Survey of Literature on Discovery From 1970 to the Present: Expressed Dissatisfactions and Proposed Reforms

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SURVEY OF THE LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS

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I. INTRODUCTORY STATEMENT

Eight years have passed since the last major revision of the discovery provisions of the Federal Rules of Civil Procedure.[1] During those years there has been a substantial amount of writing on the discovery rules.[2] While much of it has been aimed at helping practitioners understand the rules, a large portion has been critical in nature, examining how well the rules are functioning, isolating their problem areas and making suggestions for reform. It was the purpose of the study on which this Report is based to survey and analyze that critical literature.

The Report's first section sets out in detail the scope and methodology of the study. The second section identifies two common threads which emerge from the literature as a whole. The third section consists of a rule-by-rule analysis of the dissatisfactions expressed with the discovery provisions and of reforms proposed for those provisions. A final section briefly summarizes the study's findings and conclusions.

II. SCOPE AND METHODOLOGY

The study aimed to survey all critical literature on the federal discovery rules published from January,1970 to the present.[3] It was hoped to uncover attitudes toward discovery of scholars, practitioners,and lay people. Accordingly, not only scholarly but professional and lay publications were canvassed.

Scholarly legal journals - The Index to Legal Periodicals (ILP) served as the major "gateway" into materials in scholarly journals. It was examined for the period 1970 through April, 1978. The headings that were searched were "discovery," "deposition," "interrogatory,"and "pretrial procedure." Every piece under each of these headings was read to determine whether it expressed dissatisfaction with any element of the current discovery rules or whether it proposed any reform of those rules. Each piece expressing dissatisfaction or proposing reform is briefly summarized in Appendix B of this report. A xerox copy of each piece summarized in Appendix B is on file at the University of Pennsylvania Law School.

While as might have been expected, there were instances in which it was a matter of interpretation as to whether a given piece "expressed dissatisfaction" with the rules, every attempt was made to err on the side of inclusion in the group of pieces represented in Appendix B. As a matter of completeness and for

potential utility in verification, Appendix C identifies and very briefly summarizes all pieces under the searched ILP headings dealing with civil discovery which neither express dissatisfaction nor propose reform.

Three other sources were used to uncover relevant pieces in scholarly legal journals. First, note was taken of materials cited in the articles included in ILP. While in the vast majority of cases these materials were themselves indexed in ILP, a few pieces were not. These were read and, if appropriate, included in the materials represented by Appendix B. Second, since there is a lag time of at least a month between an article's publication and its inclusion in ILP, a more current source--the Contents of Current Legal Periodicals--was searched through the issue of June, 1978 for the most recent articles on discovery. Again, where appropriate, these pieces are included in Appendix B. Third, since ILP has not consistently indexed Judicature, a potentially rich source of discovery materials, volumes of that journal for the period 1970-1978 were individually searched.

Bar association journals and publications - To the extent that state bar association publications are included in ILP, relevant pieces were of course identified in the search described above. However, a substantial amount of bar association material is not indexed in ILP; not all bar journals are included in its index and of course non-journal materials (e.g., resolutions,

reports, speeches) are not indexed there. Consultation with, among others, the staff of the Cromwell Library of the American Bar Foundation, revealed that there is in fact no comprehensive national index of state bar materials. Accordingly, it was decided to send a letter to all state and territorial bar associations requesting them to forward any materials of whatever sort--journals, speeches, etc.--that they had published which are critical of current discovery procedures or which suggest reform. The body of that letter is reproduced in Appendix D, infra.

As of the date of this Report, responses to the letter have been received from 17 bar associations. These responses are reproduced in Appendix E, infra. Any pieces relevant to this study are appropriately summarized in Appendix B, infra.

Non-legal journals - Several sources were used to gain access to materials dealing with discovery in lay journals. First, the Readers Guide to Periodical Literature was searched for the period from 1970 to the present. The headings examined were as follows: "civil procedure," "justice, administration of," "judges," "courts-United States," "procedure," "conduct of ccurt proceedings," "United States-Supreme Court," and "videotape recorders and recordings."

A second source was the New York Times Index. Headings searched there, again from 1970 to the present, were "courts-

United States-federal," "courts-United States-general," and "courts-United States-Supreme Court."

Finally, access to lay material was sought through use of "The Information Bank," a computerized journal research service whose data base includes many of the major American newspapers and journals. The journals included in "The Information Bank" data base are set out in Appendix F. Access to this system is achieved through a search request using the system's "thesaurus", basically a listing of subject matter headings which the computer can search. After several experimental search requests, a request was arrived at which instructed the computer to search for all articles indexed under both "Federal District Courts" and "Rules of Evidence and Trial Procedure." The computer responded with abstracts of 53 articles. The printout of that response is on file at the University of Pennsylvania Law School. Of the 53 articles, only one appeared relevant; it was examined and included in the materials indexed in Appendix B.

An effort was also made to identify material on discovery appearing in non-legal scholarly or "quasi-scholarly" journals. Searches were made of the Social Sciences Index (S.S.I.), the Social Sciences Humanities Index (S.S.H.I.), and The Public Affairs Information Services Bulletin (P.A.I.S.B.). The S.S.H.I. was searched for the period from January, 1970 through

March, 1974. The S.S.I., which supercedes the S.S.H.I., was searched from April, 1974 through June, 1978. The following headings were examined under these two indices: "citizen suits (civil procedure,)" "civil procedure," "conduct of court proceedings," "court administration," "courts," "depositions," "discovery," "federal courts," "federal rules," "interrogatories," "judges," "judgments," "judicial process," "justice (administration of)," "pretrial procedure," "procedure (legal)," "Supreme Court," "trial practice," and "videotape."

P.A.I.S.B. was searched for the period from January, 1970 through March, 1978. Headings searched were: "civil procedure," "courts," "judges," "justice (administration of)," "legal procedure," "popular actions," "pretrial procedure," "trials," "United States (Supreme Court)" and "videotape (court use)."

Books - The card catalogue of the University of Pennsylvania's Biddle Law Library was searched to identify any post-1969 books dealing with discovery, The headings searched were "discovery," "civil procedure," "pre-trial procedure," and "court rules."

Federal Rules Decisions - West's Federal Rules Decisions Reporter publishes selected presentations at judicial conferences and the like. The F.R.D. index was searched for pieces on discovery under the headings of "administration of justice," "civil procedure," "discovery," "pretrial procedure," and "rules."

Those pieces relevant to this study are included in Appendix B, infra.

Legislative materials - The Index to Congressional Publications and Public Laws, published by the Congressional Information Service, was searched for hearings, reports or other Congressional documents dealing with discovery. The following headings were checked: "administration of justice," "civil procedure," "courts of the United States," "federal district courts," "Federal Judicial Center," "judicial reform," and "judicial conference." The index yielded code numbers for potentially relevant material which were then checked in the volume of abstracts accompanying each annual index. An inspection of these abstracts yielded no material relevant to the subject of dissatisfaction with the current discovery rules.

In addition, two other sources were checked. First, to double-check the results yielded by searching the Index to Congressional Publications and Public Laws, the Congressional Quarterly Weekly Report was examined; no relevant materials were found. Second, the Congressional Record index was checked through the end of 1974, the year of the last annual cumulative index. No discussion of possible reforms in the discovery rules or of dissatisfaction with those rules could be found

in floor debates or in materials entered by Congressmen into the record.

Telephone inquiries were made to several staff members of the Senate Judiciary Committee, the House Judiciary Committee and the Criminal Justice Subcommittee of the House Judiciary Committee, which has been given jurisdiction over the Federal Rules of Civil Procedure. These conversations confirmed the absence of relevant Congressional materials. A complete description of the persons contacted may be found in Appendix G, infra.

Miscellaneous - In order to identify relevant publications not included in the searched indices, inquiries were made of representatives of selected institutions as to whether they knew of any additional material relevant to this study. The institutions contacted include the Administrative Office of the U.S. Courts, the American Bar Association Litigation Section, the American Bar Foundation, the American Law Institute, the Association of Trial Lawyers of America, the Federal Judicial Center, the National Center for State Courts, the National Commission for the Review of Antitrust Laws and Procedures, the National Science Foundation, and the Office for Improvements in Justice of the Department of Justice. Appendix G lists the specific individuals who were talked to. Any materials uncovered which were relevant are included in Appendix B.

III. COMMON THREADS

It is difficult to identify any unifying theme in the post-1969 literature on discovery. While a few of the pieces take an overarching look at discovery practice in general, most select for analysis a single provision or a single aspect of a single provision. Nevertheless, even if there is no single theme to the literature, the materials do have enough in common to allow identification of at least two common threads.

The first thread is in a sense a negative one, a reflection of what is not in the materials rather than what is in them. The materials contain no outcry for comprehensive and fundamental revision of the federal discovery provisions. Commentators do not seriously question the notion that the basic framework of pretrial discovery is a desirable one, that Rule 1's goal of securing the "just, speedy, and inexpensive determination of every action"[4] is served by a pretrial discovery scheme that looks, at least in its broadest outlines much like the one we have now. The reforms suggested are aimed at altering the existing system, rather than at abandoning it altogether.

The absence of suggestions for truly radical reform may reflect in part the commentators' sense that making such proposals would be futile and in part a conservative "lawyerly" tendency to favor incremental change rather than comprehensive reform.

Nevertheless, the literature's seeming acceptance of the Federal Rules' basic discovery structure would appear to have some significance. One can at least conclude that there is a common assumption that, as Professor Moore's treatise notes, "the future holds no retreat from [the rules'] general philosophy of full disclosure."[5]

The second thread running through many of the surveyed materials is that the potential for what is termed "abuse" of the discovery process is an increasingly serious problem in the administration of the discovery provisions. While the 1970 amendments to Rule 37 were intended to deal more effectively with problems of abuse,[6] much of the post-1969 literature argues that, as they have actually functioned, the rules have provided inadequate abuse protection.

The abuse focused on by the literature is basically of two kinds. First, there is a broad sense that in a substantial number of cases there is "too much" discovery. One writer observes that "[t]he pendulum has swung too far on the side of free use of discovery techniques, and every litigant, attorney, and judge familiar with the pre-trial scene today knows the imbalance must be soon corrected."[7] And an attorney specializing in Title VII job discrimination defense work contends that "[d]iscovery in Title VII cases frequently is so burdensome that employers often weigh the costs of preparing their responses against the price of an early settlement."[8] Several commentators

point to complex antitrust cases in which discovery produced hundreds of thousands of documents, cost millions of dollars, and took several years to complete.[9] These commentators argue that that level of discovery, motivated at times simply by a desire to delay resolution of the case or to force the other party to settle, may impede rather than secure the "just, speedy, and inexpensive determination" of the litigation.

Although each side tends to focus on the abuses of the other, this sense of "over-discovery" is apparently shared by both plaintiffs' and defendants' bars. So, for instance, presenting the plaintiffs' perspective in a symposium on discovery appearing in the Antitrust Law Journal, Seymour Kurland, a nationally known antitrust lawyer, commented that "we are presently suffering the affliction of too much rather than too little discovery."[10] In that same symposium, Peter Byrnes, a defendants' antitrust lawyer, noted that "the scope of discovery sought by plaintiffs has reached staggering and wholly unmanageable proportions."[11] While of course, much of the surveyed literature does not treat the "over-discovery" issue, it may be significant that no writer offers significant opposition to the principle of making increased efforts to deal with problems of "over-discovery."[12]

The agreement in the materials that there is a problem of "over-discovery" is not, it should be noted, matched by agreement as to what should be done about the problem. Some commentators

urge more vigorous judicial enforcement of the existing rules, rather than changes in those rules. For instance, Professor Moore's treatise argues that "for the most part [abuses that do occur] can be met under the Rules by a more deft, appreciative, and firm application of the Rules."[13] Those commentators who argue that some modification in the rules is called for do not agree among themselves as to what changes would be appropriate. Their proposals, all discussed in the next section of this Report, range from narrowing the scope of discoverable matter as set forth in Rule 26(b)(1), to encouraging the use of pretrial conferences in order to identify the issues before discovery begins, to limiting the number of interrogatories that a party can serve without making a special showing.

The second type of abuse addressed by much of the post-1969 literature is the problem of parties using delay, incompleteness, and evasion in responding to opponents' discovery requests. Perhaps reflecting a pro-defense bias, one antitrust defense counsel views it as "the age-old problem of plaintiffs refusing (or avoiding) full and adequate responses to defendants' discovery requests."[14] Another practitioner notes "the numerous practices of evasion by a party served with interrogatories."[15]

Suggestions as to how to deal with the problem of discovery "avoidance" have focused on the sanction provisions of Rule 37. Some writers point to gaps in coverage which remained even after

the 1970 revisions of Rule 37.[16] Other materials in the literature center not so much on these asserted gaps and the necessity for rule revision as on a perceived failure by the judiciary to utilize effectively the sanction scheme as it now stands. According to one student commentator, "Although the Federal Rules provide adequate sanctions against both the innocent and intentional failure to comply with discovery requests, ... judicial reluctance to employ these sanctions vigorously in the past has afforded much latitude to parties intent on impeding litigation."[17]

The problems of "over-discovery" and "avoidance" are far more complex than presented in this overview. Some of their complexities will be discussed in the following section. It is sufficient here simply to note that, grouped together as the problem of "abuse," they constitute one of the two common threads going through much of the post-1969 discovery literature.

IV. RULE-BY-RULE ANALYSIS OF THE LITERATURE

This section of the Report analyzes in detail the relevant post-1969 discovery literature. Generally organized in conformity with the rules, it treats each rule in turn.

Rule 26: General Provisions Governing Discovery - Rule 26 articulates general standards governing all types of discovery. Because of the rule's wide coverage, it has triggered more commentary than any of the other discovery provisions. Each of the rule's subdivisions will be treated separately.

Rule 26(a): Discovery Methods - Rule 26(a) sets forth the permissible methods of discovery and provides that "the frequency of use of these methods is not limited." Nothing in the relevant literature expresses any dissatisfaction with this provision.[18]

Rule 26(b): Scope of Discovery - Rule 26(b) has four subdivisions dealing with the permissible scope of discovery. The amount of commentary to which each has been subjected justifies treating them separately in this Report.

Rule 26(b)(1): Scope of Discovery; In General - Rule 26(b)(1) provides in part that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense

of any other party. . . ." This provision's standard of "relevant to the subject matter" has been attacked by those concerned with what is referred to above as the problem of "over-discovery." In concluding that "relevance is not a meaningful criterion of discovery," Arthur Liman, a partner in a large New York law firm, contends that the combination of the current standard with notice pleading has led to the pleader being entitled "to pry almost any information from his adversary."[19] Liman expresses dissatisfaction with the courts having interpreted Rule 26 as expressly "authorizing fishing expeditions 'so long as the fish may become bait with which to catch admissible evidence.'"[20] In reflecting on the breadth of the current standard, Simon Rifkind, senior partner in the same firm as Liman and a former federal judge, suggests that "over-discovery" affects interests even more fundamental than that of judicial efficiency: "A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment."[21]

In terms of steps to be taken to deal with what is perceived as an unduly broad general scope of discovery, four potential approaches emerge from the literature. First, Judge Rifkind suggests that it might be desirable to require that a litigant make a showing of "probable merit" to his case before discovery would be allowed to begin.[22] According to Judge Rifkind,

implementation of this proposal would greatly limit those actions instituted solely in the hope or expectation that discovery itself will reveal a claim.[23] No commentators have reflected in print on Rifkind's proposal and indeed, Rifkind himself has not developed the proposal in the literature beyond a bare outline. It would seem, though, that requiring a "probable merit" determination in every piece of civil litigation would represent a substantial burden on already overtaxed judicial resources. Moreover, Rifkind's proposal deals neither with the problem of excessive discovery by defendants nor with the issue of how to limit the scope of discovery by those plaintiffs able to surmount his "probable merit" barrier.

A second proposal for limiting the general scope of discovery is offered by Arthur Liman, the New York attorney referred to above. Liman suggests that it might be desirable to require that "each discovery request carry a certificate that the proponent has good grounds to believe that all of the information sought is necessary for trial preparation and that no more efficient method of securing and preserving the evidence is available.'[24] Liman would provide that the lawyer seeking discovery be prepared to justify his certificate. Inability to do so would subject him to sanctions, including the payment of costs.

As is the case with Judge Rifkind's proposal, Liman's suggestion has as yet elicited no response in the literature. It

would appear though that its successful implementation would be hindered by the difficulty in making a judicial determination either that no good grounds exist for requesting the information in question or that there is a more efficient means for getting that information. Indeed, Liman himself concedes that adoption of his proposal would be largely a symbolic "consciousness raising" step.[25]

The Special Committee for the Study of Discovery Abuse of the American Bar Association's Section of Litigation (hereinafter referred to as the "A.B.A. Special Committee") has proposed a third and more direct method for narrowing the scope of discovery. In a report issued in October, 1977 and approved by the A.B.A. Board of Governors in December, 1977, the committee suggests that Rule 26(b)(1) be amended to provide a discovery standard of "relevant to the issues raised by the claims or defenses of any party."[26] As noted in the Committee Comments, the proposal essentially substitutes "issues" for "subject matter" in the current rule.[27] While recognizing the difficulty in distinguishing between "subject matter" and "issues," the committee is nevertheless persuaded that the proposal's adoption would at least serve the purpose of "direct[ing] courts not to continue the present practice of erring on the side of expansive discovery."[28]

While the A.B.A. Special Committee's proposal has not been comprehensively dealt with in the literature, there have been

several published reactions to it. Francis R. Kirkham, a member of the San Francisco bar who has been active in the area of discovery reform, supported the proposal in a presentation before the Second Circuit Judicial Conference.[29] And Messrs. Weyman I. Lundquist and H. Stephen Schechter, both San Francisco lawyers active in litigation, have written in support of the proposal in the American Bar Association Journal.[30] Additionally, Lundquist and Schechter report that Attorney General Bell has commented as follows on the proposed change: "I am particularly pleased with the proposed change to Rule 26 which narrows the scope of discovery to the 'issues raised.'"[31] Finally, in what can only be viewed as lukewarm support, the Committee on State and Federal Rules of Procedure of the Virginia State Bar Association favors restricting the scope of Rule 26(b)(1) but "doubts that the proposed language will materially influence judicial interpretation."[32]

Vigorous opposition to the A.B.A. Special Committee proposal has come from Senior District Judge William H. Becker, Chairman of the Board of Editors of the Manual for Complex Litigation. Becker views the proposal as a return "toward the frustrating and diverting sterile common law pleading system now rejected by the legislative and judicial branches of all states and of the Nation."[33] Fearing that the substitution of "issues" for "subject matter" in Rule 26(b)(1) would result in the abandonment of the current scheme of "qualified notice pleading," Becker objects

strongly to what he sees as the proposal's requirement that discovery be deferred until the issues in the case "are framed by pleadings with particularity and are 'at issue.'"[34] Referring to the procedures suggested by the Manual for Complex Litigation, he contends that the utilization of discovery as a means for narrowing issues in combination with close judicial supervision of discovery scheduling is a far better way for avoiding over-discovery in complex litigation.[35] Insofar as non-complex litigation is concerned, Becker feels that devices such as limiting the number of permissible interrogatories are far preferable to limiting the general scope of discovery.[36]

The Advisory Committee on Civil Rules of the Judicial Conference of the United States (hereinafter referred to as the "Advisory Committee") in a Preliminary Draft of Proposed Amendments[37] proposes another method of limiting the general scope of discovery. The committee would delete the language as to "subject matter" in the existing rule and thereby establish a standard allowing discovery "regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party."[38] Explaining its rejection of the A.B.A. Special Committee proposal, the Advisory Committee expresses doubt that "replacing one very general term [i.e., subject matter] with another equally general one [i.e., issues] will prevent abuse

occasioned by the generality of language."[39] Anxious to avoid confusion and resultant litigation over the introduction of a new term into Rule 26(b)(1), the committee proposes amendment of the rule by deletion as opposed to addition of language.

Published only two and one half months ago, the Advisory Committee's proposal has yet to elicit any detailed response in the literature. However, there may be more similarities than differences between its proposal and that of the A.B.A. Special Committee. In particular, "relevant to the claim or defense" and "relevant to the issues" may be equally difficult to distinguish from "relevant to the subject matter." If implemented, the Advisory Committee proposal, like the A.B.A. Special Committee proposal, might depend for its effectiveness more on its conveying a "spirit" of a more restrictive discovery scope than on the language in the amended rule being in and of itself more limiting than the present language.

There is an added and important point of similarity between the Advisory Committee proposal and the A.B.A. Special Committee proposal. As a corollary to the narrowing of the general scope of discovery, both provide that on request of any party, the court shall hold a conference on discovery matters.[40] The single prerequisite to the making of such a request is that the requesting party, in the words of the Advisory

Committee proposal, state that he has made "a reasonable effort with opposing counsel to reach agreement on the matters set forth in the request."[41] Sanctions are applicable to a party who without good cause fails to cooperate in seeking a discovery plan by agreement.[42] Both proposals view a central goal of such conferences as being the issuing of an order defining the issues, setting forth a plan and schedule for discovery, and describing the limitations, if any, to be placed on discovery.[43] Thus, to the extent that this mechanism is utilized, the issues for discovery would be precisely defined by judicial order at an early stage in the litigation.[44]

Two points are worth noting regarding the Advisory Committee and the A.B.A. Special Committee proposals. First, manifesting a concern for conserving judicial resources, the comments accompanying both proposals indicate that failure of the parties to agree on discovery matters without judicial intervention should be excused "only rarely" and that discovery conferences therefore should be the exception rather than the rule.[45] The threat of sanction is expected to act as a prod toward agreement on discovery matters, with a pretrial discovery conference guaranteed to either party in the event of a failure, after good faith efforts, to reach such agreement.

Second, it should be noted that the present Federal Rules of Civil Procedure, and in particular Rules 16 and 26(c), do allow the trial court to hold the type of pretrial conferences outlined

in the two proposals. Indeed, several pieces in the surveyed literature contain descriptions by district court judges of the procedures they follow in holding just such conferences.[46] What the proposals add to the current rules is first, a singling out of pretrial discovery conferences which serves to underline a concern that discovery be handled in an expeditious orderly fashion. Second, and more important, while the present rules give the trial judge the discretion to hold pretrial discovery conferences, these proposals mandate the holding of such a conference at the request of any party who has unsuccessfully but in good faith attempted to resolve his discovery problems out of court. The proposals in effect allow a party, who at a relatively early stage of the litigation is unable to resolve discovery matters with his adversary, to "force" judicial activity without seeking either a sanction or a protective order.

Rule 26(b)(2): Insurance Agreements - Pursuant to a 1970 amendment, Rule 26(b)(2) provides that the existence and contents of liability insurance policies are discoverable. According to the Advisory Committee Notes accompanying the amendment, "[d]isclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation."[47]

Prior to the 1970 amendment, litigation and commentary abounded on the issue of the discoverability of insurance policies.[48] However, since 1970 there has been relatively little discussion of the issue in the literature and even less in the way of criticism of the current rule.

