

Winter 1980

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Joel M. Wachs

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Recommended Citation

Joel M. Wachs, *Is Ordeal by Discovery Over - Discovery by Telephone and Conference: New Pretrial Techniques Considered for the District Courts Adopted by the United States Customs Court*, 13 J. Marshall L. Rev. 225 (1980)

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IS ORDEAL BY DISCOVERY OVER?
DISCOVERY BY TELEPHONE AND
CONFERENCE: NEW PRETRIAL
TECHNIQUES CONSIDERED
FOR THE DISTRICT COURTS ADOPTED
BY THE UNITED STATES CUSTOMS
COURT

JOEL M. WACHS*

INTRODUCTION

Sometime in the first half of this year, the Supreme Court is expected to "prescribe" new rules for "the practice and procedure of the district courts."¹ In light of the extensive review to which these rules have already been subjected,² there seems lit-

* J.D., Columbia University School of Law (1972). Mr. Wachs is presently the Law Assistant to the Honorable Frederick Landis, Judge of the United States Customs Court. The author assisted in the preparation of the recent revisions of the Customs Court Rules.

1. The Supreme Court possesses this power to prescribe rules for congressional enactment. 28 U.S.C. § 2072 (1976).

2. The initial impetus for review of the Federal Rules of Civil Procedure arose at what has become known as the "Pound Conference," part of the country's bicentennial celebration cosponsored by the Judicial Conference of the United States, the Conference of Chief Justices, and the American Bar Association. The Conference, formally entitled the "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice," was held in April, 1976 in St. Paul, Minnesota. Roscoe Pound had delivered an address on the same topic to the A.B.A. in St. Paul in 1906.

Much of the Pound Conference was devoted to studies of the mounting costs of discovery. Two months later, in June 1976, a "follow-through task force" was established by the A.B.A. to prepare recommendations for the annual meeting of the Association's Board of Governors in August.

The task force reported the obvious:

Substantial criticism has been leveled at the operation of the rules of discovery. It is alleged that abuse is widespread, serving to escalate the cost of litigation, to delay adjudication unduly and to coerce unfair settlements. Ordeal by pretrial procedures, it has been said, awaits the parties to a civil law suit.

AMERICAN BAR ASSOCIATION, REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE 28 (Aug., 1976) (footnote omitted). The blue-ribbon task force urged consideration of the problem by the A.B.A. Litigation Section. This referral was made and, consequently, a large portion of the new rules is attributable to the Litigation Section. Further discussion of the evolution of the new rules appears in footnote 10.

the likelihood of Congressional objection.³

Most of the rule changes involve minor revisions of existing federal rules of civil procedure. Two of the additions, however, may mark important milestones in federal practice. One new rule would specifically permit deposition by telephone; the second would allow parties to engage in a "discovery conference." The provision for deposition by telephone should expedite and improve pretrial procedures, while the discovery conference potentially could have a significant impact in curbing discovery abuse.

Effective January 1, 1980,⁴ the United States Customs

3. Congress' role is set forth as follows:

Such rules [prescribed by the Supreme Court] shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

28 U.S.C. § 2072 (1976).

4. All nine judges of the Customs Court were present on October 26, 1979, at a special meeting to consider amendments to the court rules. At this meeting, the judges promulgated the following "Statement of the Court in Adopting the Rules":

That the following amendments and additions to the Rules of the United States Customs Court shall take effect on January 1, 1980, and shall govern all proceedings in actions brought thereafter. They shall also govern all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies.

In addition, whenever a party is required or has been requested prior to the effective date of the following amendments and additions to perform an act, pursuant to the Rules of this Court in effect prior to January 1, 1980, the act may still be performed in accordance with the Rules in effect prior to January 1, 1980.

13 Cust. B. & Dec. No. 51, Dec. 19, 1979, at 13.

The judges' language is a slight improvement, due to the breakup of sentences, over that customarily used in transition rules concerning the effective date of amendments to court rules. *See, e.g.*, FED. R. CIV. P. 86(e) and a similar order of the Supreme Court of the United States dated April 26, 1976, found in HOUSE COMM. ON THE JUDICIARY, RULES OF PROCEDURE COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, H.R. DOC. NO. 94-464, 94th Cong., 2d Sess. 29 (1976).

The final sentence of the Customs Court order apparently is new and may be somewhat contradictory to the preceding one. In the last sentence, which concerns actions pending on the effective date, the court has ordered that "whenever a party is required or has been requested prior to the effective date . . . to perform an act . . . the act may still be performed in accordance with the Rules in effect prior to January 1, 1980." Yet the second sentence of the order, which also concerns actions pending on the effective date, appears to state that the new rules "shall also govern all further proceedings," unless the court orders otherwise.

On rare occasions, transition rules are litigated. *New Orleans Pub. Belt R.R. v. Wallace*, 173 F.2d 145 (5th Cir. 1949); *John R. Alley & Co. v. Federal Nat'l Bank*, 124 F.2d 995 (9th Cir. 1942); *see Preston v. Aetna Life Ins. Co.*, 174 F.2d 10 (7th Cir.), *cert. denied*, 338 U.S. 829 (1949). Oddly, the first Customs

Court,⁵ an article III court⁶ with nationwide⁷ jurisdiction,⁸ be-

Rules Decision published this year presented a transition difficulty. In *Alberta Gas Chemicals, Inc. v. United States*, — Cust. Ct. —, Cust. B. & Dec. Vol. 14, No. 2, at 59, C.R.D. 80-1 (1980), the defendant moved for summary judgment prior to filing an answer. Under the current Customs Court Rules, such a motion is appropriate, but under Customs Court Rule 8.2(a) in effect until December 31, 1979, summary judgment could be sought only "at any time after a responsive pleading has been filed." Judge Newman stressed that the statement set forth at the outset of this footnote applied to "further proceedings" not "pending proceedings." Since both the motion for summary judgment and the opposition were filed prior to January 1, 1980, consideration was "premature." Judge Newman added: "Under these circumstances, it is clear that the new rule has no application in this case, and in any event its application would 'work injustice' to plaintiff." *Id.* at 68 n.6.

5. The United States Customs Court, an outgrowth of the Board of General Appraisers, was established in 1926. 19 U.S.C. § 405(a) (1976). The Board had been created by the Customs Administrative Act of June 10, 1890 to review decisions by the collectors of customs as to the ad valorem rate and amount of duty. The Board also considered determinations of government appraisers of merchandise as to the value of imported goods and reviewed some other administrative actions. Act of June 10, 1890, ch. 407, 26 Stat. 131.

Apparently, only one published book discusses this history. See W. H. FUTRELL, *THE HISTORY OF AMERICAN CUSTOMS JURISPRUDENCE* (1941). The Clerk of the Customs Court has prepared a more modern publication. J.E. LOMBARDI, *THE UNITED STATES CUSTOMS COURT—A HISTORY OF ITS ORIGIN AND EVOLUTION* (1976) (in Customs Court Library). A third history appears in Johnson, *The United States Customs Court—Its History, Jurisdiction, and Procedure*, 7 OKLA. L. REV. 393 (1953). An unpublished and undated history is on file in the Customs Court Clerk's Office. See Kinstler, *A Short History of the United States Customs Court*. For general information about the Customs Court, including some history, see Rao, *Customs Administration and Law*, 25 FORD. L. REV. 77 (1956). See also R. STURM, *A MANUAL OF CUSTOMS LAW* (1980).

