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November 28, 1978

BY HAND

Mr. Robert Weinberg
President, D.C. Bar
839 17th Street, N.W.
Suite 1000
Washington, D.C. 20006

Dear Bob:

The Steering Committee of Division IV met yesterday (four members present and voting) and unanimously approved each of the comments set forth in the proposed Comment of Division IV of the Bar previously distributed to you with the following exceptions:

1. Rule 26(b)(1) [Scope of Discovery] -- The Steering Committee unanimously agreed that the present scope of discovery needs to be restricted. Three members of the Steering Committee approved the comment as set forth in the report previously distributed to you. One member of the Steering Committee, while agreeing that the present scope of discovery in the Federal Rules is too broad and needs to be cut back, believes that the Advisory Committee's recommendation is not the way to deal with the problem.

2. Rule 26(f) [Discovery Conference] -- The Steering Committee rejected the comment set forth in the report previously distributed to you. The Steering Committee voted instead to adopt as the view of Division IV the new comment on this rule attached hereto. In the report as submitted to the Committee on Rules and Practices, the attached page will be substituted for the discussion of Rule 26(f) now set forth at page 25 - 29. Those pages shall then be set forth as the dissenting view of their author, Mr. Sherman Cohn.

3. Two other small substantive deletions were made from the texts of the comments relating to Rule 5(d) [Service and Filings of Pleadings and Other Papers] and Rule 33(a) [Numerical Limitations on Interrogatories].

Sincerely,

Martin D. Minsker
Chairperson
Division IV

MDM/dc

Enclosure

cc: All Division IV Steering
Committee Members

Prof. Patricia Wynn

Prof. Sherman Cohn

George Frampton, Esq.

Donal Tobin, Esq.

Ms. Claudia Booker -- By Hand

STEERING COMMITTEE

COMMENT OF DIVISION IV

ON RULE 26(f)

Division IV supports the proposed rule. While judicial participation in discovery conferences may represent some drain on judicial time, it appears to us that this drain would not be significant; we note in this respect that the management of discovery matters often is handled by magistrates. While the conservation of judicial time is an important goal, we believe that it is more important to permit counsel for one party to call for a discovery conference as of right in a case where he or she has attempted sincerely but unsuccessfully to work out discovery problems with adversary counsel.

The District of Columbia Bar

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November 28, 1978

Mr. Joseph F. Spaniol, Jr.
Secretary
Committee on Rules of Practice
and Procedure
Administrative Office of the
U.S. Courts
Washington, D.C. 20544

Re: Proposed Draft Amendments to the
Federal Rules of Civil Procedure

Dear Mr. Spaniol:

Submitted herewith, pursuant to the invitation of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, are the comments of Division Four of the District of Columbia Bar on certain of the proposed amendments to the Federal Rules of Civil Procedure, as printed at 77 F.R.D. 613 et. seq.

Sincerely,

Martin D. Minsker

Martin D. Minsker, Chairperson
Division Four, D.C. Bar

MDM/dc
Enclosure
cc: Robert Weinberg
President, D.C. Bar

Division Four Steering
Committee Members

Prof. Sherman L. Cohn

George T. Frampton, Jr., Esq.

Donal B. Tobin, Esq.

COMMENT OF DIVISION IV

DISTRICT OF COLUMBIA BAR

ON DRAFT AMENDMENTS TO

FEDERAL RULES OF CIVIL PROCEDURE

Principal Author of Comment on Particular Rule	
Rule 5(d)	George Frampton
Rule 26(b)(1)	Sherman Cohn
Rule 26(f)	Div. IV Steering Committee
Rules 30(b)(1) and 30(b)(4)	Donal Tobin
Rule 33(a)	Martin D. Minsker
Rule 37(e)	Donal Tobin

Approved: November 27, 1978

STANDARD DISCLAIMER: THE VIEWS EXPRESSED HEREIN REPRESENT ONLY THOSE OF DIVISION FOUR, COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE, OF THE DISTRICT OF COLUMBIA BAR AND NOT THOSE OF THE D.C. BAR OR OF ITS BOARD OF GOVERNORS.

TABLE OF CONTENTS

COMMENT OF DIVISION FOUR, DISTRICT OF COLUMBIA BAR ON DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Introduction

Submitted herewith, pursuant to the invitation of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, are the comments of Division Four of the District of Columbia Bar on certain of the proposed amendments to the Federal Rules of Civil Procedure, as printed at 77 F.R.D. 613 et. seq.

Division Four (Courts, Lawyers, and the Administration of Justice) is one of the sixteen divisions of the District of Columbia Bar. The within comments were prepared by an ad hoc committee organized under the direction of the Steering Committee of Division Four. The members of this ad hoc committee were Sherman Cohn, George Frampton, Martin D. Minsker and Donal Tobin. The principal author of each of the substantive comments set forth hereinafter is identified on the cover page to this report.

This report was reviewed by the members of the Steering Committee of Division Four, consisting of five persons elected by the members of Division Four. The Steering Committee adopted (four members present and voting) this report as a comment on behalf of Division Four of the Bar on November 27, 1978.

As set forth in the standard disclaimer on the cover page of this report, the views expressed herein thus represent only those of Division Four of the Bar and are in no way to be attributed to the District of Columbia Bar as a whole or to the Board of Governors of the District of Columbia Bar.

Hereinafter are comments on the proposed amendments to Rules 5(d), 26(b)(1), 26(f), 30(b)(1), 30(b)(4), 33(a) and 37(e). There are other proposed amendments to the Federal Civil Rules upon which we have not commented. There are also proposed amendments to the Federal Rules of Criminal Procedure and the rules governing Section 2255 proceedings. We have limited ourselves only to those rules specifically commented upon hereinafter because of the relatively short time which we have been able to devote to this report. The absence of any comment on any of these other proposed amendments does not constitute an expression of either approval or disapproval in any way of the contents of those draft rules.

In this report, we shall cite where appropriate to the Advisory Committee's notes as printed in Volume 77 of the Federal Rules of Decision. We shall also cite the Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation, American Bar Association, as "ABA Report."

COMMENT ON PROPOSED RULE 5(d)

PROPOSED RULE 5(d):

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

* * *

(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, but, unless filing is ordered by the court on motion of a party or upon its own motion, depositions upon oral examination and interrogatories and requests for admission and the answers thereto need not be filed unless and until they are used in the proceedings.

CHANGE FROM PRESENT RULE

The present rules "require the immediate filing of discovery materials," according to the Advisory Committee's Note. 77 F.R.D. at 622. The new language underlined above would provide that discovery materials "need not" be filed until they are used in the proceedings.