One post-1969 piece, however, that does directly and stridently attack the 1970 amendment appears in the July, 1970 issue of the Insurance Counsel Journal.[49] There Michael A. Coccia, a member of the Chicago law firm of Baker and McKenzie, sets forth the position of the International Association of Insurance Counsel (I.A.I.C.) on the just-adopted 1970 amendments. With respect to the 26(b)(2) amendment, Coccia contends that the discovery of insurance policies as a general matter would not narrow the issues at trial nor would it be helpful in developing evidence for trial; therefore, he argues, such discovery "should not be allowed."[50] Coccia reports that the experience of "many of the [I.A.I.C.'s] members" led them to believe that "in most instances when a plaintiff and his attorney know that high policy limits are available, a new wave of enthusiasm takes over with the evident hope that some way, somehow, they may realize the rainbow's end."[51]

A 1970 piece by Peter A. Davis, an Ann Arbor, Michigan lawyer, criticizes Rule 26(b)(2) in a more tentative, less direct fashion.[52] In comparing the federal approach to that of Michigan

state courts, which at least at that time, severely limited the discovery of liability insurance policies, Davis finds the federal approach preferable.[53] However, he also presents an alternative which would allow courts to make a case-by-case determination as to whether discovery would be allowed. His suggested criteria for making this determination include factors such as a) relevance of the policy limits to issues presented by the pleadings, b) the appearance of uncollectability on the part of the defendant, and c) whether liability has been admitted or established as a matter of law.[54] In contrasting this alternative to Rule 26(b)(2)'s blanket allowance of discovery, Davis, while opting for his approach, concedes that the federal approach is "acceptable" and admits that his case-by-case proposal could impose substantial burdens on both court and litigant.[55] His preference for the case-by-case approach seems at best marginal.

Rule 26(b)(2) might have been criticized as too limited rather than as too expansive. As the Advisory Committee's Notes to the 1970 amendment indicate, it does not extend discoverability to non-insurance aspects of a defendant's financial status.[56] However, the post-1969 literature reflects no widespread outcry that the scope of 26(b)(2) be so extended. The only piece surveyed advocating such an extension is an article by two lawyers appearing in a 1970 issue of the

Hawaii Bar Journal.[57] The article argues that "[i]t would appear logical that if knowledge of insurance contributes to a realistic appraisal of a particular case, so might discovery of the general financial status of a defendant with no insurance and no known assets."[58] Acknowledging that the reluctance of the Advisory Committee to make a defendant's financial status discoverable stemmed from concerns for privacy, the authors suggest that those concerns would best have been accommodated by "reference to protective orders [under Rule 26(c)] for undue harassment, rather than by restricting applicability of the Rule."[59] It may be, though, that Rule 26(c), with its implicit grant of broad discretion to trial judges to act or not act, would, standing alone, be an inadequate guarantee that privacy interests would be appropriately protected.

If the surveyed literature is any indication, then, there is no widespread dissatisfaction with Rule 26(b)(2). The position of the insurance industry was considered in the deliberations of the Advisory Committee before the rule's adoption, as was the argument that litigants' entire financial status should be discoverable. Nothing in the post-1969 literature suggests that 26(b)(2) should be the subject of extensive reconsideration at this time.[60]

Rule 26(b)(3): Trial Preparation; Materials - Representing an effort to deal with the "work product" issue, Rule 26(b)(3) was added to the rules in 1970. It allows a party to obtain discovery of "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." It further provides that "in ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

The post-1969 literature contains substantial critical commentary on Rule 26(b)(3). Rather than attacking the fundamental rationales behind the rule, the commentary, by and large, points to perceived vagueness and gaps in the language of the provision. Each of these problems will be dealt with in turn.

A. One asserted point of vagueness in Rule 26(b)(3) is in the term "substantial need." According to a student commentator in the Columbia Journal of Law and Social Problems, analysis of the reported cases decided in the first two years after the amended rule's adoption suggests that "[t]he definition of 'substantial need' appears to be the most troublesome problem [in the work product area]."[61] In support of this position, the student points to several pairs of cases presenting almost identical fact situations in which district courts arrived at conflicting determinations as to whether the "substantial need" test had been met.[62]

While the "substantial need" standard has an element of vagueness to it, it may be impossible to formulate an acceptable, more precise standard. The "substantial need" language itself was formulated in response to dissatisfaction with the "good cause" test proposed in the Preliminary Draft of what became the 1970 amendments.[63] It may be that further refinement of its meaning should be left to the development of case law rather than to any further revision of the rule. Indeed, with the literature after 1972 not reflecting any current of dissatisfaction with the "substantial need" test, that refining function may already be well under way.

B. A second vagueness perceived in Rule 26(b)(3) lies in the phrase "prepared in anticipation of litigation or for trial." Only materials coming under this language are subjected

to the discovery limitations of the rule.

Some critics contend that the rule provides no guidance as to how to determine when materials are "prepared in anticipation of litigation or for trial." The student commentator referred to just above points to cases with similar fact situations in which conflicting determinations were made as to whether Internal Revenue Service field agent reports were "prepared in anticipation of litigation."[64] Writing in the Pittsburgh Law Review, another student commentator, in analyzing a Pennsylvania rule with analogous language, makes similar observations.[65] And two lawyers, writing in the Hawaii Bar Journal, contend that the "revised rule has not truly clarified the knotty problem of just when materials are 'prepared in anticipation of litigation or for trial.'"[66] None of the critics suggest any amendment to the rule to deal with the indefiniteness they see.

As was the case with the "substantial need" language discussed above, it may be that, particularly when read with the Advisory Committee's Notes,[67] the rule can do no more to clarify the phrase "prepared in anticipation of litigation or for trial." This problem too may better be addressed by development of case law than by rule revision.

C. There is another difficulty which has been felt in connection with the phrase "prepared in anticipation of

litigation or for trial." Several critics find the phrase unclear as to whether it applies to the discovery of materials prepared by an attorney in preparation for prior litigation.[68] A Duke Law Journal student piece suggests that the provision was drafted without consideration as to whether its protection should extend beyond the litigation for which the materials in question have been prepared.[69]

Several suggestions have been offered as to how this ambiguity in the rule should be resolved. For instance, the Duke Law Journal Note argues that the applicability of the rule in any given case should turn on whether "[u]nder the circumstances existing at the time of the preparation of the initial suit, [there would] have been in the mind of a reasonable attorney a belief that there was a substantial probability of significant subsequent litigation to which his present work product would be relevant."[70] And Professor Moore's treatise argues that the rule's applicability should turn on "whether the first action was complete and upon the relationship between the first and second actions."[71]

It is worth noting that federal courts have been far from consistent in dealing with the "dual litigation" issue. Compare, for instance, Midland Investment Co. v. Van Alstyne, Noel and Co., 59 F.R.D. 134 (S.D.N.Y. 1973), adopting the standard suggested by Professor Moore, with Duplan Corp. v. Moulinage et Retorderie de Chavanos, 487 F.2d 480 (CA4, 1973), applying Rule 26(b)(3)

to materials prepared for already terminated, unrelated litigation, and with United States v. IBM, 378 F.Supp. 310 (S.D.N.Y. 1974), limiting application of the rules solely to materials prepared in anticipation of the instant litigation.

In this case, it may be feasible to resolve the rule's ambiguity by amending its language. Indeed, the drafting would be relatively simple if one were to opt for either blanket inclusion or blanket exclusion from the rule's coverage of materials developed in preparation for prior litigation. It would be more difficult if, say, either the middle ground position of the Moore treatise or that of the Duke student piece were adopted. However, it would appear that the ambiguity is serious enough, the inconsistencies and dissatisfactions substantial enough, and the potential for successful drafting great enough that serious consideration should be given to amending the rule.[72]

Rule 26(b)(4): Trial Preparation: Experts - Added to the rules in 1970, Rule 26(b)(4) sets forth standards of discoverability for "facts known and opinions held by experts . . . and acquired or developed in anticipation of litigation or for trial." In order to aid analysis, the rather complex text of the provision is set forth below:

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

The post-1969 literature contains substantial critical commentary on a number of aspects of Rule 26(b)(4). Again, by and large, it is less the fundamental structure of the

provision than its perceived ambiguities and gaps which are subjected to attack.

A. A first issue discussed by the commentators concerns whether the expert information covered by Rule 26(b)(4), if embodied in documentary form, is also covered by the work-product provisions of Rule 26(b)(3). Rule 26(b)(4) nowhere mentions Rule 26(b)(3) while the beginning of Rule 26(b)(3) provides that it is "subject to the provisions of subdivision (b)(4) of this rule."

The commentary reflects a division of opinion on the issue. One student piece, appearing in the University of Richmond Law Review, looks at Rule 26(b)(3)'s explicit coverage of "consultants" and argues that to the extent that a single person can be considered both an "expert" and a "consultant", the documents produced by him in preparation for litigation are protected both by Rule 26(b)(3) and Rule 26(b)(4).[73] This reading, supported by the holdings of several cases,[74] presents the possibility that a document that would be discoverable under Rule 26(b)(4) alone might not be discoverable under Rule 26(b)(3) with its explicit requirement of "substantial need."

The position taken by the Richmond piece is vigorously rebutted by Professor Michael H. Graham of the University of Illinois Law School. Writing in the University of Illinois

Law Forum,[75] Graham urges that any application of Rule 26(b)(3) to experts covered by Rule 26(b)(4) would be "clearly erroneous."[76] In support of his position, he points to 26(b)(3)'s limiting reference to 26(b)(4) and, more forcefully, to the portion of the Advisory Committee's Notes to the 1970 amendments which states that Rule 26(b)(4) "reject[s] as ill-considered the decisions which have sought to bring expert information within the work-product doctrine."[77] A student piece in the Columbia Journal of Law and Social Problems suggests agreement with the position taken by Professor Graham.[78]

Particularly in light of the Advisory Committee's Notes, it would appear that Professor Graham has the best of the argument in terms of the intent of the rule's authors. However, with several courts applying Rule 26(b)(3) to expert information even after publication of the Rules and Notes, amendment of the rule to clarify the relationship between the two provisions should be considered.[79]

B. The manner in which the rule deals with the discovery of experts whom the "other party expects to call . . . at trial,"(Rule 26(b)(4)(A))has also been the subject of critical commentary. The same Richmond Law Review student piece referred to above observes, with some dissatisfaction, that 26(b)(4)(A)(ii) provides a judge with no guidelines to use in deciding whether to grant "further discovery by other means" in addition to that

mandated by 26(b)(4)(A)(i).[80] Reflecting on the same problem, Professor Graham notes that "the few reported decisions [on 26(b)(4)(A)(ii)] have taken widely divergent approaches."[81] He sees the absence of guidelines in the provision not as an oversight by the rulemakers but rather as the product of compromise between those members of the Advisory Committee favoring liberal discovery of expert witnesses and those favoring, at most, restricted discovery.[82]

The Richmond Law Review commentator offers no suggestion as to how the rule might be amended to deal with the problem he sees. However, Professor Graham offers a comprehensive proposal for amending Rule 26(b)(4)(A), a proposal which treats not only the "unguided discretion" issue of 26(b)(4)(A)(ii) but also the more fundamental difficulties that he has with 26(b)(4)(A)'s restriction on discovery of expert witnesses. Graham's proposal rejects the limitations on expert witness discovery in the current provision and establishes in their place a right of full discovery of experts expected to be called at trial.[83] The proposal further provides that if the expert witness in question "relies in forming his opinion, in whole or in part, upon facts, data, or opinions contained in a document or made known to him by or through another person, a party also may discover with respect thereto."[84]

A comprehensive analysis of Graham's proposal is beyond the scope of the present study. It is worth noting, however,

that his dissatisfaction with the restrictions on discoverability in 26(b)(4)(A) stems from several sources. First, he feels that the interrogatory mechanism provided in 26(b)(4)(A)(i) is on too many occasions an inadequate means for a party to prepare his cross-examination of an opponent's expert witness.[85] Second, the results of a questionnaire administered by Graham to a broad range of judges and attorneys suggest to him that in practice, "further discovery occurs voluntarily between counsel without resort to the court."[86] Adoption of his proposal, according to Graham, would therefore, "reflect the actual practice of the discovery of expert witnesses."[87] Finally, Graham notes that under Rules 703 and 705 of the Federal Rules of Evidence, an expert may testify without prior disclosure of the basis of his opinion and in certain circumstances may rely on non-admitted and even non-admissible information to form an opinion.[88] Graham argues that the fact that these provisions "significantly reduce the probability of an expert fully disclosing the basis of his opinion on direct testimony at trial," makes it clear that full discovery is necessary to assure adequate opportunity to prepare for cross-examination and rebuttal.[89] As his proposal reflects, this "adequate opportunity" includes the ability to discover with respect to "second tier" experts, i.e., experts on whose data an expert witness has relied in forming his opinion.[90]

Graham's proposal represents a substantial departure from the current rule. The fact that the current rule is only eight years old and has apparently not occasioned any widespread fundamental dissatisfaction may suggest that such a relatively radical proposal should not be adopted at this time. Nevertheless, the concerns that the proposal raises are clearly substantial enough to be borne in mind in future deliberations on Rule 26(b)(4).

C. With respect to the expert "retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness," (emphasis added), Rule 26(b)(4)(B) allows discovery only "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." Although nothing in the literature seriously challenges the need for some limitations on the discoverability of non-witness experts, several commentators have noted the lack of clarity in the rule--and the consequent split in the cases[91]--as to whether the provision's "exceptional circumstances" test must be met in order simply to discover the identity of the other party's non-witness experts.[92] One student commentator argues that such discovery should be allowed "to alert a party to the possible existence of information to which he may be

entitled after making the necessary showing of exceptional circumstances."[93] Professor Graham, on the other hand, argues that the identity of such experts should not be freely discoverable, since it could lead to discovering counsel attempting to contact his opponent's expert informally "to obtain favorable information."[94] The student's argument is more persuasive; it would seem that the rule's underlying policy of discouraging a party from relying on his opponent's work in the preparation of his case would not be undermined by allowing discovery of the identity of non-witness experts.[95]

D. Rule 26(b)(4)(B) limits the discovery that it allows to "experts retained or specially employed" by another party. Indeed, the Advisory Committee's Notes accompanying the 1970 amendments explicitly state that "the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed."[96] Accordingly, it becomes important to distinguish between "retained or specially employed" experts and "informally consulted" experts.

The need for this distinction has provoked two kinds of criticism in the literature. First, there is some dissatisfaction that the rules offer no guidelines on how to make the distinction.[97] Second, Professor Graham suggests that there is no need for such a distinction and that the rule should be amended to allow the

same "exceptional circumstances" discovery of informally consulted experts as is currently allowed for retained experts. According to him, there are at least some situations in which the needs of the discovering party should outweigh a concern that parties not be discouraged from informally consulting experts.[98]

If the distinction between "retained or specially employed" and "informally consulted" is to be maintained, it may be very difficult to formulate acceptable clarifying language to be inserted in the rule. Moreover, the practical need for clarification by amendment is not clear; difficulties in making the distinction have not been reflected in reported District Court cases. In terms of the further issue of whether the distinction should be done away with, Professor Graham is convincing in arguing that the ban on discovery of informally consulted experts should not be absolute.

E. The meaning of "retained or specially employed' in Rule 26(b)(4)(B) has also been questioned in terms of its applicability to experts who are permanent employees of a party. Finding some support in the Advisory Committee's Notes to the 1970 amendments,[99] Professor Graham argues that "a 'specially employed' expert is properly interpreted as encompassing a regular employee of the party who is designated and assigned by that party to apply his expertise to a

particular matter in anticipation of litigation or for trial."[100] On the other hand, a student commentator in the Wayne Law Review contends that "specially employed" does not encompass permanently employed experts, and suggests amendment of the rule to cover such experts explicitly.[101] There would seem to be little reason not to have the provision cover permanently employed experts. To the extent there is a potential ambiguity, a clarifying amendment would seem to be in order.

F. In addition to allowing the discovery of non-witness experts on a showing of exceptional circumstances, Rule 26(b)(4)(B) permits discovery of such witnesses "as provided in Rule 35(b)." (Rule 35(b) deals with the discovery of medical reports subsequent to a court-ordered medical or physical examination.) Rule 26(b)(4)(A)'s treatment of witness experts contains no such reference to Rule 35(b), leading Professor Graham to fear that courts might conclude that "Rule 35(b) [has] no application to expert[s] . . . expected to testify."[102] Seeing no reason that 35(b) should not apply to such experts and arguing from the Advisory Notes to the 1970 amendments that the rulemakers intended it to so apply, Graham suggests amendment of the rule to so provide.[103] His proposal seems worthy of serious consideration.

G. Rule 26(b)(4) covers only those experts whose information was acquired "in anticipation of litigation or for

trial." Two commentators note that the rule is silent about those experts who may have relevant information not acquired in anticipation of trial.[104] Of particular interest to these commentators is the problem of the discoverability of such an expert whose information, although relevant to the lawsuit, was acquired through training and experience unrelated to the litigation and who, prior to the requested discovery, has had no connection with the litigation.[105] Both commentators identify factors (e.g., need for the information, availability of the information from other sources) which they feel should guide a court in determining the discoverability of such an expert. Both note that unfairness to the expert subjected to discovery can be mitigated somewhat by an award to him of fees for time spent in preparation for and at deposition. But of particular importance here is the fact that neither propose an amendment to the rules to deal with the problem. Both conclude properly that the discretion given the trial judge in the current rules to control discovery provides an adequate rule framework within which satisfactory case law on the issue can develop. Accordingly, neither feels that this "gap" in the coverage of Rule 26(b)(4) is one that needs to be corrected.

Rule 26(c): Protective Orders - Under Rule 26(c) a trial judge is given a broad measure of discretion in controlling discovery. The only criticism in the literature

directed at the provision is in the Columbia Journal of Law and Social Problems student article referred to above, page 27 supra.[106] The writer there is concerned about that part of the rule which states: "If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery." He argues that this language leaves uncertain whether the mere denial of a protective order (i.e., without any accompanying specific order compelling discovery) still leaves a party free to resist answering until an order compelling response is made or whether, as seems more sensible, the refusal to grant a protective order is in itself the equivalent of a court order compelling a response.[107] While acknowledging that the question is not likely to arise often, the writer suggests that this ambiguity be eliminated from the rule.[108] However, he cites no reported cases raising this ambiguity[109] and, given the further fact that no other piece in the surveyed literature points to the issue as a problem, amendment of the rule would not seem to be warranted.

While the literature expresses no further suggestion for amendment of Rule 26(c), the absence in the rule of explicit sanctions for excessive discovery requests has stimulated efforts to revise the sanctions provisions of Rule 37. These proposals are discussed later in this Report.[110]

Rule 26(d): Sequence and Timing of Discovery - This rule allows discovery, absent a court order otherwise, to be used in any sequence. Nothing in the literature expresses any dissatisfaction with this provision.

Rule 26(e): Supplementation of Responses - This rule sets forth the responsibility of a party to supplement his response to discovery requests. Nothing in the literature expresses any dissatisfaction with this provision.

Rule 27: Depositions Before Action or Pending Appeal - This rule sets out the procedure to be followed when discovery is sought either before institution of an action or while an appeal is in process. Nothing in the literature expresses any dissatisfaction with this rule.

Rule 28: Persons Before Whom Depositions May Be Taken - This rule provides that depositions may be taken before persons authorized to administer oaths or persons named by the court. Both the A.B.A. Special Committee and the Advisory Committee propose that it be made clear in the rule that this official need not remain at the deposition after the oath is administered.[111] While no other materials in the literature deal with this issue, the proposal seems eminently sensible and should be adopted.

Rule 29: Stipulations Regarding Discovery Procedure - This rule provides substantial scope for the parties to agree among themselves as to the manner in which discovery will proceed. Nothing in the literature expresses any dissatisfaction with this rule.

Rule 30: Depositions Upon Oral Examination - This rule sets forth the applicable procedures for the taking of oral depositions. The search for ways to reduce the immense cost of oral depositions[112] is reflected in the literature in two proposed areas of reform.

A. Both the A.B.A. Special Committee and the Advisory Committee offer proposals to amend Rule 30 to allow the taking of depositions by telephone without court order.[113] Under both proposals, any party objecting to such a deposition could seek a court order requiring that the deposition be taken in person. While Rule 29 of the current rules allows parties to agree between themselves to telephonic depositions, both proposals in effect put a burden of justification on any party opposing such a deposition.[114]

The use of telephonic depositions would help decrease the costs of discovery. While, apart from the two committee proposals, nothing in the literature explicitly advocates amendment of the rules to encourage such depositions, the proposals seem to be sound ones.

B. The recording of depositions by other than stenographic means is a second area in which amendment to the rule has been proposed. Rule 30(b)(4) currently requires that the party seeking that a deposition be recorded by other than stenographic means secure a court order so providing. Both the A.B.A. Special Committee and the Advisory Committee propose that this burden be shifted to the party opposing the non-stenographic recording.[115] The proposals of the two committees provide that "[t]he notice . . . may provide that the testimony be recorded by other than stenographic means."[116] Opposition to non-stenographic recording would be sustained according to the proposal when the court "deems [stenographic recording] necessary to assure that the record of the testimony be accurate."[117]

The post-1969 literature on discovery is replete with materials on non-stenographic recording of depositions, and on videotape recording in particular.[118] All the surveyed pieces view the expansion of such recording in a favorable light, arguing that problems of inaccuracy and susceptibility to tampering can be adequately dealt with.[119] If the literature is a true index of positions on the issue, encouraging the use of non-stenographic recording seems to be a noncontroversial way to lessen discovery costs.

Rule 31: Depositions Upon Written Questions - Under Rule 31 a litigant wishing to initiate a deposition upon written questions serves written notice on all parties. Accompanying the written notice must be his written "direct" interrogatories. The other parties have an opportunity to prepare written cross-interrogatories. There is then a time period in which redirect and recross questions can be prepared. The interchange of questions being complete, the party seeking discovery forwards the set of questions to the officer selected to administer the deposition. At the deposition, the officer propounds all of the questions and makes a verbatim record of the answers.

The only piece in the literature expressing dissatisfaction with the current rule is by John R.Schmertz, Jr., a professor at the Georgetown University Law Center.[120] Schmertz is concerned that the current rule does nothing to insure that the deponent has not already seen the questions before the deposition is administered.[121] To the extent that the rule is intended to preserve the spontaneity of the oral deposition in a far less expensive mechanism, this failure is significant.

In terms of how to deal with the problem, Schmertz concludes that when the deponent is a party, nothing can be done to prevent his access to the questions prior to the deposition's administration.[122] It would, he argues, be almost impossible to

enforce a prohibition on counsel showing submitted questions to a party prior to administration of a deposition on written questions.[123] However, when the deponent is not a party, Schmertz contends that a ban on either party and on counsel for either side "previewing" the questions for the deponent could be effective. Accordingly, he proposes that the rule be amended to provide just such a ban, violation of which would subject the violator to a requirement "to pay all or part of the reasonable expenses of an oral deposition of the non-party deponent."[124]

Schmertz's proposal is an intriguing one. On the one hand, it may be that depositions on written questions are used so infrequently that amendment of the provision would have no impact. On the other hand, to the extent the proposal would lead to decreased reliance on oral depositions, it could represent a substantial savings in discovery costs.

Rule 32: Use of Depositions in Court Proceedings - Rule 32 details the extent to which depositions can be used in court proceedings. Except for several technical amendments proposed by the Advisory Committee which are primarily designed to bring the rule into conformity with the Federal Rules of Evidence,[125] nothing in the literature expresses any dissatisfaction with the rule or suggests any reform of it.

Rule 33: Interrogatories to Parties - Rule 33 sets forth the mechanism for the use of interrogatories as a discovery device. The post-1969 literature contains a substantial amount of critical material on several aspects of Rule 33.

