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OF SAILING SHIPS AND SEEKING FACTS: BRIEF REFLECTIONS ON MAGISTRATES AND THE FEDERAL RULES OF CIVIL PROCEDURE

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Building a system of procedure is a little like designing and building a new ship. The old ships are in need of repair. Clever designers invent a new ship, sleeker, swifter, able to cut through treacherous seas and reach their destinations more rapidly and more safely than the old ships. But she too begins to age: the paint fades, barnacles attach to the hull, leaks are discovered, and newly invented devices must be fitted to prevent her obsolescence. After a time the ship is so encumbered with stop-gap repairs, and so laden with piecemeal adaptations, that it takes a trained eye to discern her original design.

A new system of procedure has a life with some of the same patterns. As the system matures, new problems arise and are often dealt with by amending or interpreting the rules in new and unforeseen directions. The system becomes an amalgam of its initial structure and the various adaptive appendages it has grown or had tacked on. After a while, the structure no longer adequately supports its appendages, or an impending social sea-change makes it appear inadequate to the task, and major refitting or a new structure becomes desirable.

In this Article we will discuss the evolution of two important components of the now fifty-year-old system under the Federal Rules of Civil Procedure: first, the basic design of the 1938 Rules, a great expansion in discretion and procedural power that the Rules accorded the federal judiciary; and, second, a new post-1938 departure, the substantial and increasing delegation of authority to federal magistrates. These two features play a critical role in shaping

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modern federal litigation. Without them, our present federal trial court system would look quite different.

It seems obvious that the original drafters could not have foreseen the huge expansion of federal litigation and its enormous complexity. Yet, like the Constitution, whose anniversary we have just celebrated, there was enough flexibility and sensible design in the original Rules to meet new problems. In the Eastern District of New York we have met the new demands in part by expanding the size of the court from six authorized judges and no magistrates, in 1938, to twelve authorized judges, four senior judges, and five full-time magistrates in 1988. In large measure, as indicated below, power to control pretrial stages has been shifted to the magistrates, who have been clothed with some of the discretion of Article III judges. The growth of the magistrates as a critical component of the federal courts has not yet been fully appreciated by those not engaged in daily litigation. Further discussion of this phenomenon in procedural literature is warranted.

UNIFORM FEDERAL RULES

The Federal Rules of Civil Procedure replaced over a century of procedural disarray with a uniform, well-considered plan. Before these Rules, the federal courts followed separate procedures in actions at law and actions at equity. In actions at law, federal procedure was governed by the Conformity Act of 1872,¹ which generally required the application of the contemporaneous procedure of the state in which the federal court sat. But state procedures were often complex and pedantic, requiring special pleadings, recognizing narrow forms of action, and strewing the litigation path with numerous technical obstacles. Mid-nineteenth century attempts to simplify state procedure, such as the Field Code in New York, although initially successful, were eventually defeated by legislative tinkering and judicial reinterpretations.²

Our current rules for civil procedure in the federal courts were born in a wave of dissatisfaction with then-current design that started rising in the first decade of this century and finally swept in with the New Deal. The fierce and lengthy struggle began in the early 1900s when a group of luminaries—notably Roscoe Pound,

¹ Act of June 1, 1872, ch. 255, §§ 5-6, 17 Stat. 196, 197.

² See Weinstein & Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520-21 (1957).

William Howard Taft, and Thomas Shelton—began pressing for reforms of federal procedure.³ They began by planning one set of federal rules for all actions at law.⁴ The reformers soon urged that all cases in law and equity be merged into one uniform system of equity-based federal procedural rules.⁵

The chief opponent of reform was Senator Thomas Walsh of Nebraska. His vigorous and agile tactics stymied the attempts of the early reformers to gain passage of the Rules Enabling Act, the bill that would permit uniform federal rules. Walsh opposed uniform federal procedure on the powerful ground that most lawyers, having local practices, were better off with federal courts following local procedure. By 1933, the reformers had effectively given up hope.⁶ President Roosevelt's newly appointed Attorney General Homer Cummings, however, proved to be the savior of uniform national procedure. With Cummings' support, the bill sped through Congress, and on June 19, 1934, the Rules Enabling Act became law.⁷

Ironically, the liberal New Dealers had swiftly and decisively accomplished in one stroke what the conservatives—Pound, Taft, and the ABA—had been desperately and futilely sponsoring since 1906. The conservatives had proposed uniform equity-based procedure because they sought to allow judges to reach the merits of cases directly, without technical barriers. Through streamlined procedure, they hoped to restore faith in the judiciary, which they saw eroding as litigants became frustrated with elaborate but useless pleading rules, forms of action, and the like.⁸ The liberals stayed in the background of the debate until the 1930s, when the

³ See Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOKLYN L. REV. 1, 6-9 (1988).