Rule 30, as presently written, prescribes a procedure by which oral depositions are automatically transmitted for filing to the clerk of the court by the officer before whom

the deposition was taken no more than thirty days after the deposition is submitted to the witness for the witness's signature. Present Rules 33 and 36, dealing with written interrogatories and requests for admissions, require only that such documents and responses thereto be "served" upon the parties. But the presently existing Rule 5(d) contains a requirement that all papers required to be "served" upon a party "shall be filed with the court either before service or within a reasonable time thereafter."

Conforming changes are therefore proposed in Rule 30 to eliminate automatic filing of oral depositions. Under proposed Rule 30(f), the stenographer who took the deposition (or the transcriber of a tape recorded deposition) would simply certify on the transcript the accuracy of the transcription, when it is transcribed. Proposed conforming changes in Rule 30(e) would place the duty of submitting the deposition to the witness for signature upon the party taking the deposition -- rather than, as at present, upon the officer before whom it was taken -- and also place upon the party taking the deposition the responsibility for recording any changes made by the witness and any failure or refusal of the witness to sign the deposition. 1/

1/ For reasons not made clear in the Advisory Committee Notes, depositions on written questions would still be routinely filed with the clerk of the court under Proposed Rule 30(b) in the same manner as oral depositions are presently filed under Rule 30(f). This matter should be clarified by additional conforming language.

The stated purpose of the amendment is twofold: to reduce the burden on court clerks in some districts where the volume of depositions being filed is creating substantial storage problems, and to reduce the cost to the parties of making additional copies of discovery materials simply for purposes of filing.

COMMENT OF DIVISION IV

Division IV supports adoption of the amendment insofar as it eliminates the automatic requirement of filing, but suggests that it should be made clear -- either through a revision in the language of the amendment or through expression of the Advisory Committee's intention, or both -- that a party may file discovery materials at its election and that the Committee does not intend to effect any substantive change in the existing situation regarding public access to discovery materials.

The Special Committee for the Study of Discovery Abuse convened by the ABA's Section of Litigation cited the expense to parties of making additional copies of transcripts and exhibits to discovery materials for filing, and also noted that the "routine filing of such items can engulf the space in a clerk's office." ABA Report, at 1. Accordingly, the Committee suggested that Rule 5(d) be amended by adding language specifying that

> unless ordered by the Court, discovery papers need not be filed until used with respect to any proceeding.

Id., at 1. The Advisory Committee adopted the Special Committee's suggestion with several clarifying changes in language.

The Advisory Committee's suggested draft provides that a court order for filing must be "on motion of a party or upon [the Court's] own motion." The Advisory Committee Note, however, states that "[it] is intended that the court may order filing on its own motion at the request of a person who is not a party who desires access to public records . . ." 77 F.R.D. at 623. Thus, despite the apparently limiting language in the proposed Rule, the Advisory Committee evidently envisions that any member of the public -- for instance, a newspaper reporter -- would, in effect, have "standing" to seek an order requiring the filing of discovery materials. How such a request by a non-party would be made is not spelled out by the Committee.

The amendment is quite obviously a desirable one to the extent that it would alleviate storage problems, or reduce clerical work and expense to parties and court clerks, without changing the current status of discovery materials. However, the question has been raised whether this seemingly technical change in filing requirements would in fact substantially reduce the amount of information available to the public in civil litigation by altering the "presumptively public" nature of discovery materials.

In assessing this concern, several questions must be addressed. First, what is the "public" status of civil discovery material under the current rules? In most districts, oral depositions and answers to interrogatories presumably are routinely filed, unless one of the parties has obtained a protective order under Rule 26(c). This Rule, which provides among other things for the sealing of depositions, permits the court wide latitude to enter "any order which justice requires to protect a party or person from annoyance, embarrassment [or] oppression," but the burden is placed upon the party resisting public disclosure to seek relief and to make an appropriate showing. Thus, in general, it appears that oral depositions and answers to interrogatories may be considered to be "presumptively public" under the present scheme, since it is assumed that they have been or soon will be filed with the court and become a matter of public record.

Nevertheless, a number of caveats to this conclusion must be noted. In spite of the Rule's apparent requirement of mandatory filing, a few districts already provide by local rule that depositions and interrogatories need not be filed until used in the proceedings.[2/] Second, it is possible that

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[2/] C.D. Calif. and S.D. Calif., Local Rule 6(d) (interrogatories need not be filed unless used in proceeding); E.D. La., Local Rule 7 (depositions need not be transcribed and filed if parties so agree by written stipulation); D.N. Mex., Local Rule 10(d) (interrogatories need not be routinely filed); D.P.R., Local Rule 10 (discovery materials need not be filed, but proof of service of such materials on other parties must be filed); D.S.C., Local Rule on "Filing of Discovery," (discovery materials filed only if used in proceedings); M.D. Tenn., Local Rule 9(e)(1) (discovery materials used in proceedings must be filed "before trial," by implication excluding filing of other materials).

We do not know how much discovery material actually ends up being filed in any particular district.

in many cases, by tacit agreement of the parties, some discovery materials simply do not get filed unless the case is about to go to trial and it is anticipated that the materials will be used at trial. For example, when a witness whose deposition has been taken delays signing and returning the transcript to the stenographer who took the deposition, and no pressure is placed upon the witness by the parties to do so, filing may be delayed or avoided -- unless the stenographer is especially zealous in pursuing the matter independently of the wishes of the party who employed him. Third, although some districts specifically provide by local rule for the clerk to file depositions for public examination,[3/] other districts require that depositions received in the clerk's

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3/ The following local district court rules appear to provide that absent a court order, depositions are filed for public inspection: N.D. and S.D. Iowa, Local Rule 17(a); E.D. La., Local Rule 7; D. Montana, Local Rule 8(c); N.D. Ohio, Local Rule 6(b); M.D. Alabama, Local Rule 1; M.D. La., Local Rule 8; D.N. Mex., Local Rule 8(c). A few courts provide that depositions ordinarily will be filed, but that the parties may stipulate to the contrary. D. Maine, Local Rule 15; D. R.I., Local Rule 14(b).