A. Under Rule 33, interrogatories can be posed only to another "party" in the litigation. This limitation has provoked a great deal of debate as to whether absent class members in a class action suit can be compelled to answer interrogatories. In Brennan v. Midwestern United Life Insurance Co., 450 F.2d 999 (C.A.7, 1971), the leading case on the issue, it was held that absent class members are subject to service of interrogatories provided that the court finds the interrogatories to be "necessary or helpful" to the fair presentation and adjudication of the suit and provided, further, that the discovery is not being used to harass the absentees.[126] Failure of absent class members to respond, the court held, could result in them having their claims dismissed with prejudice.[127]

Most of the commentators on the issue view it as a problem to be resolved on the basis of Rule 23 and its policy rather than on the basis of a narrow debate as to what "party" means in Rule 33.[128] A student commentator in the Yale Law Journal notes that "to call a person a party or not is merely to state a conclusion; the question is whether absent class members should be subject to discovery, and if so, under what conditions."[129]

A variety of approaches to the problem, most of which are not mutually exclusive, have been suggested. A student commentator in the Duke Law Journal suggests that subjecting absent class members to interrogatories may so threaten the efficacy of the class action as a procedural device that such interrogatories should be barred, with class members effectively being viewed as non-parties under Rule 33.[130] Another student commentator, writing in the Fordham Law Review, is unwilling to establish an absolute rule but would allow such interrogatories only "under the most extraordinary circumstances."[131] Still a third student writer suggests in the Journal of Public Law that whatever the standard for posing interrogatories to absent class members, the maximum sanction for failure to respond should not be dismissal with prejudice but rather exclusion from the class, thus allowing the class member to bring an individual action if he wants to pursue the claim.[132] Finally, a student in the Yale Law Journal urges that at least in situations in which the interrogatories go to the issue of damages as opposed to liability, utilization of a split trial could allow the limiting of interrogatories to the period after liability is already established.[133]

As varied as the suggested approaches are, none of the materials in the literature suggest that Rule 33--or indeed Rule 23--should be amended to deal with the problem. This is

probably appropriate. The kind of rather delicate balancing of competing policies involved in resolving the issue is likely done most effectively on a case-by-case basis. Unless one were to opt either for viewing absent class members simply as parties or for totally barring interrogatories to them--neither of which are desirable solutions--there may be little that an amended rule can add in the way of clarity or precision.

B. Critics of "over-discovery" have focused much of their attention and attack on the potential for the abusive utilization of extraordinarily large numbers of interrogatories. A Dallas practitioner, for instance, points to one piece of antitrust litigation in which the "initial wave" of interrogatories constituted over 12,000 separate questions. He contends that such discovery techniques "if unchecked, will undoubtedly ruin and make totally unusable what would otherwise have been a step forward toward justice in the administrative process."[135]

In terms of how to deal with the problem of excessive interrogatories, one relatively straightforward suggestion has been simply to limit the number of interrogatories that a party can ask without making some special showing of good cause. Indeed, there are federal districts which have adopted such a scheme as part of their local rules.[136]

While passing references have been made in the literature

to the feasibility of limiting the number of interrogatories by rule,[137] such proposals surprisingly have not been the subject of comprehensive analysis. While the A.B.A. Special Committee has proposed limiting the number of interrogatories that a party may serve by right to 30,[138] the Advisory Committee in its Preliminary Draft has elected simply to leave the matter to the discretion of local districts.[139] Reflecting a still more negative position, the Committee on State and Federal Rules of Procedure of the Virginia State Bar contends that such a proposal is "unrealistic, hence unworkable."[140]

It may be that the Advisory Committee's approach to the problem is preferable at the present time. Allowing district courts to experiment for a period with the limitation of interrogatories might result in a more informed determination several years hence as to whether such limitations are effective or whether, say, trial judges are as a matter of course making "good cause" determinations and allowing added interrogatories.

C. In a provision added in 1970, Rule 33(b) provides in part that "[a]n interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact." Two articles in the surveyed literature, noting the rule's implication that there are some circumstances in which interrogatories as to

opinions or contentions are objectionable, probe the issue of how to distinguish between the objectionable and the non-objectionable interrogatory. Writing in the North Carolina Law Review, one student commentator suggests that the appropriate criterion for distinguishing between the two is whether the interrogatory "relates to an 'essential element' of either party's claim or defense."[141] The student supports his proposed criterion by pointing to what he sees as "the purposes of interrogatories to supplement notice pleading and to narrow and define the issues for trial."[142] In an article in the Marquette Law Review two practicing lawyers suggest another criterion: "Would an answer serve any substantial purpose?"[143] They point[144] in particular to the Advisory Committee's statement that opinion and contention interrogatories "can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery."[145]

In effect, both proposals appear to amount to suggestions that if the interrogatory at issue comes within the permissible scope of discovery set out in Rule 26(b)(1), it should not be held objectionable as an opinion or contention interrogatory. If this is true, it would seem that the purposes of the proposals could more easily be accomplished by simply deleting the word "necessarily" from the current rule. Such a deletion may well be warranted; there is nothing in the Advisory Committee's Notes to the 1970 amendments to explain

the word's being in the rule and its presence may be an invitation to confusion and controversy.

D. In a more direct attack on Rule 33(b), the International Association of Insurance Counsel (I.A.I.C.), in an Insurance Counsel Journal article already referred to,[146] page 23 , supra, opposes the rule's approval of opinion interrogatories. The article argues that "the net effect of this rule . . . force[s] a shifting of the burden of proof from the plaintiff onto the defendant in each case."[147] This claim is an exaggerated one; the rule involves no such shifting of burden. It may be, though, that the claim is simply meant to convey dissatisfaction at the rule's providing for disclosure of litigation positions that hitherto might have been kept secret. However, in opting for disclosure, the rule simply reflects the policy behind the very notion of discovery.

E. Under Rule 33(c) a party can substitute access to his business records for answers to interrogatories if the answers can be ascertained from the records and if "the burden of deriving or ascertaining the answer[s] is substantially the same for the party serving the interrogatory as for the party served." In the mind of one antitrust lawyer, this provision in practice has resulted in substantial abuse. "My experience is that this well-intentioned device is too often abused, especially when interrogatories are directed to the

issue of violation. For example, when a large corporation is asked whether meetings with competitors occurred, . . . it is simply not responsive or productive to point to rows of file cabinets and answer that if it happened the facts can be found in the drawers."[148] And a student commentator in the Columbia Journal of Law and Social Problems, motivated by the same concerns, argues that the determination as to "who has the greater burden" is inherently speculative.[149] He concludes that "[t]here is no apparent or logical reason for exempting interrogatories from the general policy that a party is required to accept the 'burdens' of discovery as an incident of the litigation."[150] The student implies that Rule 33(c) should be repealed and that protective orders under Rule 26(c) could deal adequately with abusive interrogatory requests.[151]

While the literature in the surveyed law journal articles provides no further detailed analysis of the abuse potential of Rule 33(c), the A.B.A. Special Committee and the Advisory Committee do deal with the problem, both in the same way. They propose an amendment which would require any party electing to proceed under Rule 33(c) to "include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained."[152] While this proposal maintains the rule's special treatment of interrogatories, it would, if effectively enforced, reduce the chances of abuse.

Rule 34: Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes - Under Rule 34, a party may require production of documents held by any other party which are within the scope of "relevance" articulated by Rule 26(b)(1). A "good cause" requirement which was formerly part of the rule was deleted in a 1970 amendment.

An amendment to the procedure followed under Rule 34 was proposed recently to the Second Circuit Judicial Conference by Robert Meserve, a former president of the American Bar Association, and is now being considered by the Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation.[153] Meserve's proposal addresses his concern a) that the burdens of searching files can be excessive to a party faced with a complex and extended request for production, and b) that much time is wasted in litigating the issue of the scope of a given request and the issue of whether the documents submitted fulfill that request. His proposal gives the requesting party the option of simply identifying the subject matters on which he desires documents to be produced. Under this option, the producing party would then identify the location of such documents, i.e., the offices and files in which they are contained.[154] The requesting party would then have the right to go through the files to discover the relevant documents.[155] According to Meserve, this option would lessen the search burden on the discovered party, and, because of

duplication of searching that he feels exists under the current system, would also decrease the total search burden.[156]

In the event the requesting party did not elect the option described above, he would, under Meserve's proposal, proceed as under the present system with one significant exception: "The courts would be directed to be far more restrictive in their approach to imposing burdens on the party making production."[157] According to Meserve, if the requesting party elects to have his opponent bear the burden of searching its files, "it is equitable that that burden be reduced."[158]

Meserve's proposal is an interesting one. However, its procedure is complex enough and its forecast results speculative enough that it would seem wiser to allow localized experimentation with some version of it than to immediately adopt it as part of the Federal Rules.

The A.B.A. Special Committee apparently rejected proposals to amend Rule 34 to deal with excessive discovery requests, opting instead to rely on sanctions, see pages 58-64, infra, and pretrial discovery conferences, see pages 20-22, supra, to control the problem. However, the Special Committee--and the Advisory Committee--did offer a proposal to deal with another problem that they perceived, the problem of a producing party deliberately attempting "to burden discovery with volume

or disarray."[159] According to the Special Committee, "[i]t is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance."[160] The Special Committee's proposal provides that "[w]hen producing documents, the producing party shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request that call for their production."[161] It would seem that this proposal is an eminently sensible one.

Given the growing concerns with problems of "over-discovery," it is somewhat surprising that Mr. Meserve's proposal is the only one in the surveyed literature that suggests substantial revision of Rule 34 to deal with over-discovery. It may be, though, that, like the A.B.A. Special Committee, most commentators feel that the problem can better be addressed through devices such as limiting the general scope of discovery and enhancing the sanction mechanism.

Rule 35: Physical and Mental Examination of Persons - Under Rule 35, a court, on a showing of good cause, may order a party to submit to a physical or mental examination or to produce any person in "[his] custody" or "under [his] legal control" for such an examination. Two pieces in the surveyed literature articulate dissatisfaction with the current rule.

The first, the article already referred to, page 23 supra,

which expresses the position of the International Association of Insurance Counsel, argues that the requirement that a party produce persons under his "custody" or "legal control" is an unrealistic one since, if narrowly interpreted, it could be read to "require a party to produce for examination those persons who are, in fact, unavailable."[162] The position of the I.A.I.C. is itself unrealistic since the Advisory Notes to the provision state that "an order to produce [a] third person imposes only an obligation to use good faith efforts to produce the person."[163]

A second criticism of the rule comes from two lawyers writing in the Hawaii Bar Journal.[164] They suggest that the rule is defective in not providing authority to compel the physical examination of a corporate employee when the corporation and not the employee is a party to the suit.[165] No other piece in the surveyed literature finds this to be a substantial problem. Accordingly, the balance struck by the rule between concerns for full disclosure and concerns for privacy should probably not be disturbed.[166]

Rule 36: Requests for Admission - Under Rule 36 admissions may be sought of other parties. They are binding only for purposes of the pending litigation. The rule is intended to "facilitate proof with respect to issues that cannot be eliminated from the case, and . . . to narrow the

issues by eliminating those that can be."[167]

The only article expressing dissatisfaction with the rule is the position paper of the International Association of Insurance Counsel referred to above.[168] That article argues that, particularly insofar as Rule 36 does not prohibit requests for admission of "ultimate" facts, it invades the province of the trier of fact.[169] Moreover, it contends that, in allowing admissions to be sought with respect to the application of law to fact, the rule treads too close to the seeking of legal conclusions.[170]

The law-fact-ultimate fact distinction that the I.A.I.C. paper seeks to preserve seems not particularly helpful. To the extent that the use of admissions can fairly expedite litigation, they should be encouraged. The article's arguments against the rule are not persuasive.

Rule 37: Failure to Make Discovery: Sanctions - Rule 37 provides the major vehicle under the current rules for controlling abuses in discovery practice. Consequently, several aspects of the rule and its enforcement have been subjected to substantial critical commentary in the post-1969 literature.

A. While Rule 37 provides a series of sanctions that can be applied against a noncomplying party, that application is discretionary with the court. Several pieces in the literature

argue that trial courts have on the whole been too unwilling to impose the sanctions at their disposal. After noting the infrequency with which sanctions were imposed prior to the 1970 amendments, a 1972 student piece concludes that "[t]here is no suggestion in the recent cases that the judges are any more liberal in granting expenses than they were under the prior practice."[171] In a more recent commentary, an antitrust litigator writing in the Antitrust Law Journal criticizes what he perceives as "the almost wholesale unwillingness of the courts to employ the sanctions provided for in Rule 37."[172] And, as noted above, page 13 , supra, a student writer in the Harvard Law Review, arguing that judges should adopt a deterrence theory leading to a greater willingness to impose sanctions, observes that "judicial reluctance to employ . . . sanctions vigorously in the past has afforded much latitude to parties intent on impeding litigation."[173]

It is worth noting that in the past several years there has been at least some sign that increased discovery abuse has begun to undermine judicial reluctance to impose sanctions. Perhaps most importantly, the Supreme Court, in affirming the use of the sanction of dismissal in National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976), criticized the notion that noncomplying parties, if given "one more chance," will comply in the future. The Court argued that imposition of sanctions is important to deter other parties to other

lawsuits from feeling free to disobey discovery orders.[174] This statement from the Supreme Court might well serve as a prod to lower courts to make more frequent use of Rule 37 sanctions.

None of the materials in the surveyed literature suggests any way that Rule 37 might be amended to further encourage judges to use their existing discretion to impose sanctions. While it might be feasible to formulate such an amendment, it will probably be developing case law and increasing experience with discovery abuse that will provide the most encouragement toward the effective utilization of discovery sanctions.[175]

B. Several pieces in the literature express concern that even after 1970 there remain types of discovery abuse which cannot be dealt with through the use of discovery sanctions. In a paper written at the University of Pennsylvania Law School and currently circulating at the Department of Justice, Mark Werner, citing a recent Fifth Circuit case,[176] notes that a failure to supplement responses is apparently not susceptible to Rule 37 sanctions.[177] The failure of the rule to provide sanctions against those who seek unnecessary discovery is criticized in a North Carolina State Bar Quarterly piece by the President of the A.B.A.[178] And the Harvard Law Review note referred to above, page 59 , supra, is critical of the fact that even an egregious failure to comply with reasonable discovery requests can generally be met as an initial matter

only by an order to compel, thus providing little incentive against engaging in preliminary delaying tactics.[179] All these "loopholes" in the rule seem deserving of serious concern.

While none of the surveyed law review articles suggests ways to deal with these gaps in Rule 37's coverage, both the A.B.A. Special Committee and the Advisory Committee do propose solutions. Using almost identical language, they propose that the rule be amended to authorize the imposition of sanctions if "any party or counsel . . . abuses the discovery process in seeking, making or resisting discovery."[180] This "umbrella" provision would seem to eliminate all gaps, allowing a court to impose sanctions in whatever context it observes abuse.

C. Those who have complained about discovery abuse have not exempted the United States government from their direct attack. According to one litigator specializing in defending Title VII actions, government discovery requests can be so burdensome in such actions that "Title VII defendants are on the fringes of trial in terrorem when the Equal Employment Opportunity Commission is the antagonist."[181] And a student writer, having surveyed the case law in the area, observes that "[o]ne factor which surfaces from a reading of both district and appellate opinions is a pattern of resistance to, and abuse of, discovery by governmental agencies."[182] He concludes that

"governmental agencies all too often resist reasonable discovery."[183] While the vast majority of the pieces dealing with discovery abuse do not focus on governmental abuse in particular, the literature contains no suggestion at all that the government's performance in the area has been better than the average.

Under Rule 37 as it now stands, a trial court facing discovery abuse may be more limited in how it can react when the offending party is the United States than when the offending party is non-governmental. Rule 37(f) provides that "[e]xcept to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule."[184] This limitation, in combination with the A.B.A. Special Committee's general concern about governmental discovery abuse, led the committee to propose that a novel type of sanction against the United States be explicitly provided for in the rule. Under the committee's proposal-concurred in by the Advisory Committee[185] - the trial court would be authorized "[i]n an appropriate case . . . [to] . . . notify the Attorney General of the United States in a public writing that the United States, through its officers or attorneys, has failed without good cause to cooperate in discovery or has otherwise abused the discovery process."[186]

The materials contain two somewhat tentative reactions to the Special Committee proposal. The student writer referred to just above views it as a "constructive attempt to induce government attorneys to abide by the discovery rules" but

observes, quite properly, that the effectiveness of a "public writing" as a deterrent to discovery abuse "may depend in large part upon the Attorney General's response to such public reprimands."[187] And the Committee on State and Federal Rules of Procedure of the Virginia State Bar elected not to favor the reform but rather to note simply in its Report that "[t]he Committee does not oppose this change."[188]

The enormous amount of federal civil litigation in which the government is involved, when combined with what may be a special responsibility of government attorneys not to abuse the judicial system, mandates that governmental discovery abuse be minimized. Given what may be a unique responsiveness of those involved in government to public disclosure of their own wrongdoings, the mechanism proposed by the Special Committee has promise as a deterrent. At the least, it will bring instances of abuse to the attention of the Attorney General in a public way and will put pressure on him to act to control his subordinates. Especially since the literature presents no alternative proposal for dealing specifically with the problem of governmental discovery abuse, it would seem that the A.B.A. Special Committee proposal is worthy of adoption.

D. Dissatisfaction with the perceived shortcomings of Rule 37 has led some commentators to probe for alternative vehicles through which sanctions might be imposed for abusive

discovery. A 1977 student piece in the University of Chicago Law Review points to 28 U.S.C. § 1927 as one such alternative.[189] The statute provides that "[a]ny 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 as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs." While acknowledging that the statute has been little used in the past, the writer argues that it has "great promise as an effective measure against attorney misconduct in federal courts."[190]

With the same thought in mind, both the A.B.A. Special Committee and the Advisory Committee have proposed that Rule 37 make explicit that the sanctions it authorizes are "[i]n addition to [those] authorized . . . by Title 28, U.S.C. § 1927."[191] This amendment would serve both to counter any notion that Rule 37 sanctions are exclusive and to remind parties and judges of the availability of §1927 as an enforcement tool. There seems little reason to oppose the proposal's adoption.

Rule 45: Subpoena - Rule 45 sets out the mechanism for calling non-parties to testify at depositions and for compelling them to produce documents. There is no expressed dissatisfaction with the rule in the law journal literature; the Advisory Committee, however, has proposed one relatively

minor modification of the rule.

The committee proposes that it be made clear what is sufficient to constitute the proof of service that the rule requires. According to the proposal, the requirement would be fulfilled by filing "a copy of the notice together with a statement of the date and manner of service and of the names of the persons served, certified by the person who made service."[192] The committee asserts that the absence of such a clarifying provision has led to "results that vary from district to district."[193] It would seem that there is utility in having a single understanding of what constitutes proof of service; the proposed amendment would fulfill that function by articulating simple and straightforward components of the proof of service requirement.

V. SUMMARY OF FINDINGS AND CONCLUSIONS

As reflected in the foregoing discussion and in the attached appendices, the amount of post-1969 literature on discovery is substantial. Most of the major discovery provisions have been the subject of extensive critical analysis. By virtue of that fact, a literature survey like the one on which this Report is based can present an accurate picture of the perceived problem areas in the current rules and the possibilities for reform.

It is worth underlining, though, that a literature survey should not be regarded as the equivalent of a carefully designed attitudinal study. And given the character of the literature dealt with here, it would be particularly inappropriate to claim that it can provide an accurate quantitative measure of the precise attitudes of the practicing legal community toward the current discovery provisions. Relatively little of the post-1969 literature has been produced by practicing lawyers; the bulk of it has been written either by law students or by members of law faculties. Apparently, practitioners have in general not taken in great numbers to publishing pieces - at least in the literature surveyed here - to express their concerns about the efficacy of the current rules.

Notwithstanding the foregoing caveat, there is still a series of conclusions - some of them already alluded to in this Report - which can be drawn from the literature:

A.[194] As noted earlier, there is no outcry in the literature for wholesale abandonment of the scheme of the current discovery rules. While many of the reforms proposed are clearly more than trivial, they are not massive or comprehensive in scale; they do not challenge the fundamental notion that providing for relatively liberal discovery tends to further rather than impede the goal of an effective system of justice.

B. The sense of there being a growing problem of excessive discovery requests is conveyed by many of the surveyed materials. While most of the cited examples of abuse through "over-discovery" are those occurring in complex litigation,[195] the rule reforms proposed in the literature do not by and large distinguish between complex and "simple" litigation.[196] The most promising reform proposals in the area of "over-discovery" provide for a narrowing of the general scope of discovery in combination with a reinforced sanction scheme and an expanded opportunity for parties to seek - and be granted - pretrial discovery conferences.[197]

C. Concern that current mechanisms are inadequate to deal with problems of evasion in parties' responses to opponents' discovery requests is also reflected in much of the literature. In terms of dealing with the problem, bolstering the trial court's capacity to sanction is viewed as the most promising rule reform proposal.

D. Until recently, the idea prevailed that it was highly desirable to minimize judicial participation in the discovery process; it was thought that the scheme provided in Rules 26-37 served to allow the parties to conduct most pretrial discovery effectively between themselves with judicial assistance limited largely to the issuance of protective orders, orders compelling discovery,and sanctions. The perception of a growing problem of discovery abuse has made this "minimal intrusion" model less acceptable to a number of commentators. Many of the surveyed materials advocate that participation by the trial court at the discovery stage be increased.[198] While the central proposal for rule reform in the area is the proposal of the Advisory Committee and A.B.A. Special Committee for expanded availability of pretrial discovery conferences,[199] many of the commentators encourage judges to use the rather broad discretion that they have under the current rules to participate in a more active way in the discovery process.[200] In short, the "minimal intrusion" model seems to be giving way to a "measured intrusion" model. While, as with the problem of "over-discovery," the rule reform proposals make no distinction between complex and "simple" litigation, those who advocate greater judicial activity tend to focus their attention on complex litigation.[201]

E. Problems of "over-discovery" and "avoidance" are not the only discovery issues about which there is concern. Asserted elements of ambiguity and vagueness in the current rules have led commentators to suggest clarification so that confusion can be minimized.[202] In a fewer number of areas, suggestions have been offered to restructure parts of a given rule.[203] The importance of some of these "non-abuse" proposed reforms should not be minimized; particularly where the years have revealed imprecision and incompleteness in the rules, modifications should be seriously considered.

Given discovery's central role in much litigation, it is not surprising that it has been the subject of much critical commentary. As is indicated in this Report, the literature is of mixed quality, some parts of it extremely superficial and simplistic but other parts both insightful and imaginative. Looked at as a whole, however, the literature adequately reflects both the problems and the possibilities involved in attempting to formulate amended rules which more nearly achieve the goal of securing the "just, speedy, and inexpensive determination of every action."[204]

VI. FOOTNOTES

1. Relatively minor revisions of Rules 27 and 30 were made in 1971. Minor revisions of Rules 30 and 32 were made in 1972.

2. The provisions dealing in detail with discovery are Rules 26 - 37 and Rule 45. Their full text is set out in Appendix A. In addition, Rule 5 mentions discovery in its articulation of the materials required to be served on all parties and filed with the trial court. See note 197 infra. Its text too is presented in Appendix A.

3. 1970 was chosen as the limiting date because the last major revision of the federal discovery rules occurred in that year. It is worth noting, however, the arbitrary element in the selection of any date. A piece written in 1969 but delayed in publication only because of journal scheduling would be within the scope of this study, while an identical piece which was promptly published would be outside the study's scope.

4. Fed. R. Civ. P. 1.

5. 4 J. Moore, Federal Practice ¶26.02[3] (1976).