⁴ See Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1069-71 (1982); Chandler, *Some Major Advances in the Federal Judiciary System, 1922-1947*, 31 F.R.D. 307, 479-83 (1963).

⁵ See Weinstein, *supra* note 3, at 9-10. The reformers eventually decided to apply the concepts of the Federal Equity Rules of 1912 to all forms of action. See Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 943-61 (1987).

⁶ See Weinstein, *supra* note 3, at 10-11. By 1933 many of the original reformers, including Shelton, had died. Newly elected President Roosevelt quickly wiped out what little hope was left by appointing none other than Thomas Walsh as his first Attorney General. But events suddenly, and completely unexpectedly, changed direction when Walsh died on his way to Washington.

⁷ Rules Enabling Act, ch. 651, §§ 1-2, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (1982)); see Weinstein, *supra* note 3, at 15-16.

⁸ See Subrin, *supra* note 5, at 956-61.

New Dealers saw in uniform federal procedure an opportunity to prepare the federal courts for the coming boom in federal legislation.⁹

Once the Rules Enabling Act had been passed, the Supreme Court began designing the new Rules. At first, Chief Justice Hughes proposed that the new set of Rules be for actions at law only, leaving the Federal Equity Rules of 1912 in place. But an article published by Dean Charles Clark and Professor James Moore of Yale Law School in January 1935¹⁰ urged a merger of law and equity, and in February, former Attorney General William Mitchell made the same point in a letter to the Chief Justice.¹¹ Mitchell's letter persuaded Hughes to change his mind; the Chief Justice announced his new policy favoring a merged system on May 9, 1935.¹²

In June 1935, the Supreme Court appointed an Advisory Committee of fourteen experts to help prepare the new Federal Rules. The Committee was chaired by William Mitchell, and its reporter was Dean Clark, later a judge of the Second Circuit Court of Appeals. Other members included Scott Loftin of Florida, the President of the ABA; George Wickersham, the President of the American Law Institute; Edgar Tolman, a distinguished attorney from Chicago; and Professor Edson Sunderland of the University of Michigan Law School.¹³ Two other members, George Donworth and Warren Olney, Jr., had been judges.¹⁴

Clark and the other reformers believed it wise to merge all civil actions under a system modeled after the equity procedure. The new uniform federal procedure would be flexible, giving judges substantial discretion and avoiding technical maneuvers. The committee favored broad discovery and joinder, so that an entire dispute could be placed before the judge at once. By 1938, it was quite clear, as Professor Subrin reminds us, that "[e]quity [had]

⁹ See *id.* at 969.

¹⁰ Clark & Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L.J. 387 (1935). It was soon followed by Clark & Moore, *A New Federal Civil Procedure: II. Pleadings and Parties*, 44 YALE L.J. 1291 (1935).

¹¹ See Chandler, *supra* note 4, at 489-90.

¹² See *id.* at 490 ("there seems little doubt that it was the letter that caused" Hughes' change of mind).

¹³ See *Supreme Court Adopts Rules for Civil Procedure in Federal District Courts*, 24 A.B.A. J. 97, 97-98 (1938) (listing committee members); Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 499 n.24 (1986) (same).

