Recent Efforts to Change Discovery Rules: Advice for Draftsmen of Rules for State Courts

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Readers will note that, for some time, there have been movements to reform the discovery provisions in the Federal Rules of Civil Procedure. Sometimes unclear have been the purposes of reform, and indeed of discovery itself.

Indeed, why do American courts, virtually alone in the world, empower lawyers to investigate disputed facts? The reality is that discovery is more deeply rooted in our legal and political culture than many who bear its costs notice, or care to acknowledge.

I. THE ADVENT OF DISCOVERY AND PRIVATE LAW ENFORCEMENT

While much of the practice and diction of discovery was known to the English Court of Chancery, discovery was not a major feature of American law until the Federal Rules of Civil Procedure were promulgated in 1938. The 1934 Rules Enabling Act had been a political triumph of the American Bar Association. Its primary goal was the unification of the federal judiciary in serving the common purpose of enforcing rights and duties of citizens challenged or endangered in civil litigation. On that account, it enjoyed the support, indeed the zealous advocacy, of nationalists as diverse in their politics as the arch conservative William Howard Taft and Charles Edward Clark, a committed New Dealer.

Anyone writing procedure rules on a clean slate in 1936 would have done as Judge Clark and his drafting committee chose to do in rejecting the traditional practice of code pleading, then prevalent in most states. In adapting discovery for general use, the draftsmen acted on a premise supplied to us in the Eighteenth Century by the Enlightenment. The premise is that cases ought be decided on the facts and the law, and not as a consequence of the skill or luck of the parties’ representatives in games such as

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jousting or Sumo, a sport initially devised as a method of dispute resolution, or a word game such as common law, or later code, pleading. That idea of the Enlightenment has been notably celebrated by Max Weber. Few if any advocates of discovery reform would question that premise.

The discovery rules elevated the law-enforcing role of the federal courts. Not only were federal courts committed to enforcing law in civil cases, but they were assured of being more able to investigate and discern facts in dispute than any courts had ever been. The private bar, serving as officers of the courts, were effectively commissioned to use the courts’ subpoena power to investigate a wide range of possibly unlawful conduct.

While some critics doubted that the increased accuracy in the application of the law was worth the cost to the litigants of the new methods of investigation, by the mid-1960s, the federal courts had replaced administrative agencies as the preferred means of enforcing much of our national law. Unlike administrative agencies and other political bodies in any government anywhere, the federal courts, their juries, and the private bar serving them were almost invulnerable to political manipulation, intimidation or bribery in any of their many forms. The federal district court was therefore as close to a level playing field as any public forum had ever been. Armed with the contempt power, the federal courts were indeed a daunting threat to anyone considering a possible violation of the national law potentially injurious to the rights of others. Law enforcement in civil cases, not mere dispute resolution, became the primary business of the federal courts. Primarily enforced through civil litigation were federal laws deterring trade practices injurious to markets in goods and fraud injurious to investment markets, laws protecting civil rights and civil liberties, and laws protecting the environment. Where other countries relied upon administrative bureaucracies to protect the public interest in these large and important areas, America relied primarily upon its courts because they proved to be more effective.

State courts and legislatures in most states soon perceived this effect and replicated the federal practice in their state courts. We have by means of Rules 26-37 and their analogues in state law, privatized a great deal of our law enforcement, especially in such fields as antitrust and trade regulation, consumer protection, securities regulation, civil rights, and intellectual property. More frequently than before, American lawyers were giving their clients the unwelcome advice that unlawful conduct harmful to others would likely be detected and the law enforced. In short, American law became surprisingly effective. Private litigants in America thus do, and do more effectively, much of what is in other industrial states done by public officers working within an administrative bureaucracy. This development coincided with the steady rise in the rights-consciousness of the American people.

This development was entirely consistent with American political traditions. At least since the time of Andrew Jackson, many and sometimes most Americans had been skeptical about the ability of bureaucratic government to protect the individual interests
of ordinary citizens from predations by those with greater wealth and economic power. That skepticism was repressed during the Progressive Era and by the New Deal, when most of our federal bureaucracies were created. But it was confirmed a thousand times in the first half of this century that regulatory agencies tend to be co-opted by those whom they regulate.\(^7\)

As a result, we have since about 1950 acted on the belief that if individuals of modest standing and resources are to be secure from predation by those possessing the means of exploitation, private civil litigation is the best means available to them. Congress and state legislatures have therefore been disinclined to create new regulatory bureaucracies and have generally expressed regulatory purposes by imposing civil liability on predatory conduct they mean to deter. Legislators and their constituents have known that, however numerous their many deficiencies, are more likely than bureaucracies to enforce the rights of individuals without fear or favor.\(^8\) Discovery has been an essential instrument in that shift from bureaucratic to private regulation.

