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THE AUGUST 1, 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: A CRITICAL EVALUATION AND A PROPOSAL FOR MORE EFFECTIVE DISCOVERY THROUGH LOCAL RULES

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TABLE OF CONTENTS

I. BACKGROUND ........................................ 769
   A. The Root of the Discovery Abuse Problem .......... 769
   B. Discovery Abuse and the Bar .................... 773
   C. The Courts and Discovery ........................ 775

II. 1983 AMENDMENTS TO THE FEDERAL RULES .......... 778
   A. Rule 16 Pretrial Conferences .................... 781
      1. Mandatory Feature of Rule 16—The Scheduling Order 782
      2. Agenda for Pretrial Conferences .............. 783
      3. Protocol at Pretrial Conferences .............. 785
      4. Sanctions (Rule 16(f)) ....................... 786
   B. Rule 26 ........................................ 786
      1. Limitations on Discovery ..................... 788
      2. Judicial Intervention .......................... 789
      3. Certification .................................. 790
   C. Sanctions ....................................... 791

III. WILL THE 1983 AMENDMENTS ALLEVIATE DISCOVERY ABUSE? .............................................. 793
   A. Litigation Costs and the 1983 Rules ............. 793
   B. The 1983 Amendments and the Courts ............. 795
      1. Sanctions and the Courts ..................... 795
      2. Active Judicial Supervision of Discovery .... 796
      3. Judicial Resolution of Discovery Disputes .... 797
   C. Defining Proportionality ........................ 798

IV. IMPACT OF THE 1983 AMENDMENTS ON LOCAL DISTRICTS .................................................. 800
   A. Work of the Eastern District .................... 801
      1. Cooperation Among Attorneys ................. 801

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(767)
2. Judicial Intervention .................................. 803
   a. Rule 16 Conference ............................. 804
   b. Judicial Intervention in Discovery Disputes 805
      (1) Role of the Magistrate ......................... 805
      (2) Assignment of Magistrates .................... 807
      (3) Reconsideration of Magistrates'
           Rulings .................................. 808
      (4) Manner in Which Discovery Disputes
           Are to be Raised with the Court ......... 809
3. Conduct of Discovery ................................ 811
   a. Depositions .................................. 812
   b. Interrogatories, Document Demands and
      Requests for Admission ........................ 817
4. Sanctions ............................................. 820

B. The 1983 Amendments and the Eastern District Ap-
   proach: A Comparison ............................... 822

V. Conclusion ........................................... 824

The 1983 amendments to the Federal Rules of Civil Procedure1 (1983 amendments) represent by far the most ambitious effort to date to remedy the widely perceived problem of discovery abuse in federal practice.2 These amendments are designed to improve the conduct of discovery by eliminating improper practices and making discovery more cost-effective for the parties, and thereby helping the pretrial phase of an action to run more smoothly. The 1983 discovery amendments have three basic thrusts: (1) active involvement by the court in the pretrial phases of a case pursuant to rule 16;3 (2) recognition of specific


2. In 1980, minor amendments were made to rules 26, 33, 34, 37 and 45, but these changes proved ineffective in stemming the tide of discovery abuse. See infra notes 52-57 and accompanying text. For a discussion of the problem of discovery abuse in federal practice, see infra notes 8-49 and accompanying text.

3. For a discussion of the changes to rule 16, see infra notes 63-92 and accompanying text.
limitations on discovery under rule 26;\(^4\) and (3) mandatory sanctions for misuse or overuse of discovery tools and use of baseless motions to avoid proper discovery or to compel needless discovery,\(^5\) as well as discretionary sanctions for failure to participate in good faith in pretrial conferences.\(^6\)

The key to the 1983 amendments is a heightened emphasis on the use of sanctions to curb discovery abuse. The new rules rely strongly on sanctions to effect a fundamental attitudinal change by the practicing bar and the courts regarding the discovery process.\(^7\) An ideal discovery system would provide for broad pretrial disclosure of facts at the lowest possible cost and would minimize unnecessary judicial intervention. It is far from self-evident, however, that the 1983 amendments' introduction of the mandatory sanctions concept will achieve the goals of the ideal system or put an end to abusive discovery practices that have been nurtured by attorneys for four and one-half decades. The purpose of this article is threefold: (1) to summarize and analyze the 1983 amendments as they relate to discovery; (2) to evaluate the probable effectiveness of the new rules, particularly those relating to sanctions, in remediying discovery abuse; and (3) to examine possible complementary or alternative approaches to addressing effectively the problems of discovery abuse, focusing specifically on the discovery reforms implemented in the Eastern District of New York in March, 1984.

I. BACKGROUND

A. The Root of the Discovery Abuse Problem

Much has been written in recent years about the problems of discovery abuse in the federal system.\(^8\) Discovery abuse is the

\(^4\) For a discussion of the changes to rule 26, see infra notes 93-113 and accompanying text.

\(^5\) For a discussion of the mandatory sanctions for discovery abuse under rule 26(g), see infra notes 106-25 and accompanying text.

\(^6\) For a discussion of the discretionary sanctions for misconduct in the pretrial conference process under rule 16(f), see infra notes 90-92 and accompanying text.

\(^7\) For discussions of the sanctions under the new rules, see infra notes 90-91 & 106-25 and accompanying text.

\(^8\) Available literature on discovery abuse in the federal system includes: Brazil, Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 A.B.A. FOUND. RESEARCH J. 787 (abuse of discovery is especially burdensome and costly in large cases; failure to distribute relevant information to all parties occurs at least 50% of the time); Burger, Agenda for 2000 A.D.—A Need for Systematic Anticipation, 70 F.R.D. 83 (1976) (misuse and overuse of pretrial procedures constitute "areas of concern" that require "fundamental
misuse or overuse of the discovery process to gain an unfair tactical advantage over an adversary. It is to be distinguished from the intended purpose of discovery: to uncover facts underlying the merits of an opponent’s claims and defenses and thereby to promote the “just, speedy, and inexpensive determination of every action.” There is a widespread perception among judges, scholars, practicing attorneys and clients that discovery has been misused and overused by plaintiffs and defendants alike. The


10. FED. R. CIV. P. 1.

11. See supra note 8. For examples of cases recognizing the problem of discovery abuse, see Herbert v. Lando, 441 U.S. 153, 177 (1979) (district courts should restrict discovery as necessary to protect libel defendants from excessively burdensome inquiries into state of mind and editorial processes); ACF Indus., Inc. v. EEOC, 439 U.S. 1081, 1085-88 (1979) (Powell, J., dissenting) (sanction of dismissal must be available to punish and deter severe discovery abuse); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975) (potential for discovery abuse is especially high in antitrust cases); In re Sealed Case 737 F.2d 94, (D.C. Cir. 1984) (perjury and document destruction were severe misconduct, not “mere” discovery abuse as characterized by offending party’s
result has been delay in the resolution of claims and defenses, clogged dockets and increased litigation expenses.

However, while clients and courts have suffered, the litigating bar has clearly benefitted. Attorneys have had two very significant incentives to abuse discovery. First, since over ninety percent of the civil cases in the federal system settle or are otherwise disposed of prior to trial,\(^\text{12}\) pretrial discovery is where litigators earn the bulk of their fees.\(^\text{13}\) Second, ethical norms, which require the attorney to represent his client zealously, encourage the attorney to err on the side of caution. Thus, overuse and perhaps misuse to obtain every advantage for the client is seen as an imperative of the profession.\(^\text{14}\) Given these realities, discovery has become a self-contained universe with a life of its own, rather than, as intended, a tool for facilitating litigation. As the eminent procedural scholar Arthur Miller has noted, discovery in the federal courts is not unlike the dance marathons of another era wherein the object was to hold onto your partner and wander aimlessly about the dance floor for as long as possible.\(^\text{15}\)

The problems we are facing today with respect to discovery arose from the philosophy embraced by the original drafters of the Federal Rules of Civil Procedure.\(^\text{16}\) Broad pretrial disclosure

counsel); Marrese v. American Academy of Orthopedic Surgeons, 726 F.2d 1150 (7th Cir. 1984) (discovery of sensitive documents is sometimes used to coerce adverse party to settle case), rev’d on other grounds, 105 S. Ct. 1327 (1985).


14. Canon 7 of the Model Code of Professional Responsibility provides that “a lawyer should represent a client zealously within the bounds of the law.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1979). See also Renfrew, supra note 9, at 274 (use of discovery sanctions are likely to have chilling effect on the attorney’s duty to represent his client zealously).

15. Miller & Culp, Litigation Costs, Delay Prompted by the New Rules of Civil Procedure, NAT. LJ., Nov. 28, 1983, at 24, col. 3. The authors also take the position that the reform efforts’ focus on litigation was misplaced, as over 90% of federal cases never go to trial. Id. They suggest that the key to reform is the discovery period, the period between initiation of the suit and trial. Id.

16. The underlying philosophy of the rules is that a meritorious claimant ought to have his day in court. This philosophy is evidenced by, among other things, the simplification of formerly complex technical pleading rules. See C. Wright, supra note 9, § 68, at 438-39. The drafters sought to simplify the mechanics of pleading to avoid dismissal of meritorious claims for failure to comply with complex and esoteric pleading requirements. Id. Thus, under the rules, a complaint normally need contain only a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Functions that traditionally had been performed by pleadings, such as narrowing of issues and disposing of sham claims and defenses, are now handled through other pretrial mechanisms. See C. Wright, supra note 9, § 91, at 601.
was the “Cinderella of changes” under the rules. Traditionally, little outside the pleadings was disclosed prior to trial. The trial itself was more a battle of wits than a search for truth, with victory going to the party with the more clever advocate. The drafters of the Federal Rules adopted the view that the search for truth would be best effectuated where the parties have the “fullest possible knowledge of the issues and facts before trial.” Discovery rules were drafted to make certain that trial was “less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” To be sure that both sides would have the fullest possible knowledge of the issues, the rules provided for broad pretrial discovery to permit discovery of “any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Moreover, discovery was not limited to admissible evidence. Instead, any matter which “appeared reasonably calculated to lead to the discovery of admissible evidence” was discoverable. Full disclosure was the operative goal, with the trial of a case to be little more than the organized presentation of information gained in discovery.

17. C. Wright, supra note 9, § 81, at 539. Wright notes, however, that “there are those who are saying that the carriage has turned into a pumpkin, and that major changes are needed if it is to be a carriage again.” Id. The discovery rules were a significant and highly innovative change in civil procedure, but experience revealed the potential for abuse and the fact that the rules would have to be extensively amended if they were to fulfill their original purpose. Id. at 540.


B. Discovery Abuse and the Bar

The goals of the original drafters were admirable, but their attainment has proven to be elusive. The rules were drafted with a broad brush and were not designed to provide the details of what constitutes acceptable conduct by attorneys' discovery. Such details were to be worked out at the local rulemaking level based on the practical experience of attorneys and the courts. Nevertheless, because neither the Federal Rules of Civil Procedure nor the various local rules dealt with every conceivable dispute that might arise, gray areas inevitably emerged. Indeed, in the nearly half century that the Federal Rules have been in effect, a number of practices have arisen that are neither expressly approved nor expressly prohibited by the rules. For example, although the rules mandate broad disclosure and provide that pretrial testimony shall be taken subject to objections, it is generally accepted that a witness on deposition may decline to answer a question calling for privileged information. In some districts, notwithstanding the silence of the rules, it is established practice to permit an attorney to direct a witness not to answer questions propounded at a deposition on grounds other than privilege. Such grounds might include the fact that the examiner is abusive or that the questions are irrelevant. Precisely be-

24. Not all commentators agree that the goals of the drafters were admirable. See Liman, supra note 8, at 8 (the goal of securing the "just, speedy, and inexpensive determination of every action," expressed in rule 1, "seems pure Pollyanna").

25. Rule 83 authorizes local district courts to make rules regulating their practice "in any manner not inconsistent with these rules." Fed. R. Civ. P. 83. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States had circulated a draft amendment to rule 83 that would have attempted to enhance local rulemaking by providing for notice of proposed changes, comment periods, and experimental local rulemaking. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Aug. 22, 1983) (committee note to proposed rule 83). That proposal, however, has since been withdrawn.

26. See Fed. R. Civ. P. 30(c) (testimony at a deposition should be taken subject to objections to "the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party").


28. See infra note 28.

29. See, e.g., Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 903 (7th Cir. 1981) (some irrelevant questions go "beyond
cause the rules set forth no firm boundaries, discovery practice has been corrupted by those attorneys who have misused or over-used pretrial disclosure devices to take unfair advantage of their adversaries.

Thus, discovery may be used as a device for forcing the quick settlement of a tenuous claim.\(^{30}\) Likewise, it may be employed by well-heeled defendants as part of a "scorched earth" policy designed to force a plaintiff’s capitulation before getting to the merits.\(^{31}\) Moreover, a party may deplete its adversary’s resources by refusing to cooperate in discovery and forcing the other party to seek judicial intervention to obtain even the most basic disclosure. While rule 37 makes such abusive tactics punishable,\(^{32}\) the reluctance of many judges to impose sanctions has resulted in such misconduct going unpunished for the most part.\(^{33}\)

\(^{30}\) See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975) (plaintiff with largely groundless claim may use discovery to force settlement); Marrese v. American Academy of Orthopedic Surgeons, 726 F.2d 1150, 1161 (7th Cir. 1984) (discovery of sensitive documents may be used to force opponent to settle where opponent would rather settle than produce documents, regardless of merits of case), rev’d on other grounds, 105 S. Ct. 1327 (1985).

\(^{31}\) See Chrysler Corp. v. Fedders Corp., 540 F. Supp. 706, 731 (S.D.N.Y. 1982) (defendant moved for expedited trial after Chrysler had conducted four years of discovery utilizing tactics that illustrated "how a modern litigant can wage unlimited guerilla war").

\(^{32}\) Rule 37 provides for a variety of sanctions or controls over discovery abuse. It allows a party to make a motion to compel discovery if his opponent is not cooperating in the discovery process. Fed. R. Civ. P. 37(a)(2). Depending on the circumstances, the court may require the party whose conduct necessitated the motion to pay the moving party’s reasonable expenses, or it may require the moving party to pay the other party’s expenses incurred in opposing the motion. Id. Failure to comply with a court order regarding discovery may result in a party being held in contempt of court. Fed. R. Civ. P. 37(b)(1). If a party requests an admission under rule 36, and the opposing party refuses to admit to the truth of the matter requested, the opposing party may be required to pay expenses incurred if the requesting party later establishes its truthfulness. Fed. R. Civ. P. 37(d), (g). It should be emphasized, however, that imposition of these sanctions is within the discretion of the court.

\(^{33}\) See 8 C. WRIGHT & A. MILLER, supra note 18, § 2284, at 771-72 (imposition of sanctions under rule 37 is relatively rare occurrence); Renfrew, supra note 9, at 271-72 (fundamental cause of underutilization of sanctions is courts’ reluctance to use them); Sobra, supra note 8, at 703-04 (sanctions are rarely sought
C. The Courts And Discovery

It would be a serious mistake to lay the entire responsibility for problems encountered in discovery on the shoulders of the litigants and their attorneys. The federal judiciary must share at least some of the blame. As initially conceived by the drafters of the rules, discovery was to be largely self-regulating. The sweep of discovery was so broad that judicial intervention would rarely be necessary, except to determine (1) whether privilege attached, thus placing the information sought beyond the scope of discovery; (2) whether a request was "reasonably calculated to lead to the discovery of admissible evidence"; (3) whether a party ought to be compelled to provide discovery; and (4) whether a party had disobeyed a court order requiring discovery.