¹⁴ See Subrin, *supra* note 5, at 971 n.369.

conquered common law."¹⁵ Dean Clark declared that the new Federal Rules were intended to follow "the uniform equity rules of 1912" which "embodied . . . about the best of English and American procedure of the day."¹⁶ Edgar Tolman wrote: "The Federal Equity Rules are the backbone of the procedure."¹⁷

The Advisory Committee drafted the new Rules and the Supreme Court adopted them in essentially the form we know today. The Court transmitted the Rules to the Attorney General in December 1937, and Congress received them in early 1938. The Enabling Act had provided that rejection of the Rules would require concurrent action by both houses of Congress. Although there was some lingering opposition in the Senate, it faded in the face of the House's approval, and the Rules became operative on September 16, 1938.¹⁸

The centerpiece of the Rules was the discretion given to the federal judges to control cases. Federal district judges have almost absolute power to run civil cases as they see fit: to determine schedules, to gather all the necessary parties, to define the scope of discovery, and to structure trials. The rules restricting intermediate appeals¹⁹ insulate the federal district judge from most outside interference. It is probably the free availability of intermediate and interlocutory appeals to the Appellate Division, rather than the

¹⁵ *Id.* at 909; see also *id.* at 961-73 (discussing key figures in growth of doctrine).

¹⁶ Chandler, *supra* note 4, at 499.

¹⁷ *Id.* (quoting *Hearing on the Rules of Civil Procedure Before the House Judiciary Comm.*, 75th Cong., 2d Sess. 73 (1938)).

¹⁸ See *id.* at 505-12. The new Federal Rules had a profound impact on state procedure as well. Even those states which did not adopt the federal practice in toto, such as New York, modified or replaced their old systems in order to take advantage of the innovations in the Federal Rules. See, e.g., Weinstein, *Proposed Revision of New York Civil Practice*, 60 COLUM. L. REV. 50 (1960) (discussing reforms); Weinstein & Bergman, *New York Procedures to Obtain Information in Civil Litigation*, 32 N.Y.U. L. REV. 1066 (1957) (discussing reforms of New York's discovery rules); Weinstein, Gleit & Kay, *Procedures for Obtaining Information Before Trial*, 35 TEX. L. REV. 481 (1957) (surveying relationship of states' discovery reforms to federal reforms).

¹⁹ See 28 U.S.C. §§ 1291-1292 (1982 & Supp. IV 1986). The evolution of what is an appealable order demonstrates that even today, vestigial distinctions between actions at law and actions at equity are still being laboriously excised. In *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133 (1988), the Supreme Court at long last overruled the narrow *Enelow-Ettelson* doctrine of appealability. Justice Marshall described the doctrine as "outmoded" and "a total fiction," "hopelessly unworkable" in our modern merged procedure, and he relied in part on an opinion Charles Clark wrote in 1942. See *id.* at 1140-41.

Other threats to the independence of federal trial judges nevertheless persist. See, e.g., Weinstein, *The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge*, 120 F.R.D. 267 (1988).

differences in the written rules and statutes, that account most for the sharp differences between federal and New York pretrial practice.²⁰

When a federal district employs an individual assignment calendar, as is done in the Eastern District of New York, a district judge is permitted virtually unfettered discretion to direct the course of the litigation before final judgment. The drafters thought that this power would enable federal judges to proceed straight to the merits of cases. By combining actions at law and actions at equity under one equity-style procedure, they meant to reduce proceduralisms and facilitate substantive decisions. They were persuaded that this transformation would be more likely to do justice between the parties, where the old system had often been frustrating and unfair and sometimes incomprehensible. As a corollary, they were impressed that the new procedural system would nurture burgeoning new national legislation. They believed that federal litigation should attend to important questions of social policy, not simply the disagreement between the two parties.²¹ The Rules were clearly aimed at fostering this kind of public-oriented legal decision-making.

The Supreme Court's contemporaneous decision in *Erie Railroad v. Tompkins*²² had a related effect of clearing the federal courts' decks in preparation for the large volume of nationally-oriented litigation that was about to consume their dockets.²³ In concert, the new Rules and *Erie* turned much federal litigation upside down: the Rules freed the federal courts from local procedure, and *Erie* freed them from local substantive lawmaking.²⁴ The federal

²⁰ See 7 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 5701.03 (1988) (New York "represents an extreme position among American jurisdictions allowing appeals" from intermediate orders).

²¹ See Subrin, *supra* note 5, at 966-69.

²² 304 U.S. 64 (1938).

²³ This argument is made in greater detail in Weinstein, *supra* note 3, at 20.