Unsurprisingly, those receiving the unwelcome advice that their misdeeds are detectable by private counsel find discovery and the uniquely American form of private law enforcement to be objectionable. Many American firms perceive themselves to be victims of discovery. And the knowledge that discovery can result in exposure of corporate misdeeds is a major reason why foreign firms doing business in the United States tend to despise American courts, and why they strenuously resist the introduction of that practice in their home countries.

Not so many years ago, our economy seemed to be in disarray. Vice-President Quayle was put in charge of a commission to restore the competitiveness of American business. Among the concerns his group expressed was the high legal costs inflicted on our entrepreneurs. The longstanding grievance of the chamber of commerce and similar organizations against discovery was again voiced. Not observed by the Quayle Commission was the fact that the higher legal costs paid by American firms are balanced by higher taxes paid in Europe and Japan by firms in those countries that are more heavily regulated by administrative offices and agencies. Senator Biden seemingly sought to steal a march on the Vice President and sought the help of the Brookings Institute to prepare a quick study leading to enactment of the ill-considered Civil Justice Reform Act of 1990. The principal effect of that legislation was to encourage local experimentation by federal district courts in their management of pretrial litigation. The discovery rules were modified in 1993 to accommodate the experiments being conducted pursuant to that act. The period prescribed for such experiments having come to an end, it is again time for those responsible for the federal civil rules to revise them to reflect current understanding and practice. It seems almost certain that revisions will be made next year, and proposals to effect change are presently percolating through the elaborate system by which rule changes are accomplished.

As the Quayle Commission report tends to demonstrate, there is a chronic tendency of business firms who are inviting targets for litigation to conflate procedural
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reform with tort reform. Those who cannot hope to secure relief by the legislative abrogation of the rights of the citizens who are suing them may seek to achieve that result by the more devious means of impeding their adversaries’ access to the evidence needed to establish their claims. Nevertheless, there may be merit in some proposals for substantive law reform intersecting with discovery. For example, there is at least some merit in eliminating the occasion for expensive document searches in products liability cases. It is in the public interest that corporate officers have discussions of risks unfettered by the threat of liability imposed on the basis of intramural discussions. Tort liability, I do not doubt, is a useful incentive to manufacturers to make prudent decisions about the risks to users of their products. But it may be counterproductive to that purpose to impose or increase liability on the basis of communications between officers of manufacturing firms discussing such risks candidly. Neither liability nor damages ought be framed in such a way that candid internal discussion has substantial adverse consequences for the firm. For that reason, the law of products liability should perhaps be reformed to make the manufacturer’s subjective state of mind irrelevant. Such a reform would materially reduce the cost of discovery in products liability cases, for there would be no point in searches through storehouses of documents looking for the proverbial smoking gun that is nothing more than an expression of concern about apparent hazards.

It is, however, contrary to the public interest to allow manufacturers’ legitimate concern for the consequences of socially counterproductive document searches to drive a substantial reform of discovery practice having broader ramifications for the enforceability of the rights of citizens. We ought keep clearly in mind that discovery is the American alternative to the administrative state. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.

II. THE CASE AGAINST LOCALISM

The most heated issue regarding the present proposals to reform federal discovery practice is one of no more than modest interest to state judges, but requires brief note here. As a result of Senator Biden’s Civil Justice Reform Act, and local plans promulgated pursuant to that legislation, there remain detritus of local rules or standing orders bearing on the subject of discovery. While the official study of the local rules by the Civil Justice Institute was not designed to measure the effects of local differences in discovery rules, its data tends to confirm a high level of dissatisfaction with localism in discovery rules. A loose survey conducted by the ABA Section on Litigation speaks strongly to this same issue.

The data accord with common sense. The costs of localism in discovery practice are apparent. Local discovery plans and rules, including standing orders or, as they are sometimes called, local-local rules, create clutter impeding the efforts of lawyers, and sometimes even judges, to know what their rights, powers, and duties might be. They
add complexity, and thereby add to the investment of lawyer time required to move cases. They are especially a burden to lawyers and litigants who appear episodically in court, or in more than one district court, and they confer an inappropriate benefit on local repeat players. In some cases, it may be necessary for litigants to retain local counsel merely to secure guidance through the maze of local discovery rules.

