

RENOVATING DISCOVERY

*Paul D. Carrington**

I. INTRODUCTION

I have been invited by those who planned this symposium to suggest revisions of the discovery provisions (Rules 26-37) of the Federal Rules of Civil Procedure. Those rules were last amended in 1993¹ on recommendations made during my term as Reporter to the Civil Rules Committee. The 1993 revisions were intended to be a temporary accommodation of local plans being promulgated under the Civil Justice Reform Act of 1990 [hereinafter CJRA].² Reconsideration of those rules is now timely and ought be informed by the 1996 Report of the Institute for Civil Justice [hereinafter RAND Report]³ on the operation of those plans.

II. A TIME FOR CALM

The late Maurice Rosenberg⁴ was fond of saying that there are two kinds of empirical studies of law, those that confirm the hunches of lawyers and those that lawyers perceive to be false. The RAND Report is of the former sort. It confirms many intuitive hunches of those who have most thoughtfully observed the

* Chadwick Professor of Law, Duke University. Reporter, Advisory Committee on Civil Rules of the Judicial Conference of the United States, 1985-92. Ed Cooper, John Frank, Rick Marcus, Tom Metzloff, and Tom Rowe made helpful suggestions. In a previous draft, this paper was presented to a conference held at the University of Alabama School of Law by the American Bar Association on the Implementation of the Civil Justice Reform Act of 1990. Brooks Giles helped with the references.

1. Amendments to the Federal Rules of Civil Procedure, *reprinted in* 146 F.R.D. 401 (1993).

2. Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-82 (1994) [hereinafter CJRA].

3. JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996) [hereinafter RAND REPORT].

4. Medina Professor of Law, Columbia University (1919-1995).

process in recent years, and it is consistent with other empirical studies of discovery done by various persons and institutions over the three decades⁵ since the first such carefully conceived studies were completed by Rosenberg.⁶

The first thing to be said about the RAND Report is that it supplies no basis for general retrenchment on the right of federal civil litigants to discover evidence bearing on disputes to which they are parties. The CJRA might have been taken to imply the contrary. The Report of the concurrent President's Council on Competitiveness also reflected a certain impulse in that direction.⁷ And certainly it is easy to find shrill rhetoric about the cost of federal litigation, as well as forecasts that the sky will fall if something dramatic is not done.⁸ Such rhetoric has been heard since the time of Hammurabi.⁹ There was no empirical evidence, and there is none now, that the cost of discovery is a general problem for the broad spectrum of federal litigants or that it has significant malign consequences for the public interest.

That is an important message. Illuminating the background of the CJRA and the RAND Report in this respect is the work of Marc Galanter, who has persuasively demonstrated that the alleged "Litigation Explosion" to which the CJRA purported to

5. JOSEPH L. EBERSOLE & BARLOW BURKE, *DISCOVERY PROBLEMS IN CIVIL CASES* (FEDERAL JUDICIAL CENTER, 1980); PAUL R. CONNOLLY ET AL., *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY* (FEDERAL JUDICIAL CENTER, 1978); DANIEL SEGAL, *SURVEY OF THE LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS* (FEDERAL JUDICIAL CENTER, 1978).

6. COLUMBIA UNIVERSITY PROJECT FOR EFFECTIVE JUSTICE, *FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY, REPORT TO THE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE* (1968) (unpublished report); Maurice Rosenberg, *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 479 (1969); MAURICE ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* (1964).

7. See PRESIDENT'S COUNCIL ON COMPETITIVENESS, *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA* 16-19 (1991).

8. See, e.g., Remarks of Vice President Quayle at the American Business Conference, Oct. 1, 1991, Fed. News Serv.; PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 4 (1988); President Bush, remarks at Labor Day Picnic, Waukesha, WI, Sept. 7, 1992, Fed. News Serv.; Jack Anderson, *U.S. Has Become Nation of Lawsuits*, WASH. POST, Jan. 25, 1985, at B8; Robert F. Dee, *Blood Bath*, 10 ENTERPRISE 2 (1986).

9. Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, Lecture Delivered Before the Association of the Bar of the City of New York (Nov. 17, 1921), in *LECTURES ON LEGAL TOPICS* 89 (1926).

respond did not exist.¹⁰ Much of the hooplah about litigation costs may be traceable to those whose real complaint is that they or their clients are exposed to liabilities that they would prefer to avoid.¹¹ There is a disguised outcry for tort reform. That outcry has, unfortunately, often taken the form of a campaign of disinformation based on anecdote and hyperbole. The celebrated hot coffee case¹² is a recent and dramatic example of a chronic problem of media misreportage feeding public cynicism about judicial as well as other public institutions.¹³ Some of the disinformation has been directed at discovery.

There may be merit, let it be said, in some proposals for substantive law reform intersecting with discovery. For example, there is at least some merit in eliminating the occasion for expensive document searches in product liability cases.¹⁴ It is in the public interest that corporate officers have discussions of risks unfettered by the threat of liability imposed on the basis of intramural discussions. Tort liability, I do not doubt, is a useful incentive to manufacturers to make prudent decisions about the risks to users of their products. But it may be counterproductive to that purpose to impose or increase liability on the basis of communications between officers of manufacturing firms discussing such risks candidly. Neither liability nor damages ought to be framed in such a way that candid internal discussion has substantial adverse consequences for the firm. For that reason, the law of product liability should perhaps be reformed to make the manufacturer's subjective state of mind irrelevant. Such a reform would materially reduce the cost of discovery in products liability cases, for there would be no point in searching through

10. See Marc S. Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 93 (1993); Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 6 (1986).

11. But see William H. Rehnquist, *1995 Year-End Report on the Federal Judiciary*, 19 AM. J. TRIAL ADVOC. 491, 495-99 (1993); William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 2-5; Letter of Transmittal, 446 U.S. 996, 998 (1980) (Powell, J., dissenting).

12. *Liebeck v. McDonald's Restaurants*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994).

13. See Dan Shaw, *Coffee, Tea or Ouch?*, N.Y. TIMES, Oct. 12, 1994, at C1; Andrea Gerlin, *A Matter of Degree*, WALL ST. J., Sept. 1, 1994, at A1.

