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SANCTIONING ATTORNEYS FOR DISCOVERY ABUSE UNDER THE NEW FEDERAL RULES: ON THE LIMITED UTILITY OF PUNISHMENT*

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A primary shortcoming of the federal judicial system prior to 1938 was its limited pretrial discovery.1 In that year, the Federal

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** United States District Judge, Southern District of New York. I appreciate the assistance on this Article of my law clerk, Thomas Ogden, Esq., and of the St. John’s Law Review staff for making the footnotes a research resource. In addition, the Article benefited from the helpful comments of Professor Maurice Rosenberg, and Edwin Wesely, Esq., who have been among the leaders of the effort to reform discovery abuse in federal litigation.

1 In federal practice, the procedural separation of law and equity continued until 1938. Holtzoff, Origin and Sources of the Federal Rules of Civil Procedure, 30 N.Y.U. L. Rev. 1057, 1057 (1955). Actions at law were governed by the Conformity Act of 1872, which required federal courts to adopt the common-law procedure of the state in which the court was situated. Id.; see Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197 (repealed 1948). If the state made no provision for discovery in actions at law, the only other device that could be used to acquire information from an opponent was a bill of discovery, a bill that had originated in the equity courts. FEDERAL JUDICIAL CENTER, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 6 (P. Connally, E. Holleman & M. Kuhlman eds. 1978) [hereinafter cited as DISCOVERY]. The bill of discovery was formulated to compensate for the common-law prohibition against testimony by a party to the action, but was retained after this evidentiary rule was eliminated. O'Reilly, Discovery Against the United States: A New Aspect of Sovereign Immunity?, 21 N.C.L. Rev. 1, 3 (1942). Use of discovery bills in federal actions at law was permissible, but rare. R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 223 (1982); see, e.g., Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U.S. 689, 694-95 (1933).

Federal actions in equity were governed by Federal Equity Rules that were promulgated by the Supreme Court under congressional authorization. Holtzoff, supra, at 1057; see Act of May 8, 1792, ch. 35, 1 Stat. 196 (current version at 28 U.S.C. § 2072 (1976)). Until the Federal Rules of Civil Procedure were adopted, discovery was governed by Federal Equity Rules 58 and 47. Sunderland, The New Federal Rules, 45 W. Va. L.Q. 5, 19 (1938). Rule 58 permitted parties to serve written interrogatories. Id. at 20; see Fed. Eq. R. 58, 226 U.S. 665 (1912). Rule 47 only allowed the taking of depositions in exceptional circumstances. Sunderland, supra, at 20; see Fed. Eq. R. 47, 226 U.S. 661 (1912). There also were two statutes authorizing depositions in federal courts in both law and equity cases. Sunderland, supra, at 19; see 28 U.S.C. §§ 639, 644 (1940) (repealed 1948). These statutes, however, only authorized pretrial depositions where necessary to obtain proof. Sunderland, supra, at 19. The restrictions on these statutes so limited information gathering that the procedures they au-
Rules of Civil Procedure were adopted, authorizing broad and extensive discovery practices. At the time, the rules were hailed as a great advance in the truth-seeking process. Today, however, such accolades seem odd, as excessive and abusive discovery has become


It is apparent that in the pre-1938 federal system the pleadings were intended to be the primary, if not the sole device for pretrial preparation. See W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 17-18 (1968); G. RAGLAND, DISCOVERY BEFORE TRIAL 5 (1932). See generally R. MILLER, supra, at 201-19. The only facts and documents ascertainable under rule 58 were those related to the case of the party seeking discovery. Sunderland, supra, at 21. Discovery of an adversary's claim or defenses was not allowed. DISCOVERY, supra, at 9. Interrogatories were limited to parties to the action, and admissions were permitted only for the limited purpose of establishing the execution and genuineness of documents. Id.

See DISCOVERY, supra note 1, at 5; Hopkinson, The New Federal Rules of Civil Procedure Compared With the Former Federal Equity Rules and the Wisconsin Code, 23 MARQ. L. REV. 159, 171-73 (1939); Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 HARV. L. REV. 1033, 1035-36 (1978). The federal rules were promulgated under the authorization of the Act of June 19, 1934, ch. 651, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (1976)), which enabled the Supreme Court of the United States to prescribe forms of process, writs, pleadings and motions, as well as practice and procedure for federal courts in civil actions. Id.; Holtzoff, supra note 1, at 1057-58; Hopkinson, supra, at 159. The rules were adopted by the Court on December 20, 1937, becoming effective on September 16, 1938, and established a uniform system for cases at both law and equity. DISCOVERY, supra note 1, at 8; see Fed. R. Civ. P. 2, 86. Unlike former discovery procedures, see supra note 1, the new rules permitted requests for information relating to the adversary's claim or defense, as well as the use of admissions, to establish any relevant fact. DISCOVERY, supra note 1, at 9. Judicial intervention would occur only when an objection was posed by one of the parties, or when discovery was not carried out. See Cohn, Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules, 63 MINN. L. REV. 253, 253 (1979).

See, e.g., Hickman v. Taylor, 329 U.S. 495, 501 (1947); Pike & Willis, The New Federal Deposition—Discovery Procedure: II, 38 COLUM. L. REV. 1436, 1453 (1938); Sunderland, Discovery Before Trial Under the New Federal Rules, 15 TENN. L. REV. 737, 738-39 (1939). Pre-code procedure placed a premium on trial strategy based upon surprise instead of efficient preparation. Pike & Willis, supra, at 1453. The code was designed by its proponents to eliminate surprise as a tactical advantage and make full disclosure more advantageous to both parties. See Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 VAND. L. REV. 1295, 1298-99 (1978) [hereinafter cited as Brazil, Adversary Character]. Commentators of the period believed that the rules would change the Anglo-American adversary trial proceeding into a mutual search for truth by the parties. See id. at 1299. The Supreme Court was certainly optimistic as to the rules' effects. In Hickman, the Court observed:

The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing . . . to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

329 U.S. at 501.
a major problem. Critics assert, in fact, that this abuse is so extensive and costly that it threatens the profession’s public standing, undermines justice in the federal courts, and requires major institutional adjustments.4

Many commentators have emphasized the need for greater judicial involvement in controlling discovery, and for more intensive efforts to regulate and control attorney behavior.5 Some critics suggest that, if district judges were willing to impose the sanctions provided in the rules,6 the problem could be ameliorated.7 The pre-


5 Discovery, supra note 1, at 77; ABA, Report of Pound Conference Follow-Up Task Force, 74 F.R.D. 159, 191 (1976); Cohn, supra note 2, at 258; Underwood, supra note 4, at 629 & n.18. The Supreme Court has encouraged the use of stronger measures by judges to control misuse of the discovery process. In National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (per curiam), the Court upheld the district court’s dismissal of an action as a sanction for refusal to obey a discovery order. Id. at 643. The Court observed: [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. Id.

6 E.g., Levy, Discovery—Use, and Abuse, Myth and Reality, 17 Forum 465, 471-72 (1981); Renfrew, supra note 4, at 271-72. Several commentators have concluded that reluctance on the part of the judiciary to impose sanctions is the primary reason for difficulties in the discovery process. See Levy, supra, at 471-72. A majority of practicing attorneys apparently would agree. In a recent survey, 71% of lawyers questioned considered judicial handling of discovery to be the most significant cause of discovery abuse, and 80% believed more stringent sanctions should be imposed for such abuses. See Brazil, Civil Discovery: How Bad Are the Problems?, 67 A.B.A. J. 450, 456 (1981). The judiciary’s unwillingness to impose sanctions may be due to a number of factors, including an inclination to defer to the
vailing view, however, is that the enforcement provisions in the rules are inadequate, and that clearer and more stringent guidelines are necessary.\textsuperscript{8}

The rules have been changed in recent years to deal with discovery abuse, and to expand authority to impose sanctions.\textsuperscript{9} Additional changes are now being sought by members of the bar, largely due to the efforts of the Special Committee for the Study of Discovery Abuse, appointed by the ABA's Section of Litigation to respond to the findings of the Pound Conference in 1972.\textsuperscript{10} In September 1982, the Judicial Conference of the United States adopted recommendations of its Advisory Committee on Rules of Practice judgment of lawyers, a belief that sanctions are an inappropriate response to discovery abuses, and concern that clients may suffer unjustifiably if sanctions are imposed. See Renfrew, supra note 4, at 272-74.

\textsuperscript{7} See, e.g., C. Ellington, A Study of Sanctions for Discovery Abuse 53-54 (1979); Levy, supra note 6, at 472-73; Rosenberg & King, supra note 4, at 589; Underwood, supra note 4, at 668; Note, supra note 4, at 640. Several commentators have observed, however, that it is unrealistic to expect lasting changes in the discovery process to result from judicial action alone, since a number of nonlegal factors have contributed to the problem. See Levy, supra note 6, at 469-71; Noteware, Discovery Abuse, 17 Forum 474, 481 (1981); Renfrew, supra note 4, at 287. Levy points to a number of factors that indirectly contribute to discovery abuses, such as the tendency of large firms to develop discovery specialists who possess few of the skills needed to try cases; the practice of billing clients on an hourly basis; and the nature of the adversary system itself. Levy, supra note 6, at 470-71. Judge Renfrew suggests that the American courts' infrequent use of summary judgment results in excessive reliance on liberal federal discovery. See Renfrew, supra note 4, at 266-67. Noteware asserts that "to cure the problem of discovery abuse, there needs to be a change in attitude of trial lawyers [toward the use of discovery]." Noteware, supra, at 481.

\textsuperscript{8} See Levy, supra note 6, at 465; Rosenberg & King, supra note 4, at 588-89. Some believe that the rules' failure to define clearly the permissible scope of discovery is responsible for most discovery abuses. E.g., Shapiro, Some Problems of Discovery in an Adversary System, 63 Minn. L. Rev. 1055, 1055, 1090-92 (1979); Sherwood, supra note 4, at 568.

\textsuperscript{9} E.g., Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997, 1004-10 (1980); see Fed. R. Civ. P. 26(f)(2), 37(b), 37(g). Rule 26(f) was added to the rules in 1980 to permit the court to call a pretrial conference in order to discuss discovery procedures. See Fed. R. Civ. P. 26(f). After such a conference, the court must enter an order establishing a plan or schedule of discovery to be used in the proceedings. Id. The 1980 amendments also provide for the imposition of sanctions for violation of such a discovery conference order. See id. 37(b)(2). In addition, the rules were amended to authorize the court to award expenses incurred by a party in a good faith attempt to frame a discovery plan if any party causes such expenses through his failure to participate in good faith. See id. 37(g).

\textsuperscript{10} A brief history of the ABA Special Committee for the Study of Discovery Abuse is found in Flegal & Umin, Curbing Discovery Abuse in Civil Litigation: We're Not There Yet, 1981 B.Y.U. L. Rev. 597. In November 1982 the Special Committee sponsored a conference on discovery reform at the University of Texas. The materials for that conference included much of the available literature on discovery reform. See ABA Section of Litigation, Conference Materials (1982) (National Conference on Discovery Reform).
and Procedure\textsuperscript{11} intended to reduce discovery abuse by setting standards for attorney behavior and by providing for the sanctioning of attorneys for violating those standards. On April 29, 1982, these recommendations were adopted by the Supreme Court; they became effective on August 1, 1983, and will remain in effect unless approved, delayed or modified by Act of Congress.

We are at an important crossroad on these issues. The Advisory Committee's proposals for expanding the use of attorney sanctions—the subject to which this Article is primarily addressed—are part of a restructuring of the pretrial process in the federal courts. This Article asks, among other questions: Is so fundamental a restructuring of the pretrial process necessary?; should the changes be applied to all cases?; and will the restructuring foster the fundamental purpose of the Federal Rules of Civil Procedure—"the just, speedy, and inexpensive determination of every action"?\textsuperscript{12}


The Judicial Conference of the United States was originally established by Act of Sept. 14, 1922, Pub. L. No. 67-298, ch. 306, § 2, 42 Stat. 837, 838 (current version at 28 U.S.C. § 331 (1976 & Supp. IV 1980)). This conference, to be called annually by the Chief Justice of the United States, includes the chief judges of the Court of Claims, the Court of Customs and Patent Appeals, and of each judicial circuit, as well as one district judge from each judicial district and two bankruptcy judges. \textit{Id.} The duties of the Judicial Conference are to conduct a comprehensive survey of business in the federal courts, to arrange for reallocation of judges from circuits or districts as necessary, and to "submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business." \textit{Id.} It is assisted in these tasks by the Federal Judicial Center. The Center, a component of the judicial branch, was established by Act of December 20, 1967, Pub. L. No. 90-219, 81 Stat. 664 (current version at 28 U.S.C. §§ 620-629 (1976 & Supp. V 1981)). The Federal Judicial Center was designed to study and develop suggestions to improve the judicial administration of the federal courts and to present recommendations for this purpose to the Judicial Conference of the United States. S. REP. No. 781, 90th Cong., 1st Sess. 1-2, 6-9 (1967), \textit{reprinted in} 1967 U.S. CODE CONG. & AD. NEWS 2402, 2407-08. The Center was "expected to produce the objective and in-depth analyses of court management problems that existing administrative and judicial institutions have not been able to produce." \textit{Id.} at 6, \textit{reprinted in} 1967 U.S. CODE CONG. & AD. NEWS 2407.

I. THE ADVISORY COMMITTEE'S 1982 PROPOSALS

A. The Present Scheme

The present linchpin for sanctions in the federal courts, rule 37, still contemplates a system in which discovery proceeds without judicial intervention until the court's assistance is invoked by a party either claiming that discovery has been improperly denied or seeking protection against improper discovery. When a response made in discovery is inadequate, rule 37(a) requires the court to impose upon the responsible party or his attorney "the reasonable expenses incurred in obtaining the [necessary discovery] order, including attorney's fees, unless . . . [it finds that] opposition to the motion [is] substantially justified or that other circumstances make an award of expenses unjust." If a party violates an order entered under rule 37(a), the affected party, under rule 37(b), may seek any of a wide range of remedies including dismissal and any "just" order in regard to the failure. Here, again, the court must require the disobedient party or his attorney to pay the reasonable expenses caused by the failure, including attorney's fees, unless the failure is substantially justified, or other circumstances make the imposition of fees unjust. If a party fails to appear at a deposition, to answer or object to interrogatories, or to respond in writing to a request for inspection, rule 37(d) authorizes the court to im-

13 Ohio v. Crofters, Inc., 75 F.R.D. 12, 20-21 (D. Colo. 1977), aff'd sub nom. Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir.), cert. denied, 439 U.S. 833 (1978); Cohn, supra note 2, at 254-55. The Crofters case is a good example of the typical situation in which discovery sanctions are imposed. In that case, the defendant, Arthur Andersen & Co., obstructed attempts by the State of Ohio to discover documents located in the Swiss office of its client by, inter alia, falsely asserting that the documents were privileged under foreign law. 75 F.R.D. at 16-18. After Arthur Andersen had disobeyed several court orders to produce the requested documents, the State of Ohio filed a motion for sanctions under rule 37(a). See id. at 17-18; Fed. R. Civ. P. 37(a). The court refused to apply the "ultimate sanction" of entering a default judgment against the defendant, even though it found the defendant's conduct to constitute a wilful breach of the discovery rules. 75 F.R.D. at 23-24.

14 Fed. R. Civ. P. 37(a)(4), (b)(2); see H.K. Porter Co. v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1124-25 (6th Cir. 1976); Hayden Stone, Inc. v. Brode, 508 F.2d 895, 897 (7th Cir. 1974); 4A J. Moore, MOORE'S FEDERAL PRACTICE ¶ 37.01, at 37-2 (2d ed. 1983); Note, supra note 2, at 1037. Rule 37 must be invoked by a party's motion for an order compelling discovery, though the court may impose a sanction sua sponte for failure to comply with a previous discovery order. See Fed. R. Civ. P. 37(a), (b)(2).