There are, on the other hand, few if any redeeming benefits of localism in procedure rules. There are no differences among federal districts, or among counties within a state system, to warrant differences in discovery practice to reflect local conditions. Whatever differences may exist in the professional cultures of different districts, there are none that bear any rational connection to the present law of discovery.

This was the position of the Congress of the United States in 1988 when it enacted legislation to constrain the local rulemaking power. The Judicial Conference in response to Congressional concern established the Local Rules Project resulting in the reconsideration and elimination of many local rules and in the promulgation of revised Rule 83 in 1995. Among the local rules that were not consistent with the national rules were scores bearing on discovery. After enactment of the 1988 revision of the Rules Enabling Act, all such rules were forbidden by Congress, and it was a task for the Civil Rules Committee to help make that clear to district judges. The most common kind of local rule invalidated by the 1988 law were standard restrictions on the number of interrogatories a party could serve except by leave of court. Almost every district had such a rule, and after 1988, all of them were invalid.

The 1990 Act was a puzzling but momentary reversal of direction by Congress. While directing the district courts to establish local plans, it did not explicitly or by necessary implication repeal the 1988 proscription on deviant local rules, and hence did not authorize a local plan to violate a national rule. There was never any thought by those who write procedure rules that localism was desirable for its own sake. Indeed, the Civil Rules Committee continued to strive in the direction of national uniformity. This was evidenced by the revision of Rule 83 to make it conform to the Rules Enabling Act as modified in 1988. Now, however, come many federal judges who, having imbibed the intoxicating drink of local rulemaking, wish not to give it up.

I do not perceive that local rulemaking is a serious problem in state courts. But the present imbroglio in the rulemaking process of the Judicial Conference of the United States suggests the wisdom of a state policy never, never to commission local groups of judges to make their own rules.

III. DISCLOSURE

Much of the brouhaha in federal rulemaking has to do with the provision of Rule 26(a)(1) requiring parties and their attorneys to disclose at the outset evidence in their possession bearing on the issues raised by the pleadings. That provision was introduced into the rules in 1993 as a device for enabling lawyers to plan and to manage discovery. The 1993 provision contained a local option provision and was promulgated chiefly
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because several local districts wanted to experiment with such a requirement that would have been in violation of the rules, absent the 1993 provision. The evidence on the utility of the disclosure requirement suggests that the reform was mildly useful where tried, but had no major consequence. The rulemakers are inclined to make a modified disclosure provision a part of the national rules. Some lawyers and judges are strongly opposed.

Lawyer opposition is generally rooted in their attachment to the adversary tradition. It is the fear of some that their clients will feel betrayed if they turn over to adversaries evidence harmful to their clients' causes. That objection is one that has been advanced to prior reforms designed to pursue the Enlightenment aim of applying law to facts. Those clients who would be exposed to just liability tend to be the first to insist on the adversary tradition that allows counsel to impede the presentation of just claims or defenses by opponents.

One answer to that concern was expressed in 1814 by Justice Brackenridge of the Supreme Court, in pronouncing, "I disclaim as lawyers those who avail themselves of the slips of counsel; and would take advantage of a mistake. These may be said to carry on the legal war, not according to the laws of civilized practice, but resembling savages, who make their attacks waxen, which is a species of assassination." More recently, another Pennsylvania lawyer, Henry Drinker, explained,

Five hundred years ago the law was a game, the processes of which were continually and openly employed by means of obscure technicalities, serving no useful purpose. ... Recently, with increasing insistence, the bar and the courts have taken radical steps ... to simplify and develop promptly and dispose of, finally and clearly, the real issues in the case. ... It is clearly the duty of the bar to cooperate wholeheartedly in developing all such new procedures and in making them work practically.

The duty of the lawyer is to be an adversary within such rules as may be prescribed; it is not a proper purpose of procedural rules to pit adversaries against one another or to reward the party with the most effective advocate.

Some states are ahead of the federal courts in the use of disclosure requirements. I have no data on their experience. Unless further study reveals costs or benefits that are so far unrevealed, a state ought to consider adopting the disclosure requirement of Rule 26(a)(1), but without expectation that its use will bring any substantial change in the cost or delay experienced by litigants.