A few courts provide that while depositions ordinarily will not be opened, the clerk should open a deposition on the request of any counsel or party, presumably resulting in public access as well. N.D. Ga., Local Rule 210; E.D. Ill., Local Rule 16; D. Mass., Local Rule 14.

office be kept sealed absent a court order or agreement by the parties to the contrary.[4]

In short, the current practice concerning the public filing of depositions and interrogatories appears to be considerably less "automatic" than the Federal Civil Rules make it appear to be. And it is doubtful whether non-parties have any absolute right, even absent a protective order, to obtain discovery materials, especially when the parties themselves are unanimous in desiring to prevent non-party access. See, e.g., Nixon v. Warner Communications, 98 S.Ct. 1306, 1312 (1978) (common law right to inspect even filed records not absolute but subject to discretionary judicial limitation).[5]

The "presumptively public" nature of discovery materials becomes even less clear in the case of materials other than depositions and interrogatories. The present rules contain no provisions for the filing of materials produced in response to document requests under Rule 34, or for the filing of the results of mental or physical examinations conducted

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[4] D. Idaho, Local Rule 16 (not opened except by court order or stipulation of the parties); D. Nevada, Local Rule 17(a)(5) (depositions "shall not be opened" except by court order); D. Alaska, Local Rule 8(a) (depositions can be "opened" at request of either party, but not released to the public except by court order); C.D. Calif. and S.D. Calif., Local Rule 6(a) (clerk opens envelope, checks for notary seal and signature of witness, and then reseals envelope and files); D. Conn., Local Rule 8(b) (depositions withheld by clerk from public inspection); D. Colo., Local Rule 5(b).

[5] Also, Rule 29 arguably could be construed to permit an agreement by the parties to postpone or modify filing requirements contained in other discovery rules.

under Rule 35. In many cases, documents are produced pursuant to a written or oral understanding between the parties that copies of the documents are to be used only for the purposes of the litigation -- in other words, what amounts to an agreed informal protective order. When there has been no such understanding, however, are counsel free to disclose to interested non-parties or to the press copies of an opposing party's documents?

This question leads to the second issue that must be addressed in assessing the impact of the proposed amendment: if the automatic filing requirement for depositions and interrogatories is removed, will that by itself change the "status" of such documents from "presumptively public" to "presumptively confidential?" We think the answer is that it should not. Absent a protective order, there is nothing in the rules or in the canons of ethics that forbids a party or his attorney to disclose information obtained in civil discovery to non-parties, including the media. Whether the material is or is not required to be filed with the clerk of the court should not affect that result, either under the existing or the proposed rules. In other words, insofar as civil discovery materials are presently considered to be presumptively public, it is not simply because they are presently required to be filed and thereby become public documents, but rather because they are generated in the course of a public proceeding and there is no legal or ethical prohibition on

their dissemination should any party wish to take such action.

Theoretically, then, the proposed elimination of routine filing should have no impact on the status of discovery materials. As a practical matter, however, at least two considerations would undoubtedly operate to inhibit attorneys and parties from publicly disclosing information contained in unfiled depositions to the media or to other interested non-parties, even when they wished to do so. First, when the information the party wished to disclose was arguably libelous, serious questions would be raised as to whether any privilege or qualified privilege attached to the dissemination of the information. Second, no matter how nebulous are the prohibitions placed by the canons of ethics and local court rules on creation of prejudicial pre-trial publicity in civil cases,[6/] the fear of being accused of trying his or her case in the press could be a significant deterrent to the attorney contemplating disclosure.

6/ DR 7-107(G) of the Code of Professional Responsibility provides that attorneys in civil cases shall not make any extrajudicial statement likely to be disseminated by the media that relates to evidence in the case, credibility of witnesses, or an opinion about the merits of a claim or defense, or any other matter likely to interfere with a fair trial, except when referring to "public records." See, e.g., the Local Rules of the U.S. District Court for the District of Columbia, Rule 1-27(d), which also prohibits the kinds of statements listed in DR 7-107(G) but only if "there is a reasonable likelihood that such dissemination will interfere with a fair trial..."

Both of these inhibitions would be substantially eliminated by making it clear that while discovery material need not be routinely filed, such material may be filed by any party. Such a provision would afford parties and attorneys desiring to make disclosure the same opportunity they now have under the present rules to assure themselves of the public status of the material, rather than leaving the matter in an area of uncertainty. As drafted, proposed Rule 5(d) is somewhat ambiguous on this score, but appears to contemplate that any party wishing to file discovery materials for reasons other than their use in the proceedings must seek a court order. We see no reason to require this use of judge time to rule on what should be no more than a clerical transaction, especially since such motions should be routinely granted. (Indeed, if they were not routinely granted -- that is, if a party wishing to file were required to set forth some substantive justification for filing -- then courts would inevitably be drawn into the litigation of public disclosure issues unrelated to the merits of the underlying action.) The result we propose could be accomplished by adding the words "may, but" between the word "thereto" and the "need" in the next to the last line of the Advisory Committee's proposed Rule 5(d) as quoted in this comment at p. 3, supra.

Of course, it could be argued that such a revision in the proposed rule does not go far enough in protecting the public interest in access to information, since non-parties

would still have to find one party willing to make disclosure in order to obtain information, whereas in the past the information was readily available in the clerk's office. However, such an argument ignores the fact that even under the present rules public access is limited both legally and practically -- by the right of any party to seek a protective order and by the possibility of private arrangements between parties who are agreed that public disclosure of certain pre-trial information ought to be avoided. Moreover, the proposed rule gives a news organization or public interest group, to take two examples, the opportunity to seek an order requiring filing even when the parties are adamantly opposed to disclosure.

On the other side, it could be argued that the revision to the proposed rule that we have suggested here detracts too much from a desirable shift in the status of discovery materials that would otherwise be accomplished by the proposed rule, namely, to insure that pre-trial discovery materials were normally kept from the public absent a good reason to the contrary. That is, it could be argued that an individual or a company has a right to resort to the judicial process to pursue a claim or mount a defense without exposing itself to public scrutiny of every embarrassing fact its opponent is able to dredge up during pre-trial proceedings. To this, of course, it could be said that the judicial process <u>is</u> a public process, and that any legitimate need for confidentiality can always be asserted through a request for a protective order.

In any event, the purpose of the proposed new Rule 5(d) is to solve storage problems and to save clerical effort and expense, not to effect a major and considered change in public access to discovery materials. We believe that the revision we have suggested -- providing that such materials need not be filed but may be filed at the election of any party -- will accomplish the desired purpose in a manner that results in the least change from the present situation respecting public access to these materials.

Finally, we suggest the Committee consider adding to the Advisory Committee Note an express disclaimer of any intention by this amendment to alter the substantive law in any way regarding the public or non-public status of discovery materials or the permissibility vel non under applicable ethical restrictions of attorneys disclosing to the public the existence of discovery materials.