15 Id. 37(b)(2); see Roadway Express, Inc. v. Piper, 447 U.S. 752, 763-64 (1980); In re Oil Spill by AMOCO Cadiz, 93 F.R.D. 840, 844 (N.D. Ill. 1982); Barker v. Bledsoe, 85 F.R.D. 545, 549 (W.D. Okla. 1979). Under rule 37, fees may be charged to the party, his counsel, or both, for failure to cooperate with discovery requests. Roadway Express, 447 U.S. at 763.
pose many of the sanctions available under 37(b). Rule 37(c) permits the imposition of costs incurred in proving a fact, the truth of which is wrongfully denied on a motion to admit under rule 36. When a party obtains protection under rule 26(c) from unreasonable or oppressive discovery demands, the trial court may, pursuant to rule 37(a)(4), award the expenses incurred in obtaining the protective order. Finally, some trial courts have resorted to rule 37 generally to justify sanctions against various forms of misconduct relating to the discovery process.

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17 See Fed. R. Civ. P. 37(b), (d). There is no requirement that the failure to cooperate with discovery or obey a discovery request be "willful," since the court may impose sanctions which are appropriate under the circumstances. See id. Wilfulness, however, is a factor to be considered in determining the sanction to be imposed. Id. 37(d) advisory committee note; see Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 993 (8th Cir. 1975).

18 Fed. R. Civ. P. 37(c). A party may avoid liability costs incurred in proving a fact if he can show either that "the request was objectionable under rule 36(a), the admission in question had no substantial importance, the party failing to make the admission had a reasonable belief that he might prevail, or there was a valid explanation for the failure to make the admission." Id.

19 See id. 26(c), 37(a)(4). The imposition of expenses on either the client or his attorney is intended to deter discovery abuse where no genuine dispute exists. Id. 37(a)(4) advisory committee note. Thus, when it can be shown that the losing party was "substantially justified" in believing that a genuine dispute existed, there is no such liability. Id. It is also possible, however, that other circumstances, such as unjustifiable conduct by the prevailing party, may make an award unjust. Id. The purpose of rule 37(a)(4) is to encourage the court "to address itself to abusive practices." Id.

20 See, e.g., Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 897-99 (8th Cir. 1978); Davis v. Marathon Oil Co., 528 F.2d 395, 403 (6th Cir. 1975), cert. denied, 429 U.S. 823 (1976); Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 993 (8th Cir. 1975). In Admiral Theatre, a civil antitrust action, the district court, in accordance with established law, permitted discovery as to films demanded so that the plaintiffs could prove damages resulting from their denial of discovery, and also allowed discovery of other films so that the plaintiffs could demonstrate the existence of a conspiracy to prevent them from bidding. 585 F.2d at 898 & n.18. The court agreed to modify its order to permit discovery as to proof of damages for all films, provided the plaintiffs could show that the defendants had behaved in such a way as to render all attempts to procure the films futile. Id. at 898. Refusal to modify the order in the absence of such proof was held not to be an abuse of discretion. Id. at 898-99.

The Davis court dealt with whether the district court properly excluded testimony from five witnesses whose names had been furnished to defendant for the first time only 3 days before the trial was to begin. 528 F.2d at 403. The court held this refusal to be a proper exercise of discretion, in view of the fact that the case had been pending for nearly 2 years, making it unlikely that these witnesses were newly found, as the plaintiff claimed. Id. This ruling, the court stated, was essential to protect the defendants from unfair surprise, and furthered the policy of rule 37. Id. at 403-04.

The Fox court refused to reverse the lower court's order dismissing the plaintiffs' complaint for willful refusal to respond to written interrogatories. 516 F.2d at 992-93. The court noted that such willful noncompliance with discovery rules justified dismissal and that such a sanction could be imposed even if no prior discovery order had been entered. Id. at 993.
Other rules permit dismissal or default, but no other rule authorizes the imposition of discovery costs. Some courts have implied the power to impose costs from the prohibition in rule 11,21 or from the power to dismiss in rule 41(b).22 Such holdings, however, are rare.23 The only legislatively approved basis for monetary sanctions is the federal costs statute,24 which specifically authorizes imposing on attorneys the excess costs they create by engaging in unreasonable and vexatious conduct that results in a multiplication of proceedings.25 Until 1980, however, this statute was construed not to permit an award of attorney’s fees, and few judges relied on it.26 Courts have also relied, in imposing monetary sanc-

21 Fed. R. Civ. P. 11; see, e.g., Textor v. Board of Regents of N. Ill. Univ., 87 F.R.D. 751, 754-55 (N.D. Ill. 1980); Kinke v. Abraham Lincoln Fed. Savings & Loan Ass’n, 365 F. Supp. 975, 982-83 (E.D. Pa. 1973). Some courts have noted that discretionary authority to award expenses, including attorney’s fees, exists under rule 11 where the nonprevailing party has either acted wilfully, with malice, or in bad faith, although in each case an examination of the particular facts led the court to conclude that such a sanction was not warranted. E.g., Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980); Driscoll v. Oppenheimer & Co., 500 F. Supp. 174, 175 (N.D. Ill. 1980). But see United States v. Standard Oil Co., 603 F.2d 100, 103 n.2 (9th Cir. 1979) (rule provides for discipline of lawyer, not assessment of fees against his client); Orenstein v. Compusamp, Inc., 19 Fed. R. Serv. 2d (Callaghan) 466, 469 (S.D.N.Y. 1974) (since allegations in complaint were adequately supported, defendants’ request for costs under rules 11 and 23.1 was without merit).

22 Fed. R. Civ. P. 41(b); see Zavala Santiago v. Gonzalez Rivera, 553 F.2d 710, 712 & n.1 (1st Cir. 1977); Dyotherm Corp. v. Turbo Mach. Co., 392 F.2d 146, 148-49 (3d Cir. 1968); J.M. Cleminshaw Co. v. City of Norwich, 93 F.R.D. 338, 354 (D. Conn. 1981). Although the Dyotherm court reversed and remanded the case based on its finding that dismissal for failure to pay expenses assessed by the court was too harsh a sanction, it did not upset the decision of the district court with respect to the imposition of expenses. See 392 F.2d at 148-49. Courts occasionally have based penalties for lack of prosecution, not on rule 41(b), but on the inherent powers of a federal court to regulate its own business. See Link v. Wabash R.R., 370 U.S. 626, 630-32 (1962) (courts retain power to dismiss sua sponte for lack of prosecution, despite adoption of rule 41(b)).

23 See Underwood, supra note 4, at 638-45; see also Cohn, supra note 2, at 873-74 (statutes authorizing monetary sanctions are narrowly construed).


25 Section 1927 now provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

tions, on their inherent power to control judicial proceedings,\textsuperscript{27} as well as on their authority over the conduct of attorneys through the contempt power.\textsuperscript{28} The Supreme Court has discouraged reliance on inherent judicial power, at least in instances where rule 37 might be applicable.\textsuperscript{29} Moreover, the contempt power has long been regarded as an extreme measure, the use of which is unsuited for routine management of the discovery process.\textsuperscript{30}


Application of the statute, however, remains problematic. For example, it has been held not to apply to cases in which the vexatious conduct was the product of negligence. United States v. Ross, 535 F.2d 346, 349-50 (6th Cir. 1976); see Sanctions Imposable, supra, at 76. At least one court has held that the statute does not apply to parties proceeding pro se, no matter how vexatious their conduct. See 1507 Corp. v. Henderson, 447 F.2d 540, 542 (7th Cir. 1971). The Second Circuit, however, recently noted the importance of section 1927 as a deterrent to the vexatious and unreasonable multiplication of proceedings by counsel. In Kline v. Wolf, 702 F.2d 400 (2d Cir. 1983), the court reversed a district court's imposition of a settlement in a securities class action. The named plaintiffs (through their attorneys) objected to entry of a final judgment embodying the settlement because it foreclosed an appeal of the district court's denial of class certification. Noting that class certification could benefit the named plaintiffs as well as their attorneys, the Second Circuit ruled that "a court may not impose upon a plaintiff a settlement that deprives him of relief to which he could be entitled after trial." Id. at 405. The court went on to state:

We recognize that the claims here may be so lacking in merit that they have but a slender chance of success at trial and that a trial might result in needless expense to the defendants and waste of judicial resources. In that event the district court and the defendants would be justified in invoking 28 U.S.C. § 1927 to require plaintiffs' counsel personally to satisfy excess costs, expenses and any attorneys' fees reasonably incurred because plaintiffs' counsel had multiplied proceedings unreasonably and vexatiously in view of defendants' earlier offer to pay plaintiffs' entire individual damages.

Id.

\textsuperscript{27} See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-65 (1980); Control Data Corp. v. Washington Metropolitan Area Transit Auth., 87 F.R.D. 377, 379-81 (D.D.C. 1980); Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Colum. L. Rev. 480, 484-86 (1958); Underwood, supra note 4, at 648 & n.7. The Roadway Express Court observed: "There are ample grounds for recognizing . . . that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel." 447 U.S. at 765; see supra note 22.


\textsuperscript{30} Sherwood, supra note 4, at 605; Note, supra note 28, at 862; Note, supra note 4, at
B. The Advisory Committee Proposals

The express powers of federal district courts to impose monetary sanctions have been expanded significantly by the adoption of the proposals of the Advisory Committee, which became law on August 1, 1983. The proposals are part of a new scheme to regulate litigation, including discovery. The scheme rests, first, on changes in rules 7 and 11 which require attorneys or signing parties to certify, not only in pleadings, but also in motions and in all other papers, that to the best of the attorney's or party's knowledge and belief, "formed after reasonable inquiry," each paper certified "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, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." This standard is said to be "more precise" than the existing standard, which appears only in rule 11 and which requires attorneys to certify that each pleading they file has "good ground to support it; and that it is not interposed for delay." To enforce this change, rule 11 would mandate the imposition of "an appropriate sanction" upon the attorney, or party, or both, "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, including a reasonable attorney's fee." Another

619-23; see, e.g., In re Attorney General, 596 F.2d 58, 65 (2d Cir. 1979). This reluctance to rely upon the contempt power stems from the judicial view of such power as a punishment of last resort. Note, supra note 28, at 862.

The Advisory Committee characterized its proposals as addressing three major subjects: (1) reform of procedures for the holding of pretrial conferences and for the scheduling and management of litigation by district judges, (2) the control of discovery abuse, and (3) the need to conform the rules to the jurisdictional provisions of the Federal Magistrates Act of 1979. Proposed Amendments, supra note 11 (remarks of Walter R. Mansfield, Chairman, Advisory Committee on Civil Rules).

Id. Rule 11 advisory committee note.

Proposed Amendments, supra note 11, Rule 11. The provision imposing sanctions on the attorney, the party, or both, in addition to appearing in rule 11, appears in rule 7 with reference to "the filing of the motion or other paper." Id. Rule 7.

Id. Rule 11 advisory committee note. The present rule 11 provides that the attorney's
comment makes clear that the new rule seeks to deal with abuse in pleadings and discovery "by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation." The requirement that an attorney act willfully before being found to violate rule 11 is deleted, though the degree of knowledge is still to be considered.

With respect to sanctions, the note explains that abusive pleadings and discovery frequently are permitted both because of confusion as to the range of available and appropriate sanctions, and because of a perceived reluctance by many courts to impose

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signature on the pleading merely certifies that "he has read the pleading [and] that to the best of his knowledge, information, and belief there is good ground to support it." Fed. R. Civ. P. 11. The courts have interpreted this rule as establishing a standard of bad faith for the imposition of sanctions for its violation. Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980) ("our conclusion that the instant action was . . . not commenced in bad faith necessarily precludes the award of such fees under Rule 11"), on remand, 94 F.R.D. 136 (S.D.N.Y. 1982) (attorney's fees awarded under rule 11 for bad faith continuance of litigation), aff'd, 704 F.2d 652 (2d Cir. 1983) ("We uphold the District Court because its finding of bad faith continuation of this lawsuit is well supported by the particular circumstances of this record. We do not thereby create an easy test for the award of attorney's fees to a successful defendant"). Rule 11, as amended, by specifying that the belief be "formed after reasonable inquiry" both imposes an affirmative duty to inquire into the facts and the law and raises the standard to "reasonableness under the circumstances." Proposed Amendments, supra note 11, Rule 11 advisory committee note.

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37 Proposed Amendments, supra note 11, Rule 11 advisory committee note. The prior rule 11 did not expressly authorize a court to award attorney's fees against an unsuccessful litigant but merely provided that "an attorney may be subjected to appropriate disciplinary action" for wilfully violating the rule. Fed. R. Civ. P. 11. With respect to an equitable doctrine allowing the award of expenses, with the exception of situations in which the litigation arises out of either a fiduciary or a legal relationship between the parties, the courts have limited the exercise of such power to award fees to cases in which the unsuccessful litigant acted in bad faith. United States v. Standard Oil Co., 603 F.2d 100, 103-04 (9th Cir. 1979). This equitable doctrine has been labeled "a well-established, though infrequently invoked, exception" to the general rule that attorney's fees will not be awarded absent a contrary provision in a statute or an enforceable contract. Misegades v. Sonnenberg, 76 F.R.D. 384, 385 (E.D. Va. 1976). Thus, in Orenstein v. Campusamp, Inc., 19 Fed. R. Serv. 2d (Callaghan) 466 (S.D.N.Y. 1974), the court refused to find that the plaintiffs had wilfully violated rule 11 "even though additional research by plaintiff's attorneys might have accelerated the present litigation and reduced the wrath of defendants' attorneys." Id. at 466. But cf. Textor v. Board of Regents of N. Ill. Univ., 87 F.R.D. 751, 754 (N.D. Ill. 1980) (where there was no colorable ground for asserting jurisdiction over nonresident defendants, it was within the inherent power of the court to award defendants their attorney's fees).

38 Proposed Amendments, supra note 11, Rule 11 advisory committee note. Although the new rule 11 does not limit disciplinary action to wilful violations, the Advisory Committee indicated that the court should consider the actual or presumed knowledge of the party who signs the paper at the time he signs it. Id.
any sanctions.\textsuperscript{39} To overcome these problems, the new rule grants clear authority to impose costs and fees, and mandates the imposition of at least some form of sanction.\textsuperscript{40} The Advisory Committee note states that “it is the attorney whose signature violates the rule,” but continues that “it may be appropriate under the circumstances of the case to impose a sanction on the client.”\textsuperscript{41} The new rule contemplates that sanctions will be decided by motion, on notice, and recognizes that the procedure “must comport with due process requirements.”\textsuperscript{42} Further, while the circumstances surrounding the offense, as well as the severity of the proposed sanction, are to be taken into consideration, the judge should be able to decide the appropriate steps to be taken with “little further inquiry.”\textsuperscript{43} Thus, “the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions . . . .”\textsuperscript{44}

The second major element of the changes is a modification of rule 16 to provide for the mandatory issuance of a scheduling order in every case except where exempted as inappropriate by local

\textsuperscript{39} Id.
\textsuperscript{40} Id. Rule 11. The new rule 11 states that the court has discretion to determine the particular sanction to be imposed as well as the person upon whom it will be imposed, but makes the imposition of some sanction mandatory. Id. (“[i]f a pleading . . . is signed in violation of [rule 11], the court . . . shall impose . . . an appropriate sanction” (emphasis added)).
\textsuperscript{41} Id. Rule 11 advisory committee note. Rules 7 and 11, as amended, each provide for the imposition of sanctions on either the person who signed the paper, the represented party, or both. Id.; see supra note 35. The effect of this change is to make both rules consistent with rule 37, which permits imposition of sanctions upon the attorney, the party, or both. PROPOSED AMENDMENTS, supra note 11, Rules 7, 11; see Fed. R. Civ. P. 37. One court has indicated that such factors as the party's personal knowledge of and responsibility for the action triggering the sanction should be considered in determining whether sanctions should be imposed on that party. Browning Debenture Holders' Comm. v. Dasa Corp., 560 F.2d 1078, 1089 (2d Cir. 1977).
\textsuperscript{42} See PROPOSED AMENDMENTS, supra note 11, Rule 11 advisory committee note. Due process considerations are most important with respect to sanctions such as dismissal, which have the effect of foreclosing arguments on the merits. Note, supra note 2, at 1041 & n.52, but they must also be addressed in connection with other “lesser” sanctions as well, id. at 1041.
\textsuperscript{43} PROPOSED AMENDMENTS, supra note 11, Rule 11 advisory committee note; see supra note 42. A broader objection to the increased authorization of sanctions in the Federal Rules is made in Burbank, Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power, 11 Hofstra L. Rev. 997 (1983) (changes should be made by Congress, not Supreme Court).
\textsuperscript{44} PROPOSED AMENDMENTS, supra note 11, Rule 11 advisory committee note. In order to ensure efficiency, the Advisory Committee indicates that discovery in sanction proceedings should be “only by leave of the court, and then only in extraordinary circumstances.” Id.
rule.\textsuperscript{45} The scheduling order is to issue "as soon as practicable but in no event more than 120 days after filing of the complaint."\textsuperscript{46} The order must set time limits for joining other parties, amending the pleadings, serving and hearing motions, and completing discovery, and in addition may schedule dates for pretrial conferences, trial, and any other matters.\textsuperscript{47} The new rule lists as subjects for discussion at pretrial conferences all the ordinarily appropriate subjects, but seeks to buttress the effectiveness of these discussions by requiring attendance at each conference of at least one attorney for each party with authority to stipulate or admit as to "all matters that the participants may reasonably anticipate may be discussed."\textsuperscript{48} The new rule also describes what should occur at the "final" pretrial conference, which must be attended by at least one of the attorneys for each party who will conduct the trial, and requires the entry of pretrial orders reciting the action taken at such conferences, which shall be modified "only to prevent manifest injustice."\textsuperscript{49}

To enforce these requirements, the recently adopted rule confers significant sanctioning authority. In effect, the rule treats every scheduling or pretrial order and every required appearance as equivalent to an order entered under rule 37(a). Consequently, noncompliance with any such order would become punishable, on motion or at the court's initiative, by any of the sanctions provided in rule 37(b)(2)(B), (C) or (D), including citation for contempt and

\textsuperscript{45} Id. Rule 16. Recognizing that there are some cases in which a scheduling order would constitute an unnecessary degree of judicial involvement, the Advisory Committee allowed district courts to establish rules exempting categories of cases from mandated scheduling orders. Id. Rule 16(b) advisory committee note. Cases that could be expected to fall within such exempted categories would include "social security disability matters, habeas corpus petitions, forfeitures, and reviews of certain administrative actions." Id. These particular cases are actually particularly appropriate for scheduling orders, but they seldom require pretrial discovery.

