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GENERAL LOCAL RULE 9(g) OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS AND THE FEDERAL RULES OF CIVIL PROCEDURE: ARE THEY CONSISTENT?

INTRODUCTION

In 1937, the United States Supreme Court adopted the Federal Rules of Civil Procedure[1] which were intended to provide a simple, uniform means of governing civil procedure in the federal district courts.[2] Rule 83 of the Federal Rules[3] grants federal district courts the power to adopt local rules to govern elements of civil procedure which are not fully covered by the Federal Rules.[4] Rule 83 requires that any local rule promulgated by a district court must be consistent with the Federal Rules.[5] Ostensibly, pursuant to Federal Rule 83, the

1. Hereinafter referred to as the Federal Rules. The Federal Rules of Civil Procedure became effective September 16, 1938, after consideration by the United States Congress. The Enabling Act, 28 U.S.C. § 2072 (June 19, 1934, c. 651, § 1, § 2, 48 Stat. 1064; *as amended*, June 25, 1948, c. 646, § 1, 62 Stat. 961; May 24, 1949, c. 139, § 103, 63 Stat. 104; July 18, 1949, c. 343, § 2, 63 Stat. 446; May 10, 1950, c. 174, § 2, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, § 12(m), 72 Stat. 348; November 6, 1966, Pub. L. 89-773, § 1, 80 Stat. 1323).

28 U.S.C. § 2072 (1966) authorizes the United States Supreme Court to enact rules governing the civil procedure in the district courts. Section 2072 reads in part:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

See Hopkinson, *The New Federal Rules of Civil Procedure Compared with the Former Federal Equity Rules and the Wisconsin Code*, 23 MARQ. L. REV. 159 (1938-39) [hereinafter cited as *New Federal Rules*]; Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251 (1967) [hereinafter cited as *Local Federal Rules*].

2. Monod v. Futura, Inc., 415 F.2d 1170 (10th Cir. 1969); Nasser v. Isthmian Lines, 331 F.2d 124 (2d Cir. 1964); American Fidelity & Cas. Co. v. All American Bus Lines, 190 F.2d 234 (10th Cir. 1951). *See also Local Federal Rules, supra* note 1, at 1256.

3. FED. R. CIV. P. 83:

> Each district court by action of a majority of the judges thereof *may from time to time make and amend rules governing its practice not inconsistent with these rules*. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules (emphasis added).

4. First Nat'l Bank v. Small Business Admin., 429 F.2d 280, 284 (5th Cir. 1970):

> Court procedure may be regulated by local rule when not provided for in the federal rules and then only 'in a manner not inconsistent with these rules.' FED. R. CIV. P. 83.

See also Local Federal Rules, supra note 1, at 1253.

5. *See* note 3 *supra*.

United States District Court for the Northern District of Illinois enacted Local General Rule 9(g)[6] in June, 1975. This rule provides that no more than twenty interrogatories can be served without leave of court. In order to serve additional interrogatories, a party must file a written motion setting forth the proposed interrogatories and show good cause for their use.[7] Local Rule 9(g) relates directly to the same subject matter as Rule 33 of the Federal Rules.[8] Rule 33 governs the use of interrogatories as a discovery device. Therefore, Local Rule 9(g) must be consistent with Federal Rule 33 in order to be considered valid under Rule 83 of the Federal Rules.

In order to make a determination regarding the validity of Local Rule 9(g), an examination of the Federal Rules to which this local rule relates is necessary. The local rule-making power of Federal Rule 83 will be discussed in order to understand what requirements a local rule must meet to be considered valid. An examination of the basic philosophy behind the federal discovery rules,[9] as governed by Federal Rule 26,[10] will determine whether Local Rule 9(g) is consistent with the spirit and intent of discovery in the federal district courts. Specifically, subdivision (c) of Federal Rule 26 will be examined to ascertain whether fixed limitations can be placed on the frequency of use of a discovery device. The provisions of Federal Rule 33 will be reviewed in order to determine whether Local Rule 9(g) is consistent with the intended use of interrogatories as a discovery device. This comment will also include a discussion of the purpose of Local Rule 9(g) and how the same results can be achieved through application of Federal Rule 37.[11] Finally, the means available to an attorney who might wish to challenge the validity of Local Rule 9(g), as well as the difficulties involved in making such a challenge, will be investigated.

RULE 83

The Committee on Rules of Practice and Procedure of the

6. Hereinafter referred to as Local Rule 9(g). The rule states:
Rule 9. Form of Papers Filed
(g) No party shall serve on any other party more than twenty (20) interrogatories in the aggregate without leave of court. Subparagraphs of any interrogatory shall relate directly to the subject matter of the interrogatory. Any party desiring to serve additional interrogatories shall file a written motion setting forth the proposed additional interrogatories and the reasons establishing good cause for their use. Any such motion shall be subject to the provisions of Rule 13 of the General Rules of this Court. [Added 6/20/75.]
7. *Id.*
8. *See* note 39 *infra.*
9. FED. R. CIV. P. 26-37.
10. For text of Rule 26 *see* note 27 *infra.*
11. For text of Rule 37 *see* note 75 *infra.*

Judicial Conference of the United States[12] intended to govern most aspects of procedural law in the federal district courts through application of the Federal Rules.[13] It was recognized, however, that certain procedural matters of a unique and local nature could be governed more adequately by local rules.[14] The Advisory Committee suggested, as an example, that a local rule may be used to govern "the time for and conduct of oral arguments to the court and jury."[15] Federal Rule 83 was enacted to enable the district courts to promulgate local rules which would govern such unique aspects of procedure.[16] However, Rule 83 was never intended to allow district courts to pass innumerable local rules indiscriminately.[17] Rather, Federal Rule 83 was expected to allow local district courts to make ad hoc decisions in those cases where an unusual and infrequent question of procedure arose and to pass local rules where a prevalent procedural problem occurred, with emphasis on decision-making rather than on rule-making.[18] This interpretation of Rule 83 was necessary to avoid the possibility that numerous local rules would destroy the uniformity that the Federal Rules were designed to accomplish.[19]