However, experience has proven that discovery does not al-

and frequently not ruled upon even when rule 37 motion to compel discovery is granted).


35. See Fed. R. Civ. P. 26(b)(1). For a discussion of rule 26(b)(1) see infra notes 97-105 and accompanying text. For a discussion of privilege as grounds for refusing to answer a question in a deposition, see supra note 27 and accompanying text.


ways proceed harmoniously. The courts therefore, cannot sit idly on the sidelines during the pretrial phase of the case. Sometimes, the parties or their attorneys simply do not get along and cannot resolve even the most insignificant discovery disputes without judicial intervention. Even where the parties conscientiously seek to settle their differences outside of court, judicial intervention may become necessary because the dispute is indeed significant and unresolvable without an arbiter. In such cases, discovery may grind to a halt unless the court steps in to break the impasse.

Moreover, judicial intervention is necessary at times to set the limits of acceptable conduct by attorneys and thereby keep the law of the jungle from governing discovery. As noted above, in the half century that the rules have been in effect, a number of practices have arisen that are neither expressly approved nor expressly prohibited by the rules. In such cases, the onus falls upon the courts to develop practical and workable discovery procedures which are consistent with the spirit of the Federal Rules.

Unfortunately, district judges have been less than eager to involve themselves intimately in the interstices of discovery matters. This is not surprising, given the heavy case loads that district judges now carry and given the fact that many judges view their primary responsibilities to be trying cases and resolving dispositive motions. Judges are only too happy to refer all discovery matters to magistrates or special masters, or simply to defer consideration of discovery motions in the somewhat unrealistic hope that the parties eventually will resolve the matter themselves.

39. For a discussion of discovery abuse, intimidation, “scorched earth” tactics, and other conduct by attorneys in the discovery process, see supra notes 24-33 and accompanying text.

40. See supra notes 27-29 and accompanying text.

41. In a leading empirical study on discovery, professor Wayne D. Brazil found that attorneys were angry and disappointed over the way judges handled discovery. Brazil, Views From the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 A.B.A. FOUND. RESEARCH J. 219, 245-49. Brazil’s study disclosed that attorneys felt that judges had negative attitudes toward discovery disputes and that many judges appeared to feel that discovery disputes did not belong in court. Id. Attorneys felt that judges were reluctant to commit the time and resources necessary to resolve discovery disputes and that they were too lenient in punishing discovery abuse. Id. For a general discussion of the courts’ reluctance to impose available sanctions, see supra note 33 and accompanying text.

42. The Brazil study indicates that the assumption that the parties can “work things out” is often naive, as discovery disputes frequently involve real controversies that only can be resolved in court. See Brazil, supra note 41, at 245-49. But see supra note 34 and accompanying text (intent of drafters was that discovery would proceed without judicial intervention).
The nitty-gritty of discovery work is itself quite distasteful and may require the judge to review lengthy and detailed interrogatories or document requests, as well as equally lengthy and often highly technical objections thereto. For a judge fully familiar with the case, deciding such a discovery motion may prove arduous; but for the judge who has little knowledge of the case, the task is overwhelming. Nevertheless, the mere fact that the work is distasteful should not be a sufficient justification for not doing it. Unquestionably, many judges could be more diligent in making discovery rulings. Indeed, the more promptly a ruling is made, the more quickly procedural logjams can be resolved.

Lack of diligence, however, is not the only shortcoming of judicial handling of discovery. Frequently, there is a lack of uniformity of discovery motion practice among judges in the same district, with many judges establishing, formally or informally, their own “personal” rules. Some judges insist that all discovery motions be fully briefed and argued, with motion, response and reply papers to be filed with the court. Other judges will entertain motion papers only after an in-court personal appearance by the attorneys. Still others may not permit submission of written papers at all. This proliferation of individualized rules tends to create confusion among practitioners and contributes significantly to delay in the hearing and determination of discovery motions.

Apart from the procedural quagmire created by individualized rules, judges frequently frustrate the parties and the discovery process by inordinate delay in deciding discovery disputes. Once it is clear that the parties have reached an impasse on dis-

43. See Brazil, supra note 41, at 245-49.
44. The New York Law Journal regularly publishes the individual rules of federal judges in the Southern District of New York, which illustrate the variety of rules within one district. See, e.g., N.Y.L.J., March 18, 1985, at 26, col. 5; id. March 11, 1985, at 25, col. 5.
45. Id., March 18, 1985, at 26, col. 7.
46. Id.
47. Id., March 11, 1985, at 25, col. 7.
[a] major criticism which has been levelled by the practicing bar is the judicial system’s failure to determine discovery disputes promptly and decisively, thereby causing delays and additional expense to the parties. Prompt resolution of discovery issues minimizes wasted time, lessens needless acrimony between the parties, and enables attorneys to get on with the pretrial process in an expeditious manner.
covery, and that judicial intervention is necessary, it is in the best interest of all concerned to have the dispute resolved expeditiously so that the matter may proceed. In some cases, delay by the court may be a conscious tactic to force the parties to resolve the problem themselves. This approach, however, seldom works.\footnote{49} More often, the delay is caused by the court's reluctance to involve itself in the drudgery of discovery practice. Certainly, deciding discovery motions is neither the most desirable nor the most scholarly task judges are asked to perform. Nevertheless, it is the court's responsibility to resolve such matters.

II. 1983 Amendments To The Federal Rules

While much has been written about the problems of discovery abuse, very little has been done to remedy the malady. In 1976, at the now famous Pound Conference, the profession began to take a hard look at ways to improve the American system of justice, including the operation of pretrial discovery.\footnote{50} The Pound Conference led to the formation of an American Bar Association committee (ABA Special Committee) to examine the problem of discovery abuse.\footnote{51} The ABA Special Committee issued a detailed report recommending significant changes in the discovery area.\footnote{52} The Judicial Conference's Advisory Committee on Civil Rules (Advisory Committee), however, chose not to endorse

\begin{itemize}
\item \textit{Id. See supra} note 42 and accompanying text.
\item \textit{Id.} On April 7-9, 1976, the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, known as the Pound Conference, took place in St. Paul, Minnesota. Its participants included the Chief Justice of the Supreme Court of the United States, leaders in the federal judiciary, chief justices of the highest state courts, leading trial attorneys and legal scholars. A major item on the agenda was the discovery process in the federal system. \textit{See Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 79 (1976).}
\item \textit{Report of Pound Conference Follow-up Task Force, 74 F.R.D. 159, 165 (1976).} The American Bar Foundation formed the task force "to assure that the ideas presented at the Pound Conference would be carefully considered by those organizations or agencies best able to evaluate and implement them." \textit{Id.} The task force identified discovery abuse as a significant concern of the conference participants. \textit{Id.} at 171. Following the issuance of the task force report, the Litigation Section of the American Bar Association formed a Special Committee for the Study of Discovery Abuse (Special Committee). \textit{See ABA Report, supra} note 8. In the fall of 1977, the ABA Special Committee issued a draft report recommending certain amendments to the Federal Rules of Civil Procedure. \textit{See id.} The draft was circulated for comment and a revised report was subsequently issued. \textit{See ABA Second Report, supra} note 8.
\item \textit{See ABA Second Report, supra} note 8.
\end{itemize}
such sweeping changes. Finding that discovery abuse was not so pervasive as to require fundamental changes in discovery in all cases, the Advisory Committee proposed instead only modest amendments to the Federal Rules. These amendments became effective on August 1, 1980.

The 1980 amendments sought to address the problem of discovery abuse by providing for a discovery conference early on in the litigation. The amendments also sought to remedy specific


54. The Advisory Committee originally had issued a preliminary draft of proposed amendments which reflected the ABA Special Committee's recommendations for significant changes in the rules. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613 (1978). However, after circulation for public comment, a revised draft that recommended fewer sweeping changes was issued. See Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 323 (1979). It is particularly noteworthy that the Advisory Committee, in its final draft, rejected the ABA Special Committee's recommendation that the scope of discovery be limited to "any matter not privileged, which is relevant to the issues raised by the claims or defenses of any party." ABA Report, supra note 8, at 157. The final draft of the Advisory Committee was promulgated by the United States Supreme Court and became effective on August 1, 1980. See Amendments to Federal Rules of Civil Procedure, 446 U.S. 995 (1980).

55. See Fed. R. Civ. P. 26(f). Subsection (f) was a new addition to rule 26 under the 1980 amendments. It was designed to allow a party who sought, but had not received, the cooperation of an opposing party in effecting a plan for discovery to seek the assistance of the court. Fed. R. Civ. P. 26(f) advisory committee note. Rule 26(f) provides:

(f) Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;
(2) A proposed plan and schedule of discovery;
(3) Any limitations proposed to be placed on discovery;
(4) Any other proposed orders with respect to discovery; and
(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than ten days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.
abuses relating to the manner in which parties responded to interrogatories and document requests. Significantly, Justice Powell joined by Justices Stewart and Rehnquist, dissented from the Supreme Court Order promulgating the 1980 amendments on the grounds that they were wholly inadequate to deal with the widespread problems of discovery abuse. Justice Powell proved prophetic. The 1980 amendments did little to stem the rising tide of discovery abuse because they did not address the underlying causes. The stage was thus set for the 1983 amendments.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pre-trial conference authorized by Rule 16.

56. With respect to responses to interrogatories, rule 33 was amended to require that parties opting to produce pertinent business records in lieu of direct answers provide the interrogating party with information as to where in the records the answer can be found. Fed. R. Civ. P. 33(c). This amendment was designed to remedy a perceived abuse of the 33(c) option occurring when the responding party would direct the interrogating party "to a mass of business records" rather than simply answering the interrogatories. Fed. R. Civ. P. 33(c) advisory committee note.

With respect to document production requests, rule 34 was amended to require responding parties to "produce [the requested documents] as they are kept in the usual course of business" or to "organize and label [the requested documents] to correspond with the categories in the request." Fed. R. Civ. P. 34(b). This amendment was designed to remedy situations in which the responding party would "deliberately mix . . . critical documents with many others in order to obscure significance." Fed. R. Civ. P. 34(b) advisory committee note.

57. Amendments to Federal Rules of Civil Procedure, supra note 54, at 997-98 (Powell, J., dissenting). Justice Powell described the amendments as "tinkering changes" which fell "short of those needed to accomplish reforms in civil litigation that are long overdue." Id. at 998, 1000. Justice Powell went on to state:

The American Bar Association proposed significant and substantial reforms. Although the Standing Committee initially favored most of these proposals, it ultimately rejected them in large part. The ABA now accedes to the Standing Committee's amendments because they make some improvements, but the most recent report of the ABA Section of Litigation makes clear that the "serious and widespread abuse of discovery" will remain largely uncontrolled. There are wide differences of opinion within the profession as to the need for reform. The bench and the bar are familiar with the existing Rules, and it often is said that the bar has a vested interest in maintaining the status quo. I imply no criticism of the bar or the Standing Committee when I suggest that the present recommendations reflect a compromise as well as the difficulty of framing satisfactory discovery Rules. But whatever considerations may have prompted the Committee's final decision, I doubt that many judges or lawyers familiar with the proposed amendments believe they will have an appreciable effect on the acute problems associated with discovery. The Court's adoption of these inadequate changes could postpone effective reform for another decade.

Id. at 998 (footnotes omitted).
While the ABA Special Committee's sweeping proposals for discovery reform were rejected in 1980, the ongoing work of that committee met with approval in the profession. Ultimately the Advisory Committee resurrected some of the ABA Special Committee's concepts in proposing the 1983 amendments.\textsuperscript{58} It endorsed the ABA proposals that had imposed a nondelegable duty on lawyers to conduct discovery in good faith and had expressly adopted a principle of proportionality in discovery.\textsuperscript{59} It also proposed that the frequency of use of discovery methods be limited to ease the problem of excessive discovery.\textsuperscript{60} In addition, the Advisory Committee proposed major changes in rule 16\textsuperscript{61} and a substantial revision of the certification requirements of rules 7 and 11.\textsuperscript{62}

A. \textit{Rule 16 Pretrial Conferences}

Under the 1983 amendments, rule 16 has been rewritten completely to encourage active judicial management of the pretrial phase of litigation by shifting the court's focus away from the trial and toward judicial management of all pretrial matters.\textsuperscript{63} The following discussion outlines the relevant provisions of new rule 16.


\textsuperscript{59} 97 F.R.D. at 216-17. For a discussion of the obligation to conduct discovery in good faith, see \textit{infra} notes 106-13 and accompanying text. For a discussion of the introduction of the concept of proportionality, see \textit{infra} notes 100-01 and accompanying text.

\textsuperscript{60} 97 F.R.D. at 214-15. For a discussion of the amendments' limitations on excessive discovery, see \textit{infra} notes 96-101 and accompanying text.

\textsuperscript{61} 97 F.R.D. at 201-05. For a discussion of the amendments' major changes to rule 16, see \textit{infra} notes 63-92 and accompanying text.

\textsuperscript{62} 97 F.R.D. at 196-97. For a discussion of the revisions of certification procedures under rules 7 and 11, concerning certification of motions and pleadings respectively, see \textit{infra} notes 117-25 and accompanying text.

\textsuperscript{63} \textit{Fed. R. Civ. P.} 16 advisory committee note. The Advisory Committee observed:

Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices. \textit{Id.} (citing S. Flanders, \textit{Case Management and Court Management in United States District Courts} 17 (1977)). As a result of these considerations, the Advisory Committee redrafted rule 16 to facilitate early intervention by the trial judge in pretrial management of the case.
1. *Mandatory Feature of Rule 16: The Scheduling Order*

The only mandatory aspect of amended rule 16 is the requirement in 16(b) that a scheduling order be entered within 120 days after the complaint is filed.64 The goal of the 120 day limit is to "galvanize each judge into action" and start the case moving toward adjudication.65 Rule 16(b) provides that the scheduling order shall limit the time (1) to join other parties and to amend the pleadings; (2) to file and hear motions; and (3) to complete discovery. The order also may include: (4) the date or dates for conferences before trial, a final pretrial conference, and trial; and (5) any other matters appropriate in the circumstances of the case.66 The rule provides that the order be entered after consultation with attorneys for the parties or with any unrepresented parties, but it does not specify the mode of such consultation.67 Since the new rule does not mandate an in-person conference, it appears that consultation may be had by telephone, mail or other appropriate forms of communication.68

Significantly, the drafters recognized that a scheduling order may not be necessary in every case and that it may require could further tax attorneys, their clients and an already overburdened judiciary. Rule 16(b), therefore, empowers each district by local rule to exempt certain categories of cases from the scheduling order requirement where the burdens imposed by the scheduling order would outweigh the efficiencies derived therefrom.69 Some districts have already exercised this option.70

64. Fed. R. Civ. P. 16(b). With respect to the timing of the order, rule 16(b) provides:

The [scheduling] order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

Id.

65. Miller & Culp. *The New Rules of Civil Procedure: Managing Cases, Limited Discovery*, Nat. L.J. Dec. 5, 1983, at 24, col. 1. Judicial involvement at an early stage is a "desirable tool in reducing the time between institution and pretrial termination" and preordained deadlines are likely to reduce chances of slippage in the trial date. Id. at 23, col. 3.