\textsuperscript{46} Id. Rule 16. Not only must the order be issued promptly, but once it is issued the schedule can only be modified "by leave of the judge upon a showing of good cause." Id.

\textsuperscript{47} Id. The rule refrains from mandating the scheduling of such items as pretrial conferences and trials in recognition of the potential difficulty in scheduling these items within the stated time limit. See id. Rule 16 advisory committee note.

\textsuperscript{48} Id. Rule 16(c)(11). The requirement of authority to stipulate or admit is not intended to mandate that the attorney have the ability to settle the litigation; rather, it is meant to ensure that the conference be more than an empty ritual. Id. Rule 16(c) advisory committee note.

\textsuperscript{49} Id. Rule 16(e). The stringent standard of "preventing manifest injustice" is limited to modification of orders issuing from the final pretrial conference; no limitation at all is placed upon other pretrial orders, although it is to be understood that no pretrial order should be changed arbitrarily. Id. Rule 16(e) advisory committee note.
dismissal. In addition, the same sanctions could be applied "if a party or party's attorney is substantially unprepared to participate" at a required conference, or "fails to participate in good faith." Finally, rule 16 would require the judge to punish noncompliance by requiring the offending party, his attorney, or both, to bear the reasonable expenses arising from such noncompliance. The Advisory Committee note explains that this sanction provision is intended to reflect current practice, under which, it claims, "courts have not hesitated to enforce" existing rule 16 "by appropriate measures." The new provision, the Committee states, will "obviate dependence upon rule 41(b) or the court's inherent power to regulate litigation."

Perhaps the most relevant aspect of the changes is the revision of rule 26, which governs discovery. The new rule expressly grants district courts authority to limit discovery if the discovery sought is found to be unnecessary or inappropriate for a variety of

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50 Id. Rule 16(f). The Advisory Committee acknowledges that the courts have in fact been imposing sanctions for noncompliance with pretrial orders, despite the absence of any mention of such sanctions in the current rule 16, but notes that "explicit reference to sanctions reinforces the rule's intention to encourage forceful judicial management." Id. Rule 16(f) advisory committee note. By incorporating within the new rule the sanctions already prescribed in rule 37(b), the Advisory Committee hopes to capitalize on the experience the courts and the bar have already had with those sanctions. Id.

51 Id. Rule 16(f).

52 Id. The judge would still have power to refrain from ordering the payment of expenses if he finds either substantial justification for the noncompliance or other circumstances that would make such an order unjust. Id.

53 Id. Rule 16(f) advisory committee note; see, e.g., Simonsen v. Barlo Plastics Co., 551 F.2d 469, 471 (1st Cir. 1977) ("proper exercise of discretion" for the court to exclude expert testimony when the party had failed to designate the expert pursuant to a pretrial order); In re LaMarre, 494 F.2d 753, 756 (6th Cir. 1974) ("the District Judge had the right and the power to issue an order to [a party] to attend a pretrial session of the court and, on refusal, to enforce said order by contempt proceedings"); Pakech v. American Export-Isbrandtsen Lines, Inc., 22 Fed. R. Serv. 2d (Callaghan) 39, 39 (E.D. Pa. 1979) (granting plaintiff's motion for new trial because of defendant's failure to disclose factual allegation and theory of defense before trial); Marriott Homes, Inc. v. Hanson, 50 F.R.D. 396, 400-01 (W.D. Mo. 1970) (answer and counterclaim stricken and default judgment entered against defendant for failure to comply with pretrial orders); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 245 F. Supp. 889, 892 (N.D. Ill. 1965) (plaintiff's motion to strike a defense granted as sanction for failure to comply with pretrial order).

54 Proposed Amendments, supra note 11, Rule 16(f) advisory committee note. By eliminating dependence upon rule 41(b), the new rule will not change existing practice, but merely will provide a more direct means of accomplishing the same result. See id.

55 Id. Rule 26. Although the Advisory Committee expressly identifies two significant problems in this area, excessive discovery and resistance to reasonable discovery requests, the amendment to rule 26 expressly addresses only the former. See id. Rule 26 advisory committee note.
reasons, including undue burden, relation to the amount in controversy, relative importance of the issue, and the resources of parties. Every request for discovery would have to be signed by an attorney of record, whose signature would certify:

that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry 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.

To enforce this requirement, the rule provides additional authority to impose sanctions. To redress a certification made in violation of the rule, the court, upon motion or upon its own initiative, is to impose upon the certifying party, or the party in interest, 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." The Advisory Com-

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66 Id. Rule 26(b). As amended, rule 26(b) directly addresses the need to reduce excessive discovery by encouraging the judge to exercise his discretion so as to prevent discovery which would not further the goal of the "just, speedy, and inexpensive determination of every action." Id. Rule 26 advisory committee note (citing Fed. R. Civ. P. 1); see also PROPOSED AMENDMENTS, supra note 11, Rule 26(b).

67 PROPOSED AMENDMENTS, supra note 11, Rule 26(g); see supra notes 31-34 and accompanying text (discussion of parallel signing requirements in proposed rules 7 and 11).

68 PROPOSED AMENDMENTS, supra note 11, Rule 26(g). The new rule expressly requires the imposition of some sanction in order to overcome the current reluctance on the part of judges to impose sanctions for discovery abuse. Id. Rule 26(g) advisory committee note; see infra notes 79-82 and accompanying text.

One commentator has suggested that there has already been some movement in the direction of increased willingness to impose sanctions, Note, supra note 2, at 1044-45, and points to the case of one judge who acknowledged that his reluctance to impose sanctions had been a mistake, id.; see SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp., 72 F.R.D. 110, 112 (N.D. Tex. 1976) ("apparently my prior policy, which included a reluctance to use Rule 37 sanctions, has not worked. Henceforth, I will embark on a different course liberally using the full range of Rule 37 sanctions in appropriate circumstances"). That the problem has not yet been resolved is indicated by the following remarks of one litigator: "Unless judges take a strong stand no one will quit playing games because you know you can get away with it." Brazil, Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 AM. B. FOUND. RESEARCH J. 787, 862 (quoting unidentified Chicago litigator) [hereinafter cited as Brazil, Civil Discovery].
committee note explains that these provisions are designed to curb excessive discovery or resistance to reasonable discovery. Judges are encouraged to control discovery more closely, and the parties are encouraged to be less adversarial in their conduct. The Advisory Committee makes clear its intent that sanctions be used specifically to curb discovery abuse, and not simply as penalties for improper conduct. In the Committee's words, "the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor." The Committee hopes moreover, that the perceived judicial reluctance to impose sanctions will be overcome by granting this explicit authority as well as by requiring that an appropriate sanction be imposed for every violation. Again, the Committee recognizes that due process must be afforded attorneys who are deemed to have failed to meet the standards established by the rule, but cautions against the use of inappropriately lengthy proceedings.

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59 See Proposed Amendments, supra note 11, Rule 26 advisory committee note.

60 Id. Rule 26(g) advisory committee note. The Advisory Committee observes that "[s]anctions to deter discovery abuse would be more effective if they were diligently applied 'not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.'" Id. (quoting National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam)).

61 Proposed Amendments, supra note 11, Rule 26(g) advisory committee note; see Underwood, supra note 4, at 667 & n.205.

62 Proposed Amendments, supra note 11, Rule 26(g) advisory committee note; see supra note 42. A recent report by the Special Committee on Effective Discovery in Civil Cases for the Eastern District of New York, chaired by Edwin T. Wesely, Esq., with Dean Edward D. Cavanagh of St. John's Law School acting as reporter, makes several interesting and creative suggestions, in part to avoid the excessive costs that could be created by the new rule changes. With respect to the problem discussed in text, the report recommends that challenges to certification be discouraged by permitting district judges, in their discretion, to charge the challenger the full costs of proceedings made necessary, whenever the challenge fails to result in finding a violation. Report Rule 23(d), p. 48. The report would greatly lessen the costs of mandatory Rule 16 conferences by avoiding them in several classes of cases, and by having such conferences take place by telephone or other means less costly than actual appearance. Id. at 15-18. While the report agrees with the need for sanctions, and accepts the new rules, it would reverse the intent of the new rules by giving maximum authority to attorneys to control discovery by agreement, recommending the use of magistrates, and discouraging appeals from magistrate rulings by authorizing the district judge to charge the losing appellant with the other side's costs and attorney's fees. Id. at 7, 13, 18-23, 43 (Rule 23(e)). The report also proposed a set of sensible "presumptions" concerning common discovery problems, which are deemed to govern unless a judge rules otherwise. Copies may be obtained from the Clerk, U.S. District Court, E.D.N.Y.
II. THE CASE FOR MONETARY SANCTIONS TO CURB DISCOVERY ABUSE

Much of what the Advisory Committee has fashioned is salutary, but certain facets of the proposed changes merit greater scrutiny. For example, while discovery abuse is a serious problem in the federal courts, and thus warrants provisions requiring greater responsibility by attorneys and more extensive judicial involvement, it is less widespread than the Advisory Committee's approach suggests. Moreover, while the Advisory Committee is also on firm ground in concluding that monetary sanctions are potentially useful in curbing discovery abuse, and are too infrequently utilized, greater use of these sanctions would be more effectively encouraged if general authority and simple procedures for imposing them were provided, instead of the specific authorizing provisions in the pending proposals.

A. Extent and Types of Discovery Abuse

Empirical studies demonstrate that discovery presents no significant problem in most cases in the federal courts. One study, conducted for the Federal Judicial Center (FJC) and based on 3,000 cases from six metropolitan districts, showed that no discovery requests were filed in 50% of all cases, and only 5% of all cases contained 10 or more discovery initiatives. The cases involving 10 or more discovery initiatives, however, had an average of 17.47 requests each, accounting for about 60% of all discovery enforcement motions in the entire sample. Moreover, the average number of enforcement motions per discovery request was twice as high in the cases having high levels of discovery as in all other cases combined. Nine enforcement motions were made in each of the few cases with over 31 discovery requests. Similarly, in Pro-

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63 DISCOVERY, supra note 1, at 29. The six metropolitan districts included in the survey were the United States District Courts for the Districts of Southern Florida, Central California, Eastern Louisiana, Maryland, Massachusetts, and Eastern Pennsylvania. Id. at 85-86 app. The report was based upon approximately 500 cases which terminated in fiscal year 1975. Id. at 85.

64 Id. at 31.

65 Id. at 34. The high-volume group was broken down into three subgroups. Id. The subgroups of cases with 11-20 requests and 21-30 requests had an average of 13 discovery-related motions. Id. The subgroup of cases with 31 or more requests had an average of 23 discovery-related motions. Id. By comparison, the group of cases with one to three discovery requests had an average of only nine discovery-related motions. Id.

66 Id.; see supra note 65.
fessor Ellington’s study on sanctions for discovery abuse, more
than 6,000 cases, over 50% of the total studied, involved no discov-
ery activity; and of those cases which did involve discovery activ-
ity, over 70% had no recorded discovery problem. As the FJC
discovery study concluded, “discovery abuse, to the extent it ex-
ists, does not permeate the vast majority of federal filings.”

On the other hand, discovery abuse may at least partially ex-
plain the intensive discovery activity and disputes that exist in the
small proportion of cases involving high levels of discovery. More-
over, subjective evidence of widespread concern over discovery
abuse suggests that, although such abuse may be confined to a rel-
atively small proportion of all cases, those cases are so intensively
litigated that they have a significant impact on the federal judicial
system. Professor Ellington found widespread concern over discov-
ery abuse among the federal judges he surveyed. In a study of the
attitudes of a group of Chicago litigators, Professor Brazil found
79% of the lawyers had mixed or clearly negative views of the
workings of the discovery system. Over 40% of the lawyers in the
Chicago study cited excessive discovery and harassment as specific
problems. Although the lawyers responding were dispropor-
tionately those who handle large cases for corporate clients, an over-

67 C. ELLINGTON, supra note 7, at 17. Professor Ellington's study dealt with discovery
activity in Atlanta and Chicago. Id. Of the 2,055 cases scanned in Atlanta, approximately
55% (1,121) had no discovery activity and 45% (934) had some discovery activity. Id. Sev-
enty-three percent of the cases with discovery activity had no recorded discovery problem.
Id. In Chicago, approximately 62% (2,569) of the 4,175 cases had no discovery activity. Id.
Thirty-eight percent had some discovery activity, while 72% of the cases with discovery
activity had no recorded discovery problem. Id.

68 DISCOVERY, supra note 1, at 35. The study concludes that, in the filings in which
there is discovery, “abuse—to the extent it exists—must be found in the quality of the
discovery requests, not in the quantity.” Id. (emphasis in original). In a 1979 study of dis-
cov er practices among Chicago-area attorneys conducted by Professor Wayne Brazil, the
attorneys involved in smaller cases estimated that 47% of their cases in the 5 years preced-
ing the study involved “evasive or incomplete responses” to their discovery efforts. Brazil,
Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil
Discovery, 1980 Am. B. Found. Research J. 217, 223 n.9 [hereinafter cited as Brazil, Views
from the Front Lines]. In comparison, the attorneys involved in larger cases estimated that
72% of their cases involved such tactics. Id.

69 C. ELLINGTON, supra note 7, at 36-37.

70 Brazil, Civil Discovery, supra note 58, at 785. Forty-six percent of the lawyers had
mixed views, describing the discovery system as “o.k.,” “mediocre,” “fair,” or “adequate.”
Id. Thirty-three percent of the attorneys were classified as clearly positive toward the sys-
tem, describing it in such terms as “excellent,” “[working] quite well,” “good,” and “very
workable.” Id. at 794 n.8.