To meet the requirements of Federal Rule 83, a local rule must deal with an aspect of procedure not fully covered by the Federal Rules[20] and must be consistent with the general intent of the Federal Rules.[21] A local rule, therefore, "can neither detract from nor add to the rights and limitations contained in the Federal Rules."[22] Since Local Rule 9(g) directly affects

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12. Hereinafter referred to as the Advisory Committee.
13. *See Local Federal Rules, supra* note 1, at 1256.
14. *Id.* at 1255.
15. *Id.*
16. *Id.*
17. *Id.* at 1276.
Federal judges, almost without exception, seem to be unaware that one purpose of the Rule's authors was to keep the rule-making to a minimum.
18. *See also* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3155 (1970) [hereinafter cited as WRIGHT & MILLER]; *Local Federal Rules, supra* note 1, at 1255.
19. *See Local Federal Rules, supra* note 1, at 1256:
If the district courts continued to use the Rule 83 rule-making power to 'add meticulous details, that they think improve the Supreme Court rules, simplicity and flexibility will be impaired, and uniformity will be destroyed . . . .'
The article quotes William Mitchell, Chairman of the Advisory Committee on the Federal Rules.
20. *See* note 4 *supra.*
21. Jefferson v. Asplund, 467 F.2d 199 (9th Cir. 1972); Dickinson Supply, Inc. v. Montana-Dakota Util. Co., 423 F.2d 106 (8th Cir. 1970); Cedolia v. C.S. Hill Saw Mills, Inc., 41 F.R.D. 524 (M.D.N.C. 1967); Farmer v. Arabian Am. Oil Co., 285 F.2d 720 (2d Cir. 1960); Bogatay v. Montour R.R. Co., 177 F. Supp. 269 (W.D. Pa. 1959).
22. Fagan v. Sunbeam Lighting Co., Inc., 13 F.R. Serv. 2d 59a.63, Case 1 (S.D. Ill. 1969).

the discovery rules, it must be consistent with those rules if it is to be considered valid under Federal Rule 83.

Discovery Rules

The discovery rules under present federal procedure serve to narrow the issues that will be contested, to obtain evidence that can be used at trial, and to secure information as to the existence of evidence which may be used at trial.[23] These functions of the discovery rules enable a litigant to prepare adequately for trial.[24] The importance of the discovery rules was explained by the United States Supreme Court in *Hickman v. Taylor*.[25] In *Hickman*, the Court stated that under prior federal practice the pleadings were used to ascertain the facts and issues in a particular case before trial. The pleadings proved to be inadequate for this purpose and restricted the parties in their discovery attempts. The Federal Rules replace the pleadings as a pre-trial discovery device and allow the parties to prepare more adequately for trial by enabling the "parties to obtain the fullest possible knowledge of the issues and facts before trial."[26]

Rule 26

Federal Rule 26[27] contains the general provisions governing discovery that relate to all the discovery devices contained in

23. *See* Carlson Cos., Inc. v. Sperry & Hutchinson Co., 374 F. Supp. 1080 (D. Minn. 1974); Wood v. Todd Shipyards, 45 F.R.D. 363 (S.D. Tex. 1968); Berry v. Haynes, 41 F.R.D. 243 (S.D. Fla. 1966).

24. Wright & Miller, *supra* note 18, § 2001.

25. 329 U.S. 495 (1947).

26. *Id.* at 500-01.

27. Fed. R. Civ. P. 26(a), (b)(1), (c) and (d):

GENERAL PROVISIONS GOVERNING DISCOVERY

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

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

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

. . .

(c) Protective Orders. Upon motion by a party or by the per-

Federal Rules 26 to 37. A brief examination of Rule 26 will explain the basic philosophy behind the discovery rules and the power of the district courts to control the use of discovery.

In order to allow a litigant to prepare adequately for trial, the discovery rules, as governed by Rule 26, have been consistently interpreted as providing for broad and liberal discovery of all matters relevant to the facts and issues in a pending action.[28] In 1970, the discovery rules were amended and reorganized.[29] As a result of this reorganization, Federal Rule 26

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

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) SEQUENCE AND TIMING OF DISCOVERY. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

As amended December 27, 1946, *eff.* March 19, 1948; January 21, 1963, *eff.* July 1, 1963; February 28, 1966, *eff.* July 1, 1966; March 30, 1970, *eff.* July 1, 1970.

28. Canuso v. City of Niagara Falls, 7 F.R.D. 159, 160 (W.D.N.Y. 1945):

> The Federal Rules of Civil Procedure are most liberal in their provisions entitling a party to pre-trial examination of parties and witnesses, and those rules have quite uniformly been so construed by the courts.

Accord, e.g., Bowman v. General Motors Corp., 64 F.R.D. 62 (E.D. Pa. 1974); Roto-Finish Co. v. Ultramatic Equip. Co., 60 F.R.D. 571 (N.D. Ill. 1973); Mallinckrodt Chemical Works v. Goldman, Sachs & Co., 58 F.R.D. 348 (S.D.N.Y. 1973); Peterson v. United States, 52 F.R.D. 317 (S.D. Ill. 1971); Mellon v. Cooper-Jarrett, Inc., 424 F.2d 499 (6th Cir. 1970); Spier v. Home Ins. Co., 404 F.2d 896 (8th Cir. 1968); Gen. Tel. & Elec. Lab., Inc. v. Nat'l Video Corp., 297 F. Supp. 981 (N.D. Ill. 1968).

