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MODERN DISCOVERY: REMARKS FROM THE DEFENSE BAR

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The curbing of discovery abuse is an issue of general concern for all those who take an interest in the evolution of our legal process. It is of particular interest for me, however, as General Counsel of International Business Machines Corporation (IBM), the most discovered company in America. My views have been influenced, in some measure, by having borne witness to the surprising number of lawyers that have poured through the records of Tom Watson,¹ scrutinizing his activities for the Boys Scouts of America, in hope of finding some smoking gun in those files. Thus, although my personal sentiment is strong, I would like to start with a less particularized discussion of the topic at hand.

It seems evident that litigation has become so expensive as to make it quite an unsatisfactory method of resolving disputes.² Discovery and the rules of discovery have a great deal to do with this. Although additional sanctions against attorneys will have some ameliorative impact on discovery abuse,³ it is doubtful that these sanctions are in any sense a solution to modern discovery problems.

Adequate legal authority for necessary sanctions against counsel or against the party are available under the current law.⁴ The

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¹ Thomas J. Watson Jr. was Chairman of the Board of Directors of IBM from May 1961 to June 1971.

² See Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RESEARCH J. 217, 234; Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 203 (1976) (“[t]o put it bluntly, the courts and the profession have slept while the processes we employ to achieve substantive determinations have swallowed up the capacity to make such determinations”).

³ U.S. JUD. CONF., PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (1982) Rule 26(g) advisory committee note adopting as amended COMM. ON RULES OF PRAC. AND PROC., U.S. JUD. CONF., PRELIMINARY DRAFT OF THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (1981), reported in Nat'l L.J., Oct. 11, 1982, at 13, col. 3, and N.Y.L.J., Sept. 29, 1982, at 1, col. 2.

⁴ See *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 351-60 (D. Conn. 1981); 28 U.S.C. § 1927 (Supp. V 1981); FED. R. CIV. P. 11. See generally Renfrew, *Discovery*

presence of these sanctions, however, diverts attention from the conduct of the attorney in the case.⁵ It is the job of the attorney to be more efficient⁶ and effective in conducting discovery. The problem of abusive discovery is likely to be much more a problem of the individual incompetence and ineptitude of the lawyers involved than it is of any grander conspiracy. Quite simply, it seems that they are not as conscientiously prepared⁷ as they should be and we all should face up to that problem. Several illustrations of this from IBM's own litigation history readily come to mind.

For example, Frank Cary, who was the Chief Executive Officer of IBM, was deposed by the private plaintiffs and the Government in the action for a total of 45 days. In one of the last depositions, which was 11 years into the case, and 2 or 3 years after the Government rested, the questions asked clearly indicated that the attorneys involved had never read any of the earlier depositions. A random sampling proves the point: "Where is the corporate office of IBM?"; "Would you provide please the present address of each corporate staff officer?"; "What are IBM's two world trade groups called?"; "Are any computer systems manufactured by the data systems division?"; "Who is the head of the general products division?"; "What is the approximate size and square feet of the facility at Poughkeepsie?"; "What is the approximate size and square feet of the data plant?"; "What is the Federal Systems Division?"; "Does the chief executive play any role in planning?"; "When did

Sanctions: A Judicial Perspective, 67 CALIF. L. REV. 264, 267-71 (1979); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 640 (1977).

⁵ See Liman, *The Quantum of Discovery vs. the Quality of Justice: More is Less*, 4 LITIGATION 8, 8 (Fall 1977); Renfrew, *supra* note 4, at 281. Additional sanctions "will not curb excesses unless the bar's attitude toward discovery shifts from indulgence to self-restraint." Liman, *supra*, at 8. The recent shift in judicial emphasis in favor of using sanctions as a deterrent to future abuse may help achieve such a change of attitude. See generally Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1044-54 (1978).

