroughly adversarial process is inefficient and expensive. It also often fails to achieve its primary purpose: to assure that “[m]utual knowledge of all the relevant facts gathered by both parties [that] is essential to proper litigation.”¹⁷ Our data indicate that in about 50 percent of the larger, more complex cases that are closed by settlement, at least one party believes it knows something significant about the case that counsel for other parties have not discovered.¹⁸ The comparable figure is a sizable 30 percent even in those rarer actions that proceed all the way through trial to a final judgment on the merits.¹⁹

Our data about how the system is working pose a serious challenge to some of the fundamental premises upon which the current federal rules of discovery were structured.²⁰ The people who designed the initial federal discovery apparatus in the 1930s hoped that it would reduce the role of gamesmanship and surprise in litigation and assumed that, for the most part, the system would be self-executing and self-policing.²¹ The drafters expected opposing counsel to identify the informational needs each matter presented, then, at least in most cases, to heed the spirit of

16. Brazil, *Civil Discovery*, *supra* note 2, at 831. The ABA's Antitrust Section surveyed (through a questionnaire) the views of 100 practitioners about pretrial problems in civil litigation. Of those responding, 62 percent pointed to “excessively broad discovery” as an aspect of the system that needed improvement. Only one other problem was mentioned more often: 100 percent of the lawyers cited “lack of judicial supervision.” See ABA Antitrust Section Complex Litigation Questionnaire, 48 *Antitrust L.J.* 663 (1980). But see C. Ronald Ellington, *A Study of Sanctions for Discovery Abuse* (Federal Justice Research Program, Office for Improvements in the Administration of Justice, FJRP- 79/003), at 92-102, 121 (Washington, D.C.: U.S. Dept. of Justice, May 1979) (cited hereinafter as Ellington, Study).

17. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). But see Nordenberg, *Discovery Reform*, *supra* note 13, at 586-87; and generally Rosenberg & King, *Curbing Discovery Abuse*, *supra* note 13.

18. Brazil, *Civil Discovery*, *supra* note 2, at 811-12.

19. *Id.* at 812-15.

20. I will focus in this article on the *federal* rules because so many big cases are litigated in federal court and because of the great influence the Federal Rules of Civil Procedure have had on the states' procedural systems.

21. Cohn, *Survey*, *supra* note 13, at 253-54; Nordenberg, *Discovery Reform*, *supra* note 13, at 555-60; Rosenberg & King, *Curbing Discovery Abuse*, *supra* note 13, at 3. See also Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *Vand. L. Rev.* 1295, 1298-1303 (1978).

the new rules by orchestrating a relatively orderly and frictionless exchange.²² The courts were given no active, substantive role in this process; they retained, of course, their power to compel compliance and to sanction misbehavior, but it was assumed that there would be relatively few occasions requiring exercise of that power.²³ For the most part, the lawyers would be left to run the machinery of discovery on their own. In the words of former federal District (now Circuit) Judge Kaufman: "The whole discovery procedure contemplates an absence of judicial intervention in the run-of-the-mill discovery attempt."²⁴ And as Professor Cohn has pointed out, this philosophy of judicial nonintervention was reconfirmed and extended in the 1970 revisions of the federal discovery rules.²⁵ Indeed, one of the purposes of those revisions was "to reduce the time that judges were to spend on discovery matters."²⁶

As our data and most recent commentary strongly suggest, the assumption that the discovery system would be efficient and effective in big cases, while remaining substantially self-executing and self-policing, was misplaced.²⁷ One reason for the failure of this crucial assumption is that it presupposes that opposing counsel will have the capacity to exert relatively tight constraining pressures on one another. While counsel with sufficient resources and experience might enjoy that capacity on a relatively regular basis in modest-sized litigation (the kind that the framers of the original discovery rules may have had in mind), attorneys in big cases often appear to lose that capacity in the swamp of information and the morass of management difficulties that major lawsuits involve. The volume of the data and the complexity and subtlety of the process not only reduce the resources any given big case lawyer has for policing her opponent; they also make it substantially more difficult to know when a policing effort is in order. In big cases there is so much more room to

22. See, e.g., *Fisher v. Harris, Upham & Co.*, 61 F.R.D. 447, 449 (S.D.N.Y. 1973), where, in explaining the need to appoint a special master to supervise aspects of discovery, the court declared: "The spirit of cooperation mandated by the federal rules was sorely lacking."

23. Kaminsky, Proposed Federal Discovery Rules, *supra* note 13, at 911-12.

24. Irving R. Kaufman, *Judicial Control over Discovery*, 28 F.R.D. 111, 116 (1962).

25. Cohn, *Survey*, *supra* note 13, at 254.

26. *Id.*

27. In addition to the sources cited in note 13 *supra*, see National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General, 80 F.R.D. 509, 522-23, 544-46 (1979) (hereinafter cited as Antitrust Commission, Report); ACTL, *Recommendations*, *supra* note 7, at 215, 223; Frank Flegal & Steven Umin, *Curbing Discovery Abuse in Civil Litigation: We're Not There Yet*, 1981 B.Y.U.L. Rev. 459 (cited hereinafter as Flegal & Umin, *We're Not There Yet*); Julius B. Levine, "Abuse" of Discovery: Or Hard Work Makes Good Law, 67 A.B.A.J. 565, 567 (1981). Levine is one of the few recent commentators to suggest that complaints about discovery abuse are greatly exaggerated and that there is little need for reform. Nonetheless, he concedes that complex cases are the most likely to provoke discovery abuse and that there is a need for continuing judicial supervision in the case development stage of such actions. Levine appears to be unaware of the author's empirical work in this area and of the serious methodological limitations of the empirical work sponsored by the Columbia Project for Effective Justice in the early 1960s. See, Brazil, *supra* note 21, at 1305-11.

maneuver that an opponent may be able to do so undetected. And the magnitude of this threat to the system as originally envisioned has increased with the perhaps unforeseen increase, since 1938, in the size and complexity of much of the litigation in federal courts.

Another factor that has contributed significantly to the failure of the assumption that the system can work effectively on a self-executing and self-policing basis is the litigating bar's failure to embrace the spirit of the discovery rules, to accept the notions that discovery should produce "mutual knowledge of all relevant data" and should do so through an orderly process that is unimpeded and undistorted by various forms of "gaming."²⁸ Our data about the extent to which tactical considerations affect litigators' thinking about discovery graphically support this point. To many lawyers, gaming remains a legitimate and important feature of *all* stages of litigation. Such lawyers are not likely to exercise the kind of self-restraint that the designers of modern systems of discovery apparently anticipated. Nor are such lawyers likely to feel much responsibility for the system as a system. The economic and psychological facts of life, as well as some of the current commandments of the Code of Professional Responsibility,²⁹ dictate a sense of responsibility to clients that leaves little room, at least in day-to-day decision making, for concern about the health of the system as a whole. The problem, in short, is that there is a fundamental tension between, on the one hand, the theory and spirit of the discovery rules and, on the other, the reality of the adversarial pressures, incentives, and opportunities of big case litigation. The judges who have produced the Manual for Complex Litigation have explicitly acknowledged this problem in the following words:

The trial judge has the undoubted power and inescapable duty to control the processing of a case from the time it is filed. In the complex case, the judge must assume an active role in managing all steps of the proceedings. . . . Under the adversary system, each advocate has a mission and a commitment to process and to present the case in the manner most favorable to his client, consistent with ethics and good faith. It is the mission and commitment of the judge *only* to ensure that justice results as speedily and economically as possible without regard to the special interest of any party. Opposing advocates, if left to themselves, each pursuing that course which is most favorable to his particular client, should not be expected to

28. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). See also Kaufman, *supra* note 24, at 125.

29. See, e.g., ABA Code of Professional Responsibility, DR 7-101, EC 7-1, EC 7-3, in American Bar Association, Committee on Ethics and Professional Responsibility, Model Code of Professional Responsibility and Code of Judicial Conduct, at 36 & 32 (Chicago: American Bar Association, 1980). The ABA's Commission on Evaluation of Professional Standards (also known as the Kutak Commission because chaired by Robert J. Kutak) has published Proposed Final Draft of the Model Rules of Professional Conduct ([Chicago]: American Bar Association, May 30, 1981) (cited hereinafter as Kutak Commission, Model Rules). I describe the proposed changes that most directly affect attorneys' responsibilities in civil discovery *infra*, at pp. 888-90, 928-30.

conceive, agree upon, present and execute a plan which will expeditiously, economically and justly determine a complex case.³⁰

The product of that tension is a system in almost desperate need of external control. There is graphic evidence of the severity of the system's internal strain in the fact that so many of those to whom the rules assign primary responsibility for maintaining the discovery apparatus are crying for help from the judiciary. *Nine out of every ten* big case lawyers we interviewed reported feeling that they did *not* "get adequate and efficient help from the courts in resolving discovery disputes and problems."³¹ A similar percentage wants the courts to use more often their power to impose sanctions for discovery abuse,³² and four out of five expressed their desire for generally greater judicial involvement in the discovery stage of litigation.³³

While support for such proposals has expanded considerably during the past five years,³⁴ the suggestion that courts should exercise more control over large, complex suits than traditionally thought appropriate for most civil actions has been energetically argued for at least three decades.³⁵ Despite these arguments, and the availability of the Manual

30. The Manual is published in several places. See, e.g., 1 (Pt. 2) Moore's Federal Practice (2d ed. New York: Matthew Bender & Co., 1980 & Cum. Supp. 1980-81). For a brief discussion of the Manual's history, see Comment, Observations on the Manual for Complex and Multidistrict Litigation, 68 Mich. L. Rev. 303, 304-305 (1969). The Federal Judicial Center periodically publishes revisions of the Manual. The citations to the version of the Manual in this article are to the Tentative Draft, Fifth Revision, Manual for Complex Litigation (February 4, 1980), published in looseleaf form (cited hereinafter as Manual for Complex Litigation); the material quoted in the text is from § 1.10, at 58-59.

Some of the lawyers and judges we interviewed suggested that the nature of the Manual itself has inhibited assertions of control by the judiciary over the pretrial stage of complex litigation. I explore the thinking behind this observation *infra*, at pp. 907-9 & note 120.

31. Brazil, Civil Discovery, *supra* note 2, at 862-64.

32. *Id.* at 865-66.

33. *Id.* at 865.

34. See, e.g., Robert F. Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 Cal. L. Rev. 770 (1981) (cited hereinafter as Peckham, Judge as Manager); ACTL, Recommendations, *supra* note 7, at 210-12; Antitrust Commission, Report, *supra* note 27, at 515-18; Cohn, Survey, *supra* note 13, at 268-71, 295-97; Ebersole & Burke, Discovery Problems, *supra* note 12, at 79-81; McKinstry, *supra* note 10, at 797-98; Nordenberg, Discovery Reform, *supra* note 13, at 560-71, 592-99. But see Steven Flanders, *et al.*, Case Management and Court Management in United States District Courts 17 (Washington, D.C.: Federal Judicial Center, 1977) (cited hereinafter as FJC, Case Management), where the authors declare: "To handle its case load efficiently, a court must minimize the time judges spend on the initial stages of their cases and require lawyers themselves to resolve the relatively petty disputes (especially discovery questions) in most instances." This position is criticized by Nordenberg, Discovery Reform, *supra* note 13, at 566-67.

35. See, e.g., Breck P. McAllister, The Big Case: Procedural Problems in Antitrust Litigation, 64 Harv. L. Rev. 27 (1950); [The Prettyman Report] (Adopted by the Judicial Conference of the U.S., Sept. 26, 1951), 13 F.R.D. 62 (1953); Albert A. Ridge, The Organization of the Big Case—The First Pre-trial Conference, in Proceedings of the Seminar on Protracted Cases for United States Circuit and District Court Judges Held at New York University Law Center, New York City, August 26-30, 1957, 21 F.R.D. 395, 406 (1958); Proceedings of the Seminar on Protracted Cases for United States Judges Held at the School of Law, Stanford University, Stanford, California, August 25-30, 1958,

for Complex Litigation, however, there is no reason to believe that most judges regularly employ any systematic set of procedures for exercising firm control over the pretrial development of large lawsuits.³⁶ In fact, federal judges have been notoriously reluctant to use the one tool for controlling discovery that the Federal Rules of Civil Procedure explicitly encourage: sanctions for discovery abuse.³⁷

Judicial reluctance to attempt to manage or control the discovery process even in complex cases undoubtedly has several sources. One of the more important is the basic philosophy of "attorney control" that has informed the structure of the Federal Rules of Civil Procedure since 1938.³⁸ Until the 1980 revisions, neither the rules themselves nor their accompanying commentary offered substantial encouragement to judicial activism during the discovery stage of litigation.³⁹ Even the 1980 amendment of Rule 26, which authorizes discovery conferences, was in no sense a general invitation to judicial involvement in discovery. In fact, the amendment reflects the traditional belief that the primary responsibility for both conducting and controlling discovery rests with the lawyers and not with the court. The new provision does not make discovery conferences mandatory; nor does it suggest that they be held in complex cases. Moreover, it states explicitly that such conferences cannot be held on motion of counsel unless a proper showing has been made that the opposing attorneys have attempted to resolve their differences privately but have failed to do so. The Advisory Committee's note makes it even more clear that federal judges should not view this amendment as signaling a departure from the traditional notion that primary responsibility for managing discovery rests with the counsel and not with the court. After declaring that "abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases," the committee declares:

It is not contemplated that requests for discovery conferences will be made

23 F.R.D. 319 (1958); Handbook of Recommended Procedures for the Trial of Protracted Cases: Report of the Judicial Conference Study Group on Procedure in Protracted Litigation, 25 F.R.D. 351, 375 (1960).

36. See, e.g., Cohn, Survey, *supra* note 13, at 297; Cutner, Discovery, *supra* note 13, at 986; American College of Trial Lawyers, Comments Regarding Revision of the Manual for Complex Litigation (1979), at 4-5 (cited hereinafter as ACTL, Comments); ACTL, Recommendations, *supra* note 7, at 214-15; James R. Withrow & Richard P. Larm, The "Big" Antitrust Case: 25 Years of Sisyphean Labor, 62 Cornell L. Rev. 1, 5 (1976) (cited hereinafter as Withrow & Larm, The "Big" Antitrust Case).

37. The authorities and data that support this generalization are cited in notes 154-56 *infra* and are discussed in the accompanying text.

38. See, e.g., Paul R. Connolly, Edith A. Holleman, & Michael J. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery 8-14 (Washington, D.C.: Federal Judicial Center, 1978) (cited hereinafter as FJC, Judicial Controls); Cohn, Survey, *supra* note 13, at 253-54.

39. See, e.g., Advisory Committee, Proposed Amendments, note to Rule 16, *supra* note 11, at 14-15; Cutner, Discovery, *supra* note 13, at 946.

routinely. A relatively narrow discovery dispute should be resolved by resort to Rules 26(c) or 37(a), and if it appears that a request for a conference is in fact grounded in such a dispute, the court may refer counsel to those rules. If the court is persuaded that a request is frivolous or vexatious, it can strike it.⁴⁰

Of course the judiciary's failure to exercise greater control over the discovery stage of large lawsuits cannot be ascribed solely to the influence of the philosophy and structure of the Federal Rules of Civil Procedure. The problem is not an absence of authority for greater activism.⁴¹ The Manual for Complex Litigation has served as one form of authority for assertions of control over major cases since the late 1960s.⁴² And in some federal district courts local rules or standing orders that permit greater judicial intervention have been in effect for years.⁴³ As Cohn has argued, however, there is something substantially less than a necessary correlation between (1) the existence of authority to manage and (2) regular exercise of that authority; he writes: "having a rule on the books is not an answer in itself. There must be an intent on the part of the judge to manage a case (either personally or through a magistrate) in order to bring about as speedy, efficient, and inexpensive completion of discovery as possible."⁴⁴

The available data suggest that there are a great many judges, even among those who often confront large, complex lawsuits, who simply have no such "intent . . . to manage."⁴⁵ Several judges we interviewed, for example, volunteered that they did not like discovery matters and preferred not to be involved in them. Even one of the "activist" judges (i.e., a proponent of aggressive case management by courts) complained that he finds most discovery disputes "puerile" affairs whose consump-

40. Advisory Committee note to Rule 26(f), in Advisory Committee, Proposed Amendments, *supra* note 11, at 6-7.

41. Stanley J. Levy, A Defense of Meaningful Pre-trial Discovery, 14 Forum 781, 786 (1979); FJC, Judicial Controls, *supra* note 38, at 15-17.

42. Comment, *supra* note 30, at 303-5. Apparently for the first time, the Supreme Court cast a shadow of doubt on the authority of the Manual in the recent opinion in *Gulf Oil Co. v. Bernard*, ___ U.S. ___, 101 S. Ct. 2193 (1981). In *Gulf* the court reversed a trial court's verbatim use of a form of order that the Manual for Complex Litigation recommends to help control communication between counsel and members of a group who could join a class action. Relying on Rule 23, the Court held that trial judges must engage in particularized balancing evaluations before entering such orders, even when the form of order is recommended by the Manual.

43. Advisory Committee, Proposed Amendments, note to Rule 16, *supra* note 11, at 19; Cohn, Survey, *supra* note 13, at 265-71, 268 n.89; see generally FJC, Case Management, *supra* note 34.

44. Cohn, Survey, *supra* note 13, at 271.

45. There are, of course, many judges whose "intent to manage" is unquestionable and highly visible. Many attorneys we interviewed cited Judge Hubert L. Will, United States District Court for the Northern District of Illinois, as a prime example. See also Milton Pollack, Discovery—Its Abuse and Correction, 80 F.R.D. 219 (1979), and William W. Schwarzer, Managing Civil Litigation: The Trial Judge's Role, 61 Jud. 400 (1978).

The data generated by our interviews with lawyers and judges, however, strongly suggest that aggressive judicial management during the discovery stage is the exception rather than the norm. Observations by other students of discovery problems support this conclusion; see, e.g., Ellington, Study, *supra* note 16, at 32-37; Antitrust Commission, Report, *supra* note 27, at 522.

tion of judicial resources he resents. Such attitudes are visible to many lawyers and are discouraging recourse to the judiciary for help with discovery problems.⁴⁶

There are additional sources of judicial reluctance to try to manage discovery. Some judges we interviewed expressed concern about preserving their impartiality, both in fact and in the eyes of counsel and litigants. These judges assumed that there was a correlation between being remote and being perceived as neutral. They intimated that their neutrality might be threatened by the thorough knowledge of the developmental transformations in a complex case and of the character of the parties and lawyers that aggressive and intelligent management of discovery would involve.

Another factor was suggested by a judge who insisted that many of his peers had too little experience as litigators before being appointed to the federal bench to be competent case managers. Inexperience with litigation (especially its tactical subtleties), as well as unfamiliarity with the substance of some complex areas of the law, and with some sophisticated commercial or institutional practices, could reduce a judge's confidence in his capacity to intelligently direct the development of major lawsuits. Several judges we interviewed freely admitted that often there was simply too much to know in big cases for them to make well-considered decisions about many discovery matters.⁴⁷ Rather than make decisions whose quality they could not trust, these judges would prefer to leave the decision making to someone else. Moreover, many of the judges we interviewed declared that the intensity of the demands on their time by other responsibilities, responsibilities they view as substantially more important (e.g., conducting criminal and civil trials), makes it impossible for them to commit significantly more time to discovery matters. They view the task of intelligently monitoring discovery in complex cases as potentially overwhelming—threatening to consume far more of their resources than they can possibly spare. In combination with a general lack of respect for and interest in discovery disputes, such fears may contribute significantly to judicial reluctance to assume greater responsibility for the discovery process in big cases.

Regardless of the relative importance of the various contributing factors, their product is a fact of considerable consequence: in many big cases, the courts exercise no effective restraining influence on the discovery process.⁴⁸ They fail not only to play an affirmative, guiding, managerial role, but also to sanction abuses of discovery tools or breaches of

46. Brazil, Views, *supra* note 2, at 245–46, 248–49.

47. See also Ellington, Study, *supra* note 16, at 115–16.

48. The pervasiveness of this view within the group of predominantly big case lawyers we interviewed may be reflected in the fact that about 80 percent of them favor greater judicial involvement in the discovery stage. See Brazil, Civil Discovery, *supra* note 2, at 864.

disclosure obligations. Some attorneys even accuse the courts of failing to learn enough about big cases to make any pretrial rulings intelligently. The absence of effective external restraints that results from such judicial behavior too often leaves the discovery system in major lawsuits essentially out of control.⁴⁹ Ineffectively restrained big case litigators and litigants too often succumb to the economic and psychological pressure to seek competitive advantage by misusing the tools or evading the obligations of discovery. Thus one way of conceptualizing the difficulty with big case discovery is to suggest that it too often takes place in what comes too close to being a responsibility vacuum: neither courts nor counsel assume a sufficient level of responsibility for the system, as a system, to make its successful operation likely.⁵⁰

Working from this conceptual base, it seems to me that a primary goal of reform proposals should be to expand *both* lawyers' and judges' sense of responsibility for the discovery process. I believe that we should be trying to design changes in procedural and ethical rules that will *simultaneously* move both courts and counsel away from the periphery and toward the center of the responsibility sphere. It is necessary to extend the obligations of both bench and bar because the problems besetting discovery in big cases are too pervasive, too complex, and too elusive to admit of solution by changing the roles of only lawyers or only judges. To shift metaphors, it seems to me that the problems of big case discovery have exhibited an amoeba-like quality: applying pressure from only a few points has accomplished little; the creature simply moves into a new shape, its vitality undisturbed by the transition to a new form. To improve the likelihood of affecting the essence of the animal, we must surround it and then exert pressure on it simultaneously from as many directions as possible.⁵¹

Converting this vision of holistic reform into one multifaceted, coherent, and practical plan is a task clearly beyond our power to complete immediately. The distance to the final objective, however, should not discourage efforts to advance toward it. Happily, the Advisory Committee on Civil Rules⁵² has circulated for public comment several proposed changes in the Federal Rules of Civil Procedure, which in my judgment push in the right direction.⁵³ The revisions the committee recommends promise to encourage a greater sense of responsibility, in both judges and

49. For further discussion of ways in which judicial remoteness and reluctance to sanction can spawn discovery abuse, see Brazil, Views, *supra* note 2, at 248-50.

50. Cutner, Discovery, *supra* note 13, at 986.

51. Ebersole & Burke, Discovery Problems, *supra* note 12, at 72-73.

52. This committee reports to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, which, in turn, reports to the Supreme Court. See 28 U.S.C. § 331 (1976 & Supp. III 1979).

53. Advisory Committee, Proposed Amendments, *supra* note 11.

lawyers, for the system of pretrial case development. The proposals that would promote greater *judicial* control over the pretrial stage of civil actions include (1) a major overhaul of Rule 16,⁵⁴ (2) a new, explicit authorization in Rule 26(B)(1) for judicially imposed limits on the frequency or extent of the use of discovery tools in given cases,⁵⁵ (3) explicit provisions for sanctions under Rules 7, 11, and 16,⁵⁶ (4) a duty to sanction violators of a new discovery certification requirement under Rule 26,⁵⁷ and (5) a group of new rules to guide courts in the use of magistrates.⁵⁸ To encourage *attorneys* to assume greater responsibility for the case development process the committee's proposals would impose (through new Rule 16) duties to prepare for and participate in case management conferences and would impose new certification obligations under Rules 7, 11, and 26.

Perhaps not wholly fortuitously, the Advisory Committee's efforts to increase counsels' sense of responsibility for the pretrial system are complemented by a parallel movement from another important quarter in the profession. In the Proposed Final Draft of its Model Rules of Professional Conduct the ABA's Commission on Evaluation of Professional Standards (Kutak Commission) advocates changes in the formulation of ethical prescriptions that, among other things, would acknowledge explicitly a lawyer's duty to make a reasonable effort to expedite litigation⁵⁹ and would prohibit an attorney from (1) knowingly failing to disclose a fact necessary to prevent a fraud on a tribunal,⁶⁰ (2) unlawfully obstructing another party's access to evidence or concealing relevant material,⁶¹ or (3) "in pretrial procedure, [making] a discovery request that has no reasonable basis or [failing] to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."⁶²

The recommendations advanced by the Advisory Committee and by the Kutak Commission are responsive to some of the major problems that afflict the discovery system in big cases. If adopted and enforced, they could, through time, substantially improve the efficiency and fairness of the pretrial process. There are, however, some aspects of the committees' proposals that might be improved. One purpose of the sections following is to suggest changes or additions that might bring these re-

54. *Id.* at 10-14.

55. *Id.* at 23.

56. *Id.* at 2-3, 6-7, 13.

57. *Id.* at 23-24.

58. *Id.* at 38-54.

59. Kutak Commission, Model Rules, *supra* note 29, Rule 3.2.

60. *Id.* Rule 3.3(a)(2).

61. *Id.* Rule 3.4(a).

62. *Id.* Rule 3.4(d).

forms nearer to closing the circle of pressure toward responsibility around court and counsel.

III. CASE MANAGEMENT AND THE PROPOSED REVISION OF RULE 16

A. A Model for Judicial Management of the Pretrial Development of Civil Actions

During the past five or six years there has been a dramatic increase in the number of voices supporting the basic proposition that firm judicial control is an absolutely essential element of any serious effort to improve the efficiency and fairness of the pretrial development of big cases.⁶³ Most of the lawyers and judges with whom we have discussed the matter vigorously join this chorus. Despite the growth of support for this view, and its endorsement by the Supreme Court,⁶⁴ there is a widespread belief that additional encouragement and pressure will be necessary if judicial activism in the pretrial period is to be significantly expanded.