29. *See* PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE RELATING TO DISCOVERY, ADVISORY COMMITTEE'S EXPLANATORY STATEMENT CONCERNING AMENDMENTS OF THE DISCOVERY RULES, 48 F.R.D. 487 (1970) [hereinafter cited as 1970 ADVISORY COMMITTEE NOTE]. In Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 444-45 (1946), the United States Supreme Court stated that the statements of the draftsmen of the Rules are relevant to their interpretation.

now contains the general provisions that govern all the discovery rules.[30] Subdivision (a) of Rule 26 lists the different methods by which pretrial discovery may be made.[31] The broad and liberal interpretation accorded the discovery rules since their enactment in 1938 is specifically propounded in subdivision (b) (1).[32] Subdivision (b) (1) states in pertinent part that parties may obtain discovery of any matter that is both relevant to the subject matter of the pending action and not privileged. The party from whom discovery is sought can not object that the information sought is inadmissible at trial if such information is "calculated to lead to the discovery of admissible evidence."[33] The language used in framing this subdivision makes it clear that parties to an action are permitted to use discovery quite liberally. However, notwithstanding the liberal concepts embodied in subdivisions (a) and (b) of Federal Rule 26, these subdivisions do allow the district court to limit discovery. Subdivision (a) permits a court to limit the frequency of use of the discovery methods[34] and subdivision (b) enables the court to limit the scope of discovery.[35] Since Local Rule 9(g) places a limitation on the frequency of the use of the discovery device of interrogatories, it relates directly to subdivision (a) of Federal Rule 26.

The last sentence of subdivision (a) states that the frequency of use of the discovery methods is not limited, except as the court may order under subdivision (c) of Rule 26. Subdivision (c) of Federal Rule 26 allows a court to issue protective orders to limit discovery if it can be shown that discovery is being abused. Subdivision (c) states in part that the court in which the action is pending may make any order necessary to protect a party from improper discovery if that party moves the court for a protective order and is able to show good cause for the issuance of such an order.[36] Federal Rule 26(c) provides protection for parties who are able to show that the discovery sought is annoying, embarrassing, oppressive, unduly burdensome or expensive. The Rule requires, however, that a protective order be issued only after a party has shown good cause[37] *based on the facts*

30. *See* 1970 ADVISORY COMMITTEE NOTE, *supra* note 29, at 490; WRIGHT & MILLER, *supra* note 18, § 2001.
31. *See* note 27 *supra*, subdivision (a) of Rule 26.
32. *See* WRIGHT & MILLER, *supra* note 18, § 2007.
33. FED. R. CIV. P. 26(b) (1970). The full text of subdivision (b) (1) is contained in note 27 *supra*.
34. *See* note 27 *supra*, last sentence of subdivision (a).
35. *See* 1970 ADVISORY COMMITTEE NOTE, *supra* note 29, at 498; WRIGHT & MILLER, *supra* note 18, § 2007.
36. *See* note 27 *supra*, subdivision (c).
37. *See, e.g.*, Advance Labor Service, Inc. v. Hartford Accident & Indem. Co., 60 F.R.D. 632 (N.D. Ill. 1973); Davis v. Romney, 55 F.R.D. 337 (E.D. Pa. 1972); White v. Wirtz, 402 F.2d 145 (10th Cir. 1968). (Prior to 1970, Rule 30(b) contained the provisions for protective orders. In 1970, subdivision (b) of Rule 30 was transferred to Rule 26(c)).

and circumstances of a particular case.[38] Thus, any limitation on the frequency of use of a discovery method must be based on the facts and circumstances of *that* particular case. Federal Rule 26(c) does not give a district court the power to place a fixed or blanket limitation on the frequency of use of a discovery method in all cases litigated in a particular district. In the event such a power were to be given to a district court, the broad and liberal interpretation accorded the discovery rules could be negated by indiscriminate judicial interference.

Since the court can place limitations on discovery only after consideration of the facts peculiar to each case, any fixed limitation on the frequency of use of a discovery device would be inconsistent with the provisions of Federal Rule 26(c). Local Rule 9(g) places just such a fixed limitation on the use of the discovery device of interrogatories by requiring leave of court to serve more than twenty interrogatories. Therefore, Local Rule 9(g) appears to be inconsistent with Federal Rule 26.

Since Federal Rule 33 governs the use of interrogatories, an examination of this Federal Rule will explain why the limitation of leave of court is inconsistent. It will also be seen that Local Rule 9(g) alters the basic concept that the party making an objection to an interrogatory has the burden of proof as to the impermissibility of that interrogatory.

Rule 33

Federal Rule 33 deals with the service of interrogatories upon a party.[39] This rule is given the same broad and liberal inter-

38. Krortz v. United States, 56 F.R.D. 555 (W.D. Va. 1972); Stoneybrook Tenants Ass'n Inc. v. Alpert, 29 F.R.D. 165 (D. Conn. 1961); Hoffman v. Wilson Line, Inc., 7 F.R.D. 73 (E.D. Pa. 1946); WRIGHT & MILLER, *supra* note 18, § 2036.

39. FED. R. CIV. P. 33(a) and (b):

INTERROGATORIES TO PARTIES

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

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

pretation as all other discovery devices listed under Federal Rule 26.[40] The history of Federal Rule 33 is useful to obtain an understanding of why leave of court is no longer required to serve any number of interrogatories.

Originally, in 1938, Federal Rule 33 contained a sentence which limited to one the number of sets of interrogatories that could be served on an opposing party without leave of court.[41] In 1946, this provision was stricken and the following language was added:

> The number of interrogatories or of sets of interrogatories to be served is *not limited* except as justice requires to protect the party from annoyance, expense, embarrassment or oppression . . . .[42]

Leave of court was no longer required to serve interrogatories unless service was made within ten days of the commencement of the action. The ten day period was to allow the defendant time to engage counsel and prepare his case.[43] The Advisory Committee Notes clearly state that the number of interrogatories to be served can not be limited to a specific number, "but that a limit may be fixed only as justice requires . . . in individual cases."[44]

Under the 1946 version of Federal Rule 33, it was obvious that Local Rule 9(g) was inconsistent in that it fixed a numerical limitation beyond which leave of court was required. How-

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party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

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

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

As amended December 27, 1946, *eff.* March 19, 1948; March 30, 1970, *eff.* July 1, 1970.