IV. JUDICIAL CASE MANAGEMENT

Anxiety about the requirement that parties disclose evidence before it is requested by an adversary raises a separate issue regarding the proper role of court and counsel in preparing cases for trial. In recent decades, federal judges have with increasing frequency practiced case management. The practice is not unknown to state courts. It requires that
cases be assigned to individual judges promptly at filing so that each judge can manage his or her cases. The aim is to prevent the metastasization of disputes, perhaps especially disputes over discovery matters.

As Judith Resnik points out, judicial case management is a misnomer; it is more accurately denoted as judicial management of lawyers. Few would contend for a return to the adversary tradition as it was known prior to the advent of discovery. It was implicit in the 1938 rules that the role of the advocate was modified to impose a limited duty of cooperation in the investigation of facts in dispute. Such a duty was not novel, but had been long known to equity practice. Nevertheless, the breadth of the discovery rules substantially enlarged the duty of counsel as an officer of the court to cooperate.

Of course, there have always been clients who preferred lawyers who neglected public duty to protect their private interest, and the lawyers for such clients have powerful incentives to neglect their duties. That is especially likely to be so for lawyers representing parties asserting groundless claims or defenses. By enlarging their professional duty, the 1938 Rules enlarged the pressures on such counsel to misuse the process. There seemed to have been as a result a gradual erosion of the conduct of lawyers engaged in discovery practice that became noticeable in the 1960s. Judicial case management has been the judges’ response to the diverse tactical ploys employed by lawyers to gain illicit advantage. Among the illicit means sometimes employed were the imposition of costs on adversaries by excessive and pointless discovery, stonewalling, and burying adversaries in a blizzard of useless disclosures. Such tactics can be controlled and even eliminated by prudent case management of big and bitterly contested cases in which they are most likely to appear.

Judicial case management is, however, in its more extreme forms a costly, radical transformation of the American legal tradition. It is sometimes explained as a mere adaption of the judicial practices commonly found on the continent of Europe or in Japan. And so, in important respects, it is. But the suitability of civil law practice in the United States is dubious. Courts in civil law countries are not generally used for the wide range of political and regulatory purposes that American courts are employed. Judges in those countries are selected at a very early stage in their professional careers and therefore have no political roots and no connections to “interest groups.” And there is no right to jury trial in civil cases underscoring the importance of individual access to a disinterested finding of fact by lay persons. For these reasons, the civil law example is one to be followed only with the greatest caution.

The Civil Justice Reform Act was not cautious in promoting more aggressive case management; its authors appeared to suppose that judicial management might be the key to the presumed, if non-demonstrable, problem of cost and delay. The votes are now in and it is clear that judicial management is not a magic bullet to achieve the stated aims of the Act. The data generated indicates that judicial management has been oversold, that heavy management in the minerun of cases is a waste of time or worse. The misdirection of a district judge’s time and energy is a waste with extended consequences.
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Because judges are a scarce resource, their misuse results in losses felt elsewhere. The one most important and indispensable duty of trial judges is to try cases, thus to enforce the law and to concentrate the minds of parties on the settlement of their disputes "in the shadow of the law." If judicial case management reduces the availability of judges to conduct trials, that is an important loss.

There are other adverse effects of case management that are ineffable. A secondary and unwelcome effect is a modification of the courts’ focus away from the task of law enforcement. The primary concern of judges who manage cases is to achieve dispositions, i.e., to move cases through the court to whatever disposition the parties can be induced to accept. This is a different mission from that of courts trying cases, whose primary task is to achieve correct results, i.e., results conforming to the law.

Another unwelcome secondary effect of judicial management is to increase the moral responsibility of the individual trial judge. Whereas the institution of discovery expanded the temptations of counsel, case management expands the temptations of the judge because it increases the range of discretion exercised. When combined with the diminishing intensity of appellate review in the federal system, it has helped to make federal district judges more like chancellors sitting on the woolsack of autocratic power, and less like officers of the law accountable for their exercise of official power. The hidden effect of case management is a transfer of power away from individual parties and their lawyers, and also from juries or appellate courts who would review decisions on the merits when and if rendered.

However, these unwelcome consequences of judicial case management do not suggest the wisdom of a return to the days when counsel were free to abuse or impede discovery. Rather, they suggest that case management techniques should not be employed routinely in the absence of evidence that there are abuses to be prevented that cannot be controlled by other means and thus that real benefits can be secured. Judicial involvement in pretrial litigation should be the exception, not the rule.