The substantial revision of Rule 16 that the Advisory Committee currently is considering could serve as one important source of such encouragement and pressure. While Cohn surely is right when he insists that the mere existence of a formal rule cannot *assure* desired judicial behavior, he overstates the case when he declares that without "an intent on the part of the judge to manage" the presence of "a rule is no help."⁶⁵ While the en-

63. See, e.g., ACTL, Comments, *supra* note 36; *id.*, Recommendations, *supra* note 7; Antitrust Commission, Report, *supra* note 27; Cohn, Survey, *supra* note 13; Cutner, Discovery, *supra* note 13; Ebersole & Burke, Discovery Problems, *supra* note 12; FJC, Case Management, *supra* note 34; *id.*, Judicial Controls, *supra* note 38; Kevin M. Forde, Use of the Manual for Complex Litigation—The Plaintiff's Viewpoint, 15 Forum 137 (1979); Hufstедler & Nejejski, *supra* note 10; Justice Delayed, *supra* note 10; Kaminsky, Proposed Federal Rules, *supra* note 13; Dennis A. Kendig, Procedures for Management of Non-Routine Cases, 3 Hofstra L. Rev. 701 (1975); Francis R. Kirkham, Problems of Complex Civil Litigation, 83 F.R.D. 497 (1979); Levy, *supra* note 41; McKinstry, *supra* note 10; Nordenberg, Discovery Reform, *supra* note 13; Note, The Pretrial Conference: A Critical Examination of Local Rules Adopted by Federal District Courts, 64 Va. L. Rev. 467 (1978); Peckham, Judge as Manager, *supra* note 34; Paul Perlman, The Federal Discovery Rules: A Look at New Proposals, 15 New England L. Rev. 57 (1979); Pollack, *supra* note 45; Steven Puro, Roger L. Goldman, & Alice M. Padawer-Singer, The Evolving Role of U.S. Magistrates in the District Courts, 64 Jud. 436 (1981); Charles B. Renfrew, Discovery Sanctions: A Judicial Perspective, 67 Cal. L. Rev. 264, 280-81 (1979) (cited hereinafter as Renfrew, Discovery Sanctions); Alvin B. Rubin, The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts, 4 Just. Sys. J. 135 (1978); Mary M. Schroeder & John P. Frank, The Proposed Changes in the Discovery Rules, 1978 Ariz. St. L.J. 475; William W. Schwarzer, Managing Antitrust and Other Complex Litigation: A Handbook for Lawyers and Judges (scheduled for publication in the fall of 1981 by Michie Co./Bobbs-Merrill Law Publishing); *id.*, *supra* note 45; Linda J. Silberman, Masters and Magistrates, Part II: The American Analogue, 50 N.Y.U.L. Rev. 1297, 1361 & n.367 (1975); Larry L. Sipes, Managing to Reduce Delay, 56 Cal. St. B.J. 104 (1981); Sipes *et al.*, *supra* note 9; H. Richard Smith, The Concern over Discovery, 28 Drake L. Rev. 51 (1978); Withrow & Larm, The "Big" Antitrust Case, *supra* note 36, at 36; Thomas J. Wyllie, Use of the Manual for Complex Litigation—The Defendant's Viewpoint, 15 Forum 163 (1979).

64. In *Herbert v. Lando* the court advised that "judges should not hesitate to exercise appropriate control over the discovery process." 441 U.S. 153, 177 (1979).

65. Cohn, Survey, *supra* note 13, at 271.

actment of rules, by itself, may have little direct impact on some judicial attitudes or personalities, once in place rules can be used to compel behavior—and modifications in behavior can be accompanied (albeit grudgingly) by modifications in attitude. When Cohn asserts that a rule is no help if it is inconsistent with previously formed judicial intentions he relies on data that do not support his generalization. He compares the median time for completion of discovery in the United States District Court for the Southern District of Florida (182 days) and for the Eastern District of Pennsylvania (305 days). In so doing, he writes that the Florida court “does not require a preliminary pretrial conference and . . . permits discovery to continue until five days before final pretrial.”⁶⁶ On the next page, however, he describes in some detail “the method of control exercised by the Southern District of Florida.” He notes that there is a well-established system in that district under which, about 18 days after joinder of issue, scheduling orders are entered which fix very short deadlines for completion of discovery, for the final pretrial conference, and for trial. Thus, the Florida court uses a tightly controlled, thoroughly regularized, and locally well-known system of pretrial case management, even though some aspects of it are not formally described in a local rule.⁶⁷

The situation in the Eastern District of Pennsylvania offered even less support for Cohn’s generalization. The data that established the median time for completion of discovery in that district at 305 days were based on cases terminated during fiscal year 1975.⁶⁸ However, the local rule that Cohn reports as requiring judges to hold a preliminary pretrial conference within 45 days of the filing of the complaint was *not* adopted until June 1976 to become effective July 1 the same year. According to Chief Judge Joseph S. Lord III, the local rule that was in effect in the Eastern District of Pennsylvania between 1973 and 1976 simply stated that pretrial conferences and status calls should be called as the judge deemed appropriate. Thus there is no connection whatever between the 305-day median period for completing discovery and the more recent local rule that Cohn said “requires” early preliminary pretrial conferences. Moreover, even the post-1975 local rule does not “require” a preliminary pretrial conference. Instead, that rule states that a “preliminary pretrial conference will *ordinarily* be *scheduled* within forty-five (45) days after commencement of the action.”⁶⁹ Finally, there is some evidence that even though the version of the rule in effect since 1976 imposes no rigid obli-

66. *Id.* at 267.

67. See also Milton Kelner, Ready Justice, 16 Trial 56 (Jan. 1980); FJC, Case Management, *supra* note 34, at 20.

68. FJC, Case Management, *supra* note 34, at 18–19, 109.

69. Former Rule 7(b), now Rule 21 (b), of Local Rules, United States District Court, Eastern District of Pennsylvania (emphasis added).

gation to promptly hold a preliminary pretrial conference, it has contributed to an improvement in overall disposition time.⁷⁰

On the assumption that directives in rules can affect judicial behavior, I will suggest, toward the end of this section, ways in which the Advisory Committee's proposed version of Rule 16 might be made more effective as a guide for case management. Before turning to that task, however, I will present an outline of an alternative set of procedures for pacing and monitoring the pretrial development of civil actions. In this alternative, which is set forth in the form of a model rule in appendix A,⁷¹ I have attempted to synthesize ideas and approaches suggested by judges, magistrates, and lawyers we have interviewed and by other commentators and reform commissions. It is important to emphasize at the outset that the alternative rule I propose is designed with sufficient flexibility to make it useful for managing a wide range of sizes and kinds of cases. With very little expenditure of judicial resources, courts can use its key elements to pace the pretrial development of smaller cases. For larger, more difficult matters, the model rule provides a panoply of devices for guiding and restraining discovery and other aspects of trial preparation.

There is now a substantial body of empirical data to support the notion that judicially imposed controls on the progression of even modest-sized civil cases toward trial can measurably improve efficiency with no detectable cost to the quality of dispute resolution.⁷² The literature emphasizes that prompt judicial intervention, at least in the form of setting early and firm dates for completion of discovery and trial, can significantly reduce overall disposition time for most sizes and kinds of litigation. It is also widely recognized, however, that some control measures that can expedite large or complex matters can be unnecessary or inappropriate for smaller, less demanding cases.⁷³ It follows that the first stage of the processing system for courts with jurisdiction over a wide range of types of cases should be designed to perform both of two important functions: (1) to generate the information needed to determine which type of control system is most appropriate for given lawsuits and (2) to assure at least a minimal level of prompt scheduling intervention and pressure by the court in every case. To assure achievement of these objectives, court rules

70. See FJC, Case Management, *supra* note 34, at 19 n.2.

71. See A Model Rule for Pretrial Management of Civil Actions, appendix A *infra*.

72. See, e.g., Sipes *et al.*, *supra* note 9, at 37-38, 47-53; Sipes, *supra* note 63; FJC, Case Management, *supra* note 34, at 19; FJC, Judicial Controls, *supra* note 38, at 52-66. See also Peckham, Judge as Manager, *supra* note 34, at 772, where he writes: "The most elementary function of the status conference is to establish a timetable for the litigation. While very easily administered, this simple scheduling function yields perhaps the greatest benefits of any of the various pretrial procedures."

73. Advisory Committee, Proposed Amendments, *supra* note 11, note to Rule 16, at 14-15; Kaminsky, Proposed Federal Discovery Rules, *supra* note 13, at 909-11; ACTL, Recommendations, *supra* note 7, at 209-10; Peckham, Judge as Manager, *supra* note 34, at 781-82.

should impose two basic requirements in *virtually all* kinds of civil litigation:⁷⁴ (1) counsel for opposing parties should be compelled to exchange specified kinds of information within a short, firmly fixed period after commencement of each action,⁷⁵ and (2) at the close of that period the court should be compelled to select an appropriate case management track or system and to set the dates at least for the close of discovery, the final pretrial conference, and the trial.

Because the rules should require litigants and lawyers to accomplish several things *before* the initial intervention by the court, the first judicially conducted management conference should be scheduled for between 55 and 65 days after the commencement of the action.⁷⁶ For ease and clarity of reference, I will refer to this meeting as the “day-60 conference.” In order to assure adequate preparation for this conference, and to maximize the return on the investment of judicial time in it, the model rules I propose should require opposing parties, accompanied by their lawyers, to meet and confer within 45 days of the filing of the complaint.⁷⁷ For ease of reference, this preliminary private meeting could be called the “stipulation conference.” The rules should explicitly require the parties and their counsel to attend these conferences in person except when the court, on motion, has found good cause to order otherwise. There are a number of reasons for such a requirement. One is that some lawyers we interviewed reported that other litigators often try to “satisfy” less precisely framed obligations to “meet and confer” simply by having a secretary call an opponent’s office with the message that agreement on the prescribed topics would be impossible.⁷⁸ A second reason for requiring the conference to be

74. The Advisory Committee’s version of Rule 16 would permit district courts to adopt local rules exempting “categories of actions . . . as inappropriate for scheduling conferences or orders.” See subdivision (b) of the proposed rule, reproduced in appendix B *infra*. At least until there is reason to believe courts will abuse this power to create exemptions, I believe the flexibility it permits is desirable and should be incorporated into the model management schema.

75. Unrepresented parties would perform these tasks directly.

76. Chief Judge Peckham reports favorable experience with this time frame and recommends amending Rule 16 so that “it explicitly requires an early status conference.” He also writes: “Since, the status conference is most helpful when held promptly, Rule 16 should require it to be held within a specified time after the commencement of the action. I believe that sixty to ninety days provides ample time for the parties to prepare themselves to schedule their pretrial activity, and this belief seems to be justified by experience in the Northern District of California.” Peckham, Judge as Manager, *supra* note 34, at 785.

77. See, e.g., Manual for Complex Litigation, *supra* note 30, §1.00, at 54–55. As one of the judges we interviewed pointed out, it makes no sense to use the date on which the answer is filed or the issue is joined to trigger management schedules or case development obligations. Answers may not be filed until months after the action is commenced, and in cases involving multiple defendants (where management is more likely to be needed), delay in the filing of only one answer could needlessly postpone judicial intervention and thus retard progress toward disposition.

78. As Cohn has pointed out, some federal courts have adopted “meet and confer” rules that require counsel to submit affidavits affirming that good faith “personal consultation” failed to resolve outstanding discovery disputes and to specify the date, time, and place of the conference, as well as the names of all participants. While such requirements presumably improve the likelihood that the attorneys themselves will confer, Cohn remains skeptical that meet and confer requirements can accomplish much. See Cohn, Survey, *supra* note 13, at 262–64.

face to face is the assumption that people are likely to take such sessions more seriously than they would take an exchange that required no one to leave her office, or to significantly disrupt her schedule, or to confront squarely the other human sides of the matter in dispute.

Requiring personal attendance by clients and counsel at a preliminary private conference would create direct and indirect costs (e.g., business disruptions or lost opportunities) that could be quite substantial in cases involving multiple or distant parties. Where it appeared to the court that those costs clearly would outweigh the gains likely to be derived from the personal attendance of one or more of the participants, the court could permit some or all of those concerned to participate through a telephone conference call. It would be important, however, to shape the rule so that litigants or lawyers who wanted to be relieved of the duty to attend in person would be compelled to seek judicial permission. Imposing this requirement not only would promote attendance; it also would give the judge an opportunity to impress upon conferees the importance of taking their conference duties seriously and to communicate her expectations about what should be accomplished before the day-60 conference. Perhaps as important, motions for relief from the duty to attend in person would give the court an early opportunity to identify cases that seem likely to cause difficulties or to require special controls.

The suggestion that the *parties* be required to participate in this initial private conference (unless excused by the court) is inspired by several considerations. One purpose of this aspect of the rule is to increase litigants' capacity to pressure their lawyers into taking more economically responsible approaches to case development, discovery, and settlement. The key assumption underlying this proposal is that there are more situations in which knowledgeable clients will act as forces toward economic restraint than there are situations in which they will encourage counsel to use economic power to abuse the litigation process in search of competitive advantage. It is important to acknowledge forthrightly that this is an assumption, that I know of no significant data to support or to challenge it,⁷⁹ and that if it is wrong this aspect of the model rule could backfire. At the very least, however, this requirement would increase clients' sense

79. Our interview data suggest that even in large, complex matters, clients do not routinely play a major role in decisions about how to approach preparation for trial and discovery. While it appears that major institutional clients are more likely than individuals to pressure their attorneys to resist disclosure of sensitive information, even large corporate clients appear to exert such pressures in fewer than 30 percent of the cases. Brazil, *Civil Discovery*, *supra* note 2, at 859-61. A few attorneys reported having been urged by clients to use discovery tools for retaliatory harassment or to impose economic pressure on opponents, but, on balance, the most reasonable inference from our data is that it is unusual for clients to encourage counsel to abuse discovery devices. It is important to emphasize, however, that our data about client behavior are far too limited to support anything approaching firm conclusions.

of involvement in the representation of their interests, and increase their knowledge of their opponents' perspective and of what the litigation in question might entail. These positive effects of requiring client participation should help resolve doubts in favor of the rule. Perhaps the most persuasive arguments for requiring client attendance, however, build on what the meet and confer rule I propose would require participants to do at this first private session. I will examine those requirements now.

The model rule should require parties and counsel to make good faith efforts to achieve several ends. Each requirement is designed to promote prompt commencement of case development and evaluation and to improve the effectiveness of the first judicially conducted pretrial conference. The rule should compel the litigants to explore the possibility of settlement at their first private meeting. It should encourage discussion of settlement both at the outset of that first session and near its end, after the parties had exchanged the several pertinent kinds of information and estimates described below. It also should encourage the participants to consider various means of improving communication about settlement issues—for example, whether to enlist the aid of a mutually acceptable mediator or a panel of experts,⁸⁰ or to ask for a settlement conference hosted by a judicial officer. The judicial officer selected to host the settlement negotiations probably should not be the judge or magistrate who will try the case. Several judges and magistrates we interviewed suggested that effective participation in frank, rough-and-tumble settlement interchanges could compromise the judge's or magistrate's appearance of neutrality and jeopardize her ability to control subsequent stages of the litigation. One judge pointed out that it is especially dangerous during settlement sessions for the judicial officer who will try the case to ascribe a monetary value to it. Even if the matter will be tried to a jury, a judge who has committed herself before trial to a valuation of an action is inviting tremendous pressure to order a new trial or to enter a J.N.O.V. if the verdict is substantially different from the judge's estimate.

To serve as a basis for narrowing and focusing the dispute and for estimating the amount of discovery the case will involve, the model rule also should require the parties to exchange, at least five days before the first private conference, narrative descriptions of their versions of the real-world events that form the basis for the suit or defense of it.⁸¹ Lawyers

80. See, e.g., Eric D. Green, Jonathon B. Marks, & Ronald L. Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 *Loy. L.A.L. Rev.* 493 (1978).

81. See, e.g., Antitrust Commission, Report, *supra* note 27, at 561, 568. According to attorneys and judicial officers we interviewed, exchanges of narrative statements worked effectively to produce stipulations about factual matters in the early pretrial stages of the federal government's antitrust action against AT&T. For a description of the procedures initially established by Judge Harold H. Greene in this lawsuit and for an explanation of their rationale, see *United States v. American Telephone & Telegraph Co.*, 461 F. Supp. 1314, 1344-49 (D.D.C. 1978). Judge Greene's order required

we interviewed reported that such exchanges can be especially effective, even early in litigation, in establishing agreement about both foundational and relatively peripheral matters. To make exchanges of narratives something more than a repetition of pleadings, the model schema should require the lawyers to make their factual accounts as detailed and specific as possible. And to improve the likelihood that counsel will be in a position to satisfy this requirement, the model rules should compel the attorneys and parties to make reasonable investigative efforts before drafting their statements. The rules, however, probably should discourage formal discovery during this first 40-day period. In fact, because one of the primary purposes of the schema I propose here is to reduce unnecessary, unfocused, or harassing discovery probes, the rules probably should prohibit discovery during this period except upon a showing to the court that carefully limited and tailored discovery efforts could substantially improve the quality of the initial narratives or were necessary to preserve evanescent evidence.

Counsel should be required to append to the factual accounts they exchange brief statements of their central legal contentions, that is, their views of what the relevant legal principles are and how they apply to the facts as portrayed in the accompanying accounts. The rules should emphasize, however, that counsel should devote most of their energy to preparing the factual narratives and should make their presentations of the law succinct and streamlined, avoiding detailed arguments and heavy documentation. It is important to impose restraints on the presentation of legal contentions in order to encourage parties and attorneys to focus their efforts where they are most likely to be productive at this early stage (i.e., in investigating the facts), to minimize premature and potentially wasteful legal research, and to avoid expanding the areas in which disagreements and hostilities can form.

It would be unreasonable and counterproductive to treat such early, informal statements as rigidly binding. Such treatment would invite counsel to resist drafting the statements or to make them as general, opaque, and useless as many complaints and answers are. The rules should make it clear that these narratives would not be considered pleadings and would

the parties to describe in detail their legal contentions and their versions of the facts, and to "list the witnesses and the documentary and other evidence which will be used to support" each factual claim. In the initial exchanges I propose, however, parties would not be required to list witnesses or to describe evidence, and would be required to present their expositions of the law briefly. In the opinion cited here Judge Greene assigned responsibility for coordinating the exchanges of narratives to the United States magistrate. The judge subsequently transferred that responsibility to the special masters.

For an embryonic version of the kind of requirement I have described in the text, see the Rules for Complex Litigation promulgated by the United States District Court for the Northern District of Ohio, Rule 2.04(a); these rules can be found in the looseleaf service published by Callaghan & Co. under the title Federal Local Court Rules (updated into 1981).

not be admissible as evidence at trial for any purpose. The rules also should indicate that the primary purpose of these narratives is to expedite trial preparation by serving as a basis for focusing and limiting discovery. To serve this purpose and to prevent abuse of these statements in pursuit of tactical advantages (e.g., various forms of sandbagging), however, the model rules also should make it clear that the statements would be reviewed by a judicial officer, that they would remain in the action's official file, and that fundamental changes in them would be permitted only upon a showing of justification based on subsequent investigation or discovery.⁸² The rule also should compel counsel (or an unrepresented party) to certify (by signing the document) that there are good grounds for the factual assertions made in the statement, that they were drafted in good faith after reasonable investigation, and that they are as complete, detailed, and accurate as currently available information permits. Further, the rule should specify that by signing the document counsel certifies that the legal contentions presented in the statement are warranted by existing law or by good faith argument for the extension, modification, or reversal of existing law.⁸³ Finally, the rule I propose would require courts to impose appropriate sanctions for violation of the certification duty.⁸⁴

At their first private meeting, the parties should be required by the model rules to use their narrative statements to try to stipulate to as many factual and legal propositions as possible and to attempt to identify the major issues that remain in contention. Using the product of this effort as a guide, the parties should be obligated to explore the possibility of arranging for voluntary, informal exchanges of relevant documents and other tangible evidence. One of the federal judges we interviewed argued vigorously that a great deal of time and money could be saved if judges

82. The relevant aspects of Judge Greene's order in the government's action against AT&T are very instructive but probably cannot serve as a model for how courts should treat the *initial* statements I would require parties to exchange before their first private meeting. Under Greene's plan, it is not entirely clear what function the first statements prepared by the parties would serve. They would not be used to restrict discovery during the period before the exchange of the second set of statements. See *United States v. AT&T*, 461 F. Supp., at 1346 n.108. Apparently these initial statements would serve primarily as rough but flexible outlines of matters in dispute. In their second statements, parties were to be permitted considerable freedom to enlarge upon contentions made in the first statements or to add new contentions; that freedom would be essentially unrestricted if the desire to depart from the first statement could be supported by subsequently discovered information. *Id.* at 1346. As the discussion in the text makes clear, under the rules I propose the initial statements would be used to focus and limit at least the first rounds of discovery.

Portions of Greene's description of the ways he intended to use the series of statements by the parties to limit discovery and of the standards under which he would evaluate requests to depart from positions taken in preceding statements are reproduced in note 134 *infra*.

83. Most of the elements of this certification duty are taken from the Advisory Committee's proposals for extending the certification requirement of Rule 7 and for adding a certification obligation to Rules 11 and 26. See Advisory Committee, Proposed Amendments, *supra* note 11, at 2, 6-7, 23-24. I discuss the Committee's certification proposal for Rule 26 *infra*, at pp. 937-40.

84. See sec. IV *infra* for an analysis of shortcomings in current formulations of sanctions rules and for suggested changes in these provisions.

and rules of procedure aggressively encouraged such informal exchanges. He believes that voluntary exchanges could reduce substantially the number of documents that parties feel the need to authenticate or for which they seek to establish chains of custody in the record. His theory is that lawyers in big cases often go through costly production and authentication rituals (which can include depositions of several custodians) for literally thousands of documents that are never used at trial or for any other purpose. Moreover, because a very high percentage of civil actions are settled, such rituals are very often unnecessary even for materials that clearly would have been introduced at trial. A federal rule of procedure explicitly creating a duty to make efforts to arrange for voluntary exchanges might help overcome one reported source of reluctance to proceed informally: lawyers' fears that appearing to be too cooperative with opponents might engender resentment or even malpractice actions by clients. Explicit recognition in the rules of a duty to make good faith efforts to share information informally and voluntarily also might serve as a source of leverage for attorneys who need help persuading clients to be fully responsive to discovery requests from opponents.

In conjunction with the duty to prepare in good faith for the first private meeting with other parties, the model rules should encourage each litigant to estimate the volume of documents within its control that would have to be processed if the case were prepared completely for trial. Such estimates could improve counsel's ability to perform one of the more important tasks the model rule should require of participants in this initial private meeting: to estimate, in good faith, how much and what kinds of discovery they would conduct over the course of the pretrial period and how much time would be needed to complete it. There is a danger, well recognized by experienced judges and litigators,⁸⁵ that counsel will be tempted to inflate such estimates in order to build more flexibility into their calendars—to postpone for as long as possible the day when a client must part with its money, or simply to hedge against being trapped with insufficient time to prepare for trial. If the rule makes it clear that although these early estimates of discovery requirements are not binding, they must be made conscientiously and honestly, they probably will be sufficiently illuminating to warrant requiring them. In most instances, such estimates would improve a judge's capacity to make intelligent decisions about what dates to fix for closing discovery and for trial. That two or more estimates will be submitted in each case, and that opposing counsel will have opportunities and incentives to dissect disingenuous submissions, should help protect the court from efforts to needlessly extend the

85. See, e.g., Advisory Committee, Proposed Amendments, *supra* note 11, note to Rule 16, at 15, 17.

pretrial period. Moreover, how counsel respond to this requirement could give judges an early opportunity to identify problem cases or problem lawyers and thus could alert the court to a special need for aggressive assertion of control at the outset.

A model rule for an initial private meeting of opposing litigants and lawyers also might impose on counsel a duty to make rough estimates of the probable cost of discovery and of other aspects of pretrial preparation and trial. A version of this idea has been suggested by the authors of a recently completed study of discovery problems sponsored by the Federal Judicial Center.⁸⁶ Although their data base was quite small,⁸⁷ the authors of the study concluded that “in most cases, judges do not know how much discovery cost. Those who were actively involved early in the case had a better notion of the relative burden of discovery, but even with a discovery plan the real costs are not obvious because plans do not include estimates of discovery cost.”⁸⁸ Without exploring the pros and cons of the idea, the authors went on to suggest: “Some method by which a judge could be informed about the estimated costs of discovery in a case would seem to be worth considering—not for purposes of controlling costs, but to help the judge assess discovery plans in a case that may result in extensive or disproportionate discovery.”⁸⁹

While it is not clear how such cost estimates would improve judicial ability to “assess discovery plans,” it does seem likely that they would increase judicial incentives to impose controls on the discovery process. In addition, such estimates could inspire clients to look more seriously at the advantages of early settlement or to play a more active role in restraining their lawyers’ discovery activities. There are, however, several reasons to fear that litigants’ early cost estimates would not be reliable. Exposing the potential cost of discovery, for example, might in some cases increase an economically more powerful litigant’s temptation to use the system to pressure an opponent into accepting an unfair settlement. In a similar vein, parties with financially vulnerable adversaries might be tempted to inflate cost estimates as part of a settlement leverage strategy. By contrast, lawyers frequently might feel pressure to underestimate discovery costs in order not to alarm their clients or to try to reduce the likelihood that the court will aggressively manage case development. The many possible incentives to distort cost estimates for tactical purposes, in combination with the inherent difficulty of arriving at even moderately reliable figures for anything but the simplest cases, leave me uncertain about the

86. Ebersole & Burke, *Discovery Problems*, *supra* note 12, at 77, 79.

87. The study attempted to explore in detail the nature of discovery problems in 23 cases. *Id.* at 8.

88. *Id.* at 77.