67. See id.

68. Fed. R. Civ. P. 16(b) advisory committee note.

69. Fed. R. Civ. P. 16(b). The Advisory Committee notes to rule 16(b) suggest that such cases might include social security disability matters, habeas corpus petitions, forfeitures and reviews of various administrative actions. Fed. R. Civ. P. 16(b) advisory committee note.

70. See, e.g., E.D.N.Y. Civ. R. 45 ("Matters involving habeas corpus petitions, social security disability cases, motions to vacate sentences, forfeitures, and reviews from administrative agencies are exempted from the mandatory
2. Agenda for Pretrial Conferences

Amended rule 16(c) expands upon the topics which may be covered at the pretrial conference in order to encourage better planning and more effective management of the litigation, and thereby allow for more rapid disposition of cases. The following is a list of the expanded topics contemplated by the amendments:

a. New rule 16(c)(1) broadens its predecessor by making clear that pretrial conferences can be used to formulate as well as to simplify issues. The addition of the term "formulate" is significant because, in certain complex cases, issues cannot even be shaped until there has been some initial discovery. As amended, rule 16(c)(1) also permits the court to dispose of frivolous claims or defenses at the pretrial conference without first having to entertain formal motion papers.

b. Amended rule 16 expands old rule 16(c)(3) by providing that the pretrial agenda may include not only discussion of admissions relating to facts and authenticity of documents, but also discussion of the feasibility of stipulations regarding documentary evidence and of the practicality of obtaining advance rulings on evidentiary matters. Additionally, the court is encouraged to discuss ways to avoid unnecessary or cumulative proof, to identify witnesses and documents to be offered as proof, and to set scheduling order required by Rule 16(b) of the Federal Rules of Civil Procedure.

71. Fed. R. Civ. P. 16(c) advisory committee note. In articulating their goals in expanding 16(c), the Advisory Committee stated that the new rule was intended "to encourage better planning and management of litigation." Id. The Committee observed that "[i]ncreased judicial control during the pretrial period accelerates the processing and termination of cases." Id. (citing S. FLANDERS, supra note 63; Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures (Jan. 22, 1979)).

72. Fed. R. Civ. P. 16(c)(1) (participants at any pretrial conference may consider "the formulation and simplification of the issues, including the elimination of frivolous claims or defenses").

73. See Miller & Culp, supra note 65, at 24 (reference to "formulation" of issues is designed to foster defining of issues early in litigation).


75. Fed. R. Civ. P. 16(c)(3). Rule 16(c)(3) provides that the following may be discussed at any pretrial conference:
the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence.


77. Fed. R. Civ. P. 16(c)(5).
forth a schedule for exchange of pretrial briefs and future conferences.78

c. In recognition of the expanded role of magistrates in pretrial proceedings,79 the amended rule provides for consideration of reference to a magistrate or master at the pretrial conference.80

d. Amended rule 16 explicitly endorses the propriety of discussing settlement at pretrial conferences.81 Settlement is an especially appropriate topic for discussion at pretrial conferences. The sooner settlement negotiations begin, the greater the likelihood of early disposition, thus allowing parties to realize savings in attorneys' fees and court costs. Perhaps more importantly, the amended rule encourages the parties to consider whether their disagreement is better resolved by resort to alternative dispute resolution mechanisms rather than to the courtroom.82 For example, where the action involves highly technical or complex issues, arbitration or the minitrial procedures may be a more fitting mechanism for dispute resolution than the traditional trial.83

e. Newly added provisions encourage the court and the parties to investigate the need for, and use of, special procedures in complex litigation.84 The court, to facilitate discovery, may pre-

78. Id.
81. Fed. R. Civ. P. 16(c)(7). This subsection, permitting discussion of settlement at any pretrial conference, was not designed to impose settlement on unwilling parties, but rather to provide a neutral forum for conciliatory talks. Fed. R. Civ. P. 16(c)(7) advisory committee note. While the drafters considered placing limits on judicial involvement in settlement discussion, the 1983 amendments do not address the question of specific procedures to be followed in settlement discussions. Miller & Culp, supra note 65, at 24, col. 2.
82. See Fed. R. Civ. P. 16(c)(7).
84. Fed. R. Civ. P. 16(c)(10). The rule identifies "complex issues, multiple parties, difficult legal questions, or unusual proof problems" as features of a given case that might make it a candidate for special treatment. Id. The drafters did not specify any particular techniques for handling these complex cases, but
scribe the order and subject matter of depositions or direct the order in which various discovery tools are to be used.\textsuperscript{85}

The procedures incorporated in the rule 16 amendments are neither new nor radical. Indeed, a number of judges in the federal system have been employing such procedures for many years.\textsuperscript{86} The amended rule simply makes active judicial involvement a routine part of all pretrial procedures.\textsuperscript{87}

3. Protocol at Pretrial Conferences

The last sentence of the new rule 16(c) requires that attorneys be prepared to participate in the pretrial conference in a meaningful way and that those attending the pretrial conference have authority to enter into stipulations and to make admissions rather than refer to outside authorities for suggestion. See \textit{Fed. R. Civ. P. 16(c)(10)} advisory committee note (citing \textit{FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION} (1978); Kendig, \textit{Procedures for Management of Non-Routine Cases}, 3 \textit{Hofstra L. Rev.} 701 (1975); Rubin, \textit{The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts}, 4 \textit{Just. Sys. J.} 135 (1976)).

\textsuperscript{85} \textit{Fed. R. Civ. P. 26(b)}.

\textsuperscript{86} Judge Edward R. Becker, now sitting on the Third Circuit Court of Appeals, used many of the techniques adopted in the new rule 16 in handling complex litigation as a trial judge in the Eastern District of Pennsylvania. See, \textit{e.g.}, \textit{In re Japanese Elect. Prods. Antitrust Litigation}, 478 F. Supp. 889, 946-60 (E.D. Pa. 1979) (use of pretrial discovery order and timetable in a complex antitrust case) \textit{aff'd in part and rev'd in part, 723 F.2d 319 (3d Cir. 1983), cert. granted in part, 53 U.S.L.W. 3702 (Apr. 1, 1985)}. Judge Becker has advocated "[e]arly and active and ongoing case management, strong case management" on the part of the trial judge as the key to effective handling of complex cases. Addressing the Antitrust Section of the American Bar Association in 1982, Judge Becker emphasized his conviction that "the judge must get into the case from day one, understand the case, understand the issues, be a partner in fashioning the development of the case substantively as well as procedurally, manage[] through the vehicle of periodic and frequent pretrial conferences." Becker, \textit{Expediting and Controlling Antitrust Litigation—The Demand for Cost Containment}, 51 \textit{ANTITRUST L.J.} 437, 440 (1982).

Judge Patrick E. Higginbotham of the Court of Appeals for the Fifth Circuit has endorsed similar case management techniques in complex cases. See, \textit{Higginbotham, Discovery Management Considerations in Antitrust Cases}, 51 \textit{ANTITRUST L.J.} 231, 234 (1982) (emphasizing that complex cases should be controlled through judicial intervention from the beginning).


\textsuperscript{87} \textit{Fed. R. Civ. P. 16} advisory committee note (the goal of the new rule is "judicial management that embraces the entire pretrial phase, especially motions and discovery").
regarding all matters that the participants might reasonably anticipate will arise.\textsuperscript{88} This is designed to cure a common abuse of sending to pretrial conferences junior attorneys who have no authority to make binding decisions.\textsuperscript{89} Such practices seriously undermined the usefulness of the pretrial conferences. Ideally, the attorney who will try the case will regularly attend pretrial conferences.

4. **Sanctions: Rule 16(f)**

Failure to comply with rule 16 may result in the imposition of sanctions on the noncomplying parties.\textsuperscript{90} Rule 16(f) incorporates portions of rule 37(b)(2), which prescribes sanctions for failure to provide discovery.\textsuperscript{91} Sanctions under rule 37(b) may include a preclusion order, striking of a pleading, staying of a proceeding, default, contempt, or an award of attorneys' fees incurred by the opposing party as a result of noncompliance.\textsuperscript{92}

B. **Rule 26**

The second major thrust of the 1983 amendments is their recognition that the right of pretrial disclosure is subject to some limitation beyond relevance.\textsuperscript{93} Rule 26(a) had heretofore pro-

\textsuperscript{88} \textit{FED. R. CIV. P.} 16(c).

\textsuperscript{89} \textit{FED. R. CIV. P.} 16 advisory committee note. The drafters observed that a major criticism of the pretrial conference procedure prior to the amendments was that the conferences tended to be "ceremonial and ritualistic, having little effect on the trial and being of minimal value, particularly when the attorneys attending the sessions are not the ones who will try the case or lack authority to enter into binding stipulations." \textit{Id.}

\textsuperscript{90} For a discussion of other sanctions provided for under the new amendments, see infra notes 114-25 and accompanying text.

\textsuperscript{91} \textit{FED. R. CIV. P.} 16(f) provides:

Sanctions. If party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

\textit{Id.}

\textsuperscript{92} \textit{FED. R. CIV. P.} 37(b). For a discussion of sanctions available under rule 37(b), see supra note 32.

\textsuperscript{93} The limitations imposed by the 1983 amendments will affect the depth
provided: "Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these [discovery] methods is not limited." To mitigate the problems of duplicative, redundant and excessive discovery, the drafters eliminated that sentence of the rule. The new rule places the following specific limitations on discovery:

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in contro-

rather than the breadth of discovery. The broad, sweeping language of rule 26(b)(1), which permits discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action," has been retained. See Fed. R. Civ. P. 26(b)(1). The drafters considered and rejected proposals to limit the scope of discovery under rule 26(b)(1) to matters "relevant to issues raised by the claims or defenses" or "relevant to the claims or defenses." See Special Committee for the Study of Discovery Abuses, Report, supra note 8, at 157. These proposed limitations would have narrowed the scope of discovery. However, such limitations on the breadth of discovery may well misperceive the real source of discovery abuse: discovery that is too deep, i.e., redundant, duplicative, or costly, and not that which is too broad. Rosenberg & King, supra note 8, at 586 (frequently, excessive discovery is not irrelevant, but just redundant). Moreover, limitations on the breadth of discovery would virtually eliminate notice pleading and might prove meaningless in a system that allows pleadings to be amended freely. Id. at 583 (notice pleading would be wiped out by scope limiting amendments, but amendments would be useless in the face of liberal pleading amendment rules); Schroeder & Frank, The Proposed Changes in the Discovery Rules, 1978 Ariz. St. L.J. 475, 481-90 (considering whether discovery should be confined to "issues" instead of "subject matter" or "claims"). In addition, it would probably take the courts years to define "issues" or "relevant to the claims or defenses." Rosenberg & King, supra, at 584. Given these considerations, it appears that the Advisory Committee acted wisely in seeking to limit the depth of discovery, rather than its breadth.

95. Fed. R. Civ. P. 26(a). The new rule provides:

Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to inspect upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

Id. The purpose of eliminating the final sentence of the old rule was to urge the court to identify and limit needless discovery. Fed. R. Civ. P. 26(a) advisory committee note.
versy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).96

These amendments modify existing discovery practice in two important respects. First, they alter the longstanding presumption in favor of disclosure by providing for specific limitations on the right of pretrial inquiry; and second, by providing for judicial intervention, they constitute an implicit acknowledgement that discovery cannot always operate on a self-regulating basis.

1. Limitations on Discovery

The three subsections of rule 26(b)(1) address discovery problems that have received too little attention in the past. Rule 26(b)(1)(i) expressly prohibits redundant discovery.97 This prohibition should eliminate the vexatious practice of “criss-crossing” document demands, which involves asking for the same materials over and over to assure that nothing has been missed. In addition, under this rule interrogatories are now inappropriate when they seek information that has already been obtained by oral deposition.

Rule 26(b)(1)(i) also provides that the court may intervene where the information sought could be obtained more efficiently by another means of discovery.98 This provision should encourage attorneys to be cost-sensitive in invoking a given mode of discovery. For example, if information regarding company sales is sought and such information is contained in company records, a deposition may be deemed inappropriate.

Rule 26(b)(1)(ii) seeks to reduce redundancy by requiring attorneys to make the most of each discovery demand. Under this subsection, a court is empowered to prohibit or otherwise limit opportunities for discovering parties to reopen depositions or to have a second look at documents which an adversary has previously produced.99

Perhaps the most significant discovery limitations are those contained in rule 26(b)(1)(iii). This new subsection attacks the problem of excessive discovery by providing that discovery shall

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96. FED. R. CIV. P. 26(b)(1).
97. FED. R. CIV. P. 26(b)(1)(i).
98. Id.
be proportional to the magnitude of the case.\textsuperscript{100} Simply put, the rule will not permit litigants to use a bazooka where a water pistol will do. The rule contemplates that the parties will be selective in invoking various discovery devices; parties no longer are free, necessarily, to follow a discovery program that leaves “no stone unturned.” Nor will parties be permitted to follow a “scorched earth” discovery policy calculated to coerce an adversary into capitulation. Thus, it would appear that a discovery program costing $50,000 in a case involving claims for $10,000 ordinarily would transgress rule 26(b)(1)(iii).\textsuperscript{101}

2. \textit{Judicial Intervention}

In addition to limiting the depth of pretrial disclosure, the new rule 26(b)(1) encourages the court to monitor actively the discovery process. Heretofore, discovery had been largely self-regulating, with the court intervening only when called upon by the parties.\textsuperscript{102} The new rule empowers the court to regulate discovery on its own motion to, for example, prevent a certain party from invoking a particular mode of discovery or to limit the number of depositions in a particular case.\textsuperscript{103} Amended rule 26(b)(1) complements the new rule 16 in that the court’s regulating function may be exercised in conjunction with periodic pretrial conferences encouraged under rule 16.\textsuperscript{104} Properly used, these two rules taken together will alert the judge to trouble before a discovery bottleneck arises, thereby preventing the litigation from becoming hopelessly bogged down, irrespective of the posture of the parties.\textsuperscript{105}

\textsuperscript{100} \textit{Fed. R. Civ. P.} 26(b)(1)(iii).

\textsuperscript{101} For a discussion of the lack of clarity in the proportionality standard enunciated in rule 26(b)(1)(iii), see infra notes 139-47 and accompanying text.

\textsuperscript{102} For a discussion of the problems inherent in a self-regulating system of discovery, see supra notes 34-38 and accompanying text.

\textsuperscript{103} \textit{Fed. R. Civ. P.} 26(b)(1). The rule provides that “[t]he frequency or extent of use of the discovery methods . . . shall be limited by the court” in the event that a party violates the discovery limitations set forth in the rule. \textit{Id.} The drafters intended the court’s sanctioning power to guard against redundant or disproportionate discovery. \textit{Fed. R. Civ. P.} 26(b)(1) advisory committee note.

\textsuperscript{104} \textit{Fed. R. Civ. P.} 26(b)(1) advisory committee note (it is appropriate for court to act under rule 26(b)(1) in conjunction with pretrial conferences). For a discussion of rule 16, see supra notes 63-73 and accompanying text.