71 Id. at 831.
whelming majority of all the lawyers in the study favored the more frequent use of available discovery sanctions.\textsuperscript{72}

Attorneys abuse the discovery process by seeking evidence that is unnecessary, or by seeking evidence for an improper purpose, or by imposing unnecessary costs in seeking necessary material. Some familiar examples are the documentary request that calls for every paper that relates to a corporation's policies and activities on safety, hiring, firing, or pricing; the set of interrogatories with multipage introductory definitions, followed by questions that would require thousands of hours to answer, calling for all the evidence relating to each of the respondent's legal positions; and the series of largely if not entirely aimless depositions intended to impose huge costs and pressures upon an opponent.\textsuperscript{73}

Failures to make or to cooperate in discovery are, however, at least as prevalent a source of abuse as unnecessary or oppressive demands. Prior to the adoption of the federal rules in 1938, relatively little discovery was possible, and thus virtually all discovery abuse took the form of opposition to discovery, even when it was reasonable and limited. Rule 37 is still explicitly addressed to failures to cooperate in discovery, and such failures remain widespread. Here, also, shocking conduct, though still rare, has become too familiar: documents are purged on concocted claims of privilege, destroyed, secretly withheld, produced in unusable form, or buried in truckloads of irrelevant paper; answers to interrogatories are flatly refused for improper reasons or for no reason at all; deponents are repeatedly instructed not to answer on grounds other than privilege, and depositions are delayed or terminated upon the unilateral decision of a party's attorney.\textsuperscript{74}

\textsuperscript{72} Id. at 866. Ninety percent (36 of 40) of the attorneys who litigated large cases (median case of $1 million) were in favor of more frequent use of sanctions. Id. at 865. Among the "smaller-case" attorneys, 74 percent (100 of 134) favored more frequent use of sanctions for discovery abuse. Id. at 866; see Flegal & Umin, supra note 10, at 600-01 & 600 n.15.

\textsuperscript{73} See Pope, Rule 34: Controlling the Paper Avalanche, 7 LITIGATION 28, 28-29 (Spring 1981); see also Peter Gruenberger's "gruesome profile of a discovery abuser," described by ABA Litigation Section Chairman Joan M. Hall, in 9 LITIGATION 1, 1 (Summer 1983), and her appraisal of the new rules.

\textsuperscript{74} See Smith, supra note 4, at 59; Underwood, supra note 4, at 654-59. One commentator describes modern discovery as the "unjustified proliferation of a cosmetic type of discovery where magcard typewriters are used to spill out 300-page interrogatories, and where trial lawyers delegate the taking of depositions to inexperienced lawyers, many of whom have never tried cases." Kennelly, Pretrial Discovery—The Courts and Trial Lawyers Are Finally Discovering That Too Much of It Can be Counterproductive, 1977 TRIAL LAW. GUIDE 458, 466.
B. The Advisory Committee's Proposed Limitations

The Advisory Committee wisely rejected the recommendation of the ABA Special Committee that discovery be limited to material "relevant" to the claims or defenses of the parties. That recommendation is unrealistic and regressive. Discovery is abused both in demands and in resistance to demands, and a change in the scope of proper discovery may thus create greater opportunities for one form of abuse in attempting to curb another. Imposing a limitation of relevance in depositions or other discovery, for example, would enable attorneys to oppose proper and reasonable discovery just as often as they might use the limitation to protect against improper and unreasonable demands. Any attempt at discovery reform must therefore anticipate that limitations on the scope of discovery are equally likely to generate as to lessen abuse.

The recently amended rule 26 would, however, accord trial judges clear authority to limit discovery on practical or equitable grounds. The present rules suggest that unlimited opportunities must be provided to obtain anything that might conceivably lead to the discovery of relevant material. Practical limitations on discovery are permitted only "for good cause shown." The Committee would change this by allowing judges to limit the "frequency and extent of use" of discovery, in light of a variety of relevant factors. This express authority will enable judges to intervene and prevent abusive discovery efforts and eliminate the present doubts as to their power to prevent such injustice.

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76 See Special Committee for the Study of Discovery Abuse, ABA, Comments on Proposed Amendments to the Federal Rules of Civil Procedure 4-5 (1981) [hereinafter cited as ABA Special Committee for the Study of Discovery Abuse]; Liman, The Quantum of Discovery vs. the Quality of Justice: More is Less, 4 Litigation 8, 58 (Fall 1977).
77 Fed. R. Civ. P. 26(a),(b)(1). Rule 26(a) enumerates an exhaustive list of methods of discovery, concluding that "the frequency of use of these methods is not limited." Id.
78 Proposed Amendments, supra note 11, Rule 26(b)(1). The addition to rule 26(b)(1) limits the use of discovery methods under rule 26(a) upon a determination that:
(i) the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is either more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, 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).
The Advisory Committee also proposes to deal with discovery abuse by having attorneys and parties assume responsibility for their requests and responses. The proposed certification requirements for rules 7, 11, and 26 would require attorneys or parties to warrant the propriety of motions, requests, and responses in the discovery process. The present requirement in rule 11 applies only to the filing of pleadings. The proposed certifications should encourage greater care by lawyers and unrepresented parties in investigating, initiating, or contesting suits and motions. Finally, the proposed changes in rule 26 are designed to encourage judges to become more involved in supervising their cases. This has been identified by some commentators as the key to preventing discovery abuse. Furthermore, studies of federal litigation demonstrate that closer administration will reduce discovery abuse, and indeed will substantially shorten the average disposition time for cases.

The Advisory Committee's proposed changes go too far, however, by requiring expensive and time-consuming modifications in all federal litigation to deal with delay and abuse that are signifi-

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79 PROPOSED AMENDMENTS, supra note 11, Rules 7, 11, 26; see supra notes 31-39, 56-63 and accompanying text.
80 FED. R. CIV. P. 11.
81 See Renfrew, supra note 4, at 280-81. Judge Renfrew suggests five devices by which the court could better supervise litigation: (1) regular status conferences; (2) restrictions on the number of interrogatories without permission of the court; (3) prompt determination of deadlines for completion of discovery and commencement of trial; (4) discovery conferences; and (5) a requirement of good cause to postpone these deadlines. Renfrew, supra note 4, at 281; see Underwood, The New Amendments to the Federal Discovery Rules, PRAC. LAW., June 1, 1980, at 23, 25-28.
82 See DISCOVERY, supra note 1, at 67-84. Professor Brazil's survey of Chicago-area litigators suggests that attorneys view the present judicial administration as inadequate. Brazil, Views from the Front Lines, supra note 68, at 245-51. Cited as major difficulties in the system were the negative attitudes of the courts toward discovery problems, the limited resources at the courts' disposal to provide the means to solve discovery problems, and the judges' reluctance to impose sanctions. Id. at 248. The attorneys consider judicial intervention, when it occurs, as merely "superficial." Id. at 249.
83 See, e.g., DISCOVERY, supra note 1, at 67-72; C. ELLINGTON, supra note 7, at 11. A 1978 Federal Judicial Center study revealed that the average disposition time for cases tried by judges who used strong administrative controls on discovery was about half that of cases tried by judges using no controls or less rigorous controls, regardless of whether the cases were tried or settled. DISCOVERY, supra note 1, at 68-69. Such controls also succeeded in halving the amount of time used in discovery. Id. at 70-71. Pleading time showed a less marked reduction, however, and trial time was approximately the same for judges who became actively involved in managing discovery intensely and those who did not. Id. at 71-72. These results confirm the belief held by the majority of federal judges that only more assertive judicial management of cases will check discovery abuse. See C. ELLINGTON, supra note 7, at 51.
cant only in a small proportion of cases. The certification requirements, for example, impose a burden of care that is unwarranted for all papers filed in federal courts. While certifications would be potentially useful in connection with the filing of all complaints, answers, and dispositive motions, trial judges rarely have occasion to question the propriety of discovery requests or responses. In fact, discovery documents are seldom even seen by the judge. No need exists, therefore, for a painstaking certification of each and every paper. Moreover, the certification proposed for rule 26 would be particularly demanding, imposing an obligation to consider numerous factors, not now at issue in the filing of routine discovery documents. No doubt most lawyers would develop speedy and relatively inexpensive techniques for fulfilling these requirements, among other reasons, to protect their clients from unwarranted costs. But routinized certifications would make the requirements viable only at the price of lessening their potential effectiveness. Greater effect would be achieved, at lower cost, if certifications were required for discovery requests and nondispositive motions only in those cases where the trial judge or opposing counsel believed they were warranted to prevent abusive conduct.

A similar flaw exists in the proposed changes to rule 16. The mandatory scheduling order contemplated for rule 16 would create unnecessary and time-consuming duties by multiplying the minor administrative tasks that already absorb significant amounts of judicial and attorney time. Additionally, the force of written scheduling orders in those cases whose complex characteristics warrant them might be diminished significantly by their indiscriminate use.

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84 See Sherman & Kinnard, Federal Court Discovery in the 80's—Making the Rules Work, 95 F.R.D. 245, 282-83 (1982). Sherman and Kinnard view the imposition of a certification requirement in pleadings as "both a virtue and a vice." Id. at 282. They express concern that such a rule may unduly restrict the liberality of the federal discovery provisions and compel attorneys to decide theories of liability at a premature stage in the proceedings which may obstruct the fair and prompt disposition of cases. Id. at 282-83. They admit, however, that such certification requirements "[leave] less room for rationalizing unduly adversary behavior." Id. at 282.

85 See Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 423-24 (1982); Schroeder & Frank, Discovery Reform: Long Road to Nowheresville, 68 A.B.A. J. 572, 572-73 (1982). The Special Committee of the American Bar Association estimated that the implementation of the scheduling conference requirement in rule 16(b) would consume the time of more than 10 federal district judges working exclusively on scheduling conferences and orders. ABA SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE, supra note 75, at 14 & n.5. In addition, the scheduling conferences would entail an increase in costs of more than $12.6 million annually. Id.
Despite the exhortations of the Advisory Committee's note, mandated scheduling orders will be amended as a matter of course and thus become of little consequence. Furthermore, while a significant improvement in disposition time may well take place by requiring scheduling orders in all cases, this improvement will result simply from speedier dispositions of the large number of relatively simple cases that presently are concluded within an acceptable period of time.\textsuperscript{86} As for the difficult cases that currently linger on court dockets and involve extensive, often wasteful discovery, close judicial supervision is indeed required, but not necessarily in the form of administratively burdensome scheduling orders.

The Advisory Committee provided an exemption from the new rule 16 for "categories of actions" deemed by district court rule not to warrant scheduling orders.\textsuperscript{87} The types of cases in which a scheduling order is required, however, cannot be determined by reference to the category of action involved. While cases involving substantial discovery do tend to fall into several categories,\textsuperscript{88} not all cases within those categories warrant the treatment proposed by rule 16, and some cases in other categories could benefit from scheduling orders. The matter should be left to the discretion of the district judge, to be exercised on the basis of his or her first-hand knowledge of the parties and claims. Further, if scheduling orders are to be mandated, they should be required only after substantial discovery has occurred or is expected by the parties to occur. In short, close management of discovery should be mandated only when indicated by the specific requirements of the actions at bar.

\textsuperscript{86} DISCOVERY, supra note 1, at 66. The Federal Judicial Center Report acknowledged that overall decreases in discovery time resulting from increased judicial supervision were largely a function of decreases in discovery time for relatively fast-moving, low-discovery cases. Id.; see Resnik, supra note 85, at 424 (required management may waste judicial resources in cases which settle of their own accord).

\textsuperscript{87} PROPOSED AMENDMENTS, supra note 11, Rule 16(b).

\textsuperscript{88} See Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation, 90 F.R.D. 207, 211 (1981). The categories of cases most often cited as being complex, and thus apt to involve substantial discovery, are antitrust cases, securities cases, class actions and cases involving a large number of parties. Id. For a list of cases that involved extensive discovery, see Yankwich, "Short Cuts" in Long Cases, 13 F.R.D. 41, 63-64 (1952).

Among all the cases involving extensive discovery, few compare with United States v. IBM, No. 69-200 (S.D.N.Y. Jan. 17, 1969). During the first 5 years of discovery, over 64 million pages of documents were produced. Pope, supra note 73, at 28. The case was concluded almost 13 years from the date it began, with the filing of a stipulation of dismissal. In re IBM, 687 F.2d 591, 593-94 (2d Cir. 1982).
Finally, the suggestion that attorneys must be encouraged to be less adversarial in discovery is necessary and potentially useful, but unlikely as a solution. Our adversary system contributes greatly to discovery abuse. The unseemly battles in which attorneys engage are a major factor in making the system costly and time consuming. Efforts to encourage restraint, cooperation, and openness are welcome counterforces to the irresponsibility, manipulativeness, and downright malevolence sometimes observed. But the nature of attorney behavior cannot effectively be modified at only one stage of the litigation process. An attorney who is expected to fight the admission of evidence at trial as privileged or irrelevant will not readily comprehend why the same evidence should willingly be made available in discovery. The will to win—so essential to effective advocacy—cannot be limited to the courtroom; it does and to an extent should permeate the discharge of all the attorney's services to the client. Discovery abuse will not be significantly reduced by appeals to conscience when allegiance is properly divided, and when the source of improper behavior is often as elusive as the sources of other forms of human aggressiveness and irrationality.

C. Need for the Imposition of Monetary Sanctions

The Advisory Committee accurately concluded that monetary sanctions are seldom imposed by district judges. Professor Rosenberg recognized in 1958 that the imposition of any kind of sanction was infrequent. Changes in the rules were made in 1970 to pro-

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88 See Brazil, Adversary Character, supra note 3, at 1303-04. Brazil criticized the proponents of the modern discovery rules for failing to recognize that "traditional professional loyalties, deeply ingrained lawyering instincts, and competitive economic pressures" would make a nonadversarial discovery process extremely difficult to achieve. Id. at 1304. Brazil concluded:

[T]he unarticulated assumption underlying the modern discovery reform movement was that the gathering and sharing of evidentiary information should (and would) take place in an essentially nonadversarial environment. That assumption was not well made. Instead of reducing the sway of adversary forces in litigation and confining them to the trial stage, discovery has greatly expanded the arenas in which those forces can operate.

Id. at 1303-04.

89 See Pope, supra note 73, at 28; Renfrew, supra note 4, at 255; Underwood, supra note 4, at 654-60.

90 Rosenberg, supra note 27, at 494-97. Professor Rosenberg criticized the courts for using "informal correctives not authorized by the rules," id. at 495, and recommended that the rules be revised to halt this practice, id. at 497. Many courts, for example, imposed a
vide for the award of expenses in seeking or defending a motion to compel discovery, to make clear that judges could sanction negligent as well as willful conduct, to permit the award of expenses in addition to the more severe sanctions for violating a discovery order, and to authorize judges to impose any "just" orders for failures to make discovery. Recent studies have shown, nevertheless, that sanctions are seldom sought, that judges frequently do not even rule on motions for sanctions, and that no substantial sanction is imposed even when motions to compel are granted.

The FJC discovery study, published in 1978, found 7,117 requests for discovery in the cases studied. Motions for sanctions were made in connection with less than 1% of all requests. No ruling was made in almost one-half of the motions, though of the rulings made, some 74.3% were granted. Rulings were much more frequently made on motions for sanctions filed under rule 37(b), for the violation of a discovery order (72.7%), than under rule 37(d) where no prior compelling order had been entered (32.4%). Professor Ellington's more recent study of sanctions for discovery abuse also found a low level of requests for sanctions. Motions for sanctions appeared in only about 5% of the cases involving some discovery activity, or about 2% of all cases. No ruling was made on 33% of the sanctions motions recorded. Of the rulings made, only 37% granted a sanction. Taking into account motions on which no rulings were made, only 38.8% of all motions for sanctions were granted in the FJC study, and 24.4% in the Ellington study. Significantly, the combined results of the FJC and the

willfulness element on rule 37. Id. at 495. Professor Rosenberg's suggestion that the title to rule 37 be changed from "Refusal to Make Discovery" to "Failure to Make Discovery," id. at 497, was adopted by the 1970 Amendments. See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 485, 538, Rule 37 advisory committee note (1970).