At the present time, Congress is considering expanding the jurisdiction of the Customs Court and changing the court's name. S. 1654, 96th Cong., 1st Sess. (1979). The bill passed the Senate on December 18, 1979. On February 20, 1980, hearings concluded in the House Judiciary Committee. H.R. 6394, 96th Cong., 2d Sess. (1980). If the legislation is enacted, the court will be known as the United States Court of International Trade. The breadth of the anticipated legislation, the "Customs Court Act of 1980," is outlined in the bill's "purpose" section:

TITLE I—PURPOSE

Sec. 101. The Congress declares that the purposes of this Act are—

(a) to provide for a comprehensive system of judicial review of civil actions arising from import transactions, utilizing, whenever possible, the specialized expertise of the United States Customs Court and Court of Customs and Patent Appeals and ensuring uniformity afforded by the natural jurisdiction of these courts;

(b) to assure access to judicial review of civil actions arising from import transactions, which access is not presently assured due to jurisdictional conflicts arising from the present ill-defined division of jurisdiction between the district courts and the customs courts;

(c) to provide expanded opportunities for judicial review of civil actions arising from import transactions;

(d) to grant to the customs courts the plenary powers possessed by other courts established under article III of the constitution; and

came the first court in the country to adopt a specific procedural

(e) to change the name of the United States Customs Court to the United States Court of International Trade to be more descriptive of its expanded jurisdiction and its new judicial function and purpose relating to international trade in the United States.

28 U.S.C. § 251 (1976).

6. For a similar congressional enactment regarding the Court of Customs and Patent Appeals (CCPA), see 28 U.S.C. § 211 (1976). The CCPA serves as the appellate court for Customs Court decisions. The ultimate arbiter, of course, is the Supreme Court. See, e.g., *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978). But such review is rare.

The road to article III recognition, assuming that has been achieved, has not been an easy one for the Customs Court. In 1929, only three years after the Customs Court came into existence, the Supreme Court held that the Court of Customs Appeals, the CCPA's predecessor, was a legislative rather than a constitutional court. *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929). For a discussion of the distinction between courts, see C.A. WRIGHT, *LAW OF FEDERAL COURTS* (3d ed. 1976) [hereinafter cited as WRIGHT]. This distinction was followed ten years later by the courts of appeal for the fourth and seventh circuits in cases concerning respectively, a judge of the Customs Court and a judge of the CCPA. *Magruder v. Brown*, 106 F.2d 428 (4th Cir. 1939); *Bland v. Commissioner*, 102 F.2d 157 (7th Cir. 1939). Both judges, Brown and Bland, had challenged the imposition of federal income taxes on their salaries.

After Congress had declared the CCPA an article III court in 1958, the Supreme Court reached the same conclusion in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). The same result was reached with respect to the status of the Court of Claims. The two cases combined in *Zdanok* arose under the statutory authority permitting assignment of judges of one court to sit on another. 28 U.S.C. § 293(a) (1976). A judge of the Customs Court may be assigned to a district court, *id.* § 293(b), or the CCPA. *Id.* § 293(d). The *Zdanok* decision is discussed in 76 HARV. L. REV. 160 (1962); 37 TUL. L. REV. 144 (1962). Justice Douglas dissented, for himself and Justice Black, noting that "[t]he decision in these cases has nothing to do with the character, ability, or qualification of the individuals who sat on assignment," but that the CCPA was a "legislative" court nevertheless. 370 U.S. at 589.

Even the five member majority was split. Only seven Justices heard the case. Three justices, in an opinion written by Justice Harlan, concluded that *Bakelite*, "long . . . considered of questionable soundness," should be overruled. Justice Clark, concurred joined by Chief Justice Warren, commenced his opinion by declaring specifically:

I cannot agree to the unnecessary overruling of *Ex parte Bakelite Corp.*, . . . and *Williams v. United States*, 289 U.S. 553 (1933). [*Williams* concerned the Court of Claims.] Both were unanimous opinions by most distinguished Courts, headed in the *Bakelite* case by Chief Justice Taft and in *Williams* by Chief Justice Hughes.

370 U.S. at 585. To emphasize not only the unanimity in the earlier decisions, but the quality of the bench as well, a footnote citation in the above paragraph advises the reader that at the time of *Bakelite*, the Court was composed of Justices Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford and Stone.

What ultimately persuaded Clark and Warren to concur in *Zdanok* was the intervening 1958 statute, in which Congress declared the CCPA an article III court. By contrast, the Harlan view maintained that the CCPA was a constitutional court even prior to 1958. There is no doubt today that the CCPA is an article III court.

While the Supreme Court did not consider the Customs Court's status in *Zdanok*, or subsequently, there appears to be no reason, certainly under the rationale of the majority in *Zdanok*, why the lower court should not be

rule permitting deposition by telephone, and the second⁹ to pro-

considered an article III court. Wright states that such a conclusion is "probably" true. WRIGHT, *supra*, at 36.

After *Bakelite*, but prior to the 1956 congressional enactment declaring the Customs Court an article III court, the Second Circuit spoke inconclusively on the issue. *Brooks v. Mandel-Witte Co.*, 54 F.2d 992, 994 (2d Cir.), *cert. denied*, 286 U.S. 559 (1932). Following *Bakelite* and the 1956 legislation, but prior to *Zdanok*, the United States Court of Appeals for the District of Columbia Circuit anticipated the Harlan-Clark majority split: "We do not decide, however, whether the expression of congressional intent is sufficient to transform the customs courts into Article III tribunals." *Eastern States Petroleum Corp. v. Rogers*, 108 U.S. App. D.C. 63, 280 F.2d 611, 614, *cert. denied*, 364 U.S. 891 (1960).

Since *Zdanok*, at least three of the circuits have sidestepped the question of the Customs Court's status. *J.C. Penney v. United States Treasury Dep't*, 439 F.2d 63, 67 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968); *Kocher v. Fowler*, 397 F.2d 641, 643 (D.C. Cir. 1967), *cert. denied*, 391 U.S. 920 (1968). Nevertheless, the Customs Court should be considered an article III court. 1 FULLER, CUSTOMS LAW AND INTERNATIONAL TRADE 137 (1979).

Certainly that is how the Customs Court judges view their court. Then Chief Judge Nils A. Boe wrote in *Consolidated Merchandising Co. v. United States*, 375 F. Supp. 1356, 1360, 72 Cust. Ct. 308, 312, C.R.D. 74-7 (1974), *rev'd on other grounds*, 527 F.2d 640, C.A.D. 1164 (1976): "The United States Customs Court is a duly constituted court of the United States, declared to be a court established under Article III of the Constitution of the United States."

Writing for a three-judge court including Judge Ford in *Borneo-Sumatro-Trading Co. v. United States*, 49 Cust. Ct. 510, 514 A.R.D. 150 (1962), Judge Rao wrote that "this is a duly constituted court of the United States, declared to be a court established under Article III of the Constitution of the United States, . . . clothed with all the inherent powers of a Federal district court, and authorized to apply the same rules of evidence, practice and procedure." *But cf. Matsushita Elec. Indus. Co. v. United States*, 67 Cust. Ct. 328, C.D. 4292 (1971), *aff'd*, 60 C.C.P.A. 85, C.A.D. 1086, *cert. denied*, 414 U.S. 821 (1973) (Judge Rao possibly changed his mind.)

Finally, the "Customs Court Act of 1980," if passed, will reaffirm the article III status of the court, and this is particularly persuasive in view of the Supreme Court's *Zdanok* decision. If enacted in its present form, 28 U.S.C. § 251 will be amended to read:

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and eight judges who shall constitute a court of record known as the United States Court of International Trade. The Court is a court established under article III of the Constitution of the United States. . . .

7. Officially and physically, the United States Customs Court is located at One Federal Plaza in New York City. 28 U.S.C. § 251 (1976). Periodically, legislation is introduced to open a second clerk's office in Los Angeles. S.1707, 90th Cong., 1st Sess. (1967); H.R. 7350, 91st Cong., 1st Sess. (1969).