COMMENT ON PROPOSED RULE 26(b)(1)

The proposed rule would delete from the presently existing rule the language in brackets below, so that Rule 26(b)(1) would read:

> (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.

COMMENT OF DIVISION IV[6a/]

The proposed change is a response to a perceived need to reduce the scope of discovery. The Special Committee for the Study of Discovery Abuse of the Litigation Section of the American Bar Association concluded that the present rule encourages "sweeping and abusive discovery" by limiting discovery solely by the "subject matter" of the pending action. ABA Report at 3. That Committee felt that courts were construing "subject matter" too broadly so as to permit broader discovery than is

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6a/ This comment on this rule was approved by three of the four members of the Steering Committee present and voting. One member of the Steering Committee, while agreeing that some restriction on the scope of discovery is necessary, does not believe that the Advisory Committee's recommendation is the way to deal with the problem.

warranted. ABA Report at 3. The ABA Committee proposed restricting discovery to the "issues raised by the claims or defenses of any party." Id., at 2. The Advisory Committee proposal rejects that restrictive approach. Bowing to the perception that some federal courts may be going too far in the scope of discovery permitted, the Advisory Committee proposes that the phrase "subject matter involved in the pending action" be stricken so that the scope of discovery would be limited to that which is "relevant to the claim or defense" of any party.

The theory of discovery under the Federal Rules, since its inception in 1938, has been based upon the premises that so-called notice pleading is to apprise the parties generally of what the lawsuit is about, that at that stage counsel are not yet ready to define issues, that discovery is truly a stage in which counsel discover the evidence that can lead to issue-definition, and that issue-definition while overlapping discovery to some degree occurs at the pre-trial stage. Whether this system should be changed depends on one's perception of how it has worked.

The ABA Committee proposed revision of Rule 26(b)(1), coupled with its proposal for the role of the discovery conference, would work a most significant revision of the premises of the federal civil procedural system: it would call for definition of issues to be tried to occur at the very beginning of the case, with all discovery limited by that definition. We believe that there is no warrant in experience for such a radical alteration in the system. Thus, we believe that the Advisory Committee correctly rejected the ABA Committee's approach.

The question remains whether even the limitation on scope of discovery signaled by the Advisory Committee's proposal is desirable.

Whether the present broad scope of discovery should be narrowed at all depends on one's perception of how well the present system has worked. We think that it has worked well in most cases,[7/] but there is no question that there has been a problem in cases where counsel are determined to inquire into matters relevant to the "subject matter" of the case but not really relevant to the dispute between the parties. Insofar as the discovery now permitted by some district courts is overly broad and burdensome, the proposed rule undoubtedly could serve as a useful direction to the courts to key discovery to the matters that are or might be relevant to the real disputes in the lawsuit. This change, coupled with other changes in Rule 37, hopefully would lead trial judges to exercise the power at their command to discourage abusive discovery without restructuring the entire system.

Therefore, the Division does favor the amendment to the Rule proposed by the Advisory Committee. We feel that over the 40 years since Rule 26 was introduced, discovery practice

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7/ It is worth observing that for discovery problems caused by the complexity of the case, the Manual on Complex Litigation provides for some alternative procedures. For counsel who abuses the system, we have had the sanction of 28 U.S.C. 1927 since 1813, long before the inception of the Federal Rules.

has grown to encourage broad discovery which is often too broad to foster the "just, speedy and inexpensive resolution" of every action as Rule 1 requires. We see the problem as involving more than an abuse of discovery by a limited number of lawyers. Many lawyers feel compelled, in order to properly represent their clients and to avoid later criticism, to exhaust every area of discovery permitted by this now very broad discovery practice.

And there is a hidden social cost here, going beyond considerations of time and money. People in our society presently contemplating civil lawsuit for an otherwise legitimate injury to their legal interests must be cautioned by their own attorneys prior to the filing of their complaint that they are opening for discovery in the highly adversarial setting of a deposition (perhaps to be followed by public filing) any portion of their lives relevant to the subject matter of the lawsuit, even if not entailing a factual issue bearing seriously on the litigation. This may be a strong inhibiting factor on many of our citizens contemplating resort to the courts to vindicate their rights.

Just urging courts to tighten up on abuse will not solve this problem. Courts and lawyers need a strong policy statement in the form of an amended rule to justify their desires to live with a less exhaustive, yet still thorough development of the facts. The ABA Committee's proposal goes too

far for the reasons so well stated in the Advisory Committee's Note. See 77 F.R.D. at 626-28.

The Division recommends that the Advisory Committee's amendments be accepted. However, a further comment should be added clearly stating that the amendments are only intended to encourage courts to control discovery within reasonable bounds to avoid unnecessary expenditure of time and effort in the preparation of a case. The amendment should not be seen as making any fundamental change in the policy of the Federal Rules that disputes are resolved more fairly when the facts are disclosed to the fullest extent possible.

Specifically, we are concerned that there is a possibility that the courts might interpret the words "claim" and "defense" in the proposed rule to refer to specific allegations and defenses set forth with particularity in the pleadings. Such a reading would make the Advisory Committee's proposal unconfortably close to the ABA's proposal, since discovery would be limited to issues set forth and joined by the pleadings themselves. We believe that the proposed change could be useful, but that the Advisory Committee should take pains in its Note to make clear that "claim" and "defense" refer to the overall cause of action being asserted and to "defenses" in general, including potential defenses a party has some basis for thinking it might develop during pre-trial discovery.

One member of the Ad Hoc Committee disagrees with the views stated above concerning this amendment to the rules. His views are as follows:

VIEWS OF MR. TOBIN
ON PROPOSED RULE 26(b)

I do not favor the amendments to Rule 26(b) proposed by either the ABA Committee or the Advisory Committee on the Federal Rules. Although I agree that, in certain cases, there have been abuses of the discovery process, I believe that the courts already have the tools necessary to correct those abuses.[8/] It seems to me unnecessary to adopt the proposed amendments to Rule 26(b) to encourage courts to use existing tools to curb demonstrable discovery abuses. If new tools are needed, they should be provided by specific amendments directed to that issue and not by introducing subtle changes to a basic and time-tested rule.