14. Litigation against both tobacco manufacturers and breast implant manufacturers has entailed an intense search for correspondence between executives manifesting knowledge of dangers not disclosed to the public.

storehouses of documents looking for the proverbial smoking gun, which is nothing more than an expression of concern about apparent hazards.

It is, on the other hand, contrary to the public interest to allow a manufacturer's legitimate concern for the consequences of socially counterproductive document searches to drive a reform of discovery practice that in most of its applications has benign consequences. We should keep clearly in mind that discovery is the American alternative to the administrative state. We have by means of Rules 26-37, and by their analogues in state law, privatized a great deal of our law enforcement, especially in such fields as antitrust and trade regulation, consumer protection, securities regulation, civil rights, and intellectual property. Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy.¹⁵ Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.

The superiority of private litigation over the administrative process was recognized in the years following 1938, when modern discovery was introduced.¹⁶ At least since the time of Andrew Jackson, many and sometimes most Americans had been skeptical about the ability of bureaucratic government to protect the individual interests of ordinary citizens from predations by those with greater wealth and economic power.¹⁷ That skepti-

15. See Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 933-44 (1996) [hereinafter Carrington, *A New Confederacy?*].

16. See REPORT ON DISCOVERY UNDER FEDERAL RULES 26(b)(1), 127 F.R.D. 625, 625 (1989).

17. Jackson's most famous utterance was his bank veto message of 1832:

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes . . . [W]hen the laws undertake to add to [their] natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics, and labor-

cism was repressed during the Progressive era and by the New Deal when most of our federal bureaucracies were created. But it was confirmed a thousand times in the first half of this century that regulatory agencies tend to be co-opted by those whom they regulate.¹⁸

Since 1950, we have acted on the belief that if individuals of modest standing and resources are to secure protection from predation by those possessing the means of exploitation, private civil litigation is the best means available to them. Congress and state legislatures have therefore been disinclined to create new regulatory bureaucracies and have generally expressed regulatory purposes by imposing civil liability on predatory conduct they mean to deter. Legislators and their constituents have known that, however numerous their many deficiencies, the private bar and the jury cannot be bribed, intimidated, or socialized by the incentives of status and class association and are more likely than bureaucracies to enforce the rights of individuals without fear or favor.¹⁹ Discovery has been an essential instrument in that shift from bureaucratic to private regulation. Cutting deeply into discovery would not only impair private enforcement, but would create a demand for more bureaucratic protections.

III. THE CASE AGAINST LOCALISM

The second important point to be made in response to the RAND Report is that the sun should set, not only upon the Civil Justice Reform Act, but also on the local plans, and on any other existing local rules or standing orders bearing on the subject of discovery. While the RAND study was not designed to measure

ers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing.

2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 590 (James D. Richardson comp., 1905).

18. See, e.g., JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT, S. REP. NO. 86-26 (1960).

19. WILLIAM O. DOUGLAS, WE THE JUDGES 389 (1956) (stating “[The jury] is the one governmental agency that has no ambition.”).

the effects of local differences in discovery rules, its data tends to confirm a high level of dissatisfaction with localism in discovery rules.²⁰ The loose survey conducted by the ABA Section of Litigation speaks strongly to this same issue.²¹

The data accord with common sense. The costs of localism in discovery practice are apparent. Local discovery plans and rules, including standing orders or, as they are sometimes called, local local rules, create clutter impeding the efforts of lawyers, and sometimes even judges, to know what their rights, powers, and duties might be.²² They add complexity, thereby adding to the investment of lawyer time required to move cases. They are especially burdensome to lawyers and litigants who appear episodically in court or in more than one district court, and they confer an inappropriate benefit on local repeat players. In some cases, it may be necessary for litigants to retain local counsel merely to secure guidance through the maze of local discovery rules.

There are, on the other hand, few, if any, redeeming benefits of localism in federal discovery rules. There are no differences among the districts to warrant differences in discovery practice to reflect local conditions. Whatever differences may exist in the professional cultures of different districts, there are none that bear any rational connection to the present law of discovery. While judges in many districts may feel that they can improve on the national rules and some of them doubtless could, the added complexity and unevenness resulting from local efforts to improve on the rules, and the risk that local rules will prove in some cases inferior to national rules and prejudicial to non-local litigants clearly and substantially outweigh any benefit to be secured by local autonomy. Therefore, whatever the national rules may be, they will be superior to the localized product; one size does fit one district as well as the next.

It is not a consideration favoring localism that individual judges need discretion in the administration of pretrial litigation. Of course they need to fit the national rules to particular

20. See RAND REPORT, *supra* note 3.

21. AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, MANDATORY DISCLOSURE SURVEY: RULE 26(a)(1) (1996).

22. See Carrington, *A New Confederacy?*, *supra* note 15, at 944-52; see also H.R. REP. NO. 99-422, at 14-16 (1985) (criticizing the use of local rules).

cases coming before them, and there has been since 1938 ample authority for the exercise of that kind of case-directed discretion by individual judges.²³ Local rules do not amplify that discretion, but purport to limit it, and limit it in exotic ways. Useful discretion is employed case by case, not district by district or even by exegesis on the controlling law by individual judges.

Neither is it a consideration that we need local experimentation. We should embrace the wisdom of Justice Brandeis favoring legal experiments²⁴ and apply it to local districts willing to conduct useful experiments in the administration of the law. But such experiments are useful only if they are designed and conducted under controlled circumstances permitting empirical examination of the results.²⁵ There are no local discovery rules that are experiments in any useful sense.

What I have said about localism is hardly news. It was the position of the Congress of the United States in 1988 when it enacted legislation to constrain the local rulemaking power.²⁶ The Judicial Conference in response to Congressional concern established the Local Rules Project²⁷ resulting in the reconsideration and elimination of many local rules and in the promulgation of revised Rule 83 in 1995. Among the local rules that were not consistent with the national rules were scores bearing on discovery. After enactment of the 1988 revision of the Rules Enabling Act, all such rules were forbidden by Congress, and it was a task for the Civil Rules Committee to help make that clear to district judges. The most common kind of local rule invalidated by the 1988 law was the standard restriction on the number of interrogatories a party could serve except by leave of court;²⁸ almost every district had such a rule, and after 1988 all

23. Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 305-07 [hereinafter Carrington, *"Substance" and "Procedure"*].

24. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

25. This is what is envisioned by the present Rule 83.

26. Act of Nov. 19, 1988, Pub. L. No. 100-702, § 401, 102 Stat. 4642, 4649 (codified as amended at 28 U.S.C. §§ 2072-74 (1994)).

27. The Judicial Conference of the United States authorized the Standing Committee on Rules of Practice and Procedure to undertake the Local Rules Project in 1986.

28. DANIEL R. COQUILLETTE ET AL., REPORT OF THE LOCAL RULES PROJECT 95-99 (1988).

of them were invalid.

The CJRA of 1990 was a puzzling but momentary reversal of direction by Congress. While directing the district courts to establish local plans, it did not explicitly or by necessary implication repeal the 1988 proscription on deviant local rules, and hence did not authorize a local plan to violate a national rule.²⁹ Thus, the 1993 revision of the discovery rules authorizing local variations was put forward by the Civil Rules Committee of that time in the belief that authority for local rules was needed if discovery variations were to be legitimately included in local plans promulgated under the CJRA. There was never any thought that localism was desirable for its own sake. Indeed, the Civil Rules Committee continued to strive in the direction of national uniformity. This was evidenced by the revision of Rule 83 to make it conform to the Rules Enabling Act as modified in 1988. That revision of Rule 83, promulgated by the Court in 1995, supersedes the CJRA,³⁰ so that if there was any question about the possibility that the CJRA authorized local rules in violation of national rules, that doubt is now clearly resolved: district courts are bound by the national rules and are not empowered to make rules (whether or not denoted as plans) that are in any respect inconsistent with the national rules.

This being so, the first task of those "implementing" the CJRA is to put humpty-dumpty back on the wall and re-establish national rules guiding the conduct of civil cases in all United States District Courts. The local option provisions should be eliminated.

IV. THE FUTURE OF JUDICIAL CASE MANAGEMENT

The third point to be made on the basis of the RAND Report is a little more surprising. It is that district courts have overdone case management, and should forebear that practice in most cases. As Judith Resnik points out elsewhere in this issue,

29. See Carrington, *A New Confederacy?*, *supra* note 15, at 952-65.

30. CJRA, *supra* note 2; see also Rules Enabling Act of 1988, 28 U.S.C. § 2072(b) (1994) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."); *Henderson v. United States*, 116 S. Ct. 1638 (1996) (a recent instance of supersession).

judicial case management is a misnomer; it is more accurately denoted as judicial management of lawyers.³¹ Few would contend for a return to the adversary tradition as it was known prior to the advent of discovery.³² It was implicit in the 1938 rules that the role of the advocate was modified to impose a limited duty of cooperation in the investigation of facts in a dispute.³³ Such a duty was not novel, but had been long known to equity practice.³⁴ Nevertheless, the breadth of the discovery rules substantially enlarged the duty of counsel as an officer of the court to cooperate.

Of course, there have always been clients who preferred lawyers who neglected public duty to protect their private interest, and the lawyers for such clients have powerful incentives to neglect their duties. That is especially likely to be so for lawyers representing parties asserting groundless claims or defenses. By enlarging their professional duty, the 1938 Rules enlarged the pressures on such counsel to misuse the process. There seemed to have been, as a result, a gradual erosion of the conduct of lawyers engaged in discovery practice that became noticeable in the 1960s.³⁵ Judicial case management has been the judges'

31. Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133 (1997).

32. See Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984). Compare HUGH H. BRACKENRIDGE, *LAW MISCELLANIES* at xii (Philadelphia, Byrne, 1814):

I disclaim as lawyers, who avail themselves of the slips of counsel; and would take advantage of a mistake. These may be said to carry on the legal war, not according to the laws of civilized practice, but resembling savages, who make their attacks waxen, which is a species of assassination.

with HENRY S. DRINKER, *LEGAL ETHICS* 83 (1953):

Five hundred years ago the law was a game, the processes of which were continually and openly employed by means of obscure technicalities, serving no useful purpose Recently, with increasing insistence, the bar and the courts have taken radical steps . . . to simplify and develop promptly and dispose of, finally and clearly, the real issues in the case It is clearly the duty of the bar to cooperate wholeheartedly in developing all such new procedures and in making them work practically.

33. ROBERT W. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 217-19 (1952).

34. See 1 JOHN NORTON POMEROY & SPENCER W. SYMONS, *POMEROY'S EQUITY JURISPRUDENCE* § 204 (5th ed. 1941).

35. See Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 482-83 (1958).

response to the diverse tactical ploys employed by lawyers to gain illicit advantage.³⁶ Among the illicit means sometimes employed were the imposition of costs on adversaries by excessive and pointless discovery, stonewalling, and burying adversaries in a blizzard of useless disclosures.³⁷ Such tactics can be controlled and even eliminated by prudent case management of big and bitterly contested cases in which they are most likely to appear.

Judicial case management is, however, in its more extreme forms a costly, radical transformation of the American legal tradition.³⁸ It is sometimes explained as a mere adaption of the judicial practices commonly found on the continent of Europe or in Japan.³⁹ And so, in important respects, it is. But the suitability of civil law practice in the United States is dubious. Courts in civil law countries are not generally used for the wide range of political and regulatory purposes that American courts are employed. Judges in those countries are selected at a very early stage in their professional careers and therefore have no political roots and no connections to "interest groups."⁴⁰ And there is no right to jury trial in civil cases underscoring the importance of individual access to courts.⁴¹ For these reasons, the civil law example is one to be followed only with the greatest caution.

The CJRA was not cautious in promoting more aggressive case management;⁴² its authors appeared to suppose that judi-

36. Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 256-60 (1985); William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989).

37. See Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618 (1996); John K. Setear, *The Barrister and The Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569, 581-84 (1989); EBERSOLE & BURKE, *supra* note 5.

38. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424-31 (1982).

39. See Benjamin Kaplan et al., *Phases of German Civil Procedure (pts. 1 & 2)*, 71 HARV. L. REV. 1193, 1443 (1958); Arthur T. von Mehren, *Some Reflections on Japanese Law*, 71 HARV. L. REV. 1486, 1489 (1958).

40. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 848 (1985).

41. *Id.* at 864-65.

42. CJRA, *supra* note 2. Section 473(a)(1) provides:

In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group

cial management might be the key to the presumed, if non-demonstrable problem, of cost and delay. The votes are now in, and it is clear that judicial management is not a magic bullet to achieve the stated aims of the CJRA.

The unvarnished truth now confirmed by this vast experiment is that we have no idea how to make a substantial dent in either cost or delay. The federal judiciary were, with some exceptions, already doing about as well as they knew how to do, and the adjurations of Congress to do better could have little effect in the absence of a genuine "Eureka!" of an idea. Case management was not so grand an idea, nor was any other available in 1990, nor has one been generated by experience under the CJRA.

To the contrary, the data generated is useful to demonstrate that judicial management has been oversold, that heavy management in the mine run of cases is a waste of time or worse.⁴³ The misdirection of a district judge's time and energy is a waste with extended consequences. Because judges are a scarce resource, their misuse of time results in losses felt elsewhere. The most important and indispensable duty of district judges is to try cases, thus to enforce the law and to concentrate the minds of parties on the settlement of their disputes "in the shadow of the law."⁴⁴ If judicial case management reduces the availability of judges to conduct trials, it is an important loss.

There are other adverse effects of case management that are ineffable and therefore, not noted in the RAND Report. Thus, a secondary unwelcome effect of contemporary case management

appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction: (1) systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case

See also BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, BROOKINGS INSTITUTE, REDUCING COSTS AND DELAY IN CIVIL LITIGATION 11 (1989) (stating that empowering courts to assign cases to a three-tiered tracking system according to case complexity and the court's local rules would move cases to disposition more quickly and more economically).

43. See RAND REPORT, *supra* note 3.

44. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 954-56 (1979).

is a modification of the courts' focus away from the task of law enforcement. The primary concern of judges who manage cases is to achieve dispositions, i.e., to move cases through the court to whatever disposition the parties can be induced to accept. This is a different mission from that of courts trying cases, whose primary task is to achieve correct results, i.e., results conforming to the law.

Another unwelcome secondary effect of judicial management is to increase the moral responsibility of the individual trial judge. Where the institution of discovery expanded the temptations of counsel, case management expands the temptations of the judge because it increases the range of discretion exercised. When combined with the diminishing intensity of appellate review,⁴⁵ it has helped to make our district judges more like chancellors sitting on the woolsack of autocratic power, and less like officers of the law accountable for their exercise of official power.⁴⁶ The hidden effect of case management is a transfer of power away from individual parties and their lawyers, and also from juries or appellate courts who would review decisions on the merits when and if rendered.

These unwelcome consequences of judicial case management are not presented as an argument for a return to the days when counsel were free to abuse or impede discovery. But, as the RAND Report suggests, case management techniques should be employed only when there is persuasive evidence that there are abuses to be prevented that cannot be controlled by other means.⁴⁷ Judicial involvement in pretrial litigation should be the exception, not the rule.

45. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 643-444; Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403; William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

46. See Paul D. Carrington, *An Unknown Court: Appellate Caseload and The "Reckonability" of the Law of the Circuit*, in *RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS* 206 (Arthur D. Hellman ed., 1990); Carrington, *A New Confederacy?*, *supra* note 15, at 932-40.

47. RAND REPORT, *supra* note 3.

V. FACILITATING CASE MANAGEMENT BY LAWYERS

Given appropriate incentives, lawyers can manage pretrial litigation in most cases with minimal involvement of judges. As the RAND data suggest, the first and most essential incentive to be provided by the court is a reasonably firm trial date.⁴⁸ Such a date should, with rare exception, be set by conference call within hours after an issue is joined. While it is generally desirable that the date be sooner rather than later, there is no need or justification for haste so urgent that it deprives the parties of a full opportunity for discovery. Nor is there justification for refusing modest postponements necessitated by a surprise in discovery. But with those qualifications, it can be said that the single most important deed a district judge can perform in the administration of pretrial litigation is to set a trial date and stick as closely to that date as possible.

With a credible trial date, the lawyers can, in most cases, plan discovery without the participation of a judge. The RAND study confirms this to be true.⁴⁹ The discovery conference prescribed by Rule 26(f) generally works when employed for its intended purpose.⁵⁰ It especially works if counsel comply with the disclosure requirements now set forth in Rule 26(a)(1). Those disclosures, so despised by lawyers who perceive them as undermining their relations with clients,⁵¹ are, however, essential to establish a framework for planning discovery without undue delay. If such disclosures are not made, planning by lawyers is impeded and the obvious alternative is for the court to step in and manage the case. This is a step that, in the end, is more a derogation of the role of counsel and parties than is compliance with modest disclosure requirements. The RAND data point in the direction of retaining the substance of both Rule 26(f) and

48. *Id.* at 57-58, 91-92.

49. *Id.*

50. *Id.* at 55-58; Rogelio E. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel A Reexamination of the Adversary Process*, 36 B.C. L. REV. 479, 494-96 (1995); Joseph E. Stevens et al., *Practical Aspects of the Revisions to the Federal Rules of Civil Procedure Effective 12/1/93*, 50 J. MO. B. 341, 345-46 (1994).

51. See, e.g., Laura A. Kaster & Kenneth A. Wittenberg, *Rulemakers Should Be Litigators*, NAT'L L.J., Aug. 17, 1992, at 15.

(a)(1), making them the source of the discovery plan that will control the conduct of pretrial litigation in all but the rare case.⁵²

As a concession to the concerns of lawyers who despise the idea of voluntary disclosure, the Civil Rules Committee ought to consider rewriting those provisions. One change might be to make explicit the duty of parties and counsel to cooperate in discovery. Lawyers know of their duty, but parties often do not, and lawyers should be given all available help in explaining to their clients why disclosures must be made to adversaries without requiring rulings by the court at each point of revelation.