As in the formative years of the Supreme Court, the Customs Court judges "ride circuit." According to Charles Wright: "As early as 1792, Chief Justice Jay and his associates joined in a memorial to the President in which they protested that the task of circuit riding was 'too burdensome.'" WRIGHT, *supra* note 6, at 4. In 1921, members of the Board of General Appraisers, the predecessor of the Customs Court, still were protesting:

Do you consider the fact that we are nomads, that we have to leave home and be away most of the time, travelling all over the country, and putting up with all sorts of treatment—travelling under a time limit all the time, with no comforts except what we pay twice our allowance for?

vide for a discovery conference. These new discovery rules were adopted, practically verbatim, from the Proposed Amendments to the Federal Rules of Civil Procedure promulgated by the Standing Committee on Rules of Practice and Procedure¹⁰ of the Judicial Conference of the United States.¹¹

Every federal circuit and district court is represented at the annual Judicial Conference. The United States Court of Claims and the Court of Customs and Patent Appeals¹² are also represented. The Customs Court, however, is not a member of the conference. This has permitted the court to adopt the Standing Committee's recommendations earlier than other courts, which

Hearings on General Tariff Revision Before the House Comm. on Ways & Means, 67th Cong., 1st Sess., 4200-06 (1921). Some of the Customs Court judges still experience this inconvenience today.

Customs Court judges may conduct trials anywhere in the United States. 28 U.S.C. § 256(a) (1976). Most trials actually are held at the port city of entry of the contested merchandise, or at the Customs Court in New York. An examination of the trials held during 1979 demonstrates that just over fifty percent were held in New York City.

Since many imports enter at more than one port, for evidentiary reasons trials may be held at more than one site. The Chief Judge of the court may authorize a judge to preside at evidentiary hearings in certain foreign countries. *Id.* § 256(b). Customs Court Rule 2.2 delineates the mechanism for such an evidentiary hearing. The most recent case in which such a procedure was utilized was *Dolliff & Co. v. United States*, 455 F. Supp. 618 (Cust. Ct. 1976), *aff'd*, 599 F.2d 1015 (C.C.P.A. 1979), in which Judge Richardson conducted a hearing in Canada.

8. The jurisdiction of the Customs Court is provided by 28 U.S.C. § 1582 (1976). The most recent expansion of the court's jurisdiction occurred in 1979 as a result of the Tokyo Round of the multilateral trade negotiations. *See* The Trade Agreements Act of 1979, Pub. L. No. 96-39 (1979). As noted previously, the jurisdiction of the court may soon be extended even further.

9. Effective January 10, 1977, the Supreme Court of Kansas adopted a general discovery conference rule, KAN. CT. R. 60-2702a, Rule 136. Thus far, the rule has not been interpreted by the judiciary.

10. The committee will be hereinafter referred to as the Standing Committee. The specific proposed amendments were first propounded by the Section of Litigation of the A.B.A. in October, 1977, in a publication entitled "Report of the Special Committee for the Study of Discovery Abuse." The first effort by the Standing Committee was published in 77 F.R.D. 613 (1978). The Proposed Amendments referred to here were released in February, 1979. COMM. ON RULES OF PRAC. AND P., JUDICIAL CONFERENCE OF THE UNITED STATES, REVISED PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FED. R. CIV. P., 80 F.R.D. 323 (1979) [hereinafter referred to as the REVISED PRELIMINARY DRAFT].

11. Congressional authorization for the Judicial Conference of the United States appears at 28 U.S.C. § 331 (1976). The Judicial Conference forwarded the Standing Committee's Proposed Amendments, with revisions not relevant here, to the Supreme Court during the first week of November, 1979.

12. Legislation now pending, the Federal Courts Improvement Act, would merge the CCPA and the Court of Claims. S. 1477, 96th Cong., 1st Sess. (1979). The new court would be known as the Court of Appeals for International Trade, Patents and Trademarks.

must await Judicial Conference review and consideration by the Supreme Court and Congress.

The adoption of these two new discovery rules, telephone and conference, in the United States Customs Court is of particular significance due to the nationwide jurisdiction of this court. The principal problem in the area of discovery in the Customs Court has been procrastination. This court handles cases primarily in the international trade arena, making discovery a time-consuming task with great distances being involved. The possibilities for abuse by delay are self-evident. It is for this reason that the potential impact of these new procedures will be much greater in the Customs Court than in federal practice generally. Both new rules are designed to help eliminate delay by granting to the court tighter control over the discovery process.

DEPOSITION BY TELEPHONE

Depositions by telephone are equally permissible under the federal and Customs Court procedural rules. Federal Rule of Civil Procedure 29, Stipulations Regarding Discovery Procedure, allows the parties by written stipulation to agree that depositions "may be taken before any person, at any time or place, upon any notice, and in any manner. . . ." The second portion of Rule 29 permits the parties to modify the other methods of discovery, except that certain stipulations extending time limitations require court approval. The comparable Customs Court Rule seemingly allows the parties even greater leeway:

RULE 7.1 STIPULATIONS REGARDING DEPOSITIONS AND DISCOVERY PROCEDURE

Unless the court orders otherwise, the parties, by written stipulation filed with the clerk of the court: (1) may modify the procedures provided by these rules as to permit other methods of discovery; and (2) may take any deposition provided for in these rules before any person, at any time or place, upon any notice, and when so taken such deposition may be used in the same manner as other depositions.¹³

In the Customs Court, the parties may even stipulate to extend the time limitations of the discovery rules.

This particular disparity¹⁴ in the courts' rules highlights the crux of discovery abuse in the Customs Court. The true abuse in that court is not "*over*" discovery or *resistance* to discovery, as in the district courts, but *delay* in discovery and failure to

13. CUST. CT. R. 7.1 (1976).

14. There is another distinction. The Customs Court Rule provides that the written stipulation be filed with the clerk of the court while the federal rule does not. On the other hand, both rules commence: "Unless the court orders otherwise. . . ."

prosecute. Of course, this rule distinction only underscores the abuse and is not the core of the problem. In practice, the parties may stipulate to extend time, but a judge of the court usually issues an order.

Despite such authorization for depositions by telephone upon stipulation of the parties, the technique has not often been utilized. The new rule as adopted by the Customs Court, however, allows depositions by telephone upon court order and provides:

The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and rule 7.6 [*infra*], a deposition taken by telephone is taken at the place where the deponent is to answer questions propounded to him.¹⁵

As forwarded by the Standing Committee to the Judicial Conference for consideration, allowance for deposition by telephone would appear as a new Federal Rule of Civil Procedure 30(b)(7). If approved in its present form, the addition to the existing rule on Deposition Upon Oral Examination would read as follows:

The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(a)(1), 37(b)(1) and 45(d), a deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions propounded to him.¹⁶

This rule and the Customs Court Rule are identical except that the latter omits three references to other rules which are inapplicable to a court with national jurisdiction.¹⁷ Proposed Federal Rule (30)(b)(7) also refers to Rule 28(a), relating to "Persons Before Whom Depositions May Be Taken." While the comparable Customs Court Rule 7.6 varies only slightly from the federal rule, once again due to the nationwide jurisdiction dis-

15. CUST. CT. R. 7.3(b)(6) (1976). Rule 7.3 is the general Customs Court Rule for Depositions Upon Oral Examination.

16. REVISED PRELIMINARY DRAFT, *supra* note 10.

17. Cited Federal Rule 37(a)(1) concerns the "appropriate court" in which to move for an order compelling discovery: "An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. . . ." Rule 37(b)(1) pertains to sanctions imposed by the "Court in District Where Deposition is Taken" for failure to comply with a discovery order. Rule 45(d) refers to subpoenas issued "by the clerk of the district court for the district in which the deposition is to be taken. . . ." In a national court like the Customs Court, this dilemma of whether to turn for deposition assistance to the court in whose district the discovery is held, or the district court where the action actually is litigated, simply does not exist.

inction, this reference was retained in the new Customs Court Rule 7.3(b)(6).

The reason for this retention, and the second sentence of Rule 7.3(b)(6), is twofold. Maintaining the reference clarifies a possible ambiguity as to *where* the deposition is actually taking place. Both the Customs Court Rule and the Federal Rule indicate that the oath in a telephone deposition will be administered at the deponent's end of the telephone line. Furthermore, the reference specifies that the transcription of testimony should take place there as well.