²⁴ While the Rules erased the distinction between law and equity, *Erie* reaffirmed the distinction between procedure and substance. This latter distinction, and its problems, persist today. See, e.g., *Arguments Before the Court*, 56 U.S.L.W. 3635 (U.S. Mar. 22, 1988) ("half a century after the court decided [*Erie*], the federal courts are still struggling to distinguish between matters of substance and matters of procedure") (discussing argument in *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988)). The Court in *Stewart* faced the question of "whether state or federal law governs the enforceability of a forum selection clause in a contract between two private parties," *id.*, because enforcement of contract provisions is ordinarily a matter of substantive law while correct venue is considered procedural. The *Stewart* Court ultimately determined that the federal venue statute, 28 U.S.C. § 1404(a) (1982), as a procedural housekeeping rule, controls the effect of the forum-selection

courts entered a new era in which national problems became a more important aspect of their work.

Our modern array of cherished civil liberties is in part the result of this procedural realignment. The federal courts were opened to the aggrieved by the simpler pleading rules, the straightforward route to the merits, the opportunity for broad discovery, and the ability to join numerous parties or bring class actions. The broad discretion given to federal judges has also enabled them to move cases expeditiously and thereby keep the courts available for new claims. Since 1938, the federal courts have steered one of the main engines of justice,²⁵ helping us to shape our liberties and adapt to the evolving values of a changing society. Without the Rules and *Erie*, appropriate remedies for many of our systematic ills could never have been fashioned.²⁶ We owe at least part of our achievements in civil rights, as in several other fields of national law, to the visionaries who fought for and designed the Federal Rules of Civil Procedure.²⁷

Yet, the years of the federal system's predominance in substantive reform may be ending. Changes in the federal procedural system, and particularly changes in the views of those appointed to the federal bench in recent years, have shifted more and more responsibility for progressive jurisprudence, in both private and public law, to the states. It is still too early to determine whether this tendency reflects a merely passing perturbation or a basic shift in

clause. See 108 S. Ct. at 2245.

²⁵ Cf. Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026 (1988) (arguing that framers of Constitution intended federal judiciary to exercise political power to establish justice).

²⁶ Cases in which judicial discretion made possible systemic remedies include *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Baker v. Carr*, 369 U.S. 186 (1962).

²⁷ We cannot know whether all the conservatives who battled for the Rules Enabling Act would have approved the civil rights advances as heartily as did the liberals who drafted the Rules. In their time, the "conservatives" were ardent reformers. Roscoe Pound's 1906 speech to the American Bar Association in St. Paul, Minnesota, advocating sweeping procedural reform, made him seem "a flaming rebel against the legal establishment." Gossett, Segal & Smith, *Foreword to THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* at 7 (A. Levin & R. Wheeler eds. 1979). In 1937, Wigmore called the speech *Roscoe Pound's St. Paul Address of 1906: The Spark that Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE Soc'y 176 (1937), and by the 1960s, Pound's 1906 speech was "almost universally considered to be the most influential paper ever written by an American legal scholar." Gossett, Segal & Smith, *supra*, at 7. Pound's 1906 views, understood in their historical context, suggest that he might have been an enthusiastic supporter of the civil rights advances after World War II. See Higginbotham, *The Priority of Human Rights in Court Reform*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE*, *supra*, at 87.

power.

SINCE 1938: MISCHIEF AND MAGISTRATES

Like a proud ship, the Rules also age. Some kinds of reforms are helpful and necessary to sustain the vitality of the original procedural design. The best of these is the federal magistrate. But other kinds of "reforms" have been pursued by the detractors of open, streamlined, equity-based procedure. The last fifty years have witnessed persistent attempts, some successful, to tinker with the Rules, to restrict their breadth, to re-erect barriers and hurdles in the paths of litigants, and to re-localize procedure.

Special rules of pleading have been developed to discourage certain kinds of cases, such as habeas corpus, civil rights, antitrust, securities litigation, and now RICO claims.²⁸ The general climate has turned against broad discovery and the "big case."²⁹ New sanctions are now entrenched in the Rules,³⁰ replacing judicial attention to the merits with judicial coercion and punishment, and reflecting our deteriorating trust in the integrity of our colleagues at the bar.³¹ Local rules have been adopted to please local judges and

²⁸ See Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 447-50 (1986); Subrin, *supra* note 5, at 984. Note that rule 9 has always required specificity for allegations of fraud.