40. Hickman v. Taylor, 329 U.S. 495 (1947); Felix A. Thillet, Inc. v. Kelly-Springfield Tire Co., 41 F.R.D. 55 (D. Puerto Rico 1966); Klauser v. Sidney Printing & Publishing Co., 271 F. Supp. 783 (D. Kan. 1967); WRIGHT & MILLER, *supra* note 18, § 2165; 4A MOORE'S FEDERAL PRACTICE ¶ 33.10 (2d ed. 1975).

41. *See* REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, REPORT OF THE ADVISORY COMMITTEE, 5 F.R.D. 433, 461 (1946).

42. *Id.* at 461 (emphasis added).

43. *Id., Notes.*

44. *Id.* at 462 (emphasis added).

> At the same time, *it is provided that the number of or number of sets of interrogatories to be served may not be limited arbitrarily or as a general policy to any particular number,* but that a limit may be fixed only as justice requires to avoid annoyance, expense, embarrassment or oppression in individual cases. The party interro-

ever, Federal Rule 33 was amended in 1970,[45] and the provision dealing with the unlimited number of interrogatories was stricken. The Advisory Committee, however, made it clear that no change in the substance of the rule was intended. The Advisory Committee Notes to Federal Rule 33 state:

> Certain provisions are deleted from subdivision (b) because they are fully covered by new Rule 26(c) providing for protective orders and Rules 26(a) and (d). The language of the subdivision is thus simplified *without any change of substance.*[46]

The Advisory Committee refers to subdivisions (a), (c) and (d) of Federal Rule 26. A review of these subdivisions will reveal that they do not allow a federal district court to place fixed limitations on the frequency of use of a discovery device.

The last sentence of Federal Rule 26(a) states that "[u]nless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited." The Advisory Committee's Notes on subdivision (a) of Federal Rule 26 explain the meaning of this last sentence: "The provision that the frequency of use of these methods is not limited confirms existing law. It incorporates in general form a provision now found in Rule 33."[47] The provision referred to in Federal Rule 33 was the language added in 1946 that the number of interrogatories was not to be limited by a fixed number. As discussed earlier, Federal Rule 26(c) allows the court to limit the frequency of use of a discovery method only when good cause is shown based on the facts and circumstances of a particular case. Federal Rule 26(d) simply governs the sequence and timing of discovery.[48] The 1970 amendment, therefore, was by no means an expansion by the Advisory Committee of the authority of a local district court to restrict the number of interrogatories that can be served without leave of court. Rather, it was clearly intended to continue the post-1946 application, and the number of sets of interrogatories is still not to be limited by a fixed formula.

The Advisory Committee stated that one of the reasons for the 1970 amendment was to "encourage extrajudicial discovery with a minimum of court intervention."[49] This was accomplished in Federal Rule 33 by three changes.[50] First, the time

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gated, therefore, must show the necessity for limitation on that basis. It will be noted that in accord with this change the last sentence of the present rule, restricting the sets of interrogatories to be served, has been stricken.

45. *See* note 39 *supra.*

46. 1970 ADVISORY COMMITTEE NOTE, *supra* note 29, at 524 (emphasis added).

47. *Id.* at 498.

48. *See* note 27 *supra*, subdivision (d).

49. 1970 ADVISORY COMMITTEE NOTE, *supra* note 29, at 488.

50. *Id.* at 522-23.

within which to answer interrogatories was increased to 45 days for a defendant, after service of summons and complaint, and 30 days for any other party, after service of summons and complaint. Under the 1946 version of Federal Rule 33, an interrogated party had 10 days within which to serve objections to interrogatories and 15 days to serve answers. The Advisory Committee felt that these time periods were too short and encouraged objections as a means to gain time within which to answer interrogatories.[51] As will be seen under the third change, these objections usually lead the parties into court.

The second change removed the requirement of leave of court for early discovery. Prior to 1970, leave of court was required of the plaintiff if he wished to serve interrogatories within 10 days after commencement of the action. The 10 day period was to allow the defendant time within which to employ counsel before a response was due to interrogatories. The Advisory Committee felt that this protection of the defendant was "adequately fulfilled"[52] by the enlarged time within which to answer and the fact that interrogatories would be served with or after service of the summons and complaint.[53]

The third change dealt with which party would move the court for a resolution of any objections. Before 1970, the interrogated party had to serve a notice of hearing along with objections to any interrogatories considered impermissible. The 1970 amendment removed the requirement that a notice of hearing be served by the interrogated party. It is now up to the interrogator to seek judicial intervention to resolve a dispute over interrogatories. The interrogator, of course, does not have to seek the aid of the court but can attempt to resolve the dispute between the parties informally. This prevents an automatic hearing on any objections.[54]

The Advisory Committee felt these changes would reduce the need for "court intervention"[55] and encourage out-of-court resolution of problems that arose due to use of interrogatories during discovery.[56] Local Rule 9(g) reinstates the restriction of leave of court by requiring the court's approval to serve more than twenty interrogatories. This necessitates an additional court appearance which is not required under Federal Rule 33[57]

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51. *Id.*
52. *Id.* (quoting the Advisory Committee).
53. *Id.*
54. *Id.*
55. *Id.* (quoting the Advisory Committee).
56. *Id.*
57. *See* Blair, *A Guide to the New Federal Discovery Practice*, 21 DRAKE L. REV. 58, 69 (1971-72) [hereinafter cited as *A Guide to Discovery*].

Each question must be answered, either by responding with the re-

and defeats the purpose of the 1970 amendment by requiring judicial intervention. Obviously, Local Rule 9(g) is inconsistent with Federal Rule 33 in this regard.