89. *Id.*

wisdom of building this requirement into a model pretrial rule. The safest approach might be to encourage experiments, either by explicitly giving judges discretion to impose a duty to make such estimates or by encouraging a few courts to incorporate the duty into local rules.

There are other obligations whose inclusion in the model rule for the initial private conference provokes substantially less uncertainty. After exchanging estimates about the amount of discovery that preparing the case is likely to necessitate, the parties should be compelled to discuss the advisability of a reference of some or all pretrial matters to a magistrate⁹⁰ or a special master.⁹¹ If appointment of a master seems appropriate, the parties should be required to identify the tasks they recommend for the reference⁹² and to exchange names of acceptable candidates.⁹³ Similarly, the model rule should require the participants in this first meeting to explore any other special management or scheduling needs the litigation might present and to recommend appropriate measures for responding to those needs. In this connection, the parties should be explicitly required to consider whether the development of the case would be expedited by holding a Rule 26(f) discovery conference sometime after the day-60 conference.

90. Under the 1979 amendments to 28 U.S.C. §636 magistrates can assume responsibility for all aspects of civil litigation, including trial, if the parties freely consent to the reference. The statute does not require party consent when the court assigns responsibility for nondispositive discovery matters to a magistrate. The proposals the Advisory Committee has circulated for comment include three new federal rules (72, 73, and 74) that would provide explicit rule authorization for magistrates to exercise the powers that Congress has made possible through 28 U.S.C. §636(c) (Supp. III 1979).

91. The only provision in the Federal Rules of Civil Procedure for the appointment of special masters is Rule 53, which imposes significant restraints on use of the referencing power and provides little or no guidance about assigning pretrial responsibilities to special masters. In fact, Rule 53 seems to have been drafted only in contemplation of using masters at the trial stage. Nonetheless, many federal courts have invoked Rule 53 as a source of authority to assign pretrial functions to special masters. See, e.g., *Omnium Lyonnais D'Etancheite et Revetement Asphalte v. Dow Chem. Co.*, 73 F.R.D. 114 (C.D.Cal. 1977); *Fisher v. Harris, Upham & Co.*, 61 F.R.D. 447 (S.D.N.Y. 1973). There also is good reason to believe that courts need not rely on Rule 53 to appoint a special master because they have "inherent authority" to make such appointments. See, e.g., *Ex parte Peterson*, 253 U.S. 300 (1920) and *First Iowa Hydro Elec. Coop. v. Iowa-Ill. Gas & Elec. Co.*, 245 F.2d 613, 627 (8th Cir. 1957). But see *Arthur Murray, Inc. v. Oliver*, 364 F.2d 28 (8th Cir. 1966). Moreover, it is at least arguable that consent freely given by the parties can be an independent and sufficient source of authority for references to special masters. Cf. *Cruz v. Hauck*, 515 F.2d 322, 330 (5th Cir. 1975); *Kimberly v. Arms*, 129 U.S. 512 (1889). But cf. *Wilver v. Fisher*, 387 F.2d 66 (10th Cir. 1967).

In a subsequent article I will explore in detail the scope of federal courts' authority to refer pretrial matters to special masters and will examine the advantages and disadvantages of using special masters to supervise discovery or to resolve specific discovery disputes. I also will suggest substantial amendments to Rule 53 that will be designed to offer federal judges clearer guidance about using special masters in the pretrial period.

92. The model rule or the notes that elaborate on it might list some of the tasks that masters have performed successfully in the past. Because ruling on assertions of privilege to protect documents is the kind of task that can be very time consuming and is especially appropriate for assignment to a master (see, e.g., *United States v. AT&T*, 461 F. Supp. at 1348), the rule might require counsel to estimate the volume of documents they expect to be subject to assertions of privilege.

93. I will discuss procedures for selecting special masters in a subsequent article in this series.

The model rule should require the participants to prepare a brief written report of the results of their private meeting and to submit it to the court at least ten days before the day-60 conference. Each party should be required to attach its narrative version of the facts and its statement of legal contentions as exhibits to this report. If the parties could not agree on what transpired at the meeting, each could submit its own version. To improve the likelihood that these reports would be appropriately brief, orderly, and well focused, and would cover all required subjects, the model rule should prescribe an outline form and compel its use. Requiring these reports to be in one organized, standard format would make them much easier for judges to use and would reduce the cost to clients of having them prepared.

Using the information provided in these reports, as well as in pleadings and motions (e.g., a request to be relieved from the duty to attend that initial session in person), the judge to whom the case is assigned should make several kinds of decisions in advance of the day-60 conference about how it should be conducted and what it should attempt to cover and accomplish. In particular, he should decide promptly whether it would be appropriate to conduct the meeting through a telephone conference call or to require personal appearances and should give serious consideration to using the conference call procedure in uncomplicated matters in which there is no evidence of significant acrimony between attorneys or parties. In one of our interviews in 1981 the chief judge of an urban federal district court reported that he had conducted a very successful year-long experiment using the telephone for status conferences and hearings on routine motions. He believes that conference calls can save litigants 80 percent or more of the cost of resolving these matters.⁹⁴ Attorneys we interviewed have expressed similarly positive sentiments about using the telephone to reduce the need for personal appearances for routine pretrial matters.

Despite the obvious potential for short-term savings that using the telephone promises, however, the model rule should encourage courts to resolve doubts in favor of requiring personal appearances at the day-60 conference. Many of the judges and litigators we interviewed emphasized the importance of a vigorous judicial effort to set the tone and to fix the basic ground rules at the outset of each case. There is strong, widespread support for the view that judges can contribute significantly to reducing the frequency and intensity of discovery disputes (and thus to increasing

94. The ABA's Action Commission to Reduce Court Costs and Delay has been monitoring a substantial experiment using conference calls for pretrial matters in state courts in Maine. See, e.g., Hufstedler & Nejelski, *supra* note 10, at 965, wherein the authors also briefly describe successful uses of the telephone for related purposes by judges in other jurisdictions.

the overall efficiency of the system) if, in the earliest stages of an action, they set appropriate expectations by making it clear that they will not tolerate abuse of discovery tools or resistance to discovery obligations and that retribution for violating these norms will be quick and substantial.⁹⁵ Judges are more likely to be effective in communicating such messages if they do so in person rather than over the telephone. One of the principal purposes of the day-60 conference is to persuade parties that the court intends to maintain firm, well-informed, and continuous control over the pretrial development of the case.⁹⁶ Judges create a substantial risk of defeating that purpose (by appearing to contradict it) if they do not require personal appearances at what is billed as the first major opportunity to establish that control. For large, complex cases, the rule should give federal judges no choice: it should require personal appearances.

The model rule itself should set forth the criteria under which a case would be designated large and complex for the purpose of this personal appearance requirement. While my research does not equip me to offer a definitive list of the characteristics that should qualify cases for inclusion in this category, the task of constructing such a list need not be as intimidating as at first blush it might appear. The United States District Court for the Northern District of Ohio, for example, has decided that every case with one or more of the following characteristics should be made subject to the special procedures for handling "Complex Litigation" prescribed in a local rule:

- (a) arises under any of the antitrust laws of the United States;
- (b) involves a prayer for recovery of \$1,000,000 or more;
- (c) involves a request for injunctive relief affecting the operation of a major business entity;
- (d) involves a large number of parties or an association of a large membership;

95. See, e.g., ACTL, Recommendations, *supra* note 7, at 220; Antitrust Commission, Report, *supra* note 27, at 546; Cutner, Discovery, *supra* note 13, at 950-54; Kaminsky, Proposed Federal Discovery Rules, *supra* note 13, at 984, 996.

96. See, e.g., Peckham, Judge as Manager, *supra* note 34, at 782, where Chief Judge Peckham describes in the following words some of the "intangible benefits" of an early status conference between judge and attorneys:

Although the primary functions of the status conference are to resolve scheduling matters, shape further pretrial procedures, and formulate a discovery plan that will be cost-efficient, certain intangible benefits also flow from this early meeting of attorneys and judge. The meeting itself warns the attorneys that they have a vigilant judge, and it may therefore prod attorneys who might otherwise be less than diligent into transferring the case to their "active" files. The conference can also give the judge a "feel" for the case and the attorneys. For example, he may pick up early signals that an attorney tends to be careless or to procrastinate, perhaps warranting a fairly rigid timetable and a warning that it will be strictly enforced. Or, he may see that the parties are particularly combative and thus likely to engage in many pretrial disputes. He may glean that one or both attorneys are confused about important legal or other issues in the action, so that the later, formal pretrial conference and order should be comprehensive. In short, the status conference is usually the first personal contact between the judge and the attorneys, and the judge can use his considerable influence to set the tone of a relationship in which he and the attorneys are likely to be engaged for the duration of the litigation.

- (e) is [a] patent case involving an unusual multiplicity or complexity of issues; or
- (f) may otherwise be a protracted case.⁹⁷

The Manual for Complex Litigation includes in its list of “Classes of Potentially Complex Cases” not only those identified in the above list but also common disaster cases; individual stockholders’, stockholders’ derivative, and stockholders’ representative actions; products liability cases; cases arising as a result of prior or pending government litigation; multiple or multidistrict litigation; and class actions or potential class actions.⁹⁸ At least two commentators have suggested, however, that the list of characteristics presented in the Manual for Complex Litigation is inadequate for identifying cases whose pretrial development may require special procedures and intensified judicial intervention. These commentators, both of whom are practitioners, suggest the need to consider additional, largely functional indicia of litigation difficulty or complexity, for example, the volume of documents likely to be subject to discovery, the number of depositions likely to be noticed, and the number of interrogatories likely to be served,⁹⁹ or the presence of “public questions” that might invite joinder by additional parties, or the involvement of people or events that have been subjects of “sensational” publicity.¹⁰⁰

Because national consensus about what kinds of cases are likely to warrant special treatment might be difficult to obtain, the model rules I propose probably should do no more than suggest a list of criteria, then direct the district courts to adopt a local rule specifying the characteristics to be used in determining whether a case will be presumed complex and thus to trigger the requirement of personal attendance at the day-60 conference. Local rules also should require court clerks to identify all actions that satisfy the local criteria¹⁰¹ and, promptly after the complaint is filed, to notify counsel and the assigned judge that the day-60 conference will be conducted in person rather than by conference telephone call.

When personal appearances are required at the day-60 conference, the judge should have the discretion to decide whether to compel the attendance of parties (in addition to their lawyers). The direction in which the

97. L Comp R 2.01 (1), N.D. Ohio, reproduced in Federal Local Court Rules (Callaghan & Co.; updated into 1981).

98. Manual for Complex Litigation, *supra* note 30, §0.22. The Manual does not include in its list of categories any reference to the size of the prayer. The criteria for identifying potentially complex cases offered by the American College of Trial Lawyers are very similar to those suggested in the Manual. See ACTL, Recommendations, *supra* note 7, at 211.

99. Kaminsky, Proposed Federal Discovery Rules, *supra* note 13, at 916–19, 977.

100. Kendig, *supra* note 63, at 703–8.

101. For suggested means of handling the mechanics of identifying complex matters, see *id.* at 708–12; Manual for Complex Litigation, *supra* note 30, §0.23, at 41–42; Kaminsky, Proposed Federal Discovery Rules, *supra* note 13, at 916–17.

judge exercises that discretion should depend in part on what she has decided to try to accomplish at the conference (e.g., requiring attendance by the parties might be advisable if the court senses a real possibility of settlement) and in part on whether it seems likely that the parties will be sources of friction or resistance in the case development process.

If it appears likely from the pleadings or the parties' preconference submissions that some pretrial matters will be referred to a magistrate or a special master, the court should make arrangements to have the person who will serve in that capacity attend the day-60 conference. If a special master is to be involved, the court will have to decide who will assume that role and secure his or her consent, as well as the consent of the parties (if required or advisable),¹⁰² before the conference. Judges, magistrates, masters, and litigators we interviewed agreed that if a magistrate or special master is to have significant responsibility, it is very important that he be brought into the case as early as possible, that the nature of his responsibilities and the scope of his authority be precisely delineated from the outset, and that before he begins to function, the judge convincingly demonstrate that she has confidence in him, will communicate regularly with him about the case, and will support his authority and uphold his decisions unless a party can establish a strong reason not to do so. Having the magistrate or special master attend the day-60 conference provides the judge with an ideal opportunity to achieve these ends.

In addition to setting a tone for the conduct of the litigation, a tone that demands respect for the letter and spirit of the discovery rules and for any parajudicial officers who may be assigned tasks in the action, the judge should use the day-60 conference for the following purposes. At the outset, the court should at least raise the settlement issue and explore the parties' receptiveness to using any of several alternative approaches to negotiated resolution of their dispute. While some data suggest that routine commitment of substantial judicial resources to compulsory settlement conferences may not repay the effort,¹⁰³ it is clear that the savings to the parties and the public that result from early settlement are substantial enough to warrant at least a modest expenditure of judicial energy. Even the study that raises doubts about the productivity of compulsory settlement conferences in all cases concedes that

many judges think a nudge early in the case may break the ice. If a judicial officer—judge or magistrate—can raise the possibility of settlement early,

102. There are at least some circumstances in which courts can refer nondispositive discovery matters to a special master even over the objection of a party. See, e.g., *Omnium Lyonnais D'Etancheite et Revetement Asphalte v. Dow Chem. Co.*, 73 F.R.D. 114 (C.D.Cal. 1977). For reasons I will develop in a subsequent piece, however, it might not always be wise for courts to exercise that power.

103. FJC, *Case Management*, *supra* note 34, at 37-39.

before much money has been spent, he may encourage negotiation that would not take place otherwise. Often, in cases that could be settled, each side is reluctant to raise the issue, fearing to betray a sign of weakness. For this reason, a judicial suggestion can be useful. A practice of briefly mentioning settlement at a preliminary conference would be consistent with our finding here. Also, in a substantial number of cases—especially among the complex ones—greater involvement by the judge may encourage settlement.¹⁰⁴

If the judge's introduction of the settlement question fails to evoke promising responses, he should proceed to the next order of business prescribed by the model rule: using the parties' narratives as a starting point to try to extend and add to the stipulations entered as a result of the parties' earlier private meeting. The model rules also should require the court to use the parties' narratives to identify the legal and factual issues genuinely in dispute. As the literature makes clear, this is an extremely important and sensitive dimension of any management scheme for major litigation.¹⁰⁵ After reducing the scope of the dispute as much as possible through stipulations, the judge must make a reasoned but vigorous effort to ferret out all frivolous, clearly insubstantial, or irrelevant claims, defenses, or contentions. Even lawyers who typically represent impecunious plaintiffs have stated in interviews with us that the cost of overbroad discovery, made possible in part by vague and overbroad statements of claims and defenses, is one of the most serious threats to resolution of disputes on the merits created by the current system. Thus it is clear that the court's skill in narrowing the scope of a dispute before substantial discovery commences can greatly affect the efficiency and quality of pretrial preparation.¹⁰⁶

104. *Id.* at 39. The authors complete the thoughts in the quoted passage by suggesting: "This purpose might be best served if conferences could be held before a judge other than the one to whom the case was assigned, or before a magistrate, to permit free discussion of the merits of the case."

105. See, e.g., ACTL, Recommendations, *supra* note 7, at 212-26; Antitrust Commission, Report, *supra* note 27, at 558-69; Withrow & Larm, The "Big" Antitrust Case, *supra* note 36, at 22-26; *United States v. AT&T*, 461 F. Supp. at 1347; Peckham, Judge as Manager, *supra* note 34, at 780.

106. Judge Frederick B. Lacey, Proposed Techniques for Streamlining Trial of Complex Antitrust Cases: Pro and Con, 48 *Antitrust L.J.* 487, 488 (1980), where Judge Lacey (United States District Court, District of New Jersey) declares: "The most effective device for saving trial time is the ruthless reduction of contested issues at pretrial. Counsel, acting without steady judicial pressure, will often not achieve this."

Judge Patrick E. Higginbotham (United States District Court, Northern District of Texas) has emphasized how the pressure of firm and early deadlines to complete trial preparation can lead counsel to identify and focus on the central issues in litigation. In the following passage Higginbotham also warns that premature efforts to delimit issues can backfire:

While I agree at least in theory with the Commission's recommendation of early issue-definition, I have found that in practice the setting of time schedules forces the lawyers themselves to concentrate upon the discovery that is really necessary to their case and to thereby bring into focus the central issues. I would not rule out the use in certain cases of the Commission's recommendation that the parties exchange throughout the pretrial stage of the litigation nonbinding statements of fact and contentions of law. There is a danger, however, that definition of issues too early in the course of the lawsuit may be self-defeating in the sense

A key aspect of the court's early effort to establish control over the pretrial growth of a large lawsuit will be the theory of discovery orchestration the court adopts. "Free form" has been tried and has failed. Thus the model rules I propose would require the court to adopt some scheme for discovery management at the outset of all major lawsuits. However, the rules also must recognize a conclusion supported by common sense and by many lawyers and judges:¹⁰⁷ not all kinds of big cases are best managed in the same way. The courts must tailor control devices to respond to the particular needs of given matters. In defining an appropriate management scheme, the judge should focus primarily upon the scope and nature of the issues that remain after the initial exchanges of narratives and on the parties' estimates of the amount of discovery they believe will be necessary. Before selecting a management plan, however, the court should strongly encourage the parties to extend their efforts to share information on a voluntary and informal basis. But after thus narrowing the scope of the task that remains for formal discovery, the court must make a choice between several management options.¹⁰⁸

In those unusual cases in which it is possible, early in the game, to isolate one or two specific factual allegations on which the liability or damages issues are likely to turn, the most appropriate management strategy suggests itself: discovery should be confined, at least initially, to those potentially dispositive issues.¹⁰⁹ In a similar vein, there may be situations in which it would be fair and expeditious to confine discovery initially to either the liability or the relief aspects of the matter. If neither of these devices seems appropriate, the court probably will have to turn to one of the two more general approaches to discovery management.

The first of these approaches is embodied in the current version of the Manual for Complex Litigation. I will make no attempt here to detail all the procedures set forth in the Manual. For present purposes, it is sufficient to point out that the Manual endorses a "wave" theory of discovery in which the court generally confines the first set of probes to identifying "the sources of discoverable information"¹¹⁰ and to disclosing "information concerning the transactions upon which the claims for relief are based."¹¹¹ While formally eschewing rigidity and acknowledging the need

that it may generate a plethora of minor disputes as to whether requested discovery falls within the defined issues.

Higginbotham, *The Commission Recommendations Can Work*, 48 *Antitrust L.J.* 475, 482 (1980) (footnote omitted).

107. See, e.g., Advisory Committee, Proposed Amendments, *supra* note 11, note to Rule 16, at 19.

108. See, e.g., Cutner, *Discovery*, *supra* note 13, at 946, 950-56, 986.

109. See, e.g., ACTL, *Recommendations*, *supra* note 7, at 222.

110. *Manual for Complex Litigation*, *supra* note 30, §0.50.

111. *Id.* §1.50.

for some exceptions,¹¹² the Manual's approach normally contemplates postponing discovery "on the merits" until the second wave.¹¹³ Consistent with this scheme, the Manual does *not* encourage judges to attempt to define the issues or to fix the scope of the dispute early in the case development period.¹¹⁴

The principal purpose of the scenario the Manual suggests is to assure orderliness (and fairness and efficiency which may accompany orderliness) by preventing "early and ineffectual discovery" and the "postponements and continuances" that can result from "a belated claim of late discovery of a new source of information."¹¹⁵ Thus while it recognizes that there may be situations in which the court should permit some exploration of the merits during the first wave,¹¹⁶ in the system the Manual promotes, discovery usually will begin at the outer perimeters of the action and work toward the center. The theory inspiring this approach is that it is best to cast a wide, tight net at the outset in order to minimize the odds that relevant data will escape altogether or be captured so late that the processing operation will have to be interrupted or repeated.

The commercial fishing metaphor suggests both the content and the source of some of the criticisms of the Manual's approach to managing discovery. Defense lawyers have strong feelings about the use of discovery to conduct fishing expeditions, and some have suggested that the Manual's commitment to thoroughness can be converted too readily by plaintiffs into a license and a vehicle for unwarranted excursions that can, among other things, provide an artificial source of settlement leverage.¹¹⁷ In choruses with less self-interested overtones, critics of the Manual also insist that its wave approach, with the concomitant reluctance to define issues early, can result in gross and unjustifiable inefficiency. According to this argument the first wave of discovery almost inevitably includes extended explorations of matters that are peripheral (or beyond) at the time and that become wholly irrelevant as the second wave of discovery, which focuses on the merits, identifies the issues genuinely in dispute or leads to a belated settlement.¹¹⁸ Moreover, by postponing serious efforts to identify the genuine issues, the Manual allegedly undermines one of its own primary purposes: facilitating prompt assertion of

112. *Id.* §1.70.

113. *Id.* §2.30.

114. *Id.* §§3.70 & 4.00. See also Wyllie, *supra* note 63, at 170; ACTL, Comments, *supra* note 36, at 5-8; Kaminsky, Proposed Federal Discovery Rules, *supra* note 13, at 915; *United States v. AT&T* 461 F. Supp. at 1347.

115. Manual for Complex Litigation, *supra* note 30, at §§0.50, 1.50.

116. *Id.* §1.70.

117. See, e.g., ACTL, Comments, *supra* note 36, at 21.

118. *Id.* at 8-14; Antitrust Commission, Report, *supra* note 27, at 549, 559-60.

aggressive judicial control over the pretrial development of big cases.¹¹⁹ The Manual's critics argue that the courts' most effective tool for focusing and restraining discovery is issue definition and that until judges have identified the issues in given lawsuits they are almost powerless to set rational limits on discovery. The result, in this view, is that the first wave of discovery too often balloons into huge proportions and remains largely beyond judicial control. And the longer the first wave lasts the longer it is before the case is subjected to effective management.

The authors of the Manual have attempted to respond to the criticism that the procedure it promotes is needlessly rigid and wasteful by acknowledging the appropriateness of some discovery into the merits during the first wave, but there is considerable tension between that acknowledgment and the overall approach the Manual advocates. Moreover, the Manual's authorization of some early exploration of the merits seems begrudging and to be accompanied by considerable ambivalence. The authors obviously are not about to abandon their basic premise, but their concessions to their critics rob their system of coherence and, in my judgment, make it confusing as a guide. One of the federal judges and several of the lawyers we interviewed suggested that it is in part because the Manual is lengthy, convoluted, and difficult to follow that it is not used as often as its proponents would like.¹²⁰

According to its critics, who are not confined to defense lawyers,¹²¹ the Manual's theory of discovery management is backward: it advocates beginning on the outside edge and moving toward the center instead of beginning in the center and moving toward the periphery only on a clear showing of a need to do so. The spatial image that best describes the major alternative to the Manual's approach has a "core" that may become surrounded, through time, with a series of progressively larger concentric circles. Unlike the effects of throwing a stone into a pond of still water, however, there is nothing inevitable about the successive appearance of the broader rings: in fact, the purpose of starting in the center and of strict judicial management over the process is to minimize the economic ripple effect of filing a lawsuit. Under this alternative system, then, the judge confines discovery initially to issues that are clearly central to the dispute and hopes that probes into these core matters will equip and in-

119. Manual for Complex Litigation, *supra* note 30, §1.10; Withrow & Larm, The "Big" Antitrust Case, *supra* note 36, at 27-28.

120. See also Cutner, Discovery, *supra* note 13, at 950, where the author declares: "Many judges seem to believe that utilization of the provisions of the Manual is onerous and somehow *makes* the case complex, and will refuse to consider its use even when requested to do so" (emphasis in original).

121. One predominantly plaintiff's attorney whom we interviewed declared, for example, that a wealthier defendant's capacity to bury a plaintiff in the costs and delays of overbroad discovery has become one of the biggest obstacles to pursuing meritorious claims through litigation.

spire the litigants to evaluate their positions early and to promptly settle the case. If no such settlement occurs the court will permit discovery to expand into the area bounded by the next concentric circle, but only if information the parties already have uncovered suggests that the additional discovery is likely to yield relevant evidence. At the very least, this approach encourages counsel to develop, early in the pretrial period, coherent theories to guide subsequent discovery efforts. Such theories should sharpen the focus and reduce the inefficiency of the discovery probes they guide.¹²²

The judges and lawyers we interviewed who advocate this "core-concentric circle" model of discovery control concede that the key to both its fairness and its efficiency is the *accuracy* of the parties' and the courts' early identifications of the genuine issues. Premature, or at least prematurely rigid, issue identification obviously could result in the unwarranted destruction of legitimate claims. As one of the judges we interviewed pointed out, it also can cause great inefficiency by forcing the court to reopen discovery (even during trial) so that parties can explore subjects that early orders foreclosed. Because of such potential problems,

122. One of the most articulate proponents of an approach whose principal features, at least, track those described in the text is Judge William W. Schwarzer of the United States District Court for the Northern District of California. In the fall of 1981 Michie Co./Bobbs-Merrill Law Publishing (Charlottesville, Va.) will publish Judge Schwarzer's *Managing Antitrust and Other Complex Litigation: A Handbook for Lawyers and Judges*. See also Schwarzer, *supra* note 45. Another articulate proponent of a version of the approach described in the text is Ronald E. McKinstry, who is head of the litigation section in the Seattle, Washington, law firm of Bogle and Gates. McKinstry has served several times as a special master during the pretrial stages of litigation in federal courts. He has described, in *outline* form, his view of the core-concentric circles theory of discovery orchestration in the following terms:

An alternate to the "dragnet" approach is what I term the expanding concentric circle approach. By this is meant the production of documents will begin with the central core of documents that all agree have a more direct relation to the lawsuit issues. In setting the temporal, geographic, and other relevance boundaries, the guideline will be those initial discovery boundaries which are believed will produce *probable* rather than *possible* relevant evidence. It is a matter of degree which requires the production, review, and assimilation of center core documents before proceeding into the more peripheral and expanding concentric circles. From the initial production, the scope expands based upon showing, from documents produced, the reasonable need to go into the peripheral fringes. It is the difference between building a document base from the core out rather than starting with the entire document universe and discarding the majority down to relevant exhibits.