There does not appear to be any unanimity of opinion among the Bar as to what effect the proposed changes to Rule 26(b) will have on the conduct of litigation. It seems to me that the approaches suggested by the ABA Committee or the Advisory Committee entail the risk of altering the entire discovery process far beyond what is necessary to correct the

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8/ For example, Rule 26(c) protective orders and Rule 37 sanctions. Also through careful use of Rule 36 admissions, counsel can eliminate whole areas from discovery. If a fact is admitted, discovery directed to it may be rendered moot.

present abuses. I see the risk that the proposed amendments could upset the fundamental policy of the Federal Rules that litigation should be conducted in an atmosphere of full discovery of all pertinent facts.

The ABA Committee comments indicate that courts must be directed "not to continue the present practice of erring on the side of expansive discovery." ABA Report, at 3. To correct this situation the ABA Committee has recommended that Rule 26 be amended to limit discovery to the "issues" presented by the action in place of the present provision which limits discovery to the "subject matter" of the action. The Advisory Committee has shied away from the ABA Committee's proposal expressing doubt that replacing one very general term with another equally general term will prevent the abuse occasioned by the generality of language in the present rule. 77 F.R.D. at 627. The Advisory Committee also expresses a fear that introducing a new term in place of a familiar one will invite unnecessary litigation over the significance of the change. Id. The Advisory Committee suggests that the words "subject matter" be stricken so that the rule would provide for "discovery regarding any matter, not privileged, which is relevant to the claim or defense. . . "

I believe that neither proposed amendment should be adopted because neither is tailored closely enough to the problem at hand. Both changes could be so broadly interpreted as to introduce basic changes into the litigation process or so

narrowly interpreted as to effect no change whatsoever.

If the change is broadly interpreted, discovery could be limited to the specific claims or defenses actually pleaded. This presents a serious dilemma for conscientious counsel in every litigation and goes beyond just discouraging discovery abuses. Rule 11 provides that a pleading may not be interposed unless the pleader believes that there is good ground to support it. The proposed amendments to Rule 26 could prevent a pleader from obtaining the necessary discovery to support a claim or defense about which the pleader has only a suspicion. Litigants may feel compelled to introduce claims and defenses for which they may not have good grounds merely to protect their right to discovery, in violation of Rule 11.

Present Rule 26 provides sufficiently broad discovery to permit a litigant to obtain from his adversary's files or from the files of a third party, the factual information necessary to provide the basis for a pleading. Rule 15 provides the liberal basis for amending the pleadings to include the discovered matter. However, if discovery is placed within a narrow compass of the already pleaded claims, the liberal policy of Rule 15 may be defeated. I see this as an unacceptable by-product of the proposed amendments to Rule 26(b).

If the change is broadly interpreted, it could unduly focus the court's attention on the details of the pleadings as the point of reference for the conduct of the litigation. It could alter the practice of notice pleading that was originally touted as one of the basic reforms introduced by the

Federal Rules in 1938. A flurry of discovery motions is apt to be replaced by a similar flurry of pleadings motions. I do not favor a return to the days of procedural fencing over fine points of pleadings. I feel it better conduct to resolve disputes on the basis of a thoroughly developed factual record. The present rule provides 40 years of precedent to assist courts and lawyers in determining whether particular facts are discoverable. If all that is necessary is to remind courts to control discovery within reasonable bounds, I believe that neither of these amendments is necessary to accomplish that objective.

On the other hand, the proposed amendments could be interpreted so narrowly as to work no change at all. The last sentence of Rule 26(b)(1) has not been changed.

> It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence.

The failure to address this portion of the rule could nullify the intended changes to the first sentence. The ABA Committee seems to realize that this could happen when it states in its comment that "It is intended that the rubric 'admissible evidence' contained in that sentence be limited to the new relevancy which emerges from the term 'issues' rather than from the more comprehensive term 'subject matter.'" ABA Report, at 3. This is the loose thread that can unravel the entire cloth of the proposed amendments.

I do not favor either amendment. On the one hand, the changes may be so narrowly construed as to work no change at all. On the other hand, the changes may be so broadly interpreted as to upset the fundamental policy of the Federal Rules. A basic rule should not be rephrased unless the resulting changes are clearly predictable.

COMMENT ON PROPOSED RULE 26(f)

(f) Discovery Conference. At any time after commencement of an action, the court shall hold a conference on the subject of discovery if requested by any party. The request for a discovery conference shall include:

(1) A statement of the issues;

(2) A plan and schedule of discovery;

(3) Limitations to be placed on discovery, if any;

(4) Other proposed orders with respect to discovery; and

(5) A statement showing that counsel making the request has made a reasonable effort with opposing counsel to reach agreement on the matters set forth in the request.

Notice of the request shall be served on all parties. Objections or additions to matters set forth in the request shall be served not later than 10 days after service of the request.

Following the discovery conference, the court shall enter an order identifying the issues for discovery purposes, establishing a plan and schedule of discovery, setting limitations upon discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the case.

The court may exercise powers under Title 28 U.S.C., §1927 and Rule 37(e) to impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement.

Upon a showing of good cause, any order entered pursuant to this subdivision may be altered or amended.

COMMENT OF DIVISION IV

Division Four supports the proposed rule. While judicial participation in discovery conferences may represent some drain on judicial time, it appears to us that this drain would not be significant; we note in this respect that the management

of discovery matters often is handled by magistrates. While the conservation of judicial time is an important goal, we believe that it is more important to permit counsel for one party to call for a discovery conference as of right in a case where he or she has attempted sincerely but unsuccessfully to work out discovery problems with adversary counsel.

One member of the Ad Hoc Committee disagrees with the views stated above concerning this amendment to the rules. His views are as follows:

VIEWS OF MR. COHN
ON PROPOSED RULE 26(f)

This proposal would incorporate into Rule 26 an explicit authorization for a discovery conference. The holding of this conference is to be mandatory upon the request of any party. The conference is to result in an order listing the issues as they appear at that time, a plan and schedule of discovery, limitations upon discovery, and other matters in the management of the case that are appropriate for decision at that time. Again a comparison with the ABA Committee proposal is appropriate: that Committee urged that following the discovery conference "the court shall enter an order fixing the issues," and the term "issues" has reference to the "issue to be tried." ABA Report, at 4. Read in conjunction with the ABA Committee proposal for revising Rule 26(b)(1), it is clear that at the very beginning of the case we would have a fixing of the

issues to be tried in the case and discovery would be limited to those issues. I believe that the present system has been working well enough in the overwhelming number of cases to render unwarranted such a radical revision of the procedural system.