²⁹ See, e.g., Lundquist, *The Climate has Changed—Will the Dinosaurs Survive?*, in NEW AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 110 (P. Rothstein ed. 1983); *The Rise and Fall of the Class-Action Lawsuit*, N.Y. Times, Jan. 8, 1988, at B7, col. 3 (reporting that federal class actions have fallen from over 3,000 in 1975 to 600 in 1987 and that, consequently, "use of the courts as a vehicle for social change has subsided").

³⁰ FED. R. CIV. P. 11; see *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 566-576 (E.D.N.Y. 1986), *aff'd as modified*, 821 F.2d 121 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 269 (1988); G. VAIRO, REPORT TO THE ADVISORY COMMITTEE ON AMENDED RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE (Sept. 1987); Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 511-14 (1986).

³¹ For a discussion of the deteriorating trust in the bar and in judicial solutions to disputes, see generally Resnik, *supra* note 13.

In our view, requests for sanctions have not improved the quality of litigation and have impeded the resolution of primary cases. See, e.g., Margolick, *At the Bar: Has the Profession's Attempt to Curb Ludicrous Litigation Actually Boomeranged?*, N.Y. Times, Mar. 11, 1988, at B11, col. 1 (suggesting that satellite disputes over sanctions have created more wasteful litigation than the sanctions have deterred). Margolick further queried: "Will there come a case in which counsel files a Rule 11 motion against another Rule 11 motion that he violated Rule 11? It seems only a matter of time." *Id.* at col. 2. Within a month of this query, the court in *Vallejo v. Webb*, No. 82 Civ. 4825, slip op. (S.D.N.Y. Apr. 4, 1988), granted rule 11 sanctions for violation of rule 11 in the opponent's original rule 11 motion.

practitioners at the expense of strangers.³² These and other changes have combined to shift the balance in favor of defendants and the status quo.

The one innovation since the 1938 Rules that has been the most helpful in meeting new strains is the creation of, and substantial delegation of power to, federal magistrates. The old United States commissioners had the power to try certain petty criminal cases, issue search and arrest warrants, set bail, and conduct some limited criminal pretrial proceedings.³³ In 1968, Congress replaced the commissioners with the much more powerful magistrates.³⁴ Today's magistrates have all the powers of the old commissioners, and in addition perform numerous other roles such as supervising discovery, calculating attorney's fees, estimating damages, holding arraignments, mediating settlements, and selecting juries. Congress left the actual assignment of powers and duties to magistrates to be determined by the individual federal courts.³⁵ In the Eastern District of New York, where there is a remarkably able and dedicated group of magistrates,³⁶ the district judges have delegated as

³² Local rules are authorized by Federal Rule of Civil Procedure 83. *See, e.g.*, GENERAL, CIVIL, CRIMINAL, ADMIRALTY AND MAGISTRATE PROCEEDINGS, UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK (effective Oct. 26, 1983) (containing, *inter alia*, nine local "General Rules" and 46 local "Civil Rules"); *cf.* *Holloway v. Lockhart*, 813 F.2d 874, 880 (8th Cir. 1987) (finding local rule clearly in conflict with FED. R. CIV. P. 34(b) and invalidating local rule).

Individual judges' own rules have also proliferated. *See, e.g.*, NEW YORK STATE BAR ASSOCIATION COMMITTEE ON FEDERAL COURTS, REPORT ON UNIFORMITY AMONG INDIVIDUAL JUDGES' RULES IN THE EASTERN DISTRICT (Aug. 16, 1988); NEW YORK STATE BAR ASS'N, INDIVIDUAL JUDGES' RULES, PROCEDURES AND FORMS IN THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN, EASTERN, NORTHERN AND WESTERN DISTRICTS OF NEW YORK (2d ed. 1986).

Unrestricted local rule making frustrates the purpose of national rules. *See* C. WRIGHT, HANDBOOK OF THE LAW OF THE FEDERAL COURTS 407 (4th ed. 1983). A superb project to review the huge outpouring of local rules, standing orders, and policies, with the thought of controlling them, has been undertaken under Dean Coquillette's direction at Boston College Law School. *See* Workbooks, Conference on Local Rules in the Federal District Courts (Nov. 12-13, 1987 at Boston College Law School) (sponsored by Judicial Conference of the United States).

³³ *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE SELECTION AND APPOINTMENT OF UNITED STATES MAGISTRATES 2 (1987) [hereinafter SELECTION AND APPOINTMENT].