McKinstry, *Use of Special Master in Major Complex Cases, in Federal Discovery in Complex Civil Cases: Antitrust, Securities and Energy*, 213, 221 (New York: Law Journal Seminars Press, Inc., 1980).

One experienced big case litigator we interviewed who generally favors the core-concentric circle approach to discovery argued for one exception which, in my judgment, would threaten to defeat the purposes of the theory. This lawyer would permit wide-open early discovery of documents, confining the core restrictions to interrogatories, depositions, and other discovery tools. His rationale for creating this exception is based on his belief that documents are the most reliable vehicles for arriving at the truth. He feels most comfortable about his understanding of a case if he begins by systematically reviewing all arguably relevant documents, then building a picture or story of the underlying events and personalities from that document base. The difficulty with creating an exception to the core approach for documents, of course, is that in major lawsuits document discovery can represent such a huge portion of pretrial preparation that this exception frequently would swallow the rule.

courts that use the core approach must develop a reliable system of early issue identification. The procedures for exchanging narratives I have described above, perhaps supplemented by limited formal discovery, seem to hold the promise of satisfying this need in many cases.

When the issues are identifiable with sufficient clarity early in an action the core approach has many advantages that make it preferable to the Manual's waves. When the issues do not appear sufficiently well defined by the day-60 conference to justify a pure core approach, however, courts may be forced to resort to a modified version of the Manual's scheme. But because of the risk of loss of judicial control in such situations, judges should set strict time limits on the first wave of discovery and, to the extent possible, should compel the parties to use early discovery efforts to delineate the substantive features of their dispute.

It is important to acknowledge, however, that there is some at least potential tension between the core approach and two important parts of the current version of Rule 26. Under Rule 26(b)(1) a party is permitted to discover any unprivileged matter "which is relevant to the subject matter involved in the pending action," and relevance is defined to include even information that is "inadmissible" as long as it "appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(a) declares that parties may use the authorized "methods" of discovery as often as they like unless a court enters a limiting protective order under Rule 26(c). A protective order may be premised on a finding that the discovery sought would be oppressive or unduly burdensome or expensive, but, under the current structure of Rule 26(c), such orders are available only after a motion and showing of good cause by the party or person who is the target of the discovery probe. Read literally these provisions do not confer upon parties a right to conduct discovery in whatever *sequence* they see fit; thus Rule 26 probably does not stand as a theoretically insurmountable barrier to using at least some version of the core-concentric circles approach to discovery management. Nonetheless, it seems clear that the spirit of Rule 26 contemplates a discovery process in which the parties are for the most part left free to determine in what order and by what means they will explore the whole universe of data that could lead to admissible evidence.

If the Advisory Committee's proposals for changing Rule 26 are adopted, however, the spiritual tension between that rule and the core approach to discovery management would be effectively eliminated. The committee recommends the deletion of the last sentence of subdivision (a), the sentence declaring that the frequency of the use of discovery methods is not limited unless a protective order is entered.¹²³ Amplifying

123. Advisory Committee, Proposed Amendments, *supra* note 11, at 22.

that deletion, the committee also suggests that the following paragraph be added at the end of Rule 26(b)(1):

The frequency or extent of use of the discovery methods set forth in subdivision (a) may be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative [*sic*] or duplicative, or obtainable from some other source that is either more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, the parties' available resources, and the values at stake in the litigation. The court may act upon its own initiative or pursuant to a motion under subdivision (c).¹²⁴

The committee's note makes it clear that these changes would constitute an acknowledgment of "the reality that [discovery] cannot always operate on a self-regulating basis" and would be designed to encourage "greater judicial involvement in the discovery process."¹²⁵ While the note also would remind courts to "be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case," the note's use of the phrase "reasonably necessary," in conjunction with the rule's clear purpose of empowering judges to prohibit "redundant or disproportionate discovery,"¹²⁶ would provide judges with ample authority to justify a discovery management scheme that would compel parties to focus their initial probes on the core of their dispute and to show that discovery beyond such a core was reasonably likely to be productive.

Regardless of the approach to discovery management the court adopts, model rules should require the judge at the day-60 conference either to schedule a formal discovery conference of the kind described in Rule 26(f) or to fix the time frame and scope for the first round of discovery. While the degree of specificity of the court's order in this regard can vary with the circumstances, it is very important for the judge to establish the date of the next judicial intervention and what he expects the litigants (or their counsel) to have accomplished during the intervening period. Judges and attorneys we interviewed agree that this kind of judicial pressure and pacing are crucial components of any successful management scheme.

The model rules also should require the judge at the day-60 conference to set forth clearly the ground rules under which discovery disputes will be resolved and decisions about sanctions made. Many lawyers we interviewed emphasized how much a quick and inexpensive procedure for resolving discovery disputes can contribute to improving the pretrial stage

124. *Id.* at 23.

125. *Id.* at 26.

126. *Id.* at 25-26.

of litigation. It is conceivable, of course, that providing easy access to a decision maker could encourage litigants to turn too frequently to him, thus resolving fewer problems themselves and unduly burdening the system. Our information, however, suggests that this specter is more theoretical than real and that it is outweighed by the clearly positive effects of an expeditious process for resolving disagreements about discovery. Several of our respondents reported that a procedure for resolving disputes that is slow or expensive (or both) seriously weakens a key source of restraint and invites abuses. It creates more room, for example, to obstruct or delay case development. Similarly, counsel who perceive that it will be time consuming and costly for their opponents to try to discipline them or to compel them to comply with discovery obligations will be less likely to play fully by the rules than attorneys who know that their performance is closely monitored or subject to prompt review. Justice Department research indicates, for example, that the cost and unpredictability of the sanctioning process often discourage attorneys from seeking judicial aid with discovery problems.¹²⁷ In short, a costly and cumbersome enforcement apparatus poses a serious threat to a policing system that relies heavily on private initiative.

It follows that a strategy for effective judicial management must include both setting up and clearly describing to counsel, preferably in local rules, the available means for expeditiously resolving discovery disputes. Because the advantages of using a magistrate or a special master or both to achieve this end can be substantial, the model rule should require the judge at the day-60 conference to consider enlisting the assistance of such a parajudicial officer.¹²⁸ If the management scheme the judge adopts is to include a special master or magistrate, the court must specify the matters to be taken to that officer and the procedure for appealing his decisions. The standard the trial court should use in reviewing matters referred to a special master presumably would vary with the kinds of decisions involved.¹²⁹ These standards should be articulated in nationally applicable statutes or rules.¹³⁰

The judge also should indicate the kinds of disputes, if any, counsel should present directly to her and the procedures for such presentations. In this connection, the judge should give serious consideration to setting up procedures for resolving at least some kinds of discovery problems

127. Ellington, Study, *supra* note 16, at 6.

128. See generally Silberman, *supra* note 63; Irving R. Kaufman, Masters in the Federal Courts: Rule 53, 58 Colum. L. Rev. 452 (1958); Note, Masters and Magistrates in the Federal Courts, 88 Harv. L. Rev. 779 (1975).

129. See, e.g., 28 U.S.C. §636, which suggests standards for reviewing decisions by federal magistrates. See also the new rules (72-76) relating to magistrates in the Advisory Committee's Proposed Amendments, *supra* note 11.

130. I will propose model rules that include such standards in the next article in this series.

through telephone conference calls, a device whose convenience is likely to improve access to the decision maker and one that has been used successfully to settle the potentially disruptive disagreements that can arise during oral depositions. Other means of expediting judicial resolution of discovery disputes that have been suggested by our respondents and that the court should consider at the day-60 conference include presumptively prohibiting either oral argument or written briefs with respect to certain kinds of motions, or imposing page limits on briefs submitted in conjunction with specified discovery matters.

Courts should not enter such restrictive orders, however, without careful thought. Inflexible restrictions might run afoul of due process requirements, especially if the restrictions substantially limited a party's capacity to present the merits of its position at trial.¹³¹ A *flexible* local rule or standing order that merely created presumptions against oral arguments on discovery motions or in favor of specified limitations on the number of pages briefs submitted in connections with such motions could contain might be less vulnerable to constitutional attack but also might be impractical. Unless very carefully crafted, such an order or rule could provoke time-consuming litigation designed to overcome the presumptions. Unscrupulous counsel also might succumb to the temptation to use litigation about such matters to delay case development or to harass an opponent. On the other hand, if the restrictions were firm but applied only to nondispositive, relatively routine discovery disputes it is unlikely that they would violate the due process clause or provoke frequent, counterproductive challenges.

Most important, the model rule requires the judge at the day-60 conference to fix the key dates that will enable her to monitor and pace the case's pretrial development. Even for relatively routine, uncomplicated actions the court should set the dates for the close of discovery, for the final pretrial conference, and for the trial.¹³² In more complex lawsuits the judge also should set dates for a Rule 26(f) discovery conference (if one is to be held) or for the next status conference, as well as for completing the joinder of parties and claims, and where appropriate, for filing specified types of motions (e.g., under Rule 12). At this juncture the court should explain to counsel any other devices it intends to use to monitor the action¹³³ and its longer-range plan for controlling case devel-

131. For relatively recent statements by the Supreme Court about how to determine how much process is due under the United States Constitution in civil settings, see *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1 (1978) and *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978).

132. The beneficial effects of promptly fixing these dates even in smaller, routine matters are now clearly documented. See, e.g., *Sipes et al.*, *supra* note 9; Test Project in Delay Reduction Favorable, *supra* note 9, FJC, Case Management, *supra* note 34.

133. Some of the judges we interviewed, e.g., reported successfully using a flagging system under

opment. The specific features of such plans will vary with the nature of the cases involved, but the model rule should require judges to include in every plan a clear provision for regularly scheduled contact between counsel and a judicial officer. Courts should have considerable discretion with respect to the character of that contact and how it is achieved (e.g., in some situations brief telephone conferences might suffice), but it is essential that a mechanism be established in each action that equips the court, directly or through a magistrate or special master, to exert even-handed, constant, and firm pressure toward orderly and efficient case development.

For complex lawsuits, the model rules should require the courts to build into their management plan, at the outset, a structured, regularly repeated procedure for expanding the scope of stipulated matters and for narrowing and refining outstanding issues. Toward this end, the rules should require the courts to calendar, at the day-60 conference, a series of status conferences, each to be held at the close of a major stage or significant period of discovery. In addition, the rules should require the court to order the parties to exchange (and file) revised and refined narratives on fixed dates before each such conference, and then to meet before the conference to attempt to enter additional stipulations. Working from the refined narratives and stipulations, the judge (or magistrate or special master) should use the status conferences themselves to encourage still more agreements about relevant facts, evidence, and law and to limit and pace additional discovery.¹³⁴

which their clerks periodically review the status of every case assigned to the court. The judge or a member of his staff contacts counsel in every case in which there is no record of activity over a specified period, e.g., three months. See also Cohn, Survey, *supra* note 13, at 269-70.

134. The approach adopted by Judge Greene in the government's antitrust action against AT&T is sufficiently thoughtful and instructive to warrant a detailed description here. What follows are quotations from his opinion in *United States v. AT&T*, 461 F. Supp. at 1345-47; they reflect the outlines of the control scheme he devised.

In essence, that order provides that the parties shall file four successive Statements of Contentions and Proof over the next eighteen months, each to become progressively more specific than the last, and each to be followed by a special pretrial conference. The filing of the final statements shall signal the close of discovery.

Thus, by November 1, 1978, plaintiff shall file a Statement of Contentions and Proof, in which it shall describe, with specificity, each of the government's legal and factual contentions, including the activities of the defendants it expects to rely upon to prove its charges of violation of Section 2 of the Sherman Act. Under the heading of each factual contention, the statement shall list the witnesses and the documentary and other evidence which will be used to support the claim that such activity was carried on to effect unlawful combinations in violation of the antitrust laws, or which will otherwise support the allegations of the complaint. The statement shall describe the extent to which such evidence is presently in the possession of the plaintiff, or where, in the government's view, it may be found.

Defendants shall then have until January 1, 1979, to file their first Statement of Contentions and Proof in which they shall state their factual and legal contentions in response to plaintiff's claims, the factual and legal basis for their affirmative defenses, if any, and the documentary or other proof they expect to rely upon in support of each factual contention. Defendant's statement shall be organized in a manner similar to that of plaintiff and it shall be similarly detailed.

Within thirty days thereafter, a special pretrial conference shall be held before the Magistrate in accordance with Rule 16, F.R.Civ.P. and 28 U.S.C. §636, for the principal purposes of narrowing and simplifying the issues, arriving at stipulations of uncontroverted facts, and reducing further unnecessary discovery.

Each of the parties shall file three additional Statements of Contentions and Proof, and three additional

Finally, the model rule should require the court to formally enter an order after the completion of the day-60 conference and after each subsequent session at which any consequential decisions were made or agreements reached. These orders should memorialize as specifically as possible the results of each conference and should incorporate (by reference if necessary) all stipulations. The importance of such orders is difficult to overestimate. They not only serve the obvious purposes of guiding and pacing case development but also serve as sources of several different kinds of potentially important leverage. Lawyers can use them to pressure either their own clients or opposing counsel to comply with discovery obligations. As important, the existence of crisp and detailed conference orders will give judges (or magistrates or masters) additional authority for imposing sanctions—and the clarity of that authority should help overcome judicial reluctance to use the sanctioning power to help retain control over the case during the discovery stage.¹³⁵ Several judges we interviewed reported feeling more comfortable imposing sanctions after a clear directive in an order had been violated. The existence of such directives makes judges more confident that the basic notice requirement of due process has been satisfied. Moreover, judges seem to view a violation of a specific command in an order as substantially more culpable than failure to satisfy an obligation that is premised only on the federal rules.

special pretrial conferences shall be held successively thereafter, as follows. [Schedule for statements omitted] [S]pecial pretrial conferences shall be held on or about June 1, 1979, December 1, 1979, and May 1, 1980. Some of these pretrial conferences, particularly the later ones, may be conducted by the Court rather than the Magistrate. On April 1, 1980, contemporaneously with the submission of the final statements, all discovery shall be closed.

If the issues are to be narrowed and this case is to be brought to trial within a reasonable period of time, it is essential that the parties be bound by their Statements of Contentions and Proof. Accordingly, after a party has filed a statement, it will be restricted to discovery within the limitations of the issues identified by that statement and the contemporaneous opposing statement. Likewise, with the exceptions noted below, subsequent statements may not enlarge upon or add to contentions previously made, and they will have as their purpose not the inclusion of matters neglected or overlooked in earlier statements, but the further narrowing and tightening of matters in dispute between the parties.

To be sure, in the early stages of this process the parties may not be able to be fully definitive as to either the evidence or the specific contentions that will be based on that evidence. Accordingly, upon leave of the Magistrate, which will be freely granted with respect to a request based upon new discovery, the second statement may enlarge upon the first, either by broadening existing contentions or by adding new contentions. Cf. Rule 15, F.R.Civ.P. Thereafter, however, the burden to justify a departure from previous statements shall become progressively heavier. After the parties file their second statements, an enlargement will be allowed only upon good cause shown, and after the third statements are filed, any amendment, other than by way of limitation, will be granted only to prevent manifest injustice. [Citations omitted] These procedures will be enforced and administered to achieve a narrowing of the issues, to apprise opponents and the Court of the status of the case, and to effect appropriate limitations on discovery. [Paragraph numbers and footnotes omitted]

135. See, e.g., Note, Federal Rules of Civil Procedure: Defining a Feasible Culpability Threshold for the Imposition of Severe Discovery Sanctions, 65 Minn. L. Rev. 137, 154 (1980), wherein the author concludes, *inter alia*:

In light of previous experience, rules 26(f) and 37(a) should be amended by inserting appropriate language requiring written court orders for establishing discovery plans and for compelling discovery. Written orders promote certainty in the duty of litigants and their attorneys to aid courts in securing "the just, speedy, and inexpensive determination of every action." [Footnotes omitted]

See also Ellington, Study, *supra* note 16, at 53, 68-69.

A violation of a court order is an offense not only to opposing parties and to the system in the abstract but also to an individual judge.

B. Suggestions for Improving Proposed Rule 16

Assuming that the Advisory Committee is not likely to adopt in toto the model rule described above or to attempt to incorporate all of its elements into the proposed new structure of Rule 16, I will use the preceding discussion as a basis for suggesting several changes in the version of the rule the committee has circulated for comment. Before turning to specific recommendations, however, I should emphasize a point made earlier: the data produced by our interviews and from other sources strongly support the basic purposes and concepts that shape the new version of the rule advocated by the Advisory Committee. There is little room to doubt that the committee's revision would represent a substantial step in the right direction, that is, toward expanding both the courts' role in case management and counsels' obligations to assist in the prompt and efficient preparation of matters for trial. Thus, even if the committee accepts none of the suggestions offered in the following paragraphs, the Supreme Court and Congress should adopt the proposed changes in Rule 16.

To facilitate their use, I will present my suggestions by tracking the structure of the version of the new rule proposed by the Advisory Committee. The full text of the Advisory Committee's proposal for Rule 16 is reproduced in appendix B of this article.

Subdivision (a) of the revised rule would confer upon courts the power to convene pretrial conferences and would describe in general terms some of the major purposes such conferences could serve. For reasons outlined above, I believe this subdivision should explicitly recognize the courts' discretionary power to direct the parties, even when represented by counsel, to attend pretrial conferences.¹³⁶ While the committee's notes could suggest that this discretion be exercised only after balancing the potential benefits against the burdens of compelling party attendance, there are sufficient potential advantages of requiring parties (as well as their lawyers) to participate to warrant an explicit reminder to the judiciary that the power exists.

Subdivision (a) also should acknowledge that responsibility to be alert to the need for or potential utility of an early pretrial conference is not confined to the court. One way to incorporate such an acknowledgment in the rule itself (as opposed to merely discussing it in accompanying notes) is to indicate that the litigants or their lawyers may file a motion

136. The proposed version of subdivision (a) explicitly empowers the court to compel the appearance only of "the attorneys for the parties *and any unrepresented parties*" (italics in the original, to identify additions to the current rule).

requesting the court to convene a conference.¹³⁷ It is not clear, however, that the court should be *obligated* to schedule a conference merely because a potential participant requests one. A rule that would give the parties or their attorneys an essentially unqualified right to compel the convening of these kinds of conferences might be abused to delay the movement of an action toward trial or to burden (e.g., economically) an opponent. This possibility, coupled with the notion that pretrial conferences should remain primarily *judges'* tools for case control, suggest that at least in the absence of the kinds of requirements Rule 26(f) imposes on a party moving for a discovery conference, Rule 16(a) should leave the court with the discretion to deny a motion for any pretrial conference not required by the language of the federal rule itself or by a local rule adopted by a district court.

Subdivision (b) of the new rule would require the courts, except in categories of cases exempted by local rule, to consult at least informally (e.g., by telephone or correspondence) with counsel and unrepresented parties about the time requirements for joinder, amended pleadings, motions, and discovery, and then within 90 days of the filing of the complaint, to issue an order fixing the dates for completion of these matters. Some matters 16(b) leaves optional for the court to include in a scheduling order should be moved to the mandatory list: at least the dates for the final pretrial conference and for the trial itself. As discussed above,¹³⁸ the data produced by our interviews and by other studies indicate that fixing early and firm dates *for the completion of trial preparation and for the trial itself* is probably the single most effective device thus far developed for encouraging prompt and well-focused case development. There does not appear to be any consequential practical obstacle to setting these dates very shortly after an action is commenced. Several judges we interviewed reported that they routinely follow such a procedure and that it has had very beneficial effects. Other studies and commentaries have described the successful use of this approach in several federal courts.¹³⁹

137. See the Proposed Amended Rule 16 in Antitrust Commission, Report, *supra* note 27, at 568, which begins with the following: "In any action, the court may, in its discretion, *or upon the request of any party*, direct the attorneys for the parties to appear before it for a conference *or conferences* to consider [the matters listed]" (italics in the original to identify additions to current rule). See also Peckham, Judge as Manager, *supra* note 34, at 779, where Peckham reports: "The provision [in local rule 235-3 of the United States District Court for the Northern District of California] allowing attorneys to move for status conferences is a valuable aspect of our local rules. Thus, even if a judge does not take the initiative to set the conference, a party who perceives a need to organize the pretrial schedule and commit his opponent to court-ordered deadlines can obtain assistance from the court."

138. See text *supra*, at pp. 894-95, 903-4.

139. FJC, Case Management, *supra* note 34, at 33-37; FJC, Judicial Controls, *supra* note 38, at 52-59; Nordenberg, Discovery Reform, *supra* note 13, at 597-99; Antitrust Commission, Report, *supra* note 27, at 534-40.

As the description of my model rule for pretrial management should make clear, I believe there is a need for a more fundamental change in proposed 16(b). That subdivision (or some other part of Rule 16) should set forth criteria for identifying "potentially complex or protracted cases" or should require each district court to adopt a local rule that does so. Thereafter, the rule should separately set forth additional requirements for managing actions that satisfy the criteria. For potentially complex or protracted cases, these additional requirements should convert the scheduling conference into a broader and more formal management session by expanding the list of mandatory subjects for consultation and incorporation in an order to include: (1) exploring, at least briefly, the possibility of settlement and various means to achieve it, (2) formulating and attempting to narrow the issues genuinely in dispute, (3) devising means to secure stipulations to as many matters as possible, (4) discussing possibilities for voluntary, informal exchanges of information, (5) deciding whether to hold a Rule 26(f) discovery conference and, if not, estimating the amount and kinds of discovery the case will require and setting guidelines for the first round of discovery, (6) deciding whether to refer any pretrial matters to a magistrate or special master¹⁴⁰ and, if so, specifying the scope of his authority as well as procedures for appealing his decisions and the standards to be applied on such appeals, and (7) fixing an early date and an agenda for the next pretrial or status conference.

It is particularly important that the federal rules assure that the courts take affirmative steps at the outset of each action to identify potentially complex cases. Clause 10 of 16(c) of the proposed rule identifies four "illustrative" characteristics, any one of which, according to the note, makes "a case a strong candidate for special treatment."¹⁴¹ Because the discovery stage consumes such a significant percentage of the overall litigation time of complex actions and because of the great need for control during that stage, I recommend adding a fifth characteristic to the list in clause 10: "extensive discovery."¹⁴² This addition should encourage judges to focus on the potential for inefficiency and delay during discovery when they are deciding whether to adopt "special procedures for managing potentially difficult or protracted actions."¹⁴³

It also is important that the rules compel prompt and meaningful judicial involvement in assessing discovery needs and shaping and pacing discovery proceedings. Rule 26(f) does not accomplish this purpose. There is

140. The committee's note about clause (6) should be revised to include reference to the potential utility of *special masters* during the discovery phase of major lawsuits. See Advisory Committee, Proposed Amendments, *supra* note 11, at 18.

141. *Id.* at 19.

142. Cf. Withrow & Larm, The "Big" Antitrust Case, *supra* note 36, at 5-9.

143. Advisory Committee, Proposed Amendments, *supra* note 11, at 12 (Rule 16(c)(10)).

reason to question the potential effectiveness of any rule that, like 26(f), relies primarily on initiatives by counsel to involve the judiciary in case management. Even though most of the big case litigators we interviewed said they would favor, at least as an abstract proposition, "greater judicial involvement in the discovery stage of litigation,"¹⁴⁴ some of our respondents suggested that attorneys might feel considerable reluctance, in specific cases, to take steps that would foreseeably reduce the scope of their freedom to maneuver by vesting significant control over pretrial developments in a judicial officer.¹⁴⁵ Widely shared beliefs that many judges and magistrates are not interested in discovery matters and, under current procedures, tend to be superficial or arbitrary in ruling on discovery disputes could intensify that reluctance.¹⁴⁶ Considerations like these, plus the demanding prerequisites of Rule 26(f), may help account for reports that litigators are filing motions for discovery conferences only in a small percentage of cases.¹⁴⁷ In any event, one thing seems clear: prompt, close, and continuous judicial or parajudicial monitoring of the discovery process is too important in big cases to be left to chance. Either Rule 16 or Rule 26 should establish compulsory procedural machinery to secure that kind of monitoring in all potentially complex actions.