The Standing Committee's advisory note explained the significance of proposed Federal Rule 30(b)(7): "Depositions by telephone are now authorized by Rule 29 upon stipulation of the parties. The amendment authorizes that method by order of the court."¹⁸ The greatest significance of depositions by telephone for the Customs Court, and probably the district courts, may have been overlooked in the advisory note. The mere specification of a distinct subdivision concerning depositions by telephone undoubtedly will encourage the method's use.

Since the Customs Court has nationwide jurisdiction, the potential implications of depositions by telephone, such as the time, cost, and inconvenience savings for parties, witnesses, attorneys, and even the court's judges, may be especially great. For those attorneys who fear that the deponent's demeanor, a critical element in an oral deposition, will be missing, and their follow-up queries will be less effective, note that the rule does not preclude, and all the rules taken together encourage, the use of a television-telephone hook-up, "picture-phone."¹⁹ In fact,

18. REVISED PRELIMINARY DRAFT, *supra* note 10. Note that originally deposition by telephone was proposed as the concluding sentence to FED. R. Civ. P. 30(b)(1):

(b) Notice of Examination: General Requirements; Special Notice; Non-Stenographic Recording; Production of Documents and Things; Deposition of Organization.

(1) . . . *A notice may provide for the taking of testimony by telephone, but the court in which the action is pending may, on motion of any party, require that the deposition be taken in the presence of the deponent.*

77 F.R.D. 613, 630 (1978). At this early date, FED. R. Civ. P. 30(b) ended:

(7) For the purposes of this rule, and Rules 28(a), 37(a)(1), 37(b)(1) and 45(d), a deposition is taken in the district and at the place where the deponent is to answer questions propounded to him.

77 F.R.D. 613, 632 (1978). For reasons stated in the text, the version adopted by the Customs Court is preferable.

19. "Picturephone," the telecommunications system that televises an actual phone conversation, was developed by American Telephone and Telegraph Company. The system has been utilized just once in a transcontinental deposition, in a pending action in the Supreme Court of New York, Kings County, in which the New York Telephone Company is one of numer-

this consideration was contemplated by the A.B.A. in their Discovery Report in which this comment appears: "The Committee intends, by the use of the word 'telephone' to embrace any other recognized form of telecommunications between distant points."²⁰

THE DISCOVERY CONFERENCE

Discovery Abuse

Possibly an even greater tool against discovery abuse is the discovery conference. When the much-respected Committee on Federal Courts of the Association of the Bar of the City of New York reported on the proposed Discovery Conference Rule, they prefaced their approval with the observation that "few would dispute the almost axiomatic proposition that there is widespread dissatisfaction with the manner in which discovery is typically conducted today in the Federal courts."²¹ Perhaps the most colorful appraisal is one by Judge Ruggero Aldisert of the Third Circuit: "The average litigant is overdiscovered, overinterrogated, and overdeposed—as a result, he is overcharged, overexpensed, and overwrought."²² Knowledge of the abuse of discovery is so widespread that this specific topic was even recently aired on the Op-Ed page of *The New York Times*.²³

ous defendants. *Glaser v. New York Tel. Co.*, Index No. 57776/74. A photograph of the picturephone in operation appeared in the *National Law Journal* article on the case. Nat'l L.J., Dec. 4, 1978, at 9. See also 181 N.Y.L.J. 1 (1978).

20. See note 10 *supra*.

21. Committee on Federal Courts Report on the Proposed Discovery Conference Rule of the N.Y.C.B.A.; accord, Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219 (1978); see Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition*, 78 F.R.D. 267 (1978).

22. Committee on Federal Courts Report on the Proposed Discovery Conference Rule of the N.Y.C.B.A.

23. Subrin, *The Law and The Rules*, *The N.Y. Times*, Nov. 10, 1979, at 37, col. 4. The author, a professor at Northeastern University School of Law who is writing a historical analysis of the Federal Rules of Civil Procedure, commented:

The discovery rules permit each side to compel the other to answer hundreds, sometimes thousands, of questions under oath before trial. Discovery can lead to important information, but often it takes years, seriously disrupts the lives of non-lawyer participants, and costs a fortune.

Applying the rules to all cases, big and small, has proved disastrous. The ease of starting a case, launching into discovery, and hoping for a settlement prompts questionable litigation. Small disputes quickly becomes wars. Partners, associates, paralegals, secretaries, office managers, experts, photocopying machines, magnetic tapes and computers stand like platoons poised to attack, defend and counterattack. Clients pay for the arms race.

Essentially, in federal practice, this abuse materializes in two incarnations—"overdiscovery," as pithily described by Judge Aldisert, and discovery "resistance," overuse of protective motions. This discovery abuse dichotomy constituted the analytical foundation for the most recent pretrial study by the Federal Judicial Center.²⁴ Interestingly, the researchers concluded that overdiscovery-type abuse, much more than resistance abuse, mandated prompt judicial intervention.

These discovery abuses are not as prevalent before the Customs Court. Here, the result is similar, but yet the cause is very different. The problem is not overuse or resistance, but procrastination and delay.

Certainly one reason for overdiscovering in the district courts may be to delay. That "Fifth Set of Interrogatories" may very well not be directed at discovering new information, but may be interposed to win time. Similarly, the underlying purpose of resistance may also be a delay tactic. Such motions are inherent in our adversarial jurisprudence.

However, in the customs field, delay exists with a life of its own. For this reason, the acceptance in principle of early judicial intervention in discovery, manifested by adoption of the Discovery Conference Rule, is especially significant. The new Customs Court Rule 6.1(f) reads as follows:

Discovery Conference. At any time after the filing of a complaint the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon request by the attorney for any party if the request includes:

- (1) A statement of the issues as they then appear;
- (2) A proposed plan and schedule of discovery;
- (3) Any limitations proposed to be placed on discovery;
- (4) Any other proposed orders with respect to discovery; and
- (5) A statement showing that the attorney making the request has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the request. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. 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 tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper manage-

24. B. BURKE & J. EBERSOLE, *DISCOVERY PROBLEMS IN CIVIL CASES* (Federal Judicial Center, 1980).

ment of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly requests a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 9.3.²⁵

Proposed Federal Rule 26(f) varies only slightly from this Customs Court Rule.²⁶ The lengthier committee comments are

25. CUST. CT. R. 6.1(f). Essentially, the 1978 Federal Rule 26(f) draft, 77 F.R.D. 613 (1978), was similar. At that time, the contemplated rule included the following paragraph: "*The court may exercise powers under Title 28 U.S.C., Sec. 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.*" 77 F.R.D. 613, 625 (1978). The Customs Court ultimately placed a comparable paragraph in the sanctions rule. See CUST. CT. R. 6.5(f). This solution is what the Standing Committee finally proposed.

26. See REVISED PRELIMINARY DRAFT, *supra* note 10, at 332. There are only two inconsequential differences between the proposed federal rule, Rule 26(f) and the adopted Customs Court Rule. The first difference is that Customs Court Rule 6.1(f) begins: "At any time after the filing of a complaint, the court may. . . ." This variation simply reflects the fact that in federal practice a civil action is commenced by the filing of a complaint (FED. R. CIV. P. 3), while in the Customs Court, most actions are (indeed, prior to January 1, 1980, all actions were) commenced by the filing of a summons. The reason some civil actions now are commenced by the concurrent filing of a summons and complaint lies in the new statute. *E.g.*, The Trade Agreements Act of 1979, *supra* note 8.

Since all actions in the Customs Court today are commenced by the filing of a summons (and only certain types of action require the concurrent filing of a complaint), one might think that the precise parallel to the proposed federal discovery conference rule should begin: "At any time after the filing of a summons, the court may. . . ." Such a conclusion would be erroneous because of the "Reserve File" procedure of the Customs Court. CUST. CT. R. 14.6.

Under the "Reserve File" procedure, the filing of a summons, while technically commencing the action, actually is only "protective." Plaintiffs have 180 days from the denial of their "protest" before the Customs Service in which to "commence" their court action by filing a summons. Customs Court Act of 1970, 28 U.S.C. § 1582 (1976). After such "commencement," the action is placed in a "Reserve File" where it may remain for two years, unless the court extends the time. CUST. CT. R. 14.6(e).