\textsuperscript{105} Miller & Culp, supra note 65, at 25, col. 1, 34, col. 1 (former presumption of unlimited discovery is reversed under rules 16 and 26, and the court is obligated under those rules to intervene and restrict the discovery process in appropriate situations).
3. Certification

Rule 26(g) imposes an affirmative duty upon attorneys to engage in pretrial discovery in a responsible manner consistent with rules 26-37.\textsuperscript{106} Rule 26(g) is further designed to limit discovery abuses by explicitly encouraging imposition of sanctions.\textsuperscript{107} The rule provides that, by signing a discovery response or objection, an attorney is certifying that it is:

(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.\textsuperscript{108}

The Advisory Committee noted that while rule 26(g) is designed to make an attorney "pause and consider" the reasonableness of a discovery request or response, it is not meant to discourage legitimate and necessary discovery.\textsuperscript{109} Attorneys are required to inquire into the factual basis of a discovery request, response or inquiry.\textsuperscript{110} However, the attorney's signature does not constitute a certification as to the truthfulness of the client's factual responses to a discovery request.\textsuperscript{111} Rather, it means that the attorney has made a reasonable effort to determine that the client has provided all information or documents available to him that are responsive to the discovery demand.\textsuperscript{112} Thus, rule 26(g) certifications must be distinguished from other signature requirements under the Federal Rules, such as those found in rule 33 (interrogatories) and rule 30(e) (depositions).\textsuperscript{113}

\textsuperscript{106} Fed. R. Civ. P. 26(g) advisory committee note.
\textsuperscript{107} Id. For a discussion of sanctions under rule 26(g), see infra notes 114-25 and accompanying text.
\textsuperscript{108} Fed. R. Civ. P. 26(g).
\textsuperscript{109} Fed. R. Civ. P. 26(g) advisory committee note.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id. Answers to interrogatories pursuant to rule 33(a) and depositions pursuant to rule 30(e) are signed under oath; the signer swears to the truth of the statements therein. See Fed. R. Civ. P. 33(a), 30(e). This is clearly different from rule 26(g) certification, in which the signer merely certifies that he has
C. Sanctions

Perhaps the most controversial concept in the 1983 amendments is the imposition of mandatory sanctions for violation of the certification procedures required under rule 7(b)(3) (motions), rule 11 (pleadings) and rule 26(g) (discovery requests). Rule 26(g) provides in relevant part:

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.114

The words "shall impose" make sanctions mandatory for violation of the certification procedures and demonstrate the drafters' intentions that noncompliance result in sanctions.115 The certification procedure and mandatory sanctions for violation thereof are designed to deter both excessive discovery and evasion of legitimate discovery.116 When read in combination with other amendments, the signing requirement now means that each discovery request, response or objection (1) be grounded on a theory that is reasonable in law or a good faith belief as to what the law should be, (2) not be interposed for any improper purpose, and (3) not be disproportionate to the case.117 Application of this standard will depend heavily on the facts of each case and, for that reason alone, is quite problematic.118

Just as rule 26(g) imposes mandatory sanctions for discovery

made a reasonable effort to provide all responsive information and documents. See Fed. R. Civ. P. 26(g) advisory committee note.


115. Fed. R. Civ. P. 26(g) advisory committee note. The drafters observed: The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances.

Id.

116. Id.

117. Id.

118. Id. To date, there are no decisions fleshing out the standards articulated in rule 26(b), particularly those relating to proportionality. However, the broad standards for certification under rule 26(g) are apt to give rise to varying and inconsistent interpretations among the district courts, to the potential detriment of the unwary practitioner.
abuse, rule 11 prescribes mandatory sanctions for a violation of certification procedures relating to pleadings and motions. By signing the pleading or motion, the attorney certifies that he has read the papers; that, after reasonable inquiry, he has concluded that it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose. The certification portion of rule 11 provides in relevant part:

If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.

Rule 11 sanctions are designed to deter frivolous pleading and groundless discovery motions, particularly those interposed

The mandatory nature of sanctions under rule 11 was underscored in Eastway Constr. Corp v. City of New York, 762 F.2d 243 (2d Cir. 1985). The court in Eastway stated:

By employing the imperative “shall,” we believe the drafters intended to stress the mandatory nature of the imposition of sanctions pursuant to the rule. Unlike the statutory provisions that vest the district court with “discretion” to award fees, Rule 11 is clearly phrased as a directive. Accordingly, where strictures of the rule have been transgressed, it is incumbent upon the district court to fashion proper sanctions.

A natural concomitant of a mandatory imposition of sanctions is a broadened scope of review by the Court of Appeals. Where the only question on appeal becomes whether, in fact, a pleading was groundless, we are in as good a position to determine the answer and, thus, we need not defer to the lower court’s opinion.

At the same time, however, we note that the district courts retain broad discretion in fashioning sanctions, and apportioning fees between attorney and client. The commentary to Rule 11 sets forth a number of the factors that will be examined in arriving at an appropriate award, and in determining by whom any costs will be borne. In reviewing the specifics of an award of attorneys’ fees, therefore, we shall continue to adhere to the “abuse of discretion” standard

Id. at 254 n.7.

Rule 7(b)(3) provides that under rule 11 the certification requirements for rule 11 pleadings shall also apply to motions. Fed. R. Civ. P. 7(b)(3).


121. Id.

for the purposes of harassment or delay.\textsuperscript{122} By including the term "Sanctions" in the caption of rule 11, the draftsmen hoped to call attention to such procedures and to emphasize that sanctions are not to be viewed simply as an empty threat.\textsuperscript{123} Moreover, amended rule 11 makes clear that sanctions may be imposed on the attorney personally as well as on the client.\textsuperscript{124} It should be noted that where the issue relates to a discovery motion, rule 11 governs; but where the issue relates to a discovery request, rule 26 is the appropriate standard.\textsuperscript{125}

III. Will the 1983 Amendments Alleviate Discovery Abuse?

While it is still too early to analyze definitively the impact of the 1983 amendments, it appears that their approach, especially the heavy reliance on sanctions as a behavior modification device, has serious drawbacks that may exacerbate rather than remedy the problems of discovery abuse.

A. Litigation Costs and the 1983 Rules

Perhaps the most significant problem with respect to discovery is that of cost: cost in terms of the enormous and seemingly

\textsuperscript{122} Fed. R. Civ. P. 11 advisory committee note (imposition of sanctions designed to "discourage dilatory or abusive tactics").

\textsuperscript{123} Id. (new language in the rule intended to reduce the "reluctance of courts to impose sanctions").

\textsuperscript{124} Id.

\textsuperscript{125} Although they apply to discrete situations, the standards of rule 11 and rule 26 are interrelated. In commentary, the Advisory Committee stated:

The duty to make a "reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11.

Fed. R. Civ. P. 26(g) advisory committee note.

Curiously, while cases interpreting rule 26(g) are almost nonexistent, there have been a number of cases in which sanctions have been imposed under Rule 11. See, e.g., Wells v. Oppenheimer & Co., 101 F.R.D. 358 (S.D.N.Y. 1984) (counsel fees awarded against party who moved for summary judgment in case where there were obvious questions of fact and motion was clearly futile); Rodgers v. Lincoln Towing Service, Inc., 596 F. Supp. 13, 28 (N.D. Ill. 1984) (counsel fees awarded against plaintiff in a civil rights action where the court found "no possible justification under an objective standard for loading down a complaint with worthless claims...totally unsupported by even a single allegation in the complaint"). The appearance of more rule 11 cases may indicate that it is easier for a court to detect sham suits or motions than to identify discovery abuse. Courts also may be generally reluctant to impose rule 26(g) sanctions, given the lawyer's ethical obligation of zealous representation. This countervailing consideration may arise less frequently in rule 11 cases where bad faith and maintenance may be inferred with more certainty.
uncapped financial burdens that discovery imposes upon litigants; cost in terms of the strains discovery motion practice and hearings impose upon our already overtaxed judiciary; and cost to the society at large in terms of delay in the just resolution of disputes between litigants. Yet, the solution offered by the 1983 amendments—sanctions—is likely to increase rather than to decrease all of the above-mentioned costs.

Sanctions proceedings are in themselves costly. They force litigants to incur the legal expenses of bringing a motion, preparing a brief and gathering proof. It is not unusual for a formal hearing on sanctions to turn out to be a minitrial. In addition, sanctions proceedings delay the ultimate resolution of claims and divert the attention of the court and the parties from the substantive matters at stake in the litigation. Precisely because sanctions are costly and tend to delay the progress of the case, the clever advocate, cloaked in righteousness, may well be able to gain an unfair advantage over an opponent by using sanctions as a tool to sap the adversary's financial strength. Thus, increased reliance on sanctions as a method of effecting reform of discovery practice may prove self-defeating.

126. See Rosenberg & King, supra note 8, at 588-89 (advocating amendments to rule 26 that would require greater judicial involvement in the discovery process so as to reduce the costs of unnecessary duplication and repetition in discovery. Weinstein, Reflections on 1983 Amendments to U.S. Rules of Civil Procedure, N.Y.L.J., Nov. 14, 1983, at 1, col. 2.

127. For an example of a case in which the discovery hearing resembled a minitrial of the case, see In re Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. Ill. 1979). In this case, the question was whether defendants had violated a discovery order by refusing to turn over certain “foreign documents”. Id. at 1142. Upon plaintiff's motion for sanctions, a three-week hearing was held in which over a dozen witnesses testified and a plethora of documentary evidence was introduced. The dilatory effect of such a “hearing” is obvious.

128. The possibility that the costs of sanctions exceed the benefits was indeed a concern of the drafters of the 1983 amendments. In commenting on the amendments, Advisory Committee Reporter Arthur Miller wrote:

A more realistic concern is that the very availability of sanctions will become an attractive plaything of the bar—sanctions will take on a life of their own. The fear is that the new rules may become a Frankenstein monster by generating satellite litigation about sanctions. Lawyers will rationalize that professional responsibility requires them to seek sanctions to reduce their clients' litigation costs.

Under the worst scenario, the system will expend more on sanction proceedings than it saves through deterrence. To guard against that possibility, the advisory committee note appropriately indicates that discovery in connection with a sanction proceeding should be conducted only with leave of court.

Unfortunately, litigation has become so uncivilized in many contexts that greater reliance on the sanction process becomes imperative. So it seems realistic to anticipate a sharp escalation in sanction applica-
B. The 1983 Amendments and the Courts

A second major question mark regarding the 1983 amendments is whether the judiciary will share the drafters’ enthusiasm for sanctions and active intervention during discovery. The new rules provide little incentive for the already overburdened judiciary to assume the added responsibilities of monitoring discovery, nor do they provide any penalties for judges who fail to do so.

1. Sanctions and the Courts

It is unlikely that the court will impose sanctions for discovery abuse under the new rules with any greater enthusiasm than they did prior to the 1983 amendments.\(^{129}\) Imposition of sanctions on an attorney may subject that individual to public disgrace, the stigma of which may seriously impair his ability to practice law successfully in the future. Because of these serious consequences, courts, mindful of the attorney’s ethical obligation to represent zealously the interests of his client, are reluctant to

...
penalize an attorney for discovery conduct which conceivably could be characterized merely as overaggressive. The natural inclination of courts has been to give the attorney who “plays it close to the line” the benefit of the doubt.

Nor is the fact that sanctions are mandatory under the new rules, rather than discretionary as in the past, likely to change this attitude. Where a judge feels disinclined to impose sanctions, he will undoubtedly find a way to characterize conduct as consonant with the Federal Rules. It would thus appear that, except for egregious cases, judges will retain de facto latitude in the imposition of sanctions.

A second, and perhaps more significant reason for the reluctance of courts to impose sanctions for discovery abuse, is their desire to avoid the ill feelings among members of the bar and between the bench and bar that are generated when sanctions motions are filed. Much more can be accomplished in discovery where the parties are cooperating and communicating with one another to resolve differences than where they are constantly running to court for judicial resolution. Sanctions practice tends to disrupt any rapport which may have existed between opposing counsel. Indeed, the filing of a sanctions motion may be viewed as tantamount to a declaration of war. It is difficult enough for adversaries to work together on discovery under normal circumstances; the threat of sanctions only adds to the tension.

Thirdly, it is far from clear that imposition of sanctions will deter misconduct in discovery. It may be that sanctions will work as a direct deterrent in the sense that a sanctioned attorney will be less likely to transgress in the future. However, the in terrorem effect, the effect on the conduct of all attorneys as a result of imposition of sanctions on attorney X, is not empirically demonstrable and may well be insignificant, given the predisposition of many judges against sanctions.

2. Active Judicial Supervision of Discovery

As noted above, amended rules 16 and 26 encourage active involvement in pretrial proceedings by judges. However,

130. See supra note 14 and accompanying text.
131. Soffer, supra note 8, at 703-06.
132. See Weinstein, supra note 126, at 4, col. 1 (sanctions “are counterproductive because they are bound to create ill will—among attorneys and between the judge and attorneys” making it more difficult to handle a case because lawyers will be mad at each other).
133. See supra notes 63-125 and accompanying text.
given the fact that the federal judiciary is already taxed to the limit, it is unrealistic to think that judges will have either the time or the inclination to devote themselves to discovery matters instead of trials, dispositive motions, criminal sentencing or settlement negotiations.\textsuperscript{134} Not every case requires close judicial monitoring.\textsuperscript{135} To be sure, complex litigation, including antitrust and securities matters, ought to command the court's close attention from the outset of the pretrial stages, but these cases are the exception, not the rule.\textsuperscript{136} Our judicial resources are meager enough as matters now stand. The mandates of the new rules may prove overwhelming for the courts.

3. Judicial Resolution of Discovery Disputes

Another serious drawback of the 1983 amendments is their failure to address the judiciary's inability to resolve discovery disputes promptly. While the judges may be faulted to a degree for slow turnaround time on discovery motions, much of the delay is caused by factors beyond their control, notably heavy caseloads.\textsuperscript{137} Judges were having a difficult enough time keeping matters current before the amendments took effect. It is not realistic to assume that they will be able to devote the additional time to discovery matters as contemplated by the amended rules.

This added burden upon the judges' limited time is exacer-


\textsuperscript{135} For a discussion of rule 16's recognition of the need for exemptions to the general rule of judicial intervention, see supra notes 69-70 and accompanying text.

\textsuperscript{136} Proof of claims and defenses under the antitrust, patent, copyright and securities laws frequently require complicated and detailed factual investigation. See Kendig, supra note 84, at 703-05 (1975) (recognizing that courts faced with certain classes of cases must deal with unusually complex or esoteric factual issues that require the court to evaluate extremely complex testimony and documentary evidence). Where complaints in such cases make sweeping allegations of widespread wrongdoing, the scope of discovery may seem boundless. Id. at 705. Unless the trial judge takes control of the pretrial proceedings at the outset, the case is likely to get out of hand quickly. Id. at 712.

On the other hand, excessive discovery is rarely a problem in a large number of matters entertained by the federal courts, including FELA cases, Jones Act cases, diversity cases, social security matters and habeas corpus petitions. Fed. R. Civ. P. 16 advisory committee note. Hence, there is no need for close judicial monitoring of discovery in these cases. Id. See also supra notes 69-70 and accompanying text.

\textsuperscript{137} For a discussion of the factors contributing to judicial inefficiency in handling discovery matters, including overburdened court calendars, see supra notes 49-51 and accompanying text.
bated by the Advisory Committee's emphasis on the need to have the trial judge involved in discovery, and by its explicit discouragement of the use of magistrates to handle discovery disputes.138 Spurning the magistrate, a potentially valuable resource in handling discovery disputes, will only enhance the inefficiency that currently exists in resolving disclosure controversies, and thereby undercut the goal of prompt disposition of pretrial disputes. The new rules thus erect additional institutional barriers for the judiciary which may well slow, rather than hasten, pretrial proceedings.