Rule 16(b) and (c) should also describe counsel's obligations with respect to both scheduling and pretrial conferences more clearly than they do in the Advisory Committee's preliminary draft. Responsibilities of participants in scheduling or pretrial conferences are mentioned in two places in the proposed rule. The first of these is the last sentence of 16(c), which appears to relate only to pretrial conferences. It requires counsel to "have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed."¹⁴⁸ The only other reference to the duties of parties and counsel is in 16(f), which is devoted to "Sanctions." That paragraph authorizes courts to impose sanctions if

a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial con-

144. Brazil, *Civil Discovery*, *supra* note 2, at 863-65.

145. Cf. Nordenberg, *Discovery Reform*, *supra* note 13, 567, 595-96; Cutner, *Discovery*, *supra* note 13, at 950-52.

146. Brazil, *Views*, *supra* note 2, at 245-47. See also Cutner, *Discovery*, *supra* note 13, at 946-50, 955-56.

147. One United States magistrate estimated that attorneys in his district request a Rule 26(f) discovery conference in 10 percent or fewer of the cases in which there is some discovery activity. The magistrate pointed out that one major reason for this low percentage might be the fact that such conferences have been explicitly authorized only since August 1, 1980 and, therefore, might not have "caught on." We have, however, relatively little data about frequency of use of Rule 26(f); it simply is too early to make any serious effort to assess the effects or utility of the current provisions for discovery conferences.

148. Advisory Committee, *Proposed Amendments*, *supra* note 11, at 12.

ference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith.¹⁴⁹

Together, these passages in essence require counsel to "substantially" prepare for scheduling or pretrial conferences, to acquire authority to enter stipulations and make admissions during pretrial conferences (but not during scheduling conferences), and to appear (when ordered) and to participate in good faith in both kinds of conferences.

There are several ways in which these duty provisions could be improved. The rule would communicate much more clearly what counsels' obligations are if it described them in a separately lettered subdivision to precede the subdivision authorizing sanctions.¹⁵⁰ The subdivision devoted to articulating the obligations the rule imposes should explicitly require the court to give counsel (and unrepresented parties) timely advance notice of any subjects the court expects to cover or tasks the court intends to accomplish that are not described with particularity in a standing order or local rule applying to the type of conference involved. The "duties" subdivision also should compel counsel, in advance of the scheduling conference or within 60 days after commencement of the action, to draft estimates of the amount of time required for joinder, amending pleadings, presenting Rule 12 motions, completing discovery, and preparing for the final pretrial conference. Such estimates are necessary to enable the judge to make the decisions required by 16(b). By failing to make the duty to prepare such estimates clear, the rule invites either irrational judicial decision making or delays while counsel scramble belatedly to respond to the court's initial effort at "consultation."

The duties section of Rule 16 also should have a separate subdivision setting forth additional obligations that counsel or parties involved in potentially complex cases must fulfill. That subdivision should require counsel, in advance of the first judicially hosted conference, (1) to draft and exchange statements of the major issues and narrative descriptions of the events or acts on which the lawsuit is based, (2) to explore the possibility of arranging for voluntary, informal exchanges of information, (3) to estimate the amount and kinds of discovery they will conduct, and (4) to discuss the advisability of referring matters to a magistrate or special master and, if appropriate, to exchange lists of names of acceptable masters.

There are, in my judgment, more fundamental problems with the sanc-

149. *Id.* at 13.

150. The sanctions paragraph then could begin simply by declaring: "If a party or party's attorney fails to comply with any of the duties set forth in [the 'duties' paragraph], the judge shall [take whatever action the 'sanctions' paragraph prescribes]." See the next section for a discussion of problems with the structure of the sanctions provisions and for suggested changes.

tions paragraph the committee has drafted for Rule 16. These problems, however, are not peculiar to Rule 16; they are shared by most of the subdivisions of Rule 37. Because the suggestions I have for improving the Advisory Committee's proposal for Rule 16(f) apply as well to Rule 37, and because my comments raise basic questions about the structure and efficacy of the principal tools for enforcing the discovery rules, I will present my critique of and recommendations for this part of Rule 16 in the following separate section, which focuses on the generic problem of sanctioning parties and/or attorneys for failing to comply with obligations during the pretrial period.

IV. THE SANCTIONS PROVISIONS

A. Shortcomings of Current Provisions for Sanctions

The proposed amendments the Advisory Committee currently has under consideration include several new provisions for sanctions.¹⁵¹ These provisions include some important advances in structuring sanctions rules, and their adoption would represent a potentially important step toward the goal of expanding both the judiciary's and the litigating bar's sense of responsibility for the efficient and open operation of the discovery system. For reasons described below, however, I believe that the Advisory Committee's proposals fail to come to terms with fundamental problems impairing the effectiveness of the current versions of the sanctions rules and that the committee should begin a comprehensive effort to reevaluate and restructure all of the provisions for sanctions in the federal rules, especially those in current Rule 37 and proposed Rule 16(f).

In this section I will describe the dimensions and causes of the problems encumbering the machinery for enforcing the discovery rules. I will then propose an alternative approach whose main features include acknowledging a right to compensation for expenses caused by other persons' breaches of discovery obligations and articulating tougher and more precise standards for evaluating efforts to justify failures to perform acts required by the rules. A primary purpose of making these standards more demanding is to reduce the scope of judicial discretion to conclude that no right to compensation exists because no violation occurred. I will conclude this section with proposals of my own for the sanctions provisions of Rules 26 and 16.

A comprehensive reevaluation and restructuring of the sanctions provisions of the rules is a big job. Is it necessary? Could changes in these rules produce sufficient improvements in the pretrial system to justify the effort? While it is impossible to answer these questions in the affirmative

151. See, e.g., proposed Rules 7(b)(3), (11), 16(f), and 26(g), all in Advisory Committee, Proposed Amendments, *supra* note 11.

with complete confidence (if that were possible, the committee already would have undertaken the task), there are many reasons to believe that a major overhaul of these provisions would represent a substantial contribution.¹⁵²

While there is some evidence that at least some judges have begun to use their power to sanction more often,¹⁵³ there is an overwhelming consensus that the federal judiciary remains, as a general proposition, very reluctant to impose even mild financial sanctions for violations of discovery obligations and to assume responsibility for actively policing the pre-trial development of civil litigation.¹⁵⁴ The data produced by our interviews in 1979¹⁵⁵ and in 1981, and by the only substantial recent empirical study of the sanctioning process,¹⁵⁶ strongly support this conclusion. Most lawyers apparently believe that most judges are unlikely to impose any sanctions for discovery abuse,¹⁵⁷ that the courts usually will respond to the first two or three failures to comply with discovery obligations only by admonishing or warning the offending litigator or party, that if the judge ultimately imposes a sanction it is likely to be relatively innocuous, and that the chances of avoiding having to pay the penalty are good.

As noted in section II of this article, these perceptions of judicial leniency have very negative effects on the pretrial environment. In essence, they result in a restraint vacuum in which economic and competitive pressures often lead litigators and parties to violate clear duties or, at least, to test the outer limits of the elasticity of the rules or of the system for enforcing them. Moreover many lawyers and judges we interviewed complained that individual acts that violate at least the spirit of the rules often set cycles of abuse in motion: conduct that is perceived as abusive or excessively tactical can inspire its victims to retaliate in kind or can help them rationalize self-serving breaches of duties to others. Relying on a "logic" that would provoke furrowed brows in other contexts, some fed-

152. As I hope to make clear below, the recommendation Maurice Rosenberg made in 1958 remains appropriate: "So pivotal to the successful functioning of the federal rules are effective and efficient sanctions for discovery that at the earliest practicable moment revisions should be made." *Sanctions to Effectuate Pretrial Discovery*, 58 Colum. L. Rev. 480, 497 (1958).

153. Some of the judges we interviewed indicated that they recently have become aware of the need to police the system more aggressively. See also Renfrew, *Discovery Sanctions*, *supra* note 63, at 282; FJC, *Judicial Controls*, *supra* note 38, at 24-25; S. Mark Werner, *Survey of Discovery Sanctions*, 1979 Ariz. St. L.J. 299, 316; Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 Harv. L. Rev. 1033 (1978).

154. See, e.g., McKinstry, *supra* note 10, at 793, 799-801; Cutner, *Discovery*, *supra* note 13, at 955 & n.63; Cohn, *Survey*, *supra* note 13, at 294-95; Smith, *supra* note 63; Antitrust Commission, *Report*, *supra* note 27, at 518; Kaminsky, *Proposed Federal Discovery Rules*, *supra* note 13, at 983-93; Ebersole & Burke, *Discovery Problems*, *supra* note 12, at 65, 70. (Ebersole and Burke also point out, however, that increased use of the sanctioning authority is not a panacea for the system's ills, at 75-76.)

155. Brazil, *Civil Discovery*, *supra* note 2, at 865-67.

156. Ellington, *Study*, *supra* note 16, at 117-23.

157. See, e.g., Peckham, *Judge as Manager*, *supra* note 34, at 803, 804.

eral judges have reported to us that when abuse begets abuse the resulting mutuality of unclean hands leads to a sanctions wash: since both parties were bad, neither can be punished.¹⁵⁸

The data clearly indicate, however, that judicial inaction in response to breaches of discovery obligations is by no means dependent on such tidy rationales. And the result of that inaction, at least in the subworld of the larger cases, is a chorus of appeals to the judges to intervene more aggressively and to use their power to sanction more often.¹⁵⁹ Thus while few would claim that more frequent imposition of sanctions is a panacea for the ills of the discovery system,¹⁶⁰ and while many hope that more thoroughgoing judicial management of the pretrial development of big cases will reduce both the opportunities for abuses and, in turn, the need for imposing sanctions, there also is a widespread conviction, at least among the people we interviewed, that a major effort to improve the reliability and effectiveness of the sanctioning process must be an integral part of any larger, multifaceted strategy to surround the amoeba of discovery abuse.¹⁶¹

To assess the likelihood of measurably improving the sanctioning system, and to think intelligently about means to that end, it is essential to try to understand at least some of the principal sources of the current system's shortcomings. Why is the sanctioning authority used so infrequently and to such relatively little effect? In the paragraphs below I discuss about a dozen different factors that judges and lawyers we have interviewed, as well as other commentators, have suggested help answer these questions. I certainly do not suggest, however, that even this relatively long list of considerations is exhaustive. Nor can I ascribe relative weight or significance to the factors I identify. Not knowing the relative significance of these factors, however, need not present an insurmountable obstacle to improvement; in part because many of the problems I identify have overlapping dimensions and sources, the reforms I propose are complementary and often are responsive simultaneously to several different shortcomings in the system.

One reason offered by judges we interviewed for not using their power to sanction very often in the past was that they did not fully appreciate the

158. I discuss the rationale for this approach and the problems caused by it at pp. 931-33 *infra*.

159. The attorneys interviewed by Ellington join this chorus. See Ellington, Study, *supra* note 16, at 58-59.

160. Ebersole and Burke emphasize that the causes of the discovery system's ills are too numerous and complex to be remedied by the single solution of more sanctions. See their Discovery Problems, *supra* note 12, at 75-76.

161. This view has been expressed also by former United States District Court Judge Charles B. Renfrew: "Sanctions cannot solve the entire problem; but, in combination with other remedies, they can help to control the misconduct of participants in the judicial process." Renfrew, Discovery Sanctions, *supra* note 63, at 267.

need to do so. Some judges simply have not known, or have not wanted to acknowledge, that the discovery system's machinery for policing itself was not working in larger cases. Nor have some judges been aware of the litigating bar's disaffection with judicial performance in this area, or of the widespread desire among lawyers in that bar for more aggressive judicial enforcement of the rules. And one reason some judges have not perceived the full dimensions of the need is that litigators have not routinely sought judicial help in resolving their discovery problems. As Ellington's empirical research suggests, many attorneys are reluctant to spend time and money pursuing even financially compensatory sanctions because they believe, with substantial justification, that the likelihood of success is too small to warrant the expenditure of resources on the effort.¹⁶² While there are additional factors that can inhibit counsel from seeking sanctions against an opponent,¹⁶³ it seems clear that the courts' reluctance to sanction and the lawyers' reluctance to pursue sanctions form a vicious circle; the judges' behavior helps perpetuate the behavior by the lawyers that helps keep the judges ignorant of the need for change. Thus one purpose of a reformulation of the rules should be to try to break this vicious circle by making judges more aware of the importance of exercising their sanctioning authority and by making the imposition of at least some kinds of sanctions more automatic.¹⁶⁴

Another reason some judges cited to help explain the relative infrequency of their use of sanctions is their fear that imposing sanctions can pollute the pretrial environment by creating or intensifying acrimony between attorneys or parties. Some judges believe that entering a sanctions order can significantly reduce the likelihood of settlement by exacerbating animosities between litigants. In a similar vein, some believe that if they impose a sanction they risk destroying a party's or a lawyer's confidence in their impartiality and their reliability. These judges believe that imposing a sanction can threaten a litigant's or a lawyer's perception of them as a neutral arbiter, and that being so perceived is crucial to their capacity to control the case, that is, to induce counsel and client to accept their guidance and not to contest every one of their rulings.

162. Ellington, Study, *supra* note 16, at 5, 62-67.

163. See Renfrew, Discovery Sanctions, *supra* note 63, at 272, discussed *infra* at pp. 946-47. See also Ellington, Study, *supra* note 16, at 57, 60-61.

164. See Cutner, Discovery, *supra* note 13, at 982-83, where the author argues that the system would be improved if the scope of judicial discretion *not* to impose at least financially compensatory sanctions was reduced, thus making expense awards more automatic. See also Hufstedler & Nejedlski, *supra* note 10, at 967, where the authors suggest:

Existing rules deal with discovery abuse, but recent studies have confirmed the general feeling that lawyers are reluctant to ask for and judges are reluctant to use these sanctions. The action commission has been studying the feasibility of experiments with either greater enforcement of current rules or modifications which would make the use of sanctions more automatic. For example, a court could adopt a presumption that a party losing a discovery motion would normally pay the cost and attorney's fees involved in that motion.

Our interviews suggest, however, that such fears might regularly play a significant role only in smaller, less complex cases.¹⁶⁵ At least some judges believe that the likelihood of settlement is greater in smaller cases and that judicial behavior can have a more dramatic impact on the course of pretrial events in such matters than it can in larger lawsuits, where judicial influence competes with powerful economic or political forces that often seem to give the development of the action an independent momentum. Thus judges may be more concerned about protecting their capacity to encourage settlement in smaller suits than they are in large, complex matters. It also is worth noting at this juncture that a set of rules that would give judges virtually no power to refuse to award certain kinds of sanctions in carefully described situations could reduce judicial concern that “deciding” to impose a sanction would intensify animosities or threaten party confidence in the court’s impartiality. If, for example, financially compensatory sanctions were awarded more often and more automatically, they would have less of the personal connotation and sting that accompany unusual and highly discretionary acts and, therefore, would be less likely to provoke resentments.¹⁶⁶

Chief Judge Robert F. Peckham (United States District Court, Northern District of California) recently has acknowledged that fear of straining relations between parties may discourage judges from imposing even merely compensatory financial sanctions. In Peckham’s view, however, such fears often are misplaced:

Opponents of monetary sanctions may also argue that the imposition of sanctions may ruin any chance of rapport and cooperation between the opposing attorneys, and therefore lessen the chances for stipulations and settlements. This should not be a serious problem: once one party has sought sanctions, rapport between the attorneys is already ailing—indeed, if a party has been seriously inconvenienced by the other side’s disobedience of a pretrial rule, rapport will suffer even more if the inconvenienced party is left with no remedy. Furthermore, a court’s failure to sanction clear violations of its rules can only breed disrespect for the rules and for the judicial system. Courts should therefore not hesitate to impose sanctions for clear and serious violations.¹⁶⁷

165. Ellington’s Study, *supra* note 16, at 113–14, however, suggests that these concerns might trouble judges in a broad range of cases.

166. See also *id.* at 112–13, where Ellington reports:

A third reason [for judicial reluctance to sanction] goes to the dynamics of the relationships between court and litigation bar. Often there are strong professional and social ties. Judges expressed in various ways the constraints they feel in pushing lawyers too hard. Judges should be “moderate” and must not interject themselves too far into the lawyer’s case. To do so risks losing the bar’s “respect.” This is not simply an avowal of timidity or reluctance to face down aggressive counsel. It also, and more truly, reflects a desire to maintain a good working relationship with the bar and a feeling that to impose a sanction on client or lawyer is to embarrass and humiliate another member of the profession. Hence, sanctions are reserved only for the most serious and persistent abuses that cause demonstrable harm to the complaining side. Discovery is, after all, engaged in by adversaries. Technical violations do not count.

See also Renfrew, Discovery Sanctions, *supra* note 63, at 272.

167. Peckham, Judge as Manager, *supra* note 34, at 802–3.

Other factors some judges have cited to explain their reluctance to impose sanctions are their dual concerns about penalizing a client for the independent acts of its attorney and impairing a party's ability to fully litigate the merits of its position.¹⁶⁸ Dissenting in *Ali v. A&G Co.*, Judge Oakes forcefully expressed these concerns:

I believe . . . that dismissal of an otherwise meritorious cause of action for the misconduct of counsel is rarely, if ever, an appropriate remedy in cases of this kind. Rather, the trial court should first consider the more specific and perhaps even more deterrent remedy of imposing costs personally on the offending attorneys. Imposing a penalty on those responsible for wasting the court's time, while not dismissing a party's potentially valid claim, seems to me to make the punishment better fit the crime.¹⁶⁹

Carefully read, the current version of Rule 37 leaves judges free to take corrective action without jeopardizing the interests of innocent parties; it provides for a wide range of sanctions and gives the courts more than ample discretion to decide what kinds of sanctions are appropriate and who is to be penalized. There are, however, several important parts of Rule 37 that can create the impression that only "parties" are potential wrongdoers and that therefore only parties are the proper targets of sanctions orders. In describing sanctionable conduct, for example, the subdivisions in the rule consistently refer only to failures by "a party." The provisions authorizing judges to sanction a culpable "attorney" do not appear until the end of each subdivision, almost as if they were afterthoughts.¹⁷⁰

The persistence of concern about unfairly penalizing clients for the misbehavior of their lawyers, and the arguably misleading impression created by the current phraseology of Rule 37, are additional indications that the sanctions rules need to be clarified. In particular, Rule 37 should be reworded to explicitly acknowledge that counsel, rather than client, in some instances may be to blame for violations of the discovery rules and that in such instances, except where fairness to other litigants requires entry of an order that directly penalizes the client,¹⁷¹ the court should impose the appropriate sanction directly on counsel and should prohibit him from directly or indirectly passing along its cost to the party he is representing.¹⁷²

168. Ellington, Study, *supra* note 16, at 115; see also Renfrew, Discovery Sanctions, *supra* note 63, at 273-74; Peckham, Judge as Manager, *supra* note 34, at 790-95.

169. *Ali v. A&G Co.*, 542 F.2d 595, 597 (2d Cir. 1976).

170. Fed. R. Civ. P. 37(a), (b), (d).

171. See Renfrew, Discovery Sanctions, *supra* note 63, at 277-78.

172. See Peckham, Judge as Manager, *supra* note 34, at 801-2, and cases cited in 801 n.109. Peckham emphasizes the importance of focusing the sanction on counsel, when appropriate, and the effectiveness of orders doing so, in the following passage (at 802):

An order imposing a monetary sanction for the violation of pretrial rules should be tailored to avoid the

Judges and magistrates we interviewed also admitted that their reluctance to sanction was sometimes attributable to not knowing enough about the action, the parties, or the lawyers to feel confident that sanctions are warranted.¹⁷³ Judges know that discovery disputes brought before them in big cases often reflect only the tip of a mammoth pretrial iceberg, the great bulk of which they never see. Since acting rationally and fairly is a central component of a judge's self-image, knowing that they *don't know* a great deal about the past behavior of clients and counsel, and even about the particular events that have triggered given disputes, makes many judges cautious in forming judgments, especially judgments with overtones of moral condemnation and punishment. Several judges and magistrates pointed out that one virtue of the kind of active case management described in the preceding section is that it can substantially improve a judicial officer's familiarity with the nuances both of a case and of the personalities and behavior patterns of the principal actors in the litigation drama, thus appreciably increasing the court's capacity to make well-informed rulings and to take decisive disciplinary action. Assigning responsibility for all nondispositive discovery and other pretrial matters to a magistrate or special master who is empowered to impose financially compensatory sanctions, and to recommend more severe measures, is another means of overcoming the obstacle to effective policing that ignorance erects.

The judges' hesitancy to make morally condemnatory judgments, however, is by no means exclusively attributable to unfamiliarity with the details of the matters before them. Some judges also have confessed that, at least during their first years on the bench, they felt considerable sympathy with attorneys whose zealous pursuit of their clients' interests inspired behavior in the discovery arena that arguably crossed the line separating aggressive but clean advocacy from abuses of discovery tools or violations of disclosure obligations. One judge who had been a litigator for many years reported that he understood so well the pressures and the unwritten rules under which litigators practice that after he became a judge he found it difficult to punish conduct that violated at least the

possibility that an attorney's innocent client will bear the financial burden. The judge should carefully consider the attorney's explanation for his violation, and, if the fault seems to rest with the attorney, should frame the order so as to enjoin the attorney from billing his client for the sanction imposed. It is naive to suppose that some firms will not treat such sanctions as overhead costs, eventually passing them on to their clientele. A partial solution to this problem would be to require the sanctioned attorney to serve his client with a copy of the order. This will insure that the client knows of the sanction, can guard against being billed for it, and can even discharge his attorney if he feels that the event warrants such action. Although the attorney might still be able to pass on the financial burden of the sanction as an overhead cost, this need not render the sanction a nullity. If clients are made aware of the imposition of such sanctions, and attorneys are thereby made more answerable to their clients, sanctions can hardly fail to have an effect on careless attorneys. Moreover, I believe that lawyers do not take monetary sanctions so lightly. Most lawyers would not wish to risk the damage a judicial reprimand would entail to their pride, to their professional reputations, and to their credibility with their clients.

173. See also Ellington, Study, *supra* note 16, at 115-16.

spirit of the discovery rules but that he knew was commonplace. Other commentators also have suggested that experience as a litigator before moving to the bench creates a sympathy with pretrial tactics that fosters in some judges an unhealthy leniency toward, if not an outright tolerance of, misbehavior.¹⁷⁴

Sympathy with the pressures under which litigators work can influence the way judges perform the important, largely discretionary task of defining the norms by which they evaluate discovery behavior. Loose norms cannot promote vigorous enforcement of the rules. Sympathy with established patterns of litigation behavior can produce loose norms by leading judges to draw their standards from their perceptions of the state of the art. Unfortunately, neither the prescriptions of the Code of Professional Responsibility nor the language of Rule 37 discourages judges from using such state of the art standards for evaluating the pretrial conduct of litigants and lawyers. In addition to commanding attorneys to represent their clients "zealously within the bounds of the law,"¹⁷⁵ the code admonishes counsel who is "serving as advocate" to "resolve in favor of his client doubts as to the bounds of the law."¹⁷⁶ Since it is the advocate who, at least in the first instance, decides whether or not a doubt exists, this admonition can serve as a handy rationale for adversarial excesses. Clear excesses, however, may not be the most consequential problem to which the directives of the Code of Professional Responsibility contribute. Our data, and the work of Ellington, indicate that among the most pervasive and costly problems afflicting the discovery system are evasive and incomplete responses to discovery requests.¹⁷⁷ Litigators I have interviewed have vigorously defended (or aggressively boasted about) a philosophy of pretrial practice that revolves around the notions that it is unprofessional to voluntarily disclose any evidence that could hurt a client and that in our system a central feature of an advocate's responsibility is to capitalize fully on every error or oversight made by an opponent.¹⁷⁸ Thus lawyers have told me that when they receive document production demands or interrogatories from an opponent they take advantage of every arguable ambiguity and construe every probe in the light that compels them to disclose the least possible information about their case. In short, there is considerable tension between the admonitions of the Code of Professional Responsibility, which seem to encourage such adversarial conduct, and the "spirit of cooperation" that the rule makers and the

174. Kaminsky, Proposed Federal Discovery Rules, *supra* note 13, at 993; Ellington, Study, *supra* note 16, at 112-13.

175. ABA, Code of Professional Responsibility, *supra* note 29, at Canon 7.

176. *Id.* EC 7-3.

177. Brazil, Civil Discovery, *supra* note 2, at 825, 833; Ellington, Study, *supra* note 16, at 55-57.

178. Brazil, Civil Discovery, *supra* note 2, at 836.

courts believe should inform the behavior of parties and counsel during the discovery stage of civil litigation.¹⁷⁹

The American Bar Association's Commission on Evaluation of Professional Standards (also known as the Kutak Commission, in honor of its chairman) appears to have recognized this tension when it drafted the Proposed Final Draft of the Model Rules of Professional Conduct it has submitted for approval by the House of Delegates in early 1982.¹⁸⁰ As noted earlier, the proposed Model Rules would make significant, constructive changes in the way advocates' responsibilities are defined and would offer separate directives for the pretrial-discovery period, directives that come much closer than the current code does to reflecting the "spirit of cooperation" that discovery requires.

The relevant provisions of the Model Rules include a prohibition against asserting or controverting an issue without "a reasonable basis for doing so" (Rule 3.1) and a commandment to "make reasonable effort consistent with the legitimate interests of the client to expedite litigation" (Rule 3.2). While these rules presumably cover intentional use of discovery tools to harass an opponent or to delay an action, explicitly so stating, at least in the notes, would make these provisions more effective.

Most significant, proposed Rule 3.4(d) would declare that "a lawyer shall not . . . in pretrial procedure, make a discovery request that has no reasonable basis, or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." Rule 3.4(a) would prohibit a lawyer from "unlawfully" obstructing "another party's access to evidence" or from concealing "material that the lawyer knows or reasonably should know is relevant to a pending proceeding or one that is reasonably foreseeable." The commission has not made it clear, however, that this rule applies to civil discovery. More important, the rule does *not* appear to impose any *affirmative duty to disclose* relevant, unprivileged material that an opponent is seeking through discovery.