Turning to the Advisory Committee proposal, there are several considerations. As far as there now are abuses of discovery and as far as discovery now drags or is overly extended because counsel does not pursue it expeditiously, the early discovery conference should be of help. It will bring the attention of a judge onto the case at an early stage and, as far as that judge takes command of the case, the abuses and foot-dragging will be easier to spot, harder to accomplish, and more susceptible to sanction where a judge is willing to use sanctions.

However, there are two costs to be paid: there will be an increase in judge time required, and counsel will lose some control over the management of the case. Each of these costs deserves some consideration.

The theory of modern discovery, particularly as developed in the 1970 amendments to the Federal Rules, is to render it as extra-judicial as possible. Based upon empirical research under Professor Maurice Rosenberg of Columbia University, the Advisory Committee concluded in the late 1960s that discovery was working quite well with minimal court

intervention, and such automatic court involvement as had been provided in Rules 33 and 34 were dropped. Judge time was to be utilized only where the discovery process broke down and either a protective order or an order to compel discovery was desired. Proposed Rule 26(f) calls for a reversal of this philosophy. Upon the request of any party, a judge is to become involved in discovery from the very beginning. It must be recognized that, if done effectively, this will require a significant increase in judge time. Of course, it may be that the discovery conference will be used as a rare exception rather than as a usual procedure, as apparently the Advisory Committee hopes. But I rather expect that it will become a somewhat common device. I also expect that in a significant number of cases more than one conference will be required as the case proceeds. (While expense may be saved by using cheaper magistrate time, that only reduces the degree of the impact of the cost.)

The other cost is to counsel. Where a judge truly grabs hold of a case at this early stage, experience has shown that the judge may order what discovery may be had and in what order. While this may be done with every good motive of preventing abuse, reducing expense, and expediting discovery, it must be recognized that, to the extent that the judge commands, counsel loses command over his or her own case. While this may be a necessary cost, it should be recognized as a cost to today's perception of the working of the adversary system.

The discovery conference is nothing new. It is provided for in the Manual for Complex Litigation. It is also provided for in the local rules of some district courts. For example, Local Rule 7(b) of the Eastern District of Pennsylvania makes mandatory a discovery conference within 45 days of the filing of the complaint. The Central District of California (Local Rule 9(a)) calls for such a conference sixty days after issue. In other courts, individual judges provide for discovery conferences in all civil cases coming before them. Six of the nine judges in the Eastern District of Louisiana make such a conference standard practice. At least one judge in the District of Columbia follows that practice. And the above is not represented as an exhaustive list.

The fact that discovery conferences are now being used leads to two conclusions. First, a federal rule providing for such conferences is not required. It is being done now without any such rule.[9/] But, more significantly, the local experimentation in this area might furnish a data base for an empirical study as to whether the discovery-conference device is an effective tool to move a case along and to measure the

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9/ Indeed, it is being done even without local rules on an *ad hoc* basis when individual judges perceive the necessity.

cost involved, at least in judge time.[10/]

This is not to urge that the Advisory Committee proposal would work more harm than good. Rather, it is to suggest that local experimentation has provided an experience that might be drawn upon to attempt to measure (a) the effectiveness of the discovery conference to solve the perceived problems, and (b) the cost to be incurred by bringing it into more general use. Nothing in the ABA Committee report or in the Advisory Committee comments would lead one to believe that any study of this local experience has been made or drawn upon by the Advisory Committee.

I therefore respectfully urge that pending a study of the local experience, the law remain where it now is: discovery conferences may be made mandatory by local rules or may be required by individual judges in all or selected types of cases. I urge that a study of this experience be undertaken and that, upon its completion and circulation, there be further consideration of inclusion of a discovery-conference device into the Federal Rules.

10/ Data is now emerging which could provide the start for empirical analysis. A recent study by the Federal Judicial Center shows that in the Eastern District of Pennsylvania (where a local rule requires a discovery conference 45 days after filing of complaint) and in the Eastern District of Louisiana (where six of nine judges require such a conference between 30 and 60 days after issue), the median time for substantial completion of discovery after filing of the complaint is 308 and 305 respectively. This should be contrasted with the national median of nine months and the median of 182 days in the Southern District of Florida, where there is no required or general practice of a discovery conference.

COMMENT ON PROPOSED RULES 30(b)(1) and 30(b)(4)

Rule 30(b)(1) has been amended to permit a notice of examination to specify that testimony may be taken be telephone. Correspondingly Rule 30(b)(4) has been rewritten to permit the notice to specify the method for recording and preserving the testimony. The onus of seeking a court order to require traditional stenographic recording has been shifted to the party from whom discovery is sought or the witness. A party may move to require the deposition to be taken in the presence of the deponent. A witness may, as always, seek a similar order under Rule 26(c) controlling the manner in which discovery may be taken.

COMMENT OF DIVISION IV

The Advisory Committee Note to Rule 30 indicates that the parties could always agree under Rule 29 to take a deposition in any manner they wanted. 77 F.R.D. at 639-40. Because electronic recording means are now reliable, the Advisory Committee felt that advocates could usually agree to take telephonic depositions and that objections could normally be resolved by the parties. Id. at 40. Division IV agrees. Extensive case law developed under prior Rule 30(b)(4) sets forth various and extensive guidelines for non-stenographic recording of depositions. See for example Wescott v. Neeman, 55 F.R.D.

257 (D. Neb. 1972); Colonial Times, Inc. v. Gasch, 509 F.2d 517 (D.C. Cir. 1975).

One procedural aspect seems to have been overlooked, however. A party may move under new Rule 30(b)(1) to require that the deposition be taken in the presence of the deponent. To require that the deposition be taken in person, a non-party witness may only move under Rule 26(c) upon a showing of good cause to protect himself from annoyance, embarrassment, oppression, or undue burden or expense. A party appears not to be required to make such a showing. This should be corrected by permitting the non-party to so move under Rule 30(b)(1) in the court in the district where the deposition is to be taken. This would maintain the parity that has always existed.

New Rule 30(c) appears to foster the same disparity by failing to specify that a non-party witness may also require the testimony to be transcribed. Courts have required transcripts to be provided the witness, see Buck v. Bd. of Ed., 16 F. Rules Serv. 2d 112 (E.D.N.Y. 1972), but the witness's right to require a transcript should be in the rule. Rule 30(f)(2) permits a witness to demand a "copy" of the deposition if he pays for it but that does not necessarily require that the copy be transcribed: it could be just a tape.

COMMENT ON PROPOSED RULE 33(a)

The proposed rule would permit local district courts, by action of a majority of the judges, to limit the number of interrogatories that may be used by a party. The presently existing rule contains no limitations on the number of interrogatories a party may serve.