³⁴ *See* Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 631-39 (1982 & Supp. IV 1986)).

³⁵ *See* 28 U.S.C. § 636 (1982 & Supp. IV 1986); SELECTION AND APPOINTMENT, *supra* note 33, at 2.

³⁶ *See* Kohn, *U.S. Magistrates: A Boon to Judicial Administration*, N.Y.L.J., May 31, 1988, at 1, col. 1 (commending magistrates in the Eastern and Southern Districts of New York).

much power to the magistrates as possible.

The magistrate, and occasionally a special master, can be of great assistance in federal practice. Judges may refer almost any matter to magistrates under section 636 of title 28 of the United States Code. Although some dispositive motions may not be referred for actual determination by the magistrate, they may be referred for report and recommendation to the district judge.³⁷ Magistrates may also act as special masters and, once specially designated, may try cases with the consent of the parties.³⁸ Using all these avenues, a district judge may rely on an experienced magistrate for substantial assistance, particularly in complex cases requiring extensive work on nondispositive matters.³⁹

Because we are concerned here with civil procedure, the magistrate's function to be lauded most is the supervision of discovery. Discovery under the original, quite permissive Rules sometimes needs monitoring lest it be used improperly.⁴⁰ One of the drafters'

³⁷ 28 U.S.C. § 636(b)(1)(B) (1982); *see, e.g.*, *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 56 (2d Cir. 1988) (affirming dismissal of complaint based on magistrate's report).

³⁸ *See* 28 U.S.C. § 636(b)(2) (1982) (serving as special masters); 28 U.S.C. § 636(c)(1) (1982 & Supp. IV 1986) (trying cases); *see also* *United States v. Kallash*, 785 F.2d 26, 27 (2d Cir. 1986) (affirming in part conviction obtained in jury trial before magistrate). *See generally* C. SERON, *THE ROLES OF MAGISTRATES: NINE CASE STUDIES* (Federal Judicial Center 1985); C. SERON, *THE ROLES OF MAGISTRATES IN FEDERAL DISTRICT COURTS* (Federal Judicial Center 1983); Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452 (1958); Peterson, *Federal Magistrates Act: A New Dimension in the Implementation of Justice*, 56 IOWA L. REV. 62 (1970); Silberman, *Masters and Magistrates Part I: The English Model*, 50 N.Y.U. L. REV. 1070 (1975); Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297 (1975); Weinstein, *Standing Masters to Supervise Discovery in the Southern District, New York*, 23 F.R.D. 36 (1959) [hereinafter Weinstein, *Standing Masters*]; Zavatt, *The Use of Masters in Aid of the Court in Interlocutory Proceedings*, 22 F.R.D. 283 (1958).

³⁹ There are limits to the "additional" duties that magistrates may be delegated pursuant to 28 U.S.C. § 636(b)(3) (1982). *See* *Minerex Erdoel, Inc. v. Sina, Inc.*, 838 F.2d 781, 786 (5th Cir. 1988) (magistrates may not be referred determination of attorneys' fees on appeal from bankruptcy court decision); *United States v. Ford*, 824 F.2d 1430, 1438 (5th Cir. 1987) (magistrates may not select juries in felony cases), *cert. denied*, 108 S. Ct. 741 (1988); Note, *The Federal Magistrates Act: Are Defendants' Rights Violated When Magistrates Preside Over Jury Selection in Felony Cases?*, 56 FORDHAM L. REV. 783 (1988). *But see* *United States v. Garcia*, 848 F.2d 1324, 1329 (2d Cir. 1988) (permitting magistrates to select juries in felony cases).

⁴⁰ The Rules contemplate that much of the pretrial litigation will be run by "the lawyers themselves" without "full judicial control," Weinstein, *Standing Masters*, *supra* note 38, at 38, and this less-supervised stage may permit some misconduct. There are, however, some inherent features of the bar which tend to limit discovery abuse, even in the absence of judicial monitoring. *See* Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse* (Mar. 1988) (Working Paper No. 75 at Civil Liability Program of the Center for Studies in Law, Economics, and Public Policy, Yale Law

fears was that wide-ranging discovery might be used by one party to "blackmail" the other into settling.⁴¹ Such so-called "discovery abuse" is actually quite limited in the real world. About half of all federal cases involve no discovery at all, and the cases in which "abuse" actually occurs in the Eastern District are quite few.⁴² Attorneys are essentially trustworthy, and federal judges usually perceive and restrain potential abuse before it takes place. Discovery run by magistrates is one of the best methods for such judicial control.