Another revision might be to change the diction of the disclosure requirements, perhaps to state them in the form of questions, as "standard interrogatories" to be answered as a predicate to the formulation of a discovery plan wrought by counsel.⁵³

In addition, as an aid to parties and counsel in planning, the Rules should provide some presumptive parameters to be extended by agreement whenever good cause is shown. The most important parameter is a time within which discovery will be completed. The RAND data suggests that 120 days is generally a suitable presumptive norm.⁵⁴ Other parameters that might be useful include a presumptive limit on the number of interrogatories and on the number and length of depositions. But the Rules should be explicit that the duty of cooperation includes a duty to go beyond the presumptive parameters for good cause.

To make it clear that discovery planning is a duty of counsel, it might also be prudent to relieve the court of the authority to intercede and manage a case that the parties are managing to their own satisfaction without intervention of the court, save perhaps in exceptional circumstances to be stated by the court. At the same time, the court must make it clear that the duty of parties to cooperate in planning discovery is a duty that the court will enforce and enforce so promptly that no counsel or party will be tempted to delay proceedings by making matters unnecessarily difficult for an adversary. To that end, the Rules

52. RAND REPORT, *supra* note 3, at 188.

53. See S.C. R. CIV. P. 33(b).

54. RAND REPORT, *supra* note 3, at 188.

might wisely provide that motions respecting discovery shall, unless otherwise specifically ordered, be made orally and ruled upon "forthwith." Judges who effectively and promptly enforce rights with respect to discovery are much less likely to be burdened with frequent interruptions of their work by frivolous discovery disputes than those who take such motions under advisement and await opportunities to read briefs and transcripts of depositions. Because delays in ruling create incentives for counsel to bicker over trifling discovery issues, judges who do not rule quickly make more work for themselves while imposing costs on the parties.

It might also be useful for the rules explicitly to authorize counsel to record discovery conferences as well as depositions. A recording would better enable a party to demonstrate a lack of cooperation by an adversary, and thus enhance the threat of sanctions against a party who does not cooperate in planning discovery.

Practice under the 1938 Rules was characterized by an absence of the application of sanctions under Rules 37.⁵⁵ Weak enforcement by courts contributed to the problem of abuse and delay by counsel.⁵⁶ While the sanction provisions were strengthened by the addition of Rule 26(g),⁵⁷ it remains true that judges have been reluctant to punish lawyers for playing hostile games with discovery. A likely reason for this weakness is that judges were lawyers once and identify with pressures felt by lawyers to aggressively protect interests of clients even at the expense of performance of duties to the court. Another reason is that an application of sanctions creates satellite litigation on the appropriateness and measure of the sanction. The unhappy experience with sanctions under Rule 11⁵⁸ has likely reinforced the disin-

55. Rosenberg, *supra* note 35, at 494-96.

56. See, e.g., JONATHAN HAAR, A CIVIL ACTION 149-93 (1995) (a striking example of abuse and delay by counsel).

57. Fed. R. Civ. P. 26(g) was added in 1983, and in conjunction with Rule 37, represents "the principal enforcement power to punish discovery abuse." Gregory P. Joseph, *Current Issues in Discovery*, in CURRENT PROBLEMS IN CIVIL PRACTICE 1994 at 321, 377 (PLI Litig. & Admin. Practice Course Handbook Series No. 498, 1994).

58. See, e.g., Melissa L. Nelken, *Sanctions Under Amended Rule 11—Some Chilling Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); JEROLD S. SOLOVY & CHARLES M. SHAFFER, JR., RULE 11 AND OTHER SANCTIONS: NEW ISSUES IN FEDERAL LITIGATION (1987); GREGORY P. JOSEPH,

clination of many judges to impose sanctions on the abuse of discovery.

The Civil Rules Committee should, therefore, give serious attention to other possible incentives to cooperate. In particular, consideration should be given to the application of the English rule⁵⁹ on shifting attorneys' fees to the resolution of discovery disputes. This would mean that whenever a court ruled on a discovery issue, the prevailing party would be entitled automatically to a reasonable attorney's fee to compensate for the cost of litigating the issue. The demerit of this English rule in its application to final judgments is that it unduly chills the assertion of claims and defenses. But that is just the result desired with respect to discovery disputes. It would provide counsel with an additional reason to give her or his client for not contesting a discovery issue; that there would be an additional cost associated with an unsuccessful contention. If the English rule were adopted for this limited purpose, the Civil Rules Committee ought to consider the use of an English-style taxing master⁶⁰ to relieve the court of the burden and authority to fix the fee.

Moreover, in that rare case in which irrationally contentious parties are frequently resorting to the court over discovery issues, the court should be encouraged to appoint a special master to manage the case.⁶¹ The merit of the special mastership is

SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (2d ed. 1994); GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* (2d ed. 1992).

59. For a recent account of the rule and suggestions of its possible applications in the United States, see Thomas D. Rowe, *Background Paper, American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 887-92.

60. John Vargo explores the concept of a taxing master stating:

In modern practice, however, the English courts have developed an elaborate system of taxing costs. Under this system, the solicitor representing the winning party prepares a bill of costs, detailing each item of taxable expense. If the losing party agrees, it pays the bill; parties, however, rarely agree. When disputed, the parties present their itemized expenses to a taxing master who decides the appropriate amounts after a hearing.

John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1571 (1993); see also William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147, 148 (1992) (discussing the advantages and disadvantages of the English system and how it may work in America); see REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

61. See FED. R. CIV. P. 53; Linda J. Silberman, *Masters and Magistrates Part I:*

that it imposes the cost of childish bickering on sometimes infantile counsel and their clients rather than on the public, and leaves the judge accessible to those who need decisions on the merits or who need prompt attention to legitimate discovery disputes. Experience in California suggests, however, the importance of regulating the fees of attorneys appointed as special masters.⁶²

VI. OTHER SUGGESTED REFORMS

While the Civil Rules Committee is reunifying the discovery rules and reducing the role of the judge in the management of pretrial litigation, there are other minor changes worthy of consideration at this time.