C. Defining Proportionality

The limitations on the depth of discovery enunciated in amended rule 26(b)(1) have been welcomed in some quarters as necessary.139 Few attorneys would quarrel with the proposition that unreasonably cumulative discovery or discovery that could be better obtained from another source ought to be limited.140 Nor is there likely to be much objection to limiting discovery where the parties have had ample opportunity to obtain the information sought.141 However, the proportionality standard of rule 26(b)(1)(iii) raises a serious conceptual problem.142 As an abstract proposition, the notion that discovery ought to be proportional to the needs of the case makes perfect sense.143 However,

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138. See Fed. R. Civ. P. 16 advisory committee note. The drafters state: The use of the term "judge" in [Rule 16(b)] reflects the Advisory Committee's judgment that it is preferable that this task [of issuing a discovery scheduling order] should be handled by a district judge rather than a magistrate, except when the magistrate is acting under 28 U.S.C. § 636(c).

Id.

139. For example, Judge Becker made the following observations: Do you have a right to unlimited discovery? Ultimately I suppose everything comes down to the due process clause. Do you have a right under the due process clause to turn over every stone? The case has never been presented, but I don't think you do, and I think that strong discovery control with deadlines that are adhered to is now received wisdom as is strong document management and creation of document depositories. If you have a computerized litigation support system, there is a possibility of common computerized data banks.

Becker, supra note 86, at 441.

140. For a discussion of this limitation in rule 26(b)(1)(i), see supra notes 97-98 and accompanying text.

141. For a discussion of this limitation in rule 26(b)(1)(i), see supra text accompanying note 99.

142. For a discussion of rule 26(b)(1)(ii)'s proportionality standard, see supra notes 100-01 and accompanying text.

143. See Rosenberg & King, supra note 8, at 586-87 (much of the "truly abusive discovery" that occurs is discovery that is "too deep rather than too broad" and is "simply disproportionately costly in relation to the values at stake in the
the practical implementation of such an ill-defined standard is difficult. The rule itself provides no guidance as to when discovery is unduly burdensome and expensive other than its reference to (1) the needs of the case; (2) the amount in controversy; (3) the parties' resources; and (4) the importance of issues at stake in the litigation. The drafters make it clear that amount in controversy is not to be a benchmark when important matters of public policy are involved, but they say little more. Thus, limitations imposed by the nebulous proportionality standard will have to be defined on a case by case basis, and it will be many years before the parameters of proportionality even approach clarity. The impact of the proportionality rule on discovery is predictable: additional motion practice to define proportionality in a given case, which in turn will lead to added litigation expense and greater delay in the pretrial phases of a case.

A potential difficulty with this approach [of proportionality] is in finding principled criteria for differentiating between various types of cases. What values should be used in deciding whether, for example, the plaintiff in a $10,000 personal injury case should be limited in the number of depositions he may take, or the plaintiff seeking reinstatement in an employment discrimination case should be prohibited from discovering documents only tangentially related to the claim, or the defendant in a $10,000,000 product liability case should be allowed to require answers to voluminous interrogatories involving the most searching details of the plaintiff's past life? Where, one may ask, are judges expected to find the criteria and analytical structure for making such judgments?

Economics, particularly market theory regarding the exchange of goods and services through the price mechanism, provides one obvious frame of reference. The optimal use of resources in producing a given output or in accomplishing a given task is a positive value under market economics. Misallocation of litigation resources into unnecessary discovery or prolonged legal disputes over how discovery will take place (imposed both on the government through the expenditure of judicial resources and on the private litigants through costs of either compliance or resistance) increases the transaction costs for accomplishing the purposes of litigation.

Id. at 276-77 (footnotes omitted).

144. See Sherman & Kinnard, supra note 34, at 276. These commentators observe:

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Id. at 276-77 (footnotes omitted).


146. Fed. R. Civ. P. 26 advisory committee note. The drafters stated that "the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Id.

147. See Sherman & Kinnard, supra note 34, at 279 ("[J]udges will have to develop rules-of-thumb for determining the amount of discovery normally permissible in certain types of cases").
It is even more troublesome that this proportionality standard is incorporated into the sanctions provisions set forth in rule 26(g).\textsuperscript{148} An attorney or his client may be fined or face other penalties for transgressing vaguely defined standards for certification. This possibility raises serious questions as to whether the proportionality standard comports with due process.\textsuperscript{149}

IV. IMPACT OF THE 1983 AMENDMENTS ON LOCAL DISTRICTS

The national debate surrounding the 1983 amendments has sparked debate within various districts as to what could be done on the local level to remedy discovery abuse. Even before the Supreme Court promulgated the 1983 amendments, several districts formed special committees to reexamine discovery practices within their jurisdictions.\textsuperscript{150} Perhaps the most significant local project was undertaken in the Eastern District of New York, where a Special Committee on Effective Discovery in Civil Cases in the Eastern District of New York (Special Committee) conducted an extensive study of discovery practices within the district and issued a comprehensive report recommending that certain procedures be adopted by the court.\textsuperscript{151} The following discussion will focus on the work of the Special Committee. Such an analysis may prove useful because: (1) the committee is a vanguard effort in attacking discovery abuse on a local level;\textsuperscript{152} (2) it represents

\textsuperscript{148} For a discussion of the sanction provisions of rule 26(g), see supra notes 114-25 and accompanying text.

\textsuperscript{149} One must assume that the drafters believed that the proportionality standard set forth in rule 26(b)(1)(ii) met the demands of due process. However, a litigant cannot, consistent with due process, be sanctioned where the rule violated is so vague in its prohibitions that the litigant cannot reasonably determine its meaning. See L. Tribe, American Constitutional Law § 10-8, at 513 (1978) (quoting Lanzella v. New Jersey, 306 U.S. 451, 458 (1939)). It should be recognized that the courts traditionally have had wide latitude in the area of sanctions under the Federal Rules. See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinea, 456 U.S. 694, 706-09 (1982) (imposition of a sanction under rule 37(b)(2)(A) for failure to comply with a discovery order did not violate litigant's due process rights).

\textsuperscript{150} On November 30, 1982, Chief Judge Jack B. Weinstein of the United States District Court for the Eastern District of New York announced the formation of a Special Committee on Effective Discovery in Civil Cases for the Eastern District of New York. Eastern District Revised Report, supra note 48, at 359. Shortly after Judge Weinstein's announcement, Chief Judge Constance Baker Motley formed a similar committee in the Southern District of New York. In the Southern District of Alabama, a committee on local discovery practices had begun work even earlier than its counterparts in New York. More recently, a committee was formed in the District of Rhode Island to reexamine discovery procedures as part of an overall effort to revise local rules there.

\textsuperscript{151} See Eastern District Revised Report, supra note 48.

\textsuperscript{152} The importance of the Special Committee's effort is underscored by
the work product of a diverse group of attorneys from widely varying practice backgrounds, whose experiences mirror the full spectrum of litigation brought in the Eastern District;\textsuperscript{153} (3) it provides novel and sensible approaches to achieving cost effective discovery; and (4) it may serve as a blueprint for other districts in fashioning procedures to manage discovery and combat discovery abuse.\textsuperscript{154}

A. The Work of the Eastern District

Concerned that the 1983 amendments unduly emphasized sanctions as the means for remedying discovery abuse, and that sanctions would serve to fuel skyrocketing litigation costs by encouraging expensive satellite litigation, Chief Judge Jack Weinstein appointed the Special Committee in December 1982. This committee was to study the problem of discovery abuse in the Eastern District, particularly in light of the then-proposed amendments to the Federal Rules, and to propose its own solutions.\textsuperscript{155} The Special Committee was charged with the responsibility to:

1. determine how discovery necessary to just and

the fact that Chief Justice Warren Burger sent copies of the Special Committee’s report and the Eastern District’s local rules on discovery to all federal district court chief judges as an example of one approach to combatting discovery abuse. See Letter from Chief Justice Warren Burger (April 2, 1984) (enclosing a copy of the Eastern District’s materials and requesting information from the chief judges as to steps taken in their districts and their suggestions for curbing discovery abuse).

153. Special Committee members included attorneys from large and small firms, sole practitioners, those who represent plaintiffs and those who represent defendants, representatives from the United States Attorney’s Office and from law departments of local governments, academicians, judges, a magistrate and the district executive. See Eastern District Revised Report, supra note 48, at 360-61 (listing the members of the committee and their professional affiliations).

154. Chief Justice Burger has suggested that the Eastern District’s approach “may provide a helpful pattern” in fashioning local rules in other districts. See Letter, supra note 152. The Special Committee was careful to note, however, that the proposals outlined in its report were tailored to the needs and resources of the Eastern District and were not necessarily portable to other districts:

We emphasize that our proposals are geared specifically to the Eastern District of New York. A careful study was made of the strengths, case-load, practices and procedure of the bench and bar in the Eastern District. The recommendations made herein are customized to that single District and they took into account intangible qualities which may or may not exist in other Districts.

Eastern District Revised Report, supra note 48, at 368. Thus, the Eastern District’s approach should be viewed as a starting point from which other districts may fashion local rules that fit the needs and resources of their individual situations.

155. See Weinstein, supra note 126, at 4.
speedy resolutions of disputes can be obtained at minimum costs in money, time and annoyance;

2. publish interim reports so that the bar and litigants can be heard with respect to proposals;

3. meet with all the judges and magistrates of the Eastern District to arrive at a consensus on the proper role of court personnel;

4. arrange educational sessions with the bar and law schools so that the lawyers will understand what is expected of them;

5. propose any necessary changes in local rules and forms;

6. prepare a short guide for lawyers on how discovery will be conducted . . . to reduce disputes among counsel and interventions of the court.156

On August 9, 1983, the Special Committee issued its initial report in the form of proposed local rules.157 That widely circulated report was the subject of comments from bar associations, law firms and individual practitioners.158 Public hearings were held before the Special Committee and the judges of the district at the Brooklyn courthouse on November 17, 1983.159 On January 30, 1984, the Special Committee issued a revised report. On March 1, 1984, the report, to be known as the Standing Orders of the Court (Standing Orders), was unanimously adopted by the Board of Judges of the Eastern District of New York for a three year period.160

There are four basic goals of the Standing Orders. The first is to encourage cooperation in discovery. Second, the orders are intended to provide prompt access to a judicial officer so as to resolve discovery disputes expeditiously and with a minimum of paperwork. A third goal is to provide attorneys with a blueprint for conducting discovery. This blueprint includes a series of provisions setting forth specific practices that are presumptively inap-

156. Eastern District Revised Report, supra note 48, at 359.
157. Id. at 362.
158. Id.
159. Id. at 363.
160. United States District Court for the Eastern District of New York, Standing Orders of the Court on Effective Discovery in Civil Cases, 102 F.R.D. 339, 342 (1984) (Chief Judge Weinstein's preface to the standing orders) [hereinafter cited as Standing Orders]. Following adoption of the Standing Orders, conferences were held to acquaint the practicing bar with the new rules and procedures. Id.
appropriate. Finally, the Standing Orders should offer guidance in instances where sanctions are either mandated or indicated.\textsuperscript{164} An analysis of the Standing Orders in light of their capability for implementing each of these goals follows.

1. Cooperation Among Attorneys

It would seem axiomatic that discovery proceeds most expeditiously where there is cooperation and courtesy among attorneys in all aspects of the pretrial phase of a case. Yet, it is striking how infrequently opposing counsel communicate with one another in a meaningful way to resolve discovery disputes, and conversely, how frequently they communicate on discovery matters through formal motion practice. It is equally striking how often attorneys fail to extend to their adversaries basic courtesies in matters relating to scheduling and timing of various discovery procedures. Therefore, the Standing Orders contain a salutary, if only precatory, provision urging counsel to cooperate, consistent with the interests of their clients, in all phases of the pretrial process.\textsuperscript{162} To further encourage cooperation in discovery, the Standing Orders provide that the parties may stipulate to alter, amend, or modify any practice with respect to discovery, unless the modification would be contrary to a prior order of the court entered specifically in that action.\textsuperscript{163} Thus, for example, attorneys may agree that it is permissible on deposition to direct witnesses not to answer on grounds other than privilege\textsuperscript{164} or to provide for a particular method of document production.

2. Judicial Intervention

Judicial intervention in the discovery process may occur in two separate but related contexts: with respect to the Rule 16 scheduling conference, and with respect to disputes arising during the course of discovery.\textsuperscript{165}

\textsuperscript{161} Eastern District Revised Report, supra note 48, at 366-68.
\textsuperscript{162} Standing Order 1, Standing Orders, supra note 160, at 347. Standing order 1 provides: "Counsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures." \textit{Id.}
\textsuperscript{163} Standing Order 2, Standing Orders, supra note 160, at 347.
\textsuperscript{164} Eastern District Revised Report, supra note 48, at 369-70 (commentary to standing order 2).
\textsuperscript{165} \textit{Id.} at 370-71 (prefatory note to standing orders on judicial intervention).
Rule 16 Conferences

As noted, the 1983 amendments to rule 16 encourage active judicial management of the pretrial phase of the case. However, the details of pretrial management are left to the discretion of the court and flexibility is encouraged. Rule 16(b) itself recognizes that the details relating to scheduling conferences and scheduling orders may be fleshed out by local district court rules. Although the drafters of rule 16 expressed a definite preference for having the judge handle the task of formulating and entering the scheduling order, the rule specifically provides that a magistrate may be assigned this task when authorized by local rule. The Special Committee shared the view that the judge, rather than the magistrate, should handle such tasks, but it was also mindful of the fact that the heavy caseloads of district judges may not permit them to prepare and enter scheduling orders in every case. The Special Committee felt that the burdens on the judges might be eased if magistrates were authorized to enter scheduling orders in appropriate cases. Whether or not the judge or a magistrate shall deal with the scheduling order is left to the discretion of the judge. Similarly, the mode of the scheduling conference, whether in-person, by mail, by telephone or otherwise, is left to the discretion of the judge or the assigned magistrate. The Standing Orders further reduce the burden on the judiciary by providing that the parties, prior to any scheduling conference, shall try to agree on a scheduling order; if they

166. See supra notes 63 & 133 and accompanying text.
167. See, e.g., Fed. R. Civ. P. 16(b) (permitting the judge to include “any other matters appropriate in the circumstances of the case” in a scheduling order).
168. Fed. R. Civ. P. 16(b) (allowing exemptions from rule 16 compliance where local district court rules so provide). For a discussion of this aspect of rule 16, see supra notes 69 & 135 and accompanying text.
169. Fed. R. Civ. P. 16(b) advisory committee note. For a discussion of this preference, see supra note 138 and accompanying text.
170. Eastern District Revised Report, supra note 48, at 371 (prefatory note to standing orders on judicial intervention).
171. Id.
172. Standing Order 3(a), Standing Orders, supra note 160, at 347. Standing order 3(a) provides, in pertinent part, that “the judge shall determine whether the judge or the magistrate shall deal with the scheduling order.” Id.
173. Eastern District Revised Report, supra note 48, at 372 (commentary to standing order 3(a)). The Special Committee intended that, “[i]n accordance with Fed. R. Civ. P. 16(a), the court shall determine whether to confer by an in-person scheduling conference, by mail, by telephone or by other suitable means.” Id.
do agree, such order will be approved routinely by the court.175

b. Judicial Intervention in Discovery Disputes

A major reason for delays in discovery is the failure of the judiciary to resolve discovery disputes promptly and decisively.176 While the 1983 amendments encourage judges to monitor pretrial proceedings,177 they provide no mechanism by which to insure prompt disposition of discovery motions. The Special Committee's revised report provides a number of procedures which fill the gaps left by the Federal Rules, thereby assuring prompt access to a judicial officer, and encouraging efficient and inexpensive resolution of issues. These procedures are briefly examined below.