92 Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, supra note 91, at 539, Rule 37 advisory committee note.
93 Id. at 541-42, Rule 37 advisory committee note.
94 Id. at 540-41, Rule 37 advisory committee note.
95 Id. at 539, Rule 37 advisory committee note.
96 Discovery, supra note 1, at 24.
97 See id.
98 Id.
99 Id. at 25.
100 C. ELLINGTON, supra note 7, at 62-76.
101 See id. at 17, 63.
102 Id. at 63.
103 Id.
Ellington studies show that only 45% of the motions for sanctions involving a prior court order under rule 37(b) are ultimately granted.\textsuperscript{104}

The results are similar in connection with requests for costs caused by discovery abuse. Ellington distinguished requests for costs from motions for such sanctions as striking of pleadings or other monetary sanctions not directly related to an aggrieved party’s expenses.\textsuperscript{105} Approximately one-half of the discovery motions studied by Ellington included requests for costs.\textsuperscript{106} Of those motions to compel that included a request for costs, over one-half were granted, but in only one-third of those successful motions were costs actually awarded.\textsuperscript{107} Of the relatively small number of motions for protective orders that included requests for costs, over one-half were granted; but only one-half of the motions granted resulted in an award of costs.\textsuperscript{108} These results are particularly striking when one considers that the 1970 amendments to the federal rules were intended to make the award of costs a routine feature of successful discovery motions.\textsuperscript{109}

The frequency with which judges impose monetary sanctions upon attorneys was not reported in these studies. An estimation of how frequently judges in the Second Circuit impose such sanctions is provided by the results of a brief questionnaire, to which thirty-five responses were received. Over one-half of the judges responding (twenty) indicated that they have imposed monetary sanctions upon attorneys rather than clients. Of these twenty, however, only three have done so more than five times during their entire judicial careers. Two judges believed that there was no need for sanctions where the court closely supervised discovery. As Professor Ellington’s more scientific survey concluded, “[a] decided majority of the

\footnotesize{\textsuperscript{104} Id. at 63.  
\textsuperscript{105} Id. at 62 n.20.  
\textsuperscript{106} Id. at 74.  
\textsuperscript{107} Id. at 75.  
\textsuperscript{108} Id.  
\textsuperscript{109} Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, supra note 91, at 539, Rule 37 advisory committee note. The 1970 amendments changed the language of rule 37(a)(4) to provide that expenses be awarded “unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(a)(4). The advisory committee states that this language was meant to provide that “expenses should ordinarily be awarded unless the court finds that the losing party acted justifiably in carrying his point to court.” Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, supra note 91, at 540, Rule 37 advisory committee note (emphasis added).}
judges reported that they 'seldom' or 'almost never' award the costs of bringing or opposing a discovery-related motion."

The Advisory Committee’s decision to encourage greater use of monetary sanctions, particularly against attorneys, is sound. While some judges are able to manage discovery without resort to any form of sanction, most judges need to impose sanctions as one of the several devices to encourage compliance with the rules and with court orders. Moreover, some attorney misconduct is too flagrantly abusive to let pass unpunished. Furthermore, sanctions are not designed merely to punish or deter improper conduct. They also serve the important purpose of restitution, enabling courts to rectify the improper imposition of costs on one party by another, or enabling judges to require parties who waste public resources to pay to the United States the excessive costs they have imposed.

1. Advantages of Monetary Sanctions

Monetary sanctions for discovery abuse have great potential utility. A monetary sanction does not affect the merits of the litigation in which it is imposed. Nonmonetary sanctions, on the other hand, such as dismissals or the exclusion of evidence, directly affect the merits, often controlling the result. Courts consequently

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110 C. Ellington, supra note 7, at 8.

111 See, e.g., Underwood, supra note 4, at 654-60. As examples of discovery abuse, Professor Underwood notes the Berkey Photo-Eastman Kodak antitrust litigation, see Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977), and Penthouse Int’l v. Playboy Enters., 86 F.R.D. 396 (S.D.N.Y. 1980), aff’d, 663 F.2d 371 (2d Cir. 1981). Underwood, supra note 4, at 654-60. In Berkey Photo, attorneys concealed documents while claiming in court that they had been accidentally destroyed. Renfrew, supra note 4, at 265; see Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 305-08 (2d Cir. 1979). In Penthouse International, the court dismissed Penthouse’s complaint because of its attorney’s discovery abuse. 86 F.R.D. at 406-07; see Underwood, supra note 4, at 657-58.

Some recent appellate decisions punishing lawyers for flagrantly abusive conduct should encourage greater sensitivity to the difficulties that trial courts face. For example, in United States v. Potamkin Cadillac Corp., 689 F.2d 379 (2d Cir. 1982) (per curiam), the Second Circuit assessed double costs and $500 attorney’s fees against Potamkin and its attorney for bringing a frivolous appeal of summary judgment. Id. at 380. Potamkin then moved, pursuant to rule 60(b)(2), to vacate the district court’s judgment on the ground of newly discovered evidence. United States v. Potamkin Cadillac Corp., 697 F.2d 491, 492 (2d Cir. 1983). The motion was denied and Potamkin appealed. Id. The Second Circuit concluded that Potamkin’s attorney had “unduly delayed the termination of [the] litigation,” and again assessed double costs and $500 in attorney’s fees to be paid personally by Potamkin’s attorney. Id.

112 See infra note 142.
are reluctant to impose or uphold drastic nonmonetary sanctions. At a relatively early stage in the development of the federal discovery rules, for example, the Second Circuit regarded as too severe the entry of a default judgment for failure to appear at a deposition. The court stated, "[i]n the final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of willful default." The United States Supreme Court reached a similar result in Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, in which dismissal was held to be an excessive sanction, where the plaintiff's failure to produce had been "due to inability, and not to willfulness, bad faith, or any fault of petitioner." Recent decisions, in particular the Supreme Court's holding in National Hockey League v. Metropolitan Hockey Club, Inc. and the Second Circuit's ruling in Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., have made clear that dis-

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113 Gill v. Stolow, 240 F.2d 669, 670 (2d Cir. 1957). In Stolow, the plaintiff in a breach of warranty and fraud action was awarded damages of $18,000 plus interest and costs when one of the defendants refused to return from Germany to have his deposition taken. Id.
114 Id.
116 Id. at 212 (footnote omitted).
117 427 U.S. 639 (1976) (per curiam). In National Hockey League, a district court had dismissed respondents' antitrust action under rule 37, for failure to answer timely petitioners' written interrogatories. 427 U.S. at 639. The district court stated that 17 months elapsed while the interrogatories remained unanswered despite the court's many warnings to respondents. In re Professional Hockey Antitrust Litig., 63 F.R.D. 641, 656 (E.D. Pa. 1974). The Supreme Court upheld the district court's finding that the failure was due to respondents' counsel's "flagrant bad faith" and "callous disregard" of the responsibilities owed to the court and to their opponents. 427 U.S. at 640-43. The Court determined that it was not an abuse of the district court's discretion to conclude that, under the circumstances, the severe sanction of dismissal was warranted. Id. at 643.
118 602 F.2d 1062 (2d Cir. 1979). In Cine Forty-Second Street, the plaintiff had opened a movie theatre and brought an action for treble damages alleging antitrust violations by neighboring theatres and motion picture distributors. Id. at 1064. Discovery on the issue of damages continued for 3 years while plaintiffs delayed and failed to answer adequately defendants' interrogatories, notwithstanding the admonitions of the magistrate. Id. at 1064-65. The magistrate determined that Cine's noncompliance with her orders was wilful. She therefore recommended to the district court that Cine be precluded from introducing evidence on the issue of damages. Id. at 1065. The district judge held that, since there was a possibility that Cine's failure to answer did not rise to the level of bad faith or wilfulness, a lesser sanction was more appropriate. Id. On appeal, the Second Circuit reversed, holding that where counsel's failure to answer discovery interrogatories is due to "gross negligence amounting to a 'total dereliction of professional responsibility' but not a conscious disregard of court orders," id. at 1067, a sufficient basis still exists for a court in its discretion to "order a preclusion of evidence tantamount to the dismissal of a claim under [rule] 37," id.
missal remains within a judge's discretion when noncompliance with a court order is intentional and unexcused. Notably, however, National Hockey League was predicated upon a finding of bad faith,\textsuperscript{119} and the court in Cine Forty-Second Street expressly cautioned against dismissal or other harsh sanctions until less drastic measures had been tried, and unless "gross professional negligence is found."\textsuperscript{120}

The close scrutiny to which appellate courts subject decisions imposing severe nonmonetary sanctions renders such measures impractical for routine use in curbing discovery abuse. One survey found that, in the 16 months after National Hockey League, circuit courts reversed about one-half of the forty-four dismissals and default judgments entered under rule 37.\textsuperscript{121} Another study found:

In spite of the seeming dispositive teaching of the Supreme Court's opinion in the National Hockey League case that the imposition of [immunity] sanctions for the failure to make prompt discovery is to be favorably regarded by the reviewing courts, the willfulness standard continues to permit many loopholes. The trial judges continue to be reluctant to impose [immunity] sanctions except for flagrant violations of discovery orders and reviewing courts continue to reverse a substantial portion of cases where nonmonetary discovery sanctions have been imposed.\textsuperscript{122}

\textsuperscript{119} 427 U.S. at 643; see supra note 117.
\textsuperscript{120} 602 F.2d at 1068; see Donnelly v. Johns-Manville Sales Corp., 677 F.2d 339, 343 (3d Cir. 1982) (dismissal for failure to obtain local counsel reversed, and use of lesser sanction suggested); Schwarz v. United States, 384 F.2d 833, 835-36 (2d Cir. 1967) (dismissal for failure to prepare for trial upheld, but imposition of substantial costs on attorney suggested). The extent to which circuit courts have required that severe sanctions not be applied until lesser alternatives have failed is reflected in Titus v. Mercedes Benz of N. Am., 695 F.2d 746 (3d Cir. 1982). There, the Third Circuit remanded for reconsideration in light of Donnelly v. Johns-Manville Sales Corp., a dismissal based upon plaintiffs' counsel's failure to attend pretrial conferences and to comply with several directions and orders. Id. at 747. It was suggested by Judge Garth in dissent that the court, in vacating the dismissal of this action, in which the plaintiff four times failed to comply with pretrial orders of the district court, now signal[s] the bar that a district court's procedural rules and orders can be ignored or can be violated with impunity. By so doing, this court significantly undermines the ability of district court judges to manage litigation efficiently and deprives the district court of one of the few sanctions available to it. Id. at 761 (Garth, J., dissenting) (emphasis in original). The district court, reacting with predictable frustration, dismissed the complaint on remand. 96 F.R.D. 404, 405-06 (D.N.J. 1982).

Appellate courts, on the other hand, are less likely to interfere with monetary sanctions imposed for discovery abuse.\(^2\) Although the standard for review of any form of legislatively authorized sanction is “abuse of discretion,” a dismissal or default judgment is generally subjected to a higher standard of appellate scrutiny than a monetary sanction.\(^3\) Moreover, as a practical matter, district judges are subject to considerably less scrutiny in imposing monetary sanctions inasmuch as such sanctions usually are deemed interlocutory and not subject to immediate appeal.\(^4\)

Monetary sanctions have other important advantages. They can be adapted to fit each particular case, since the amount to be imposed is flexible. Furthermore, unlike nonmonetary sanctions, which inevitably benefit one party at the expense of the other, a

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1. See generally Sanctions Imposable, supra note 26, at 8-56 (citing various examples of appellate courts’ tendency to reverse sanctions imposed for violation of the Federal Rules of Civil Procedure); Renfrew, supra note 4, at 276 (“[t]rial judges cannot deal effectively with abuse of the judicial process unless appellate tribunals are willing to back them up, and to date the necessary support has not been always found”).

2. See Sanctions Imposable, supra note 26, at 28; Epstein, Corcoran, Krieger & Carr, supra note 122, at 172. For examples of cases in which an appellate court upheld the imposition of monetary sanctions, see Litton Sys., Inc. v. AT&T, 700 F.2d 785, 827-28 (2d Cir. 1983) (upholding denial of $10 million in antitrust attorney’s fees as a sanction for discovery abuse); Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1375 (10th Cir.), cert. denied, 439 U.S. 833 (1978).

3. Sanctions Imposable, supra note 26, at 11. The same study noted: “Abuse will be found when there is a showing of manifest injustice. The harsh sanctions of dismissal and default are generally subject to stricter scrutiny reflecting the appellate court’s attitude that district court judges should use these sanctions only when the punishment fits the crime.” Id. at 102 n.39. Moreover, as the Supreme Court has observed: “The due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers.” Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 n.14 (1980). The Second Circuit recently made explicit its preference for monetary over substantive sanctions. In upholding a district court’s denial of $10 million in attorney’s fees to a prevailing antitrust plaintiff which had engaged in various forms of discovery abuse, the court specifically rejected the defendant’s assertion that discovery abuse in the case warranted dismissal. Litton Sys., Inc. v. AT&T, 700 F.2d at 828.

monetary sanction calling for payment into court can be used to punish one litigant without helping the other, or to punish both parties without affecting the merits.126

Finally, one of the primary reasons courts are reluctant to impose nonmonetary sanctions, such as dismissal or exclusion of evidence, is that such sanctions fall upon innocent clients, rather than upon the attorneys responsible for discovery abuse. Monetary sanctions afford courts the flexibility to target sanctions at the parties they find most responsible for abusing the discovery process.127 Courts can thereby attempt to obtain both specific and general deterrent effects by tailoring their imposition of these sanctions on a case-by-case basis.128

2. Propriety of Sanctioning Attorneys

Several factors support imposing sanctions directly upon clients. The attorney-client relationship lends itself to an agency analysis in which the client as principal hires the attorney to achieve the goal of succeeding in litigation.129 An agency theory is particularly appropriate when, as is generally the case in major liti-


127 See Litton Sys., Inc. v. AT&T, 700 F.2d 785, 827-28 (2d Cir. 1983) (denial of $10 million in attorney's fees may appropriately penalize both plaintiff and plaintiff's attorney); United States v. Potamkin Cadillac Corp., 697 F.2d 491, 493-94 (2d Cir. 1983) (per curiam) (double costs and attorney's fees imposed upon lawyer and client for bringing a frivolous appeal; sanction imposed "jointly and severally, since attorney and client are in the best position between them to determine who caused this appeal to be taken"); Ches Int'l, Ltd. v. Fashion Assoc., Inc., 425 F. Supp. 234, 237-38 (S.D.N.Y.) (attorney's fees awarded to plaintiff because of defendant's failure to comply with a Special Master's order; Special Master's finding that defendant's attorney be jointly and severally liable for the award affirmed, "because [defendant's lawyer] was the attorney advising the party failing to obey the order, [and] because the Master found that he 'contributed significantly to the pattern of delay and defiance'"), aff'd, 573 F.2d 1288 (2d Cir. 1977).

128 See W. SCHWARZER, MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION § 8-1, at 147-49 (1982) (suggests criteria courts could use to tailor sanctions for maximum effectiveness in curbing discovery abuses). That general deterrence of discovery misuse is a proper consideration of a district court in setting sanctions was made clear in National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642-43 (1976) (per curiam). See DISCOVERY, supra note 1, at 22; Note, supra note 2, at 1046-47.

129 See Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962) ("[p]etitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. . . . [E]ach party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney' ") (quoting Smith v. Ayer, 101 U.S. 320, 326 (1879)). See generally SANCTIONS IMPOSABLE, supra note 26, at 70-73.
gation, the client has in-house counsel who reviews the outside attorney's discovery activity. Furthermore, such liability effectively serves the goal of deterring abuse in litigation, since a client who shares the risks of additional costs will review the attorney's activity more carefully than one who is not exposed to such potential liability. Finally, the agency theory makes sense as a practical matter, since an attorney usually will be able to pass on to his client at least part of the cost of the sanctions imposed upon him.130

Despite these considerations in favor of holding the client responsible for monetary sanctions, stronger considerations may dictate the imposition of such sanctions upon attorneys, either jointly with their clients, or alone. The attorney is responsible for formulating and implementing litigation strategy, including any discovery abuse. The attorney's responsibility is also of a different character than that of the client; as an officer of the court, an attorney has public and professional duties that go far beyond those of his client,131 and the courts are obliged, through their supervisory authority, to enforce these strictures. Moreover, the deterrent intent of monetary sanctions is most likely to be achieved by sanctioning attorneys. Some attorneys consciously abuse or at least manipulate the discovery process, and will continue to do so unless punished.132 Attorney conduct is also most likely to be affected by a

130 The ABA Special Committee has recognized that monetary sanctions levied against an attorney may be passed on by the attorney to his client. To avoid this result, the Committee has recommended an addition to rule 37 specifically providing that, when a court imposes a monetary sanction upon an attorney, "the attorney or his firm shall satisfy such sanction and shall not, directly or indirectly, charge any portion of such sanction to his client or receive or accept [sic] any portion of such sanction from his client." Section on Litigation, ABA, Second Report of the Special Committee for the Study of Discovery Abuse 18a (1980).