Since leave of court is not required by Federal Rule 33 to begin or continue discovery, the interrogating party is not required to justify his interrogatories to a district court judge. Federal Rule 26(c) does require a showing of good cause, but it is the party being interrogated who must show such cause when seeking a protective order to limit discovery.[58] It has traditionally been the burden of the interrogated party to prove that the interrogator has stepped beyond the permisssible limits of discovery and should be controlled by the power of the district court.[59] Local Rule 9(g), however, requires the *interrogator* to show good cause when desiring to serve more than twenty interrogatories.[60] Thus, the burden of proof as to the permissibility of an interrogatory is switched from the interrogated party to the interrogating party. This restricts discovery by forcing an interrogator to prove his interrogatories acceptable before any objection may be raised by the other party and by requiring a court appearance that is not necessary under Federal Rule 33. The switch in the burden of proof directly contradicts the procedure established by the Advisory Committee:

> (3) If objections are made, the burden is on the interrogating party to move under Rule 37(a) for a court order compelling answers, in the course of which the court will pass on the objections. *The change in the burden of going forward does not alter the existing obligation of an objecting party to justify his objections.*[61]

The United States Supreme Court, in *Miner v. Atlass*,[62] held that local rules which make basic procedural changes are

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quested information or by objecting to the interrogating party (emphasis omitted). Answers and objections are served together, and there is no general resort to court at this time. The interrogating party then examines the answers and objections, and he may seek to settle the objections informally or move to compel discovery under Rule 37. *It is only at this last-mentioned occasion of a motion to compel discovery that interrogatory practice comes before the court* (emphasis added).

The 1970 amendment removed any requirement for leave of court and a court appearance is only necessary if a problem arises. *See* text accompanying notes 51-53 *supra*.

58. WRIGHT & MILLER, *supra* note 18, § 2035: "The rule requires that good cause be shown for a protective order. This puts the burden on the party seeking relief to show some plainly adequate reason therefor."

59. Glick v. McKesson & Robbins, Inc., 10 F.R.D. 477 (W.D. Mo. 1950); United States v. Purdome, 30 F.R.D. 338 (W.D. Mo. 1962); Essex Wire Corp. v. Eastern Elec. Sales Co., 48 F.R.D. 308 (E.D. Pa. 1969); Intercontinental Fibres, Inc. v. United States, 352 F. Supp. 952 (Cust. Ct. 1972); United States v. 58.16 Acres of Land, 66 F.R.D. 570 (E.D. Ill. 1975).

60. *See* note 6 *supra*.

61. 1970 ADVISORY COMMITTEE NOTE, *supra* note 29, at 523 (emphasis added).

62. 363 U.S. 641 (1960) [hereinafter referred to as *Miner*].

invalid. In *Miner*, the District Court for the Northern District of Illinois enacted a local rule, pursuant to Rule 44 of the General Admiralty Rules,[63] that allowed discovery depositions to be taken in admiralty cases. At that time, no General Admiralty Rule permitted discovery depositions.[64] The Court held that providing for discovery depositions through local rules was a "change so basic"[65] that it could not "be effectuated through the local rule-making power"[66] granted the federal district courts by General Admiralty Rule 44.

Switching the burden of proof as to the permissibility of an interrogatory to the interrogator is a basic procedural change that cannot be accomplished through local rules, as held in *Miner*. The switch in the burden of proof is not only a complete reversal of the procedure established under Federal Rule 33, but also undermines the broad and liberal interpretation accorded the discovery device of interrogatories.[67] Rather than allowing discovery to proceed until a problem arises between the parties which requires judicial intervention,[68] Local Rule 9(g) prevents discovery until an interrogator satisfies the district court that more than twenty interrogatories should be allowed. This basic change is inconsistent with the provisions and interpretation of Federal Rule 33 and exceeds the limits of the local rule-making power of the federal district courts.

Local Rule 9(g), therefore, is inconsistent with the Federal Rules in three major respects. First, Local Rule 9(g) places a fixed limitation on the number of interrogatories which can be served without leave of court and is thereby inconsistent with Federal Rules 26(c) and 33, which do not permit fixed limitations. Second, the requirement of leave of court to serve more than twenty interrogatories is inconsistent with the philosophy incorporated in the 1970 amendment of Federal Rule 33, which removed the requirement of leave of court and increased the time allowed to answer, in order to avoid judicial intervention. Third, Local Rule 9(g) requires an interrogator to prove the necessity and permissibility of any interrogatories over twenty which are to be served on a party. This is contrary to the established procedure whereby an objecting party must show why an interrogatory is not permissible and is a basic change of procedure which cannot be made through local rules. Thus, Local Rule 9(g) is

63. General Admiralty Rule 44 is very similar to FED. R. CIV. P. 83. *See Local Federal Rules, supra* note 1, at 1251 n.3.

64. *Miner* was decided in 1960. In 1961, the United States Supreme Court adopted a discovery-deposition rule for admiralty cases. *See* ADM. R. 30 A., 368 U.S. 1023 (1961).

65. 363 U.S. at 650.

66. *Id.*

67. *See* note 40 *supra.*

68. *See* note 57 *supra.*

clearly inconsistent with the relevant Federal Rules and must, therefore, be considered invalid under the provisions of Federal Rule 83.[69] Furthermore, any abuses of discovery stemming from the use of interrogatories are already governed by the provisions of Federal Rule 37,[70] as will be explained below.

Reasons Behind the Enactment of Local Rule 9(g) and Its Expected Influence on the Use of Interrogatories

The Honorable Hubert L. Will, a member of the Executive Committee of the District Court for the Northern District of Illinois, gave three fundamental reasons for the enactment of Local Rule 9(g):[71]

(I) To force interrogatories into proper perspective as a device that will disclose the identity of persons having knowledge of the subject matter of the law suit, reveal the location and categories of relevant documents, narrow the issues and disclose the location and existence of other evidence rather than being used to obtain evidence itself;

(II) To lessen the number of objections to interrogatories and answers to interrogatories by reducing the number of opportunities for objection, thereby freeing the courts from the present time-consuming hearings on such objections; and

(III) To help lower the costs to the litigants created by the use of interrogatories as a discovery device.

