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Frank F. Flegal

Steven M. Umin

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Curbing Discovery Abuse in Civil Litigation: We're Not There Yet*

*Frank F. Flegal***
*Steven M. Umin****

The present agitation for reform of the discovery process may be traced to the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice convened in St. Paul, Minnesota. That conference, held in commemoration of Dean Roscoe Pound's classic address,[1] identified discovery abuse as a major problem.[2] The conferees focused on overuse of pretrial discovery procedures resulting in "[u]nnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement" and identified such overuse as a problem requiring urgent attention.[3] At the conclusion of the conference, a task force of nationally distinguished persons was appointed. That group recommended that the American Bar Association's Section of Litigation "accord a high priority to the problem of abuses in the use of pretrial procedures and report its findings and recommendations with a view to appropriate action by state and federal courts."[4]

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* Points of view or opinions expressed in this Article are those of the authors and do not necessarily represent the positions or policies of the American Bar Association, its Section of Litigation, or the Special Committee for the Study of Discovery Abuse.

** Professor of Law, Georgetown University Law Center; Consultant/Reporter to the Special Committee for the Study of Discovery Abuse; A.B., 1963, Occidental College; J.D., 1966, Georgetown University.

*** Member of the Bar of the District of Columbia; Member Special Committee for the Study of Discovery Abuse; A.B., 1959, J.D., 1964, Yale University.

1. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 35 F.R.D. 273 (1964) (originally published in 29 A.B.A. REP. 395 (1906)).

2. *E.g.*, Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 95-96 (1976); Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978).

3. Erickson, *supra* note 2, at 288.

4. American Bar Association, *Report of Pound Conference Follow-up Task Force*, 74 F.R.D. 159, 192 (1976). Chaired by Griffin B. Bell, the Task Force members were Hon. William H. Erickson; Jane L. Frank, Esquire; Francis R. Kirkham, Esquire; Hon. Wade

Responding to that call, the American Bar Association's Section of Litigation appointed the Special Committee for the Study of Discovery Abuse.[5] The Special Committee separated the concerns over discovery into three groups. First, the Special Committee determined that discovery was too costly, and it set about to devise ways to reduce the expense now associated with the process. Secondly, the Special Committee determined that the discovery procedures were being misused, and it proposed additions and amendments to the rules aimed at deterring misuse. Finally, and most important, the Special Committee determined that discovery was being used to excess—what it called "overuse."[6]

Our purpose here is to review the discovery reform which has already occurred and to assess the need for further change. Using as our springboard the recommendations made by the Special Committee in its Second Report, we shall examine the need for further reforms and explore alternative approaches suggested by others, including those advanced by Professor Rosenberg and Judge King in their provocative article.[7]

I. Accomplished Reforms

The series of amendments ultimately proposed by the Advisory Committee in 1979, which became effective, following national debate, on August 1, 1980, made some important changes designed to deter misuse of the existing rules or to afford alternative and less costly methods of conducting depositions.[8] Al-

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H. McCree; Professor Maurice Rosenberg; and Hon. Walter V. Schaefer. Professor A. Leo Levin served as consultant to the group. *Id.* at 164.

5. That committee was initially chaired by Paul R. Connolly of the District of Columbia. Professor James W. Jeans served as its first consultant/reporter. After release of the Special Committee's First Report, Professor Flegal became consultant/reporter to the committee and following the death of Mr. Connolly in 1978, Joseph A. Ball and Weyman I. Lundquist, both of California, became co-chairmen. The membership of the committee consists of lawyers with varied practices from across the country, law professors, and federal trial and appellate judges.

6. *See* American Bar Association, Comments on Revised Proposed Amendments to the Federal Rules of Civil Procedure 6-11 (1979) (unpublished).

7. Rosenburg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. Rev. 579.

8. With the exception of the discovery conference provisions of new Rule 26(f), the 1980 amendments are aimed at reducing unnecessary costs in the discovery process and at deterring unjustified misuse of existing procedures. Wasteful filing of discovery papers may now be dispensed with pursuant to amended Rule 5(d), and depositions may be taken under less expensive procedures pursuant to amended Rule 30(b)(4) and 30(b)(7). The abusive practices often associated with production of documents or in the tendering

though the Advisory Committee had initially considered proposals aimed at the excessive use of the discovery process and abuses of the interrogatory procedure, it stopped short of major reform in those areas. The Advisory Committee explained:

> There has been widespread criticism of abuse of discovery. The Committee has considered a number of proposals to eliminate abuse, including a change in Rule 26(b)(1) with respect to the scope of discovery and a change in Rule 33(a) to limit the number of questions that can be asked by interrogatories to parties.
>
> The Committee believes 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. A very recent study of discovery in selected metropolitan districts tends to support its belief. P. Connolly, E. Holleman, & M. Kuhlman, *Judicial Controls and the Civil Litigative Process: Discovery* (Federal Judicial Center, 1978). In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.
>
> To this end [new Rule 26(f)] provides that counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court.[9]

The discovery conference provisions of new Rule 26(f) and the corresponding sanction provisions of new Rule 37(g) are provisions of unmistakable importance marking the start of an effort to bring unnecessarily expansive and expensive discovery under control. Although these new rules do not redefine the allowable scope of discovery or introduce into the rules the concept of proportionality, they represent a significant first step toward bringing discovery under control. At least, there is now in place a mechanism permitting a party to propose a plan and

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of documents in lieu of answers to interrogatories are now barred by amended Rules 33(c) and 34(b). These provisions substantially track the proposals advanced by the Special Committee in its 1977 Report, although the Advisory Committee determined to permit a party to dispense with the filing of discovery papers under Rule 5 only when an order of the court has been obtained, and to allow the alternative deposition methods only pursuant to stipulation or an order of the court. Although a minor matter, one may wonder whether the cost of preparing the motion necessary to secure such an order may not outweigh the savings sought to be made available.