131 See Hickman v. Taylor, 329 U.S. 495, 510 (1947); Litton Sys., Inc. v. AT&T, 700 F.2d 785, 827 (2d Cir. 1983) ("there is no doubt that attorneys as officers of the court, must operate on an honor system, . . . and must be appropriately disciplined to provide both specific and general deterrence"); Hirschkop v. Sneed, 594 F.2d 356, 366 (4th Cir. 1979) ("[l]awyers are officers of the court, subject to reprimand and the imposition of other disciplinary sanctions for the violations of rules to which non-lawyers are not subject. The lawyer . . . owes substantial duties to the court and to the public as well"); Edelstein, The Ethics of Dilatory Motion Practice: Time for Change, 44 Fordham L. Rev. 1069, 1071-75 (1976) (discussing the applicability of the ABA Code of Professional Responsibility to dilatory motion practice); Underwood, supra note 4, at 646-49.

132 Brazil, Civil Discovery, supra note 58, at 846-59. Of the 169 attorneys responding to Professor Brazil's study, 99% admitted that tactics played a part in the scheduling of discovery events, id. at 848, and this occurred in 75% of the interviewed group's cases, id. at 849. Among the primary tactical purposes were: (1) gaining time or slowing down part or all of an action, id. at 852-53; (2) distracting the opponent's attention from or obscuring the
monetary sanction, irrespective of its amount. Attorneys have their professional reputations at stake, and a succession of such sanctions may lead to serious disciplinary consequences.\textsuperscript{133}

Sanctions imposed expressly upon attorneys will also frequently have a meaningful financial impact. Attorneys are not always able to shift the cost of a financial sanction to their clients. In cases where the lawyer works on flat-fee and some contingent-fee arrangements, and where the attorney in effect has no client, such as in class actions and declaratory judgment proceedings by institutional plaintiffs,\textsuperscript{134} attorneys will often find it difficult or impossible to shift the cost of a sanction. Certainly in those intensely litigated cases in which the court sets the attorney's fee and expenses,\textsuperscript{135} financial punishment can be imposed effectively upon

existence of information, \textit{id.} at 854-55; and (3) imposing work burdens or economic pressure on the other party or attorney, \textit{id.} at 856-57. Commenting on practices such as these, Justice Powell noted that “discovery techniques have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice.” \textit{Herbert v. Lando}, 441 U.S. 153, 179 (1979) (Powell, J., concurring).

\textsuperscript{133} \textit{See generally} Noteware, \textit{supra} note 7, at 478-79; Werner, \textit{supra} note 121, at 325-27.

\textsuperscript{134} \textit{See Federal Judicial Center, Attorney's Fees in Class Actions} 25-26 (A. Miller ed. 1980) [hereinafter cited as \textit{CLASS ACTIONS}] (some lawsuits become class actions because the increase in the number of clients will allow attorneys to receive larger fees). Often, in class actions, a single fund will be created to satisfy the claims of both represented clients and those who are not parties to the action. \textit{Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.}, 487 F.2d 161, 164 (3d Cir. 1973). Attorneys who represent some of the claimants may petition the court for fees based upon the amount of the fund to be recovered by the unrepresented claimants. \textit{id.}

\textsuperscript{135} \textit{See, e.g.,} \textit{Barker v. Bledsoe}, 85 F.R.D. 545, 549 (W.D. Okla. 1979); \textit{Associated Radio Serv. Co. v. Page Airways, Inc.}, 73 F.R.D. 633, 636 (N.D. Tex. 1977). Intensely litigated or “high-volume” cases are defined as those in which eleven or more discovery requests were made. \textit{Discovery, supra} note 1, at 28.

Courts are using their power to set attorney's fees to deal with a number of different problems raised by modern litigation. For instance, fee inflation is claimed by some to have become a serious problem in civil rights litigation since the passage of the Civil Rights Attorney's Fees Awards Act of 1976, which permits the prevailing party to receive “a reasonable attorney's fee as part of the costs.” \textit{CLASS ACTIONS, supra} note 134, at 20-21; \textit{see Act of Oct. 19, 1976, Pub. L. No. 94-559, 90 Stat. 2641 (current version at 42 U.S.C. § 1988 (1976 & Supp. IV 1980))}. In order to prevent attorneys from profiting unduly from a court award of fees, some courts are basing fee awards on the time and labor actually spent in the preparation of the case. \textit{E.g.,} \textit{City of Detroit v. Grinnell Corp.}, 495 F.2d 448, 455-61 (2d Cir. 1974); \textit{Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.}, 487 F.2d 161, 166-69 (3d Cir. 1973); \textit{see CLASS ACTIONS, supra} note 134, at 60-62.

Another problem courts are meeting by fixing attorney fee awards is the organizational dilemma posed by class actions stemming from mass disasters. In such cases, selected counsel, upon settlement of the action, may be awarded larger fees than the rest of the attorneys involved in the case, since they expend greater effort in coordinating the massive amounts of documents generated by the litigation. \textit{See, e.g., In re Air Crash Disaster at Florida Everglades, 549 F.2d 1006, 1014-17 (6th Cir. 1977)}. The Fifth Circuit noted that, while a number
the attorney. Even when an attorney is being paid by the hour, he may have difficulty justifying the shifting of a sanction to some clients, and other clients may be concerned that a sanctioned attorney may be a less effective attorney in the long run.

Sanctions based upon abusive conduct, especially when they are imposed for deterrent purposes, are a form of discipline. This disciplinary element of sanctions leads attorneys to claim, and courts to afford, the benefits of procedural protections. Summary decisions imposing monetary sanctions on attorneys are, some might argue, an improper circumvention of procedures normally and properly required before imposing discipline.

Summary procedures have long been used, however, to punish attorneys for improper conduct. Although in the past the conduct punished by summary procedures may have been more contemptuous of the court than abusive of the rights of others, the judiciary can use the same authority to punish, within proper limits, the conduct that it now perceives as a threat to the just, speedy and efficient disposition of cases. The failure of attorney disciplinary mechanisms to handle efficiently the many complaints filed against lawyers is good cause to avoid rather than to embrace that model of adjudication. So long as the attorney is given an opportunity to be heard on the facts at issue, including the propriety of a sanction and its amount, no other procedural formality should be required. The fact that monetary sanctions may serve to punish attorneys summarily for misconduct is one of its attractive features, providing a mechanism for swift but moderate discipline measured by the economic harm the attorney has inflicted.

3. Need for Sanctioning Authority

The Advisory Committee proposals would grant district courts of other circuits had designated “lead counsel” to coordinate mass litigation, none had attempted to order extra compensation for them out of the fees of other attorneys working on the case. Id. at 1015-20.

136 See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam); SANCTIONS IMPOSABLE, supra note 26, at 26-28; cf. W. Schwarzer, supra note 128, § 8-2, at 156 (sanctions are different than “fines”).

137 See infra note 145. Courts are cautious about imposing certain sanctions out of fear of further delaying disposition of actions. See Litton Sys., Inc. v. AT&T, 90 F.R.D. 410, 421 (S.D.N.Y. 1981) (court postponed imposing sanctions due to risk that trial on merits would have to be repeated if the Second Circuit reversed or disapproved of the sanctions imposed), aff’d, 700 F.2d 785 (2d Cir. 1983).

138 See Note, supra note 4, at 619-40.
authority to impose monetary sanctions in several specific situations not presently covered by the rules.\(^{139}\) The Committee also noted the need to avoid unduly time-consuming procedures which would rob the sanctions of their effectiveness.\(^{140}\) In those situations covered by the proposed rules, the use of sanctions will be substantially encouraged by eliminating doubts as to the authority and procedure for imposing costs. Courts will remain in doubt, however, as to their authority to impose monetary sanctions in other situations, and they cannot safely read the Committee's notes as authorizing any material change in the procedures now generally followed. Sanctions will not be regularly utilized until these doubts are eliminated and with them the threat of appellate reversal for abuse of discretion or a procedural defect.

The time has come to create a single provision in the federal rules that grants district judges the power to impose monetary sanctions for any violation of the rules, measured by the costs imposed upon any other party, including attorney's fees, or by the excess costs which the violation imposed upon the courts.\(^{141}\)

The new rule should permit judges to order the payment of monetary sanctions into court. Presently, authority to enter such an order is questionable.\(^{142}\) Some judges have extrapolated the authority to order payment of a monetary sanction into the court from rule 41(b), which provides for dismissal for lack of prosecution, or from rule 37(b)(2)(C), which authorizes a judgment of default, arguing that if a dismissal or default judgment is proper, the lesser punishment of a fine should also be permissible. This line of reasoning is appropriate, however, only when dismissal or default would not be an abuse of discretion, a determination which is itself

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\(^{139}\) See, e.g., PROPOSED AMENDMENTS, supra note 11, Rule 26(g).

\(^{140}\) Id. Rule 26(g) advisory committee note.

\(^{141}\) See, e.g., SANCTIONS IMPOSABLE, supra note 26, at 89 (proposed amendment to rule 37 would authorize reimbursement to the United States for "costs incurred by the court and its personnel").

\(^{142}\) See United States v. Ross, 535 F.2d 346, 347 (6th Cir. 1976). In Ross, an attorney who failed to appear when his client's case was called to trial because he was in the midst of defending another criminal action was assessed "the costs of summoning a jury venire of 42 persons." Id. On appeal, the Sixth Circuit reversed, holding that the expense of a jury is not a cost within the meaning of section 1929 of title 28. Id. at 350-51; see 28 U.S.C. § 1927 (1976). Further, the court noted that costs may be imposed only when they "are taxable by statute or by established practice or rule of court based on statute . . . ." 535 F.2d at 357 (quoting Gleckman v. United States, 80 F.2d 394, 403 (8th Cir. 1935), cert. denied, 297 U.S. 709 (1936)).
often fraught with uncertainty.\textsuperscript{143} The court’s inherent power may well authorize the imposition of a monetary sanction for conduct that would not justify dismissal or default, but reliance on this inherent power has proved unsatisfactory.\textsuperscript{144} Thus, the general reluctance to impose sanctions will continue so long as courts must rationalize the propriety of their actions by inference or intuition.

The new rule should also expressly authorize a summary procedure for imposing monetary sanctions. Motions for sanctions should be made in the usual manner, with notice and an affidavit stating the basis for imposing costs and justifying the amount sought. A court should be free to alter this procedure, however, when the judge proposes to impose a sanction on his own motion, or when the judge is personally familiar with the relevant facts. In such situations, the judge should be free to impose the sanction immediately, within the proper monetary limits, as long as the attorney or the party facing the sanction is given an adequate opportunity to be heard as to why the sanction should not be imposed, and as to the proper amount.\textsuperscript{145} The judge should also be authorized to order immediate payment of a monetary sanction. Present practice usually leaves collection to the end of the litigation, when

\textsuperscript{143} See Donnelly v. Johns-Manville Sales Corp., 677 F.2d 339, 342-44 (3d Cir. 1982); Bardin v. Mondon, 298 F.2d 235, 237-38 (2d Cir. 1961). In Bardin, the Second Circuit explicitly recognized the crowded condition of the court calendar in the Southern District of New York, 298 F.2d at 237, and found that the district court had exercised its discretion in a reasonable manner when it dismissed the action with prejudice, id. at 238. Because of its concern for the party, the court of appeals nevertheless remanded the case, instructing the district court to dismiss without prejudice, and imposed sanctions on the plaintiff’s attorney. Id.

\textsuperscript{144} Renfrew, supra note 4, at 268-69 (“courts . . . have inherent power to impose sanctions for abuse of the judicial process,” but “[a]n amendment of rule 37 explicitly authorizing such sanctions is desirable”); see Gleckman v. United States, 80 F.2d 394, 403 (8th Cir. 1935), cert. denied, 297 U.S. 709 (1936); supra notes 27-30 and accompanying text.

\textsuperscript{145} See Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 & n.14 (1980) (attorney’s fees should not be assessed without notice and an opportunity to be heard). Prior notice and hearing appear to be mandated in summary assessment proceedings by the requirements of procedural due process. Note, supra note 28, at 883-84; Sanctions Listed in Proposed Federal Rules for Discovery, N.Y.L.J., Sept. 29, 1982, at 30, col. 4. Aside from due process considerations, it has been suggested that such procedural safeguards are also compelled by policy considerations since they tend to ensure greater reliability in the proceedings, prevent hasty decisions, and serve to ensure the preservation of adequate records for appeal. Note, supra note 28, at 890. The form of notice and hearing required will vary depending upon the facts of each case and the sanction to be imposed. See id. at 885; Sanctions Listed in Proposed Federal Rules for Discovery, supra, at 30, col. 4. In an individual case, the court should attempt to balance “the individual’s interest against the court’s need to act quickly.” Note, supra note 28, at 887.
its economic significance is often diminished or negated by settlement or recovery. Immediate appeals would be permissible when immediate payment is ordered; but appeals will seldom be taken, and should pose few problems.

III. LIMITS ON THE UTILITY OF SANCTIONS

The call for increased use of monetary sanctions to curb discovery abuse should be heeded. It will, however, lead to highly undesirable consequences if sanctions are relied upon too heavily. The reluctance of district judges to impose sanctions is based upon legitimate considerations of efficacy and practicality, to which the Advisory Committee has given insufficient weight.

A. Disadvantages of Imposing Sanctions

Professor Ellington's survey and analyses by Judges Renfrew and Schwarzer note several reasons for the relatively infrequent imposition of sanctions. First, close supervision greatly reduces the need to impose sanctions. When a sanction becomes

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146 C. Ellington, supra note 7, at 108-17. Professor Ellington observes that sanctions are mainly employed only to enforce court-ordered discovery, and then only after warnings and second-chance opportunities to comply have been given. Id. at 110. The Ellington study also cites the clean-hands doctrine as a factor in the unwillingness of the judiciary to impose sanctions. Id. at 111-12. Additionally, there exists a judicial reluctance to engage in the policing function of imposing sanctions on litigants, which is perceived as tangential from the "main mission . . . of trying cases." Id. at 112. Further, professional and social ties between bench and bar, and the desire of judges to maintain good working relationships with attorneys, contribute to the reluctance to impose sanctions. Id. at 112-13. Several judges have expressed the concern that imposition of sanctions has the counterproductive effect of reducing the chance of settlement between the parties. Id. at 113. Finally, Professor Ellington notes the general preference of the courts to decide cases on the merits, rather than on the basis of discovery violations. Id. at 115.

147 Renfrew, supra note 4, at 271-78. Judge Renfrew marks several reasons for the judicial reluctance to impose sanctions. First, lawyers infrequently seek sanctions and judges often defer to the attorneys' decisions. Id. at 272. Second, there is the reluctance to "make the client suffer for the sins of his attorney." Id. at 273. Finally, there are the concerns that increased use of judicially imposed sanctions will lead to a limitation or denial of a full hearing on the merits, id. at 277-78, and more importantly, will result in an abuse of motions for sanctions, id. at 278.

148 W. Schwarzer, supra note 128, § 8-1, at 145-49. The tension and emotion inherent in circumstances in which sanctions are warranted, coupled with the judge's calendar burdens, make difficult any objective exercise of the court's discretion in sanctioning matters. Id. at 146-48.

149 Renfrew, supra note 4, at 280. One supervisory procedure which is recommended for curbing discovery abuse is the use of periodic status conferences at which parties to the litigation must explain their overall strategy. Id. at 280-81. Based upon such an informal
necessary, an able judge will tend to blame himself as well as the offending attorney, and would prefer to supervise the litigation more closely rather than punish the lawyer. Many judges also believe that sanctions, particularly sanctions against attorneys, are counterproductive. Often, punishing lawyers will change the atmosphere in which a judge works from one of cooperation to one that is combative and less effective in bringing controversies to just, speedy, and inexpensive resolutions.\textsuperscript{180} While the claim that close pretrial supervision may bias a judge against one party or another is, in general, baseless, the argument may gain considerable, justified support if judges routinely resort to sanctions that hurt feelings and reputations.\textsuperscript{181} Further, monetary sanctions are often deemed inappropriate because the party seeking them is also at fault. Sanctioning more than one lawyer simultaneously does not make the court's task any easier.