⁶ See Brazil, *supra* note 2, at 230. In a study conducted by Professor Brazil, the interviewed attorneys subscribed to the theory that in larger cases inefficiency was the dominant characteristic. *Id.* In addition, Professor Brazil identified the "inertia of style" phenomenon, which explains the tendency of lawyers to develop a "pattern" of discovery techniques. The pattern may not be appropriate in one particular situation, but nonetheless it is followed with the "rigidity" of a "habit." *Id.* at 238-43.

⁷ See *id.* at 237. Overdiscovery may be caused by "failure to study or to understand information that is available from one's own client or that has been produced by others." *Id.* Interrogatories, for example, often contain questions which are clearly inapplicable. Flegal & Umin, *Curbing Discovery Abuse in Civil Litigation: We're Not There Yet*, 1981 B.Y.U. L. REV. 597, 605.

you become chairman?"

This example is keenly illustrative of the fact that depositions have become an unexamined way of life. My father was a trial lawyer, and it seems unfortunate that the heirs to his craft will come to be characterized as deposition lawyers. The reason for this is that unlike a trial, the inartful or dilatory deposition is without substantial effect. This trivialization, combined with the fact that money can be made in the bargain, has created a climate of enormous inefficiency.⁸

It is important to note, however, that in many cases there are no such problems.⁹ For a judge to involve himself in the discovery process when his involvement has not been requested by the lawyers handling the case therefore would be a mistake.¹⁰ There is an important factor militating against the position that judges should get involved regardless of whether they are needed. If either lawyer wants a judge involved in the case, however, judicial participation should be forthcoming. It appears that the real problems occur in cases in which the claims themselves are incredibly broad, such as those ordinarily found in antitrust, securities and environmental law.¹¹ These cases are complex precisely because they are unfocused, and they are unfocused because the law is very general and uncertain.¹² Everything therefore becomes discoverable and

⁸ See Renfrew, *supra* note 4, at 278-79.

⁹ Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253, 255 (1979). The Special Committee for the Study of Discovery Abuse of the American Bar Association's Section of Litigation posited, "abuse of discovery, while very serious in certain cases, is not so general as to require basic changes in the rules that govern discovery in all cases." Umin, *Discovery Reform: A New Era or Business as Usual?*, 65 A.B.A. J. 1050, 1050 (1979). Professor Brazil identified two "subworlds" of litigation cases: the small, relatively routine and simple case, and the large, complex case. Brazil, *supra* note 2, at 218. In the small case, except for scheduling difficulties and delay, discovery is not seen as a "problem" since it consumes less time and resources than in larger cases. *Id.* at 223. As a case becomes more complex, however, the tendency is to exhibit more of the characteristics which typify the "discovery abuse syndrome." *Id.* at 229-30.

¹⁰ Cohn, *supra* note 9, at 254; Flegal & Umin, *supra* note 7, at 603. Generally, a judge will not become involved in the discovery process unless there is a "problem." Cohn, *supra* note 9, at 254-55; Flegal & Umin, *supra* note 7, at 603. This is due in part to "judicial faith in the zeal of lawyers" to seek aid when it is needed. Renfrew, *supra* note 4, at 272.

¹¹ See Kirkham, *supra* note 2, at 202; American College of Trial Lawyers, *Recommendations on Major Issues Affecting Complex Litigation*, 90 F.R.D. 207, 215 (1981) [hereinafter cited as *Complex Litigation*].

¹² McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27, 27 (1950) ("[t]he offense established by the Sherman Act has never been sharply defined"); see Kirkham, *supra* note 2, at 202. In the typical large antitrust suit, the com-

the parameters of discovery are greatly expanded. A second orientation fueling increased discovery is the sense that one must get all the facts that one can in order to figure out some theory of recovery.¹³

The same principles can be applied to the defendant in a lawsuit. The precise problem arises when a claim of damages against the defendant is for a very large amount of money. In this situation, the only defense strategy is to scrutinize every possible business problem of the plaintiff that might have accounted for those damages. It appears almost mandatory, from my personal experience, that the defendant enlarge the scope of discovery so as to mitigate his damages.