Given appropriate incentives, lawyers can manage pretrial litigation in most cases with minimal involvement of judges. As the ICJ (Institute for Civil Justice) data suggest, the first and most essential incentive to be provided by the court is a reasonably firm trial date. Such a date should with rare exception be set by conference call within hours after an issue is joined. While it is generally desirable that the date be sooner rather than later, there is no need or justification for haste so urgent that it deprives the parties of a full opportunity for discovery. Nor is there justification for refusing modest postponements necessitated by a surprise in discovery. But with those qualifications, it can be said that the single most important deed a district judge can perform in the administration of pretrial litigation is to set a trial date and stick as closely to that date as possible.

With a credible trial date, the lawyers can in most cases plan discovery without the participation of a judge. The ICJ study confirms that this is so. The discovery conference prescribed for the federal practice by Rule 26(f) generally works when employed for its intended purpose. Especially does it work if counsel comply with the
disclosure requirements set forth in Rule 26(a)(1).\textsuperscript{49} Those disclosures, however much as they may be despised by lawyers who perceive them as undermining their relations with clients,\textsuperscript{50} establish a framework for planning discovery without undue delay. If such disclosures are not made, planning by lawyers is impeded and the obvious alternative is for the court to step in and manage the case or [as Resnik has it] the lawyers, a step that is in the end more a derogation of the role of counsel and parties than is compliance with modest disclosure requirements. The ICJ data suggest that a state revising its practice rules in light of recent federal experience should retain the substance of both 26(f) and (a)(1), making them the source of the discovery plan fit to the case that will control the conduct of pretrial litigation in all but the rare case.

As a concession to the concerns of lawyers who despise the idea of voluntary disclosure, a state's rules committee ought consider re-writing those provisions. One change might be to make explicit the duty of parties and counsel to cooperate in discovery. Lawyers know of their duty, but parties often do not, and lawyers should be given all available help in explaining to their clients why disclosures must be made to adversaries without requiring rulings by the court at each point of revelation.

Another revision might be to change the diction of the disclosure requirements, perhaps to state them in the form of questions, as “standard interrogatories” to be answered as a predicate to the formulation of a discovery plan wrought by counsel.\textsuperscript{51}

In addition, as an aid to parties and counsel in planning, a state's rules might provide some presumptive parameters to be extended by agreement whenever good cause is shown. The most important parameter is a time within which discovery will be completed. The ICJ data suggest that 120 days is generally a suitable presumptive norm.\textsuperscript{52} Other parameters that might be useful include a presumptive limit on the number of interrogatories, and on the number and length of depositions. These are included in the proposed Federal Rules.

To make it clear that discovery planning is a duty of counsel, it might also be prudent to relieve the court of the authority to intercede and manage a case that the parties are managing to their own satisfaction without intervention of the court, save perhaps in exceptional circumstances to be stated by the court. At the same time, the court must make it clear that the duty of parties to cooperate in planning discovery is a duty that the court will enforce and enforce so promptly that no counsel or party will be tempted to delay proceedings by making matters unnecessarily difficult for an adversary. To that end, practice rules might wisely provide that motions respecting discovery shall unless otherwise specifically ordered be made orally and ruled upon “forthwith.” Judges who effectively and promptly enforce rights with respect to discovery are much less likely to be burdened with frequent interruptions of their work by frivolous discovery disputes than those who take such motions under advisement and await opportunities to read briefs and transcripts of depositions. Because delays in ruling create incentives for counsel to bicker over trifling discovery issues, judges who do not rule quickly make more work for themselves while imposing costs on the parties.
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It might also be useful for the rules to explicitly authorize counsel to record discovery conferences as well as depositions. A recording would better enable a party to demonstrate a lack of cooperation by an adversary, and thus enhance the threat of sanctions against a party who does not cooperate in planning discovery.

Practice under the 1938 Rules was characterized by an absence of the application of sanctions under Rules 37.53 Weak enforcement by courts contributed to the problem of abuse and delay by counsel.54 While the sanctions provisions were strengthened by the addition of Rule 26(g),55 it remains true that federal judges have been reluctant to punish lawyers for playing hostile games with discovery. A likely reason for this weakness is that judges were lawyers once and identify with pressures felt by lawyers to aggressively protect interests of clients even at the expense of performance of duties to the court.

Another reason is that an application of sanctions creates satellite litigation on the appropriateness and measure of the sanction. The unhappy federal experience with sanctions under Rule 1156 has likely reinforced the disinclination of many judges to impose sanctions on the abuse of discovery.