If this interpretation of the reach of Rule 3.4(a) is accurate, I believe the Kutak Commission's proposals could be extended in ways that would contribute more to improving the efficiency and fairness of civil discovery. The proposed Model Rules should explicitly recognize a duty to respond to authorized discovery probes in civil matters by fully disclosing all relevant and unprivileged material. In addition, the new rules should articulate a separate "doubt resolution" rule for civil discovery. Such a rule should forthrightly acknowledge that provisions for discovery in civil actions contemplate and require a kind of openness and cooperation that is

179. See, e.g., *Fisher v. Harris, Upham & Co.*, 61 F.R.D. 447, 449 (S.D.N.Y. 1973).

180. Kutak Commission, Model Rules, *supra* note 29.

fundamentally inconsistent with adversarial jockeying for advantage. Thus the new rules should direct an attorney who is responding to a discovery probé whose scope and character are authorized by the federal rules to resolve doubts in favor of disclosing all the relevant, unprivileged material that a fair reading of the request would lead a reasonable person to believe was being sought. While the new doubt resolution rule should not compel a lawyer to construe privilege doctrine narrowly or against his client,¹⁸¹ it should expressly direct counsel to err on the side of disclosure, rather than against it, when resolving doubts about the reach of discovery probes and about the likelihood that they will lead to relevant evidence.¹⁸²

Far from constituting a radical departure from inherited wisdom about the virtues of the adversary system, such a change would merely bring the Code of Professional Responsibility into philosophic line with the norms that have been embodied in the Federal Rules of Civil Procedure since 1938. The adversary system has never been completely unrestrained in civil matters. The provisions for civil discovery originally were designed to combat the "sporting theory" of justice and to reduce the gamesmanship which for so long had soiled the image of litigation in America.¹⁸³ In fact, it was clear from the outset that if the ambition to make the system largely self-executing was to succeed, it was absolutely essential that lawyers embrace the spirit of cooperation on which the discovery apparatus was premised. Thus a change in ethical prescriptions as they apply to civil discovery is long overdue.

The language of Rule 37 does little or nothing to counter the effects that the current version of the Code of Professional Responsibility may have on the standards the judiciary uses to evaluate discovery behavior. Rule 37(d), for example, permits courts to "make such orders . . . as are just" after finding that a party has failed to satisfy one of several enumerated obligations; but the rule offers no assistance to judges who are trying to determine in specific cases which orders might be just.¹⁸⁴ Similarly, while judges are encouraged to make compensatory awards unless the behavior causing the expense was "substantially justified" or unless "other circumstances make an award of expenses unjust," the rule itself suggests no criteria for deciding whether given justifications are sub-

181. See Nordenberg, *Discovery Reform*, *supra* note 13, at 586.

182. See Fed. R. Civ. P. 26(b)(1). During an interview with the author, former United States District Court Judge Charles B. Renfrew expressed grave doubts about the feasibility of the doubt-resolution rule I propose in the text. Renfrew believes that lawyers would find it next to impossible to follow the rule I suggest during pretrial of civil matters *and* to follow diametrically opposed directives while representing criminal defendants. He noted that this "double standard" could create especially severe strains for an attorney representing a client who was simultaneously a defendant in civil and in criminal proceedings.

183. See Brazil, *supra* note 21, at 1298-1303.

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

stantial or what kinds of circumstances are sufficient to excuse any of the specified failures.

The Advisory Committee's notes explaining the 1970 amendments of Rule 37 offer only limited help in this important area.¹⁸⁵ They do dispel the notion that willfulness is a prerequisite to imposing mild financial sanctions. They also point out that severe sanctions, which in effect determine the merits of claims, should not be imposed for merely negligent breaches of discovery obligations. In addition, the notes suggest that a party should be deemed "substantially justified in carrying [a discovery] matter to court" whenever the dispute that provokes a motion to compel under Rule 37(a) is "genuine."¹⁸⁶ Identifying criteria for deciding which disputes are genuine, however, is a task the notes leave entirely to the courts, unaided even by a citation to a case.

The only additional guidance these notes offer is of dubious value. While discussing the provision in Rule 37(a) that preserves judicial discretion to deny an expense award when a party has not shown that it was "substantially justified in carrying the matter to court" but when some "other circumstances" would make an award of expenses "unjust," the Advisory Committee suggested that one such "other circumstance" would exist "where the prevailing party also acted unjustifiably."¹⁸⁷ Since the notes do not elaborate on this idea, it is impossible to know what inspired it and in which situations the committee thought it should apply. The committee apparently intended to incorporate the equitable doctrine of "unclean hands" into the body of norms by which courts are to determine the propriety of imposing sanctions. If our interviews accurately reflect the role played by that doctrine in judicial resolution of discovery disputes, however, its introduction was unfortunate. Several judges indicated that in their view one party's or attorney's violation of a discovery rule can justify an opponent's subsequent violation of a *separate* obligation.¹⁸⁸ The anomalous result is that one party's wrong in effect creates a right in another to commit a wrong of its own.

185. See 48 F.R.D. 538-42 (1970).

186. *Id.* at 540.

187. *Id.*

188. Ellington described this kind of judicial thinking about sanctions in the following terms (in his Study, *supra* note 16, at 111-12):

Why, again, are judges unwilling to impose sanctions?

.....
One factor might be called the Clean Hands Doctrine, (or, He who would seek sanctions against an opponent must himself be without fault). Judges often are influenced when asked to impose a sanction by how diligently and correctly the moving party has himself or herself behaved in seeking and allowing discovery in that case. Where the moving party has likewise hindered or obstructed discovery or has been negligent or careless in enforcing discovery remedies, the court is likely to order discovery without sanctioning non-compliance. Although not always openly acknowledged, it may often be the case that to obtain sanctions one must come into court with "clean hands."

Ellington cited *ACF Indus., Inc. v. EEOC*, 577 F.2d 43 (8th Cir. 1978), *cert. denied*, 439 U.S. 1081 (1979) (sanction reversed, in part because both sides had displayed dilatory tactics).

I can think of only one, presumably unusual, situation in which this kind of thinking has an appropriate role to play in decisions about sanctions. It would be unfair to sanction a party or a lawyer who could clearly establish that his failure to perform a required act was directly and unavoidably caused by an opponent's violation of the rules. Except in the rare case where such a showing can be convincingly made, however, the notion that mutually unclean hands should result in a wash has no place in deliberations about sanctions. In fact, that notion threatens the judiciary's capacity to police the discovery system. By failing to recognize that the rules of procedure impose *independent* obligations on all users of the system, this idea can leave simultaneous or sequential misbehavior by several parties unpunished. More important, it can help build into the discovery system destructive and expensive cycles of retaliatory abuses. It follows that the rules should explicitly ban the mutually unclean hands doctrine except when a party can show that its failure was directly and unavoidably caused by another person's violation of discovery duties.

It is conceivable that the Advisory Committee made the suggestion that mutually unclean discovery hands should result in a sanctions wash at least in part because the committee assumed that ordering opponents to pay each other's expenses would not amount to meaningful punishment, both sides being left with little or no net loss. That possibility, however, does not compel the conclusion that the misbehavior must go unpunished.¹⁸⁹ Courts confronting this situation should consider the appropriateness of nonfinancial sanctions, for example, initiating separate disciplinary proceedings against offending attorneys. In situations where only financial sanctions appear appropriate or promise to be effective, the rules should compel the courts to order each offender to pay an appropriate fine, perhaps measured by the amount of the expenses its misbehavior caused, into the general funds of the United States Treasury.¹⁹⁰

Even ignoring the effects of the unclean hands concept, the Advisory

189. Mark S. Werner has described how one judge responded to this problem:

Judge Porter was faced with opposing parties whom he characterized as both being at fault in unnecessarily obstructing discovery efforts. He proceeded to impose the expense sanction on both parties and their attorneys in a novel manner, designed to avoid a situation where the sanctions imposed on both sides cancel each other out. The attorneys for each side were assessed for the expenses incurred by the opposing party by reason of the attorneys' failure to comply with a court order concerning a discovery conference and filing of a discovery conference report. Their clients were prohibited from indemnifying or compensating them for the amount of the sanctions imposed. In addition, plaintiffs (but not their attorneys) were ordered to pay defendants for expenses caused the latter by plaintiffs' failure to comply with a court discovery order; and defendants (but not their attorneys) were ordered to pay plaintiffs for expenses caused the latter by defendants' failure to provide certain requested information, where the court found defendants' position to be without substantial justification.

Werner, *supra* note 153, at 314-15, commenting on *Associated Radio Serv. Co. v. Page Airways, Inc.*, 73 F.R.D. 633 (D. Tex. 1977).

190. In this situation some state courts have resorted to imposing financial penalties and having them paid to the state or court, rather than to opposing counsel. See, e.g., Comment, *Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power*, 26 UCLA L. Rev. 855, 881 (1979).

Committee's notes to Rule 37 leave federal courts essentially free to resort to the state of the art to locate norms for evaluating discovery behavior. Thus a judge appears to be free to decide that a particular failure to answer interrogatories is justified simply because lawyers in the area habitually fail to respond within the time prescribed by Rule 33. Similarly, because the rules and notes provide judges with no meaningful criteria for determining what constitutes "an evasive or incomplete answer,"¹⁹¹ courts may be tempted to adopt as the controlling standard the quality of answer commonly provided in response to interrogatories. The obvious difficulty with adopting that standard is that it is so low that its use would render interrogatories almost valueless for most purposes.¹⁹² That prospect suggests a larger problem: relying on the state of the art for standards tends to freeze the quality of practice in one place and greatly reduces any capacity the sanctioning machinery might otherwise have to leverage behavior up to higher plateaus. Given what our data show about the current state of the art, the specter of freezing the quality of discovery practice at today's levels is particularly discomfoting.

The difficulties created by using the state of the art as a source of norms suggest that the Advisory Committee should undertake the difficult task of attempting to articulate more precise standards for evaluating discovery behavior. The existence of more refined standards not only would decrease the need and the opportunity to resort to the state of the art for evaluative criteria; it also would reduce the size of another obstacle to firm and frequent use of the sanctioning authority: a concern among at least some judges that the rules, viewed in the context of widely recognized judicial tolerance of technical violations of discovery obligations, may fail to give counsel and their clients the clear notice required by the due process clause of what behavior is proscribed. A judge to whom being fundamentally fair is important is more likely to feel justified in imposing sanctions for violations of clearly articulated, specific standards than for breaches of vague norms.¹⁹³ Vague norms, of course, also make it more difficult to perceive or define violations, and it is fair to assume that as that difficulty increases so does judicial reluctance to sanction.

The solution I propose in the text to the wash problem minimizes the risk that troubled one judge we interviewed: he feared that judges might be tempted to abuse their authority to sanction if they had the capacity to direct the money the offenders paid either into the coffers of the court itself or to a favorite charity or institution.

191. Fed. R. Civ. P. 37(a)(3) merely declares: "For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer."

192. Many of the lawyers we interviewed complained that the quality of the responses they receive from other lawyers is so poor that interrogatories already are of very limited utility. See also Kaminsky, Proposed Federal Discovery Rules, *supra* note 13, at 955.

193. See generally Note, *supra* note 135; Comment, *supra* note 190.

Ambiguity debilitates the current version of Rule 37 in additional important ways. There is a curious and potentially consequential ambiguity, for example, in the parts of subdivisions (b) and (d) that authorize federal judges to order parties who fail to comply with court orders or to satisfy specified discovery obligations to reimburse opposing parties for the expenses they incur because of the failure. The last sentence of (b) and the penultimate sentence of (d) are identically structured; both in essence provide:

In lieu of any of the foregoing orders or in addition thereto, the court *shall* require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.¹⁹⁴

The Advisory Committee's note to the 1970 amendments indicates that the rule makers intended these sentences (which were introduced in 1970) to encourage federal judges to make expense awards by creating a substantial presumption in their favor. According to the committee these subdivisions accomplished that end by placing a "burden" on parties who failed to obey an order or to satisfy a discovery obligation; they could "avoid expenses" only by offering substantial justification or excuse for their behavior.¹⁹⁵ Unfortunately, the awkward phraseology of these provisions and, more significant, the structure of the paragraphs preceding them seriously compromise the rule's ability to communicate what the drafters intended and to accomplish the purpose of encouraging judges to make expense awards. The portions of subdivisions (b) and (d) that precede the sentence authorizing expense awards inform the district court judge that *after* she has concluded that a party failed to comply with an order or to fulfill a discovery obligation, she "*may* make such orders in regard to the failure as are just."¹⁹⁶ Thus if subdivisions (b) and (d) are read literally, the presumption described in the expense award sentences can become operative only *if* and *after* the court, exercising a discretion these portions of the rule neither guide nor restrain, decides that it would be just to enter some order "in regard to the failure." In other words, the presumption the rule literally creates is *not* that after a *failure* is established, an expense award should be made. Instead, the presumption is that if a judge freely decides that a party's conduct should be sanctioned, she should include an award of expenses in her sanctions order unless the

194. Fed. R. Civ. P. 37(b)(2)(E), (d) (emphasis added).

195. 48 F.R.D. 538, 540 (1970). Ellington reads the provision in Rule 37(a) as "according successful movants a presumptive right to recover their reasonable expenses . . . unless the losing party was substantially justified in resisting discovery." Ellington, Study, *supra* note 16, at 5.

196. Fed. R. Civ. P. 37(b)(2), (d) (emphasis added).

party charged with the failure can justify or excuse that failure. One additional difficulty with the expense award provisions is noteworthy: while they purport to make the burden of justification heavy (the failure must be shown to have been “substantially justified”), they offer lenient judges an out by suggesting that the alternative burden of showing that “other circumstances make an award of expenses unjust” can be satisfied by a mere preponderance of the evidence.

It would be naive, of course, to suggest that the judicial reluctance to make expense awards, a reluctance Ellington’s research shows has persisted for a decade *after* the 1970 amendments,¹⁹⁷ is largely attributable to the problems in draftsmanship I have just described. It seems equally obvious, however, that these problems do not enhance the effectiveness of the rule and that an effort to eliminate them is in order. Unfortunately, the Advisory Committee’s proposed version of the sanctions subdivision for Rule 16 tracks the structure of subdivisions (b) and (d) of Rule 37.

One additional serious limitation of Rule 37 remains to be described. For reasons I do not pretend to fully comprehend, the rule does not clearly authorize courts to impose sanctions for all of the major kinds of discovery abuse. For example, unless a party violates a court order in the process, Rule 37 apparently provides no authority for sanctioning even intentional efforts to use discovery tools to harass or pressure an opponent or to delay the development of a case. Thus even egregious examples of willful “overdiscovery” are not explicitly proscribed by Rule 37. The rule’s failure to reach this form of discovery abuse has been widely criticized¹⁹⁸ and cannot be rationalized on the theory that overdiscovery is so uncommon that its effects are inconsequential. When asked in open-end questions to identify the principal problems in the discovery system, one of every two lawyers we interviewed volunteered complaints about overdiscovery and 40 percent cited some type of harassment.¹⁹⁹ Among predominantly big case lawyers, these figures were even higher: more than 60 percent cited overdiscovery and about 45 percent mentioned harassment.²⁰⁰

The absence of clear authority in Rule 37 to sanction these kinds of discovery abuses unless they violate orders previously entered in the case undoubtedly discourages judicial efforts to contain such tactical excesses.²⁰¹

197. Ellington, Study, *supra* note 16, at 3–6.

198. Flegal & Umin, We’re Not There Yet, *supra* note 27; Rosenberg & King, Curbing Discovery Abuse, *supra* note 13; American Bar Association, Section of Litigation, Second Report of the Special Committee for the Study of Discovery Abuse (Jan. 1980), reproduced in 5 Litigation News 9 (Apr. 1980); Kaminsky, Proposed Federal Discovery Rules, *supra* note 13, at 922–23, 990–91.

199. Brazil, Civil Discovery, *supra* note 2, at 825, 831.

200. *Id.* at 831; but see Ellington, Study, *supra* note 16, at 92–102, 121.

201. The difficulty of determining what constitutes excessive discovery or overdiscovery also is an obstacle to effective judicial restraint on these forms of abuse. See, e.g., Rosenberg & King, Curbing Discovery Abuse, *supra* note 13; Ebersole & Burke, Discovery Problems, *supra* note 12, at 76.

It also has forced the federal courts who feel constrained to respond to these abuses to look elsewhere for a source of authority to do so. Unfortunately, neither of the two alternatives, 28 U.S.C. section 1927 and the courts' inherent authority to protect the integrity of their proceedings, has proved adequate to meet the need.

Section 1927 empowers federal courts to order a lawyer "to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because" the lawyer "multiplies the proceedings . . . unreasonably and vexatiously."²⁰² Until it was amended in September 1980 this statute was construed as permitting awards only of costs as defined in 28 U.S.C. section 1920,²⁰³ a list that does not include attorneys' fees.

Even though the 1980 amendment added real economic muscle to section 1927, the reach of the statute remains limited. It authorizes no action at all against a *party* who abuses discovery tools. The sanction it empowers courts to impose on offending counsel is limited to compensation. The statute, unlike Rule 37,²⁰⁴ does not permit a judge to extend an award beyond the level required for compensation in order to punish or to *deter* even outrageous misbehavior.

Perhaps the most significant limitation on the reach of section 1927, however, is the mental element requirement that it apparently incorporates. While former United States District Court Judge Charles Renfrew has suggested that a showing of willfulness or bad faith should not be an inflexible prerequisite to the use of section 1927,²⁰⁵ the limited case law on point and the legislative history of the 1980 amendment of the statute support the opposite conclusion. The portion of the "Joint Explanatory Statement of the Committee of Conference" which discussed the 1980 amendment of the act contains what appears to be an endorsement of conclusions reached by three different federal courts of appeals.²⁰⁶ The committee declared that the "high standard which must be met to trigger section 1927 insures that the provision in no way will dampen the legitimate zeal of an attorney in representing his client."²⁰⁷ The committee added, in words hardly calculated to encourage resort to the authority the statute confers, that the "purpose of deterring delay would be more effectively achieved if judges warn attorneys in anticipation of a violation

202. 28 U.S.C.S. § 1927 (Cum. Supp. May 1981).

203. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (June 23, 1980).

204. See *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); Note, *supra* note 153.

205. Renfrew, *Discovery Sanctions*, *supra* note 63, at 269-70.

206. *United States v. Ross*, 535 F.2d 346 (6th Cir. 1976); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1971); *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163 (7th Cir. 1968), *cert. denied*, 395 U.S. 908 (1969). See also Werner, *supra* note 153, at 323.

207. Legislative history of Pub. L. No. 96-349, 96th Cong., 2d Sess., in [1980] U.S. Code Cong. & Ad. News 2716, 2782-83.

of section 1927 rather than simply waiting for violations to occur and imposing the sanctions provided. However, the managers decided not to require a warning as a matter of law."²⁰⁸

A finding of willfulness or bad faith also appears to be required before federal courts can invoke their "inherent powers" to legitimize imposing any kind of sanction for discovery abuse. Although the precedential and conceptual support for this requirement may not be overwhelming, Justice Powell recently concluded that "a specific finding" that counsel's conduct "constituted or was tantamount to bad faith . . . would have to precede *any* sanction under the court's inherent powers."²⁰⁹

While the full significance of the mental element prerequisite to invoking section 1927 or the court's inherent powers is difficult to assess, it seems fair to assume that the bad faith requirement substantially reduces the utility of these two sources of authority as weapons for combating discovery abuse. As the Advisory Committee conceded in the notes explaining the 1970 elimination of the willfulness requirement from Rule 37(d), the "concept of 'wilful failure' is at best subtle and difficult, and the cases do not supply a bright line."²¹⁰ The difficulty of achieving a sufficient level of confidence about their ability to draw that line undoubtedly discourages some judges from imposing sanctions when such an exercise is a precondition. Judges also may be inhibited by the procedural and evidentiary burdens that must accompany an effort to establish clearly in the record that a finding of bad faith or willfulness is justified. Courts that already feel intense docket pressures, and that generally disdain involvement in discovery matters, are likely to resist launching the substantial, digressive litigation often necessary to determine whether an attorney's or party's acts were inspired by the requisite level of essentially subjective culpability. The increased likelihood of being reversed on appeal when such findings are required can only intensify this already considerable reluctance.

B. The Proposed Amendments to Rule 26

It is in part because of these limitations on the effectiveness of section 1927 and inherent powers as instruments for checking discovery abuse that the Advisory Committee's proposed amendments to Rule 26 are so important. Among other things, these amendments (1) would explicitly confer on federal trial courts the power to limit excessive discovery²¹¹ and

208. *Id.*

209. *Roadway Express, Inc. v. Piper*, 447 U.S. at 767 (emphasis added). Apparently five justices subscribed to the views Justice Powell expressed in this opinion about the court's inherent powers. See *id.* at 764 n.11, and Justice Blackmun's partial concurrence, *id.* at 768.

210. 48 F.R.D. 538, 541 (1970).

211. Advisory Committee, Proposed Amendments, *supra* note 11, at 23.

(2) would require counsel and unrepresented parties to certify that every request for or response to discovery is "consistent" with the federal rules, "interposed in good faith and not primarily to cause delay or for any other improper purpose" and is "not unreasonable or unduly burdensome or expensive, given the nature and complexity of the case, the discovery already had in the case, the amount in controversy, and other values at stake in the litigation."²¹² Equally important, the new paragraph would *compel* courts to impose "an appropriate sanction" whenever "a certification is made in violation of the rule."²¹³

There are, of course, grounds for skepticism about how much a certification requirement like this will affect either day-to-day discovery practices or judicial willingness to police the system. Rule 11 has included a less comprehensive but at least roughly comparable requirement since 1938.²¹⁴ Professor Risinger's research has shown, however, that if Rule 11's certification requirement has significantly affected pleading practice, it has done so almost *invisibly*. His study uncovered only 11 reported violations of the requirement.²¹⁵

While it is conceivable that a certification requirement in Rule 26 might suffer the same fate, there are many good reasons to support adoption of this proposal. I already have suggested one of the most important: the new paragraph in 26(b)(1) would contain the only explicit prohibition of overdiscovery and of harassing use of discovery tools to be found in the rules. It would simultaneously represent an important and long overdue judicial and legislative condemnation of these practices and would provide, for the first time, a clear basis in the rules for sanctioning these troublesome forms of abuse. Moreover, the Advisory Committee's proposed note makes it clear that the standard for determining whether an attorney violated the certification requirement is objective.²¹⁶ It follows that a violation could be established even if the evidence was insufficient to support a finding that the offending lawyer (or unrepresented party) knowingly or recklessly disregarded the rule's commandments. Since negligent misbehavior could support a sanction under this rule, its adoption would add significantly to the authority to curb abuses that courts cur-

212. *Id.* at 23-24.

213. *Id.* at 24.

214. Fed. R. Civ. P. 11, as currently phrased, declares that an attorney's signature on a pleading "constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." The Advisory Committee's Proposed Amendments include a substantial amplification of Rule 11's certification requirement. See Advisory Committee, Proposed Amendments, *supra* note 11, at 6-10.

215. D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 Minn. L. Rev. 1, 34-37 (1976). For an application of Rule 11 *after* publication of Risinger's study, see *Overmyer v. Fidelity & Deposit Co.*, 554 F.2d 539 (2d Cir. 1977) (frivolous appeal).

216. Advisory Committee, Proposed Amendments, *supra* note 11, at 27.

rently derive from 28 U.S.C. section 1927 and from their inherent powers.

There are additional important respects in which adopting 26(g) (and the comparable proposals for Rules 7 and 11) could contribute to improving the discovery system and judicial control over it. The last sentence of the new rule declares, without qualification: "If a certification is made in violation of the rule, the court . . . shall impose . . . an appropriate sanction."²¹⁷ What is striking about this language, and what distinguishes it from sanctions provisions in Rule 37 (and in the draft of new Rule 16), is that it deprives the court of the power to decide *not* to sanction a lawyer's failure to satisfy the substantive obligations the rule imposes.²¹⁸ Of course, there are differences between 26(g) and Rules 16 and 37 that help account for this difference in their provisions for sanctions. The command to sanction in 26(g) is triggered only after the court concludes that there has been a "violation" of the rule, or, in the language of the Advisory Committee's note, that counsel failed "to meet the standards established" in the rule's substantive section. Apparently the committee assumes that judges who are trying to decide whether or not a violation occurred will necessarily consider whether or not counsel's behavior was, in the words of Rule 37, "substantially justified" under the "circumstances."

Rule 37(d), by contrast, does not speak in terms of "violations" or failures to satisfy "standards." Instead, it empowers parties to trigger judicial scrutiny of an opponent's behavior on a showing that the opponent merely failed to perform some specified act. After such a showing the judge's discretionary task is to decide whether or not the failure to act was "substantially justified." Under the rule, if the failure was justified, the court is to conclude that imposing a sanction would not be just. Rule 37(d) does not explicitly purport to establish standards of behavior. Rather, it identifies types of occurrences that can provoke judicial inquiry into whether the occurrences were caused by violations of norms that are not specifically described.

The contrast between the approaches in these two rules is striking: 26(g) attempts to articulate standards of conduct and then to shift the locus of judicial discretion away from deciding whether to sanction and toward deciding whether counsel's behavior failed to satisfy the articulated norms; 37(d) tries to focus judicial discretion on deciding whether

217. *Id.* at 24.