Another factor which encourages abusive discovery is the sheer volume of discoverable items.¹⁴ When the rules were promulgated in the 1930's, my father had access to neither daily transcripts nor computer printouts. Such deprivation not only made things a great deal more efficient, but also assured the safety of

plaint states "little more than that defendants have conspired to restrain trade. Explosive advocacy immediately takes over and discovery knows no bounds." Kirkham, *supra* note 2, at 203; *accord* McKinstry, *Civil Discovery Reform*, 14 FORUM 790, 793-97 (1979). In one large securities case, 150,000 pages of deposition and transcript testimony were prepared, *In re United States Fin. Sec. Litig.*, 75 F.R.D. 702, 707 (S.D. Cal. 1977), and a set of interrogatories 381 pages long was served, *In re United States Fin. Sec. Litig.*, 74 F.R.D. 497, 497 (S.D. Cal. 1975). For an interesting procedure used to avoid "fishing expeditions," see Durham & Dibble, *Certification: A Practical Device for Early Screening of Spurious Antitrust Litigation*, 1978 B.Y.U. L. Rev. 299, 299-300.

¹³ See Kirkham, *supra* note 2, at 204. Often, complaints will be filed "to gain access to discovery, which [the parties] use, not to find evidence to support their claim, but to discover whether they have any claim at all." Renfrew, *supra* note 4, at 266 (footnote omitted). If there is a good-faith belief that an actual claim exists, there is no justification for refusing this opportunity to vindicate the party's rights. See *id.* Frequently, however, "neither the client nor the attorney has any reason to believe in good faith that a claim exists, but hopes that something may turn up in discovery that would support a claim." *Id.* at 266-67; see also Brazil, *supra* note 2, at 236 (overdiscovery is "easier than thinking" and is often a result of the failure to develop clear theories of liability). *But cf.* *Sims v. Mack Truck Corp.*, 488 F. Supp. 592, 608 (E.D. Pa. 1980) (Sherman Act claim dismissed, district court noting, "[t]he courts of appeals have been conscious of the danger present in general allegations of anti-trust violations").

¹⁴ See FED. R. CIV. P. 26(b)(1) ("[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action"). In *Hickman v. Taylor*, 329 U.S. 495 (1947), the Supreme Court stated that the discovery rules are to be accorded "broad and liberal treatment." *Id.* at 507. This statement has spawned an extremely lenient judicial approach as to what is "discoverable." C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 81, at 354 (1970). When, however, discovery results in "millions of papers, . . . we should . . . consider whether noble experiments have gone awry." Kirkham, *supra* note 2, at 202.

America's forests for future generations. Not only is the modern attorney entitled to get much more information, but there is a great deal more information to be obtained.

Concededly, it is doubtful that narrowing discovery is very likely to make good lawyers out of bad ones or even make good judges out of bad ones. Narrowing discovery, however, does serve some purpose. Thus, although the rules read as though one is entitled to discovery as a matter of right, this entitlement terminates when a judge takes control and begins to marshal rules which restrict one's access to information. As long as the judge is reasonable and fair and displays a critical sensibility, an attorney's ability to argue that he is entitled to some information as a matter of right when he is unable to give valid reasons for such access will be severely curtailed.

In the antitrust, securities and environmental law areas no discovery should be permitted until the parties have produced a statement of issues from both points of view and any factual stipulations. In a case of this sort, the judge should encourage the parties to act expeditiously on this clarification by making it nonbinding and permitting amendments. Specific criteria must be developed against which the judge can assess the discovery that the party wishes to undertake.¹⁵ It seems that, typically, in complex cases the facts are not in dispute. It is almost always the inferences that people draw from the facts which create differences of opinion. Thus, it appears feasible that one could indeed stipulate much of the bare bones facts.