9. *Amendments to the Federal Rules of Civil Procedure,* 85 F.R.D. 521, 526 (1980). Judge Mansfield, chairman of the Advisory Committee, expanded on the point in his transmittal memorandum to Judge Thomsen and the members of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. *Id.* at 538.

schedule of discovery including the limitations, if any, to be placed on that discovery and to specify "the issues as they then appear." Other parties to the litigation are required to "participate in good faith in the framing of a discovery plan by agreement," and if an agreement cannot be attained, the court is required to convene a discovery conference and thereafter to enter an order:

> tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action.[10]

Although the Advisory Committee did not seem to disagree with the Special Committee's concern over misuse of the interrogatory procedure,[11] it rejected the Special Committee's proposal that more than thirty written interrogatories be allowed only upon an order of the court. The package of 1980 amendments contained no substitute provision concerning interrogatory abuse.

II. The Problems That Remain

A. Excessive Discovery

There is a rapidly developing consensus that pretrial discovery is frequently used in excess with the result that unnecessary expense is incurred and unnecessary delay encountered. Two important studies, published since the Advisory Committee released its final recommendations in 1979, furnish strong evidence that the problem of excessive discovery is substantial. Although there are some definitional differences, the results of Professor Ellington's study,[12] prepared for the Department of Justice's Office for Improvements in the Administration of Jus-

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10. Fed. R. Civ. P. 26(f) (amended Apr. 29, 1980).

11. The Advisory Committee seems not to have been persuaded that the problem of excessive use of discovery was sufficiently serious or widespread to warrant strong corrective measures. *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. at 526-27, 543-44. The Advisory Committee did not express similar skepticism about misuse of the interrogatory process. Rather, it concluded that neither the Special Committee's proposal, nor its earlier and tentative conclusion to deal with the problem by local rule, were satisfactory solutions. *Id.* at 541-42.

12. C. Ellington, A Study of Sanctions for Discovery Abuse (May 11, 1979) (report submitted to the Office for Improvements in the Administration of Justice, United States Department of Justice).

tice, and Professor Brazil's study,[13] prepared for the American Bar Foundation, reach very similar conclusions. Professor Ellington interviewed federal trial judges in two federal districts and found that they perceived "unnecessary, expensive, overburdening discovery as a substantial threat to the efficient and just functioning of the federal trial system for civil litigation."[14] Ellington's findings conform to those of Professor Brazil who interviewed lawyers in Chicago and found that forty-nine percent of the lawyers interviewed practicing in the federal courts believe "overdiscovery" is a major abuse of the discovery process.[15]

"Overdiscovery," the term used by Professor Brazil, and "excessive discovery," the terms used by Professor Ellington, are not self-defining concepts. There is thus room for the argument made by Messrs. Rosenberg and King that the problem lies with discovery that is "too deep" and not that which sweeps "too wide." As this distinction is central to the solution they advocate, it merits careful examination.

If the problem were only that of attorneys digging too deeply into a subject, the solution would be relatively easy. The therapy would include modification of the rule permitting unlimited use of discovery procedures and expansion of the bases

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13. Brazil, *Civil Discovery: Lawyers' Views of its Effectiveness, its Principal Problems and Abuses*, 1980 AM. B. FOUNDATION RESEARCH J. 787.

14. C. Ellington, *supra* note 12, at 37. Ellington's interviews of these judges showed agreement on this point regardless of how the particular judge handled discovery matters. Those judges termed "judge as manager" by Ellington identified "the most serious discovery abuse as the 'unnecessary,' 'incessant,' 'protracted,' 'expensive' 'overuse' of discovery." *Id.* at 32. Those judges termed "judge as mediator" also found " 'needless' discovery and 'overdoing' discovery as the most serious abuses encountered. . . ." *Id.* at 34. Another group, termed "judge as umpire" by Ellington, agreed that these judges "as a group, identify 'over-discovery' and 'unnecessary' discovery as the most serious abuses encountered." *Id.* at 35. Finally, the group termed "judge as delegator" also found "the monumental volume of discovery and the wide-open nature of modern discovery as the most serious abuses encountered." *Id.* at 36-37.

15. Brazil, *supra* note 13, at 50. Importantly, Brazil's study shows that concern about overdiscovery is shared by lawyers in both big or small cases, those representing individual and corporate clients, and those involved in automobile and securities cases. Although the frequency with which these groups of attorneys voice the overdiscovery complaint varies, there is significant complaint in all groups. For example, 34% of the attorneys representing individual clients view overdiscovery as a problem while 72% of the attorneys representing corporations make the similar complaint; 62% of the attorneys involved in large cases view overdiscovery as a problem as do 38% of the lawyers involved in small cases; and 59% of lawyers involved in antitrust litigation make the overdiscovery complaint compared with 29% of those involved in automobile cases. The results are too pervasive to be dismissed as an isolated occurrence involving only a few lawyers or a few kinds of cases. *Compare* Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 ARIZ. ST. L.J. 475, 476-78.

justifying protective orders. Our disagreement is not with the solution, but with the premise. We do not read the empirical studies to support the conclusion that the problem lies only with those who dig too deeply.[16] And it is not self-evident that overly deep discovery is the only facet of the frequent complaints about excessive discovery.