Judge Will feels that too many interrogatories are served which attempt to secure evidence for use at trial, rather than merely locating evidence and ascertaining the relevant issues. He further stated that, for the most part, no real evidence is acquired regarding contested facts through use of interrogatories because most answering parties will do their best not to admit something in an answer that can be used as evidence at trial. This is accomplished by giving evasive answers to direct questions concerning any contested fact. The only evidence that will be obtained through interrogatories would involve uncontested facts, which Judge Will feels can be obtained more easily by stipulations[72] or requests for admission.[73]

Judge Will stated that depositions and other discovery devices are more practical to obtain evidence and should be used

69. *See* text accompanying notes 12-22 *supra.*
70. *See* note 75 *infra.*
71. The following section, dealing with the reasons for enactment of Local Rule 9(g) and its expected results, is based on an interview with Judge Will. Judge Will introduced Local Rule 9(g) to the judges of the District Court for the Northern District of Illinois, who adopted the rule unanimously.
72. *See* Fed. R. Civ. P. 29.
73. *See* Fed. R. Civ. P. 36.

instead of interrogatories to acquire evidence concerning contested facts. As he explained, interrogatories are not a viable substitute for depositions in discovering evidence and only a few interrogatories are necessary to narrow the issues and determine where evidence may be found. The requirement that a party wishing to serve more than twenty interrogatories must seek leave of court and show good cause for additional interrogatories is expected to discourage the use of interrogatories as a device to discover evidence for use at trial by giving the district court power to deny the request if it believes the interrogatories go beyond the limited purposes of discovering where evidence may be found and narrowing the issues.

(I) Proper Perspective

Interrogatories are a discovery device which allow a party to obtain facts, narrow issues, reduce the chance of surprise and initially aid in trial preparation.[74] If interrogatories are being misused or abused, the district court has the power to control any alleged abuses of discovery through application of Rule 37 of the Federal Rules.[75] Federal Rule 37 allows for control of

74. *See* Hickman v. Taylor, 329 U.S. 495 (1947); United States v. Procter & Gamble Co., 356 U.S. 677 (1958); United States v. Article of Drug, Etc., 43 F.R.D. 181 (D. Del. 1967); WRIGHT & MILLER, *supra* note 18, § 2163.

75. FED. R. CIV. P. 37(a), (b) and (c).

FAILURE TO MAKE DISCOVERY: SANCTIONS

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

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

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

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

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

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including

evasive answers that prevent the discovery of evidence in regard

attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

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

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

(b) FAILURE TO COMPLY WITH ORDER.

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

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

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

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

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

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

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

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

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

As amended December 29, 1948, *eff.* October 20, 1949; March 30, 1970, *eff.* July 1, 1970.

to contested facts.[76] The United States Supreme Court criticized the use of means other than Federal Rule 37 to control abuse of discovery in *Societe Internationale v. Rogers.*[77]

Societe dealt with the inability of the plaintiff to obtain records sought by the defendant because the Swiss government confiscated the records after it was determined by the Swiss Federal Attorney that disclosure of these records would violate Swiss penal laws. The district court dismissed the complaint for failure of full production under Rule 41(b) of the Federal Rules and its own inherent power. The United States Supreme Court granted *certiorari* and Justice Harlan spoke to the issue of dismissal under Rule 41(b) and the inherent power of the court. Justice Harlan stated that a court's power "to dismiss a complaint because of non-compliance with a production order depends exclusively upon Rule 37" and that resort to Rule 41(b) or the inherent power of the court would "only obscure analysis of the problem" pertaining to non-compliance with a discovery order.[78]

As amended in 1970, Federal Rule 37 made the holding in *Societe* applicable to the problem of evasive answers. Federal Rule 37(a)(3) specifically states that "an evasive or incomplete answer is to be treated as a failure to answer."[79] This allows the interrogator to seek a court order under Federal Rule 37(a)(2) compelling the interrogated party to give a proper answer. If the interrogator prevails on this hearing, the interrogated party must show that he did not act unjustifiably in giving an evasive answer or the court must award the cost of the motion to the interrogator.[80] If the interrogated party still refuses to give a direct answer, the court has the power under Federal Rule 37(b) to enforce even more severe sanctions.[81] The award of costs in subdivision (a)(4) and the sanctions under subdivision (b) of Federal Rule 37 were meant to discourage unjustified non-compliance with discovery.[82]

Judge Will stated that the only evidence that might be obtained through the use of interrogatories would involve uncontested facts which could be obtained more easily by stipulations

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76. *Id.* § (a)(3).
77. 357 U.S. 197 (1958) [hereinafter referred to as *Societe*].
78. *Id.* at 207.
79. *See* note 75 *supra.*
80. 1970 ADVISORY COMMITTEE NOTE, *supra* note 29, at 539; WRIGHT & MILLER, *supra* note 18, § 2288.
81. *See* note 75 *supra*, subdivision (b); Brown, *Proposed Changes to Rule 33 Interrogatories and Rule 37 Sanctions*, 11 ARIZ. L. REV. 443 (1969) [hereinafter cited as *Proposed Changes to Rules 33 & 37*].
82. *See Proposed Changes to Rules 33 & 37, supra* note 81, at 447; WRIGHT & MILLER, *supra* note 18, § 2288; *A Guide to Discovery, supra* note 57, at 75.

or requests for admissions. The judge explained that parties must stipulate to all uncontested facts as part of the final pretrial order. Requests for admissions are usually presented in such a fashion that only a direct answer can be given and, if necessary, direct answers can be compelled under Federal Rule 36(a). Both stipulations and requests for admissions are admissible as evidence whereas interrogatories are seldom, if ever, admitted into evidence. The initial limitation on the number of interrogatories that can be served without leave of court is expected to encourage litigants to use stipulations and requests for admissions to obtain evidence concerning uncontested facts. The question is whether Local Rule 9(g) is the appropriate means to accomplish this result. The apparent invalidity of the local rule would seem to require a negative answer.

If the courts were to exercise the power granted them under Federal Rule 37[83] to command the correct use of the discovery methods, interrogatories would be put into their proper perspective. The district court would have the power to compel direct answers to questions dealing with contested facts and sanction a party who has abused the discovery process. If litigants realize they will pay the costs of any motion they unjustifiably induce, more care might be taken in the answering and serving of interrogatories. Interrogatories would thereby accomplish the purposes of narrowing the issues, obtaining facts and allowing a litigant to initially prepare for trial.