(i) Role of the Magistrate

Key to the Special Committee's overall plan for prompt access to the courts is prudent use of magistrates.178 The Special Committee envisioned that magistrates would be assigned rou-

175. Standing Order 3(b), Standing Orders, supra note 160, at 347. Standing order 3(b) provides, in pertinent part:
Prior to any scheduling conference, the attorneys for the parties shall attempt to agree to a scheduling order and if agreed to, shall submit it to the court. If such scheduling order is reasonable, the court will approve it and advise counsel. . . . If the attorneys for the parties cannot agree on a scheduling order, they shall promptly advise the court.

176. For a discussion of the judiciary's failure to act promptly in discovery matters, see supra notes 41-43 and accompanying text.

177. For a discussion of the ways in which the new rule 16 encourages active judicial involvement in pretrial proceedings, see supra notes 63-87 and accompanying text.

178. Eastern District Revised Report, supra note 48, at 371 (prefatory note to standing orders on judicial intervention). The Special Committee stated:
The Committee . . . believes that except in cases which by reason of their importance or complexity require the supervision of a judge, discovery disputes should be determined by a magistrate and that, pursuant to Fed. R. Civ. P. 16(b)(5), the scheduling order routinely provide that discovery disputes be raised with the assigned magistrate.

When judicial intervention is necessary in a discovery dispute, the Committee is of the view that the issue ought to be decided promptly so as not to stall the litigation. A major criticism which has been levelled by the practicing bar is the judicial system's failure to determine discovery disputes promptly and decisively, thereby causing delays and additional expense to the parties. Prompt resolution of discovery issues minimizes wasted time, lessens needless acrimony between the parties, and enables attorneys to get on with the pretrial process in an expeditious manner. The Committee believes that utilization of magistrates in the Eastern District of New York to oversee discovery is a key to obtaining prompt resolution of pretrial disputes.

Id.
tinely to handle discovery matters in civil cases. The rationale for this is fourfold. First, magistrates generally have more time to devote to discovery matters than judges, since judges face many more burdens than magistrates. Thus, a magistrate is more likely to be available to handle a dispute that occurs during a deposition than is a judge, who may be occupied with other responsibilities. Were the judge the only one authorized to resolve the dispute, the goal of prompt access and resolution would be thwarted.

Second, magistrates, through their involvement in the pretrial process, may be effective in fostering settlement negotiations. Some judges prefer not to involve themselves in settlement talks in cases which they will later try, lest they appear biased at trial. The magistrate faces no such conflict. Because settlement of federal actions is to be encouraged, magistrate involvement in pretrial matters would be beneficial. Moreover, the fact that the overwhelming majority of cases are settled means that relatively few actually need the attention of the judge during the pretrial stage. Thus, it makes more sense to have judges focus on the cases that truly merit their attention and have magistrates handle the rest.

Third, because there are fewer magistrates than judges in most districts, discovery rulings are more likely to be uniform where magistrates handle the bulk of discovery. Since few discovery rulings are reviewed in the appellate courts, there is a disparity of standards regarding the propriety of various discovery

179. See Standing Order 4, Standing Orders, supra note 160, at 348. Standing order 4 provides as follows:
   (a) Selection of Magistrate. A magistrate shall be assigned to each case at random on a rotating basis upon the commencement of the action, except in those categories of actions set forth in Civil Rule 45 of this Court. A magistrate so assigned shall take no action with respect to any matter until a suitable order of reference is received.
   (b) Scope of Reference. At the time the judge determines whether the judge or the magistrate shall deal with the scheduling order, the judge shall determine whether discovery matters shall be referred to the magistrate and the scope of such reference. The judge may at any time enlarge or diminish the scope of any reference to the magistrate.
   (c) Orders of Reference. The attorneys for the parties shall be provided with copies of all orders referring a matter to the magistrate, the scope of such reference, and any enlargement or diminution thereof.

Id.

180. Eastern District Revised Report, supra note 48, at 373 (commentary to standing order 4).

181. Id.

182. Id.

183. Id.
tactics. Such disparity exists not only among districts, but within districts as well. To the extent that a small group of magistrates is responsible for discovery matters, uniformity is more likely to be attained.

Fourth, the magistrates in the Eastern District have proven to be very capable and as a result have earned the full confidence of the judges within the district.\textsuperscript{184} Thus, there is little reason to believe that one will receive differing qualities of justice, depending on whether he or she appears before a magistrate or a judge.\textsuperscript{185}

(ii) \textit{Assignment of Magistrates}

The Standing Orders provide that magistrates will be assigned automatically to each case in much the same way that judges are assigned.\textsuperscript{186} However, the magistrate has no power to act until he or she receives an order of reference from the judge.\textsuperscript{187} Thus, the judge is permitted a measure of flexibility in determining whether, and the extent to which, a magistrate will be involved in discovery.\textsuperscript{188} The revised report advises that judges retain control over discovery in complex cases, especially antitrust and securities matters.\textsuperscript{189} The rationale is obvious: unless a judge is on top of such cases from the outset, discovery is apt to grow out of control quickly and ultimate resolution of the issues will be delayed.\textsuperscript{190} Moreover, if parties feel that magistrate involvement would be inappropriate, they are free to request that the judge retain control over discovery.\textsuperscript{191}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{184} \textit{Id.}
\item \textsuperscript{185} Id. The Eastern District's enthusiasm for and confidence in its magistrates is not universally shared in other districts. For example, one study found that Chicago lawyers viewed magistrates as "woefully underequipped in talent, time, and temperament" to handle complicated discovery disputes. See Brazil, supra note 41, at 246.
\item \textsuperscript{186} Standing Order 4, \textit{Standing Orders}, supra note 160, at 348. For the text of standing order 4, see supra note 179.
\item \textsuperscript{187} Standing Order 4, \textit{Standing Orders}, supra note 160, at 348. An order of reference is an order of the district court referring discovery matters in a particular case to a magistrate. \textit{Id.}
\item \textsuperscript{188} \textit{Eastern District Revised Report}, supra note 48, at 373 (commentary to standing order 4).
\item \textsuperscript{189} \textit{Id.} But see \textit{Report of the Discovery Committee of the Southern District of New York} at 4-5 (April 4, 1984) (utilization of magistrates may be particularly effective in antitrust and securities matters).
\item \textsuperscript{190} \textit{Eastern District Revised Report}, supra note 48, at 373 (commentary to standing order 4).
\item \textsuperscript{191} \textit{Id.}
\end{enumerate}
\end{footnotesize}
(iii) Reconsideration of a Magistrate's Ruling

Consonant with the provisions of the Magistrates Act 192 and the Federal Rules of Civil Procedure, 193 the Standing Orders permit the judge to reconsider a magistrate's ruling on a discovery matter, but the ruling may be overturned only where it was "clearly erroneous or contrary to law." 194 The experience of the Eastern District has been that magistrates' orders are seldom appealed and rarely reversed. 195 Therefore, the Special Committee did not anticipate that widespread use of magistrates would increase costs of litigation and foster delay. 196

192. See 28 U.S.C. § 636(b)(1)(A) (1982). Section 636(b)(1)(A) provides: [A] judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph . . . where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

Id.

193. Fed. R. Civ. P. 72(a). Rule 72(a) provides, in pertinent part:

A magistrate to whom a pretrial matter not dispositive of a claim . . . is referred to hear and determine shall promptly conduct such proceedings as are required. . . . The district judge to whom the case is assigned shall consider objections made by the parties, provided they are served and filed within 10 days after the entry of the order, and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

Id.

194. Eastern District Revised Report, supra note 48, at 374 (commentary to standing order 5). Standing order 5 provides as follows:

(a) Procedure. A party may make application to the judge to review a ruling of the magistrate on a discovery matter pursuant to Fed. R. Civ. P. 72(a). Such application shall be made by a short-form notice of motion as appears in Form A, delineating the scope of the issues to be reviewed by the judge.

(b) Timing. An application for review of a magistrate's order shall be made to the judge within ten days after the entry of such order.

(c) Written Exposition of Magistrate's Rulings. The magistrate shall enter into the record a written order setting forth the disposition of the matter within such ten-day period if requested to do so by the judge or a party considering review. Such written order may take the form of an oral order read into the record of a deposition or other proceeding.

Standing Order 5, Standing Orders, supra note 160, at 348.

195. Eastern District Revised Report, supra note 48, at 375 (commentary to standing order 5).

196. Id.
(iv) Manner in Which Discovery Disputes Are to Be Raised with the Court

Perhaps the most innovative and significant features of the Standing Orders are the procedures designed to handle discovery disputes expeditiously. The Standing Orders reaffirm the procedure extant in many districts that, prior to seeking judicial resolution of a discovery dispute, attorneys for the disputants confer in good faith in an effort to settle the issue.¹⁹⁷

Where the attorneys at a deposition cannot resolve their differences regarding a dispute that arises, they must telephone the judge or magistrate and attempt to come to a resolution in a telephone conference.¹⁹⁸ The parties may not submit any written papers prior to the telephone conference.¹⁹⁹ If the dispute is not resolved during the conference call, the court must take whatever action it deems appropriate, including additional conferences with or without the submission of papers.²⁰⁰ If a party to a dispute that is resolved exclusively by means of a telephone conference is unhappy with the ruling, he may get a de novo reconsideration by submitting a letter not exceeding five typewritten pages together with any relevant attachments.²⁰¹ Other par-

¹⁹⁷. See Standing Order 6(a), Standing Orders, supra note 160, at 348. Standing order 6(a) provides that “[p]rior to seeking judicial resolution of a discovery dispute, the attorneys for the affected parties or non-party witness shall confer in good faith in person, by writing, or by telephone in an effort to resolve the dispute.” Id. Cf. S.D.N.Y. Civ. R. 3(d), (court will not hear any discovery motion unless the moving party has filed an affidavit certifying that counsel for both parties were unable to resolve the issue through good faith negotiation); N.D. Ill. Gen. R. 12(d) (court will not hear any discovery motion unless the moving party advises the court in writing that parties were unable to reach agreement after personal consultation and sincere attempts to do so).

¹⁹⁸. Standing Order 6(b)(i), Standing Orders, supra note 160, at 348-49. Standing order 6(b)(i) provides:
Where the attorneys for the affected parties or non-party witness cannot agree on a resolution of a discovery dispute that arises during the taking of a deposition, they shall notify the court by telephone and request a telephone conference with the court to resolve such dispute. If such dispute is not resolved during the course of the telephone conference, the court shall take other appropriate action, including scheduling a further conference without the submission of papers, directing the submission of papers, or such other action as the court deems just and proper. Except where a ruling which was made exclusively as a result of a telephone conference is the subject of de novo review pursuant to (iii) hereof, papers shall not be submitted with respect to such a dispute unless the court has so directed.

¹⁹⁹. Id.

²⁰⁰. Id.

²⁰¹. Standing Order 6(b)(iii), Standing Orders, supra note 160, at 349. Standing order 6(b)(iii) provides:
ties to the dispute are entitled to submit responses which may not exceed five typewritten pages.\textsuperscript{202} Where the dispute involves discovery other than by deposition, the disputants may raise the issue with the court by telephone conference or by a letter not exceeding three pages in length together with attachments.\textsuperscript{203} Where the letter option is exercised, a written response not exceeding three typewritten pages may be submitted by the opponent.\textsuperscript{204} Once the matter is called to its attention, the court shall, if the dispute is not determined immediately, direct the disputants to proceed in whatever manner the court deems appropriate.\textsuperscript{205} The Standing Orders thus seek to promote expeditious and inexpensive disposition of discovery disputes without the concomitant burden of preparing motion papers.\textsuperscript{206} To this end, disputants are encouraged to take advantage of modern telecom-

Where a ruling is made exclusively as a result of a telephone conference it may be the subject of \textit{de novo} reconsideration by a letter not exceeding five pages in length attaching relevant materials submitted by any affected party or non-party witness. Any other affected party or non-party witness may submit a responsive letter not exceeding five pages in length attaching relevant materials.

\textit{Id.}

\textsuperscript{202} \textit{Id.}

\textsuperscript{203} Standing Order 6(b)(ii), \textit{Standing Orders, supra} note 160, at 349. Standing order 6(b)(ii) provides:

Where the attorneys for the affected parties or non-party witness cannot agree on a resolution of any other discovery dispute, they shall notify the court, at the option of the attorney for any affected party or non-party witness, either by telephone or by a letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials. Any opposing affected party or non-party witness may submit a responsive letter not exceeding three pages in length attaching relevant materials. Any affected party or non-party witness may request a hearing or the opportunity to submit additional written materials, or to make any other appropriate presentation to the court. If the dispute is not resolved during the course of the telephone conference or if the letter option is exercised, the court shall take appropriate action to resolve the dispute, including scheduling a telephone or other conference without the submission of papers, directing the submission of papers, or such other action as the court deems just and proper. Except for the letters and attachments authorized herein or where a ruling which was made exclusively as a result of a telephone conference is the subject of \textit{de novo} review pursuant to (iii) hereof, papers shall not be submitted with respect to such a dispute unless the court has so directed.

\textit{Id.}

\textsuperscript{204} \textit{Id.}

\textsuperscript{205} \textit{Id.}

\textsuperscript{206} \textit{Eastern District Revised Report, supra} note 48, at 376 (commentary to standing order 6).
communications in lieu of expensive and time-consuming in-person courtroom hearings.207 There is simply no reason to have such hearings when the matter can be heard more quickly, at a lower cost, and just as effectively by conference call.208 While the Special Committee preferred the telephone procedure for raising discovery disputes, it also recognized that telephone conferences may prove inadequate in some instances and therefore permitted written presentations at the option of the moving party.209

The procedures adopted in the revised report have the additional benefit of routinizing the hearing and determination of discovery disputes.210 Prior to the implementation of these procedures, the mechanics of bringing discovery motions in the Eastern District varied from judge to judge.211 Some insisted on briefs and hearings; others required that briefs be submitted without oral argument; and still others required a pre-motion conference before any written materials could be submitted. With procedures now more standardized, discovery matters can be handled in a cost-efficient and far less confusing manner.212

3. Conduct of Discovery

As noted, the Federal Rules deal with discovery in broad outline and provide little detail as to practical mechanics.213 Frequently, discovery abuse occurs not out of callous disregard for the Federal Rules, but rather because attorneys are unsure of the boundaries of propriety. Indeed, many discovery practices cannot be fit into black letter categories of "do's and don'ts". While recognizing the need for flexibility, the Special Committee nevertheless felt it appropriate to identify presumptively proper or im-

207. Id. at 377.
208. Id.
209. See id.
210. Eastern District Revised Report, supra note 48, at 365 (citing reduction of inconsistency and differences in rulings by different judges and magistrates in the district as an important reason to adopt the proposed standing orders).
211. Id. The Special Committee observed that identification of appropriate practices to be followed throughout the district "should tend to reduce differences and inconsistency in rulings by the different judges and magistrates of the Court. There has been some concern expressed by the bar that a discovery practice engaged in by the same lawyer is cononded or complimented by one judge and criticized by another. Standing Orders should significantly reduce this unpredictability." Id.
212. Eastern District Revised Report, supra note 48, at 377 (commentary to standing order 6).
213. For a discussion of the breadth of the language of the Federal Rules and the effect of such language on discovery practice, see supra notes 24-29 and accompanying text.
proper conduct in various circumstances. The revised report emphasized that the standards are applied only presumptively, meaning that the attorney deviating from the standard has the burden of justifying his or her conduct.

a. Conduct at Depositions

Of all modes of discovery, it is perhaps most difficult to draw bright line rules of presumptively correct behavior in the realm of deposition practice. Many deposition practices fall into a vast gray area that is neither specifically authorized nor specifically prohibited by the Federal Rules. As has been noted, for example, although the practice of instructing a witness not to answer a question calling for privileged information is widely accepted by practicing attorneys and the courts, there is no specific authorization for this practice under the Federal Rules. Yet to force witnesses to divulge privileged information on deposition would have far-reaching and potentially disastrous ramifications.