Nor is the "more is better" message sometimes read into *Hickman v. Taylor*,[17] limited to overly deep discovery. The Supreme Court's recent and unanimous reliance on *Hickman* cuts the other way:

> The general scope of discovery is defined by Fed. Rule Civ. Proc. 26(b)(1) as follows:
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> > "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."
>
> The key phrase in this definition—"relevant to the subject matter involved in the pending action"—has been construed broadly to encompass any matter that bears on, or that reasonably *could* lead to other matter that *could* bear on, any issue that is or *may* be in the case. See *Hickman v. Taylor,* 329 U.S. 495, 501 (1947).[18]

Given this definition of relevancy for discovery purposes, it would be remarkable if excessive discovery were chiefly limited to situations where a party tried to dig too deeply into a matter concededly relevant and necessary for fair resolution of the dispute. No doubt there are cases where discovery, while relevant to issues in the case, becomes unreasonably duplicative or redundant.[19] We cannot agree, however, that this is the nub of the problem. Surely when a litigant can point to the cornerstone discovery rule permitting discovery of something that "could lead to" something else that "could bear on" something that not yet is but "could be" an issue in the case, he is relying on an official license for disproportionate and unnecessarily *broad* discovery. It is thus no surprise that the empirical evidence, from judges and lawyers alike, puts scope disputes near the top of the list of

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16. Professor Ellington found that attorneys and judges alike ranked disputes over the scope of discovery—claims that discovery was cutting too wide—well above disputes over excessive discovery. C. Ellington, *supra* note 12, at 43, 56.

17. 329 U.S. 495, 507 (1947).

18. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 350-51 (1978) (footnote omitted) (emphasis added).

19. Rosenberg & King, *supra* note 7, at 586.

discovery abuses.[20] Accordingly, we would need more evidence than we have yet seen to be persuaded that overly *broad* discovery is not a major part of the overuse or excessive discovery problem. Indeed, perhaps more than any other abuse, overly broad discovery seems to have been the principal stimulus that moved the Pound conferees in the first place.

B. Protective Orders and Sanctions

The recently completed studies of federal discovery practice show that judges as a group often fail to enforce the present protective and sanction provisions of the rules. As one lawyer interviewed by Brazil put it: " 'Courts want nothing to do with discovery and never use sanctions. Rule 37 is really Rule Zero.' "[21]

The broad protective order provisions of Rule 26(c) and the stiff sanctions authorized by Rule 37 were originally promulgated as deterrents against the temptation to abuse discovery. If, as the evidence shows,[22] those provisions are not being utilized by a significant number of judges, the process will break down because lawyers and litigants will learn that discovery abuses are not subject to sure and effective detection and correction.[23]

Nonetheless, we believe it both unrealistic and unwise to grasp at solutions which rely solely on heightened judicial intervention as the ultimate cure for discovery abuse. Despite the addition in recent years of more judges and magistrates, the pressure of mounting caseloads makes understandable judges' decisions to assign a relatively low priority to discovery squab-

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20. C. Ellington, *supra* note 12, at 43, 56.

21. Brazil, *supra* note 13, at 824. *See also* C. Ellington, *supra* note 12, at 53. Observing the reluctance of federal judges to implement the cost provisions of the existing rules, Professor Ellington commented:

> This is astonishing because the Federal Rules were amended in 1970 expressly to encourage parties to police discovery abuses more firmly by bringing such motions. As amended, the rules specifically mandate that expenses be awarded where the motion is successful unless the losing party carries the burden of showing that his conduct was substantially justified. Quite clearly, trial judges do not routinely or ordinarily award the costs of bringing discovery motions; taken together, 86.3% of the judges responded that they "seldom," "almost never" or "never" awarded such costs.

Id. at 53.

22. C. Ellington, *supra* note 12, at 102-17; Brazil, *supra* note 13, at 824-27. Some judges do utilize the protective order and sanction provisions of the rules, but the practices vary widely. C. Ellington, *supra* note 12, at 31-41. *See also* Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 271-82 (1979).

23. See Ellington's description of the methods which some attorneys use to deal with the problem of excessive discovery. C. Ellington, *supra* note 12, at 95-96.

bles. We recognize as a first principle in the effort for meaningful reform the probability that judicial resources will remain a scarce commodity in the decades to come. If we are right on that score, the goal must be to devise a solution that aims to prevent abuse and not one that simply adds to the plethora of procedures already available to correct or punish an abuse after it has occurred. Judicial resources are, and are likely to remain, a resource to be rationed. If these resources are squandered on patchwork additions to existing sanction and protective order provisions, the result is foreordained. We need those provisions, of course, and we need to have them enforced by the courts, but experience has taught us that *standing alone* they will not do the job.[24]

C. *Interrogatories*

The furor over abuse of interrogatories is not new: it was identified as a major problem in 1968[25] and it remains a major

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24. In 1968, it was learned that lawyers infrequently sought sanctions because judges rarely awarded them. *See* W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 154-56 (1968); Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 494-96 (1968). The 1970 amendments sought to discourage abuse by encouraging use of the sanction and protective order provisions. Those rules were beefed up and mandatory cost provisions were included. Ten years later, another study convincingly demonstrates that the solution did not work, and attorneys remain reluctant to incur the expense and bother of seeking such orders because judges rarely award them. C. Ellington, note 12 *supra*.