A state considering these issues should therefore give serious attention to other possible incentives to cooperate. In particular, consideration should be given to the application of the English rule57 on shifting attorneys' fees incurred in the resolution of discovery disputes. This would mean that whenever a court ruled on a discovery issue, the prevailing party would be entitled automatically to reasonable attorneys' fees to compensate for the cost of litigating the issue. The demerit of this English rule in its application to final judgments is that it unduly chills the assertion of claims and defenses. But that is just the result desired with respect to discovery disputes. It would provide counsel with an additional reason to give her or his client for not contesting a discovery issue that there would be an additional cost associated with an unsuccessful contention.

If the English rule were adopted for this limited purpose, a civil rules committee ought consider the use of an English-style taxing master58 to relieve the court of the burden and authority to fix the fee.

Moreover, in that rare case in which irrationally contentious parties are frequently resorting to the court over discovery issues, the court should be encouraged to appoint a special master to manage the case.59 The merit of the special mastership is that it imposes the cost of childish bickering on sometimes infantile counsel and their clients rather than on the public, and leaves the judge accessible to those who need decisions on the merits or who need prompt attention to legitimate discovery disputes. Experience in California suggests, however, the importance of regulating the fees of attorneys appointed as special masters.60

V. THE SCOPE OF DISCOVERY

Twenty years ago, the advisory committee on the federal rules proposed to narrow the scope of discovery by requiring that it be directed to matters "relevant to the claim or defense of a party."61 This was thought to be narrower than the present language requiring
that discovery be relevant to the subject matter of the action. After hearing comments on this proposal, the committee withdrew it, reaffirming its doubts whether such a change would do more than replace one very general term with another. The proposal had originated in the American College of Trial Lawyers, who desultorily renewed the suggestion from time to time. During my eight years as reporter to the committee, the idea was briefly considered, and rejected for the same reason that it had been rejected before.

Now, in 1999, the proposal has found new life. With slight changes, it is now proposed to revise Rule 26(b)(1) in essentially the same form so often rejected in the past. The proposal is resisted by thoughtful and disinterested groups such as the Federal Courts Committee of the Association of the Bar of the City of New York. It is supported chiefly if not exclusively by litigants who are “habitual defendants.” The argument for the change is that it will “send a message” to judges to be more aggressive in restraining excessive discovery. The arguments against it are more numerous. They are that the new rule is vague, will encourage satellite litigation, and will shelter unwarranted resistance to discovery. “Sending a message” by vague language is not an effective means of achieving the aim. Moreover, the revised rule is inconsistent with notice pleading and a throwback to the code pleading practices found to be so unsatisfactory sixty years ago. The response will be prolix pleading that will be even less helpful to lawyers trying to manage discovery efficiently.

Recognizing the desire of the defense bar to promote this idea, I suggested a compromise that would append the desired language to Rule 34 bearing on document discovery. Because the problem of excessive discovery, to the extent that it exists, is chiefly a problem with documents, it seemed prudent to limit the questionable change to that rule. For perspective, it may be useful to recall that the original 1938 version of Rule 34 did provide for narrower discovery with respect to documents. The fact that this suggestion has gained no consideration confirms to me that the aim of the proponents of the rule is indeed to sanction resistance to legitimate discovery. I would hope that if the change is indeed adopted that no state would follow suit with a similar change to their practice rules.

VI. OTHER SUGGESTED REFORMS

There are other changes to the discovery rules worthy of consideration by state rulemakers. First, it would be wise to require exchange of signed or adopted statements, or perhaps statements of possible witnesses in any form that could be presented as evidence. The existing federal rule protects such statements as trial preparation material, but requires that copies of such statements be supplied to the witnesses who adopted them, from whom, of course, they are discoverable under Rule 45. While an adopted statement is technically trial preparation material, it is much more than the mental impressions and thinking of counsel -- it is potentially a prior inconsistent statement, and the thinking it reflects is primarily that of the party or witness, not the lawyer.
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protected retention of such statements in the present Rule undermines the aims of the process in other ways. It enables counsel to impose unnecessary costs on adversaries and to engage in sharp practice by misleading hints of the content of the statements. The present practice therefore gives too little service to the values of the work product protection and too much harm to the duty of cooperation to merit its continuation.