COMMENT OF DIVISION IV

Division IV opposes the adoption of a rule that would permit district courts, by local rulemaking, to limit the number of interrogatories a party may serve. In our view: (a) it is undesirable to place a numerical limit on the number of interrogatories; and (b) it is inappropriate to remit the question to the local rulemaking process.

A. Numerical Limits on Interrogatories

Written interrogatories play a very important role in the civil discovery process. For example, this discovery device permits the parties, prior to oral depositions under Rule 30, to define the scope of subsequent discovery so that litigation resources can be expended more efficiently and more effectively. Interrogatories are also very important in isolating categories of documents to be made the subject of intelligent and pertinent document requests under Rule 34. Moreover, for parties with limited funds to expend in litigation, the written interrogatory may be the predominent if not sole

tool available by which they may effectively utilize the pre-trial discovery process.

The ABA Report proposed that parties be limited to thirty interrogatories, with "[l]eave of court, to be granted upon a showing of necessity," required to serve in excess of thirty interrogatories. ABA Report at 18. In so recommending, the ABA Report observes that "[n]o single rule was perceived by the Bar at large responding to the Committee's questionnaire as engendering more discovery abuse than Rule 33 on interrogatories." Id., at 20. The Advisory Committee, in declining to follow this recommendation, observes (77 F.R.D. at 648-49):

> In the judgment of the Committee, such a general, nationwide limitation is unwise. It fears that the limitation, subject to leave of court, will involve the courts in endless disputes without guidelines for their resolutions.

For the following reasons, we believe imposition of a general numerical limit on written interrogatories is undesirable.

First, under the existing rules, a party receiving any interrogatory which is believed to be improper for any reason, need only respond by making a formal objection in his answer and stating his grounds. See Rule 33(a). The party serving the interrogatory must then move in court to compel an answer. Id. Under this procedure the moving party is then burdened with justifying his particular request in light of the subject matter of the lawsuit, and the court is benefited by a specific record on which to determine both the necessity for

the request and any questions of abuse of the discovery process. Moreover, the objecting party has available a simple and inexpensive mechanism for flushing truly abusive interrogatories. To the extent existing procedures allow parties to frame ill-considered and harrassing interrogatories not truly justified by the substance of the litigation, those interrogatories are screened out quickly and inexpensively by a timely objection.

Second, the effect of a numerical limitation on written interrogatories alone might well be to exacerbate any existing problems of discovery abuse. Thus, the numerical limitation would pose the problem for the district court in a relatively more abstract fashion, probably at an early stage in the litigation when a number of other pre-trial discovery issues need to be resolved. If the moving party need only seek permission to surpass a fixed numerical limit, the motion papers are likely to be framed in general terms respecting the "complexity" of the subject matter of the lawsuit, or the inability

to utilize other discovery devices. Such pleadings provide a less effective basis for weeding out truly unnecessary questions. And the usefulness of a numerical restriction on written interrogatories must be gauged in light of the availability of other discovery devices, including Requests For Admissions (Rule 36) and Document Requests (Rule 34). To the extent the abusing party cannot fit the inquiry into the mold of an admission request or a document request, ultimate recourse will be had to questions at the deposition, the most expensive and stressful point in the pre-trial discovery process for all concerned. To the extent these discovery tools are fungible with Rule 33, a numerical limitation on one device will encourage inappropriate recourse to another device. The effect overall may be to chase the abuse problem from one section of the Rules to another.

Third, the very concept of an across-the-board numerical restriction applicable to all civil litigation is of doubtful utility. Thus, the ABA Report qualifies its recommendation with the suggestion to courts that:

> [I]nterrogatories inquiring as to the names and locations of witnesses or the existence, location and custodians of documents or physical evidence each be construed as one interrogatory. Greater leniency is recommended in these areas because they are well suited to non-abusive exploration by interrogatory.

ABA Report at 20. The recommendation, in effect, would exempt certain broad categories from the numerical limitation. Yet other such exemptions for particular categories of lawsuits

could be envisioned as justifiable on the stated basis; for example personal injury lawyers would probably favor exclusion of standard questions related to existence of insurance policies. More significantly, the proposed exemption for questions relating to documents reveals, we believe, the basic flaw underlying the very concept of a general numerical limitation. It is true that questions about documents are "well suited to non-abusive exploration by interrogatory," but they are just as well suited for irresponsible and harrassing invasions of privacy or needless oppression of an answering party.[12/]

In sum, we believe the Advisory Committee's disinclination to embrace the concept of a general numerical restriction on interrogatories is well-founded.

B. Reference of the Issue to the Local Rulemaking Process[13/]

The Advisory Committee observes, respecting the reference of this question to the local district court rulemaking process (77 F.R.D. at 649):

12/ Large organizations with far-flung geographic operations can be very effectively harrassed by ill-defined document requests arising from a particular lawsuit.

13/ According to one Rules service, eight federal district courts in six states have local rules limiting the number of interrogatories which may be served on a party without leave of the court. One court limits the number to 20 (Alaska: Rule 8(i)); three to 30 (Maryland: Rule 6(b), S.D. Mississippi: final paragraph; N.D. Tennessee: Rule 9); one to 40 (S.D. Florida: Rule 10(i)); two to 50 (M.D. Florida: Rule 3.03, Wyoming: Rule 7(f)); and one to one set of 30 and one set of 20 (N.D. Mississippi: Rule C-12). Federal Local Court Rules (Callaghan & Co., 1978).

> It may well be that a district familiar with the generality of its business and the habits of its bar can determine upon a reasonable number of questions. Some districts now impose limitations. Others may be deterred from doing so by the language of Rule 26(a): "Unless the court orders otherwise under subdivision (c) of this rule [Protective Orders] the frequency of use of these [discovery] methods is not limited." Accordingly, the Committee suggests that this subdivision be amended by expressly authorizing local rules on the subject. A court now has, of course, authority to limit interrogatories in response to a Rule 26(c) motion.
>
> The Committee particularly requests the views of the bench and bar on the matter of limitation of interrogatories.