6. See Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 538 (1970) (hereinafter cited as 1970 Advisory Committee's Notes).

7. McElroy, Federal Pre-trial Procedure in an Antitrust Suit, 31 Southwestern L. J. 649, 681 (1977); See also Complex Antitrust Cases: Need They Always Drag On, Antitrust and Trade Regulation Report (BNA), No. 786, p. AA-1 (Oct. 26, 1976).

8. Mazaroff, Surviving The Avalanche: Defendant's Discovery in Title VII Litigation, 4 Litigation 14, 14 (Fall, 1977).

9. See, e.g., McElroy, Federal Pre-trial Procedure in an Antitrust Suit, 31 Southwestern L. J. 649, 682 (1977); see also Kohlmeier, One Delay After Another, National Journal, Oct. 9, 1976, p. 1438.

10. Symposium, Discovery in Civil Antitrust Suits, 44 Antitrust L. J. 1, 3 (1975).

11. Id. at 24.

12. But cf. Kennelly, Pretrial Discovery - The Courts and Trial Lawyers Are Finally Discovering That Too Much of It Can Be Counterproductive, 21 Trial Lawyer's Guide 458 (1978).

13. 4 J. Moore, Federal Practice ¶26.02[3] (1976).

14. Symposium, Discovery in Civil Antitrust Suits, 44 Antitrust L. J. 1, 25 (1975) (comments of Peter Byrnes).

15. McElroy, Federal Pre-trial Procedure in an Antitrust Suit, 31 Southwestern L. J. 649, 683 (1977).

16. See e.g., Werner, Survey of Discovery Sanctions 47 (1978) (unpublished paper on file at the University of Pennsylvania Law School); Spann, Abuse of Discovery: Some Proposed Reforms, 25 North Carolina State Bar Quarterly 3, 5 (1978).

17. Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 Harv. L. Rev. 1033, 1033-1034 (1978).

18. While, as noted, the materials suggest no reform of Rule 26(a), adoption of a proposal to amend Rule 33 to limit the number of permissible interrogatories might call for some revision of Rule 26(a). This Report's discussion of such a proposal appears in the analysis of Rule 33, infra at pages 49-50.

19. Liman, The Quantum of Discovery vs. the Quality of Justice; More is Less, 4 Litigation 8, 8 (Fall, 1977); see also Chilling Impact of Litigation, Business Week, June 6, 1977, p. 58.

20. Liman, The Quantum of Discovery vs. the Quality of Justice; More is Less, 4 Litigation 8, 8 (Fall, 1977). The quotation used by Mr. Liman is from Kaufman, Judicial Control Over Discovery, 28 F.R.D. 37, iii at 115.

21. Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 79, 107 (1976) (hereinafter cited as Pound Conference).

22. Id.

23. Id.

24. Liman, The Quantum of Discovery vs. The Quality of Justice: More is Less, 4 Litigation 8, 9 (Fall, 1977).

25. Id. at 58.

26. Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation, American Bar Association 2 (1977) (hereinafter cited as A.B.A. Special Committee Report).

27. Id. at 3.

28. Id.

29. Transcript of Remarks Made at the 1977 Second Circuit Judicial Conference 94-95 (on file at the University of Pennsylvania Law School).

30. Lundquist & Schechter, The New Relevancy: An End to Trial by Ordeal, 64 A.B.A. J. 59, 60 (1978).

31. Id. at 61; see also Childs, Seeking a Better Way to Bust Trusts, Washington Post, Dec. 20, 1977, p. 17; A Plan to Cut Litigation, Interview with Griffin Bell, Business Week, June 6, 1977, p. 60.

32. Report of the Virginia State Bar Committee on State and Federal Rules of Procedure 3 (undated) (on file at the University of Pennsylvania Law School).

33. Becker, Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition 20 (1978) (unpublished paper on file at the University of Pennsylvania Law School).

34. Id.

35. Id. at 20-21.

36. Id. at 27.

37. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Advisory Committee on Civil Rules of the Judicial Conference of the United States (1978) (hereinafter cited as Advisory Committee Report). The draft, with accompanying comments, is reproduced at the beginning of the May 15, 1978 Supreme Court Reporter advance sheet (vol. 98, no. 14).

38. Id. at 6.

39. Id. at 10.

40. A.B.A. Special Committee Report 4; Advisory Committee Report 7-9.

41. Advisory Committee Report 8. The analogous language in the A.B.A. Special Committee Report requires a "certification that counsel has conferred, or made reasonable effort to confer, with opposing counsel concerning the matters set forth in the request." A.B.A. Special Committee Report 4.

42. A.B.A. Special Committee Report 4; Advisory Committee Report 8-9.

43. A.B.A. Special Committee Report 4; Advisory Committee Report 8.

44. The Committee on State and Federal Rules of Procedure of the Virginia State Bar favors the proposal to make a discovery conference available in certain circumstances

on request of either party. See Report of the Virginia State Bar Committee on State and Federal Rules of Procedure 3 (undated) (on file at the University of Pennsylvania Law School).

45. A.B.A. Special Committee Report 7; see Advisory Committee Report 11. Perhaps reflecting the same concern for saving judicial time, none of the materials in the surveyed literature advocate that the rules contain a blanket absolute requirement for pretrial discovery conferences. Even those which endorse the expanded use of such conferences recognize that "judicial discretion dictates adapting the [use of such conferences] to the particular case, with deviation or innovation where necessary or desirable." Krupansky, The Federal Rules are Alive and Well, 4 Litigation 10, 13 (Fall, 1977).

46. See Krupansky, The Federal Rules are Alive and Well, 4 Litigation 10 (Fall, 1977); Schwarzer, Managing Civil Litigation: The Trial Judge's Role, 61 Judicature 400 (1978).

47. 1970 Advisory Committee's Notes, 48 F.R.D. at 499.

48. See, e.g., the materials cited in 1970 Advisory Committee's Notes, 48 F.R.D. at 498.

49. Coccia, The New Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 37 Ins. Couns. J. 334 (1970).

50. Id. at 339.

51. Id. at 339-340.

52. Davis, Pretrial Discovery of Insurance Coverage, 16 Wayne L. Rev. 1047 (1970).

53. Id. at 1081.

54. Id. at 1081-1082.

55. Id. at 1081.

56. 1970 Advisory Committee's Notes, 48 F.R.D. at 499.

57. Kroll and Maciszewski, Pre-trial Discovery: Change in the Federal Rules, 7 Haw. B. J. 48 (1970).

58. Id. at 51.

59. Id.

60. A student piece in the Insurance Law Journal suggests that, when read with Rule 26(b)(1), Rule 26(b)(2) seems to allow the discovery of liability insurance policies only to the extent that it is at least "reasonably calculated to lead to the discovery of material which is admissible." Martinez, Insurance: Discovery and Evidence, 1971 Ins. L. J. 471, 475 (1971). The Advisory Committee's Notes make clear that this is not the case. 1970 Advisory Committee's Note, 48 F.R.D. at 498-499.

61. Note, Federal Discovery Rules: Effects of the 1970 Amendments, 8 Colum. J. of L. & Soc. Problems 623, 629 (1972).

62. Id. at 629-630.

63. See Comment, Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product, 17 Wayne L. Rev. 1145, 1160 (1971).

64. Note, Federal Discovery Rules: Effects of the 1970 Amendments, 8 Colum. J. of L. & Soc. Problems 623, 630 (1972).

65. Case Comment, Gallaher v. Yellow Cab Company of Pgh: A Guide to the Application of Rule 4011(d)'s "In Anticipation of Litigation?", 33 U. Pitt. L. Rev. 144, 150 (1971).

66. Kroll and Maciszewski, Pre-trial Discovery: Change in the Federal Rules, 7 Haw. B. J. 48, 50 (1970).

67. See 1970 Advisory Committee's Notes, 48 F.R.D. at 501.

68. See Note, Discovery of an Attorney's Work Product in Subsequent Litigation, 1974 Duke L. J. 799; Case Comment, SEC v. Nat'l Student Marketing Corp., Work Product Immunity Inapplicable to Attorney-Defendant Where Work Product is at Issue and Former Client is no Longer an Interested Party in the Suit, 6 Loy. L. J. 447 (1975); Case Note, Work-Product Privilege Extends to Subsequent, Unrelated Litigation, 27 Vand. L. Rev. 826 (1974); 4 J. Moore, Federal Practice ¶26.64[2] (1976).

69. Note, Discovery of an Attorney's Work Product in Subsequent Litigation, 1974 Duke L. J. 799, 812.

70. Id. at 820 (emphasis in original).

71. 4 J. Moore, Federal Practice ¶26.64[2] (1976).

72. Commentators have perceived two more minor gaps in Rule 26 (b)(3). First, looking at the rule's protection of any materials prepared by a party's "representative", a student note in the Wayne Law Review expresses concern that the rule does not protect the work product of a representative of a party's attorney. Comment, Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product, 17 Wayne L. Rev. 1145, 1160 (1971). It seems unlikely, though, that a court would distinguish between a representative of a party and a representative of a party's attorney, if both are engaged in preparatory work for the litigation in question. The same commentator suggests that Rule 26(b)(3) be amended to apply to intangible as well as tangible trial preparation materials. Id. at 1163. No other commentator offers the same suggestion and it is apparently true that the discovery of intangible "work product" is still governed by the doctrine of Hickman v. Taylor, 329 U.S. 495 (1947). 4 J. Moore, Federal Practice ¶26.64[1] (1976).

73. Comment, Discovery of Expert Information Under the Federal Rules, 10 U. Rich. L. Rev. 706, 720 (1976).

74. See Crockett v. Virginia Folding Box Co., 61 F.R.D. 312 (E.D. Va. 1974); Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202 (N.D. Miss. 1972).

75. Graham, Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study, 1976 U. Ill. L. F. 895 (hereinafter cited as Graham I).

76. Id. at 926.

77. Id. at 926-927. The quoted portion of the 1970 Advisory Committee's Notes appears in 48 F.R.D. at 505.

78. Comment, Federal Discovery Rules: Effects of the 1970 Amendments, 8 Colum. J. of L. & Soc. Problems 623, 633 n. 75 (1972).

79. As a policy matter, it would seem that the 26(b)(4) restrictions on the discovery of experts are severe enough that their supplementation with the further complexities of Rule 26(b)(3) is not warranted.

80. Comment, Discovery of Expert Information Under the Federal Rules, 10 U. Rich. L. Rev. 706, 715 (1976). see also Blair, A Guide to the New Federal Discovery Practice, 21 Drake L. Rev. 58, 63 n. 30 (1971).

81. Graham I at 923; see also Simon, Pretrial Discovery of Expert Information in Federal and State Courts: A Guide for the Expert, 5 J. of Police Science and Administration 247, 253 (1977).

82. Graham I at 922.

83. Graham, Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal, 1977 U. Ill. L. F. 169, 200 (hereinafter cited as Graham II).

84. Id.

85. Id. at 184; Graham I at 929-930.

86. Graham II at 184.

87. Id. at 200 (emphasis added).

88. Id. at 169, 196; Graham I at 896.

89. Graham II at 169-170.

90. Id. at 196-200.

91. Compare Perry v. W. S. Darley & Co., 54 F.R.D. 278 (E.D. Wis. 1971) with Sea Colony, Inc. v. Continental Ins. Co., 63 F.R.D. 113 (D. Del. 1974).

92. See Graham I at 933; Comment, Discovery of Expert Information Under the Federal Rules, 10 U. Rich. L. Rev. 706, 717 (1976); J. Moore, 4 Federal Practice ¶26.66[4] (1977-78 Supplement to Volume 4).

93. Comment, Discovery of Expert Information Under the Federal Rules, 10 U. Rich. L. Rev. 706, 717 n. 59 (1976).

94. Graham II at 202.

95. Professor Moore's treatise, too, supports the discoverability of the identity of retained non-witness experts. J. Moore, 4 Federal Practice ¶26.66 (1977-78 Supplement to Volume 4). While the Advisory Committee's Notes to Rule 26(b)(4) state that a party may, upon a "proper showing," require his adversary to reveal the identity of non-witness experts, the Notes provide no definition of the phrase "proper showing." 1970 Advisory Committee's Notes, 48 F.R.D. at 504.

96. 1970 Advisory Committee's Notes, 48 F.R.D. at 504.

97. See Kroll and Maciszewski, Pre-trial Discovery: Change in the Federal Rules, 7 Haw. B. J. 48, 51 (1970).

98. Graham I at 940.

99. See 1970 Advisory Committee's Notes, 48 F.R.D. at 504.

100. Graham I at 942.

101. Comment, Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product, 17 Wayne L. Rev. 1145, 1167 (1971). See also Comment, Federal Discovery Rules: Effects of the 1970 Amendments, 8 Colum, J. of L. & Soc. Problems 623, 632 (1972).

102. Graham I at 915.

103. Graham II at 200.

104. Graham I at 936; Comment, Compelling Experts to Testify: A Proposal, 44 U. Chi. L. Rev. 851, 868-872 (1977).

105. Both commentators recognize that the 1970 Advisory Committee's Notes deal with the expert whose information was acquired because "he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit." 1970 Advisory Committee's Notes at 503. The Notes indicate that "[s]uch an expert should be treated as an ordinary witness." Id.

106. Comment, Federal Discovery Rules: Effects of the 1970 Amendments, 8 Colum. J. of L. & Soc. Problems 623 (1972).

107. Id. at 635.

108. Id.

109. There have apparently been no reported cases subsequent to the publication of the Columbia Journal of Law and Social Problems piece which have found ambiguity in the provision.

110. See pages 60-61 infra.

111. A.B.A. Special Committee Report 7-8, Advisory Committee Report 12-13.

112. One estimate by a New York lawyer puts the cost of a deposition in that city at $3,000 per lawyer per day. A Quicker Route to Court, Business Week 84, 89 (December 5, 1977).

113. A.B.A. Special Committee Report 9; Advisory Committee Report 14.

114. The A.B.A. Special Committee proposal and the Advisory Committee proposal are not identical. The former specifies that a motion to require that the deposition be taken in the presence of the deponent shall be granted "[i]f necessary . . . to assure a full right of examination of any deponent." A.B.A. Special Committee Report 9. The latter articulates no grounds for the granting of such a motion, providing only that "the court . . . may, on motion of any party, require that the deposition be taken in the presence of the deponent." Advisory Committee Report 14.

It is worth noting that the Committee on State and Federal Rules of Procedure of the Virginia State Bar would favor amendment of Rule 30 only if it would provide that "the burden to seek court approval [is] on the proponent of the use of the telephone or electronic recording device, rather than on his opponent to oppose it." Report of the Virginia State Bar Committee on State and Federal Rules of Procedure 5 (undated) (on file at the University of Pennsylvania Law School). The Committee's approach seems unduly cautious. In most situations in which the discovering party would seek to depose by telephone it is likely that telephonic depositions could proceed without prejudice to either party. This suggests that the Advisory Committee and the A.B.A. Special Committee proposals represent an appropriate treatment of the problem.

115. A.B.A. Special Committee Report 10; Advisory Committee Report 15.

116. A.B.A. Special Committee Report 10; Advisory Committee Report 14-15.

117. Advisory Committee Report 15. The analogous language in the A.B.A. Special Committee Report is virtually identical. See A.B.A. Special Committee Report 10.

118. See Thornton, Expanding Video Tape Techniques in Pre-trial and Trial Advocacy, 9 Forum 105 (1973); Salomon, The Use of Video Tape Depositions in Complex Litigation, 51 Cal. State Bar J. 20 (1976); Kornblum, Videotape in Civil Cases, 24 Hastings L. J. 9 (1972); Murray, Video-taped Depositions: The Ohio Experience, 61 Judicature 258 (1978); Miller, Videotaping the Oral Deposition, 18 Practical Law. 45 (Feb. 1972); Case Comment, Trial Judge May Deny Motion for Non-stenographic Deposition Only When Particulars of Request Do Not Reasonably Ensure Accuracy Equivalent to Stenographic Deposition, 26 South Carolina L. Rev. 753 (1975); Oral Depositions to be Videotaped Under New Pennsylvania Court Rules, 57 Judicature 34 (1973).

119. But cf. Report of the Virginia State Bar Committee on State and Federal Rules of Procedure 5 (undated) (on file at the University of Pennsylvania Law School) (supporting expanded use of non-stenographic recordings but opposing shifting of burden in each case to the party opposing such recording).

120. Schmertz, Written Depositions Under Federal and State Rules as Cost-Effective Discovery at Home and Abroad, 16 Vill. L. Rev. 7 (1970).

121. Id. at 53.

122. Id. at 54.

123. Id.

124. Id.

125. Advisory Committee Report 26-28.

126. 450 F.2d at 1005.

127. Id. at 1004-1006.

128. See, e.g., Case Note, Brennan v. Midwestern United Life Insurance Co., 40 U. Cin. L. Rev. 842 (1971); Case Comment, Absentee Class Members Subjected to Discovery and Claims Dismissed for Failure to Respond, 1971 Duke L.J. 1007. See also Gruenberger, Discovery from Class Members: A Fertile Field for Abuse, 4 Litigation 35 (Fall, 1977).

129. Comment, Requests for Information in Class Actions, 83 Yale L. J. 602, 605-606 (1974).

130. Case Comment, Absentee Class Members Subjected to Discovery and Claims Dismissed for Failure to Respond, 1971 Duke L. J. 1007, 1014.

131. Case Note, Brennan v. Midwestern United Life Insurance Co., 40 Fordham L. Rev. 969, 977 (1972).

132. Case Comment, Discovery Available Against Absent Plaintiffs to a Class Action, 21 J. Pub. L. 189, 200 (1972).

133. Comment, Requests for Information in Class Actions, 83 Yale L. J. 602, 616 (1974).

134. McElroy, Federal Pre-trial Procedure in an Antitrust Suit, 31 Southwestern L. J. 649, 682 (1977).

135. Id. See also A.B.A. Special Committee Report 20.

136. A listing of those district courts with such a rule is presented in Guyer, Survey of Local Civil Discovery Procedures 23-26 (June, 1977) (Federal Judicial Center Staff Paper).

137. See, e.g., Becker, Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition 27 (1978) (unpublished paper on file at the University of Pennsylvania Law School).

138. A.B.A. Special Committee Report 18.

139. Advisory Committee Report 29.

140. Report of the Virginia State Bar Committee on State and Federal Rules of Procedure 3 (undated) (on file at the University of Pennsylvania Law School). On the basis of his experience, a member of the Trademark Trial and Appeal Board suggests that adoption by the Board of a limitation on the number of interrogatories that could be asked without special leave would be unwise; the Board, he asserts, would soon have to rule on "many motions for leave to file additional interrogatories."

Bogorad, The Impact of the Amended Rules Upon Discovery Practice Before the Trademark Trial and Appeal Board, 66 Trademark Rptr. 28, 38 (1976).

141. Comment, Opinion Interrogatories After the 1970 Amendment to Federal Rule 33(b), 53 North Carolina L. Rev. 695, 700 (1975).

142. Id.

143. Schoone and Miner, The Effective Use of Written Interrogatories, 60 Marq. L. Rev. 29, 48 (1976).

144. Id. at 49.

145. 1970 Advisory Committee's Notes, 48 F.R.D. at 524.

146. Coccia, The New Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 37 Ins. Couns. J. 334 (1970).

147. Id. at 365.

148. Symposium, Discovery in Civil Antitrust Suits, 44 Antitrust L. J. 1, 12 (1975).

149. Comment, Federal Discovery Rules: Effects of the 1970 Amendments, 8 Colum. J. of L. & Soc. Problems 623, 639 (1972); See also Figg, McCullough and Underwood, Uses and Limitations of Some Discovery Devices, 20 Prac. Lawyer 65, 74 (1974).

150. Comment, Federal Discovery Rules: Effects of the 1970 Amendments, 8 Colum. J. of L. & Soc. Problems 623, 639 (1972).

151. Id. at 639 n. 114.

152. A.B.A. Special Committee Report 19-20; Advisory Committee Report 31. The rationale behind Rule 33(c)'s allowing a limited shift in the burden of discovery apparently lies in the enormity of the task that interrogatories can present for a party to whom they have been directed. See 1970 Advisory Committee Notes, 48 F.R.D. at 524.

153. Transcript of Remarks Made at the 1977 Second Circuit Judicial Conference 107-112 (on file at the University of Pennsylvania Law School). See Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation, Proposed Local Rule (Draft of 4/10/78 on file at the University of Pennsylvania Law School).

154. Transcript of Remarks Made at the 1977 Second Circuit Judicial Conference 107.

155. Before the discovering party would be given access, "[t]he party producing or his client [sic] would of course be given the opportunity to review each . . . file initially for privileged and proprietary materials." Id. at 109.

156. Id. at 110-111.

157. Id. at 109.

158. Id.

159. A.B.A. Special Committee Report 22.

160. Id.

161. Id. The amendment proposed by the Advisory Committee has almost identical language. Advisory Committee Report 34.

162. Coccia, The New Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 37 Ins. Couns. J. 334, 370 (1970).

163. 1970 Advisory Committee's Notes, 48 F.R.D. at 529.

164. Kroll and Maciszewski, Pre-trial Discovery: Change in the Federal Rules, 7 Haw. B. J. 48 (1970).

165. Id. at 55.

166. The issue was not overlooked by the 1970 Advisory Committee. Its Notes indicate that Rule 35(a) "makes no reference to employees of a party. Provisions relating to employees in the State statutes and rules . . . appear to have been virtually unused." 1970 Advisory Committee's Notes, 48 F.R.D. at 529.

167. Id. at 531-532.

168. Coccia, The New Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 37 Ins. Coun. J. 334 (1970).

169. Id. at 373.

170. Id.

171. Comment, Federal Discovery Rules: Effects of the 1970 Amendments, 8 Colum. J. of L. & Soc. Problems 623, 642 (1972).

172. Symposium, Discovery in Civil Antitrust Suits, 44 Antitrust L.J. 1, 25 (1975) (Remarks of Peter Byrnes); but see Connolly, Holleman & Kuhlman, Judicial Controls and the Civil Litigation Process: Discovery 25 (1978)(Federal Judicial Center Report) (suggesting infrequency of imposition of sanctions is due more to attorneys' reluctance to move for them than to judges' reluctance to impose them).

173. Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 Harv. L. Rev. 1033, 1034 (1978).

174. 427 U.S. at 643.

175. The reaction of one judge to excessive abuse is quoted by a Texas attorney writing in the Southwestern Law Journal. Apparently faced with a blatant situation of abuse, the judge noted: "This case makes abundantly clear that the supposedly self-executing federal discovery rules are being abused. 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. My aim is to achieve maximum discovery with minimum involvement of this court." McElroy, Federal Pre-trial Procedure in an Antitrust Suit, 31 Southwestern L. J. 649, 683 (1977).

176. Britt v. Corporacion Peruana de Vapores, 506 F.2d 927 (1975).

177. Werner, Survey of Discovery Sanctions 34 (1978) (unpublished paper on file at the University of Pennsylvania Law School).

178. Spann, Abuse of Discovery: Some Proposed Reforms, 25 North Carolina State Bar Quarterly 3, 5 (1978).

179. Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 Harv. L. Rev. 1033, 1037 (1978).

180. A.B.A. Special Committee Report 23-24; Advisory Committee Report 35.

181. Mazaroff, Surviving the Avalanche: Defendant's Discovery in Title VII Litigation, 4 Litigation 14, 14 (Fall, 1977).

182. Werner, Survey of Discovery Sanctions 32 (1978) (unpublished paper on file at the University of Pennsylvania Law School).