During this two year or longer period, the plaintiff may file a complaint or seek a court decision based upon an agreed statement of facts. CUST. CT. R. 14.6(b)(1), (3). Plaintiff also may choose to "consolidate" or "suspend" the action. CUST. CT. R. 14.6(b)(2). "Consolidation," comparable to Federal Rule 42(a), is allowed under Customs Court Rule 10.3; "Suspension" is described in Customs Court Rule 14.7. See Rao, *A Primer on Customs Courts Practice*, 40 BROOK. L. REV. 581 (1974). The true commencement of the action, that is the time from which defendant must file an answer (CUST. CT. R. 4.7(a)), is the filing of the complaint. Note, however, that the defendant may file a "Demand for a Complaint" (CUST. CT. R. 4.4(b)) at any time, but this procedure has rarely, if ever, been utilized. Furthermore, this rule, prior to its January 1 amendment was most unclear as to the time period in which the demanded complaint had to be filed. Interestingly, as originally proposed by the A.B.A., the discovery conference could be commenced only "after the joinder of issue." See note 6 *supra*.

The second difference appears at the conclusion of the Discovery Con-

helpful in understanding the Customs Court Rule. The Standing Committee's advisory note on contemplated Federal Rule 26(f) is the lengthiest explanation any proposed amendment is afforded.²⁷ The crux of the note²⁸ is that the anticipated goal

ference Rule. The proposed federal rule conclusion permits the court to "combine the discovery conference with a pretrial conference authorized by Rule 16." The Customs Court Rule follows the language exactly except that the reference to the pretrial conference is to Rule 9.3, the comparable Customs Rule. This simple numerical designation difference certainly does not merit lengthy discussion, except for the fact that the two Pretrial Conference Rules are not the same. Aside from other differences, Federal Rule 16 contains an entire concluding paragraph not included in the Customs Court Rule. That paragraph reads:

The court shall make an order which recites the action taken at the pretrial conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

FED. R. CIV. P. 16; *see* CUST. CT. R. 9.3(c).

27. REVISED PRELIMINARY DRAFT, *supra* note 10, at 627.

28. *Subdivision (f)*. This subdivision is new. There has been widespread criticism of abuse of discovery. The Committee has considered a number of proposals to eliminate abuse, including a change in Rule 26(b)(1) with respect to the scope of discovery and a change in Rule 33(a) to limit the number of questions that can be asked by interrogatories to the parties.

The Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases. A very recent study of discovery in selected metropolitan districts tends to support its belief. P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *Judicial Controls and the Civil Litigative Process: Discovery* (Federal Judicial Center, 1978) [hereinafter referred to as CONNOLLY, DISCOVERY STUDY]. In the judgment of the Committee, abuse can best be prevented by intervention by the court as soon as abuse is threatened.

To this end this subdivision provides that counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court.

It is not contemplated that requests for discovery conferences will be made routinely. A relatively narrow discovery dispute should be resolved by resort to Rules 26(c) or 37(a) and if it appears that a request for a conference is in fact grounded in such a dispute, the court may refer counsel to those rules. If the court is persuaded that a request is frivolous or vexatious, it can strike it. *See* Rules 11 and 7(a)(2). [Note that no Federal Rule 7(a)(2) exists so the Standing Committee's citation is uncertain. Rule 7 concerns "PLEADINGS ALLOWED" so the Committee's intention may merely have been to suggest that a motion to strike a request on the grounds of frivolousness or vexatiousness is contemplated.]

A number of courts routinely consider discovery matters in preliminary pretrial conferences held shortly after the pleadings are closed. This subdivision does not interfere with such a practice. It authorizes the court to combine a discovery conference with a pretrial conference under Rule 16 if a pretrial conference is held sufficiently early to secure judicial intervention in time to prevent or curb abuse.

REVISED PRELIMINARY DRAFT, *supra* note 10, at 627.

underlying proposed subdivision (f) is the curbing of discovery abuse. The Committee had considered restricting the number of interrogatory questions that could be posed. However, it concluded that what abuse did exist did not demand such basic changes.²⁹

As noted, however, "abuse" is of a different nature in the customs field. Thus, the latent purpose of the discovery conference, as contemplated by the Customs Court's Rules Advisory Committee³⁰ and judges, is significantly different from that expressed by the Standing Committee.

That overdiscovery and resistance to disclosure is simply not a key issue in the Customs Court is demonstrated by an examination of cases. In nine years since the modern Customs Court Rules were adopted on October 1, 1970,³¹ only some fifty Customs Rules Decisions have concerned discovery questions. In 1979, only three reported cases pertained to discovery.³² In *Fruehauf Corp. v. United States*,³³ Judge Newman denied the Government's motion to compel discovery, largely on the ground of irrelevancy. In the two other cases, motions for protective orders were denied.³⁴

Customs Court Rules, to a somewhat lesser extent than the federal rules,³⁵ offer a variety of alternatives for resolution of discovery disputes. Rule 6.5 provides sanctions for failure to make discovery. The new Customs Court Rule is similar to Fed-

29. *Id.*

30. The Customs Court Committee on Rules is chaired by Judge James L. Watson. The other members are Judges Herbert N. Maletz and Nils A. Boe. The Court Advisory Committee consisted of leading practitioners in the customs field and high-ranking government attorneys.

31. The rules have been revised ten times, including the most recent amendments. Further revision is contemplated if S. 1654, *supra* note 2, passes. Only two revisions prior to the recent one concerned discovery, and both times there were only minor changes.

32. *See, e.g., Fruehauf Corp. v. United States*, Cust. B. & Dec. Vol. 13, No. 32, at 59, Cust. C.R.D. 79-12 (1979); *SCM Corp. v. United States (Brother Int'l Corp., Party-in-Interest)*, 473 F. Supp. 791 (Cust. Ct. 1979); *Airco, Inc. v. United States*, 468 F. Supp. 1327 (Cust. Ct. 1979).

33. Cust. B. & Dec. Vol. 13, No. 32, at 59, C.R.D. 79-12 (1979) (the court also discussed *res judicata*, collateral estoppel, and the law of the case).

34. *E.g., Airco, Inc. v. United States*, 468 F. Supp. 1327 (Cust. Ct. 1979); *SCM Corp. v. United States (Brother Int'l Corp., Party-in-Interest)*, 473 F. Supp. 791 (Cust. Ct. 1979).

35. The real difference lies in the area of sanctions. Compare FED. R. CIV. P. 37 with recently adopted Customs Court Rule 6.5. Note particularly the absence of an attorney's fees sanction in the latter rule. The reason for this omission is that in the Customs Court the defendant always has been the Government, and attorney's fees may not be awarded against the United States. Act of June 25, 1948, c. 646, 62 Stat. 973, 28 U.S.C. § 2412 (1966); *see NAACP v. Civiletti*, 609 F.2d 514 (D.C. Cir. 1979). The judges were unwilling to adopt a rule with such one-sided application.

eral Rule 37. Customs Court Rule 6.1(c), now identical to Federal Rule 26(c), authorizes the entry of "protective orders." Customs Court Rule 7.3(d) on "Motions to Terminate or Limit Examination" is virtually identical³⁶ to Federal Rule of Civil Procedure 30(d).

Yet the 1979 example, that these rules were dealt with but three times in customs opinions, is not, in fact, unusual. Indeed, while the same general principles of broad discovery do guide the Customs Court³⁷ and district courts, the granting of a protective order³⁸ seems to occur much less frequently in the Customs Court.

A protective order is rarely granted. One recent case where such an order was partially granted, however, was the continuing trial of *Michelin Tire Corp. v. United States*.³⁹ The circumstances were most unusual. The litigants included Charles Colson, H.R. Haldeman, Jeb Magruder, and others. Edward Bennett Williams represented John Connally. The underlying

36. Compare CUST. CT. R. 7.3(d) with FED. R. CIV. P. 30(d). The only variation is the internal reference to another court rule. However, in this instance, just the numerical designation of the cited rule differs, not the rule's substance.