First, the Rules should require exchange of signed or adopted statements, or perhaps statements of possible witnesses in any form that could be presented as evidence. The existing rule protects such statements as trial preparation material,⁶³ but requires that copies of such statements be supplied to the witnesses who adopted them,⁶⁴ from whom, of course, they are discoverable under Rule 45.⁶⁵ While an adopted statement is technically trial preparation material, it is much more than the mental impressions and thinking of counsel—it is potentially a prior inconsistent statement, and the thinking it reflects is primarily that of the party or witness, not the lawyer.⁶⁶ The pro-

The English Model, 50 N.Y.U. L. REV. 1070, 1088 (1975); Linda J. Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1338-46 (1975); Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2174 (1989).

62. *Ruisi v. Thieriot*, 61 Cal. Rptr. 2d 598, *withdrawn*, Nos. A071958, A073925, 1997 WL 194138 (Cal. App. 1 Dist. 1997) (concluding that it was improper for the trial court to appoint a special master as it was overbroad and unauthorized by statute).

63. FED. R. CIV. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1946).

64. *Id.*; Jeff A. Anderson et al., *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 811-12 (1983).

65. FED. R. CIV. P. 45.

66. Kathleen Waits, *Work Product Protection for Witness Statements: Time for Abolition*, 1985 WIS. L. REV. 305, 311; Lawrence S. Feld, *Privilege and Confidentiality*, in LITIGATING COMMERCIAL CASES UP TO TRIAL 231, 253 (PLI Litig. & Admin. Practice Course Handbook Series No. 307, 1986); see also *Virginia Elec. Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 403 (E.D. Va. 1975) (holding that

tected retention of such statements in the present Rule disserves the aims of the process in other ways. It enables counsel to impose unnecessary costs on adversaries and to engage in sharp practice by misleading hints of the content of the statements. The present practice therefore gives too little service to the values of the work product protection and too much harm to the duty of cooperation to merit its continuation.

Rule 30 should be revised to create a presumptive limit on the number of depositions, and in three other respects. For one, it should be explicit that all objections to questions asked at a deposition are automatically reserved, unless examining counsel otherwise directs.⁶⁷ The purpose of this revision is to save the time of lawyers and deponents presently devoted to bickering over the form of questions. Absent such a non-waiver provision, the time limits on depositions will be made inappropriate in a particular instance by prolonged bickering. Counsel for the deponent should, of course, be expected to assert applicable evidentiary privileges,⁶⁸ but should otherwise remain silent during the examination by other parties, unless the examining counsel wishes assurance that a particular question and answer are in a form allowing them to be used at trial.

Secondly, it should be explicit in Rule 30 that a deposition can be reopened at the request of any party, provided however, that unless the deponent agrees, or the court for good cause so orders, a secondary examination shall be conducted by teleconference or telephone, and further provided that such a discontinuous deposition shall not exceed the time allowed by the schedule, except for good cause. One effect of this change is to diminish the need to modify the discovery plan every time there is a surprise at a deposition. A second purpose is to allow for more efficient depositions and more efficient preparation by counsel, who could under such a revised rule prepare for a depo-

"statements and documents which represent the impressions and observations of the witnesses and not those of the attorney or his investigation, are not part of the attorney's 'work products'").

67. See Frank H. Penski, *Defending Depositions*, in *LITIGATING COMMERCIAL CASES*, 65 n.66, 70-71 (1994); Jay D. Blumenkopf, *Deposition Strategy and Tactics*, 10 *AM. J. TRIAL ADVOC.* 15, 23 (1987); Steven B. Stein, *Oral Depositions in Federal Civil Practice*, in *DEPOSITION TECHNIQUES IN COMMERCIAL LITIGATION* 47, 76-78 (PLI Litig. & Admin. Practice Course Handbook Series No. 328, 1987).

68. See *FED. R. EVID.* 501.

sition with reduced concern for surprise testimony or revelation of documents not previously seen. If a surprise occurs during a deposition, a surprised party can discontinue the deposition and return to it at a later time, after further investigation and preparation has been pursued.

Third, Rule 30 should be amended to affirm that any deposition recorded on videotape or other comparable technologies can be used at trial, even though the deponent is within reach of a subpoena. The present rule requiring the use of live testimony⁶⁹ was written on the assumption that the deposition would have to be read into the record at trial by some person other than the deponent. That is no longer the case; indeed it would be appropriate to require the exhibition of videotape when available in order to preserve demeanor evidence that is lost when a substitute witness reads a deposition into the record. Moreover, it will save costs if litigants can be educated to expect that videotaped depositions will be the usual form in which testimony is taken and in which it is presented at trial. Videotaped depositions can be edited to eliminate useless banter as well as inadmissible evidence. And evidentiary rulings regarding testimony can be made *in limine*.⁷⁰

Document discovery under Rule 34 is, it seems, the largest source of useless litigation cost.⁷¹ It is also the area in which parties are likely to have the most difficulty in refining a mutually satisfactory discovery plan. For perspective, it may be usefully recalled that the 1938 version of Rule 34 required leave of court for document requests;⁷² it would seem imprudent to restore that requirement, but it suggests that special restraints

69. FED. R. CIV. P. 43.

70. FED. R. CIV. P. 16(c)(4).

71. See Michael A. Pope, *Rule 34: Controlling the Paper Avalanche*, 7 LITIGATION 28 (1981); William D. Underwood, *Divergence in the Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform*, 25 TEX. TECH L. REV. 261, 271-272 (1994).

72. FED. R. CIV. P. 34 (1938):

Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control.

may be more appropriately applied to documents. On the other hand, provisional limits on the number or length of documents are unmanageable and unsatisfactory and need not be considered.