(II) Objections

The second reason for the enactment of Local Rule 9(g) concerns the number of objections raised by the voluminous interrogatories. Judge Will feels that attorneys have not, in the past, given sufficient consideration to the context and number of interrogatories, which has resulted in numerous objections to meaningless or annoying questions. It is expected that by limiting the number of interrogatories that can be served without leave of court, attorneys will give more thought to preparing fewer interrogatories which will result in worthwhile discovery through more meaningful and relevant questions. However, Federal Rule 37 is a two-edged sword that can be used against

83. 1970 ADVISORY COMMITTEE NOTE, *supra* note 29, at 540:
The present provision of Rule 37(a) that the court shall require payment if it finds that the defeated party acted without substantial justification may appear adequate, but in fact it has been little used. Only a handful of reported cases include an award of expenses, and the Columbia Survey found that in only one instance out of about 50 motions decided under Rule 37(a) did the court award expenses. It appears that the courts do not utilize the most important available sanction to deter abusive resort to the judiciary.

a belligerent interrogator as well as a reluctant interrogated party.

Subdivision (a)(4) of Federal Rule 37 provides for the award of expenses against the moving party for an unjustified motion to compel discovery under subdivision (a)(2).[84] This section of subdivision (a)(4) was intended to help prevent unwarranted motions to compel discovery by a moving party who cannot justify his demand that an interrogatory be answered.[85] The Advisory Committee made the award of costs mandatory for unjustified failure to answer and also for unjustified motions to compel discovery in order to avoid time-consuming judicial intervention in matters that could be reconciled between the parties.[86] If either party forces judicial intervention without proper reasons, that party will pay the resulting costs incurred by the other party.

Federal Rule 37 forces a party to think twice before either not answering a relevant interrogatory or demanding the court to compel an answer to a useless or impermissible interrogatory by subjecting that party to the penalty of costs for abusing discovery. These sanctions are meant to persuade the parties to resolve any conflict out of court, and thereby lessen the number of objections caused by the use of interrogatories and free the courts from the burden of time-consuming hearings on these objections.[87]

Expenses, however, do not have to be awarded in all instances. If both parties show sufficient cause for their respective action, neither party will be forced to pay the entire expense of the motion and each will simply bear his own costs.[88] When both parties do have sufficient cause and cannot resolve the matter between themselves, Federal Rule 37 recognizes that the court is the proper place to seek a just solution and no penalty will be assessed for justified judicial intervention.

The interrogated party can also seek a protective order under Federal Rule 26(c) if he believes the interrogatories to be annoying, embarrassing, oppressive, unduly burdensome or expensive.[89] The last paragraph of Federal Rule 26(c) provides that

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84. *See* note 75 *supra*; 1970 ADVISORY COMMITTEE NOTE, *supra* note 29, at 539; *A Guide to Discovery*, *supra* note 57, at 74.

85. *See* 1970 ADVISORY COMMITTEE NOTE, *supra* note 29, at 488, 539-40; *Proposed Changes to Rules 33 & 37*, *supra* note 81, at 447; WRIGHT & MILLER, *supra* note 18, § 2288.

86. WRIGHT & MILLER, *supra* note 18, § 2288; *Proposed Changes to Rules 33 & 37*, *supra* note 81, at 447.

87. *See* note 86 *supra*; 4A MOORE'S FEDERAL PRACTICE ¶ 37.02 [10] (2d ed. 1975).

88. 1970 ADVISORY COMMITTEE NOTE, *supra* note 29, at 540; WRIGHT & MILLER, *supra* note 18, § 2173.

89. 1970 ADVISORY COMMITTEE NOTE, *supra* note 29, at 522.

if a motion for a protective order is denied, the court may compel the party who sought the order to comply with discovery and the costs incurred in responding to the motion can be assessed against the moving party under the provisions of Federal Rule 37(a)(4).[90] This section of Federal Rule 26(c) gives the district court the power to award costs against a party who unjustifiably seeks a protective order.[91] Therefore, while Federal Rule 26(c) allows an interrogated party to seek protection from annoying, embarrassing or unduly burdensome interrogatories, it also provides that the penalty of costs in Federal Rule 37(a)(4) is applicable if an unjustified protective order is sought.

Thus, misuse of discovery can be adequately controlled through the applicable subdivisions of Federal Rules 26 and 37. There is no gap in the control of the abuses enumerated by Judge Will which would necessitate the enactment of a local rule under the provisions of Federal Rule 83.

(III) Costs

The third reason given for enactment of Local Rule 9(g) is that abuse of interrogatories has resulted in higher legal costs to clients in this district. Judge Will explains that a client is billed for the time needed to formulate and serve interrogatories and, in addition, for any time that is required either to seek a court order compelling answers or to defend a failure to answer in such a hearing. While the intention is commendable, the means in this instance are not justified by the outcome, which can be achieved by application of the Federal Rules.

Costs incurred through the misuse of interrogatories can be reduced by using Federal Rule 37 to insure that interrogatories are used effectively. If a court were to apply the provisions of Federal Rule 37 properly, attorneys would be forced to carefully consider the correct use of interrogatories. How often would litigants be willing to take the risk of: (1) incurring more costs; (2) admitting facts which may be untrue; (3) being unable to "support or oppose designated claims or defenses" or "introducing designated matters in evidence"; (4) pleadings being struck,

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90. *See* note 27 *supra*, subdivision (c).

91. 1970 ADVISORY COMMITTEE NOTE, *supra* note 29, at 505 (citations omitted):

> The subdivision contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play. Since the court has heard the contentions of all interested persons, an affirmative order is justified. In addition, the court may require the payment of expenses incurred in relation to the motion.

dismissal of the action or a default judgment; or (5) contempt of court, by objecting to a relevant interrogatory or disobeying a court order to answer the same?[92] Although these penalties can be quite severe, they can be avoided by adhering to the spirit and intent of discovery. Most attorneys would find it difficult to explain such sanctions to their clients and would be more likely to use discovery in its intended fashion in order to avoid possible conflict with a client over increased costs or other sanctions that can be imposed by a district court for abuse of interrogatories.