37. CUST. CT. R. 6.1(b) provides: "(1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ."

38. Rule 6.1(c) provides:

(c) Protective Orders. Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

- (1) that the discovery not be had;
- (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;
- (6) that a deposition, after being sealed, be opened only by order of the court;
- (7) that a trade secret, or confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

39. 453 F. Supp. 897 (Cust. Ct. 1978); see *Michelin Tire Corp. v. United States*, 469 F. Supp. 270 (Cust. Ct.), *app. dismissed sub nom. United States v. Watson*, 603 F.2d 192 (C.C.P.A. 1979); Note, 6 J.L. & POL. IN INT'L BUS. 237 (1974). The court denied the motion for summary judgment, and the trial continues today.

cause of action in the case involves Michelin's contesting of the denial by the Government of its protest against the assessment of countervailing duties on imports of its radial tires from Canada. The case centers on Michelin's claim that the Government's decision was improperly influenced by payments made by American tire manufacturers. The material sought in discovery included information which had been before the grand jury investigation conducted by the Watergate Special Prosecution Force.

Judge Watson generally ordered discovery, stating:

The court finds no justification for requiring a demonstration of particularized need or any other exceptional standard of discovery in this matter. Although there is somewhat of a dearth of authority in this area of the law there is a definite distinction made between discovery for the purpose of learning what occurred before the grand jury and discovery, for its own sake, of materials which were before the grand jury.⁴⁰

After overruling this objection, and dispensing with attorney-client and work-product privilege arguments, the objections to disclosure were overruled.

However, Judge Watson added that "[t]he court is further of the opinion that because these materials are associated with events of recent notoriety which remains the focus of intense public interest and could become the object of injudicious use, they should be discovered within the confines of a protective order."⁴¹ He then elaborately described the safeguards that would be imposed on the discovery.

More typical among those rare cases where a protective order is granted was *Gehrig, Hoban & Co., Inc. v. United States*.⁴² At issue was the Government's motion, pursuant to the then effective Rule 6.5(b)(2),⁴³ to impose sanctions for plaintiff's alleged failure to comply with the court's previous order to compel discovery. The court carefully traced the plaintiff's recalcitrance in discovery. In pertinent part, this history included:

It appears that on December 24, 1974 defendant served interrogatories directed to plaintiff pursuant to Rule 6.3. . . . On July 1,

40. *Michelin Tire Corp. v. United States*, 453 F. Supp. 897 (Cust. Ct. 1978).

41. *Id.*

42. 76 Cust. Ct. 277, C.R.D. 76-3 (1976).

43. Customs Court Rule 6.5(b)(2) read:

If any party or a person designated under Rule 7.3(b)(4) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under paragraph (a) of this rule, the court may make such orders in regard to the failure as are just. . . .

The rule adopted on October 26, 1979 now largely conforms the Customs Court provision with FED. R. Civ. P. 37(b)(2), but significant differences remain.

1975 (which was more than 6 months after service of the interrogatories), defendant moved pursuant to Rule 6.5 for an order compelling plaintiff to answer said interrogatories. On July 9, 1975, a conference was held in chambers pursuant to plaintiff's request concerning the discovery proceedings and proposals by plaintiff for disposition of this and other related cases. On July 18, 1975, plaintiff moved for an order extending its time to September 15, 1975 in which to answer defendant's motion to compel discovery. This latter extension of time was granted over defendant's objections by an order dated July 29, 1975. On September 15, 1975, plaintiff filed a partial opposition to defendant's motion to compel discovery; raising for the first time objections to certain interrogatories; and thereafter defendant filed a reply to the aforesaid opposition on November 14, 1975. On December 1, 1975, plaintiff was ordered to answer defendant's propounded interrogatories within 60 days. Additionally, the order directed that:

" . . . [S]hould plaintiff not fully comply with this Court's order, then plaintiff shall be precluded from either introducing at trial of the issues in this action, or presenting in conjunction with the filing of a dispositive motion herein, any evidence concerning the information sought to be elicited by defendant's interrogatories.

. . . The present motion for sanctions pursuant to Rule 6.5(b)(2) was filed on April 29, 1976. . . ."⁴⁴

The court reached the obvious conclusion that the requested information had not been provided to the defendant.⁴⁵ Yet the court ordered that "[u]nder all the facts and circumstances, defendant's motion for sanctions under the foregoing rule should be granted unless plaintiff provides the requested information."⁴⁶ In the order, plaintiff was granted an additional sixty days to comply.⁴⁷

Of course, these approximate statistics and case discussions

44. *Gehrig, Hoban & Co., Inc. v. United States*, 76 Cust. Ct. at 278, C.R.D. 76-3 (1976).

45. *Id.* at 281.

46. *Id.*

47. *Id.* Subsequently, plaintiff answered some of the interrogatories. As to others, plaintiff moved to vacate the sanctions imposed in C.R.D. 76-3. The opinion stated:

Candidly, this Court is greatly anguished by the substantial time, labor and expense on plaintiff's part necessitated by the broad scope of the propounded interrogatories. But on the other hand, the scope of the information requested by defendant is merely reflective of the broad scope of plaintiff's claims and the apparent complexity of the issues. *Gehrig, Hoban & Co., Inc. v. United States*, 77 Cust. Ct. 176, 178, C.R.D. 76-11 (1976). The court concluded that the plaintiff had not properly responded to certain interrogatories. Still, "under all the facts and circumstances, and in view of the good faith efforts demonstrated by plaintiffs," the court granted plaintiff an additional sixty days to supplement its answers. *Id.*

So far as the court record discloses, no supplemental response was filed (although the parties did enter into a court-approved stipulation). Indeed, on October 28, 1978, the judge issued an order to show cause why the cause should not be dismissed. In 1979, the court files disclosed that the parties appeared to have reached a settlement.

do not *prove* there is little discovery-resistance abuse in the customs field. But they do strongly indicate that such abuse is not as prevalent as in the district courts. Accordingly, sanctions, protective orders, and other control mechanisms are rarely employed. Admittedly though, some discovery dispositions may have been accomplished via unpublished orders. Authors of a district court discovery study which considered "protecting motions" confessed this and another statistical difficulty:

[T]he rule provisions for protecting motions turn on events not recorded in the court files—primarily annoying, embarrassing, or oppressive requests; unduly burdensome or expensive requests; or bad faith by the requesting party. We have no data to measure the extent of such conduct by requesting parties. Consequently, we could not measure the actual protecting motions against those that might have been sought, nor could we measure the number of protecting motions that were frivolously sought.⁴⁸

Other Discovery Mechanisms

As noted, the chief problem confronting the Customs Court in this area is prodding the parties to commence and pursue discovery. A mere comparison of the Federal Rules of Civil Procedure with the Customs Court Rules would suggest that judges in the latter court exercise greater supervision, and thus would have less difficulty, in controlling pretrial practice. Only the one contrast mentioned, the comparison between Federal Rule 29 and Customs Court Rule 7.1, signifies otherwise.

As to depositions upon oral examination for example, Customs Court Rule 7.3(a), prior to the rules' change effective January 1, 1980, read: "When Depositions May Be Taken: *[B]y leave of court upon motion*, any party may take the testimony of any person, including a party, by deposition upon oral examination. . . ."⁴⁹ By contrast, Federal Rule (30)(a) reads: "[A]ny party may take the testimony of any person, including a party, by deposition upon oral examination. . . ."⁵⁰ "Leave of court" is required only if "the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant."⁵¹ Even in this circumstance, there are two exceptions when leave of court is not required: if the

48. CONNOLLY, DISCOVERY STUDY, *supra* note 28, at 105.

49. CUST. CT. R. 7.3(a).

50. FED. R. CIV. P. 30(a). Note that this rule begins: "After commencement of the action. . . ." The Customs Court Rule commences: "After the filing of a complaint. . . ." For an explanation of the deviation, see note 18 *supra*. Note that prior to the recent amendments to the rules, Customs Court Rule 7.3 began: "After the filing of an *answer*. . . ." (emphasis added).