25. The Advisory Committee's commentary to the 1970 amendments makes this point clear. "There is general agreement that interrogatories spawn a greater percentage of objections and motions than any other discovery device." *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 522 (1970). *See generally* W. GLASER, *supra* note 24, at 143-55; *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 479, 490 (1968) (comments of Professor Rosenberg); Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1142-45 (1951).

Unlike an oral deposition, interrogatories are quickly and inexpensively generated and the appearance of the form interrogatory and the technological advances in word processing made old abuses such as the mimeographed interrogatory obsolete. *See The Practical Operation of Federal Discovery*, 12 F.R.D. 131, 134 (1952) (comments of William H. Speck). The 1970 amendments sought to curb abusive use of the interrogatory procedure by placing the burden "on the interrogating party to move under Rule 37(a) for a court order compelling answers" if the party served with the interrogatories interposed a timely objection. 48 F.R.D. at 523. In practice, this approach has not worked. *See generally* C. Ellington, note 12 *supra*. Professor Ellington's study calls attention to what he has dubbed the "poor man's protective order"—a party's simple refusal to object or respond to interrogatories which it perceives as being abusively broad. C. Ellington, *supra* note 12, at 89. The Special Committee's proposal would move to an earlier point in time the burden established by the 1970 amendments and would require the interrogating party to justify under the proportionality principle the filing of more than

problem today.[26] Judge Schroeder and Mr. Frank clearly identified one aspect of the problem:

> The principal area of vexations is in the field of interrogatories. The development of the form interrogatory and the Xerox machine, coupled with the now permitted practice of sending out the interrogatories with the initial pleadings, makes the profusion of interrogatories easy. We hear commonly of superfluous information sought which may be burdensome to accumulate. The excessive interrogatories may themselves be of two types: First, those which result from the use of forms so wildly inapplicable that a simple response to that effect is enough, as when the five-year-old plaintiff is asked whether he is married; second, those which go into great detail on marginal past medical history, seemingly unrelated economic transactions, or call for recollections of long distant meetings. These examples illustrate more time-consuming and costly discovery vexation.[27]

But, as the Special Committee noted:

> Abuse of the interrogatory process is not limited to the propounding party, however. We have reviewed cases where proper interrogatories were not properly answered. In some cases, the requirement of a full answer was thwarted by a strained construction of the question. . . . In other cases, partial or incomplete answers were furnished. In still other cases, a question was answered with the statement "investigation continuing" or phrases of similar import.[28]

The problems associated with interrogatories surfaced in the amendments considered in 1978 and 1979, but the Advisory Committee eventually determined not to recommend amendments aimed at these abuses.[29] The Special Committee's Second

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thirty interrogatories. *See* notes 28-30 and accompanying text, *infra*.

26. "No single rule was perceived by the Bar at large responding to the Committee's questionnaire as engendering more discovery abuse than Rule 33 on interrogatories." AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE 20 (1977) [hereinafter ABA REPORT No. 1]; AMERICAN BAR ASSOCIATION, SECOND REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE 16a (1980) [hereinafter ABA REPORT No. 2]; C. Ellington, *supra* note 12, at 65-67; Brazil, *supra* note 13, at 829-30.

27. Schroeder & Frank, *supra* note 15, at 478 (footnote omitted). The Arizona State University conferees considered a case where one written interrogatory had 2,720 parts and another case where the Department of Justice reported that 10,000 interrogatories had been filed. *Id.* at 478 n.18.

28. ABA REPORT No. 2, *supra* note 26, at 14a.

29. *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. at 543-44.

Report returned to the problems associated with the interrogatory procedure.[30]

III. Suggested Approaches

Excessive use of discovery, reexamination of the judicial role in discovery, and abuses associated with the interrogatory process are the principal issues in the present debate over the pretrial discovery procedures. The selection of appropriate solutions will set the stage for civil litigation during the last two decades of this century. It is appropriate, therefore, that the matters receive wide attention and be the subject of full debate.

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30. The Special Committee proposes distinct remedies for the problems of excessive interrogatories and nonresponsive answers. For the former, the committee would require leave of court (or an agreement of the parties) before more than thirty interrogatories could be served. This approach, suggested by the Special Committee in 1977, ABA Report No. 1, *supra* note 26, at 18, has been adopted by local rule in a number of districts. *E.g.*, Rule 230-1 (S.D. Cal.); Rule 3.03(a) (M.D. Fla.); Rule 10-I(1) (S.D. Fla.); Rule 7.4 (S.D. Ga.); Rule 9(6) (N.D. Ill.); Rule 12(c) (S.D. Ind.); Rule 15(d) (D. Kan.); Rule 6(B) (D. Md.); Rule 3(B) (D. Minn.); Rule C-12 (D. Miss.); Rule 8 (E.D. Mo.); Rule 2(e) (W.D. Mo.); Rule 10(e) (D.N.M.); Rule 12(B)(4) (S.D. Tex.); Rule 26(d)(1) (W.D. Tex.); Rule 11-1(A) (E.D. Va.); Rule 7(f) (D. Wyo.). The District of South Carolina has fixed a threshold limitation on the number of interrogatories which may be propounded without an order of the court by order. 1 Bender's Forms of Discovery 660-61 (1980). *Order in the Matter of: Interrogatories and Requests for Admission* (D.S.C. Jan. 29, 1979). Compare Rule 15 (D. Hawaii). Nevertheless, this approach remains controversial, and the Southern District of Alabama has expressly declined to follow it. Introduction to Discovery Practice in the Southern District of Alabama 21 (1980). Those opposed to the idea point out that the number "thirty", or any other number, is arbitrary and worry that a litigant with limited resources would be improperly denied an inexpensive method of discovery. Other approaches have been suggested. The Arizona State University conferees, for example, suggested that whenever a court determines that "the number of interrogatories is excessive to the needs of the situation," the court should: (1) strike the entire set of interrogatories and (2) impose a reasonable limitation on the number of interrogatories which may thereafter be propounded. *Report of the Arizona State University Discovery Conference*, 1978 Ariz. St. L.J. 494, 500.