183. Id. at 33.

184. The introductory phrase in Rule 37(f) is an implicit reference to 28 U.S.C. §2412, which permits the awarding of costs against the United States. The statutory provision, however, does not extend its coverage to "the fees and expenses of attorneys." 28 U.S.C. §2412. See 4A J. Moore, Federal Practice, ¶37.07 (1976).

185. Advisory Committee Report 35-36.

186. A.B.A. Special Committee Report 24.

187. Werner, Survey of Discovery Sanctions 48 (1978) (unpublished paper on file at the University of Pennsylvania Law School).

188. Report of the Virginia State Bar Committee on State and Federal Rules of Procedure 5 (undated) (on file at the University of Pennsylvania Law School).

189. Comment, Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process, 44 U. Chi. L. Rev. 619 (1977).

190. Id. at 623. Another student piece pointing to the potential of 28 U.S.C. § 1927 as an enforcement vehicle is Werner, Survey of Discovery Sanctions, 36-38 (1978) (unpublished paper on file at the University of Pennsylvania Law School).

191. Advisory Committee Report 35. The analogous language in the A.B.A. Special Committee Report is virtually identical. A.B.A. Special Committee Report 23.

192. Advisory Committee Report 37.

193. Id. at 39.

194. See pages 9-10 supra.

195. See, e.g., Pound Conference, 70 F.R.D. at 203 (remarks of Francis R. Kirkham); Symposium, Discovery in Antitrust Civil Suits, 44 Antitrust L. J. 1, 4 (1975) (remarks of Seymour Kurland).

196. See, e.g., Transcript of Remarks Made at the 1977 Second Circuit Judicial Conference 107-112 (remarks of Robert Meserve) (on file at the University of Pennsylvania Law School); Liman, The Quantum of Discovery vs. The Quality of Justice: More is Less, 4 Litigation 8, 9 (Fall, 1977); Withrow and Larm, The "Big" Antitrust Case: 25 Years of Sisyphean Labor, 62 Cornell L. Rev. 1, 26 (1975).

197. While the text of this Report covers Rules 26-37 and Rule 45, the concern with problems of over-discovery has manifested itself in a proposal for revision of Rule 5 as well. In general, Rule 5 requires that all "papers relating to discovery" be not only served on each party but filed with the court as well. See F.R. Civ. P. 5(a), 5(d). Both the A.B.A. Special Committee and the Advisory Committee propose that unless the court orders otherwise, the filing requirement not be triggered until the papers in question are actually used in the proceedings. A.B.A. Special Committee Report 1, Advisory Committee Report 5.

The rationale behind the suggested revisions is reflected in the Advisory Committee Note to the Advisory Committee proposal: "The cost of providing additional copies of [discovery] materials for the purpose of filing can be considerable, and the volume of discovery materials now being filed presents serious problems of storage in the clerk's office in some districts." Advisory Committee Report 5.

198. See, e.g., Schwarzer, Managing Civil Litigation: The Trial Judge's Role, 61 Judicature 400 (1978); Krupansky, The Federal Rules are Alive and Well, 4 Litigation 10 (Fall, 1977); Withrow and Larm, The "Big" Antitrust Case: 25 Years of Sisyphean Labor, 62 Cornell L. Rev. 1, 26-27 (1976).

199. See pages 20-22 supra.

200. See, e.g., Schwarzer, Managing Civil Litigation: The Trial Judge's Role, 61 Judicature 400, 403 (1978); Symposium, Discovery in Civil Antitrust Suits, 44 Antitrust L. J. 1, 25 (1975) (remarks of Peter Byrnes).

201. See, e.g., Symposium, Discovery in Civil Antitrust Suits, 44 Antitrust L. J. 1, 25 (1975) (remarks of Peter Byrnes); Withrow and Larm, The "Big" Antitrust Case: 25 Years of Sisyphean Labor, 62 Cornell L. Rev. 1, 26 (1976).

202. See, e.g., the discussion and sources cited at pages 26-29 supra.

203. See, e.g., the discussion and sources cited at pages 33, 53-54 supra.

204. Fed. R. Civ. P. 1.

VII. SURVEY OF THE LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS

(Appendices A-G)

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July 31, 1978

Rule 5. Service and Filing of Pleadings and Other Papers.

(a) SERVICE: WHEN REQUIRED. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) SAME: HOW MADE. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) SAME: NUMEROUS DEFENDANTS. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) FILING. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

(e) FILING WITH THE COURT DEFINED. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970.)

Rule 26. General Provisions Governing Discovery.

(a) DISCOVERY METHODS. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance Agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) PROTECTIVE ORDERS. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) SEQUENCE AND TIMING OF DISCOVERY. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in

any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) SUPPLEMENTATION OF RESPONSES. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which he knows that the response was incorrect when made, or he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment. A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970.)

Rule 27. Depositions Before Action or Pending Appeal.

(a) BEFORE ACTION.

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule

4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a).

(b) PENDING APPEAL. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) PERPETUATION BY ACTION. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 1, 1971, eff. July 1, 1971.)

Rule 28. Persons Before Whom Depositions May Be Taken.

(a) WITHIN THE UNITED STATES. Within the United States or within a territory or insular possession subject to the dominion of the

United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) IN FOREIGN COUNTRIES. In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) DISQUALIFICATION FOR INTEREST. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

Rule 29. Stipulations Regarding Discovery Procedure. Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

Rule 30. Depositions Upon Oral Examination.

(a) WHEN DEPOSITIONS MAY BE TAKEN. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by

subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; SPECIAL NOTICE; NON-STENOGRAPHIC RECORDING; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by the plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for casue shown enlarge or shorten the time for taking the deposition.

(4) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall

advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(c) EXAMINATION AND CROSS-EXAMINATION; RECORD OF EXAMINATION; OATH; OBJECTIONS. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) MOTION TO TERMINATE OR LIMIT EXAMINATION. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) SUBMISSION TO WITNESS; CHANGES; SIGNING. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefore; and the deposition may then be used as fully as though

signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) CERTIFICATION AND FILING BY OFFICER; EXHIBITS; COPIES; NOTICE OF FILING.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (ii) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials, may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) FAILURE TO ATTEND OR TO SERVE SUBPOENA; EXPENSES.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Mar. 1, 1971, eff. July 1, 1971; Nov. 20, 1972, eff. July 1, 1975.)

Rule 31. Depositions Upon Written Questions.

(a) SERVING QUESTIONS; NOTICE. After commencement of the action, any party may take the testimony of any person, including a

party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) OFFICER TO TAKE RESPONSES AND PREPARE RECORD. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) NOTICE OF FILING. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

Rule 32. Use of Depositions in Court Proceedings.

(a) USE OF DEPOSITIONS. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance

than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any State has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(b) OBJECTIONS TO ADMISSIBILITY. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

[(c) EFFECT OF TAKING OR USING DEPOSITIONS.] (Abrogated Nov. 20, 1972, eff. July 1, 1975.)

(d) EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS.

(1) *As to Notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to Disqualification of Officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to Taking of Deposition.*

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) *As to Completion and Return of Deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(As amended Mar. 30, 1970, eff. July 1, 1970; Nov. 20, 1972, eff. July 1, 1975.)

Rule 33. Interrogatories to Parties.

(a) AVAILABILITY; PROCEDURES FOR USE. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) SCOPE; USE AT TRIAL. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) OPTION TO PRODUCE BUSINESS RECORDS. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from

which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.

(a) SCOPE. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26 (b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26 (b).

(b) PROCEDURE. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37 (a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) PERSONS NOT PARTIES. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

Rule 35. Physical and Mental Examination of Persons.

(a) ORDER FOR EXAMINATION. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the

court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) REPORT OF EXAMINING PHYSICIAN.

(1) If requested by the party against whom an order is made under Rule 35 (a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

Rule 36. Requests for Admission.

(a) REQUEST FOR ADMISSION. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the

matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) EFFECT OF ADMISSION. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

Rule 37. Failure to Make Discovery: Sanctions.

(a) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) FAILURE TO COMPLY WITH ORDER.

(1) *Sanctions by Court in District Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) EXPENSES ON FAILURE TO ADMIT. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWERS TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) SUBPOENA OF PERSONS IN FOREIGN COUNTRY. A subpoena may be issued as provided in Title 28, U.S.C., § 1783, under the circumstances and conditions therein stated.

(f) EXPENSES AGAINST UNITED STATES. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970.)

Rule 45. Subpoena.

(a) FOR ATTENDANCE OF WITNESSES: FORM; ISSUANCE. Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place herein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) FOR PRODUCTION OF DOCUMENTARY EVIDENCE. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) SERVICE. A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

(d) SUBPOENA FOR TAKING DEPOSITIONS; PLACE OF EXAMINATION.

(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

(e) SUBPOENA FOR A HEARING OR TRIAL.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.

(f) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970.)

Appendix B

This appendix is a comprehensive listing of all materials written after 1969 that were considered relevant to the subject of this study. Together with each citation is a brief summary of the most salient points made by the piece in question. Each summary also includes the background information on the author that is provided in the piece. (Given the normal practice in law review publications, it is fair to assume that any piece in such a journal which does not give the author's name is written by a student.) The materials for the most part criticize or suggest changes in the current text of the discovery rules of the Federal Rules of Civil Procedure. In addition, some of the materials criticize or suggest changes in state discovery rules that are based on the federal rules.

The appendix is divided into four parts. Part I is a listing of all materials that consider the discovery rules as a whole and contain references to a number of the rules. Part II is a rule-by-rule listing of materials that deal principally with one rule or one subdivision of a rule. Part III lists materials that discuss problems relating to

pre-trial procedures -- especially in complex cases -- in a potentially helpful manner; these materials by and large do not treat specific provisions of the discovery rules. Finally, Part IV lists materials that compare discovery procedures in nonjudicial proceedings with the federal rules on discovery.

For ease of comparison with the Index to Legal Periodicals, that index's method of alphabetization is used; the materials in each section of the appendix are alphabetized by the first letter of their titles.

Part I: Materials That Consider the Discovery Rules as a Whole

1) A Guide to the New Federal Discovery Practice, Blair, 21 Drake L. Rev. 58 (1971).

The author is identified as a former clerk to a federal district judge in Iowa who is now in private practice.

He suggests that the elimination of the law-fact dichotomy in Rules 33 & 36 should be extended to Rule 26 to create a general rule covering discovery. Extension of Rule 35 to witnesses and other nonparties, while desirable, might, according to him, produce constitutional problems.

The clerk-magistrate in the Southern District of Iowa is empowered under local rule to rule on all discovery motions; this practice is approved.

2) Abuse of Discovery: Some Proposed Reforms, Spann, 25 North Carolina Bar State Quarterly 3 (1978).

The author is the president of the American Bar Association.

He expresses concern about abuses occurring within the context of the current discovery rules and discusses the proposals of the Special Committee on Discovery Abuse of the A.B.A.'s Section on Litigation.

3) Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 79, 107 (1976).

In one of the addresses delivered at the conference, Simon H. Rifkind, senior partner in a New York law firm and a former federal judge, points to the burdens on the judicial system of excessive discovery. He proposes that the civil litigant be required to make a showing of "probable merit" to his case before being allowed to begin discovery.

In another address, Francis R. Kirkham, a practicing lawyer from San Francisco, also discusses the problem of discovery abuse, focusing on its manifestations in complex antitrust litigation. Kirkham argues that there is not enough specificity required from complaints and contends that "the great abuse of discovery has come from confusing the roles of public attorney general and private attorney general and failing to confine the latter to relevant inquiry."

4) Ambiguities after the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product, Comment, 17 Wayne L. Rev. 1145 (1971).

Here Rule 26(b)(3) is criticized as not taking into account the rare case (e.g., malpractice against an attorney) where mental impressions should be discoverable. Intangible work product is urged to be brought under Rule 26(b)(3) because only the "hazy guidelines" of Hickman v. Taylor are otherwise applicable. Regularly employed experts who will not be called to testify should, according to the author, be discoverable under 26(b)(4).

5) Changes Ahead in The Federal Rules, Vetter, 56 A.B.A.J. 568 (1970).

The author is identified as a practitioner.

He argues that a) the standard of relevance in Rule 26 is ambiguous and too broad, and b) under current provisions experts may be too discoverable, making discovery of discussions with attorneys, tentative conclusions, and rejected opinions inappropriately permissible.

6) Discovery as to Products, Premises, Documents and Persons, Kennelly, 20 Trial Lawyer's Guide 152 (1976) (Part One); 20 Trial Lawyer's Guide 336 (1976) (Part Two).

The author is identified as a trial attorney, specializing in aviation litigation.

He contends that a relatively broad scope of discovery is necessary to fulfill the truth-finding functions of litigation. He argues that Rule 26(b)(3)'s work product doctrine should be liberally construed to make more things discoverable and that Rule 34 should be interpreted in products liability litigation to allow substantial opportunity for laboratory testing of discovered materials.

7) Discovery in Civil Antitrust Suits, Symposium, 44 Antitrust L. J. 1 (1975).

The symposium is made up of remarks by several practitioners.

Remarks of Seymour Kurland: Interrogatories aimed at absent class plaintiffs should be disallowed until after liability is determined. Production of business records in lieu of answers to interrogatories under Rule 33(c) is a vehicle for abuse. Aggressive action by trial judges may curb discovery abuse.

Remarks of Peter Byrnes: There is no valid distinction under Rules 33 & 34 between "parties" and "class members"; the latter should be subject to discovery, particularly as to legal injury. The general problems surrounding discovery are aggravated by the reluctance of judges to involve themselves in discovery matters and to apply discovery sanctions under Rule 37. Judges should take a firm hand in establishing parameters of discovery and in resolving discovery issues promptly; discovery sanctions should be more frequently applied.

8) Federal Discovery Rules: Effects of the 1970 Amendments, Comment, 8 Colum. J. of L. & Soc. Problems 623 (1972).

According to the author, Rule 26(b)(3) leaves unclear the meaning of "substantial need" and "prepared in anticipation of litigation." Rule 30 is criticized for its failure to provide guidelines for the use of non-stenographic depositions. The failure of Rule 33 to provide standards under the option to produce business records is criticized. The weakness of requests for admission procedure is ascribed to a refusal by lawyers to depart from adversariness.

9) Pre-Trial Discovery: Change in the Federal Rules, Kroll & Maciszewski, 7 Haw. B. J. 48 (1970).

The authors are identified as practicing lawyers.

The authors contend that Rule 26(b)(3) does not clarify what materials are prepared in "anticipation of litigation." They argue that clarification is needed a) of Rule 26(b)(4)(A)'s prohibition on discovery of non-testifying experts who are "retained or specially employed", and b) the Advisory Committee Notes' indication that discovery of "informally consulted" experts is prohibited by 26(b)(4)(A). The authors

suggest that Rule 35 should permit the examination of an employee or an agent of a corporation when the corporation alone is a party, so that the corporation will not enjoy an unfair advantage.

10) Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Advisory Committee on Civil Rules of the Judicial Conference of the United States (98 S.Ct. advance sheet No. 14, May 15, 1978).

The proposed changes deal principally with discovery. Inter alia, a stricter relevance standard, greater permissibility of telephonic and electronically recorded depositions, and an expanded sanctions scheme are proposed.

11) Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (October, 1977; second printing and revision December, 1977).

The proposed changes in discovery rules include a stricter relevance standard, greater permissibility of telephone depositions, the reversing of the presumption against non-stenographic depositions, a numerical limit on interrogatories, and the expansion of sanctions.

12) Report of the Virginia State Bar Committee on State and Federal Rules of Procedure (undated) (on file at the University of Pennsylvania Law School).

This is a review of suggested changes in the discovery rules. A restricted definition of relevance is approved although doubt is expressed that the change will in practice affect judicial interpretation. A numerical restriction on interrogatories is criticized as unrealistic. The taking of depositions by telephone and the substitution of electronic for stenographic recording of depositions is approved, if the burden is on the proponent to seek judicial approval.

13) Surviving the Avalanche: Defendant's Discovery in Title VII Litigation, Mazaroff, 4 Litigation 14 (Fall, 1977).

The author is identified as a litigator specializing in defending companies in job discrimination cases.

He points to what he sees as the excessive burdens placed on many Title VII defendants as the targets of discovery. He offers practical advice to practitioners on how to deal with the problem.

14) The New Amendments to the Federal Rules of Civil Procedure Relating to Discovery, Coccia, 37 Ins. Coun. J. 334 (1970)

The author is identified as a Chicago practitioner

who was a member of a committee formed by the Int'l Ass'n of Insurance Counsel to express its views on the new rules.

Rule 26(b)(2) is criticized because it does not serve the discovery purposes of 1) narrowing the issues, 2) obtaining evidence which is admissible at trial, and 3) securing information that may lead to the discovery of admissible evidence. Rule 26(b)(4) is acceptable to the author if it is read to allow discovery only in cases where the facts are no longer available to the requesting party and discovery is limited to merely ascertaining those facts. He contends that Rule 33(b) should not permit inquiry as to opinions and legal contentions and that Rule 34(b) should incorporate relevancy plus a need requirement. Rule 35(a) is criticized as ambiguous as to what constitutes "custody or legal control." The author argues that Rule 36 is totally unacceptable, because it permits requests for admission of legal conclusions. According to the author, the authority in Rule 37(a)(4) to award expenses to the prevailing party should be discretionary, not mandatory.

Part II: Materials that Consider Specific Discovery Rules

[In this part of Appendix B, each rule that has been the subject of relevant separate writing is listed separately; in addition, Rule 26 is divided into four separate listings for subdivisions 26(b)(1), 26(b)(2), 26(b)(3), and 26(b)(4).]

Rule 26:

Rule 26(b)(1):

1) A Quicker Route to Court, Business Week, Dec. 5, 1977, p. 84.

The piece reports on those urging that issues be defined at an early stage in any given litigation and that the permissible scope of discovery be somewhat narrowed.

2) Discovery of Documents, Books, Records, Etc., For Impeachment Purposes, Comment, 22 Baylor L. Rev. 516 (1970).

The author contends that there should be an exception to what he sees as a general rule of "no discovery solely for impeachment purposes" in "unusual situations" such as when material is about to be moved out of the jurisdiction.

He argues that the production of materials for impeachment purposes is appropriate at trial if credibility becomes an issue.

3) Federal Pre-trial Procedure in An Antitrust Suit, McElroy, 31 Southwestern L. J. 649 (1977).

The author is a practitioner.

He contends that abuse of the discovery provisions of the federal rules calls for a judicial tightening of the permissible scope of discovery or for amendments to the rules.

4) Managing Civil Litigation: The Trial Judge's Role, Schwarzer, 61 Judicature 400 (1978).

The author is identified as a federal judge in the Northern District of California.

He argues that a judge should be aggressive in pre-trial management, by defining relevancy and by controlling unduly expensive discovery. According to him, judicial non-intervention must give way to judicial activism.

5) New Directions in the Administration of Justice: Responses to the Pound Conference, Erickson, Bell, Lundquist & Schechter, 64 A.B.A.J. 48 (1978).

The authors are a justice of the Colorado Supreme Court, an Attorney General, and two practitioners, respectively.

They argue that the time and expense required to obtain sanctions under the current rules militate against their use. They contend that issues in complex litigation should be identified early to reduce discovery costs. They identify the most significant proposal by the Special Committee for the Study of Discovery Abuse as the changing of Rule 26(b)(1)'s scope of discovery standard to "relevant to the issues raised."

6) Protection from Discovery of Researchers' Confidential Information: Richards of Rockford, Inc. v. Pacific Gas and Elec. Co., 71 F.R.D. 388 (N.D.Cal. 1976), Case Comment, 9 Conn. L. Rev. 326 (1977).

In the analyzed case, a judge issued a protective order in a contract case to bar the discovery of interview notes which were taken by a research assistant of a third party professor. The court considered four criteria: the nature of the proceeding, whether the deponent was a party, whether

the information sought was otherwise available, and whether the information sought was at "the heart of the claim." Rather than balancing these factors, the author asserts they should be considered sequentially.

7) The Scope of Discovery In North Carolina Under Amended Rule 26, Comment, 13 Wake Forest L. Rev. 640 (1977).

North Carolina Rule 26 is patterned after federal Rule 26. The author argues that it should be construed liberally and that if there is "any possibility" that the information sought is relevant, a discovery request should be granted.

Rule 26(b)(2):

1) Discoverability of Liability Insurance Policy Limits in North Carolina, Comment, 7 Wake Forest L. Rev. 575 (1971).

The author notes that Federal Rule 26(b)(2) allows the discovery of an insurance agreement without regard to the limits of Rule 26(b)(1) (relevance and absence of privilege). North Carolina Rule 26(b) retains relevance and absence of privilege requirements as to insurance policies. The author agrees with the policy underlying the North Carolina rule.

2) Insurance: Discovery and Evidence, Martinez, 1971 Ins. L. J. 471.

The author is identified as a law student.

He asserts that the 1970 amendment to Rule 26(b)(2) does not permit the discovery of an insurance policy solely for settlement purposes; a policy may be discovered only in cases where the insurer is liable for the insured's negligence. The author believes that insurance policies should be discoverable for settlement purposes.

3) Pretrial Discovery of Insurance Coverage, Davis, 16 Wayne L. Rev. 1047 (1970).

The author is identified as a practitioner in Michigan.

He argues that the discovery of insurance coverage under the federal rule will encourage settlement, because counsel are under an obligation to limit their prayer for relief to a reasonable figure and there is a qualified duty to settle within the policy limits. A contrary Michigan state rule is criticized.

Rule 26(b)(3):

1) Discovery of Attorney's Work Product, Comment, 12 Gonzaga L. Rev. 284 (1977).

Recognizing the difficulty in applying a qualified immunity for tangible work product, the author nevertheless

asserts that Rule 26(b)(3) serves a valuable purpose in distinguishing between tangible work product and mental impressions.

2) Discovery of an Attorney's Work Product in Subsequent Litigation, Note, 1974 Duke L. J. 799.

The author argues that while Rule 26(b)(3) probably protects only materials which are prepared in anticipation of present litigation, the Hickman reasoning applies to the discovery of work product in subsequent litigation. A proposed criterion for the extension of the doctrine to subsequent litigation is suggested: under the circumstances existing at the time of preparation, would a reasonable attorney have believed that there was a substantial probability of significant subsequent litigation to which the work product would be relevant?

3) Discovery of Witnesses and Potential Parties in Texas, Sherwood & Duncan, 50 Tex. L. Rev. 351 (1972).

The authors express approval of the amended Texas Rules of Civil Procedure which permit discovery of a witness list prepared after an occurrence. "Witnesses" include those

who have knowledge or may have knowledge of events both before and after an occurrence and those maintenance personnel who inspected before an occurrence. The discovery of the names of inspectors who inspected after an occurrence are covered by the Texas work product doctrine.

4) Gallaher v. Yellow Cab Co. of PGH: A Guide to the Application of Rule 4011(d)'s "In Anticipation of Litigation"?, Case Comment, 33 U. Pitt. L. Rev. 144 (1971).

According to the analyzed case, the interpretation of the "in anticipation of litigation" language of the Pennsylvania work-product rule should revolve around: 1) the likelihood of litigation at the time of the making of a report, 2) the timing of the creation of the material, and 3) the existence of an "outward manifestation of a conscious concern for impending litigation," as in preparing the document in order to assess fault. The author argues that these factors should be overridden in some cases by the policy consideration "of allowing liberal discovery from the party with greater or exclusive control of the evidence."

5) SEC v. Nat'l. Student Marketing Corp., Work Product Immunity Inapplicable to Attorney-Defendant Where Work-Product Is at Issue and Former Client Is No Longer an Interested Party in the Suit, Case Comment, 6 Loy. L. J. 447 (1975).