Magistrates who are given full power to manage discovery can do so exceptionally well. In the Eastern District, they will frequently meet with the parties when that is desirable. They are constantly available for telephone conferences. In one extremely complex case in our court, the magistrate met almost daily with the attorneys to shepherd the discovery process.⁴³ Magistrates become experts at arranging schedules, deciding discovery disputes and preventing them, identifying improper requests and improper refusals to produce, and generally smoothing out the discovery phase of the litigation.

In the Eastern District of New York, we have institutionalized the use of magistrates in the discovery phase for nearly every civil case.⁴⁴ Much of this reform was carried out as a result of a special

School). Given attorneys' self-restraint and a healthy dose of control by a magistrate, abuse is quite manageable. See J. Weinstein, *What Discovery Abuse? Comments on John Setear's "The Barrister and the Bomb"* (Apr. 8-9, 1988) (unpublished paper delivered at the Conference on Issues in Civil Procedure: Advancing the Dialogue, Program on Civil Liability, Yale Law School); see also Resnik, *supra* note 13, at 548-49 (discussing discovery abuse in general, and the attempts at solution in Eastern District of New York).

⁴¹ See Subrin, *supra* note 5, at 978.

⁴² This figure is based upon extensive research conducted by Professor Margaret Berger of Brooklyn Law School (publication forthcoming).

⁴³ The case was *In re "Agent Orange" Product Liability Litigation*, MDL 381 (E.D.N.Y. 1985). See, e.g., *In re "Agent Orange" Prod. Liability Litig.*, 104 F.R.D. 559, 562 (E.D.N.Y. 1985) (magistrate's Pretrial Order No. 33, dated Dec. 17, 1984) ("Protective Orders Opinion"), *aff'd*, 821 F.2d 139 (2d Cir.), *cert. denied*, 108 S. Ct. 344 (1987); Scheindlin, *Discovering the Discoverable: A Bird's Eye View of Discovery in a Complex Multidistrict Class Action Litigation*, 52 BROOKLYN L. REV. 397 (1986) (authored by magistrate who conducted much of the *Agent Orange* discovery).

⁴⁴ See STANDING ORDERS OF THE COURT ON EFFECTIVE DISCOVERY IN CIVIL CASES, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK (effective Mar. 1, 1984, as amended Feb. 27, 1987). The original 1984 orders were published at 102 F.R.D. 339 (1984), along with the *Revised Report of the Special Committee on Effective Discovery in Civil Cases for the Eastern District of New York to the Honorable Jack B. Weinstein, Chief Judge*, 102 F.R.D. 357 (1984). The 1984 Orders and Revised Report, as well as the 1987 Amendments and the 1986 Report of the Discovery Oversight Committee to the United

committee of outstanding members of the bar chaired by Edwin J. Wesely. Professor Edward D. Cavanagh of St. John's University School of Law played a critical role in this work as reporter to the committee. Professor Jeffrey Sovern of the same law school was also of great assistance. As in many other instances, the court is grateful for the support of St. John's and Dean Patrick J. Rohan in markedly improving the work of our court.

Pursuant to a "standard referral order" used in the Eastern District of New York, the judge usually sends the case to a magistrate for all discovery purposes. The magistrate conferences every civil case early. The magistrates know they have full authority and that the judges will give them appropriate deference should the parties appeal an order. The parties are similarly aware that the judges will not lightly disturb a magistrate's discovery order.⁴⁵ The magistrate reports to the judge on the conduct of discovery, so that the judge is aware of any misdeeds by the parties. Discovery is thus handled by experts, and the judges are freed to concentrate on doing justice at dispositive motions and trials.⁴⁶

Not surprisingly, this kind of arrangement was anticipated by the original Advisory Committee drafting the Rules. At the group's very first meeting, William Mitchell made the point that "care must be taken to prevent [discovery] from being used as a basis for annoyance and blackmail, and that possibly it is desirable to have such proceedings conducted by a master or magistrate having power to rule on questions in order to prevent abuse."⁴⁷ This is the

States District Court for the Eastern District of New York, are available in pamphlet form from the Office of the Clerk of the Eastern District of New York.