To deal with the problem of evasive or nonresponsive answers and dilatory objections, the Special Committee has recommended incorporation of a certification requirement into Rule 33. ABA Report No. 2, *supra* note 26, at 15a.

The values and drawbacks of the different suggestions for improvement of the interrogatory process have been ventilated often and well, and we will not continue the airing here. The problem has existed for years and is not likely to go away. Whether the solution advanced by the Special Committee or the alternative approach suggested by the Arizona State conferees or yet another tack is ultimately adopted is relatively unimportant. What is important is that attention be given to the demonstrated problem and that a solution be devised that responds to the problem without unnecessarily diverting judicial resources from other and more important work.

A. Excessive Use of Discovery

Building on its initial recommendation for a mandatory discovery conference, now covered by new Rule 26(f), the Special Committee recommended a three-pronged series of amendments to Rule 26:

> Rule 26. General Provisions Governing Discovery
> (a). *Discovery Methods. Subject to the provisions of subsection (g) of this Rule, (1)* parties may obtain discovery by one or more of the following methods: deposition upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection or other purposes; physical and mental examinations; and requests for admission *and (2)* unless the court orders otherwise under *these* rules the frequency of use of these methods is not limited.
> (b). *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General. Subject to the provisions of subdivision (g) of this rule,* parties may obtain discovery regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> . . . .
>
> *(26g). Signing of Discovery Requests and Objections. Every request for discovery, every objection to a discovery request and every motion or opposition to a motion for an order under Rules 26 through 37 filed by a person represented by an attorney shall be signed by at least one attorney of record in his individual name. A person who is not represented by an attorney shall sign his request, objection, motion or opposition. The signature of an attorney or such a person constitutes a certificate by him that he has read the request, objection, motion or opposition; that to the best of his knowledge and belief the request, objection, motion or opposition is made in good faith and is not unreasonably annoying, embarrassing or oppressive or unduly burdensome or unduly expensive given the nature and complexity of the case, the amount in controversy*

or other values at stake in the litigation, and the discovery, if any, which has already been had; and is not interposed for delay. If a request, objection, motion or opposition is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action in addition to any other sanction authorized by these rules or other provisions of law.[31]

The Special Committee's three-pronged approach to the problem of excessive discovery would: (1) reverse the "frequency unlimited" message of present Rule 26(a); (2) eliminate the "subject matter" phrase in present Rule 26(b)(1); and (3) introduce into discovery practice an explicitly stated principle of proportionality to govern discovery requests and objections. The facet of this proposal that would change the "frequency unlimited" feature of discovery has met with general approval. Concerns, however, have been voiced over the other two prongs of the Special Committee's approach and it is to these elements that we now turn.

1. Proportionality

No one can seriously disagree, we think, with the principle that the discovery that is allowable ought to be measured against the needs of the particular case. A simple case involving a modest sum of money, for example, can hardly justify pretrial discovery out of all proportion to the issues raised or the recovery anticipated. A plaintiff should not be deterred from seeking judicial resolution of a dispute by the prospect that the money required to be expended for counsel fees and discovery expenses will outweigh any recovery likely to be obtained.[32] Conversely, a defendant should not be permitted to "wear down" a plaintiff by demanding discovery disproportionate to the needs of any legitimate and fair defense to the action.

Borrowing on concepts already expressed in Rules 11 and 26(c), the Special Committee thought the concept of proportionality could be expressed as follows:

[A discovery request or objection must be] made in good faith

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31. ABA REPORT No. 2, *supra* note 26, at 1a-2a.

32. To some extent, the cost of litigation serves as an important brake upon pugilistic impulses and may even be an important element the system relies upon to deter resort to the courts when other methods of dispute resolution would do.

> *and [not be] unreasonably annoying, embarassing or oppressive or unduly burdensome or unduly expensive given the nature and complexity of the case, the amount in controversy or other values at stake in the litigation, and the discovery, if any, which has already been had; and [may not be] interposed for delay.*[33]

This principle can be reflected in other language, and different versions have been suggested. Since we attach primary importance to adoption of the principle, we believe any language appropriately expressing the concept of proportionality would be quite suitable.

Some have suggested the principle of proportionality ought to include a phrase calling for consideration of the resources of the parties, and Professor Rosenberg and Judge King suggest adding a clause requiring consideration of "the resources reasonably expected to be available to the parties or persons involved." We do not understand the purpose of this additional proviso.