States might also consider creating a presumptive limit on the number of depositions, and restricting depositions in three other respects. The federal experience suggests that it should be explicit that all objections to questions asked at a deposition are automatically reserved if not immediately presented to and ruled upon by the judge, unless examining counsel otherwise directs. The purpose of this practice is to save the time of lawyers and deponents presently devoted to bickering over the form of questions. Absent such a non-waiver provision, the time limits on depositions will be made inappropriate in a particular instance by prolonged bickering. Counsel for the deponent should, of course, be expected to assert applicable evidentiary privileges, but should otherwise remain silent during the examination by other parties, unless the examining counsel wishes assurance that a particular question and answer are in a form allowing them to be used at trial.

Second, states might prudently provide that a deposition can be reopened at the request of any party, provided however that unless the deponent agrees, or the court for good cause so orders, a secondary examination shall be conducted by teleconference or telephone, and further provided that such a discontinuous deposition shall not exceed the time allowed by the schedule, except for good cause. One effect of this change is to diminish the need to modify the discovery plan every time there is a surprise at a deposition. A second purpose is to allow for more efficient depositions and more efficient preparation by counsel, who could under such a revised rule prepare for a deposition with reduced concern for surprise testimony or revelation of documents not previously seen. If a surprise occurs during a deposition, a surprised party can discontinue the deposition and return to it at a later time, after further investigation and preparation has been pursued.

Third, experience suggests the wisdom of a rule allowing any deposition recorded on videotape or other comparable technologies to be used at trial, even though the deponent is within reach of a subpoena. The present federal rule requiring the use of live testimony was written on the assumption that the deposition would have to be read into the record at trial by some person other than the deponent. That is no longer the case; indeed it would be appropriate to require the exhibition of videotape when available in order to preserve demeanor evidence that is lost when a substitute witness reads a deposition into the record. Moreover, it will save costs if litigants can be educated to expect that videotaped depositions will be the usual form in which testimony is taken and in which it is presented at trial. Videotaped depositions can be edited to eliminate useless banter as well as inadmissible evidence. And evidentiary rulings regarding testimony can be made in limine.
A suggestion pertaining to document discovery is to afford a producing party the option of making a production of documents confidential for the scrutiny only of adversary counsel. A party making a confidential production would waive no evidentiary privileges with respect to documents so produced. No document so produced would be filed with the court or otherwise used or publicized by counsel receiving the documents in confidence without the express approval of the producing party. The purpose of such a provision would be to enable the disclosing party to produce vast quantities of material without the expense of thorough pre-screening of every document produced. Much expense is incurred in present practice as a result of producing counsel’s fear that a privilege may be waived by improvident disclosure of a privileged document. Such a mistake would be very injurious to the reputation of counsel and could expose a law firm to enormous liabilities. The purpose of my suggestion would be to relax those fears.

Of course, prudent counsel would, despite such a rule, not disclose in confidence material that was known to be sensitive. All care would not be abandoned. But there are situations in which very substantial savings might be effected. This would be so where, for example, a haystack is not known to contain any needles, and is unlikely to contain even a simple straight pin. A party might then reasonably calculate that the saving in the cost of prescreening is worth a slight risk that (a) prejudicial but privileged evidence will be discovered, and (b) adversary counsel will in violation of the rule refuse to return the privileged item and refrain from using it. In some commercial litigation, the savings resulting from such confidential disclosure could run to seven or even eight figures. A risk in this proposal is that it might facilitate the tactic of burying a requesting party in an avalanche of documents.

Another outstanding issue of discovery meriting discussion by state rulemakers is the controversy regarding the practice of suppressing discovery material as part of a settlement, especially in mass tort litigation. It is argued in favor of the practice that parties should not be permitted a free ride on expensive discovery conducted in earlier like cases involving the same adversary. To preserve such material for use in subsequent similar cases deprives the party against whom it is used of the settlement bargaining chip represented by the cost of discovery. The diseconomies of redundant discovery ought be avoided if possible. The bargaining chip in question is not one the law ought be at pains to protect because it has no relationship to the merits of claims and defenses. It reflects, instead, the unavoidable but regrettable deficiencies of the legal process. For this reason, I suggest that the discovery rules should generally obligate parties to produce discovery materials produced in other like cases even if those cases were resolved short of trial. I have particularly in mind transcripts of depositions and responses to interrogatories, data compilations, tangible things, and other like items that are not privileged and not subject to a work product protection.

In the short term, this last reform would eliminate one of the incentives to settlement of some cases, especially those that might be described as “test” cases. On the other hand, it would seem to reduce materially the cost of litigating later cases of the same
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type. It would therefore increase the settlement value of meritorious claims and defenses.