In cases where an attorney's work product is the subject matter of the litigation and the client is not an interested party, the author asserts that the work product should be discoverable only if the special showing required under Rule 26(b)(3) can be made.

6) Work-Product Privilege Extends to Subsequent, Unrelated Litigation, Case Note, 27 Vand. L. Rev. 826 (1974).

The author argues that Rule 26(b)(3) should be extended under the reasoning of Hickman v. Taylor to the use of privileged material in subsequent, unrelated litigation. The author approves the Hickman policy of protecting professional effort and confidentiality.

Rule 26(b)(4):

1) Compelling Experts to Testify: A Proposal, Comment, 44 U. Chi. L. Rev. 851 (1977).

Rule 26(b)(4)(B) does not address the question whether experts who are not retained or specially employed and/or who will not be called as witnesses are subject to discovery.

The author suggests that the appropriate procedure to be applied is as follows: if the movant makes a showing of need (unavailability of information), a non-26(b)(4)(B) expert must testify at a deposition unless he shows that it is unreasonable to compel him to testify rather than some other unwilling expert.

2) Discovery of Expert Information Under the Federal Rules, Comment, 10 U. Rich. L. Rev. 706 (1976).

Allowing the discovery of experts retained or specially employed in anticipation of litigation raises the problem of determining when anticipation begins, particularly in the case of an insurance company, where the possibility of litigation is always present. The author asserts that an expert's information should be discoverable only when it is compiled with respect to a specific suit.

3) Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study, Graham, 1976 U. Ill. L. F. 895.

The author is identified as a professor of law at the University of Illinois.

Allowing experts under Rule 26(b)(4)(A) to be examined only by an interrogatory is criticized, the author noting that depositions are more flexible.

Although a motion under Rule 26(b)(4)(A)(ii) should be preceded by a motion for more specific answers to the interrogatory, the author argues that good faith answers should not foreclose further discovery and proposes that a more precise standard be articulated under Rule 26(b)(4)(A)(ii).

It is unclear under Rule 26(b)(4)(B) whether a showing of exceptional circumstances must be made for the discovery of names of nontestifying experts.

There is some difficulty in distinguishing between "retained" and "informally consulted" experts. The author suggests that one solution might be to consider any expert who satisfies the "exceptional circumstances" test to be "retained".

4) Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal, Graham, 1977 U. Ill. L. F. 169.

The author is identified as a professor of law at the University of Illinois.

He suggests several amendments to Rule 26(b)(4): a) the full discovery of testifying experts and second tier experts, and b) an exceptional circumstances test applied to discovery of nontestifying experts.

5) Experts -- Some Comments Relating to Discovery and Testimony Under New Federal Rules of Evidence, Bua, 21 Trial Lawyer's Guide 1 (1977).

The author is identified as a judge of the Appellate Court of Illinois.

In the context of an article dealing in major part with the Federal Rules of Evidence, the author argues that courts should rather freely use their discretion under Rule 26(b)(4)(A)(ii) to allow expanded discovery of experts expected to be called as witnesses. He feels strongly that in most instances expert reports should be discoverable.

6) Pretrial Discovery of Expert Information in Federal and State Courts: A Guide for the Expert, Simon, 5 J. of Police Science and Administration 247 (1977).

The author is identified as a private practitioner on leave to serve as law clerk to a Seventh Circuit judge.

In discussing Rule 26(b)(4)(A), the author notes, somewhat disapprovingly, that federal courts have been far

from consistent in the showings they demand before allowing the further discovery of expert witnesses under Rule 26(b)(4)(A)(ii). Raising the possibility that Rule 26(b)(4)(A)(ii) might deter experts from participating in litigation, he argues that a party requesting further discovery under that provision be required to show specifically why the interrogatories posed under 26(b)(4)(A)(i) have been insufficient. He further contends that all discovery under Rule 26(b)(4)(A)(ii) be limited to facts and opinions about which the expert is expected to testify and that expert discovery for "collateral impeachment" purposes not be allowed.

Rule 30:

1) Expanding Video Tape Techniques in Pretrial and Trial Advocacy, Thornton, 9 Forum 105 (1973).

The author is identified as a practitioner.

He notes that use of video tape is inexpensive and that video tape depositions may be valuable in cases where a physical demonstration is necessary.

2) Investment Properties Int'l., Ltd. v. IOS, Ltd., 459 F.2d 705 (CA2, 1972), Case Note, 14 B.C. Comm. & Ind. L. Rev. 1116 (1973).

In the analyzed case, the court granted mandamus to order a district court to permit depositions to be taken to establish the threshold issues of standing and subject matter jurisdiction. The author calls this grant consistent with the liberal discovery practice expressed in the federal rules.

3) Oral Depositions to be Videotaped Under New Pennsylvania Court Rules, 57 Judicature 34 (1973).

This article, without a byline, reports on a new Pennsylvania court rule facilitating the use of videotape depositions. Unlike the current federal provision, the Pennsylvania rule does not require judicial permission to substitute videotaping for a stenographic transcript. The scheme does allow protective orders to be requested if the videotaping is objected to, but the article contends that such orders are not likely to be granted in other than very special circumstances. The article notes that the rule further provides that the videotape depositions of experts may be used at trial whether or not the expert is available to testify.

4) The Use of Video Tape Depositions in Complex Litigation, Salomon, 51 Cal. State Bar J. 20 (1976).

The author is identified as a practitioner.

He argues that the use of video tape depositions should not depend on an actual finding of cost saving or on a movant's inability to pay for stenographic transcriptions.

5) Trial Judge May Deny Motion for Non-Stenographic Deposition Only When Particulars of Request Do Not Reasonably Ensure Accuracy Equivalent to Stenographic Deposition, Case Comment, 26 South Carolina L. Rev. 753 (1975).

Rule 30(b)(4) does not establish a standard to determine when a court should permit a non-stenographic deposition to be taken. Non-stenographic depositions should, according to the author, not be limited to situations where the moving party pleads financial hardship. An order denying a non-stenographic deposition should be issued, he argues, only when the particulars of the request for a non-stenographic deposition do not reasonably ensure a level of accuracy which is equivalent to stenographic depositions.

6) Videotape in Civil Cases, Kornblum, 24 Hastings L. J. 9 (1972).

The author is identified as a professor of law at Hastings Law School.

He argues that the absolute right to a stenographic deposition should be extended to a right to a videotape deposition.

7) Videotaped Depositions: The Ohio Experience, Murray, 61 Judicature 258 (1978).

The author is identified as a practitioner.

He looks approvingly at Ohio's practice of putting videotape and stenographic depositions on a par; unlike the federal practice, a court order is not required for the videotape deposition. Ohio has encouraged experimentation by requiring only that the resulting record be accurate and fair; the parties may stipulate as to the form of the videotape. Depositions should, the author argues, be permitted to be taken by telephone, without a court order.

8) Videotaping the Oral Deposition, Miller, 18 Prac. Lawyer 45 (Feb. 1972).

The author is identified as a practitioner.

He contends that the deponent need not examine, read, and sign a video tape deposition. The author provides a description of what he sees as a desirable physical setting for the taking of a videotape deposition.

Rule 31:

1) Written Depositions Under Federal and State Rules as Cost-Effective Discovery at Home and Abroad, Schmertz, 16 Vill. L. Rev. 7 (1970).

The author is identified as a professor at the Georgetown University Law Center.

The deposition upon written questions under Rule 31 is rarely used. The author argues that while the interchange of questions and cross-questions makes Rule 31 discovery cumbersome, it is less expensive, less time-consuming, and more spontaneous than discovery by interrogatory. He notes that it is difficult to avoid ambiguity and to anticipate evasions and that the desirability of Rule 31 discovery varies inversely with the amount involved. He contends that such discovery is unsuitable for complex and technical litigation because the right to cross-examine may not be preserved when lengthy and complicated questions must be anticipated. The author proposes that Rule 31 should be clarified to deny the "preview" of questions by the deponent, if he is a non-party.

Rule 33:

1) Absentee Class Members Subjected to Discovery and Claims Dismissed for Failure to Respond, Case Comment, 1971 Duke L. J. 1007.

The author criticizes the Seventh Circuit's decision in Brennan v. Midwestern United Life Ins. Co. for requiring absent class members to submit to interrogatories by an adverse party in a Rule 23 suit. The author asserts that such a requirement is inconsistent with the underlying policy of Rule 23.

2) Brennan v. Midwestern United Life Insurance Co., [450 F.2d 999 (CA7, 1971)], Case Note, 40 Fordham L. Rev. 969 (1972).

The author believes that unless the discovery of absent class members is limited to "extraordinary circumstances" it could be used as a tactic to diminish the class.

3) Brennan v. Midwestern United Life Insurance Co., [450 F.2d 999 (CA7, 1971)], Case Note, 40 U. Cin. L. Rev. 842 (1971).

The Seventh Circuit held in the analyzed case that identifiable absent plaintiff class members who received notice of the suit in question, and who neither elected to be excused nor entered an appearance, were required

under Rule 23(d) to submit to party discovery on the pain of dismissal of their claims with prejudice. The Court implicitly rejected the contention that absent class members are not parties for the purposes of Rules 33 & 34. The author of this piece criticizes the decision as "harsh".

4) Discovery Available Against Absent Plaintiffs to a Class Action, Case Comment, 21 J. Pub. L. 189 (1972).

Absent class members were held to be parties for the purposes of Rules 33 & 34 in Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (CA7, 1971). The author contends that, at most, absent class members should be treated as parties only for the issue of damages, not for the issue of liability.

5) Discovery from Class Members: A Fertile Field for Abuse, Gruenberger, 4 Litigation 35 (Fall, 1977).

The author is identified as a member of a New York law firm and of the A.B.A.'s Council of the Section of Litigation.

He contends that the possibilities of discovery abuse are greatest in the area of class actions and that within

that area "discovery on the merits aimed at class members is particularly subject to mischief". He asserts that in many instances abusive discovery ultimately works to neither side's benefit and points approvingly to a New York case in which sanctions for abuse were directed not against a party but against the offending lawyers.

6) Opinion Interrogatories After the 1970 Amendment to Federal Rule 33(b), Case Comment, 53 North Carolina L. Rev. 695 (1975).

The author argues that the best test for evaluating an interrogatory which relates to an opinion is whether it relates to an "essential element" of either party's claim or defense.

7) Private Treble Damage Actions: The Defendant's Side, Mattson, 41 Antitrust L. J. 551 (1972).

The author is identified as a member of the California bar.

He notes that federal law only gives federal courts jurisdiction to hear private antitrust claims brought by those who have been injured in their businesses or property by reason of an antitrust violation. He argues that with

the courts' jurisdiction so limited, a class action defendant should be entitled to discover from each member of the class as to whether and how he was damaged by the alleged violation.

8) Requests for Information in Class Actions, Comment, 83 Yale L. J. 602 (1974).

According to the author, the policy in favor of class actions may be undermined by forcing class members to opt in by furnishing information pursuant to discovery requests. He contends that the discovery of class members is generally not relevant to the defendant's liability or defenses and should generally be denied, except as to the issue of damages.

9) The Effective Use of Written Interrogatories, Schoone & Miner, 60 Marq. L. Rev. 29 (1976).

The authors are identified as practitioners.

The advantages and disadvantages of interrogatories are discussed. The authors propose that contention interrogatories be evaluated on a standard of whether they serve a "substantial purpose" in the litigation in question.

10) The Impact of the Amended Rules Upon Discovery Practice Before the Trademark Trial and Appeal Board, Bogorad, 66 Trademark Rptr. 28 (1976).

The author is identified as a member of the Board.

The Trademark Trial and Appeal Board recently adopted discovery rules patterned on the federal rules. The use of interrogatories increased, requiring more decisions on motions to compel. According to the author, the evidence is that some interrogatory practice has resulted in harassment. The author notes that the practice of monitoring the number of interrogatory questions served was found unsatisfactory due to the ingenuity of attorneys in evading limits; the requirement of good cause to serve further interrogatories was also found unsatisfactory, because in practice, the author asserts, good cause will always be pleaded.

11) Uses and Limitations of Some Discovery Devices, Figg, McCullough and Underwood, 20 Prac. Lawyer 65 (1974).

The authors are identified as two law professors and a member of the South Carolina bar.

They present what is essentially a guide to trial lawyers on the advantages and disadvantages of using various discovery devices in given situations. They suggest some

dissatisfaction with what they see as a lack of clarity in Rule 33(c)'s permitting interrogatories to be satisfied by the identification of records in certain circumstances; it is unclear to them what constitutes a sufficient specification by the responding party of the materials "from which the answer may be derived." They also see a fundamental problem in determining when 33's trigger condition is fulfilled, i.e. when the "burden of deriving . . . the answer is substantially the same for the party serving the interrogatory as for the party served".

12) Use of Long Interrogatories in Aviation Cases, Good, 36 J. of Air L. and Commerce 452 (1970).

The author is identified as a practitioner.

He notes that the relative cheapness of interrogatories is especially important in aviation tort cases, where defendants tend to have more expertise, experience,and money than plaintiffs. He argues that the burdensomeness of interrogatories should not be a ground for a protective order.

Rule 34:

1) Proposed Local Rule, Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation (Draft of 4/10/78) (on file at the University of Pennsylvania Law School).

This proposal, originally put to the Commission by Robert Meserve, former president of the A.B.A., deals with requests for the production of documents under Rule 34. Under this proposal, the party seeking production would have two alternatives. Under the first, he would list the subject matters relevant to his claim; the party opposing could then object on the grounds of lack of relevance. After the court's relevance rulings, the party making production would list the location of files relating to the subject matter, describe the documents, and identify knowledgeable sources as to files. The party seeking production would then inspect files chosen from the list prepared by the party making production. If this alternative were not chosen, the party seeking production would proceed as under current Rule 34 but would have to make his production requests within a narrower standard of relevance.

2) Transcript of Remarks Made at the 1977 Second Circuit Judicial Conference (copy obtained from the Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation, on file at the University of Pennsylvania Law School).

In these remarks, Mr. Robert Meserve, former president of the A.B.A. makes the suggestion regarding Rule 34 which formed the basis of the local rule proposal described immediately above.

Rule 35:

1) Discovery and the Doctor: Expansion of Rule 34(b), Kellner, 34 Mont. L. Rev. 257 (1973).

The Montana rules provide for discovery by deposition, interrogatory, and production of documents. The private interview is criticized by the author as potentially obliterating the doctor-patient privilege and as giving a substantial advantage to defendants. The student author urges the elimination of the private interview as a discovery tool in Montana.

Rule 37:

1) Imposition of Sanctions for Failure to Disclose Names of Witnesses, Case Comment, 43 Tenn. L. Rev. 124 (1975).

The language in the Tennessee rule on sanctions is similar to that of the federal rule. If in discovery a party fails to disclose the names of an eyewitness, the author asserts that, quite apart from the rule's language, the court has the inherent power to exclude the witness' testimony.

2) Report of Pound Conference Follow-Up Task Force, 74 F.R.D. 159 (1976).

This A.B.A. Task Force Report underlines the problems of discovery abuse. It suggests that the "creative use of sanctions" offers promise as a means for combatting abuse.

3) Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process, Comment, 44 U. Chi. L. Rev. 619 (1977).

The author argues that judicial interpretation of Rule 37 is unduly narrow. He contends that negligence should suffice to impose liability personally on an attorney

under Rule 37 and notes that 28 U.S.C. § 1927 provides a potentially useful tool for sanctioning attorneys.

4) Standards for Imposition of Discovery Sanctions, Note, 27 Maine L. Rev. 247 (1975).

The author proposes the flexible application of sanctions that are rationally related to and required by the purposes of the discovery rules. Less severe sanctions should, he argues, be considered first. He urges that the standards to be considered in applying sanctions should include: 1) the degree of sanctioning necessary to prevent prejudice to the movant, 2) the desirability of limiting a sanction to a discrete issue, 3) the nature of the proceeding (and the harm that would result from the imposition of the sanction), 4) the nature and importance of the claim, and 5) the need of the discovering party for the requested material.

5) Survey of Discovery Sanctions, Werner (1978) (unpublished paper on file at the University of Pennsylvania Law School).

The author is a law student.

He surveys reported cases dealing with Rule 37 and concludes that federal trial judges have in recent years

grown less reluctant to impose sanctions. Noting gaps in the coverage of Rule 37 and probing alternative ways to deal with discovery abuse, he supports the proposal of the A.B.A. Special Committee to amend Rule 37.

6) The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, Note, 91 Harv. L. Rev. 1033 (1978)

The author argues that judicial reluctance to impose discovery sanctions may be the product of hazy concerns about due process and the rules' philosophy of reaching the merits whenever possible. He contends that the thrust of Rule 37 until recently has been not to deter but to discourage resort to judicial process to enforce discovery. Noting that the Supreme Court has indicated that the dismissal sanction is not merely a last resort, the author suggests that more frequent use of Rule 37 sanctions in the context of a deterrence theory would be appropriate.

Part III: Materials that Consider Pretrial Procedures Without Specific Reference to the Discovery Rules

1) A Modern, Efficient Use of the Bar and Other Parajudicial Personnel in Pretrial of Ordinary Civil Actions, Becker, 53 F.R.D. 159 (1971).

The author is identified as a federal judge in the Western District of Missouri.

This is a discussion of Local Rule 20 in the Western District of Missouri. Features of the rule include the establishment of a time limit on discovery, the reduction of motion practice by eliminating the prerequisites to be met before discovery may proceed, the requirement of a filing of uncontroverted, stipulated facts, and the filing of a pretrial order.

2) A Plan to Cut Litigation, Interview with Griffin Bell, Business Week, June 6, 1977, p. 60.

In this interview, the Attorney General discusses suggestions for preventing abuses of discovery. He urges judges to identify the issues in a case early in the litigation and to limit discovery to those issues.

3) Chilling Impact of Litigation, Business Week, June 6, 1977, p. 58.

In this article, without a byline, the author reports on what he sees as a growing feeling in the legal profession that the allowed scope of discovery is too broad and that the process is too often used as an expense-producing mechanism against a financially weak litigant. He notes that the devices that have been suggested to control discovery abuse include relatively harsh sanctions for the frivolous use of discovery and generally increased judicial supervision of the discovery process.

4) Complex Antitrust Cases: Need They Always Drag On, Antitrust and Trade Regulation Report (BNA), No. 786, p. AA-1 (Oct. 26, 1976).

In this article, without a byline, the author describes in some detail the problems of delay that have been encountered in the I.B.M. antitrust litigation before Federal District Judge David Edelstein and in the FTC antitrust litigation against eight major oil companies. With respect to the FTC, the author presents the arguments for and against the agency's adopting procedural provisions similar to the federal discovery rules. With respect to the I.B.M. litigation, the author reports the contention of some that every day that

resolution of the case can be delayed may be worth upwards of $2 million to I.B.M. It is the sense of some of those interviewed by the author that the length of much antitrust litigation is simply a product of the complexity of the matters at issue rather than the dilatoriness or evasive intent of any of the parties.

5) How to Break Logjam in Courts: Exclusive Interview with Chief Justice Burger, U.S. News and World Report, December 19, 1977, p. 21.

In this interview, the Chief Justice identifies three widespread criticisms of discovery procedures: a) pretrial proceedings are being used in too many cases to delay the litigation process; b) plaintiffs are too often depending on discovery to disclose whether or not they have a claim; and c) discovery is too often being used as an expense producing weapon against a financially weak litigant.

6) Judicial Controls and the Civil Litigative Process: Discovery, Connolly, Holleman and Kuhlman (1978).

This is a Federal Judicial Center report.

The authors attempt through the analysis of empirical data to understand how effectively the federal discovery

rules are actually functioning. They conclude, inter alia, that Rule 37 is ineffective in stimulating timely discovery. Noting that discovery patterns differ greatly depending on the nature of the litigation, they develop a "Model for Effective Discovery Control". The model is designed to express the "amount of discovery activity likely to occur when major predictive characteristics are present." This predicted activity level can then in a given case be translated into a recommended time period that the judge should allot for discovery.

7) Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition, Becker (unpublished paper on file at the University of Pennsylvania Law School) (March 30, 1978).

The author is identified as a federal judge in the Western District of Missouri.

Issue pleading as a means of narrowing issues is criticized. The Manual for Complex Litigation, with its suggestions for early and aggressive action by the trial judge to limit discovery, is cited as an appropriate device to control abuse.

8) One Delay After Another, Kohlmeier, National Journal, Oct. 9, 1976, p. 1438.

In this short piece, the author discusses problems of delay in complex antitrust litigation and notes the statement of former Assistant Attorney General Donald Baker that in such cases "[p]re-trial discovery goes on for an endless time. It's a war of attrition." The author concludes that "[g]iven the stakes in these huge antitrust cases, the talents of defense lawyers and the procedures of courts, chances of streamlining antitrust litigation do not appear good."

9) Our Troubled Courts: Two Views, Kurland, Nation's Business 76 (May, 1971).

The author is a professor of law at the University of Chicago.

He contends that the federal rules allow too much delay for discovery; he argues that cases are effectively tried twice -- at discovery and at trial. According to him, there is little evidence that discovery results in the avoidance of trials.

10) Pretrial Conferences, Pollack, 50 F.R.D. 449 (1970).

The author is identified as a judge in the Southern District of New York.

He contends that a solution to burdensome and protracted pretrial procedure is for the judge to take an aggressive role early in the litigation and suggests that agreed and controverted facts be set forth by the parties.

11) Pretrial Discovery - The Courts and Trial Lawyers Are Finally Discovering That Too Much of It Can Be Counterproductive, Kennelly, 21 Trial Lawyer's Guide 458 (1978).

The author is a practicing lawyer in Chicago, specializing in aviation litigation.

He contends that counsel rather than judges can best evaluate when discovery is or is not needed. He argues that "except for manifest abuse, the courts should not attempt to usurp the rights and prerogatives of trial lawyers whether they represent plaintiffs or defendants." Much of his analysis appears in the context of his approving treatment of Identiseal Corp. of Wisconsin v. Positive Identification Systems Inc., 560 F.2d 298 (1977) in which the Seventh Circuit reversed a district court which had dismissed a case on

the rather strange grounds that the plaintiff refused to conduct any pretrial discovery.

12) Pretrial Procedures More Effectively Handled, Pollack, 65 F.R.D. 475 (1974).

The author is identified as a judge in the Southern District of New York.

According to him, an early pre-trial conference will set the ground rules for the scope of discovery, will establish the procedure for an informal resolution of discovery disputes by the judge, and will narrow issues. Discovery, he urges, should proceed in this sequence: production of documents, depositions, interrogatories (but only upon good cause and necessity shown).

13) Procedures for Management of Non-Routine Cases, Kendig, 3 Hofstra L. Rev. 701 (1975).

The author is identified as a practitioner.

He recommends the aggressive and active management of complex cases by judges, the use of pretrial conferences to settle discovery disputes and encourage settlement, and the use of masters for discovery duties and supervision.

14) Salamon, Computers Are Gaining on the Legal Pad as Lawyers' Aid in Complex Court Cases, Wall Street Journal, Nov. 2, 1977, p. 15.

In this article, the author, a staff reporter, describes the increased use of computers in the accumulation and analysis of discovery materials in complex cases. She regards such use as indispensable in cases such as the FTC's action against the nation's major oil companies in which "[d]iscovery has been contemplated at 40 million pages."

15) Seeking a Better Way to Bust Trusts, Childs, Washington Post, December 20, 1977, p. 17.