It is suggested that this language will "allow the court to take into account the need of parties with limited resources to opt for less expensive discovery methods."[34] That, however, is already the law[35] and a further amendment is not needed to accomplish that goal. There is the additional suggestion that this proviso will permit a "court to curtail discovery in circumstances where it is apparent that a party with significant resources is using the discovery process to wear down a financially weaker adversary, either to discourage meritorious claims or defenses or to force unwanted settlements."[36] Such practices, however, would be barred under the proportionality and good faith language of the proposed amendment and we do not deem it necessary to add the "resources available" language to deal with them.

Although everyone would support proposals designed to make litigation less expensive and protect financially weak litigants, we worry that this language—unless carefully constructed

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33. ABA REPORT No. 2, *supra* note 26, at 2a (emphasis in original).

34. Rosenberg & King, *supra* note 7 at 590.

35. FED. R. CIV. P. 26(c). *See generally* Molinaro v. Lafayette Radio Electronics, 62 F.R.D. 464 (E.D. Pa. 1973); Sykes Int'l, Ltd. v. Pilch's Poultry Breeding Farms, Inc., 55 F.R.D. 138 (D. Conn. 1972); Endte v. Hermes Export Corp., 20 F.R.D. 162 (S.D.N.Y. 1957); Perry v. Edwards, 16 F.R.D. 131 (W.D. Mo. 1954); Sullivan v. Southern Pac., 7 F.R.D. 206 (S.D.N.Y. 1947); Barili v. Bianchi, 6 F.R.D. 350 (N.D. Cal. 1946); Moore v. George A. Hormel & Co., 2 F.R.D. 340 (S.D.N.Y. 1942).

36. Rosenberg & King, *supra* note 7, at 591.

and clarified by detailed commentary—might be counterproductive. Suppose, for example, a case where contemplated discovery is to be banned as disproportionate, *i.e.*, a discovery that is *not* commensurate in cost, duration and frequency with the needs of the case or the substantiality of the issues. Does that discovery now become allowable simply because the litigant from whom disproportionate discovery is sought has a "deep pocket" such as the government, a major corporation, or a wealthy individual? If it does, we do not agree with the proposal. If it does not, we fail to see what the language adds.

Conversely, suppose a case of a perfectly appropriate discovery request—one proportionate to the needs of the case. Would inclusion of the "resources available" criterion permit a party from whom discovery is sought to resist that appropriate request by pleading the financial burdens of compliance? Since the rules already permit a court to order another, less expensive method of compliance, the suggested addition must contemplate this kind of a result in some cases. If that is the aim of the addition to the rule of proportionality, we are not sure it reflects good policy.[37] If the addition would not compel or permit that result, we fail to see what it adds to the Rule.

2. *Scope*

If one takes the view that excessive use of discovery is essentially a problem of litigants probing "too deep," the definition of the permissible scope of discovery set forth in Rule 26(b)(1) does not raise difficulties. If, however, that premise is rejected, the permissible scope of discovery must be reexamined in light of the realities of litigation in the 1980's.

The Special Committee's First Report pointed to the "subject matter" language of Rule 26(b)(1) as the source of what it termed "expansive" and "sweeping and abusive discovery."[38] Af-

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37. The cost of pretrial discovery, even properly controlled, is a significant deterrent to one of limited financial means. Every effort should be made to reduce these costs, and it may be that the provisions of 28 U.S.C. § 1915 should be amended to allow a court to authorize public funds for necessary discovery expenses in an appropriate case. That is a matter of policy, however, quite different from withholding concededly proper discovery from a litigant because the adverse party claims a financial burden in complying. Granting, as we unreservedly do, the need to make the judicial process freely available to litigants with limited resources, we do not understand why an opposing party should be denied otherwise proper discovery necessary to presentation of a claim or defense. Overreaching or disproportionate discovery, of course, is another matter altogether.

38. ABA REPORT No. 1, *supra* note 26, at 3.

ter that report was issued, the Supreme Court identified "subject matter" as the "key phrase" in Rule 26(b)(1) and read that phrase to "encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."[39] In its Second Report, the Special Committee returned to the theme that this definition of the scope of discovery was too broad. It proposed a redefinition of relevance for discovery purposes to embrace, subject to the rule of proportionality, "any matter relevant to the claim or defense of any party."[40]

If one agrees that excessive discovery embraces discovery that sweeps "too wide," the question narrows to an appropriate solution. Some fear that adoption of the Special Committee's proposed solution, using the "claims and defenses" definition of discovery relevancy, will place undue strain on the pleading phase of a case.[41] Others wonder whether a redefinition of the allowable scope of discovery will achieve anything at all, since it is difficult to pose a case where discovery would be "relevant to the subject matter" but not relevant to the "claims or defenses."[42] All agree that discovery should not be turned into a series of quibbles over the niceties of common law pleadings or the rules of evidence.

It seems to us the conflicting message now conveyed by the rules must be weighed against these points. On one hand, Rule 26(b)(1) says that discovery is allowed for any matter "that bears on, or that reasonably could lead to other matter that could bear on any issue that is or may be in the case."[43] Asking an attorney or judge to weigh that entitlement against a claim of

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39. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).

40. *See* note 31 and accompanying text *supra.*

41. *E.g.,* Schroeder & Frank, *supra* note 15, at 481. *See generally* Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition,* 78 F.R.D. 267 (1978). This is not the place to explore in any detail what the framers of Rule 11 had in mind when they provided that an attorney certifies by his signature on a pleading that there is "good ground" for assertion of any claim or defense. It is appropriate to observe, however, that a growing number of federal judges have expressed consternation at the notion that Rule 11 and the discovery rules are often believed to allow the filing of a lawsuit followed by extensive discovery to determine whether there is a ground for the complaint. C. Ellington, *supra* note 12, at 93. Presumably, the same point could be made for assertion of many defenses.