VII. Conclusion
Taken together, the changes suggested here would substantially reduce the involvement of judges in the conduct of pretrial litigation. While it is unlikely that these changes would materially reduce the evils of cost and delay, they might effect marginal improvements, and it seems almost certain that they would not contribute to any increase in cost or delay. It bears reiteration that the most important steps to be taken by judges are to set a reasonably firm trial date, provide reasonable and tailored parameters to the time for discovery, and rule promptly on discovery disputes. Beyond those steps the judges should not go, except in the rare case too complex to be managed by counsel. They should then concentrate their efforts on judging cases, not managing lawyers.

Notes
11. The contempt power to enforce injunctions is not available elsewhere, and is generally regarded as "a legal technique which is not only unnecessary to a working legal system, but also violative of basic philosophical approaches to the relations between government bodies and people." Ronald Goldfarb, The Contempt Power 2 (1963).
Carrington


16. Jackson's most famous utterance was his bank veto message of 1832:

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. . . . When the laws undertake to add to [their] natural and just advantages artificial distinctions, to grant titles, gratuities and exclusive privileges, to make the rich richer and the potent more powerful, the humbler members of society - the farmers, mechanics, and laborers - who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their government. There are not necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and as Heaven does its rain, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing.

2 A Compilation of the Messages and Papers of the Presidents 590 (James D. Richardson comp., 1908).


18. William O. Douglas, We the Judges 389 (1956) (stating "[T]he jury is one governmental agency t. t has no ambition.").

19. Litigation against both tobacco manufacturers and breast implant manufacturers has entailed an intense search for correspondence between executives manifesting knowledge of dangers not disclosed to the public.


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34. See JOHN NORTON POMEROY & SPENCER W. SYMONS, POMEROY'S EQUITY JURISPRUDENCE § 204 (5th ed. 1941).
35. See Maurice Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 COLUM. L. REV. 480, 482-83 (1958).
41. Section 473(a)(1) provides:

In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction: systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case.

see also BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, BROOKINGS INSTITUTE, REDUCING COSTS AND DELAY IN CIVIL LITIGATION 11 (1989).
42. See RAND REPORT, supra note 21, at 68.
46. See RAND REPORT, supra note 21, at 57-58, 91-92.
47. FED. R. CIV. P. 26(f).
Adjuncts Revisited: The Proliferation of Ad Hoc Procedure, American Analogue, See to Justice, master who decides the appropriate amounts after a hearing. However, seldom agree. When disputed, the parties present their itemized expenses to a taxing detail. In modern practice, however, the English courts have developed an elaborate system of taxing. Under this system, the solicitor representing the winning party prepares a bill of costs, detailing each item of taxable expense. If the losing party agrees, it pays the bill; parties, costs. See also, supra note 21, at 183-84.


49. FED. R. CIV. P. 26(a)(1).


51. See Local Rule 33, U. S. District Court for the District of South Carolina.

52. See RAND REPORT, supra note 21, at 183-84.

53. Rosenberg, supra note 35.


55. FED. R. CIV. P. 26(g) was added in 1983, and in conjunction with Rule 37 represents “the principal enforcement power to punish discovery abuse.” Gregory Joseph, Current Issues in Discovery, in CURRENT PROBLEMS IN CIVIL PRACTICE 1994 at 321, 377 (PLI Litig. & Admin. Practice Course Handbook Series No. 498) (1994).


57. For a recent account of the rule and suggestions of its possible applications in the United States, see Thomas D. Rowe, Background Paper, American Law Institute Study on Paths to a “Better Way”: Litigation, Alternatives, and Accommodation, 1989 DUKE L.J. 824, 887-92 (1989).

58. In modern practice, however, the English courts have developed an elaborate system of taxing costs. Under this system, the solicitor representing the winning party prepares a bill of costs, detailing each item of taxable expense. If the losing party agrees, it pays the bill; parties, however, seldom agree. When disputed, the parties present their itemized expenses to a taxing master who decides the appropriate amounts after a hearing.


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64. FED. R. CIV. P. 34 (1938):

Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control.

67. FED. R. CIV. P. 45.
70. FED. R. EVID. 501.
71. FED. R. CIV. P. 43.
72. FED. R. CIV. P. 16(c)(4).
75. See, e.g., Short v. Western Electric, 566 F. Supp. 932 (D.N.J. 1982); but see In re Agent Orange Product Liability Litigation, 821 F.2d. 139, 145-48 (2d cir. 1987).