I have two final suggestions. One is a typical defendant's suggestion: expanding a judge's discretion to actual costs, including attorney's fees.¹⁶ Adoption of the English rule¹⁷ would operate, not

¹⁵ See generally *Complex Litigation*, *supra* note 11, at 212-26. Judges are generally unequipped to handle the massive amounts of paper involved in complex litigation. As a result, the courts tend to allow plaintiffs to examine anything they request, whether it is relevant or not. Kirkham, *supra* note 2, at 203. Therefore, many commentators have expressed the need for "discovery management" by the court. See McKinstry, *supra* note 12, at 797-98 ("[i]n complex litigation it is considered essential for the court to take charge of discovery at the beginning, require the issues to be specified and limit discovery to the specific issues").

¹⁶ See Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 794 (1966).

¹⁷ In England, the courts have the authority to award attorney's fees to the prevailing party and, in practice, often do so. See Note, *Attorney's Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319, 320 (1977). The "American rule," which states that attorney's fees are not recoverable, is the general practice in the United States. Alyeska Pipeline

so much as a sanction, but as a means of making attorneys aware of the fact that somebody has to pay those bills and it is not always the other fellow. I am inclined to think this is a defendant's position because the plaintiffs, who most of the time can recover their actual attorney's fees,¹⁸ by and large already think in these terms.

The other suggestion is a simple one dealing with contingency fees. Although I believe in contingency fees, they are unnecessary to the extent that attorneys receive a multi-million dollar stake in the case. A rule that would serve to correct this situation could provide that contingencies are available at whatever percentage one bargains for, but it may not exceed a reasonable multiple of the normal hourly rate.

In short, it seems to me that the foundation for improving the discovery process is a change in the attitudes¹⁹ and the financial expectations of the lawyers involved. Sanctions may not be the ultimate concern. I think it is very difficult for a judge really to control the discovery process. I do not think they like to, and I think the rules accord them a convenient excuse not to do so. I would suggest, however, that one cannot impose sanctions without doing all of that work, and therefore it seems more appropriate to man-

Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). Proponents of the "American rule" argue that an award of attorney's fees is a penalty for prosecuting or defending a lawsuit and as such is an unfair price to pay simply for losing. Note, *supra*, at 320-21. Those who support the English system emphasize that the "American rule" is unfair to the successful party who "is never fully compensated." *Id.* at 321. There are, however, important exceptions to the "American rule," both statutory, such as section 1927 of title 28, *see* 28 U.S.C. § 1927 (Supp. V 1981), and through the "bad faith exception" in federal courts, *see id.* at 323. For a discussion of the history of the "American rule," *see Alyeska Pipeline*, 421 U.S. at 247-71.

¹⁸ *See, e.g.*, 15 U.S.C. § 15 (Supp. V 1981) (attorney's fees available to a prevailing plaintiff in antitrust suit); *id.* § 77k(e) (1976) (Securities Act of 1933); *id.* §§ 78i(e), 78r(a) (Securities Act of 1934); 42 U.S.C. § 1857h-2(d) (1976) (Clean Air Act § 304(d)); *id.* § 2000a-3(b) (Title II of the Civil Rights Act of 1964); *id.* § 2000e-5(k) (Title VII of the Civil Rights Act of 1964).

¹⁹ Judge Renfrew aptly states that "[t]he civil justice system in the United States depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice." Renfrew, *supra* note 4, at 264. Consequently, "if litigation is to remain a viable means of resolving controversies, the trial bar must change its habits. Discovery cannot be a reflex action." Liman, *supra* note 5, at 9. The emphasis in discovery must shift from a "why not?" attitude to one which concentrates on what needs to be discovered. Moreover, methods used prior to the passage of the Federal Rules of Civil Procedure should be rediscovered, such as interviewing as a less costly alternative to taking depositions. *See id.*

age a trial, manage discovery and the pretrial process than it is to determine what sanctions to impose and when.