42. Schroeder & Frank, *supra* note 15, at 479. *But see* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351-52 (1978).

43. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 350 (1978). This is the reading of the key "subject matter" phrase by the Supreme Court.

excessiveness is asking quite a bit, particularly if the proportionality principle is introduced limply into the rules with only the permissive verb "may" to serve as a guide.[44] If the huge sweep of Rule 26(b)(1)'s authorization "may" be limited by a rule of proportionality, it "may" also not be so limited. Rules which announce a permissive rule of proportionality and retain unmodified the key "subject matter" entitlement will flash exactly contradictory signals to the bench and bar.

The discovery conference provisions of Rule 26(f), providing for an agreement or order fixing the "issues for discovery," is a good start toward curbing overly broad demands. The next good step toward curbing discovery that sweeps too wide as well as that which digs too deeply might be a properly phrased mandatory rule of proportionality relating allowable discovery to the needs of a case. The rule of proportionality would require consideration, among other things, of the nature and complexity of the case, and amount in controversy or other values at stake, and the discovery, if any, which has already been had.

It may be, as the Special Committee continues to recommend, that the "subject matter" phrase should be deleted from Rule 26(b)(1). That, however, is not the only possible solution. For example, the rule of proportionality could be added as a mandatory qualification to Rule 26(b)(1)—the other branch of the Special Committee's recommendation. Another approach might permit discovery as of right concerning matters relevant to the "claims and defenses" but allow discovery beyond "claims and defenses" into "subject matter" only upon a court order entered after an appropriate showing in the particular case.

We do not here argue for the Special Committee's language or any other. We do contend that the key "subject matter" phrase of Rule 26(b)(1), as construed by the courts for the past forty years, authorizes and encourages a discovery so broad and sweeping in scope as to hamper efforts to bring abusively expansive and unnecessary discovery under control. Addressing the problem head-on will require us to face that fact and to devise a solution which affords a full and fair opportunity to prepare any legitimate claim or defense involved in the case while moving closer to the goal of a "just, speedy and inexpensive" determination of the dispute.[45]

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44. Rosenberg & King, *supra* note 7, at 595.

45. FED. R. CIV. P. 1. The heat and fray of discovery is often so intense that we lose

3. Allocation of Responsibilities Between Judges and Lawyers

The Special Committee's proposals rest on the fundamental assumption that the costs of discovery can be reduced and abuse of the discovery process can be curbed by cooperative and complementary efforts on the part of the bench and bar. As the Committee stated:

> Discovery, like pleading, is too easily abused, the consequences of such abuse in terms of delay, expense and public resentment are too serious, and the federal judiciary is too busy to continue the present reliance on protective and sanction orders as the principal weapon against abuse. While those powers must be retained and firmly exercised, we are persuaded that the effort to state and enforce proper standards of professional conduct for attorneys offers a significant opportunity to deter excessive discovery and other abuse.[46]

From this premise, the Special Committee sought to structure amendments placing first line responsibility upon the lawyers involved in the discovery process to structure a discovery suitable for the given case. This decision as to the proper locus of first line responsibility led to the discovery conference provisions of Rule 26(f) and the complementary "good faith participation" provisions of Rule 37(g) that have now been adopted. Likewise, the Special Committee now proposes an amendment to Rule 29 to allow parties to resolve any discovery matter by stipulation and without judicial intervention.[47] These provisions further the preference for resolution of discovery matters by the litigants outside the courthouse.[48]

The Special Committee carried this theme over to the problem areas of excessive discovery and the interrogatory process.[49] The Special Committee believed that appropriately specific guidelines can be fixed for the frequency and scope of allowable discovery by adoption of mandatory proportionality provisions and other suitable revisions. On that premise, the Special Committee proposals place upon the individual attorney the first line

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sight of the fact that discovery, like other procedural provisions, is a tool in the quest for a "just, speedy and inexpensive" resolution of every dispute. *See* Herbert v. Lando, 441 U.S. 153, 177 (1979).

46. ABA REPORT No. 2, *supra* note 26, at 41.

47. *Id.* at 7a. The stipulation authority contemplated by this amendment is subject to the qualification "unless the court orders otherwise."

48. C. Ellington, *supra* note 12, at 60.

49. ABA REPORT No. 2, *supra* note 26, at 1a-5a, 15a-16a.

obligation to avoid abuse of the discovery process by requiring that every request or objection submitted over that attorney's signature be read,[50] found appropriate to the needs of the case, and filed in good faith and not for delay.[51]

Abuses of the discovery process will not be brought under control simply by clarifying the limits of allowable discovery and requiring sober evaluation of each discovery request or objection signed by an attorney against those limits. Judges are needed. They have always been needed. The important question is when and where to apply the judicial resource to the best benefit and at an affordable cost.

There is a growing tendency, evidenced by some of the 1980 amendments and reflected in some current suggestions, to dump in the judicial lap each and every discovery problem—the minor as well as the major—and to do so at the earliest opportunity.[52] If there were no costs associated with this approach, that might be an acceptable solution. But there are costs. The expense associated with the preparation of needless motion papers is one. The extra burden placed on judicial dockets is another.