In this article, the author, a syndicated columnist, reports on the efforts of the Justice Department to handle big antitrust cases. He quotes Attorney General Bell approvingly as criticizing the breadth of the scope of discovery in Rule 26(b)(2).

16) Speech Before the Los Angeles Bar Association, delivered May 4, 1978, Carter, 14 Weekly Compilation of Presidential Documents 834 (May 18, 1978).

In this speech, the President, without explicitly mentioning discovery, notes the problem of excessive delay in complex antitrust litigation.

17) Survey of Local Civil Discovery Procedures, Guyer (June, 1977).

This is a Federal Judicial Center staff paper.

The paper surveys various techniques to control discovery employed by individual judges and provided for in local rules.

18) The Anatomy of a Seventy Million Dollar Sherman Act Settlement - A Law Professor's Tape-Talk with Plaintiff's Trial Counsel, Furth & Burns, 23 DePaul L. Rev. 865 (1974).

This is a transcript of a discussion between a DePaul law professor and a practitioner who was involved with the Gypsum antitrust cases.

According to the practitioner, document discovery is the most important type in an antitrust suit. He contends that broad discovery practice has probably not affected the recordkeeping practices of corporations.

19) The "Big" Antitrust Case: 25 Years of Sisyphean Labor, Withrow & Larm, 62 Cornell L. Rev. 1 (1976).

The authors are identified as a New York practitioner and an attorney with the Antitrust Division at the Departmen of Justice.

Even though the control and confinement of discovery is essential in managing an antitrust case, the authors argue that the courts have not been aggressive enough. They contend that discovery should not go forward until the material issues have been defined and that it should go no further than is necessary to support or defend each claim and defense.

20) The Federal Rules Are Alive and Well, Krupansky, 4 Litigation 10 (Fall, 1977).

The author is identified as a federal judge in Ohio.

He argues that judges should take a more aggressive role in regulating discovery, through a personal docket system, through an evaluation of pleadings, and through detailed pretrial orders.

21) The Quantum of Discovery vs. the Quality of Justice: More Is Less, Liman, 4 Litigation 8 (Fall, 1977).

The author is a practitioner.

He argues that the failure of notice pleadings has led to an overly broad relevance standard. He contends

that judicial abstention in the discovery process has led to abuse and proposes that discovery requests be required to bear a certificate of good grounds to believe that the material is necessary for trial preparation.

22) Volunteer Masters Pilot Program, Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation (on file at the University of Pennsylvania Law School).

The Commission recommends a test program, with three judges participating under which, in appropriate cases, a volunteer master would be appointed, inter alia, to help the parties formulate a plan of discovery and to supervise the actual conduct of discovery.

Part IV: Materials That Compare the Federal Rules on Discovery with Other Discovery Procedures

1) Discovery Before the National Labor Relations Board - An Unexpanded Concept, Howard, 12 So. Tex. L. J. 112 (1971).

The student author contends that adoption of the federal rules by the NLRB will advance the purposes of the Taft-Hartley

Act and will "serve justice".

2) Discovery in Agency Adjudication, Tomlinson, 1971 Duke L. J. 89.

The author is an associate professor at the University of Maryland Law School.

This article is based on a report made by the author as a consultant to the Administrative Conference of the United States, in support of the Discovery Recommendations made by the Conference Committee on Compliance and Enforcement Proceedings. The Conference Committee urged adoption of the federal rules by agencies with modifications to meet the special needs of administrative proceedings.

3) Discovery in Proceedings Before the NLRB, Case Comment, 36 Mo. L. Rev. 537 (1971).

The author cites three problems with allowing discovery by deposition in NLRB proceedings: 1) the NLRB cannot compel compliance to its orders without judicial action; 2) employees might be intimidated into silence, thereby impeding investigations; and 3) the crowded NLRB docket might be overburdened by even the good faith utilization of discovery methods.

Appendix C

This appendix lists post-1969 materials indexed in the Index to Legal Periodicals that deal in some respect with the broad topic of civil discovery but that do not express dissatisfaction with the discovery provisions of the Federal Rules of Civil Procedure or analogous state rules. A one-sentence summary is given for each piece.

To facilitate comparison with the Index to Legal Periodicals, this appendix uses the ILP method of indexing by listing the materials in the alphabetical order of their titles.

1) Academic Researchers and the First Amendment: Constitutional Protection For Their Confidential Sources?, Comment, 14 San Diego L. Rev. 876 (1977).

This comment argues in favor of a privilege against discovery for academic researchers.

2) Arkansas and the Amended Federal Discovery Rules, Case Note, 24 Ark. L. Rev. 535 (1971).

This case note compares the federal and state discovery rules.

3) Changes in Interrogatory Practice, Goheen, 40 J. B. A. Kan. 133 (1971).

This article is a recapitulation of federal Rule 33.

4) Changes in the Federal Rules of Civil Procedure Relating to Depositions, Thomas, 40 J. B. A. Kan. 127 (1971).

This article is a recapitulation of federal Rule 34.

5) Civil Procedure, Leathers, 65 Kentucky L. J. 435 (1976).

This article contains a discussion of the use of dismissal under Kentucky law as a sanction for impeding discovery.

6) Coping with the Fruits of Discovery in the Complex Case, Halverson, 44 Antitrust L. J. 39 (1975).

This article advocates the use of computers to organize discovery material.

7) Defense Tactics and Strategies During the Discovery Process in Aviation Litigation, David, 13 Forum 132 (1977).

This article discusses litigation techniques in discovery.

8) Disclosure of Lay and Expert Witness Reports--Discovery vs. The Work Product and Attorney-Client Privileges, Rylaarsdam, 48 L.A.B. Bull. 336 (1973).

This article discusses the privilege for expert witness reports in California state courts.

9) Discovery, Beirne, 39 U. Cinn. L. Rev. 497 (1970).

This article is a recapitulation of the Ohio rules on discovery.

10) Discovery Against Air Carriers, Rox, 40 J. Air L. 469 (1974).

This article discusses the problem of discovery against government agencies in aviation disaster litigation.

11) Discovery Against Manufacturers in Air Crash Litigation Madole, 40 J. Air L. 481 (1974).

This article discusses the use of the federal rules in aviation litigation.

12) Discovery and Public Interest, Jacob, 1976 Public L. 134.

This article discusses discovery in British proceedings.

13) Discovery and the Corporate Attorney-Client Privilege, Michael, 58 Chi. B. Rec. 12 (July-August 1976).

This article discusses the impact of discovery on the attorney-client privilege in the context of corporate litigation.

14) Discovery, Evidence, Confidentiality, and Security Problems Associated with the Use of Computer-Based Litigation Support Systems, Fromholz, 1977 Wash. U. L. Q. 445.

This article discusses the effects of computer technology on discovery procedure and concludes that the Federal Rules of Civil Procedure "provide sufficient discretion so that courts can adapt to problems presented by computerization."

15) Discovery in Eminent Domain Proceedings As Applied to Opinions, Conclusions and Reports of Expert Appraisers, Case Comment, 22 U. Fla. L. Rev. 470 (1970).

This case comment discusses discovery of appraisers in Florida eminent domain proceedings.

16) Discovery in Indiana--An Unanswered Question, Note, 3 Ind. Legal F. 464 (1970).

This piece discusses discovery of insurance policies under the Indiana rules.

17) Discovery in Interferences, Sears, 53 J. Patent Office Soc'y 693 (1971).

This article discusses discovery in patent interference cases.

18) Discovery in Rulemaking, Koch, 1977 Duke L. J. 295.

This article discusses the application of the federal rules to administrative rulemaking.

19) Discovery in Tennessee - A Survey, Lanier, 3 Memphis St. L. Rev. 1 (1972).

This article is a descriptive survey of the law of discovery in Tennessee.

20) Discovery in Washington, Trautman, 47 Wash. L. Rev. 409 (1972).

This article is a recapitulation of the Washington rules on discovery.

21) Discovery of an Insured's Statement to the Agent of His Insurer in an Accident Report Situation, Note, 11 Val. U. L. Rev. 91 (1976).

This article compares federal and state approaches to the discoverability of a defendant's statements to an agent of his insurer.

22) Discovery of Expert Information Under Rule 1.280 of the Florida Rules of Civil Procedure, Comment, 26 U. Fla. L. Rev. 566 (1974).

This comment approves of the harmonization of the state rule with the federal provisions on experts.

23) Discovery of Government Documents and the Official Information Privilege, Comment, 76 Colum. L. Rev. 142 (1976).

This comment discusses the governmental privilege against discovery of official documents.

24) Discovery Problems in Aircraft Litigation, Watts & Johnson, 23 Federation Ins. Coun. Q. 112 (Summer, 1973).

This article discusses governmental privileges against discovery in aviation litigation.

25) Discovery Procedures and Techniques Before Government Board of Contract Appeals, Burch, 4 Public Contract L. J. 119 (1971).

This article discusses discovery practice before the Board of Contract Appeals.

26) Discovery Tactics in a Divorce Case, Glieberman, 11 Trial 56 (March-April, 1975).

This article discusses litigation techniques in family law matters.

27) Equity's Bill of Discovery: A Unique Application in the Field of Products Liability, Note, 49 Chi.-Kent L. Rev. 124 (1972).

This piece discusses pre-complaint discovery in products liability cases under Illinois law.

28) Failure to Disclose Names and Addresses of Witnesses in Discovery Proceedings, Note, 35 Mont. L. Rev. 144 (1974)

This piece discusses sanctions under Montana law.

29) In Pre-trial Discovery, Witnesses' Records Showing Frequency of Trial Testimony Are Not Discoverable Solely For Impeachment Purposes, Case Comment, 8 Houston L. Rev. 377 (1970).

This case comment discusses discovery for impeachment purposes under the Texas relevance standard.

30) Masters and Magistrates in the Federal Court, Note, 88 Harv. L. Rev. 779 (1978)

This student piece briefly discusses the use of magistrates to conduct discovery proceedings.

31) Medical Records Discovery In Wisconsin Personal Injury Litigation, Comment, 1974 Wis. L. Rev. 524.

This comment discusses discovery of medical records under Wisconsin law.

32) Mississippi Rules of Discovery, Pyle, Ott & Rumfelt, 46 Miss. L. J. 681 (1975).

This article is a recapitulation of the Mississippi rules.

33) Nebraska Adopts Federal Rule on Insurance Discovery, Case Comment, 6 Creighton L. Rev. 381 (1973).

This case comment approves Nebraska's adoption of a rule permitting discovery of insurance coverage.

34) New Indiana Rules of Procedure Apply to Eminent Domain Proceedings, But Late Filing of Interrogatories Is Held Blameless Error, Case Comment, 6 Ind. L. Rev. 118 (1972).

This case comment discusses discovery in state eminent domain proceedings.

35) Patient-Physician Privilege in the Discovery Process, Comment, 17 S. D. L. Rev. 188 (1972).

This comment discusses the patient-physician privilege under South Dakota law.

36) Photos Are Not "Written Communications" Within the Work Product Exception of Rule 167 and, Therefore, Are Subject to Discovery in Texas, Case Comment, 6 Tex. Tech. L. Rev. 201 (1974).

This case comment discusses discovery of photographs under Texas law.

37) Plaintiff's Discovery in Antitrust Cases, Vogelson, 9 Law Notes 99 (A.B.A. Section of General Practice) (1973).

This article suggests several ways in which antitrust practitioners can efficiently use the federal discovery rules.

38) Practice, Procedure and Forms Under the Nebraska Videotape Deposition Statute, Valentino, 8 Creighton L. Rev. 314 (1974).

This article discusses videotaping procedures for depositions.

39) Pretrial Discovery Aids, Baker, 82 Comm. L. J. 479 (1977).

This article contains forms for use in commercial litigation.

40) Pretrial Discovery in Eminent Domain--What You Find Out Depends on Where You Practice, Panel Discussion, 7 Real Prop., Probate & Trust J. 706 (1972).

This panel discussion contains remarks on discovery in eminent domain proceedings.

41) Pretrial Discovery in NLRB Unfair Labor Practice Cases, Note, 46 U. Cinn. L. Rev. 500 (1977).

This piece discusses administrative discovery before the NLRB.

42) Private Treble Damage Actions: The Plaintiff's Side, Furth, 41 Antitrust L. J. 545 (1972).

This article discusses the ability of plaintiffs who join a case after discovery has taken place to take advantage of that prior discovery.

43) Prohibition - To Prevent Discovery Proceedings, Case Comment, 35 Mo. L. Rev. 533 (1970).

This case comment discusses the use of writs of prohibition in Missouri to block the use of interrogatories.

44) PUC Rate Hearings Minus Discovery Equals Delay, Carter, 43 Pa. B. A. Q. 260 (1972).

This article discusses discovery in utility rate proceedings.

45) Recent Changes in Louisiana Discovery Laws: An Analysis of Act No. 574 of 1976, Maraist, 24 La. B. J. 161 (1976)

This article discusses the 1976 revisions of Louisiana discovery law, revisions which adopt most of the 1970 amendments to the Federal Rules.

46) Re-discovering Discovery: A Fresh Look at the Old Hound, Kiely, 10 J. Marsh. J. of Prac. & Proc. 197 (1977).

This article is a recapitulation of the Illinois rules on discovery.

47) Report of the Federal Rules of Civil Procedure Committee, Coccia, 38 Ins. Coun. J. 327 (1971).

This article is a synopsis of post-1970 discovery cases that impinge on insurance concerns.

48) Rule 37 - A Workable Sanctions and Discovery System, Vasos, 40 J. B. Ass'n of Kan. 147 (1971).

This article is a recapitulation of federal Rule 37.

49) Scope of Requests for Admissions, Case Comment, 43 Mo. L. Rev. 104 (1978).

This case comment discusses requests for admissions under Missouri law.

50) Self-Evaluative Reports - A Qualified Privilege in Discovery? Case Comment, 57 Minn. L. Rev. 807 (1973).

This case comment urges a balancing test in deciding whether a privilege for self-evaluative reports should be extended.

51) '70 Amendments to the Federal Rules of Civil Procedure - Rules 34 and 36, Logan, 40 J. B. Ass'n. of Kan. 138 (1971).

This article is a recapitulation of federal Rules 34 and 36.

52) Texas Work Product Protection: Time for a Change, Comment, 15 Houston L. Rev. 112 (1977).

This piece argues that Texas' blanket prohibition on the discovery of an attorney's work product impedes efforts to "obtain a just, fair, equitable and impartial adjudication of the rights of litigants."

53) The Decline and Fall of Sanctions in California Discovery: Time to Modernize the California Code of Civil Procedure Section 2034, Comment, 9 U. San Francisco L. Rev. 360 (1974).

This comment urges that California should adopt a rule similar to federal Rule 37.

54) The New Federal Discovery Rules in Civil Cases, Panzer, 37 D. C. B. J. 49 (August-December 1970).

This article is a recapitulation of the federal rules.

55) The New Federal Rules on Discovery, Swartz, 55 Mass. L. Q. 345 (1970).

This article is a recapitulation of the federal rules.

56) The New Missouri Rules on Civil Discovery, Simeone & Walsh, 30 Mo. B. J. 463 (1974).

This article is a recapitulation of the Missouri rules.

57) The New Wisconsin Rules of Civil Procedure, Chapter 804, Graczyk, 59 Marquette L. Rev. 463 (1976).

This article contains a review of the new Wisconsin discovery rules, rules which are in large part in harmony with the federal provisions.

58) The Scope of Civil Investigative Demands in State Anticompetitive Proceedings, Case Comment, 12 Suffolk L. Rev. 125 (1978).

This case comment discusses the scope of the Massachusetts attorney general's power to seek discovery of anticompetitive practices.

59) The Scope of Discovery in New York: Liability Insurance Policies, Note, 25 Syr. L. Rev. 646 (1974).

This piece argues that New York should adopt a statute governing the discovery of liability insurance policies similar to federal Rule 26 (b)(2).

60) The Self-Incrimination Privilege in Civil Discovery, Case Comment, 1970 Wash. U. L. Q. 371.

This case comment discusses the application of the privilege against self-incrimination in civil discovery.

61) The Unanswered Request for Admission: Effect and Procedure, Dobyns, 4 Orange County Bar Journal 47 (1977).

This article reviews current California law with respect to failures to respond to Requests for Admission.

62) Thoughts on Pretrial Discovery, Bua, 3 J. Marsh. J. of Prac. & Proc. 202 (1970).

This article discusses Illinois discovery practice.

63) Unique Aspects of Discovery in Aviation Cases Involving the Federal Tort Claims Act, Kreindler, 13 Forum 154 (1977).

This article discusses the problems of obtaining access to government findings in aviation disasters.

64) Unique Aspects of Discovery in Aviation Cases Under the Federal Tort Claims Act, Pangia, 13 Forum 169 (1977).

This article discusses discovery of government information in aviation cases.

65) United States Court of Appeals for the Eighth Circuit Holds Work Product Doctrine Applicable in Grand Jury Proceedings, Case Comment, 6 Creighton L. Rev. 277 (1972).

This case comment discusses the work product doctrine in the context of grand jury proceedings.

66) United States Magistrates: Additional Duties in Civil Proceedings, Note, 27 Case Western L. Rev. 542 (1977).

This piece explores the use of magistrates to resolve discovery disputes.

67) Use of a Party's Own Deposition, Case Comment, 6 U. Rich. L. Rev. 391 (1972).

This case comment discusses the admissibility into evidence of a party's own deposition.

68) Use of Videotape in the Preparation and Trial of Lawsuits, Murray, 11 Forum 1152 (1976).

This article discusses the unique nature of videotape depositions.

69) Video Tape and Missouri Civil Trials, Cox, 30 J. of Mo. B. 216 (1974).

This article discusses technical aspects of making a videotape.

70) Videotape - the Michigan Experience, Brennan, 24 Hastings L. J. 1 (1972).

This article discusses the use of videotape under Michigan law.

71) Waiver of Discovery Rights Results From (1) Failure to Protest When Trial Court Does Not Rule on Motion to Produce, (2) Failure to Reasonably Request Discovery, or (3) Failure to Provide Reasonable Notice of Intent to Seek Order Compelling Discovery, Case Comment, 6 Ind. L. Rev. 781 (1973).

This case comment discusses waiver of discovery rights under Indiana law.

72) Workshop IV: Patents, Technology and Antitrust Enforcement, Panel Discussion, 43 A.B.A. Antitrust L. J. 215 (1973).

This workshop deals with discovery strategies in large antitrust cases.

APPENDIX D

(Below is the body of the letter mailed to all state and territorial bar associations.)

UNIVERSITY of PENNSYLVANIA

PHILADELPHIA 19174

The Law School
3400 Chestnut Street I4

With an eye toward the potential for reform the Federal Judicial Center in Washington, D.C., an arm of the federal judicial branch, is anxious to identify the sources and reasons for any existing dissatisfaction with current civil discovery rules and practices. As part of its effort, the Center has asked me to prepare a study reviewing and analyzing the literature expressing dissatisfaction with prevailing discovery rules and practices.

Law review material on discovery is of course easily accessible to me through the Index to Legal Periodicals. However, because of the lack of any comprehensive interstate indexing system, material on discovery produced by state bars, whether in journals or in the context of formal or informal proceedings or meetings, is very difficult to locate. Because this material is so critical to the Center's interests, I am taking the liberty of asking if you might conduct a search and forward to me by May 20 copies of (or at least citations to) any publications, papers, or articles produced since 1970 by your bar, its divisions or its members which deal with discovery and which, in particular, express dissatisfaction with existing civil discovery rules and practices and/or propose reform in the area. By "published" materials I mean to include materials both formally and informally published. Thus, I would be very interested, for instance, in speeches that have been reproduced in small quantities for "in house" use or limited distribution.

I apologize in advance for any inconvenience to which my request might put you. However, I assure you that input from associations like yours is essential to the Center's getting a realistic idea of current attitudes toward discovery in the legal profession.

I greatly appreciate your assistance. Please don't hesitate to write or call if you have any questions regarding my request. My telephone number here at the Law School is 215-243-7447.

Sincerely,

Professor Daniel Segal

DS:kb

APPENDIX E

The following pages of this appendix contain copies of those letters received in response to the letter reproduced in Appendix D.

ALABAMA STATE BAR
TELEPHONE 205-269-1515
415 DEXTER AVENUE
P. O. BOX 671
MONTGOMERY, ALABAMA 36101

May 3, 1978

Professor Daniel Segal
University of Pennsylvania
The Law School
3400 Chestnut St.I4
Philadelphia, Pennsylvania 19174

Dear Professor Segal:

The Alabama State Bar has "published" no materials during the time frame noted by you relating to discovery.

Publications in our official Bar journal would appear in the index to legal periodicals. Our official publication is the Alabama Lawyer.

The University of Alabama School of Law operates a research bureau in which students assist in special projects. Perhaps you might contact the research bureau to assist in your project. You may write to Camille W. Cook, Assistant Dean, University of Alabama School of Law, University, Alabama 35486.

Sincerely,

Reginald T. Hamner
Executive Director

RTH/mb

THE BAR ASSOCIATION
OF THE DISTRICT OF COLUMBIA
1819 H STREET, N.W.
WASHINGTON, D.C. 20006
(202) 223-1480

May 11, 1978

Professor Daniel Segal
University of Pennsylvania
The Law School
3400 Chestnut Street
Philadelphia, Pa. 19174

Dear Professor Segal:

I received your letter of May 2nd in regard to preparing a study reviewing and analyzing the literature expressing dissatisfaction with prevaling discovery rules and practices.

In checking our records, we could not find any papers or publications on this subject.

Sorry that we could not be of assistance to you in your study.

Sincerely,

Marie J. Rivera
Administrator

THE FLORIDA BAR

Continuing Legal Education Publications

Tallahassee, Florida 32304
(904) 222-5286

May 15, 1978

Professor Daniel Segal
The Law School
University of Pennsylvania
3400 Chestnut Street 14
Philadelphia, Pennsylvania 19174

Re: Discovery Rules

Dear Professor Segal:

In answer to your letter to Mr. Cassedy dated May 2, 1978, the publications that discuss the federal discovery rules are:

1. FLORIDA CIVIL PRACTICE BEFORE TRIAL (3d ed. CLE 1975)

   Chapter 16 discusses Rules 26 through 37 in conjunction with the Florida Rules of Civil Procedure.

2. FLORIDA DISSOLUTION OF MARRIAGE (CLE 1976)

   Chapter 8 discusses Rules 26 through 36 in conjunction with the Florida Rules of Civil Procedure.

3. PRODUCTS LIABILITY IN FLORIDA (CLE 1972)

   Chapter 6 discusses Rules 26 through 37 with the exception of Rule 35 in conjunction with the Florida Rules of Civil Procedure.

   (Supplement November 1977)

4. COMPARATIVE NEGLIGENCE AND CONTRIBUTION IN FLORIDA (CLE 1977)

   Chapter 4 mentions Discovery RUles; however, the rules are not discussed.

5. FLORIDA CIVIL TRIAL PRACTICE (2d ed. CLE 1970) (Supplement December 1977)

   Chapters 2, 7 and 11 discuss the rules of discovery in conjunction with the Florida Rules of Civil Procedure.

6. FLORIDA GUARDIANSHIP PRACTICE (CLE 1978)

   Chapter 2 mentions the rules of discovery in conjunction with the Florida Rules of Civil Procedure.

7. SUPPORT, CUSTODY AND MARITAL PROPERTY IN FLORIDA (CLE 1978)

   Chapters 6, 7 and 8 discuss Rules 26 through 35 in conjunction with the Florida Rules of Civil Procedure.