The imposition of sanctions consumes two scarce judicial resources—time and energy. United States district judges each received an average of over 400 new civil filings during the fiscal year ending June 30, 1982.\textsuperscript{182} To keep pace with this rate of filings, the average judge has to close about 7.7 civil cases every week, in addi-

conference, the judge can determine the time for compliance with the relevant discovery requests. Other potentially effective means of supervision include imposing a filing limit on the number of interrogatories which are not court approved, setting earlier deadlines for the completion of discovery procedures, and refusing "to postpone those deadlines without a showing of good cause." \textit{Id. at 281}. Thus, in light of these supervisory procedures, it has been suggested that sanctions must be "viewed as auxiliary relief, not primary means of control." Pollack, \textit{Discovery—Its Abuse and Correction}, 80 F.R.D. 219, 226 (1978).

\textsuperscript{180} See C. ELLINGTON, supra note 7, at 112-14.

As Judge Weinstein stated at the 1981 Second Circuit Conference:

\begin{quote}
In my opinion, any system that requires force, that doesn't revolve around the collegial consensus of the bar and the courts about what is right—with some guidance in individual cases, of course—is not working properly. . . .
\end{quote}

We can talk to each other, we can work out attitudinal changes, we can do a lot in the way of education, but when you reach the point of having to force independent lawyers of substance or independent judges of substance, then you are in trouble.

\textsuperscript{93} F.R.D. 675, 785 (1981).

\textsuperscript{181} See generally Resnik, \textit{supra} note 85, at 391-93, 424-31 (arguing that judicial management of aspects of litigation such as discovery threatens traditional due process safeguards).

\textsuperscript{182} \textsc{Administrative Office of the U.S. Courts, Management Statistics for United States Courts} 131 (1982) [hereinafter cited as \textsc{Management Statistics for U.S. Courts}]. This figure represents an increase of approximately 50 filings per judgeship from 1981 and of 100 filings per judgeship from 1979. \textit{Id. Total filings—civil and criminal—in the district courts increased by 13.8 percent over the previous year, and by nearly 40 percent over the level in 1977. Id.}
tion to handling a significant criminal workload under the constraints of the Speedy Trial Act. Judges can seldom afford the time to go through the procedural steps necessary to impose monetary sanctions, even when it is clear that a sanction would be justified. Consequently, when practical, judges usually will opt for nondisciplinary resolution of a problem.

Many judges are not convinced that imposing monetary sanctions will significantly deter abusive conduct. While the reasons for this disbelief are seldom articulated, they include the knowledge that discovery abuse is predominantly found in a small group of cases and does not permeate the system; that ad hoc, unpublished sanctions cannot be expected to affect attorney behavior profoundly; that an adversary system must tolerate some excesses; that parties who allow their lawyers to run up huge bills in discovery are generally aware of the proceedings and approve because it is in their interest to do so; and that it seems incongruous to compensate a party for its expenses on a discovery motion at the cost of additional judicial resources that cannot be recovered from the offending party.

These considerations should not be taken lightly. They are valid perceptions of the limited utility in imposing sanctions, monetary or otherwise, on attorneys. They refer to problems that might be addressed through reform, such as clear sanctioning authority in some situations not presently covered by the federal rules, summary procedures, and mechanisms to enable judges to require one or more of the parties to pay sanctions into the court. But they

153 According to the National Judicial Workload Profile, there were approximately 44 criminal filings per judgeship in 1982, in addition to the civil filings. Id. While this figure is substantially less than the number of civil filings handled by each district court judge, see supra note 152, its significance becomes clear in light of the time limits imposed by the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1976 & Supp. IV 1980). The purpose of the Speedy Trial Act was to expedite criminal proceedings pending in the federal courts. See United States v. Hillegas, 578 F.2d 453, 456 (2d Cir. 1978); United States v. Strand, 566 F.2d 530, 532-33 (5th Cir. 1978). Thus, for example, the Act requires that in a case in which the defendant enters a plea of not guilty, his trial "shall commence within seventy days from the filing date . . . of the information or indictment, or from the date [of appearance] before a judicial officer . . . ." 18 U.S.C. § 3161(c)(1) (Supp. IV 1980). Calendar congestion is an insufficient reason for delaying enforcement of the provisions of the Act. See United States v. Drummond, 511 F.2d 1049, 1053 (2d Cir. 1975).

154 See generally Levy, supra note 6, at 468-69. Levy observes that, given the enormous dollar amount at stake, it is unlikely that a change in the discovery rules will affect the parties in fighting "for each precious advantage." Id. at 469. "[S]o long as we adhere to the adversary system," . . . "the tensions and disputes will continue." Id. at 470.

155 One report concluded that the limited effectiveness of current sanctions indicates
also embody an irreducible set of arguments against excessive reliance on sanctions as a vehicle for curbing discovery abuse.

Perhaps the greatest lesson to be learned from these considerations is that monetary sanctions should not be mandatory. The Advisory Committee repeatedly emphasizes in its recommendations that the proposed sanctions must to some extent be used. Particularly questionable is the requirement of a mandatory sanction under proposed rule 26(g). By requiring a sanction of some kind for every violation of rule 26, the provision gives no consideration to the many practical and equitable factors that might counteract the imposition of a sanction. Moreover, mandatory sanctions invite “soft” readings of the requirements they seek to enforce, as judges turn to alternatives to avoid inappropriate sanctions. Mandatory sanction provisions will also justify appeals by those whose opponents are not sanctioned, in addition to appeals by those who are sanctioned, thus encouraging collateral proceedings that would tend to negate any benefits the new requirements might otherwise produce. Sanctions should be left where they belong, in the trial court’s discretion.

the necessity of expanding the court’s sanctioning powers, including the authority to require “reimbursement to the government for time spent and costs incurred by the court . . . .” SANCTIONS IMPOSSIBLE, supra note 26, at 86. Indeed, it was noted that, although such payments are normally made directly to the opposing parties, they are at times directed to the court’s library fund. Id. at 130 n.157; see McIlvaine, Compliance By Counsel: A District Judge’s Views As To the Means of Insuring Compliance By Counsel With the Pretrial Procedures, 29 F.R.D. 408, 411 (1962). Such costs levied on the attorney are viewed by the courts as being of a disciplinary or punitive nature. SANCTIONS IMPOSSIBLE, supra note 26, at 28.

158 See, e.g., PROPOSED AMENDMENTS, supra note 11, Rule 26(g) advisory committee note.

159 While sanction decisions are currently appealed, the appeals are generally dismissed as within the discretion of the trial court. SANCTIONS IMPOSSIBLE, supra note 26, at 8; e.g., Britt v. Corporacion Peruana DeVapores, 506 F.2d 927, 932 (5th Cir. 1975); Humble v. Mountain State Const. Co., 441 F.2d 816, 819 (6th Cir. 1971); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1125-26 (5th Cir.), cert. denied, 400 U.S. 878 (1970). One method of discouraging such appeals, particularly from the award of monetary sanctions limited to the actual costs and attorney’s fees expended, would be to authorize appellate courts, in their discretion, to award costs and attorney’s fees for any such appeal that is unsuccessful. Compare the suggestion in note 62, supra, concerning appeals from a magistrate’s discovery rulings.
B. Underlying Causes of Discovery Abuse

The utility of sanctions must also be evaluated in light of the underlying causes of discovery abuse. Excessive discovery is prompted by practices and rules that operate as powerful incentives for abusive conduct or as disincentives for more responsible behavior. To succeed in reducing substantially the costs of litigation, one must identify the practices and rules that encourage discovery abuse, and modify them to encourage responsibly limited discovery. Well-intentioned directives, threats of punishment, and calls for less adversary behavior can have no significant effect upon the underlying causes of discovery abuse.

Discovery abuse exists because some litigation is itself abusive. An examination of some of the categories of cases that generate the greatest amount of discovery conflict shows that a large proportion are ultimately found to lack merit. Class actions of all kinds, for example, have high rates of dismissal.\(^{160}\) Even where recoveries are obtained through settlement, as in many securities and antitrust cases, there is often evidence that the costs and risks of litigation, rather than any merit to the claims, prompted the defendant's willingness to settle.\(^{161}\) Meritless claims or defenses generate controversy in discovery; one side will argue that little or no discovery is necessary, while the other will seek as much discovery and delay as possible.

The present system imposes only nominal costs for the right to sue and to consume the public resources expended in running


\(^{161}\) An antitrust suit typically involves an overwhelming number of documents and depositions. W. Schwarzer, supra note 128, § 1-1, at 1; Durham & Dibble, Certification: A Practical Device for Early Screening of Spurious Antitrust Litigation, 1978 B.Y.U. L. Rev. 299, 301; Kirkham, Complex Civil Litigation—Have Good Intentions Gone Awa?, 70 F.R.D. 199, 203 (1976). The burden of dealing with this volume of evidence may result in a party's decision to settle an otherwise valid claim. See W. Schwarzer, supra note 128, § 1-1, at 8; Byrnes, supra note 160, at 25; Note, supra note 160, at 1154. While settlement is favored, "settlement coerced by intolerable litigation burdens depreciates the justice system." W. Schwarzer, supra note 128, § 1-1, at 8.
If a valuable commodity can be obtained at nominal cost, or, as with in forma pauperis litigation, for nothing, the commodity will be consumed without the restraint and responsibility that a higher, though still subsidized, cost would encourage. Furthermore, litigation incentives also exist in many cases, because of the low rates of prejudgment interest awarded in the federal courts. A party who owes money, or knows that he will eventually have to satisfy a claim, will consider the cost of contesting the claim as against the cost of paying it. With interest rates over the last several years ranging between 12 and 20 percent and the prejudgment rate for the federal courts in New York only recently raised to 9 percent from the long-standing 6 percent figure, the courts, not surprisingly, have been subjected to unnecessary litigation—including unnecessary discovery costs—because it pays defendants to refuse or to delay satisfying obligations or liabilities. The prejudgment interest rate must be raised to a point that will discourage litigation, not engender it.

162 See 28 U.S.C. § 1914 (Supp. V 1981). A filing fee of $60 is required in the district court for the institution of all civil suits. Id. § 1914(a). In addition, the clerk of each court must collect such additional fees as are prescribed by the Judicial Conference of the United States. Id. § 1914(b) (1976). For a revised schedule of filing and miscellaneous fees to be charged by the district courts as prescribed by the Judicial Conference, see Judicial Conference Schedule of Additional Fees, as amended March 5-6, 1980, reprinted in 28 U.S.C. § 1914 (Supp. V 1981).

163 See 28 U.S.C. § 1915 (1976 & Supp. V 1981). Section 1915(a) of title 28 provides: "Any court of the United States may authorize the commencement . . . of any suit, action or proceeding, civil or criminal, . . . without prepayment of fees and costs . . . by a person who makes affidavit that he is unable to pay such costs or give security therefore." Id. § 1915(a) (1976). Following the filing of the requisite affidavit, the district court may direct the Administrative Office of the United States Courts to pay the "expense of printing the record on appeal." Id. § 1915(b) (Supp. V 1981).

164 A review of prisoner petitions in federal court illustrates the freedom with which meritless claims are filed in forma pauperis. Prisoner petitions represented 15.3 percent of all cases filed in federal court during fiscal year 1981, and state prisoner petitions led all other types of cases filed in annual percentage increase (20.6 percent). Annual Report of the Director, supra note 160, at 60-63. Whereas only 40.8 percent of all federal question cases were terminated by the court without pretrial action, between 85.4 percent and 90.6 percent of the prisoner petitions, depending on the category, were disposed of in this manner. Id. at A-26.


166 Congress adopted in 1982 a statute recommended by the Judicial Conference establishing a formula for calculating postjudgment interest rates during the pendency of appeals at a level approximating the market rate of interest on United States Treasury Bills. See
Massive discovery also occurs because Congress and the Executive permit the use of the federal courts as the forum for litigating highly complex, political, and social issues.\textsuperscript{167} For example, the recent cases of \textit{United States v. IBM}\textsuperscript{168} and \textit{United States v. AT&T}\textsuperscript{169} generated discovery costs equal to the costs generated by hundreds or thousands of ordinary cases.\textsuperscript{170} In cases such as these, in which the issues are so vague and conceptually seamless, and the stakes are so high, the parties involved will press to discover every conceivably useful piece of evidence, while at the same time vigorously opposing discovery by their opponents. Large, dynamic corporations do not lightly accept efforts by the government or private persons to subject them to damages that reach the hundreds of millions\textsuperscript{171} and threaten their very existence. Controversies touching the public, such as suits to correct the effects of discrimination,\textsuperscript{172} or to improve conditions in jails or mental institutions,\textsuperscript{173}
or to implement school desegregation, are often hard-fought by both sides at all stages.

Discovery is also made costly because of the legal theories on which courts have permitted suits to proceed, and because many standards of law on important issues have been left unsettled by appellate courts for long periods of time. Expanded notions of strict liability, for example, enable plaintiffs to file complaints in which they need do little more than allege an injury that is believed to have resulted from some dangerous instrumentality or activity, and this will generally entitle them to search for an explanation through discovery. Civil rights claims permit persons of any race, sex, or religion, people over 40 years old, handicapped persons, and prisoners, to litigate on mere subjective belief, or on totally unsupported allegations. Once deemed properly com-

trial in the lower courts had been delayed for 2 years "to permit extensive pretrial discovery and legislative investigation." Id. at 6 n.4.

173 See, e.g., Wyatt v. Stickney, 325 F. Supp. 781, 782-83 (M.D. Ala. 1971), aff'd sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (class action brought by guardians of patients confined to mental hospital and by a number of hospital employees alleging treatment programs were so inadequate as to deprive patients of constitutional rights). In a discussion of the Wyatt case, two commentators underscore the complexity of such "institutional" litigation, and the extensive demands that resolution of such a controversy places on the courts. See Eisenberg & Yeazell, supra note 167, at 468-70. In addition, litigation involving prisoners is also quite detailed and often requires consideration of issues previously left to other branches of government. Id. at 470-73.

174 See, e.g., Brown v. Board of Educ., 347 U.S. 483, 487-88 (1954). In Brown, the Supreme Court for the first time directly confronted the issue of whether the Constitution mandates racially nondiscriminatory school systems. Id. at 492-93. Due to the large number of factors involved in the controversy, as well as the "nationwide importance" of its decision, see id. at 484-85, the Supreme Court invited briefs from the Attorney General of the United States and the Attorneys General of all states which either allowed or required racial discrimination in their school systems. Id. For a general discussion of the difficulties inherent in the school desegregation cases, see Bickel, The Decade of School Desegregation: Progress and Prospects, 64 COLUM. L. REV. 193, 193-218 (1964).


menced, these cases generate substantial costs, including discovery costs, which often fall upon public and quasi-public entities such as universities and hospitals, in addition to private defendants.177 The standards imposed on trial courts in ruling on motions for summary judgment make the granting of such motions rare events, and consequently require claims with little or no merit to be fully litigated.178 Further, many statutes and common-law rules turn on state of mind or other subjective evidence; these generate more discovery than those which rest on objective standards.179 In some very intensely litigated areas, especially under the securities

western Indem., 88 F.R.D. 191, 194-95 (S.D. Ohio 1980) (plaintiffs permitted to discover detailed information about defendant's computer system to develop their theory of defendant's discriminatory denial of home insurance). The court in Dunn stated that the federal discovery rules were meant to be construed liberally, especially in "complex civil rights cases." Dunn, 88 F.R.D. at 194-95.

177 See ABA, supra note 5, at 191; Brazil, Adversary Character, supra note 3, at 1319-20. It is ironic that the original justification for liberalizing the federal discovery rules was the saving of time and judicial resources that was expected to result from encouraging settlements and improving trial efficiency. Id. at 1303.

178 See Fed. R. Civ. P. 56(e). Federal Rule 56(e) provides in pertinent part:

When a motion for summary judgment is made and supported [with affidavits] as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.