51. FED. R. CIV. P. 30(a).

defendant has already sought discovery or if "special notice" is given to all parties to the action, under the circumstances subsequently delineated in the federal rules.⁵²

Nevertheless, Customs Court "control" of depositions upon oral examination has been illusory. In practice, "leave of court upon motion" almost always proceeds by consent of the parties with only perfunctory, if any, judicial supervision.

On the one occasion when this "leave of court" provision of Customs Court Rule 7.3 was interpreted, Judge Watson downplayed any significance to the imperative. In *Intercontinental Fibres, Inc. v. United States*,⁵³ the Judge, Chairman of the Court Rules Committee, construed the phrase: "The requirement for leave of court in this situation has no parallel in the federal rules and as between its representing a formal notice requirement or a complete departure from general federal practice, I must choose the former."⁵⁴ In any case, Customs Court Rule 7.3, effective January 1, 1980, obviates this "leave of court" distinction.⁵⁵

Thus, the discovery conference may be seized upon by judges to oversee the *timing* as well as the substance of discovery. Certainly such control falls within the Standing Committee's expressed language, if not their intent.⁵⁶ Under Customs Court Rule 6.1(f)(2) [proposed Fed. R. Civ. P. 26(f)(2)], the at-

52. FED. R. CIV. P. 30(b)(2).

53. 352 F. Supp. 952, 69 Cust. Ct. 337, C.R.D. 72-27 (1972).

54. *Id.* at 954, 69 Cust. Ct. at 340.

55. Prior to the recent adoption of the amendments and additions to the rules, the Customs Court had no "special notice" provision comparable to that contained in Federal Rule 30(b)(2). That omission has been rectified by Customs Court Rule 7.3(b)(7).

The only significant deviation between Federal Rule 30(b)(2) and the Customs Court Rule reflects the nationwide jurisdiction of the Customs Court. The Federal Rule provides that: "Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States . . ." CUST. CT. R. 7.3(b)(7) omits much of this language: "Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person about to be examined is about to go out of the United States. . . ."

The other difference between these two rules (aside from the internal technical numerical one, *i.e.* (b)(2) versus (b)(7)) is that the Federal Rule contains one additional sentence: "The sanctions provided by Rule 11 are applicable to the [attorney's] certification [that to the best of his knowledge, information, and belief, the statement as to the impending unavailability of the person to be examined, and the facts supporting that statement, are true]." The explanation for the omission of this sentence in Customs Court Rule 7.3(b)(7) is simply that the Customs Court has no sanction provision comparable to that of Federal Rule 11 on signing of pleadings.

56. See REVISED PRELIMINARY DRAFT, *supra* note 10, at 330.

torney seeking a discovery conference must include in his request: "A proposed *plan and schedule* of discovery." The attorney must also set forth "*any limitations* proposed to be placed on discovery."⁵⁷

Had the Customs Court published an explanatory note, they probably would have omitted the Standing Committee's statement that "[i]t is not contemplated that requests for discovery conferences will be made routinely."⁵⁸ While the United States as a defendant may want to speed cases along, international organizations may repeatedly request discovery conferences.⁵⁹

The opportunity to control the commencement and timing of discovery impressed the entire court. This attitude is demonstrated by their revision of another rule. Prior to the recent revisions, Customs Court Rule 6.1(d) read:

Sequence and Timing of Discovery: Unless the court, upon motion, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence; and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery: *Provided, that no measure for discovery may be initiated prior to the filing of an answer.*⁶⁰

There had been some prior discussion about retaining the original rule and simply changing the last sentence to read: "prior to the filing of a *complaint*." This plan was rejected not because the substance was troublesome—in fact, this was what was intended.⁶¹ Instead the court sought to achieve complete uniformity with the federal rules, an overall objective the draftsmen strove for. Besides, the proposed rule concerned the timing and sequence of discovery. No discovery would be *initiated* under Rule 6.1(d). Each method of discovery had individually been keyed to the filing of the complaint.

The full court reported out the following Rule 6.1(d):

Sequence and Timing of Discovery: Unless the court, upon motion, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence; and the fact that a party is conducting discovery,

57. CUST. CT. R. 6.1(f)(3); *see* Proposed FED. R. CIV. P. 26(f)(3), REVISED PRELIMINARY DRAFT, *supra* note 10, at 330.

58. REVISED PRELIMINARY DRAFT, *supra* note 10, at 332.

59. *See* Letter from I.T.C. General Counsel Russell N. Shewmaker by Deputy General Counsel Jeffrey M. Lang to Joseph E. Lombardi, Clerk for the United States Customs Court (October 11, 1979) [hereinafter Letter from I.T.C.]. (Mr. Lang intimated that the International Trade Commission would routinely request a discovery conference).

60. *See* FED. R. CIV. P. 26(d) (when the full court convened October 26, 1979, the proposed Custom Court Rule 6.1(d) and Rule 26(d) read verbatim).

61. *See* note 18 and accompanying text *supra*.

whether by deposition or otherwise, shall not operate to delay any other party's discovery: *Provided, that no discovery may be initiated prior to the filing of a complaint, or later than 90 days after issue is joined, without leave of court.*⁶²

Thus, the judges restated what the other rules make apparent, that no discovery may be commenced prior to the filing of a complaint. The new proviso adds, however, that discovery may be commenced before this filing, with leave of court. This portion of the proviso may have been necessary due to a seeming flaw in another aspect of the court's rules. The Customs Court has no provision comparable to Federal Rule of Civil Procedure 27(a) which concerns Depositions Before Action. Customs Court Rule 7.2,⁶³ "Depositions to Perpetuate Testimony," appears similar, but is not comparable. The critical incongruence is that Rule 7.2 exclusively concerns *pending* actions. So, this addendum on pre-complaint discovery may ameliorate Rule 7.2's deficiency.⁶⁴ In any case, the possibility of earlier discovery under Rule 6.1(d) would appear to also apply to discovery conferences.

What is more important though is the strong indication, by the judges' inclusion in Rule 6.1(d) of a specific time constraint, that they were concerned with the timing and control potential offered by the Discovery Conference Rule. There is no question that discovery cutoff dates affect judicial control of overall discovery times.⁶⁵ Yet there is no comparable existing or proposed federal rule. Indeed, the Standing Committee specifically rejected a comparable A.B.A. numerical limitation recommendation—that the number of interrogatories servable on a party be limited to thirty, unless leave of court was obtained.⁶⁶ Conceivably, the 90-day requirement will lead to unnecessary litigation. In any case, many of the judges undoubtedly will use the Discovery Conference Rule to gain greater supervision over their calendars.

62. CUST. CT. R. 6.1(d) (emphasis added).

63. Rule 7.2 remained untouched during the recent rule revisions, and, indeed, has remained unaltered since its adoption on August 3, 1970.

The Standing Committee proposed no change in the Federal Rule, which has not been significantly altered in over thirty years. Extremely minor revisions have been made on December 29, 1948, and March 1, 1971.

64. This deficiency in Customs Court Rule 7.2(a) (1) appears even more pronounced when one considers the "Reserve File" rules of the court. See note 18 *supra*.