218. The Advisory Committee's proposed note confirms that the rule is designed to deprive the court of the discretion not to sanction violations. The committee declares: "The new rule *mandates that sanctions be imposed* on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The *nature* of the sanction is a matter of judicial discretion." *Id.* at 28 (emphasis added).

specified failures to act were justified, but articulates no standards to guide courts, lawyers, or litigants in making such determinations.²¹⁹ As between these two approaches, it seems to me that 26(g)'s is conceptually cleaner, more likely to be effective as a deterrent to misbehavior, less vulnerable to a due process attack on the ground that notice of proscribed conduct is not sufficiently clear, and more likely to encourage judges to use their sanctioning power. A judge who is given a norm, even if it is not perfectly precise, is more likely to feel confident that sanctioning is justified than is a judge who is left to grope for standards in vague impressions of how things are done or the state of the art. Similarly, a rule whose language makes imposing a sanction mandatory after a finding of misbehavior holds more promise of overcoming judicial reluctance to sanction than does a rule whose language encourages judges to feel endowed with a broad range of essentially unguided discretion.

Given these advantages, I believe that the Advisory Committee should try to reformulate as many sanctioning provisions as possible to track the *structure* of proposed Rule 26(g). The goal for each rule should be to describe, with as much particularity as possible, behavioral obligations and the appropriate standards for evaluating failures to satisfy those obligations, then to make imposition of sanctions compulsory after a finding that counsel's conduct fell below the norm.

There is one respect, however, in which even Rule 26(g)'s provision for compulsory sanctions might be improved. As proposed by the Advisory Committee, that provision leaves judges with discretion to decide which of the possible sanctions is "appropriate" in any given case.²²⁰ While the rule would point out that appropriate sanctions "may include an order to pay to the other party or parties the amount of the reasonable expenses occasioned [by the violation], including a reasonable attorney's fee," neither the proposed version of this paragraph nor the committee's note makes any explicit effort to encourage courts to impose this expenses sanction. By leaving trial judges unguided in this area the new rule needlessly and unwisely imperils what should be recognized as clear rights of litigants.

C. The Entitlement Theory of Expense Awards

It seems to me that the litigation expenses one party incurs solely or primarily as a consequence of an opponent's violation of his obligations under the discovery rules cannot fairly be viewed as anything other than

219. For elaborations of the argument that the norms in Rule 37 are neither clear-cut nor stable, see generally Comment, *supra* note 190; Note, *supra* note 135; Note, *supra* note 153.

220. The Advisory Committee's note confirms the clear import of the rule by declaring: "The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances." Advisory Committee, Proposed Amendments, *supra* note 11, at 28.

an entitlement.²²¹ In fact, it may be neither accurate nor helpful to conceptualize an award that is limited to compensating a party for “the amount of the reasonable expenses occasioned” by an opponent’s failure to comply with discovery rules as a *sanction*. That word carries for attorneys a subcultural (if not a legal) connotation of punishment that inhibits corrective judicial intervention in the discovery process²²² and that, more fundamentally, is not appropriate every time a compensatory award should be made. For example, the fact that a failure to comply with a discovery order was caused by nothing more culpable than the negligence of counsel does not preclude imposition of a compensating sanction.²²³ Indeed, the analogy between situations in which compensatory sanctions are appropriate and the basic paradigm of a tort is close and compelling. When a party or its agent (attorney) violates a discovery rule in a manner or situation that foreseeably will force another party to spend more money (e.g., on counsel fees), in essence the offending party is causing the other party to suffer damages as a direct result of that breach of a legally recognized duty. A breach of duty that proximately causes measurable damages to another is generally recognized in the law as giving rise to an enforceable right in the party who suffered the damages.²²⁴ When damages are proved in such situations, courts generally are not given the discretionary power to refuse to award them or to offer some alternative remedy that for some reason the court finds more appropriate. Unless there is some consequential flaw or strain in this analogy, it is difficult to see a principled basis for denying the victim of discovery abuse a right to recover from the offender.

221. Helen Cutner comes close to articulating this view in her vigorous essay *Discovery*, *supra* note 13, at 983. Chief Judge Peckham appeared to acknowledge this when he recently wrote: “It seems reasonable that a party who has been inconvenienced by his opponent’s violation of a pretrial order or rule should be entitled to recover his costs and attorney’s fees.” Peckham, *Judge as Manager*, *supra* note 34, at 801. For a cautiously contrary view, see Ellington, *Study*, *supra* note 16, at 121–22.

222. Ellington reports, for example, that judicial reluctance to sanction “reflects a desire to maintain a good working relationship with the bar and a feeling that to impose a sanction on client or lawyer is to embarrass and humiliate another member of the profession. Hence, sanctions are reserved only for the most serious and persistent abuses that cause demonstrable harm to the complaining side.” Ellington, *Study*, *supra* note 16, at 113.

223. See the Advisory Committee’s note explaining the 1970 amendments of Rule 37, 48 F.R.D. at 541–42.

224. The Committee of Conference came close to recognizing this view in its Joint Explanatory Statement for the 1980 amendment of 28 U.S.C. § 1927. While the 1980 changes do not *compel* courts to award “excess costs, expenses, and attorneys’ fees reasonably incurred because of [the proscribed] conduct,” the Committee’s Statement suggests that a judge must have a good reason for refusing to do so. According to the statement:

The managers agreed that if an attorney does violate the existing standard covering dilatory conduct, and by such conduct causes the other parties to incur expenses and fees that otherwise [they] would not have incurred, the attorney *should be required* to satisfy personally this full range of excess costs attributable to such conduct.

[1980] U.S. Code Cong. & Ad. News 2782 (emphasis added). The support this statement offers to the argument I make in the text is limited, however, by the fact that a showing of some form of willfulness appears to be a prerequisite to invocation of § 1927. See text, *supra*, at pp. 936–37.

Nonetheless, Ellington's research suggests that the language of current provisions for sanctions has not moved judges to recognize any such entitlement. In fact, Ellington's study shows that judges view the purpose of compensating the party injured by another person's violation of a discovery obligation as a relatively unimportant factor when deciding whether or not to impose sanctions.²²⁵ Thus if the Supreme Court and Congress want to incorporate the entitlement notion into the law of discovery, they will have to rewrite the rules and accompanying commentary to explicitly acknowledge the right.

There is one obvious, but only superficially appealing, doctrinal rejoinder to the argument that parties injured by another person's breach of a discovery obligation have a right to compensation. For good or for ill, it has long been the "American rule" that attorneys' fees, which often are the biggest single element of the cost of litigating, will not be shifted from one party to another unless a statute so directs, the lawsuit produces a common fund or common benefit, or it can be shown that the losing party acted or litigated in "bad faith."²²⁶ This American rule, however, has not been viewed as constitutionally mandated. Congress has exercised many times its now well-established authority to create exceptions.²²⁷ Moreover, the desire to encourage private enforcement of important public policy has inspired many of the statutory provisions through which Congress has authorized or compelled courts to shift fee expenses to prevailing parties.²²⁸ Since the rules of discovery reflect important public policy, since authorizing recovery of the litigation expense incurred as a result of a violation of those rules would encourage private enforcement of them, and since encouraging private enforcement may well be essential to the effectiveness of these rules, there is no obvious reason why this is not a proper occasion for creating another exception to the American rule.

How such an exception and the accompanying right to compensation could be established is more problematic. The constitutionally safest means would be an independent congressional act that recognized the right and instructed the lower federal courts to enforce it. The Supreme Court's supervisory power over lower federal courts probably is an insufficient source of authority to establish a right to an expense award. Nor does it seem likely that establishing such a right would fall within the in-

225. Ellington, Study, *supra* note 16, at 109-10.

226. *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 245 (1975). Courts have not always been careful to distinguish bad faith in the decision to commence litigation from bad faith in the manner of conducting the litigation. Each kind of bad faith has served as a basis in American courts for shifting attorneys' fees. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. at 765-67.

227. 421 U.S. at 260, 263, 271.

228. *Id.* at 263.

herent powers of the federal courts to take measures necessary to maintain the integrity of their proceedings. For one thing, it is not clear that establishing such a right is necessary to preserve that integrity. For another, it appears that the federal courts' inherent powers could be used, at best, only to authorize awards of expenses caused by willful violations of procedural rules or by conduct accompanied by bad faith.²²⁹

The alternative is to establish the right through amendments to the Federal Rules of Civil Procedure. Whether the rules could be used to achieve this end is an open question. An abstract argument to support such an effort might begin by noting that the rules must be submitted to Congress before becoming effective.²³⁰ A rule that must survive congressional review, the argument would continue, is the product of a power that is ultimately congressional. It would follow that a properly processed rule could be considered an act of Congress and, as such, fully capable of carving out an exception to the American rule and establishing a right to an expense award.

While this line of reasoning may have some superficial appeal, it does not come to terms with the bald statement in the Rules Enabling Act that the rules prescribed by the Supreme Court "shall not abridge, enlarge or modify any substantive right."²³¹ While this language would appear to destroy any contention that the rules could create the kind of right I advocate, the Supreme Court's interpretations of the act leave at least some room for doubt. Not surprisingly, the Court has construed the act liberally, in favor of an expansive rule-making power for the Court. In the leading case of *Sibbach v. Wilson & Co.* the Court boldly acknowledged that through the federal rules the Court legitimately had "altered and abolished old rights or privileges and created new ones in connection with the conduct of litigation."²³² The Court obviously assumed, however, that the new rights the rules created were in some meaningful sense "procedural"; the majority went on to declare that the "test" for determining whether a given rule exceeds the Court's authority under the act "must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law." The *Sibbach* opinion offered no other substantial guidance for distinguishing procedural from substantive rights in this context.²³³

The most recent major pronouncement in this field by the Supreme

229. See *Roadway Express, Inc. v. Piper*, 447 U.S. at 764–67.

230. 28 U.S.C. § 2072.

231. *Id.*

232. 312 U.S. 1, 14 (1941).

233. As the Court pointed out some 25 years later, the line between "substance" and "procedure" may be drawn in different places in different contexts, e.g., something that is "substantive" for *Erie* purposes may not be "substantive" for purposes of the Rules Enabling Act. See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

Court, however, offers at least some support for the contention that a federal rule acknowledging a right to be reimbursed for expenses caused by breaches of discovery obligations might not violate the Rules Enabling Act. In *Hanna v. Plumer* the Court in essence concluded that a federal rule is within the authority conferred by the act as long as it is “arguably procedural.”²³⁴ According to the *Hanna* majority, the act confers “a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.”²³⁵ Read expansively, *Hanna* may stand for the proposition that a Federal Rule of Civil Procedure is “arguably procedural” (and thus within the ambit of the act) whenever it has been duly adopted—because during the enactment process both the Court and Congress, presumptively rational bodies, decided that the rule regulated “procedural” matters.

The more closely one looks at this line of reasoning the less penetrable and the more circular it appears. The bottom line in this process probably is political, not analytical. The Supreme Court is not likely to conclude that when it adopted a rule it exceeded its own authority under the act. Thus, if the Court wants to use the federal rules to acknowledge an entitlement to be reimbursed for certain kinds of litigation expenses, the only real obstacle to achieving that end is Congress. So we have come full circle: whether the right I propose will be recognized ultimately may depend upon whether Congress thinks doing so is, on balance, a good idea. I turn now to address that question.

Any suggestion that the federal rules formally acknowledge that litigants are entitled to compensation for expenses incurred because of another party’s violation of discovery obligations is likely to provoke objections based on practical considerations. We must squarely confront the possibility that this step would dramatically multiply litigation, thus intensifying the backlog problems that are a principal source of the discovery system’s woes. If the rules clearly recognize a right to recover damages caused by breaches of discovery duties, will hordes of litigants be quick to pursue that right? In fact, will they be too quick to pursue it? Would the possibility of recouping substantial fees blur the combat vision of some parties and lawyers and lead them to see violations where there are none? Might the prospect of reimbursement make it more difficult to resist the temptation to use motions for fees as a means of delaying the action or harassing an opponent? Even more disconcerting is the possibility that responsiveness to the duty to represent clients zealously and con-

234. The phrase “arguably procedural” appears in Justice Harlan’s concurring opinion. *Id.* at 476.

235. *Id.* at 472.

cern about being sued for malpractice would move litigators to append petitions for fees to every motion to compel and every request for a protective order.

We can make the specter of a litigation explosion seem even more ominous by acknowledging several additional questions. Would efforts to establish a right to compensation often mushroom into complex lawsuits in their own right? Would the courts be forced to permit parties to conduct *discovery* into *why* opponents failed to meet *discovery obligations* in the “principal” action? Would proving a violation (or fending off an accusation) require *expert* testimony? Would establishing the amount of the expenses incurred because of the violation necessitate complex and subtle calculations not only of professional fees, but also of potentially elusive figures for business disruption and opportunity costs? Would parties pursuing or resisting a compensation award have a right to have a *jury* decide the fact questions involved? Would compensatory awards be treated as final judgments from which appeals could be taken immediately? Would parties or lawyers routinely seek appellate review of such compensatory awards?

These are important and potentially troublesome questions, which do not admit at this point of doubt-free answers. There are reasons to believe, however, that the litigation nightmare they conjure is something less than inevitable. Chief Justice Robert F. Peckham very recently has responded to concern that increased imposition of monetary awards could provoke substantial additional litigation with the following reassuring words:

It might further be argued that the free imposition of monetary sanctions will generate “mini-trials” to contest the sanctions, complete with their own pretrial orders, violations of these orders, and yet more sanctions for those violations. In fact, however, sanctions have rarely been challenged. Imposition of costs usually involves amounts of money not sufficiently great to justify the expense and bad publicity that would be involved in challenging the sanction. Moreover, it is usually quite clear that a violation of a pretrial order has occurred. If, for example, a party fails to appear at a scheduled conference, and offers no satisfactory excuse, there is obviously no need for more than a simple hearing, and little to contest thereafter.²³⁶

While Peckham writes in the context of the current versions of the sanctions rules, it is not at all clear that the acknowledgment of a right to compensation that I propose would be perceived by lawyers as a significant change. As noted above, Rule 37 was rewritten in 1970 in an effort to establish a presumption in favor of awarding financially compensatory sanctions for various kinds of violations of discovery duties. Despite this

236. Peckham, *Judge as Manager*, *supra* note 34, at 803 (footnote omitted).

effort litigators remain reluctant to seek sanctions. Thus, even though for more than a decade the rule has appeared to offer an opportunity to recoup substantial fees, no hordes of litigants have sought to capitalize on that opportunity. Of course, one explanation frequently offered for that timidity is the widespread belief that judges are not likely to grant motions even for modest financial sanctions. And one purpose of redrafting the sanctions provisions would be to *reduce* that judicial reluctance. It seems highly unlikely, however, that the proposed redrafting will have an immediately pronounced effect on either judicial behavior or lawyers' perceptions of it. If change comes at all, it is likely to be gradual, and a gradual change in judicial behavior would not provoke a precipitous change in lawyers' behavior.

Some of the other reasons that have been offered to explain the fact that lawyers do not frequently seek sanctions reinforce my prediction that redrafting the rules to reflect the entitlement concept would not provoke a flood of new litigation. Our interviews of Chicago lawyers exposed what we have called the "regulars" phenomenon.²³⁷ "Regulars" are attorneys who move in the same subworld of litigation, who have developed similar styles of practice, and who know one another or at least know of one another's law firms. The lawyers in each loose sphere of "regulars" believe they have to live with one another; they expect to encounter one another not only in subsequent lawsuits but also in professional organizations and social settings. Because they have to live with one another, and because they tend to share a set of assumptions about what professional conduct is acceptable, even if not fully in compliance with the formal rules, regulars probably will remain hesitant to initiate public proceedings to punish other regulars or their clients.

In a modest variation on this theme, former United States District Court Judge Charles Renfrew has offered the following explanation for what he perceives as "an unusual reluctance among lawyers to seek sanctions where they clearly would be justified in moving them":

I suspect that the reason for this reluctance stems in large part from lawyers' recognition that sanctions for discovery abuse are a double-edged sword. A lawyer who wants the option to abuse discovery when it is to his client's advantage will hesitate to seek sanctions when his client is the victim of such practices—especially if the sanctions are imposed on the attorney instead of, or in addition to, the client. As a result, a kind of gentlemen's agreement is reached, with the tacit approval of the bench, which is extremely convenient for the attorneys who avoid the just imposition of sanctions and extremely unfair to the litigants who pay more and wait longer for the vindication of their rights than they should.²³⁸

237. Brazil, Views, *supra* note 2, at 240–43.

238. Renfrew, Discovery Sanctions, *supra* note 63, at 272.

Still another source of hesitancy to seek sanctions is counsel's fear that doing so can foster animosities in opposing litigators and parties, animosities that could encumber subsequent discovery and damage chances for settlement. Instead of deterring subsequent abuses or violations by an opponent, seeking sanctions can provoke resentment and inspire retaliation. That possibility means that to seek sanctions is to take a not very precisely calculable risk: will a sanctions motion more than pay for itself and encourage better behavior by your opponent for the remainder of the action, or will such a motion, even if "successful," provoke increased resistance, retaliatory uses of discovery tools, and a higher price for settlement, the costs of which are likely to exceed by a considerable margin any direct return from the motion itself? In lawsuits where animosities already are great, such concerns might not act as significant deterrents to seeking sanctions, but it is unlikely that redrafting the sanctions provisions would substantially affect behavior in such actions anyway. And while it may be true that the kind of calculation described above is relatively easy when the sanction sought is a potentially case-dispositive ruling, the changes in the rules I propose would relate only to compensatory awards.

Noting concern in some quarters that "an even greater judicial receptiveness to the employment of sanctions will cause abuse of motions for sanctions," former Judge Renfrew has argued that there is yet another effective source of restraint on such abuses. According to him: "A principled application of sanctions *based on adequate proof of misconduct* will not unnecessarily encourage the filing of insubstantial motions for sanctions, and a *requirement of some showing of misconduct in addition to a ruling against the allegedly offending individual* should serve to screen out the frivolous motions."²³⁹ What he seems to be suggesting here is that judges can effectively discourage motions brought in bad faith, or without a substantial basis, by communicating clearly to the bar that sanctions are by no means free for the asking and will be imposed only after the moving party has established (1) that an opponent failed to meet a discovery obligation and (2) was guilty of some brand of misconduct in the process.

There are difficulties with this reasoning. One is that it is inconsistent with the principal purpose for which Renfrew wrote: to encourage judges to use their sanctioning authority more often. A second difficulty arises from Renfrew's apparent confusion about the location of the burdens of persuasion in sanctions proceedings. While it seems reasonable to infer that the threshold burden of *establishing* that a party failed to meet a discovery obligation or to obey a discovery order must be borne by the party

239. *Id.* at 278 (emphasis added).

moving for sanctions (or, perhaps, by the court),²⁴⁰ it also seems clear that when the sanction the court is considering is a monetary award for expenses, the rule makers intended to impose *on the party (or attorney) whose failure has been established* the burden of persuading the court that its conduct was “substantially justified or that other circumstances [would] make an award of expenses unjust.”²⁴¹ Moreover, by declaring that the defending party could avoid the expenses sanction only by showing that its failure was *substantially* justified under the circumstances, the rule makers apparently intended to impose a burden that could not be satisfied by a mere preponderance of the evidence. Unfortunately, the rules say absolutely nothing about who has what level of burden when some type of sanction other than expenses is under consideration. And because sanctions that impair a party’s capacity to fully present the merits of its position raise due process concerns that are not raised by mere awards of expenses,²⁴² it is not reasonable simply to assume that the rules locate burdens of the same weight in the same places for all types of sanctions. With respect to awards of expenses, however, it seems clear that Renfrew’s assumption that the party moving for sanctions must bear all the burdens is misplaced. So, too, is his reliance on the location of those burdens to discourage thinly premised motions for compensatory sanctions. The fact that a lawyer and former judge of Mr. Renfrew’s experience and sophistication apparently misunderstood this important aspect of the rules is compelling evidence of the need to redraft and clarify them.

While we cannot rely on the location and size of the burden of justification to discourage the filing of thinly premised motions, the location and size of that burden do offer grounds to be optimistic that proceedings to determine whether a party has a right to compensatory sanctions will not routinely be complex and protracted.

By imposing a substantial burden of justification on the party from whom compensatory sanctions are sought, the rules can reduce dramatically the likelihood that substantial discovery will be necessary in these proceedings. If parties moving for expense awards perceive that the bur-

240. Neither Rule 37 nor the accompanying note makes it clear who has the initial burden of persuasion when the *court* initiates sanctions proceedings *sua sponte*. In fact, the rule does not explicitly empower the court to act on its own initiative when it perceives a potential violation. See, e.g., Rule 37(d). It also is not clear that the court is empowered to compel another litigant to conduct investigations or make evidentiary presentations for the purpose of satisfying the *court’s* desire to ascertain whether a violation of a discovery rule has occurred. It probably is fair to assume, however, that in many instances when the court initiates sanctions proceedings *sua sponte* the record or events that transpire in front of the court will make the offending party’s failure so obvious that the location of the burden of persuasion is a question of little or no practical significance.

241. Fed. R. Civ. P. 37(b) & (d); Advisory Committee’s note to the 1970 amendments to Rule 37, 48 F.R.D. at 540–41.

242. How due process considerations affect sanctions issues is a complex subject, which I will explore in detail in a subsequent article in this series.

den is on their opponent and that it is sizable, it is safe to assume that they frequently will see no reason to conduct any discovery at all. It also seems reasonable to assume that in a substantial percentage of cases the defending party's search for substantial justification for *its* failure will focus primarily or exclusively on its own situation, thus obviating the need for extensive discovery into the background of its opponent's discovery request. The courts could reduce even further the likelihood that parties resisting motions for expense awards would seek discovery into how opponents conducted their side of the litigation by sharply limiting the role the unclean hands doctrine can play in sanctions decisions. New rules would have that effect if they declared explicitly that an opponent's misbehavior is relevant to whether a given failure to satisfy a discovery obligation is sanctionable only when the defending party can show that a violation of a procedural rule by another party or attorney was the direct and sufficient cause of the defending party's failure. Moreover, if the rules and case law made it clear that escaping liability for expenses will require an extraordinarily strong showing of justification, there might be many instances in which the cost of making such a showing, coupled with the poor likelihood of success, would induce the defending party to concede or to mount only a token defensive effort.

By strictly enforcing a requirement that would permit escape from liability for expenses only on a showing of truly substantial justification, the courts also could reduce (or perhaps destroy) the relevance of expert testimony and thus could reduce the likelihood that battles between experts would encumber sanctions proceedings. Under a demanding justification requirement, courts could communicate to the bar that they will not be moved by defenses that rely primarily on arguments about how lawyers in a given area or litigants in a given industry customarily behave or customarily treat their discovery obligations. The courts, in other words, could make it clear that the community standard is not the relevant norm—that the rules independently fix the controlling norm on a high plane in large measure to avoid perpetuating unacceptable practices and sloppy professional habits. By adhering to this position the courts could in many instances justify refusing to hear testimony about the state of the art.

It also seems easy to exaggerate the potential difficulty of establishing the amount of damages caused by violations of discovery obligations. District courts could establish and periodically review a presumptively reasonable hourly rate for fees. In most compensation proceedings, calculating the moving party's damages probably would require little or nothing more than making a judgment about the number of additional hours the violation forced the moving party's lawyer to spend on the matter, then multiplying that figure by the prescribed reasonable hourly

rate.²⁴³ The courts also could make it clear, through local rules and decisions, that they would deviate from this approach only on a very persuasive showing that justice so required. If experience under a new entitlement approach showed that parties often tried to prove additional elements of damage (e.g., business disruption costs) *and* that such efforts imposed a serious strain on judicial resources, the rule makers might be justified in formally limiting entitlement damages to attorneys' fees. No such restriction should be imposed, however, merely on the basis of speculation about problems that past experience suggests are not likely to be large.

Is the specter of litigants demanding a right to trial by jury in proceedings to determine whether a compensatory award is warranted a more real source of concern? Without presuming to offer a thorough Seventh Amendment analysis, I feel modestly confident that the Supreme Court would uphold a federal rule of procedure or a separate congressional act that would deny a right to jury trial in such proceedings. The common law, of course, has not recognized such a right.²⁴⁴ Nor has the right been held to extend to civil contempt proceedings, which are at least vaguely analogous.²⁴⁵ Moreover, the Supreme Court has held that in creating statutory rights, even when those rights are in some important respects comparable to common law rights, Congress may deny the right to jury trial on the ground that conferring it would be incompatible with an administrative scheme or could frustrate attainment of legitimate statutory goals.²⁴⁶ While freedom from doubt is a pleasure rarely, if ever, experienced by sophisticated Seventh Amendment analysts, the precedents support a cautious optimism that the Supreme Court would find no offense to the Seventh Amendment in a statute or rule that acknowledged a right to reimbursement for expenses caused by violations of discovery rules but denied a right to jury trial in the proceedings to determine whether such right existed in a given situation.

Similarly optimistic predictions seem in order with respect to concern about the possibility that litigants might use appeals of discovery compensation awards to delay or disrupt pretrial case development or concern that appeals from such awards might consume inordinate amounts of precious appellate court resources. To prevent abuses of the appellate

243. There will be occasions, of course, when calculating fees will be more complicated, as when the violation has affected counsel's discovery efforts over a protracted period.

244. The role the common law tradition plays in Seventh Amendment analysis is discussed in *Ross v. Bernhard*, 396 U.S. 531 (1970).