It is worth considering whether a narrower definition of discoverability such as the American College of Trial Lawyers favors should be incorporated into Rule 34.⁷³ The College's committee has proposed, since 1981, to delete language in Rule 26(b)(1) so that discovery is limited to matter relevant to a claim or defense.⁷⁴ I am uncertain what effect that provision would have, if any, and would disfavor that change except perhaps in Rule 34. If a new limit were to be imposed on document discovery, I would hope that clearer language might be supplied than that suggested by the College. One possibility is that Rule 34(b) be revised to require that the party seeking access to documents be required to state which disputed facts that party hopes to prove by means of documentary evidence obtained as a result of the production requested. A party of whom production is requested might then be better able to resist excessive production on the ground that the hope is so implausible that the court can and should limit production pursuant to Rule 26(b)(2)(iii), which authorizes the court to restrain extravagant discovery.

Another suggestion is to afford a producing party the option of making a production of documents confidential for the scrutiny only of adversary counsel. A party making a confidential production would waive no evidentiary privileges with respect to documents so produced.⁷⁵ No document so produced would be filed with the court or otherwise used or publicized by counsel receiving the documents in confidence without the express approval of the producing party. The purpose of such a provision would be to enable the disclosing party to produce vast quantities of material without the expense of thorough pre-screening of every document produced. Much expense is incurred in present

73. American College of Trial Lawyers, Monograph of the Committee on Federal Rules of Civil Procedure, *The Deletion of "Subject Matter" Phrases from Federal Rule of Civil Procedure 26(b)(1)—An Amendment Whose Time Has Come* (Aug. 1997).

74. *Id.*

75. *But see* *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1098-99 (D.N.J. 1996); *Gorzegno v. Maguire*, 62 F.R.D. 617, 622 (S.D.N.Y. 1973); *Independent Prod. Corp. v. Loew's, Inc.*, 22 F.R.D. 266, 276-77 (S.D.N.Y. 1958).

practice as a result of producing counsel's fear that a privilege may be waived by improvident disclosure of a privileged document.⁷⁶ Such a mistake would be very injurious to the reputation of counsel and could expose a law firm to enormous liabilities.⁷⁷ The purpose of my suggestion would be to relax those fears.

Of course, despite such a rule, prudent counsel would not disclose in confidence material that was known to be sensitive. All care would not be abandoned. But there are situations in which very substantial savings might be effected. This would be so where, for example, a haystack is not known to contain any needles and is unlikely to contain even a simple straight pin. A party might then reasonably calculate that the saving in the cost of prescreening is worth a slight risk that (a) prejudicial but privileged evidence will be discovered, and (b) adversary counsel will in violation of the rule refuse to return the privileged item and to refrain from using it. In some commercial litigation, the savings resulting from such confidential disclosure could run to seven or even eight figures. A risk in this proposal is that it might facilitate the tactic of burying a requesting party in an avalanche of documents. I make this last suggestion with special diffidence. Some might view this proposal as trenching on evidence rules or even on substantive state law.⁷⁸

Another outstanding issue of discovery meriting discussion is the controversy regarding the practice of suppressing discovery material as part of a settlement, especially in mass tort litigation.⁷⁹ It is argued in favor of the practice that parties should not be permitted a free ride on expensive discovery conducted in earlier like cases involving the same adversary. To

76. See, e.g., *Bud Antle, Inc. v. Grow Tech Inc.*, 131 F.R.D. 179 (N.D. Cal. 1990) (plaintiff screened approximately 6000 documents responding to defendant's document request).

77. Roberta M. Harding, *Waiver: A Comprehensive Analysis of a Consequence of Inadvertently Producing Documents Protected by the Attorney-Client Privilege*, 42 CATH. U. L. REV. 465, 497 (1993).

78. Carrington, "Substance" and "Procedure," *supra* note 23, at 290-294; Paul D. Carrington & Derek Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass Tort Settlements Under Federal Rule 23*, 39 ARIZ. L. REV. 461 (forthcoming 1997).

79. E.g., *Short v. Western Elec. Co.*, 566 F. Supp. 932 (D.N.J. 1982); *but see In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 145-48 (2d Cir. 1987).

preserve such material for use in subsequent similar cases deprives the party against whom it is used of the settlement bargaining chit represented by the cost of discovery. The diseconomies of redundant discovery ought be avoided if possible. The bargaining chit in question is not one the law ought be at pains to protect because it has no relationship to the merits of claims and defenses. It reflects, instead, the unavoidable but regrettable deficiencies of the legal process. For this reason, I suggest that the discovery rules should generally obligate parties to produce discovery materials produced in other like cases even if those cases were resolved short of trial. Particularly, I have in mind transcripts of depositions and responses to interrogatories, data compilations, tangible things, and other like items that are not privileged and not subject to a work product protection.

In the short term, this last reform would eliminate one of the incentives to settlement of some cases, especially those that might be described as "test" cases. On the other hand, it would seem to reduce materially the cost of litigating cases of the same type later. It would therefore increase the settlement value of meritorious claims and defenses, a purpose that seems entirely at peace with the aims stated in Rule 1.⁸⁰

VII. SUMMARY AND CONCLUSION

Taken together, the proposed changes would substantially reduce the involvement of judges in the conduct of pretrial litigation. While it is unlikely that these changes would materially reduce the evils of cost and delay, they might effect marginal improvements, and it seems almost certain that they would not contribute to any increase in cost or delay. It bears reiteration that the most important steps to be taken by judges are to set a reasonably firm trial date, provide reasonable and tailored parameters to the time for discovery, and rule promptly on discovery disputes. Beyond these steps, the judges should not go, except in the rare case too complex to be managed by counsel. They should then concentrate their efforts on judging cases, not

80. FED. R. CIV. P. 1 ("These rules . . . shall be construed to secure the just, speedy, and effective determination of every action.")

managing lawyers.

APPENDIX: A MODEST PROPOSAL

To facilitate consideration of the proposed approach to case management, the following draft has been prepared; it is suggested as a new subdivision (a) of Rule 26. Given that I have no responsibility for the ultimate action taken by the Committee or the Court in promulgating rules, I have not attempted to draft with the care appropriate for a text that is actually in danger of becoming law. This provision would replace subdivisions (a), (b), and (c) of the present Rule 16 as well as subdivisions (a), (c), (d), (e), (f) and (g) of the present Rule 26.