179 Common-law rules requiring evidence concerning state of mind or subjective impressions include the "actual malice" requirement in libel actions brought against media defendants by public officials, see New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), scienter, or intent to deceive, in cases involving corporate fraud, see Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193, 201 (1976), and damages for pain and suffering in personal injury actions, see In re Air Crash Disaster Near Chicago, Ill., 507 F. Supp. 21, 22-24 (N.D. Ill. 1980). State of mind is also an important element in actions based on certain modern statutes. Typical examples include the use of domicile to establish federal diversity jurisdiction, see Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir.), cert. denied, 419 U.S. 842 (1974), and the "good faith" requirement of the Uniform Commercial Code, see U.C.C. § 1-203 (1978); Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195, 207-10 (1968).

The discovery costs imposed by amorphous state of mind rules are exacerbated by the difficulty of meeting the state of mind criteria. For example, the Supreme Court, in New York Times, admitted that "many deserving plaintiffs . . . will be unable to surmount the barrier of the New York Times test . . . ." 376 U.S. at 342. Furthermore, difficulty in meeting one's burden of proof is conducive of a number of forms of discovery abuse, such as compelling one's opponent to overspend on his own discovery efforts in an attempt to force a settlement. See Brazil, Adversary Character, supra note 3, at 1319.
antitrust laws, it is unclear which of two or more standards will apply, and parties are forced to discover and litigate on all possible theories to make a complete record.\textsuperscript{180}

Our rules of evidence, and the lax manner in which they are enforced, add to the pressure for broad discovery. For example, evidence of subsequent improvements in a practice or device is not admissible to prove negligence at the time of an accident.\textsuperscript{181} If this rule were strictly enforced, a party could avoid what sometimes amounts to costly discovery by seeking protection under the rule. The rule is riddled with exceptions, however, both legislatively and judicially engrafted, that render it virtually useless as a limitation on discovery.\textsuperscript{182} Other potential bases for limiting the scope of in-

\textsuperscript{180} See, e.g., Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 35 (1977); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741-42 (1975). Piper involved an attempt to establish a private cause of action for tender offerors injured by a violation of section 14(e) of the Securities Exchange Act, 15 U.S.C. § 78n(e) (1976), which prohibits misleading statements in tender offer solicitations. Piper, 430 U.S. at 24. The Court refused to permit such a remedy, contending that the legislative history of section 14(e) indicated that it was intended to protect shareholders, not defeated tender offerors. Id. at 34-35.

\textsuperscript{181} Blue Chips Stamps dealt with the issue of whether a party who had relied on misleading statements in a company’s prospectus resulting in a lost opportunity to purchase stock could bring an action under rule 10b-5 of the Securities and Exchange Commission. Blue Chips Stamps, 421 U.S. at 727. The Court refused to grant the relief requested, stating that permitting such suits was likely to encourage “vexatious” litigation. Id. at 740. The Court discussed two reasons why this type of action would be conducive to such litigation. First, the opportunities for discovery abuse are much greater in the securities law field than in other fields because tactics to compel disclosure in securities litigation may be pursued solely to frustrate normal business activity. See id. at 740-41. The breadth of federal discovery rules would, when combined with this type of action, create a situation in which even the weakest cases could only be disposed by trials. Id. at 742. Second, the trier of fact would have to wrestle with “many rather hazy issues of historical fact, the proof of which depend[s] almost entirely on oral testimony.” Id. at 743.

\textsuperscript{182} See Fed. R. Evid. 407.

Evidence of subsequent repairs, while not as a general rule admissible to prove the defendant’s negligence, is admissible to prove other issues. Subsequent repairs have been held admissible to show (1) the defendant had ownership or control of the premises on which the plaintiff was injured, see Powers v. J.B. Michael & Co., 329 F.2d 674, 677 (6th Cir.), cert. denied, 377 U.S. 980 (1976), (2) a duty to repair the condition, see Wallner v. Kitchens of Sara Lee, Inc., 419 F.2d 1028, 1032 (7th Cir. 1969), (3) the feasibility of preventive measures, see Boeing Airplane Co. v. Brown, 291 F.2d 310, 315 (9th Cir. 1961), (4) that the condition which allegedly caused the injury existed at the time of the injury, see Spurr v. LaSalle Constr. Co., 385 F.2d 322, 327-28 (7th Cir. 1967), and invariably (5) that the defective condition caused the injury, Farner v. Paccar, Inc., 562 F.2d 518, 528 (8th Cir. 1977). One court, in fact, has gone so far as to claim that “[e]vidence of post-accident repairs or changes is properly introduced for any purpose except to demonstrate the negligence of a defendant.” Wallner, 419 F.2d at 1032 (emphasis added). Indeed, such evidence may be admissible even to show negligence, if the subsequent repairs were performed by a nonparty. See Louisville & Nashville R.R. v. Williams, 370 F.2d 839, 843-44 (5th Cir. 1966).
quiry similarly have been eroded, particularly the hearsay rule, and the rule against parol evidence.\textsuperscript{183}

Perhaps the mightiest catalyst for discovery abuse is the so-called American Rule, under which unsuccessful litigants do not pay their opponent’s attorney’s fees, even those made necessary by their failure to drop or settle a losing cause.\textsuperscript{184} The effect of this rule on discovery is profound: a party can have as much discovery as it wants by paying only the costs of seeking that discovery; the costs of compliance are generally borne without recompense by the opposing party. This means that a party can inflict the costs of collecting, organizing, duplicating, and delivering documents simply by asking for them; or can impose the costs of obtaining answers to burdensome interrogatories simply by asking questions; or can trigger the costs of depositions, simply by demanding the presence of witnesses and examining them. No express authority exists that would enable courts to require parties to pay in advance for the discovery they claim is necessary, although in egregious cases courts occasionally impose such a condition.\textsuperscript{185} Seeking discovery is therefore made artificially cheap, encouraging its indiscriminate use, and enhancing its utility as a form of economic coercion.

The relatively low cost of seeking discovery leads all parties, not just plaintiffs, to engage in excessive discovery. Attorneys may seek unnecessarily broad discovery simply as a means of self-de-
defense against the economic coercion of discovery by opponents. By seeking massive discovery against a party that has already sought extensive discovery, the attorney conveys a message to his opponent that he intends to make the costs of litigating equal, thereby tending to deter broad requests. Alternatively, resistance to discovery may be the most effective means for defending against excessive discovery. A vigorous defense will tend to deter excessive demands, albeit also increasing the costs of reasonable demands. These defensive tactics are repugnant to the idea of justice, but it is not surprising that people will use the resources of others wastefully when they are under no obligation to pay, nor that those whose resources are being used will seek to deter or increase the price of costly demands.186

The economic incentives for discovery abuse have also been increased by hourly billing practices. As Professor Rosenberg and Judge Warren King have noted, modern billing practices have created for lawyers

a pleasing convergence of two strong motivations: their professional urge to leave no stone unturned in preparing the case through pretrial discovery, and their economic interest in increasing the number of billable hours they devote to the case. . . . [I]n cases that can tolerate it, discovery is an end in itself, without much reference to whether the incremental value of discovered materials is at least equal to the cost in energy and fees of getting them.187

The incentive for abuse, paradoxically, is greatest in cases in which an attorney has no paying client to whom to answer. For example, the government's only constraints on how much it can spend on discovery are political.188 Attorneys for plaintiffs in class action

186 See Levy, supra note 6, at 471. Levy recognizes that “[e]xtensive discovery efforts as well as attempts to delay or fight discovery could easily be justified as protecting the client.” Id. On a more profit-oriented level, however, large law firms view the hourly-based billing procedure as a tremendous source of revenue. The litigation practice of such firms flourishes as a result of the use of liberal discovery and the increased costs associated with it. Id.

187 Rosenberg & King, supra note 4, at 582 (footnote omitted). The hourly fee has the effect of removing any incentive to resolve issues as quickly as possible. In addition, it encourages overuse of discovery and litigation. Levy, supra note 6, at 471; see supra note 185 and accompanying text. Some commentators have suggested the implementation of a system of contingent fees for defense attorneys as means to limit discovery abuse.

188 See Eisenberg & Yeazell, supra note 167, at 506-10. The allocation of public funds has raised numerous questions regarding the appropriateness of government spending on discovery. Id. at 506. In institutional litigation, “[t]he existence of judicial authority to allocate funds raises particular concern in the new litigation because some of what courts order
suits and in contingency fee situations must often finance discovery, operating as a constraint on the types of cases they will commence. Once a judgment is made that a recovery is likely, however, the incentives for unnecessary discovery in such cases become even greater than usual, since discovery costs are recoverable out of the settlement or award.\(^{188}\) In fact, unnecessary discovery is encouraged by the “lodestar” approach for computing attorney’s fees in class actions and other cases.\(^{189}\) The costs of discovery are virtually guaranteed to be recovered as part of the lodestar, at least to the extent that the amount sought falls between 20 and 30% of the total recovery;\(^ {190}\) to recover sums not spent on discovery or trial, on the other hand, lawyers must convince the judge to add to the lodestar, a hazardous and sometimes unsuccessful business.\(^ {191}\) This approach in effect pays attorneys for all discovery, including as a practical matter most unnecessary attempts to obtain or to resist disclosures.

Nor can we look to defense counsel for protection against abusive practices in such cases, since extensive discovery may also be attractive to them.\(^ {192}\) As Milton Gould recently wrote:

Many years ago, I heard an eminent defense lawyer compare the lawyers for plaintiffs to the Apaches who harassed the wagon trains in the Old West. But now, the defense lawyers seem to wel-

\(^{188}\) See City of Detroit v. Grinnell Corp., 495 F.2d 448, 471 (2d Cir. 1974). Grinnell and Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973) are among the leading cases that advanced the lodestar approach. The hourly rate may, of course, vary with the type of work done.

\(^{189}\) The “lodestar” approach to fee-setting has been defined as “the number of hours reasonably expended multiplied by a reasonable hourly rate.” Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980). As a result, an attorney’s final fee calculation increases with the number of hours expended on pretrial discovery.\(^ {193}\)

\(^{190}\) See National Ass’n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1329 (D.C. Cir. 1982) (per curiam); Copeland v. Marshall, 641 F.2d 880, 892 (D.C. Cir. 1980).

\(^{191}\) See National Ass’n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1328 (D.C. Cir. 1982) (per curiam) (detailed showing required for adjustment of lodestar figure). In Copeland v. Marshall, 675 F.2d 880 (D.C. Cir. 1980), the court listed three factors to be considered in the adjustment of the lodestar, namely, the risk of an unsuccessful outcome, resulting in no fee to the attorney; additional compensation for delayed payment of fees to the attorney; and an adjustment reflecting “the quality of representation” performed by the attorney. \(id.\) at 892-94.

\(^{192}\) See N.Y.L.J., Dec. 1, 1982, at 3, col. 1. Defense counsel’s reluctance to cooperate can result in prolonged litigation. See, e.g., Ohio v. Crofters, Inc., 75 F.R.D. 12, 15-20 (D. Colo. 1977). In Crofters, a failure to comply with numerous court demands for the production of documents resulted in discovery lasting over 5 years. \(id.\) This abuse eventually led to the imposition of sanctions on the defendant. \(id.\) at 25; see Werner, supra note 121, at 313.
come the derivative suit as an opportunity for young partners and associates to sit in endless depositions, while the clock ticks away the golden hours.\[184\]

The purpose in reviewing these powerful incentives for discovery abuse is not to suggest that every practice contributing to abuse must be changed. We are irrevocably wedded to many of these practices, and we even love some of them. If we are prepared, however, to do no more than urge attorneys to conform to vague standards and threaten to sanction them for any departure, we will have little impact upon discovery abuse. More fundamental changes are necessary.

IV. CONCLUSION

The federal rule changes approved by the Supreme Court in 1983 should contribute materially to curbing discovery abuse. The certifications enacted for rules 7, 11, and 26 are all meaningful, and would impose stringent but proper responsibilities upon lawyers. The strength and importance of these certifications should lead, however, to limits on their applicability; they are unnecessary for routine discovery motions and filings, and the substantial costs of their overbroad application should be avoided. The mandatory scheduling orders embodied in rule 16 should also be limited to those cases in which close management is necessary. District judges may need to be required to manage cases more closely, in order to curb discovery abuse, but close management should not be mandated merely to achieve swifter closings in cases that presently close quickly enough.

Monetary sanctions, particularly those imposed upon attorneys, can play a useful part in the economic calculus that affects the judgments of attorneys and parties in seeking or opposing discovery. If the courts are assured of clear authority to impose such sanctions, without procedural delays, they will be able effectively to increase the costs of abusive requests or noncooperation. Furthermore, the practical availability of monetary sanctions will give

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\[184\] N.Y.L.J., Dec. 6, 1982, at 3, col. 1. The use of discovery has traditionally been the domain of plaintiffs' attorneys. Defendants were left only with the duty to respond to interrogatories initiated by the plaintiff. G. RAGLAND, supra note 1, at 32. The ease of initiating modern discovery, however, coupled with the extra time which it affords the party seeking discovery, has encouraged defendants to use this technique. Some commentators have suggested that discovery may be used by wealthy defendants who wish to force plaintiffs to agree to low settlement offers. Werner, supra note 121, at 304.
respondents to overbroad discovery demands a real alternative to discovery warfare—one intended to bring about a more equitable allocation of discovery costs. The potential utility of monetary sanctions will be undercut, however, if they are overzealously imposed, or if their imposition is made mandatory.

The federal rule changes provide important new authority to impose sanctions for discovery abuse. While these changes are necessary, with their adoption the federal rules will contain several, varied sanctioning provisions. These scattered provisions should be eliminated, for they promote uncertainty, and fail to provide clear authority for monetary sanctions in several situations warranting their imposition. The Advisory Committee should also do more than merely urge district judges to avoid time-consuming procedures in imposing sanctions. District courts, and parties, need a single rule granting clear authority to impose monetary sanctions for any violation of the federal rules, within the limits of actual costs, and with procedural simplicity.

Finally, the changes in rules 7 and 11 could be read to provide significant authority for federal judges to shift the costs of meritless litigation and abusive discovery. The certification required by those rules is far more exacting than the old rule 11 affirmation, in that the new certifications require a reasonable inquiry into the merits and the Advisory Committee’s notes insist that the change is meant to create an objective standard of good faith. If the changes are read as they are intended, rules 7 and 11 would enable the winner of any motion, including a motion to dismiss or for summary judgment, to seek attorney’s fees. A court could then, in appropriate cases, grant such requests, and award to the successful party the costs of all the litigation made necessary by an improper complaint, answer, motion, or defense to a motion. The Supreme Court should uphold the use of these changes by courts to offset the gross injustices that present practice permits Americans to inflict upon each other by commencing meritless litigation, or by asserting meritless defenses. Carefully applied, rules 7 and 11 could constitute the single most constructive measure against litigation abuse adopted since 1938.

The Advisory Committee should also adopt other mechanisms for shifting the costs of litigation in appropriate situations. One change presently under consideration by the Judicial Conference, for example, would modify rule 68—the offer of judgment rule—to enable both parties to make such an offer and to include attorney’s
fees as recoverable costs in the event less is recovered than was offered under the rule. Another change that seems desirable is to clarify and broaden the district court's discretion to appoint masters, paid for by the parties, to conduct all discovery in cases where extensive discovery is inevitable, and where the parties are uncooperative. Unlike the calls for monetary sanctions in the recently amended rules expressly addressed to discovery, changes such as these could lead to the development of meaningful limits on some of the antisocial economic incentives that underlie our system of law.

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1 Federal Rule 68 currently provides a mechanism that a defendant can employ to avoid paying the costs (not including attorney's fees) of his lawsuit if he happens to lose. Up to 10 days before the trial, the defendant must serve a written offer to settle, "with costs then accrued," upon his opponent in order to invoke the rule. See Fed. R. Civ. P. 68. If the offer is not accepted within 10 days of service, it is considered withdrawn, and if the offeree is awarded a judgment for an amount less than that of the written offer, he must pay all costs incurred after the offer was made. Id. The primary purpose of this rule is to induce settlements. See Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607, 610 (E.D.N.Y. 1974). This may be why the rule "applies only to offers made by the defendant and only to judgments obtained by the plaintiff." Delta Air Lines, Inc., v. August, 450 U.S. 346, 351-52 (1981). Another purported benefit of the rule is that it prevents a successful plaintiff "from forcing a defendant to pay costs by making an exorbitant demand." Perkins v. New Orleans Athletic Club, 429 F. Supp. 661, 666 (E.D. La. 1976).