The approach advocated by Professor Rosenberg and Judge King is, we believe, another step in this costly direction. Profes-

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50. Although, at first blush, the requirement that the discovery request or objection be read seems odd, the growth of machine generated interrogatories furnishes one clear example of the need for such a requirement. The kinds of abusive interrogatories identified by the Arizona State University conferees could not have been read by the attorney who submitted them. *See* note 27 and accompanying text *supra*.

51. The twin requirements of proportionality and good-faith-not-for delay, if read against sufficiently clear guidelines for allowable discovery, afford a first line of defense against the pressures and economics of the litigation industry which Professor Rosenberg and Judge King identify. Rosenberg & King, *supra* note 7, at 582. Moreover, these provisions erect a frontline barrier against other pressures. Many clients, particularly those involved frequently in civil litigation, are quite sophisticated and well acquainted with the realities of the judicial system. Imprecise and inconsistent guidelines over the allowable scope of discovery makes it difficult for an attorney to resist a client's demand for discovery that cuts excessively deep or sweeps excessively wide. Furthermore, the imprecision and uncertainty now found in the discovery rules contribute to the documented fear of many lawyers that failure to exhaust every avenue during discovery may result in a charge of malpractice "if they lose a case having left any stone unturned. Thus, just as medical doctors are now accused of ordering lab tests that are only peripherally necessary to build a record, so lawyers depose every witness at length and seek with undifferentiated need every scrap of paper." C. Ellington, *supra* note 12, at 92-93.

52. Although some cost saving improvements were introduced in the 1980 amendments involving the mechanics of deposition practice or the unnecessary duplication and filing of discovery papers, these procedures are unavailable until a litigant prepares a motion and secures an order authorizing their use. FED. R. CIV. P. 5(d), 30(b)(4), 30(b)(7).

sor Rosenberg and Judge King would introduce the proportionality principle into the rules by adding another paragraph to the protective order provisions of Rule 26(c) and they would phrase that principle only in permissive terms. This protective order approach puts the problem in the lap of the judge in the first instance, imposes upon the party seeking the protection of the proportionality principle the expense of preparing the necessary papers, requires judicial consideration of the motion in every case, and conveys the message that unless such an order is entered discovery is allowable to the limits of the subject matter scope set forth in Rule 26(b)(1).

If proportionality is to be the rule of discovery during the coming years, let us say so and dispense with imposing the unnecessary burden upon litigants and judges of fixing that rule by protective order in every case. If, on the other hand, there are cases where it is proper to permit a discovery not tailored to the needs of the case, let us identify those kinds of cases and exempt them from the proportionality rule.

We think, however, that the better approach is to establish by rule the unmistakably clear message that discovery out of proportion to the needs of the case is never permissible.[53] We would then rely on attorneys to comply with that clear directive as the first line of defense against abusively expansive use of the discovery procedures. If that first line is breached, the judge provides the backstop. Calling upon judges only after good faith efforts of attorneys to apply predictable criteria have failed seems to us a wiser allocation of resources offering good prospects of curbing identified abuses of the discovery process. If conscientious counsel fail in that effort it likely means that a substantial issue needs to be resolved. The discovery conference provisions of new Rule 26(f) afford a mechanism to present the dispute to the court in a focused fashion and to receive a judicial determination of the matter.[54] If the rules are nevertheless invoked for vexatious purposes, or if demands out of proportion to the needs of the case are made, the sanction and protective order provi-

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53. *See* notes 43-45 and accompanying text *supra*.

54. This is the approach reflected in the discovery conference provisions of Rule 26(f). By requiring attorneys to make reasonable efforts to reach agreement on a plan for discovery and by providing that sanctions be imposed upon any attorney who fails to participate in good faith in the effort, it is predictable that requests for discovery conferences "will [not] be made routinely." *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. at 526-27.

sions, administered with predictable consistency and firmness, furnish the judge with the necessary tools to remedy the abuse in the particular case and thereby to deter abuse in other cases.[55]

CONCLUSION

The 1980 amendments did not address the problems of excessive discovery, abuses of the interrogatory process, or the failure of the protective order and sanction provisions, standing alone, to curb discovery abuse. There is now emerging a national consensus that these are serious problems and there is evidence of a mounting resolve to take corrective measures. The national debate over discovery abuse is healthy and reasonable, and respectful differences of opinion are to be expected.

Last year three Justices of the Supreme Court expressed dismay over the "tinkering changes" reflected by the 1980 amendments and worried that adoption of those changes would stop the movement for meaningful and substantial reform of the discovery rules.[56] The public costs of discovery abuse are far too high for mere palliatives. Effective reform can occur if the resources of bench and bar are marshalled to attack the problem frontally. The temptation to layer the rules with cosmetic veneer will be strong. It must be resisted.

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55. The Special Committee recommendations include specific provisions reflecting the nondelegable professional obligation of attorneys to utilize the discovery procedures in good faith and would prohibit an attorney against whom sanctions have been imposed from passing that cost along to the client. ABA REPORT No. 2, *supra* note 26, at 15a-16a. These provisions, if taken to heart by the bar and enforced by the courts, offer significant opportunities to deter discovery abuse. *See generally* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 641 (1976); Epstein, Corcoram Kriegar & Carr, *An Up-Date on Rule 37 Sanctions After* National Hockey League v. Metropolitan Hockey Clubs, Inc., 84 F.R.D. 145 (1979); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions,* 91 HARV. L. REV. 1033 (1978).

56. Dissenting Statement, 446 U.S. 997 (1980) (Powell, Stewart & Rehnquist, JJ., dissenting).