(a) Duties of Parties with Respect to Discovery; Planning for Discovery; Sanctions

(1) Every party to a civil action has a duty to cooperate with the court and with other parties to discover evidence bearing on facts in dispute with the least expense and inconvenience to all parties the circumstances may permit. To perform this duty, unless otherwise directed by the court:

(A) Within 90 days after the complaint has been served on a defendant, the parties shall confer and develop a tentative plan to discover evidence bearing on any disputed issues of fact. With notice to other parties, a conference to draft or modify a discovery plan may be transcribed by any party.

(B) The tentative discovery plan shall be signed by counsel of represented parties and by any unrepresented party and filed with the court within 120 days after the complaint has been served on a defendant. A signature on such a plan is a certificate that the party accepts the duty of cooperation and believes that implementation of the plan as filed will result in prompt and inexpensive discovery of all relevant and unprivileged evidence known to the signing party.

(C) If there are factual disputes and the parties are unable to agree on a tentative discovery plan, and the court finds the case to be sufficiently complex that the inability of the parties timely to agree on a plan is warranted, the court shall confer with the parties and order a plan. If the parties' inability to agree is not warranted by the complexity of the case, the court shall appoint a special master to order discovery; the cost of the special mastership shall be borne by parties in proportion to their responsibility for the disagreements giving rise to the need for the appointment.

(2) The tentative discovery plan shall contain

(A) a tentative list of the disputed facts that each party will attempt to prove at trial;

(B) a tentative list of the persons possibly having information bearing on those facts who are to be interviewed or deposed, with a tentative schedule of depositions that shall set reasonable limits on the number of hours each deponent will be available for questioning by each party and the number of attorneys reasonably needed to conduct the interrogation;

(C) a tentative description by category and location of all documents, data, compilations, and tangible things to be examined to determine their bearing on the disputed facts, with a tentative schedule for their examination;

(D) a tentative limit on the number of interrogatories to be answered by each party and a tentative schedule for the service of the interrogatories and the responses;

(E) a tentative list of any necessary physical or mental examinations and a tentative schedule for such examinations;

(F) a tentative identification of any issues on which any party will present scientific or technical opinion evidence and a tentative schedule for the disclosure of the substance of such testimony;

(G) a schedule fixing the time frame within which discovery will be completed and a date for a further conference to consider settlement in light of information acquired through discovery; and

(H) a list of any issues regarding the plan on which the parties are unable to agree and which therefore require a ruling by the court, and the contention of each party with respect to all such issues.

(3) To facilitate the preparation of the plan, each party is obliged as part of the discovery conference required by clause (a)(1)(A) of this Rule to respond to the following standard interrogatories:

(A) Do you know of any individual or individuals likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings? If so, give their names, and, if known, the address and telephone number of each, and identify the subjects of the information each may have.

(B) Do you have in your possession, custody, or control, written statements reciting discoverable information and signed by any individual named in response to the preceding interrogatory? If so, attach a copy of such signed statements.

(C) Are there documents, data, compilations, or tangible things in your possession, custody, or control that are relevant to disputed facts alleged with particularity in the pleadings? If so, provide a copy or a description by category and location.

(D) If you are making a claim for compensation,

how have you computed damages? Provide a copy for inspection and duplication, of any documents or other evidentiary material not privileged or protected from disclosure, on which such computation is based, including material bearing on the nature and extent of harms suffered.

(E) If a claim for damages is made against you, are you insured or do you have a claim for indemnity against another party? If so, provide a copy for inspection and duplication of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(4) No party shall be required to participate in discovery pursuant to Rules 26-37 of these rules except pursuant to a plan filed with or ordered by the court, provided however, that a court may, before any plan has been filed, order a deposition to be taken pursuant to Rule 30(a)(2)(C). Discovery will otherwise proceed according to the tentative plan as filed with the court, until the plan is modified. To facilitate timely modification, each party is under a continuing duty to other parties promptly to supply any additional information required by paragraph (3) of this subdivision that may become known during the course of trial preparation. The plan or order shall be freely modified by the parties to allow additional discovery

(A) to accommodate the interests of parties joined and served after the initial plan is prepared;

(B) to investigate previously unrecognized issues of fact revealed in the course of discovery conducted in accordance with the initial plan;

(C) to allow for the examination of documents or the deposition of witnesses not recognized at the time of the initial planning as possible sources of probative evidence

bearing on the disputed issues; or

(D) when justice so requires.

A modification of the plan shall be signed by counsel for each party and filed with the court. To the extent that the parties are unable to agree on a proposed modification of a current tentative plan, they shall file a statement of their disagreement reciting any contentions of any party on which they are unable to agree and the court shall forthwith order any appropriate modification.

(5) In the absence of disagreement among the parties, the court shall allow them to conduct discovery in accordance with their agreed plan or the court's order if any. If there is a disagreement among the parties regarding any aspect of discovery:

(A) The court shall hear and decide the matter forthwith. Unless the court otherwise orders, submissions with respect to discovery shall be oral and on the record.

(B) A party prevailing on any such issue shall be awarded an attorney's fee as just reimbursement for the cost of the presentation made to the court.

(C) If the parties have recurring disagreements in the administration of a plan, the court shall appoint a special master to hear and decide the issues. The rulings of the special master shall be reviewed only to correct errors of law.

(D) The fees and expenses of the special master with respect to each issue resolved by that process shall be taxed against the non-prevailing party.

(6) The court shall appoint a taxing master who shall establish and maintain a schedule of standard fees to be applied in determining the compensation of counsel engaged

in the presentation of discovery matters to the court, and of special masters when appointed to establish or administer a discovery plan. The taxing master shall determine the fees to be paid in each instance in which a fee is paid to resolve a discovery dispute.

(7) If without substantial justification, a party fails to perform the duty of cooperation stated in this rule, the court shall impose an appropriate sanction on that party. The sanction shall include an order to compensate other parties for any delay resulting from the failure and may include an additional penalty sufficient to deter future deliberate failures to perform that duty. Any such additional penalty shall be paid into court.