None of these publications provide a critical analysis of the rules. They merely mention them in connection with similar Florida rules.

Please let me know if you would like to have further information about any of the above.

Sincerely,

Gerry B. Rose

GBR:dd

CC: Mr. Marshall R. Cassedy

THE FLORIDA BAR

Continuing Legal Education Publications

Tallahassee, Florida 32304
(904) 222-5286

Executive Director
Marshall R. Cassedy

Assistant Executive Director
Peter J. Fannon

Director of Continuing
Legal Education Publications
Preston W. DeMilly

Associate Director of Continuing
Legal Education Publications
Gerry B. Rose

Legal Editors
John M. Knight
John R. Stoddard

May 8, 1978

Professor Daniel Segal
The Law School
University of Pennsylvania
3400 Chestnut Street 14
Philadelphia, Pennsylvania 19174

Re: Discovery rules

Dear Professor Segal:

Mr. Cassedy has asked that I respond to your request for information concerning discovery rules and practices.

Our office will attempt to gather the information for you and forward it by May 20.

Very truly yours,

Preston W. DeMilly

PWD:dd

CC: Mr. Marshall R. Cassedy

HAWAII STATE BAR ASSOCIATION

P. O. Box 26

HONOLULU, HAWAII 96810

TELEPHONE 537-1868

May 5, 1978

Professor Daniel Segal
University of Pennsylvania
The Law School
3400 Chestnut Street 14
Philadelphia, Pa 19174

Dear Professor Segal:

After consulting every possible source, I find there has not been any literature expressing dissatisfaction with prevailing discovery rules and practices emanating from the State of Hawaii.

I regret that we cannot assist you in your study at this time.

Yours sincerely,

(Mrs.) Eleanor I. Pierce
Executive Director

ILLINOIS STATE BAR ASSOCIATION

ILLINOIS BAR CENTER • SPRINGFIELD, ILLINOIS 62701 • TELEPHONE 217 – 525-1760

VIRGIL E. TIPTON, JR.
DIRECTOR OF PUBLICATIONS

May 4, 1978

Professor Daniel Segal
University of Pennsylvania
The Law School
3400 Chestnut Street I4
Philadelphia, Pa. 19174

Dear Professor Segal:

Re: Civil Discovery Rules and Practice

Under separate cover we are sending you copies of the cumulative index to the Illinois Bar Journal (1952-1967) and annual indexes published since. Perhaps you can find reference to articles on the subject.

Sincerely,

Virgil E. Tipton Jr.

Director of Publications

VET:hr

Indiana Continuing Legal Education Forum

230 EAST OHIO STREET • INDIANAPOLIS, INDIANA 46204 • 317/264-7254, 264-4563

WILLIAM P. GLYNN, III, DIRECTOR

May 12, 1978

Professor Daniel Segal
University of Pennsylvania
The Law School
3400 Chestnut Street
Philadelphia, PA 19104

Dear Professor Segal:

This letter is in response to your letter of May 2, 1978 to Jack Lyle which has been referred to me.

While ICLEF has prepared materials in this area, nothing critical or derogatory has been contained in our materials regarding rules of discovery and the resulting practice.

Sincerely,

William P. Glynn, III
Director

WPG:sa
cc: Jack Lvle

Maine State Bar Association
124 STATE STREET / POST OFFICE BOX 788 / AUGUSTA, MAINE 04330
Telephone: 207 622-752.

May 9, 1978

Professor Daniel Segal
University of Pennsylvania
The Law School
3400 Chestnut Street 14
Philadelphia, Pennsylvania 19174

Dear Professor Segal:

Thank you for your inquiry dated May 2, 1978, concerning possible dissatisfaction with current Federal Civil Discovery Rules.

A review of the Bar Headquarters files would indicate that this Association has not undertaken a study on the subject, nor has an article concerning Federal Civil Discovery Rules been published in the Maine Bar Bulletin since 1970.

If I may be of further assistance, please feel free to contact me.

Sincerely,

Edward M. Bonney

Edward M. Bonney
Executive Director

EMB/vf

State Bar of Michigan

306 Townsend Street
Lansing, Michigan 48933
Telephone (517) 372-9030

Douglas L. Sweet
Director of Research
and Development

May 11, 1978

Prof. Daniel Segal
University of Pennsylvania
Law School
3400 Chestnut St. 14
Philadelphia, Pennsylvania 19174

Dear Prof. Segal:

Your letter dated May 2, 1978 addressed to Michael Franck requesting any reports expressing dissatisfaction with prevailing discovery rules and practices has been referred to me. I have conducted a fairly thorough search of committee reports, commissioners report, bar journals, etc. and have found nothing here as far back as 1975.

My time is very limited and older materials are not very accessible due to new construction. If I can find time soon I will see if I can locate anything back to about 1970.

Sincerely,

Douglas L. Sweet
Director of Research
And Development

DLS/mhr

Minnesota State Bar Association

100 MINNESOTA FEDERAL BUILDING MINNEAPOLIS, MINNESOTA 55402 PHONE: 612 335-1183

May 11, 1978

Professor Daniel Segal
University of Pennsylvania
Law School
3400 Chestnut Street I4
Philadelphia, PA 19174

Dear Prof. Segal:

Thank you for your recent letter.

So that you might have more complete information, I am forwarding your correspondence to Mr. Phillip A. Cole, Chairman of our Negligence and Insurance Committee, and Mr. Ronald Martell, Chairman of our Court Rules Committee.

Again, thank you for including us in your study.

Sincerely,

Gerald A. Regnier
Executive Director

GAR:cna

cc: Phillip A. Cole, Esq.
2850 Metro Drive, Ste. 514
Minneapolis, MN 55420

Ronald E. Martell, Esq.
1400 N.W. Nat'l. Bank
St. Paul, MN 55101

ROLAND J. FARICY (1922-1962)
RICHARD A. MOORE
HARRY G. COSTELLO
B. WARREN HART
WILLIAM F. ORME
MARVIN J. PERTZIK
A. PATRICK LEIGHTON
FREDERICK J. PUTZIER
DAVID L. WHITE
HAROLD R. FOTSCH
ROBERT A. ALBRECHT
RONALD E. MARTELL
WILLIAM M. BEADIE
DENIS L. STODDARD
BRUCE E. KIERNAT
LARRY A. HANSON
J. PATRICK PLUNKETT
JOAN C. MACLIN
MEDORA SCOLL PERLMAN
JOHN M. HARENS
ROBERT G. DANIELSEN

MOORE, COSTELLO & HART
ATTORNEYS AT LAW
1400 NORTHWESTERN NATIONAL BANK BUILDING
55 EAST FIFTH STREET
SAINT PAUL, MINNESOTA 55101

227-7683
AREA CODE 612

FORMERLY
FARICY, MOORE, COSTELLO & HART

WA[illegible] DOYLE
[illegible] NSEL

May 18, 1978

Professor Daniel Segal
University of Pennsylvania
Law School
3400 Chestnut Street I4
Philadelphia, Pennsylvania 19174

Dear Professor Segal:

Your letter to Gerald A. Regnier of May 2, 1978 inquiring as to articles concerning dissatisfaction with prevailing discovery practice was sent to me. As Chairman of the Court Rules Committee of the State Bar Association, I have established a subcommittee under the chairmanship of Maclay Hyde of Lindquist & Vennum to investigate methods of effecting economies in litigation through possible changes in discovery practice. I am taking the liberty of forwarding your letter to Mr. Hyde for his comments currently and so that he may advise you of the work of his subcommittee should it touch upon your areas of interest.

I personally am not familiar with any article published in Minnesota formally discussing dissatisfaction with the prevailing discovery rules and practices. Certainly prevailing discovery practices do tend to increase the costs of some litigation and to delay trial of some cases. If I can be of any further assistance to you, please do not hesitate to write.

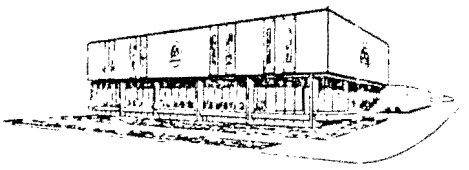
Very truly yours,

Ronald E. Martell

REM:jl

cc: Maclay Hyde
Gerald A. Regnier

THE MISSOURI BAR



THE MISSOURI BAR CENTER
P.O. BOX 119
326 MONROE
JEFFERSON CITY, MO. 65101
635-4128 AREA 314

May 8, 1978

File: 9.0108

Professor Daniel Segal
University of Pennsylvania
The Law School
3400 Chestnut Street I4
Philadelphia, PA 19174

Dear Professor Segal:

You will find enclosed a letter that I have sent to the Chairman of the Civil Practice and Procedure Committee of The Missouri Bar, Mr. R. Max Humphreys, 705 Main Street, Trenton, MO 64683, as well as to others on that committee. My letter in that respect is self-explanatory.

In addition, I am asking Glen Schomburg, Director of Education of The Missouri Bar, to call and discuss with you the contents of some handbooks published by The Missouri Bar which in one way or another discusses procedures of discovery. Mr. Schomburg has been asked to call you and then to arrange for photocopying of certain portions of those handbooks which might be helpful to you. Since the contents of those handbooks on discovery cover more than 270 pages of printed material, I felt it would be appropriate for Mr. Schomburg first to discuss the matter with you and thereafter perhaps narrow the contents in some way of those publications to only that in which you have an interest.

We recognize what you are seeking to do and appreciate your efforts, and it is for this reason that we are giving this request this attention.

We are pleased to be of service.

Sincerely yours,

Wade Baker

WFB:bc
Enclosure
CC: John R. Gibson
Bertram W. Tremayne, Jr.
Glen Schomburg

Wade F. Baker
Executive Director

THE MISSOURI BAR
326 Monroe
Jefferson City, Missouri 65101

May 3, 1978

File: 9.0103

R. Max Humphreys, Chairman
Civil Practice and Procedure Committee
705 Main Street
Trenton, Missouri 64683

Dear Max:

You will find enclosed a copy of a letter dated May 2, from Professor Daniel Segal, who has been asked by the Federal Judicial Center, Washington, D.C., to investigate and identify the sources of dissatisfaction with current civil discovery rules and practices at the federal level. I am sending a copy of this letter to the vice-chairmen, board liaison and members of the committee council of the Civil Practice and Procedure Committee of The Missouri Bar for their attention.

In view of Professor Segal's desire to have information by May 20, I'm suggesting to you and the other members of the Civil Practice and Procedure Committee receiving this letter with a copy of Professor Segal's letter, that comments and suggestions be sent directly by the individual to Professor Segal. He will understand that this is not intended to indicate the policy of The Missouri Bar or the Civil Practice and Procedure Committee. Rather, it will provide an opportunity for those individuals who are members of the Civil Practice and Procedure Committee to submit personal comments to Professor Segal with respect to this subject that can be provided him.

Sincerely yours,

Wade F. Baker
Executive Director

WFB:bc
Enclosure
CC: John R. Gibson
Bertram W. Tremayne, Jr.
James C. Jarrett, Vice-Chairman
Walter Simpson, Vice-Chairman
J. Lee Purcell, Board Liaison
Committee Council
Professor Daniel Segal

NEW JERSEY
STATE BAR ASSOCIATION *Headquarters* 172 WEST STATE STREET, TRENTON, N. J. 08608
609-394-1101

President
EMANUEL A. HONIG
President-Elect
JOSEPH H. RODRIGUEZ
First Vice President
GEORGE A. BARISCILLO, JR.
Second Vice President
WALTER N. READ
Secretary
OCTAVIUS A. ORBE
Treasurer
EDWARD G. MADDEN, JR.
Past President
DONALD R. CONWAY
Executive Director
DALTON W. MENHALL

May 6, 1978

Michael R. Griffinger, Esquire
Chairman, Federal Practice and Procedure Committee
Crummy, DelDeo, Dolan and Purcell
Gateway One
Newark, New Jersey 07101

Dear Mike:

Enclosed is a letter from Professor Daniel Segal of the University of Pennsylvania Law School regarding a study he is conducting on the Federal Judicial and Civil Discovery Rules and Practices. I do not remember our publishing anything; however, you may wish to offer some comments to him as Chairman of our Committee.

Sincerely yours,

Dalton W. Menhall

DWM/a:enclosure
cc: Daniel Segal, Esquire

The North Carolina State Bar

Office of the Secretary
B.E. James
107 Fayetteville Street
Raleigh, North Carolina 27611

May 25, 1978

Mr. Daniel Segal
Professor of Law
University of Pennsylvania
3400 Chestnut Street I4
Philadelphia, Pennsylvania

Dear Professor Segal:

In response to your letter to Mr. James of May 2, 1978, I enclose the April issue of The North Carolina State Bar Quarterly.

On page 3 is an edited version of a speech by William B. Spann, Jr. to The North Carolina State Bar.

This is the only material we have published on the topic, to my knowledge.

I hope this will assist you and I, personally, support your efforts in this area.

Yours truly,

David G. Morrow
Director of Communications

DGM:smk
Enclosure

STATE BAR OF TEXAS

Professional Development Program
Office of the Director

(512) 475-3417

June 1, 1978

Re: State Bar of Texas Material on Civil Discovery Rules

Professor Daniel Segal
University of Pennsylvania Law School
3400 Chestnut Street #14
Philadelphia, Pennsylvania 19174

Dear Professor Segal:

Your request for information the State Bar might have published on Civil Discovery Rules has been referred to me. Under separate cover, I am mailing you the booklet used as part of a series of CLE institutes after the State Bar of Texas adopted more liberal Civil Discovery Rules in 1973, for use as part of your research.

Sincerely,

Gene Cavin

Gene Cavin

GC:rb 4/1

cc: Tom Hanna
Jack Reynolds

UTAH STATE BAR

Office of the Executive Director

425 EAST FIRST SOUTH
SALT LAKE CITY, UTAH 84111

Dean W. Sheffield
Executive Director

Marsha B. Hanson
Administrative Assistant

May 9, 1978

Daniel Segal
Professor of Law
3400 Chestunut Street 14
University of Pennsylvania
Philiadelphia, Pennsylvania 19174

Dear Professor Segal:

We have published no materials criticising the federal civil discovery rules, although I am aware that lawyers have criticized them as being too all embracive and broad.

However, a Bar-Court Committee within recent years in Utah expanded the Utah Rules of Civil Procedure to embrace substantially all concepts of the federal civil discovery rules.

Prior to that time, the Utah Rules of Civil Procedure discovery rules had been considerably more restrictive.

Sorry to not be of more assistance.

Very truly yours,

Dean W. Sheffield
Executive Director

DWS/nm

VERMONT BAR ASSOCIATION

BOX 100
MONTPELIER, VERMONT 05602
800-642-3153
802-223-2020

May 5, 1978

Professor Daniel Segal
University of Pennsylvania
Law School
3400 Chestnut Street I4
Philadelphia, PA 19174

Dear Professor Segal:

Your letter of May 2, 1978, with reference to sources and reasons for any existing dissatisfaction with current civil discovery rules, has been received.

We have not had any complaints with regard to the federal practice rules. The Vermont rules of civil procedure are modelled on the federal rules and the largest number of complaints come from the judges. It seems that these rules promote endless motions of all types which delay the process of final determination of cases.

I guess that is the extent of any comments which I can give you.

Sincerely,

Lawrence J. Turgeon
Executive Director

LJT:kd

R. HARVEY CHAPPELL, JR., PRESIDENT
200 MUTUAL BUILDING
RICHMOND, VIRGINIA 23219
TELEPHONE 804-644-7851

WILLIAM T. PRINCE, PRESIDENT-ELECT
700 VIRGINIA NATIONAL BANK BUILDING
NORFOLK, VIRGINIA 23510 804-623-2100

JOSEPH E. SPRUILL, JR., IMMEDIATE PAST PRESIDENT
15 CROSS STREET
RAPPAHANNOCK, VIRGINIA 22560 804-443-3373

Commonwealth of Virginia

VIRGINIA STATE BAR

N. SAMUEL CLIFTON, EXECUTIVE DIRECTOR
MICHAEL L. RIGGS, BAR COUNSEL
JAMES N. WOODSON, DIRECTOR OF PUBLIC INFORMATION

700 E. MAIN STREET
RICHMOND, VA. 23219
TELEPHONE 804-786-2061

May 3, 1978

Professor Daniel Segal
University of Pennsylvania
The Law School
3400 Chestnut Street 14
Philadelphia, PA 19174

Dear Professor Segal:

I trust the enclosed report will answer your inquiry of May 2, 1978.

Sincerely,

N. SAMUEL CLIFTON
Executive Director

NSC/dhp

Enclosure

WYOMING STATE BAR
Post Office Box 3388
Cheyenne, Wyoming 82001
(307) 632-9061

Executive Director-Secretary
William A. Taylor

May 5, 1978

Mr. Daniel Segal
University of Pennsylvania
College of Law 3400 Chestnut Street
Philadelphia, Penn 19174

Dear Mr. Segal:

Prior to 1976, the Wyoming State Bar did not have an Executive Office or Director, thus very few records were kept of any material such as articles, speeches or non-published information.

The Wyoming State Bar, until 1976, did not publish a periodical although the Bar did subsidize the publication of the Land and Water Law Review, a publication of the Law School at the University of Wyoming.

In short, we do not have any information which might be of use to you in your study of dissatisfaction with current civil discovery rules.

Very truly yours,

William A. Taylor

WAT/jk

APPENDIX F

The following are the journals indexed in "The Information Bank" computer research system, together with the time period for which each journal has been indexed:

Journal	Time Period Indexed
Advertising Age	July 1972 - Present
American Banker	January 1971 - Present
American Scholar	September 1971 - Present
Amsterdam News	October 1971 - February 1976
Astronautics & Aeronautics	August 1971 - Present
Atlanta Constitution	July 1976 - Present
Atlantic Monthly	April 1972 - Present
Atlas	February 1971 - Present
Automotive News	February 1971 - Present
Barron's	May 1973 - Present
Black Scholar	October 1971 - Present
Black World	June 1971 - April 1976
Bulletin of Atomic Scientists	November 1971 - Present
Business Week	March 1971 - Present
Chicago Defender	October 1971 - December 1974
Chicago Tribune	July 1976 - Present
Christian Science Monitor	January 1971 - Present
Commentary	October 1971 - Present
Commonweal	February 1971 - Present
Consumer Reports	October 1972 - Present
Current Biography	October 1971 - Present
Ebony	March 1971 - Present
Economist of London	September 1971 - Present
Editor & Publisher	June 1972 - Present
Far Eastern Economic Review	July 1976 - Present
Financial Times of London	January 1977 - Present
Forbes	November 1971 - Present
Foreign Affairs	January 1972 - Present
Foreign Policy	July 1976 - Present
Fortune	August 1972 - Present
Harpers	November 1971 - Present
Harvard Business Review	July 1976 - Present
Houston Chronicle	July 1976 - Present
Industrial Research	October 1971 - Present

Journal	Time Period Indexed
Jet	October 1971 - February 1976
Journal of Commerce	April 1971 - Present
Latin America	July 1976 - Present
Latin America Economic Review	July 1976 - Present
Life	September 1971 - November 1973
London Observer	March 1971 - June 1976
London Sunday Times	March 1971 - March 1976
Look	April 1971 - June 1973
Los Angeles Times	June 1971 - Present
Manchester Guardian	July 1972 - Present
Manhattan Tribune	January 1971 - August 1974
McCalls	October 1971 - April 1975
Miami Herald	July 1976 - Present
Middle East	July 1976 - Present
Le Monde	January 1971 - June 1972
Nation (The)	October 1971 - Present
National Journal	January 1972 - Present
National Observer	May 1973 - Present
National Review	June 1971 - Present
New Republic	September 1971 - Present
New York	September 1971 - Present
New Yorker	October 1971 - Present
New York Review of Books	January 1971 - Present
New York Times	January 1969 - Present
News Summary For Today	March 1975 - Present
Newsday	March 1971 - March 1974
Newsweek	August 1972 - Present
Pittsburgh Courier	January 1971 - December 1974
Psychology Today	May 1971 - Present
Ramparts	October 1972 - August 1975
Reader's Digest	June 1971 - February 1976
San Francisco Chronicle	July 1976 - Present
Saturday Review	January 1973 - Present
Science	September 1971 - Present
Scientific American	April 1971 - Present
Sport	February 1971 - October 1974
Sports Illustrated	May 1972 - Present
Time	March 1971 - Present
Times of London	January 1971 - Present
Tuesday	January 1971 - October 1975
US News and World Report	June 1971 - Present
Vogue	January 1971 - April 1976
Variety	April 1971 - Present
Village Voice	April 1971 - Present

Journal	Time Period Indexed
Wall Street Journal	April 1973 - Present
Washington Monthly	January 1971 - Present
Washington Post	January 1971 - Present
Women's Wear Daily	July 1971 - March 1976

APPENDIX G

This Appendix lists those organizations whose representatives were asked if they possessed or knew where to locate any materials relating to dissatisfaction with or reform of the federal discovery rules. Materials sought included work produced by personnel within the organization, work produced by outside contract and outside work not produced by the organization but of which its representative was aware. The list is organized alphabetically by organization and, within each organization, identifies the person spoken to and his or her position.

Organization	Person Spoken To	Position
1) Administrative Office of the United States Courts	Carl Imlay	Chief Counsel
2) American Bar Association-Section on Litigation	Cynthia Parker	Staff Member
3) American Bar Foundation	Donald McIntyre	Associate Executive Director
4) American Law Institute	James Maugans	Staff Member
5) Association of Trial Lawyers of America	Michael Starr	Director of Research
6) Criminal Justice Sub-committee of the House Judiciary Committee	Thomas Hutchinson	Staff Member

Organization	Person Spoken To	Position
7) Department of Justice - Office for Improvements in Justice	Warren King	Staff Member
8) Federal Judicial Center	Joseph Ebersole William Eldridge	Deputy Director Director of Research
9) House Judiciary Committee	Allan Parker Michael Remington	Staff Member Staff Member
10) National Center for State Courts	Martha Roberts	Library Staff Member
11) National Commission for the Review of Antitrust Laws and Procedures	Tim Smith	Staff Director
12) National Science Foundation	Arthur Knopka	Coordinator of Research for Law and Social Sciences
13) Ralph Nader's Public Citizen Litigation Group	Alan Morrison	Director of Litigation
14) Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation	Rory Millson	Associated with the Commission
15) Senate Judiciary Committee	Francis Rosenberger	Chief Counsel
16) University of Connecticut Law School	Phillip Shuchman	Professor of Law

FPI-LOM-9-78-2M 1614

THE FEDERAL JUDICIAL CENTER

The Federal Judicial Center is the research, development, and training arm of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States is chairman of the Center's Board, which also includes the Director of the Administrative Office of the United States Courts and five judges elected by the Judicial Conference.

The Center's **Continuing Education and Training Division** conducts seminars, workshops, and short courses for all third-branch personnel. These programs range from orientation seminars for judges to on-site management training for supporting personnel.

The **Research Division** undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, usually at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal court system.

The **Innovations and Systems Development Division** designs and helps the courts implement new technologies, generally under the mantle of Courtran II—a multipurpose, computerized court and case management system developed by the division.

The **Inter-Judicial Affairs and Information Services Division** maintains liaison with state and foreign judges and judicial organizations. The Center's library, which specializes in judicial administration, is located within this division.

The Center's main facility is the historic Dolley Madison House, located on Lafayette Square in Washington, D.C.

Copies of Center publications can be obtained from the Center's Information Services office, 1520 H Street, N.W., Washington, D.C. 20005; the telephone number is 202/633-6365.