CHALLENGING LOCAL RULE 9(g)

To challenge the validity of Local Rule 9(g), the appropriate method of judicial review must first be determined. Title 28 U.S.C. §§ 1291 and 1292 provide for appeals. Section 1291 governs the appeal of final decisions of the district courts. A final decision is defined as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[93] Denying a party the right to serve more than twenty interrogatories, however, is not a decision based on the merits of the case.

Section 1291 also covers collateral orders which are "claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[94] If a party is denied the right to serve more than twenty interrogatories under Local Rule 9(g), that denial will be based on those specific interrogatories in excess of twenty for which good cause could not be shown. This does not, however, preclude a party from continuing discovery under one of the other discovery devices, or submitting other interrogatories if a showing of good cause can be made for their service. The right to serve those specific interrogatories over twenty which were denied would not, therefore, be so important that appellate review is immediately necessary. Thus, a party will not be able to appeal the question of the validity of Local Rule 9(g) under section 1291, either as a final decision or as a collateral order.[95]

Section 1292(b)[96] allows for an appeal of interlocutory

92. The sanction of costs is provided for in Federal Rule 37(a)(4); the other sanctions are provided for in Federal Rule 37(b) if a court order governing discovery is disobeyed.

93. Catlin v. United States, 324 U.S. 229, 233 (1945); *see also* C. WRIGHT, LAW OF FEDERAL COURTS, § 101 (2d ed. 1970) [hereinafter cited as LAW OF FEDERAL COURTS].

94. LAW OF FEDERAL COURTS, *supra* note 93, § 101.

95. WRIGHT & MILLER, *supra* note 18, § 2006 n.63.

96. Title 28 U.S.C. § 1292(a) (1958), lists specific orders that can be

decisions if a district court judge will certify the decision as one which involves a "controlling question of law as to which there is substantial ground for difference of opinion."[97] The appeal must proceed from an order that may "materially advance the ultimate termination of the litigation."[98] It is doubtful that denial of service of more than twenty interrogatories would be considered a "controlling question of law." Since there are alternative methods of discovery available, and more interrogatories may be served if good cause is shown, an order denying service of certain interrogatories over twenty, because good cause was allegedly not shown, will not be an order which "materially advances the ultimate termination of the litigation." Thus, section 1292(b) does not provide for appeal of the validity of Local Rule 9(g).[99]

A writ of mandamus[100] appears to be the appropriate means to challenge the validity of Local Rule 9(g). In the *Miner* case,[101] the district court granted respondent's motion to depose petitioner in accordance with a local admiralty rule. Petitioner sought a writ of mandamus to test the validity of the local rule. It appears mandamus would be the logical procedure to follow in challenging the validity of Local Rule 9(g).

In order to have standing to challenge,[102] it would be necessary for a party to have a case pending in the District Court for the Northern District of Illinois. The party would then have to attempt to serve more than twenty interrogatories upon another party and have this request denied by the district court. Denying the request to serve more than twenty interrogatories would directly affect the party wishing to challenge the validity of Local Rule 9(g) by forcing either the use of the more expensive means of depositions to continue discovery or the preparation of new interrogatories which would be more costly to the litigant. Thus, the issue of the validity of Local Rule 9(g) would be justiciable.[103]

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appealed. This section does not pertain to orders dealing with local rules and is not applicable to the present discussion.

97. *Id.* § 1292(b).

98. *Id.*

99. WRIGHT & MILLER, *supra* note 18, § 2006 n.73.

100. Schlagenhauf v. Holder, 379 U.S. 104, 109-10 (1964):

> The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction. . . . *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26. The District Court for the Northern District of Illinois has gone beyond its prescribed jurisdiction by enacting an invalid local rule that is beyond the rule-making power of the federal district courts as held in *Miner*.

101. *See* text accompanying notes 62-66 *supra*.

102. LAW OF FEDERAL COURTS, *supra* note 93, § 13.

103. *Id.* A justiciable case is one in which plaintiff can show that a statute is invalid and that he has or will sustain a direct injury if the statute is enforced.

The problem, however, is that it is unlikely that the above requirements will be met in the near future. Seeking a writ of mandamus involves costs that clients and attorneys may not be willing to incur in order to make the challenge. As a result, many attorneys may prefer to live with Local Rule 9(g), rather than assume the burden of challenging the validity of this rule. Accordingly, Local Rule 9(g) may remain despite its invalidity.

Conclusion

Judge Will does not believe Federal Rules 26 and 33 prevent the implication of a fixed limitation on the frequency of use of interrogatories if it is a preliminary limitation. He believes Local Rule 9(g) does not conflict with the Federal Rules and is a direct means of putting the use of interrogatories into proper perspective as compared to Federal Rule 37. Judge Will stated that courts are reluctant to impose the sanctions of Federal Rule 37 because these are civil penalties which are used only when there has been extraordinary abuse of discovery.

The fact remains, however, that Federal Rules 26(c) and 33 do not allow for any fixed limitation whether preliminary or permanent. Local Rule 9(g) makes a basic procedural change by requiring an interrogator to prove the validity of any interrogatory in excess of twenty that he wishes to serve upon another party. This type of change can not be made by a local rule as the United States Supreme Court has stated in *Miner*. Federal Rule 37 does give the district courts the power to control any abuse of discovery even though it may be felt to be an indirect method of control. There is no gap, therefore, in the Federal Rules which would allow for the enactment of Local Rule 9(g).

Unfortunately, Local Rule 9(g) will remain unless someone is willing and able to challenge its validity. However, the burden of making such a challenge may deter attorneys from seeking a writ of mandamus to test this rule. Therefore, the judges of the District Court for the Northern District of Illinois should seriously consider repealing Local Rule 9(g) on their own initiative.

Dan Bauer