To assist attorneys in navigating this murky area of the law, and thereby avoid costly motion practice, as well as delay, the Standing Orders incorporate a series of presumptions with respect to behavior on depositions. The following is a summary of these presumptions:

1. Directions not to answer questions at depo-

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214. See Eastern District Revised Report, supra note 48, at 365. The Special Committee stated that, “particularly with respect to controversial matters, it is better that the appropriate presumptive practice be known to all practitioners rather than be the subject of doubt or mystery.” Id.

215. Id. at 368. The Special Committee articulated the “presumptively appropriate” standard as follows: “Presumptively, as used in this report, simply means that if an attorney chooses to act differently, the burden is on him or her to justify such conduct if challenged. This mechanism leaves ample room to deal with aberrant situations or particular circumstances calling for different behavior.” Id.

216. See supra notes 24-29 and accompanying text.

217. See Fed. R. Civ. P. 30(c). In fact, the rules seem to suggest that objections to any aspect of a deposition do not justifying an instruction not to answer: All objections made at the time of the examination to qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. Id. (emphasis added).

218. See International Union of Elec., Radio and Mach. Workers v. Westinghouse Elec. Corp., 91 F.R.D. 277, 279 (D.D.C. 1981) (rule 30(c) should not be applied to mandate disclosure to privileged matter merely because such material is sought; strict application of the rule would undermine the values traditionally protected by privilege rules).
tions on the grounds of privilege are presumptively proper, but the interrogating party is entitled to know
the precise privilege being asserted and the bases there-
for. Where the direction not to answer is given and
honored with respect to non-privileged information,
either party may seek a ruling from the court, but pend-
ing such a ruling the objection stands.

(2) Objections in the presence of the witness sug-
gesting the response to a particular question are pre-
sumptively improper.

219. See Standing Order 21(a)(1), Standing Orders, supra note 160, at 353. Standing order 21(a)(1)
provides that where an attorney instructs a deponent
not to answer on grounds of privilege,
the attorney asserting the privilege shall identify during the deposition
the nature of the privilege (including work product) which is being
claimed and if the privilege is being asserted in connection with a claim
or defense governed by state law, indicate the state's privilege rule be-
ing invoked.

Id.

220. See Standing Order 11(b), (c), Standing Orders, supra note 160, at 351. Standing orders 11(b) and (c)
provide as follows:
(b) Where a direction not to answer . . . a question [calling for a non-
privileged answer] is given and honored by the witness, either party
may seek a ruling as to the validity of such direction.
(c) If a prompt ruling cannot be obtained, the direction not to answer
may stand and the deposition should continue until (1) a ruling is ob-
tained or (2) the problem resolves itself.

Id. Directions not to answer at depositions present a problem that is not suscep-
tible to any bright line rules. The Special Committee gave its imprimatur to
instructions not to answer based on privilege, but found that such instructions
based on other grounds are frequently misused by attorneys to impede the pro-
gress of a deposition. See Eastern District Revised Report, supra note 48, at 381
(commentary to standing order 11). In the Special Committee's view, it is
clearly improper to instruct a witness not to answer solely on the grounds of
objection to the form of the question. See id. On the other hand, the committee
recognized that such instructions may be the only effective way to halt unfair,
harassing or repetitious questioning. See id. Standing order 11(a), which notes
that repeated instructions not to answer on grounds other than privilege indi-
cate that a deposition is not proceeding as it should, sets the tone for proper
conduct of depositions and makes clear that instructions not to answer ought
not to be interposed lightly. See Standing Order 11(a), Standing Orders, supra note
160, at 351.

221. See Standing Order 12, Standing Orders, supra note 160, at 351. Standing
order 12 provides as follows:
Suggestive Objections. If the objection to a question is one that can be
obviated or removed if presented at the time, the proper objection is
"objection to the form of the question." If the objection is on the
ground of privilege, the privilege shall be stated and established as pro-
vided in Standing Order 21. If the objection is on another ground, the
objection is "objection." Objections in the presence of the witness
which are used to suggest an answer to the witness are presumptively
improper.

Id.
(3) Conferences between the witness and his attorney, initiated by the witness' attorney while a question is pending, are presumptively improper, unless initiated for the purpose of determining whether privilege may be asserted.

(4) Ordinarily, documents relating to a particular witness ought to be produced prior to the taking of that witness' deposition. If such documents are not pro-

By limiting the nature of the objection in this way, standing order 12 reduces the chance that an objection would suggest to the witness how to answer. The Special Committee provided that an attorney may explain the grounds of his objection if the interrogating attorney so requests or if the witness is first asked to leave the room. See Eastern District Revised Report, supra note 48, at 382 (commentary to standing order 12).

Standing order 12 thus provides a straightforward solution to the problem of suggestive objections, which is one of the most abusive tactics in deposition practice. Some attorneys have objected to the restrictions on speaking objections as overkill, in that the rule eliminates even the most innocuous comments. In response to this, it is suggested that an occasional "asked and answered" or "irrelevant" accompanying an objection is, practically speaking, harmless and unlikely to result in sanctions for violation of standing order 12. In addition, it should be noted that the Federal Rules do not authorize speaking objections at depositions. To permit such objections, thereby giving the opposing attorney the option of explaining his objection and perhaps communicating sub rosa with his client, would clearly undermine the integrity of the deposition process.

222. See Standing Order 13, Standing Orders, supra note 160, at 351. Standing order 13 provides as follows: "Conferences Between Dependent and Defending Attorney. An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted." Id.

The Special Committee's concern with attorney-client conferences while questions are pending was that the answer to the question would reflect the attorney's testimony rather than the deponent's. See Eastern District Revised Report, supra note 48, at 382 (commentary to standing order 13). Balanced against this concern is the deponent's right to confer with counsel. Id. To protect the integrity of the attorney-client relationship, standing order 13 permits conferences to determine whether a claim of privilege justifies the deponent's refusal to answer a pending question. See Standing Order 13, Standing Orders, supra note 160, at 351. Other conferences are prohibited while questions are pending, so as to facilitate the discovery process and ensure the integrity of the deponent's testimony. See id.

It is not always easy to determine when an attorney-client conference is being held for an improper purpose. If such conferences are held repeatedly in the course of a deposition, the examiner ought to note their frequency and perhaps seek a judicial ruling on their propriety. Eastern District Revised Report, supra note 48, at 383 (commentary to standing order 13). It is important for the examiner to remember that the rule does not proscribe attorney-client conferences altogether, since most conferences are initiated for bona fide purposes. See id. at 282-83. In addition, the rule does not apply to conferences initiated during breaks in the deposition or overnight. Id. at 382.

223. See Standing Order 14, Standing Orders, supra note 160, at 351. Standing order 14 provides as follows:

Document Production At Depositions. Consistent with the requirements of Fed. R. Civ. P. 30 and 34, a party seeking production of documents of
duced prior to the deposition, the noticing party may adjourn the deposition until after the documents have been produced.\footnote{224}

(5) Motions for leave to record depositions by nonstenographic means shall presumptively be granted.\footnote{225}

(6) Motions to take telephonic depositions of an adverse party shall be presumptively granted.\footnote{226}

another party in connection with a deposition should schedule the deposition to allow for the production of the documents in advance of the deposition. If requested documents which are discoverable are not produced prior to the deposition, the party noticing the deposition may either adjourn the deposition until after such documents are produced or, without waiving the right to have access to the documents, may proceed with the deposition.

\footnote{224}{Standing Order 14, \textit{Standing Orders}, supra note 160, at 351. For the text of standing order 14, see supra note 223. While rule 30(b)(5) of the Federal Rules permits document production at depositions, that process can be very cumbersome and can delay the examination when the number of documents is significant. \textit{Eastern District Revised Report}, supra note 48, at 383 (commentary to standing order 14). If the examiner is reviewing the documents for the first time at the deposition, it is difficult to maintain continuity, and time and money are wasted. \textit{Id.} Thus, the preferred procedure in the Eastern District is production of documents in advance of the deposition. \textit{See} Standing Order 14, \textit{Standing Orders}, supra. If that procedure is not allowed, the examination may be adjourned until a later date without prejudice. \textit{Id.}}

\footnote{225}{Standing Order 7, \textit{Standing Orders}, supra note 160, at 350. Standing order 7 provides: \textit{Non-Stenographic Recording of Depositions}. Motions in accordance with Fed. R. Civ. P. 30(b)(4) for leave to record the deposition of an adverse party or of a non-party witness by means other than stenographic recording, including tape recording or videotaping, shall presumptively be granted. If requested by one of the parties, the recording or videotaping shall be transcribed. \textit{Id.} With the advances in modern technology and the enormous expense of stenographically recorded depositions, there is little reason to deny a request under rule 30(b)(4) of the Federal Rules that a deposition be non-stenographically recorded. \textit{Eastern District Revised Report}, supra note 48, at 379 (commentary to proposed standing order 7).}

\footnote{226}{Standing Order 8, supra note 160, at 350. Standing order 8 provides: \textit{Telephonic Depositions}. The motion of a party to take the deposition of an adverse party by telephone will presumptively be granted. Where the opposing party is a corporation, the term "adverse party" means an officer, director, managing agent or corporate designee pursuant to Fed. R. Civ. P. 30(b)(6). \textit{Id.}}

Under the Federal Rules, telephonic depositions are permissible by stipulation or by court order. \textit{See} Fed. R. Civ. P. 30(b)(7). Telephonic depositions have a significant potential for saving time and money, and reducing inconvenience to the parties and the witnesses. \textit{Eastern District Revised Report}, supra note 48, at 379 (commentary to standing order 8). Therefore, the Standing Orders provide that requests for telephonic depositions be presumptively granted. \textit{See} Standing Order 8, \textit{Standing Orders}, supra.
(7) Attendance at depositions by a party, witness or potential witness in an action shall be permitted.\textsuperscript{227}

(8) When an officer, director or managing agent of a corporation or a government official is noticed for a deposition or subpoenaed concerning a matter about which he has no knowledge, he may file an affidavit so stating.\textsuperscript{228} The noticing party may go forward with the deposition of the witness, but may be ordered to pay

A major disadvantage of telephonic depositions is that the examiner cannot observe the witness' demeanor. Eastern District Revised Report, supra note 48, at 379 (commentary to standing order 8). If a party seeks a telephonic deposition of an adverse party, he is essentially waiving his opportunity to observe the witness' demeanor. \textit{Id.} But if a party seeks to depose a non-adverse party telephonically, he is effectively depriving the adverse party of the opportunity to observe the witness' demeanor. \textit{Id.} In the latter case, standing order 8 and the presumptive grant of the motion to take the deposition by telephone do not apply. \textit{Id.}

227. Standing Order 9, \textit{Standing Orders}, supra note 160, at 350 (parties, witnesses, or potential witnesses in an action "may attend the deposition of a party or witness"). Attendance at depositions, especially by prospective witnesses or experts, may save a party time and money. Eastern District Revised Report, supra note 48, at 379 (commentary to standing order 9). The Special Committee weighed efficiency against the possibility that a potential witness will tailor his testimony based on what he heard at another witness' deposition. \textit{See id.} It concluded that the risk of fabrication did not outweigh the benefits to be derived from attendance of non-witnesses at depositions. \textit{Id.} Indeed, since a potential witness has access to transcripts of testimony from previous depositions, excluding a witness from the deposition of another does little to eliminate the possibility of fabrication. \textit{Id.} at 379-80.

228. Standing Order 10, \textit{Standing Orders}, supra note 160, at 350. Standing order 10 provides:

(a) Where an officer, director or managing agent of a corporation or a government official is served with a notice of deposition or subpoena regarding a matter about which he or she has no knowledge, he or she may submit reasonably before the date noticed for the deposition an affidavit to the noticing party stating and identifying a person within the corporation or government entity having knowledge of the subject matter involved in the pending action.

(b) The noticing party may, notwithstanding such affidavit of the noticed witness, proceed with the deposition, subject to the witness' right to seek a protective order.

\textit{Id.} This standing order is designed to eliminate the procedure of noticing depositions of high-level corporate executives or government officials with no knowledge of the facts of the particular case, in order to induce a quick settlement. Eastern District Revised Report, supra note 48, at 380 (commentary to standing order 10). The standing order provides an affidavit procedure in order to save the time and expense of a formal motion for protective order, as would otherwise be required under rule 26(c) of the Federal Rules. \textit{See id.} at 380-81.

The Special Committee examined a related problem known as "brandying," which involves the noticed party producing witnesses pursuant to rule 30(b)(6) of the Federal Rules who have no knowledge of the matters on which information is sought. \textit{Id.} at 381. The Committee acknowledged the impropriety of this practice, but stated that the Federal Rules adequately dealt with the problem. \textit{Id.}
costs if the witness, in fact, has no knowledge.\textsuperscript{229}

(9) The information to which an examining party is entitled when a claim of privilege is interposed is set forth in detail.\textsuperscript{230}

\addcontentsline{toc}{section}{b. Interrogatories, Document Demands and Requests for Admissions}

The Standing Orders also set forth presumptive standards for the conduct of written discovery. While recognizing the potential for abuse of interrogatories, the Eastern District neverthe-

\textsuperscript{229} Eastern District Revised Report, supra note 48, at 380 (commentary to standing order 10).

\textsuperscript{230} Standing Order 21(a), Standing Orders, supra note 160, at 353. Standing order 21(a) provides, in pertinent part, that where information is withheld in reliance upon a claim of privilege in the course of a deposition, the following information shall be provided during the deposition at the time the privilege is asserted, if sought, unless divulgence of such information would cause disclosure of privileged information:

(i) for documents, to the extent the information is readily obtainable from the witness being deposed or otherwise: (1) the type of document, e.g., letter or memorandum; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena \textit{duces tecum}, including, where appropriate, the author, addressee, and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, and any other recipient to each other;

(ii) for oral communications: (1) the name of the person making the communication and the names of persons present while the communication was made and where not apparent, the relationship of the persons present to the person making the communication; (2) the date and place of communication; (3) the general subject matter of the communication.