65. See CONNOLLY, DISCOVERY STUDY, *supra* note 28, at 52.

66. PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 77 F.R.D. 613, 627 (1978).

The Need for Discovery

At least one governmental agency, the International Trade Commission, now statutorily subject to Customs Court review,⁶⁷ has intimated that a discovery conference may be requested to sidetrack all discovery at the very commencement of the action.⁶⁸ The Commission's argument, seemingly strengthened by the Trade Agreements Act, is that the court's review is limited, in certain cases, to consideration only of the administrative record.⁶⁹ This delineated record,⁷⁰ the argument continues, constitutes *the record—exclusively*. Thus, absent an allegation of fraud or the omission of a legislatively itemized portion of the record, discovery would be both unnecessary and inappropriate in certain cases.⁷¹

The Office of the General Counsel of the I.T.C. urged adoption of a rule entirely eliminating discovery in section 516A [of the Tariff Act of 1930] proceedings.⁷² According to the General Counsel: "Discovery, therefore, can only serve to waste the Court's and the parties' time when they should be concentrating on answers focused on the key issues in the cases and on motions for summary judgment supported by informed excerpts from the agency record."⁷³ In the words of the Deputy General Counsel of the I.T.C.:

The reason that the Trade Agreements Act by implication suggests that there is to be no discovery is that it finally and firmly limits the matters which the Customs Court may consider [in] sec-

67. See note 18 *supra* (under the Trade Agreements Act of 1979).

68. Note that the court prior to passage of the Trade Agreements Act had deemed the Commission subject to review. See *SCM Corp. v. United States* (Brother Int'l Corp., Party-in-Interest), 450 F. Supp. 1158, 80 Cust. Ct. 226, C.R.D. 78-2 (1978).

69. Tariff Act of 1930, 19 U.S.C. § 1516(a)(2) (1979); see §§ 516(a)(1)(c) & (a) and 777(c)(2) of the Tariff Act of 1930.

70. The "Record for Review" is set forth in 28 U.S.C. § 2635(b)(2); see *Hugo Stinnes Steel & Metals Co. v. United States*, 453 F. Supp. 94 (Cust. Ct. 1978) (not limited to the administrator's record).

71. See 28 U.S.C. § 2632(d) which provides: "The Customs Court, by rule, may consider any new ground in support of a civil action if the new ground (1) applies to the same merchandise that was the subject of the protest; and (2) is related to the same administrative decision or decisions listed in section 514 of the Tariff Act of 1930, as amended, that were contested in the protest."

72. Letter from I.T.C., *supra* note 59 (locatable in the Law Division of the United States Customs Court to whose attention the letter was called).

73. Letter from I.T.C., *supra* note 59. Furthermore, the Office of the General Counsel urged the addition of the following sentence to Customs Court Rule 6.1: "Notwithstanding the foregoing, confidential or privileged status accorded to any document, comment or information contained in any agency record, filed with the court in accordance with section 516A of the Tariff Act of 1930 shall be preserved in any such action." Letter from I.T.C., *supra* note 59.

tion 516A actions. In these cases, the Court is required to hold unlawful any determination which is (in section 516A(a) cases) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or (in section 516A(b) cases) "unsupported by substantial evidence on the record, or otherwise not in accordance with law." These are words of art drawn from the scope of review in the Administrative Procedure Act (APA), 5 U.S.C. Section 706, plainly intended to require the agency on the one hand to produce a complete record of the matter before the agency for decision, and on the other hand to limit the Court in making its determination of lawfulness to whether the agency acted lawfully in respect of the record that the agency produces. Since the agency record is the key to applying these standards, discovery is unnecessary and in fact uncommon under the APA. Rather, such actions are resolved by proceeding directly to the determination of the issues on the basis of the record that the agency produces. In the Commission's case, it is considering elaborate rules for accumulating the agency record, reflecting a good faith attempt to implement this general pattern of litigation.⁷⁴

As to the Discovery Conference Rule specifically, the Office of the General Counsel wrote:

We have a limited support for this rule. We are sure that in cases arising under statutes other than 516A, discovery conferences may be a useful device. To that extent we, of course, support the rule. Furthermore, if the Court promulgates rules such as the one permitting discovery before answer, then the discovery conference rule is necessary, since it would enable the agencies concerned in section 516A actions to point out the futility of discovery in these actions and cause the Court to limit it or to eliminate it completely. However, our lack of enthusiasm for pre-answer discovery far exceeds our support of the discovery conference rule.⁷⁵

Two Customs Court decisions which have considered *discovery* in the context of review of agency determinations conflict. The issue may be moot now, however, since both were decided prior to the effective date of the Trade Agreements Act.⁷⁶ In *SCM Corp. v. United States*,⁷⁷ Chief Judge Re, in an extensive opinion, protected certain I.T.C. documents as within the "executive privilege." The Chief Judge wrote:

74. *Id.* These I.T.C. procedures have been published. Procedures for the Conduct of Investigations of Whether Injury to Domestic Industries Results from Imports Sold at Less Than Fair Value or from Subsidized Exports to the United States. 19 C.F.R. §§ 201, 207 (1979). See particularly §§ 207.2(f), 207.50 *et seq.*

75. Letter from I.T.C., *supra* note 59. For a better understanding of "rules such as the one permitting discovery before answer," see the court rules prior and after January 1, 1980 and the textual discussion on Customs Court Rule 6.1(d).

76. Trade Agreements Act of 1979, 19 U.S.C. §§ 2503 & 1671 (1979 Supp.). Pub. L. No. 96-39 (1979), §§ 2(a), 107 (the effective date most probably is January 1, 1980).

77. 473 F. Supp. 791 (Cust. Ct. 1979) (Brother Int'l Corp., Party-in-Interest).

In summary, the Chairman of the International Trade Commission, in claiming privilege and resisting disclosure, by his affidavit and the description of the materials, has demonstrated to the court that the documents in question are advisory, and contain no severable factual information. The documents in question, representing "pure deliberative processes of government," are protected against disclosure.⁷⁸

In *Airco, Inc. v. United States*,⁷⁹ Judge Scovel Richardson permitted discovery where the Government specifically sought protection from the plaintiff's inquiries into matters not part of the administrative record.⁸⁰ The case arose in the context of a negative countervailing duty determination by the Secretary of the Treasury.

The Judge wrote:

Discovery is a useful tool with which to amplify an otherwise meager administrative record. Indeed, its employment by plaintiff prior to the instant motions has resulted in the identification of individuals whose activities in government service place them, in the court's judgment, in such high levels of policymaking endeavor in relation to the determination under review as to make them privy to relevant factual material, if it exists, and characterize them as "agents" . . . and, therefore, amenable to additional discovery procedures in such capacity.

The proposed discovery does not, in the court's view, exceed permissible limits or warrant protective measures at this point. Defendant's fears in this regard are at best anticipatory and premature, and certainly not grounded in any factual basis. Even factual material contained in deliberative memoranda is discoverable if susceptible to severance from its context. [citation omitted] And should any improper question be propounded during the examinations, defendant's remedies are ample and accessible at such a time.

For the reasons stated, plaintiff's motion is granted and defendant's cross-motion is denied.⁸¹

Of course, in addition to the statutory mandate as to the record on review,⁸² the *standard* of review has also been legislated.⁸³ This legislative statement may affect the vitality of *Airco*.

CONCLUSION

The discovery conference and deposition by telephone adopted by the judges of the Customs Court, soon to be appended to the federal rules, may mark significant milestones in civil procedure. They should aid the Customs Court even more

78. *Id.* at 799; see *Weir v. United States*, 508 F.2d 894 (2d Cir. 1974).

79. 468 F. Supp. 1327 (Cust. Ct. 1979).

80. *Id.* at 1330.

81. *Id.*

82. See notes 67-74 and accompanying text *supra*.

83. Trade Agreements Act of 1979, Pub. L. No. 96-39 (1979).

than the district courts. If deposition by telephone proves effective, obviously the impact will be even greater on this court with nationwide jurisdiction.

The implication of the Discovery Conference Rule is less clear. For the district courts, if the new rule assists in curbing the increasing abuse of discovery, clearly the innovation will be deemed a positive one. If, however, proposed Federal Rule 26(f) only promotes litigation, and in the short run that probably will be the outcome, then the discovery conference would be a mixed blessing at best. This consideration is emphasized by the fact that Federal Rule 16 could be interpreted to include the gist of what proposed Rule 26(f) seeks to accomplish. Here too, the benefits for the Customs Court, because pretrial procedural rules are less developed and the discovery abuse is of a different nature, should be greater than for the district courts.