245. According to Wright: "There is no jury trial in a civil contempt proceeding." 3 Charles Alan Wright, *Federal Practice and Procedure: Criminal* § 705 (St. Paul, Minn.: West Publishing Co., 1969). See *Shillitani v. United States*, 384 U.S. 364 (1966).

246. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Katchen v. Landy*, 382 U.S. 323 (1966). Cf. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977).

process for tactical purposes, courts could treat these awards as interlocutory orders²⁴⁷ and could require prevailing parties to wait until final judgment on the merits to collect. Rules developed to cope with the appeals problem, however, should strongly discourage judges from postponing decisions about whether a lawyer's or party's behavior constituted a breach of a discovery duty and, if it did, the amount of money damages the breach caused. Some of the lawyers we interviewed complained that some judges already have adopted the practice of postponing making the decision whether to impose sanctions until after final judgment on the merits. The consequence of such postponements reportedly is that often decisions about sanctions are never made. A huge percentage of civil lawsuits terminate by settlement rather than by judgment, and lawyers told us that disputes about sanctions often are buried or forgotten in the settlement process. Attorneys we interviewed also reported that by the time a case has proceeded all the way to judgment, counsel and court often have lost their interest in pretrial behavior that might have warranted a sanction. Thus even in the relatively unusual cases that do terminate in judgment there appears to be a substantial likelihood that postponed decisions about sanctions will never be made. For these reasons trial courts should be strongly encouraged to make such decisions near the time the alleged breach occurs. Postponing the time for collecting awards clearly made may also create risks, but if an order acknowledging a right to a fixed sum has been entered the beneficiary of that judgment at least has something definite with which to bargain during settlement negotiations.

Another, perhaps less problematic, means of coping with the appeals problem is to try to reduce the parties' incentives to appeal by adhering to a standard of review for compensatory awards that is very deferential to the conclusions reached by the district judge (or magistrate). Indeed, under the rule I propose, it seems highly unlikely that appellate courts

247. Under the *current* version of Rule 37 the courts generally have held that sanctions are immediately appealable *only* if they in effect dispose of claims or substantially impair a party's ability to litigate the merits of its position. See Robert G. Johnston, *Appealability and Reviewability of Discovery Orders*, 53 Chi. B. Rec. 210 (1972). See also Cutner, *Discovery*, *supra* note 13, at 947-48. Under the sponsorship of the Federal Judicial Center, the White Center for Law, Government, and Human Rights at the Notre Dame Law School has prepared a study in which the authors report:

Sanctions other than dismissal or default are not "final orders"; they are interlocutory in nature and are reviewable only when an appeal is taken on a final order. A final judgment is rarely reversed because of an action taken during pretrial. Some discovery orders become moot during the course of the proceedings, and, therefore, are not subject to review on appeal. Interlocutory orders may be reviewed immediately, however, by writ of mandamus or prohibition, by statutory permissive appeals, and under the collateral order doctrine.

Robert E. Rodes, Jr., Kenneth F. Ripple, & Carol Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 102 n.40 (Washington, D.C.: Federal Judicial Center, July 1981) (citing, *inter alia*, Johnston, *supra* this note).

It may not be safe to assume, however, that the law developed under *current* rules would be applied without change to rules reformulated along the lines I propose.

could justify using any standard other than "clearly erroneous" to review the findings on which the district judge based such an award. The trial courts would be empowered to make only essentially factual determinations when deciding whether to make a compensatory award. At least in most instances, the judge's task under my proposal would be confined to ascertaining whether the defending party failed to perform some act required by the discovery rules and, if so, whether that failure was made necessary by circumstances beyond that party's control. Only the "clearly erroneous" standard would be appropriate for review of these kinds of determinations by a trial court.²⁴⁸

As my efforts in the preceding paragraphs suggest, it is not possible to completely dispel concern about the practical difficulties that might ensue if the rules acknowledged an entitlement to compensation for expenses caused by violations of discovery obligations. We simply cannot muster an indisputable prediction about the effects of such a change. It is clear, however, that there are good grounds for believing that adopting the entitlement approach would not provoke anything approaching a litigation explosion; too many restraining forces stand between that alarmist vision and reality. In this context, if principled legal analysis and morally persuasive argument show that the law should acknowledge the entitlement, it seems to me that we should resolve the inevitable doubts about practical consequences in favor of experimenting with the change. The ineffectiveness of current sanctions provisions should bolster our resolve; the failure of those provisions to provide clear guidelines for courts or lawyers and to promote vigorous enforcement of the rules evidences the need for a new approach. And, of course, if a new rule were to provoke serious practical problems, the rule makers would not be bound to perpetuate it; they could use the knowledge gained through the experiment to fashion a more effective alternative.

Before turning to the reformulations of the rules I propose, I should acknowledge that even vigorous protection of a right to expense awards will by no means cure all the ills that afflict the discovery system. The threat of even sizable compensatory awards will not deter all discovery abuse. There will be occasions, especially in big cases, when the benefits of an abuse will clearly outweigh the cost of the ensuing expense award. It follows that the rules must continue to encourage the courts to consider the appropriateness of more severe sanctions. It also would seem advisable to incorporate into the redrafted sanctions provisions an explicit reminder that when an *attorney* has breached a duty the courts should consider referring the matter to disciplinary authorities.²⁴⁹

248. Fed. R. Civ. P. 52(a).

249. Some courts also have ordered an offending attorney's name indexed in court records "in

D. Toward Comprehensive Reformulation of Sanctions Rules

The revisions of sanctions rules I propose below are designed to clarify discovery obligations, to specify the standards under which failures to perform required acts should be evaluated, to indicate which parties have what size burdens in sanctioning proceedings, and to incorporate the notion that parties are entitled to compensation for expenses they incur as a result of another person's violation of discovery obligations. The redrafting I propose begins with explicit acknowledgment of the compensation objective in the captions for the relevant rules and subdivisions; for example, the caption for Rule 37 should read "Failure to Meet Discovery Obligations: Compensation and Sanctions." Similarly, the captions for the subdivisions that discuss sanctions in proposed Rules 7, 11, and 16 should be changed to read "Compensation and Sanctions."

Redrafting the texts of the current versions of these rules presents a more substantial challenge. However, if the sanctions provisions were restructured to follow the pattern of proposed Rule 26(g), redrafting to reflect the notion of entitlement to compensation would not be difficult. For example, the last paragraph of 26(g) would serve this purpose if it were worded as follows:

If a certification is made in violation of the rule, the responsible judicial officer,²⁵⁰ on motion or on his or her own initiative, shall order the person who made the certification or the party on whose behalf the request, response, or objection is made, to pay to the other party or parties the amount of the reasonable expenses occasioned by the violation, including a reasonable attorney's fee. In making such an order, the judicial officer, in appropriate circumstances and on such terms as are just, may apportion responsibility for paying the compensation between a party and its counsel. After ordering the payment of just compensation, the judicial officer also shall consider the appropriateness of imposing or recommending any of the sanctions authorized by Rule 37.

Subdivision (f) of new Rule 16 would require more fundamental restructuring. The version advocated by the Advisory Committee does not separately describe (1) the acts required and (2) the standards for evaluating failures to perform those acts. It also does not locate the burdens of persuasion and justification, and it does not embody the idea that parties are entitled to compensation for damages they suffer as a consequence of

the event his professional conduct in any other connection shall become a subject of inquiry." *Redd v. Shell Oil Co.*, Cir. No. C104-71 (D. Utah, Dec. 2, 1974) A.T.R.R. (BNA) No. 694 (12/24/74), A-8, A10-12. See also *American Auto. Ass'n v. Rothman*, 104 F. Supp. 655 (E.D.N.Y. 1952).

250. I use the phrase "judicial officer" rather than the word "court" because there may well be occasions when magistrates or special masters will be empowered to make the decisions described in the rule. The reference in the last sentence to "imposing or recommending" other sanctions reflects the fact that there are some kinds of sanctions that magistrates or special masters may not impose on their own authority.

another party's or lawyer's failure to satisfy the rule's requirements. As a step toward improving 16(f) in these respects, I offer the following reformulation:

(f) COMPENSATION AND SANCTIONS.

(1) Parties and counsel are required to obey all scheduling and pretrial orders. Unless a court order or local rule directs otherwise, each party must appear by counsel, or if unrepresented, in person, at every scheduling or pretrial conference.

Counsel and parties who are required under this rule or a local rule or court order to appear at any scheduling or pretrial conference are also required to prepare for the conference in a manner reasonably calculated to enable them to participate fully and in good faith.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter stipulations and to make admissions regarding all matters that the participants should reasonably anticipate may be discussed.

(2) Counsel and parties who are required under this rule or a local rule or court order to appear at any scheduling or pretrial conference are required also to participate in the conference fully and in good faith.

(3) A judicial officer or a party may initiate an inquiry to ascertain whether a party or an attorney has failed to meet any of the obligations set forth in subdivisions (1) or (2). The party or judicial officer who initiates any such inquiry bears the burden of establishing, by a preponderance of the evidence, that one or more of the obligations set forth in subdivisions (1) or (2) was not satisfied. A party will be permitted to conduct limited discovery for the purpose of carrying this burden only in unusual circumstances and only when it appears from evidence already in the record that limited discovery is likely to produce evidence that would materially aid in determining whether one or more of the obligations imposed by subdivisions (1) or (2) was not satisfied.

(aa) If a preponderance of the evidence establishes that a party or an attorney failed to satisfy any of the obligations set forth in subdivision (1), that party or attorney will bear a heavy burden of justifying that failure. To carry this burden, the party or attorney must demonstrate, through evidence that leaves no meaningful room for doubt, that the failure was not the product of bad faith or of any other improper purpose and that it was made necessary by circumstances beyond the party's or attorney's control. Alleged violations of this rule, or of other Federal Rules of Civil Procedure, by any other party or attorney, shall be presumed irrelevant to proceedings under this subdivision unless the defending party can show that its failure to satisfy an obligation set forth in subdivision (1) was directly and unavoidably caused by those violations.

If a party or attorney who failed to satisfy one or more of the obliga-

tions set forth in subdivision (1) also fails to justify that failure under the standard described in the preceding paragraph, the responsible judicial officer shall order that party or attorney to pay to the other party or parties the amount of the reasonable expenses, including reasonable attorney's fees, occasioned by the failure to satisfy the obligations set forth in subdivision (1). In making such an order, the judicial officer, in appropriate circumstances and on such terms as are just, may apportion responsibility for paying the compensation between a party and its counsel. If the unjustified failure to satisfy an obligation set forth in subdivision (1) is attributable solely to an attorney, the court shall order the attorney or his firm to pay the compensation and shall prohibit the attorney or his firm from directly or indirectly charging the cost of the payment to any client or clients.²⁵¹

After ordering the payment of just compensation, the judicial officer shall also consider the appropriateness of imposing or recommending any of the sanctions authorized by Rule 37 and, when an attorney has breached an obligation, of referring the matter to disciplinary authorities.

(bb) If a preponderance of the evidence establishes that a party or an attorney violated the duty imposed by subdivision (2), the responsible judicial officer shall order that party or attorney to pay to the other party or parties the amount of the reasonable expenses, including reasonable attorney's fees, occasioned by the violation of that duty. In making such an order, the judicial officer, in appropriate circumstances and on such terms as are just, may apportion responsibility for paying the compensation between a party and its counsel. If the violation of the duty imposed by subdivision (2) was committed solely by an attorney, the court shall order the attorney or his firm to pay the compensation and shall prohibit the attorney or his firm from directly or indirectly charging the cost of the payment to any client or clients.

After ordering the payment of just compensation, the judicial officer shall also consider the appropriateness of imposing or recommending any of the sanctions authorized by Rule 37 and, when an attorney has breached an obligation, of referring the matter to disciplinary authorities.

(cc) In any proceedings under subdivision (3) of this rule, the defending party shall be given timely advance notice of any sanction that might be imposed upon it and shall be accorded a sufficient opportunity to present evidence and argument on its behalf.

In offering this reformulation of Rule 16(f) I have no doubt that it could be improved. It is a rough draft whose purpose is to contribute to the dialog that I hope will produce improvements in the sanctions provisions of all the rules. While I have not undertaken the task here, I believe that the concepts structuring this proposal could be integrated without great difficulty into the revision of Rule 37 that is so sorely needed.

251. I am indebted to Deborah Ramirez, a 1981 graduate of the Harvard Law School, for the phraseology of this last sentence.

APPENDIX A

A MODEL RULE FOR PRETRIAL MANAGEMENT OF CIVIL ACTIONS

A. OBJECTIVES

The purposes of this rule are to promote the just, speedy, and inexpensive pre-trial development of civil actions, to assure meaningful judicial control over that development, and to provide district court judges with the information they need to tailor pretrial management plans to fit the needs of the cases assigned to them. To help secure these ends, counsel and, where appropriate, the parties shall prepare adequately for and participate in good faith in all conferences held pursuant to this rule.

B. APPLICABILITY OF THIS RULE

Except for the provisions that this rule explicitly makes applicable only to cases deemed "complex" under criteria that shall be defined by local rule in each district court, the requirements set forth in this rule shall be satisfied for all categories of civil actions not explicitly exempted by local rule.

C. PREPARATION FOR THE DAY-60 CONFERENCE

Between 55 and 65 days after an action was commenced the judge to whom the case is assigned shall hold an initial management conference (referred to herein as the "day-60 conference"). During the period between the commencement of the action and the day-60 conference formal discovery shall be permitted only when specifically authorized by court order entered after a showing that limited discovery is necessary to preserve evanescent evidence or that it would substantially improve a party's ability to prepare the narrative and statement required by C.2 below.

The following duties are imposed in order to maximize the utility of the day-60 conference:

1. Promptly after the complaint is filed parties and their counsel shall commence reasonable investigative efforts designed to establish the events that gave rise to the lawsuit and to locate and evaluate the probative quality of the relevant evidence.
2. By no later than 40 days after the action was commenced counsel for each party, and every unrepresented party, shall have prepared and exchanged narrative descriptions of the events giving rise to the lawsuit and brief statements of their principal legal contentions.
 - a) Neither these factual narratives nor these statements of legal contentions will be admissible for any purpose at trial. They will be used by both the parties and the court as a basis for entering stipulations, reducing the

scope of the dispute, identifying issues that remain in contention, and framing discovery plans. In addition, the court will use these narratives and statements as aids in guiding, limiting, and pacing discovery.

- b) Because the court, other litigants, and lawyers will rely on these narratives and statements for the important purposes named in C.2.a, parties will be permitted to significantly enlarge or add to allegations or contentions only when doing so is justified by disclosure of new evidence that reasonable investigation before drafting the narrative or statement would not have disclosed.
- c) Every factual narrative and statement of legal contention shall be signed by counsel or, if a party is unrepresented, by the party itself. The signature of the attorney or unrepresented party constitutes a certification (1) that he or she has read the narrative and statement; (2) that the factual assertions were drafted in good faith and after reasonable investigation and that they are supported by good grounds and are as complete, detailed, and accurate as currently available information permits; and (3) that the legal contentions are warranted by existing law or by good faith argument for the extension, modification, or reversal of existing law.

If a lawyer or a party fails to sign a narrative and statement or makes a certification in violation of this rule, the court, upon motion or upon its own initiative, shall order the lawyer or the party who failed to sign or who made the certification to pay to the other party or parties the amount of the reasonable expenses occasioned by the violation, including reasonable attorney's fees. When an attorney violates this rule, the court shall order the attorney or his or her firm to pay the compensation and shall prohibit the attorney or his or her firm from directly or indirectly charging the cost of the payment to any client or clients. After ordering the payment of just compensation, the court shall also consider the appropriateness of imposing any of the sanctions authorized by Rule 37 and, if a lawyer breached a duty, of referring the matter to disciplinary authorities.

- 3. By no later than 45 days after the action was commenced the parties, each accompanied by at least one attorney of record, shall participate in good faith in a private meeting to be referred to as a stipulation conference.
 - a) Each party and at least one of its attorneys of record shall attend the stipulation conference in person unless, at least five days before the date the parties have set for the conference, the court, on motion and for good cause shown, has entered an order permitting participation by telephone conference call.
 - b) At least one of the attorneys for each party represented at the stipula-

tion conference shall have authority to enter stipulations and make admissions regarding all matters the participants should reasonably anticipate may be discussed.

c) During the stipulation conference the parties, working from the narratives and statements they have exchanged, shall:

- i) discuss the possibility of settling the case and the utility of enlisting the services of a mediator or panel of experts to aid in settlement efforts;
- ii) stipulate to as many relevant factual and legal propositions as possible;
- iii) identify or formulate the principal factual and legal issues remaining in contention;
- iv) exchange estimates of the volume of documentary and other tangible evidence that will have to be exchanged or discovered to prepare the matter for trial;
- v) arrange for voluntary, informal exchanges of as much relevant documentary and other tangible evidence as possible;
- vi) exchange estimates of how much discovery, and of what kinds, each party will conduct in preparing for trial;
- vii) exchange estimates of the amount of time each party will need to complete the discovery it expects to conduct;
- viii) discuss the advisability of referring some or all discovery or other pretrial matters to a magistrate or a special master, and
 - (1) if a reference appears advisable, identify tasks or matters that should be referred to the magistrate or master, and
 - (2) if appropriate, exchange names of persons who might serve as the special master; and
- ix) discuss the advisability of asking the court to hold a discovery conference pursuant to Rule 26(f).

d) At least ten days before the day-60 conference, the parties, jointly or, if necessary, separately, shall file, on the prescribed form, a brief written report of the results of their stipulation conference. The narratives and statements exchanged by the parties before the stipulation conference shall be attached to these reports.

4. At least five days before the day-60 conference the judge to whom the case is assigned shall:

- a) decide whether to require the participation in the conference of any or all parties. Participation by at least one attorney of record for each party always is required and that attorney shall have authority to enter stipulations and make admissions regarding all matters that the participants should reasonably anticipate may be discussed.
- b) for cases that are not deemed “complex” under local rules, decide whether to relieve some or all of the required participants of the duty to attend in person and, instead, to permit them to participate by telephone. In cases deemed “complex” under a local rule at least one attorney of record for each party shall attend the day-60 conference in person.
- c) decide whether to enlist the services of a magistrate or special master. If a special master or a magistrate is to be involved, the judge shall make every effort, before the day-60 conference, to select the person who will serve in that capacity and to arrange for him or her to be present at the day-60 conference.

D. THE DAY-60 CONFERENCE

During the day-60 conference the judge to whom the case is assigned shall:

- 1. at least briefly explore the parties’ receptivity to seeking a settlement.
- 2. attempt to extend the parties’ stipulations to additional factual and legal propositions.
- 3. identify or formulate the principal issues remaining in contention.
- 4. review the parties’ estimates of the amount of discovery they expect to conduct and the time it would require.
- 5. select a pretrial management plan that fits the needs of the case and, in conjunction therewith,
 - a) fix the dates for the close of discovery, for the final pretrial conference, and for the trial.
 - b) decide whether to hold a discovery conference pursuant to Rule 26(f) and, if so, fix the date for it.
 - c) if no discovery conference is to be held, fix the date of the next conference with the court, magistrate, or master and specify what discovery and other trial preparation tasks the parties shall have completed by that date. In cases not deemed “complex” under local rules, the “next conference” referred to in this subdivision may be the final pretrial conference.

- d) if the services of a magistrate or a special master are to be used, specify the tasks to be referred and the scope of the magistrate's or master's authority.
- e) establish expeditious means (e.g., by telephone conferences) to resolve specified types of discovery disputes.
- f) for cases deemed "complex" under criteria defined by a local rule, calendar a series of management conferences for the purpose of extending stipulations, refining the formulation of issues, and focusing and pacing discovery.
 - i) at least seven days before each of these management conferences the parties shall exchange refined versions of their factual narratives and legal statements.
 - ii) before each management conference the parties shall also meet and confer for the purpose of extending stipulations, voluntarily exchanging information, and identifying remaining trial preparation tasks.

E. THE DAY-60 CONFERENCE ORDER

Within three working days after the close of the day-60 conference the judge to whom the case is assigned shall enter an order recording the results of the conference and specifying any duties imposed on parties or counsel in addition to those imposed by this rule or by local rules or standing orders.

F. SANCTIONS

[The provision for sanctions in this rule should track the structure of subdivision (3) of the version of Rule 16(f) described in the text, *supra*, at pp. 954-55. Only minor editorial changes would be required to shape that paragraph to fit this model rule.]

APPENDIX B

ADVISORY COMMITTEE'S PROPOSED AMENDMENT TO FEDERAL RULES OF CIVIL PROCEDURE 16*

Rule 16. Pretrial Conferences; Scheduling; Management
Pre-Trial Procedure; Formulating Issues

- 1 (a) PRETRIAL CONFERENCES; OBJECTIVES. In any action,
- 2 the court may in its discretion direct the attorneys for the parties
- 3 and any unrepresented parties to appear before it for a conference
- 4 or conferences before trial to consider for such purposes as
- 5 (1) expediting the disposition of the action;
- 6 (2) establishing early and continuing control so that the
- 7 case will not be protracted because of lack of management;
- 8 (3) discouraging wasteful pretrial activities;
- 9 (4) improving the quality of the trial through more
- 10 thorough preparation, and;
- 11 (5) facilitating the settlement of the case.
- 12 (b) SCHEDULING AND PLANNING. Except in categories of
- 13 actions exempted by district court rule as inappropriate for
- 14 scheduling conferences or orders, the judge, after consultation with
- 15 the attorneys for the parties and any unrepresented parties, shall
- 16 enter a scheduling order that limits the time
- 17 (1) to join other parties and to amend the pleadings;
- 18 (2) to serve and hear motions; and
- 19 (3) to complete discovery.
- 20 The scheduling order also may include
- 21 (4) the date or dates for a further scheduling conference,

*Reproduced from Advisory Committee on Civil Rules of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (June 1981), at 10 (in pamphlet form or bound with 101 S. Ct. (July 15, 1981) and 514 & 515 F. Supp. (July 27, 1981)). New matter is underscored; matter to be omitted is lined through.

22 other conferences before trial, the final pretrial conference,
23 and trial; and

24 (5) any other matters appropriate in the circumstances of
25 the case.

26 The order shall issue as soon as practicable after filing of the answer
27 but in no event more than 90 days after filing of the complaint. A
28 schedule shall not be modified except by leave of the judge upon a
29 showing of good cause.

30 (c) SUBJECTS TO BE DISCUSSED AT PRETRIAL CONFER-
31 ENCES. The participants at any conference under this rule may
32 consider

33 (1) the formulation and simplification of the issues,
34 including the elimination of frivolous claims or defenses;

35 (2) the necessity or desirability of amendments to the
36 pleadings;

37 (3) the possibility of obtaining admissions of fact and of
38 documents which will avoid unnecessary proof;

39 (4) the avoidance of unnecessary proof and of cumulative
40 evidence;

41 (5){4} the limitation of the number of expert identification
42 of witnesses and documents, the need and schedule for filing and
43 exchanging pretrial briefs, and the date or dates for further
44 conferences and for trial;

45 (6){5} the advisability of a preliminary reference of issues

46 matters to a magistrate or master for findings to be used as
47 evidence when the trial is to be by jury;
48 (7) the possibility of settlement or the use of extrajudicial
49 procedures to resolve the dispute;
50 (8) the form and substance of the pretrial order;
51 (9) the disposition of pending motions;
52 (10) the need for adopting special procedures for managing
53 potentially difficult or protracted actions that may involve
54 complex issues, multiple parties, difficult legal questions, or
55 unusual proof problems; and
56 (11){6} such other matters as may aid in the disposition of
57 the action.

58 At least one of the attorneys for each party participating in any
59 conference before trial shall have authority to enter into
60 stipulations and to make admissions regarding all matters that the
61 participants may reasonably anticipate may be discussed.

62 (d) FINAL PRETRIAL CONFERENCE. Any final pretrial
63 conference shall be held as close to the time of trial as reasonable
64 under the circumstances. The participants at any such conference
65 shall formulate a plan for trial, including a program for facilitating
66 the admission of evidence. The conference shall be attended by at
67 least one of the attorneys who will conduct the trial for each of the
68 parties.

69 (e) PRETRIAL ORDERS. After any conference held pursuant

70 to this rule, an order shall be entered reciting the action taken. This
71 order shall control the subsequent course of the action unless
72 modified by a subsequent order. The order following a final pretrial
73 conference shall be modified only to prevent manifest injustice.

74 (f) SANCTIONS. If a party or party's attorney fails to obey a
75 scheduling or pretrial order, or if no appearance is made on behalf of
76 a party at a scheduling or pretrial conference, or if a party or
77 party's attorney is substantially unprepared to participate in the
78 conference, or if a party or party's attorney fails to participate in
79 good faith, the judge, upon motion or his own initiative, may make
80 such orders with regard thereto as are just, and among others any of
81 the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in
82 addition to any other sanction, the judge shall require the party or
83 the attorney advising him or both to pay the reasonable expenses
84 occasioned by any noncompliance with this rule, including attorney's
85 fees, unless the judge finds that the noncompliance was substantially
86 justified or that other circumstances make an award of expenses
87 unjust.

88 The court shall make an order which recites the action taken
89 at the conference; the amendments allowed to the pleadings; and the
90 agreements made by the parties as to any of the matters considered;
91 and which limits the issues for trial to those not disposed of by
92 admissions or agreements of counsel; and such order when entered
93 controls the subsequent course of the action; unless modified at the

94 ~~trial to prevent manifest injustice.~~ The court in its discretion may
95 establish by rule a pretrial calendar on which actions may be placed
96 for consideration as above provided and may either confine the
97 calendar to jury actions or to non-jury actions or extend it to all
98 actions.