In concert, the pamphlets set out the system for conducting discovery. The court has gone to lengths to design proper and productive discovery practices and to educate the bar to those practices. We believe education to be a far more palatable and effective method for improving litigation practice than coercion through sanctions.

⁴⁵ See, e.g., *Update Art, Inc. v. Modiin Publishing, Ltd.*, 843 F.2d 67, 68 (2d Cir. 1988) (affirming magistrate's decision to impose severe discovery sanctions). Judge Timbers began his opinion for the court of appeals by noting: "The essential question presented by this appeal is whether this United States Court intends strictly to enforce sanctions provided for noncompliance with discovery orders. The opinion that follows is a stern warning that we do." *Id.* Although widespread use of sanctions is not desirable, it is clear that once properly ordered by a magistrate, sanctions should be enforced.

⁴⁶ The rapid addition of magistrates and non-judicial support staff has enabled the American federal courts to keep pace with the increased caseloads without an inordinate increase in the number of judges. See R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 97 (1985); see also Chase, *Civil Litigation Delay in Italy and the United States*, 36 *AM. J. COMPAR. LAW* 41, 53-56 (1988).

⁴⁷ Statement of W. Mitchell, Summary of Proceedings of the First Meeting, June 30,

English practice,⁴⁸ and it is the system we have adopted for our District.

One must be skeptical about the claim that "discovery abuse" is a serious problem in our courts. Perhaps "discovery abuse" is a scare tactic soon to go the way of phrases such as "imperial activist judges," "litigation explosion," "strike suits," "in terram class actions," and other exaggerations designed to bar from the courthouse those litigants deemed unworthy of admission. Unfortunately, each wave of catch-phrase scare tactics propagates new amendments to the original Rules, further encrusting and slowing down our procedural ship.

CONCLUSION

This fiftieth anniversary is a fitting time to congratulate the reformers, conservative and liberal alike, who fought for and created our Federal Rules of Civil Procedure. This is not to say that ours is the best of all possible worlds. There is much to be said for a number of European systems. But any procedural system, if it is to work effectively, must be adapted to local institutions and attitudes. At the moment, our federal system still seems to meet that requirement quite well. The complete overhaul of our civil system in the 1930s was courageous, even daring, and yet it was accomplished with such skill and foresight that, despite some barnacles,⁴⁹

1935, at 10 (July 3, 1935), *quoted in* Subrin, *supra* note 5, at 978 n.401.

⁴⁸ See Weinstein, *Standing Masters*, *supra* note 38, at 37-38; Zavatt, *supra* note 38, at 286-89. The *Standing Masters* article was originally given as a speech to the Second Circuit Judicial Conference on September 13, 1958, while its author was the Reporter revising the New York Practice into the New York Civil Practice Law & Rules (CPLR). The author's study of the English master system, including first-hand observation in London, confirmed his view that the system would be quite useful in the American federal courts, perhaps with different discovery tracks for different kinds of cases. Although the master system was not incorporated into the CPLR, upon the author's becoming Chief Judge of the federal district court for the Eastern District of New York, he convened the judges, magistrates, and a special committee to design the system of magistrate-run discovery now in operation in that district. One member of the original Eastern District committee, Professor Margaret Berger of Brooklyn Law School, is currently conducting an intensive study of this system. In addition, the use of magistrates to supervise discovery was much discussed at the National Conference Commemorating the Fiftieth Anniversary of the Federal Rules of Civil Procedure, held at Northeastern University School of Law, Oct. 7-8, 1988 (proceedings and papers to be published shortly in the *University of Pennsylvania Law Review*) (see especially remarks of Judges Posner and Weinstein, favoring use of magistrates, and of Professor Silberman, counseling caution and accountability). For a general discussion of the English system, see materials cited *supra* note 38.

⁴⁹ The analogy between undesirable tinkering with the Rules and barnacles on a ship

the main structure of the 1938 Rules remains graceful, enduring, and resilient.

was perhaps first drawn by Judge Charles Clark himself. See Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 445 (1958) (recognizing the need to "strip[] away the barnacles" every so often).