Standing Order 21(a)(2), Standing Orders, supra note 160, at 353. For a discussion of the objecting attorney's obligation under standing order 21(a) to identify the privilege being claimed, see supra note 219 and accompanying text. Standing order 21(a) also gives the examiner further rights regarding the deponent's claim of privilege:

After a claim of privilege has been asserted, the attorney seeking disclosure shall have reasonable latitude during the deposition to question the witness to establish other relevant information concerning the assertion of the privilege, including (i) the applicability of the particular privilege being asserted, (ii) circumstances which may constitute an exemption to the assertion of the privilege, (iii) circumstances which may result in the privilege having been waived, and (iv) circumstances which may overcome a claim of qualified privilege.

Standing Order 21(a), Standing Orders, supra note 160 at 354. In arriving at these procedures for asserting a claim of privilege at a deposition, the Special Committee balanced one party's right to obtain relevant information regarding the claim against the other party's right to assert a privilege without "endless and harassing inquiry about the circumstances of the assertion." Eastern Committee District Report, supra note 48, at 390 (commentary to proposed standing order 21).
less declined to enunciate numerical limits on interrogatories as other districts have done. The following summarizes the presumptive standards for written discovery promulgated by the Eastern District:

(1) "Form" requests shall not be used.

231. See Eastern District Revised Report, supra note 48, at 384 (prefatory note to proposed standing orders on interrogatories). The Committee was reluctant to impose arbitrary limitations on the number of interrogatories that may be propounded, since whether they are excessive really depends on the nature of the particular claims and defenses. In some cases, fifty interrogatories may prove too few, while in other cases five may well be too many. The Special Committee was also sensitive to the fact that interrogatories may serve as the "poor person's deposition" and that arbitrary limits on interrogatories may severely handicap impecunious parties in their search for justice. Id. at 383-84.

On the other hand, the Special Committee was not blind to the enormous potential for abuse that interrogatories harbor. For analytical purposes, interrogatories were classified in three categories: (1) identification interrogatories; (2) substantive interrogatories; and (3) contention interrogatories. Id. at 384. The Special Committee found that identification interrogatories, which are used to elicit fairly noncontroversial information such as names of witnesses and identification of documents, are subject to the least abuse. Id. Contention interrogatories, however, are frequently used as instruments to harass the adversary, especially when served at the outset of the litigation. Id. Cf. Becker, supra note 86, at 441 ("The worst kind of interrogatories, although there are circumstances where you have to resort to them, are contention interrogatories."). Similarly, substantive interrogatories—those requesting identification or description of events in issue—are also abused, though perhaps not as much as contention interrogatories, by parties who answer them with self-serving statements or laundry lists of petty objections. Id. Cf. Southern District Adopts Rule to Curb Abuses in Discovery, N.Y.L.J., Feb. 4, 1985, at I, cols. 3-4 (Southern District of New York has adopted the same tripartite categorization of interrogatories with the following limitations: (1) only identification interrogatories may be served at the commencement of litigation; (2) contention interrogatories may be served only at the end of discovery unless the court orders otherwise; and (3) substantive interrogatories are appropriate only if they are a more practical method of obtaining the information than other modes of discovery).

232. For examples of local rules which do provide numerical limits on the number of interrogatories to be propounded, see C.D. Cal. R. 8.2.1 (presumptive limit of 30 interrogatories); M.D. Fla. R. 3.03(a) (presumptively 50); S.D. Ga. R. 7.4 (presumptively 25); N.D. Ill. R. 9(g) (presumptively 20); D. Kan. R. 17(d) (presumptively 30); Order D.S.C. (Jan. 29, 1979) (presumptively 50). By way of comparison, the Special Committee stated that the number of interrogatories be reasonably limited, given the needs of the case. Eastern District Revised Report, supra note 48, at 384 (prefatory note to proposed standing orders on interrogatories).

233. See Standing Orders 15, 18, Standing Orders, supra note 160, at 351-52. Standing order 15 provides: "Form Interrogatories. Attorneys serving interrogatories shall have reviewed them to ascertain that they are applicable to the facts and contentions of the particular case. Interrogatories which are not directed to the facts and contentions of the particular case shall not be used." Standing Order 15, Standing Orders, supra note 160, at 351-52.

Standing order 18 provides: "Form Requests for Documents. Attorneys requesting documents pursuant to Fed. R. Civ. P. 34 and 45 shall have reviewed the request or subpoena to ascertain that it is applicable to the facts and conten-
(2) Written discovery requests shall be drafted and read reasonably.\(^{234}\)

(3) Each written discovery request shall be answered fully to the extent no objection is made, and no portion of a request shall be left unanswered merely because an objection is made to another part thereof.\(^{235}\)

...
(4) The information to which a discovering party is entitled when a claim of privilege is interposed is to be set forth in detail. 236

4. Sanctions

The final portion of the revised report is designed to give the courts some guidance in imposing sanctions. The Special Committee recognized that sanctions should be imposed where mandated or authorized by the Federal Rules. But the Committee also felt that the Standing Orders would minimize the need for sanctions because the responsibilities of attorneys on discovery are set forth in some detail. 237 Instead of proposing more rules on sanctions, the Special Committee proposed factors which the courts should take into account before imposing sanctions for discovery misconduct. 238 The following factors were enunciated:

1. In general, all costs of discovery abuse should be shifted against the abusing attorney and his client. 239

Whenever costs are awarded, they should be paid promptly. 240

2. Whenever sanctions are granted under the Federal Rules, the court should consider awarding, in addition to any non-monetary sanction, reasonable expenses, including attorneys' fees. 241

385 (commentary to standing order 17). The Special Committee characterized this practice of selectively ignoring proper discovery requests as an abuse. Id. Standing order 17 makes the Committee's position crystal clear by requiring a response to those portions of the interrogatories to which no objection is interposed. Id.

236. Standing Order 21, Standing Orders, supra note 160, at 353. For a discussion of the requirements of standing order 21, see supra notes 219 & 230 and accompanying text.

237. Eastern Committee Revised Report, supra note 48, at 391.

238. See id. at 391-94 (Special Committee proposes no standing orders regarding sanctions for discovery abuse, but rather discusses applications of Federal Rules sanctions under the presumptive standards of conduct set forth in the standing orders).

239. Id. at 391-92. The Special Committee suggested that the offending party bear the cost of both the abuse and any motion to correct the abuse. See id. The Committee also suggested that the offending attorney and his client be jointly and severally liable for the award. Id. at 392.

240. See id. at 392. The Special Committee suggested that any "award should be satisfied within ten days of the order directing payment." Id.

241. Id. Recognizing that attorneys' fees comprise a substantial portion of the real cost of discovery motions, the Special Committee suggested that fees be awarded to the prevailing party in appropriate cases. See id. This position is in line with an overall erosion of the "American rule," under which parties pay
3. Whenever the court finds an unjustified disregard of standing orders, it may enter a finding of non-compliance against the offending counsel and his client.\textsuperscript{242} Such a finding may result in a monetary award covering expenses, including reasonable attorney's fees, incurred by the abused party.\textsuperscript{243} Findings of non-compliance are not limited to wilful misconduct or bad faith, but may extend to negligent or careless conduct.\textsuperscript{244}

4. Sanctions or findings of non-compliance should not be imposed merely because a party has lost a discovery dispute.\textsuperscript{245}

5. Sanctions or findings of non-compliance ought not to be imposed without affording those involved an opportunity to have a hearing.\textsuperscript{246} Hearings are not required, but any hearing which does take place should be held on a written record only.\textsuperscript{247}

6. When making an expense award as part of an imposition of sanctions or a finding of non-compliance, the court should conditionally fix the award of the party injured by discovery abuse.\textsuperscript{248} The entry of the expense

\text{their own attorneys' fees, and a movement toward the "English rule," under which the prevailing party is awarded attorneys' fees. See Note, Awards of Attorney's Fees in the Federal Courts, 56 St. John's L. Rev. 277, 278 (1982).}

\textsuperscript{242} Eastern District Revised Report, supra note 48, at 392. Much of the discussion concerning the Special Committee's initial report focused on whether violations of the proposed standing orders would give rise to sanctions. Some members of the bar were concerned that violations of the Standing Orders might serve as an additional basis for sanctions, perhaps unfairly penalizing and embarrassing national practitioners. Transcript of Hearing before Special Committee on Effective Discovery in Civil Cases for the Eastern District of New York 13-15 (Nov. 17, 1983) (testimony of Sheldon Eslon). The Special Committee was sensitive to this concern, but it also recognized that the Standing Orders needed some teeth if they were to be effective. See Eastern District Revised Report, supra note 48, at 364. To this end, the Committee suggested that a judge enter a finding of noncompliance when standing orders have been unjustifiably disregarded. See id. at 392. A finding of non-compliance is not a sanction, but it may result in cost-shifting to the transgressor or imposition of sanctions. See infra note 243 and accompanying text.

\textsuperscript{243} Eastern District Revised Report, supra note 48, at 392.

\textsuperscript{244} Id.

\textsuperscript{245} Id. at 393. The Special Committee recognized that many discovery disputes involve genuine controversies in emerging areas of the law. See id. Therefore, findings of noncompliance or impositions of sanctions merely because an attorney lost a discovery dispute would be unduly harsh. See id.

\textsuperscript{246} Id.

\textsuperscript{247} Id. at 393-94.

\textsuperscript{248} Id.
award would be finalized ten days after entry. The purpose of making such an expense award is to avoid litigation of what constitutes reasonable cost.

B. The 1983 Amendments And The Eastern District Approach: A Comparison

The Standing Orders adopted by the Eastern District provide a distinctly different approach to the problem of discovery abuse from that embodied in the 1983 amendments to the Federal Rules. Whereas the 1983 amendments rely almost exclusively on sanctions and judicial supervision of pretrial proceedings as the mechanisms for remedying discovery abuse, the Eastern District seeks to solve the problem by (1) a detailed code of conduct for discovery setting forth practices which are presumptively proper or improper; (2) prompt access to a judicial officer to resolve expeditiously discovery disputes in accordance with uniform procedures; and (3) sanctions, findings of non-compliance, and expense awards to make whole the victims of discovery abuse. Thus, while the 1983 amendments make sanctions the key weapon in combatting discovery abuse, the Standing Orders minimize the need for imposition of sanctions.

Although the two approaches differ, the differences are not irreconcilable. In fact, the key “differences” in the Eastern District approach may be more imagined than real. The Special Committee’s revised report, while encouraging the use of magistrates in discovery, specifically recognizes that it would be preferable to have the judge handle the tasks of formulating the scheduling order pursuant to rule 16(b) and of resolving discovery disputes in complex cases. Many routine cases, however, involve little discovery; hence, judicial supervision of such cases would be unnecessary, if not wasteful. Moreover, with expanding federal caseloads, judicial time—our most valuable natural resource—is limited. As a practical matter, it may be impossible

249. Id. at 394.
250. Id. The Special Committee stated that the procedure for making an expense award would rarely result in litigation “because of the continuing nature of discovery, the unwillingness of many attorneys to publicly disclose their billing practices, the elasticity of what is reasonable, and other factors.” Id.
251. For a discussion of the Eastern District’s position on the use of magistrates to resolve discovery disputes, see supra notes 178-96 and accompanying text.
for a judge personally to supervise each case.\textsuperscript{253} Recognizing these practical limitations, the Standing Orders simply offer the judge flexibility in managing his caseload.\textsuperscript{254} Indeed the Standing Orders do not require reference of pretrial matters to magistrates, but merely give the judge the option to do so.\textsuperscript{255} It would appear that even judges outside the Eastern District may well be forced, because of time constraints, to refer routine discovery disputes to magistrates.

In addition, without magistrate utilization it would be difficult to effect prompt access to a judicial officer to resolve a discovery dispute. Judges, because of their many responsibilities, have far less time in their schedules to devote to discovery than do magistrates. If the judge is the only person to whom litigants may turn for a ruling, discovery is more likely to get bogged down, which in turn delays the entire litigation. Thus, magistrate utilization in discovery matters is consonant with the fundamental goal of the Federal Rules—"the just, speedy, and inexpensive determination of every action."\textsuperscript{256}

Similarly, the detailed listing within the Standing Orders of presumptively appropriate and inappropriate conduct is in keeping with the overall thrust of the Federal Rules. The Standing Orders fill interstitially the gaps left by the broadly drafted Federal Rules.\textsuperscript{257} They are thus complementary to the Federal Rules rather than contradictory. Nor do the Standing Orders impose additional burdens on "national practitioners" or attorneys who do not normally practice within the Eastern District.\textsuperscript{258} The presumptive practices listed in the Standing Orders represent a mere codification of what is widely perceived by the practicing bar as generally appropriate or inappropriate behavior.

On the other hand, the Standing Orders may well provide a more promising solution to the problem of discovery abuse than do the 1983 amendments. The Standing Orders, unlike the 1983 amendments, address the fundamental problems fostered by discovery abuse: delay in resolution of claims and uncapped

\textsuperscript{253} For a discussion of the feasibility of judicial management of pretrial proceedings in every case, see \textit{supra} note 180 and accompanying text.
\textsuperscript{254} See \textit{supra} note 188 and accompanying text.
\textsuperscript{255} See \textit{supra} notes 186-91 and accompanying text.
\textsuperscript{256} See \textit{Fed. R. Civ. P. 1}.
\textsuperscript{257} \textit{Eastern District Revised Report}, \textit{supra} note 48, at 391.
\textsuperscript{258} For a discussion of the fear among practitioners that the Standing Orders would impair the ability of firms to conduct a national practice, see \textit{supra} note 242 and accompanying text.
costs. The Standing Orders deal with delay by assuring prompt access to a judicial officer and by prescribing uniform procedures for resolving discovery disputes. Likewise, the Standing Orders help contain costs by streamlining motion procedures. In particular they eliminate unnecessary written motion papers and encourage broader use of modern telecommunications, thereby obviating the necessity for full-blown in-court appearances. As previously noted, the 1983 amendments do not address these fundamental concerns. Rather, with their strong reliance on sanctions, the Federal Rules are likely to cause further delay in litigation and add to its overall costs, thus exacerbating rather than solving existing discovery problems.

It is impossible to predict at this juncture whether the Standing Orders will be effective. A number of unanswered questions remain. Will attorneys mutually observe the Standing Orders or will they be honored in the breach? Will the judges in the District enforce the Standing Orders? Will judges refer matters to magistrates routinely? Will magistrates prove capable of handling the burdens of discovery? Will judges and magistrates make themselves available to hear discovery disputes? Will judges and magistrates follow the uniform procedures spelled out in the Standing Orders or will they fall into individual idiosyncratic procedures? Will discovery problems be promptly decided? Will use of magistrates cause judges to be inundated with requests for reconsideration of magistrates’ orders? Are additional local rules with respect to discovery necessary? Only after some careful analysis of actual experience under the Standing Orders can we even begin to answer these questions.

V. Conclusion

The 1983 amendments, while they represent an important first step in dealing with the problems of discovery abuse, are not likely to bring about a sea of change in discovery practice because
they do not effectively address the underlying problems in discovery and rely too heavily on sanctions, a tool which simply has not worked in the past. However, when fleshed out by a complementary set of local rules or guidelines detailing what is expected from attorneys in conducting discovery, the 1983 amendments do have some promise of effectuating fundamental attitudinal changes among practitioners. The work of the Eastern District's Special Discovery Committee may serve as a model for other districts seeking to combat discovery abuse. The experience of the Eastern District under the Standing Orders ought to be closely monitored. Neither the 1983 amendments nor the Standing Orders are a panacea. They will bring about meaningful change only if attorneys, their clients and the courts truly want them to work.