Division IV believes this disposition of the matter to be inappropriate. The very reference of a matter such as this to the local rulemaking process poses significant policy issues which bear importantly on the administration of justice in the federal courts. The procedural framework established by the Congress and the Supreme Court for the adoption of nationwide rules of practice in federal district courts are designed to produce simple, clear-cut and uniform principles governing civil litigation in the federal courts. That procedural framework provides for notice and comment procedures and legislative input prior to adoption of new rules. At least one commentator has suggested that under the procedural framework as intended at the time the Federal Rules were first authorized and adopted, local rulemaking power under Rule 83 was supposed to be held to a minimum, in favor of ad hoc decisions on particular procedural problems as they arise on a case-by-case basis. See generally, Note, Rule 83 and the Local

Federal Rules, 67 Colum. L. Rev. 1254-58; 1275-76 (1967).[14/]

Local rulemaking produces disuniformity of practice in the various federal courts, creating traps for the unwary and distributing costs of litigation differently among litigants according to the location of the litigation.[15/] The more important the particular local deviations, the more vigorous the forum shopping efforts of counsel become, with relatively greater waste of judicial time and energy in disposing of jurisdiction and venue motions.

In short, the policies favoring nationwide uniformity in federal practice generally are substantial, perhaps as substantial as any particular issue of procedural policy posed by any single proposed amendment of the rules. We think the Committee on Practice and Procedure should scrutinize carefully any suggestion that a particular policy issue be made the subject of an express reference to the local rulemaking power; the Committee should specifically seek to determine prior to any such reference if the particular procedural issue is one where disuniformity of federal practice is really justified by

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14/ See especially the discussion of the 1940 Report of the Committee on Local District Court Rules appointed by the Chief Justice (the Knox Committee). Id., at 1257-58.

15/ For example, if written interrogatories are relatively more important to poorer litigants, and if the numerical limitations were to be seriously enforced, those litigants would be relatively more disadvantaged in the jurisdiction concerned.

local geographic concerns or local bar habits.

Here we doubt the procedural issue warrants diversity of federal practice; we are aware of no justifiable arguments supporting a numerical limit on interrogatories based on geographic needs or local bar behavior. Nor does the Advisory Committee advance such considerations; rather, the Note merely observes that some districts have such rules and some such justifications may exist. This, we think, is the wrong approach to the question of nationwide versus local procedural rulemaking; in effect every questionable local departure from an existing uniform role becomes the basis for encouraging further disuniformity.16/

Moreover, the reference of this issue to the local rulemaking power poses another important policy question. Thus, the Advisory Committee "particularly requests the views of the bench and bar on the matter of limitation of interrogatories." 77 F.R.D. at 649. Yet most district courts do not provide for pre-adoption notice and comment procedures in connection with promulgation of local rules.17/ Thus, the very public

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16/ Has the Advisory Committee developed any bank of empirical data from those jurisdictions having such a rule showing: (a) the necessity for the local rule in light of local needs or bar habits; and (b) the relative success of the local rule in dealing with the problems of discovery abuse?

17/ As far as we are aware, the only federal district court providing for pre-amendment notice and comment is the District Court of the District of Columbia. (Rule 1-1(c)). Federal Local Court Rules (Callaghan & Co. 1978).

notice and debate which the Advisory Committee correctly recognizes as important on this issue is likely to be lacking for the most part in the very forum to which the Advisory Committee has referred the problem.[18/]

18/ The need for notice and comment procedures at the local rulemaking level has been the subject of much recent comment. See the Report of the Commission on Revision of the Federal Court Appellate System, "Structure and Internal Procedures: Recommendations For Change," at 44-46 (June 1975) (recommending notice-and-comment rulemaking for the Federal Courts of Appeals); Weinstein, "Reform of the Federal Rule-Making Process," 63 A.B.A.J. 47, 49 (January 1977) (U.S. District Judge Weinstein recommending notice-and-comment, public hearings upon objection, and prior approval by a National Standing Committee of any proposed local rule "[t]o preserve national uniformity and control excessive or unwise local rulemaking . . ."). See also, In Re Order Interpreting Local Rule 10, 18 F. Rules Serv. 2d 1422, 1423-24 (W.D. Tex. 1974).

COMMENT ON PROPOSED RULE 37(e)

Rule 37(e) has been amended to permit sanctions against any party or counsel who fails to cooperate in discovery.

COMMENT OF DIVISION IV

The Advisory Committee Note indicates the revision is necessary because existing Rule 37 sanctions only apply to those who refuse to make discovery without justification. 77 F.R.D. at 653. Although Rule 26(c) and 28 U.S.C. §1927 permit broader sanctions, they are seldom used. Division IV agrees that some additional encouragement is necessary to urge judges to sanction extraordinary abuse. The revision to Rule 37(e) should be so viewed rather than as a hue and cry against lawyers who pursue a case vigorously. We believe that the type of discovery abuses truly justifying imposition of sanctions are the exception. There is no demonstrated need to amend the rules to force the judiciary to propel cases through to judgment which require careful and thorough preparation. The discovery conference and the "new" sanctions, if too zealously pursued, could be used to force reluctant litigants to resolve issues in an atmosphere of haste which could seriously hamper the thorough development of complex civil litigations, damage the precedent value of the resulting opinion, and cut off the judge from the aid and assistance of

experienced counsel. This would interfere with the overriding policy of the Rules that they be construed to secure the just, speedy, and inexpensive determination of every action. See Rule 1.

The discovery conference is held early in the case and draws the judge into active participation often before he has studied the issues. Counsel are also often uncertain about the scope of the issues and necessary discovery at this stage of a litigation. Any application of proposed Rule 37(e) which encourages the court to take control of the development of a complex case away from counsel should be discouraged. Viewed in proper perspective the new sanctions of Rule 37(e) can encourage a judge to use the tools already at his disposal to prevent serious abuse. The Division urges that new Rule 37(e) be viewed as just such an encouragement and not a completely new and open ended authority for the court to wrest control of a case away from counsel.

We recommend that cautionary language be added to the Advisory Committee Note expressly stating that: (a) it is not the intent of the Committee to alter existing law on what may constitute an "abuse" warranting imposition of sanctions; and (b) that the courts must remain sensitive to the basic right of counsel in an adversarial system to control their own cases and vigorously pursue every truly relevant area of factual inquiry.

The Division also urges that discovery abuses may be better reduced by adopting the practice of local courts like the Northern District of California which requires counsel to certify that they have conferred and attempted to resolve discovery disputes before the court will entertain any discovery motion. Local Rules 230 (N.D. Cal.). This approach has also been adopted by certain administrative agencies like the U.S. Patent and Trademark Office in a successful attempt to reduce discovery motions practice, see 37 CFR 2.120(c). This approach preserves judicial time for serious discovery disputes and encourages counsel themselves to resolve matters as much as possible. This is by far the preferable approach to litigation and we recommend that this approach may be worthy of more general consideration.