Wyoming Law Journal

Volume 12 | Number 3 Article 5

December 2019

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THE DISCOVERY PROCEDURE IN THE GENERAL PRACTICE

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The Federal Rules were adopted in 1938, and three years later, Colorado followed suit. Accordingly, to a Colorado lawyer today, the difference between a special and a general demurrer is as mysterious as the difference between trespass de bonis asportatis and trespass per quod servitium amisit. Yet, when we first adopted our rules, the cries of anguish voiced by the experienced practitioners were something to hear, and predictions of the dire consequences which would inevitably result from this "damned notice pleading" were rife.

Moreover, we were all warned that the "discovery procedure" was simply the end result of a conspiracy of the very rich, and the client of moderate means could not afford to avail himself of the luxury of competing in this diamond studded arena of "discovery." However, despite these glum predictions and warnings, we have found that the rules work, and it would be a sad day for us if we were forced to return to practice under a code. And we have found that "discovery" is pretty much like liquor, you can go first class and spend a lot of money, but the impecunious can spend just a little money and accomplish the same result.

Before discussing the separate discovery procedures available under the rules, it is essential to mention the basic concept connecting "notice pleading" with "discovery." The codes were designed to formulate the exact issues of the case within the framework of the formal pleadings; but the rules intend only that the pleadings give reasonable notice of the nature of the claim, and that the true issues be made through the discovery procedure. This purpose was emphasized by the supreme court in *Hickman v. Taylor*:

> The pretrial deposition—discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.[1]

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1. 329 U.S. 495, 500, 67 S.Ct. 385, 388 91 L.Ed. 451, 457 (1947). This is the landmark case on discovery under the federal rules, and it is a case with which every lawyer practicing under the rules should be familiar.

Bearing in mind, then, that the discovery procedures are intended "to narrow and clarify the basic issues between the parties," and that trials conducted under the rules "no longer need be carried on in the dark," it should come as no surprise that the sole test as to the scope of inquiry under the discovery process is the test of *relevancy*. The rule itself (Rule 26(b)) permits examination into "any matter, not privileged, which is relevant to the subject matter involved in the pending action"; and the word "relevant" has been generally interpreted to mean "germane" to the case.[2] If it be remembered that in discovery relevancy is the only applicable test, and that competency and materiality are totally disregarded, the liberality of the discovery procedure is readily understood. Typical of the many decisions adhering to this mandate of the rules is *Avon Linen Service v. Gratensteins*:

> Examination under this latter rule (Rule 26(b)) has been held to contemplate inquiry not only into matters admissible in evidence, but also to matters relevant to the subject matter involved in the pending action regardless of materiality or admissibility at trial. See Lewis v. United Air Lines Transport Corp., D.C. Conn., 27 F.Supp. 946; also Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451; Engl v. Aetna Life Ins. Co., 2 Cir., 139 F.2d 469; also see 4 Moore's Federal Practice, pp. 1070-1071.[3]

Prior to the rules, no blacker charge could be made than that a party was conducting a "fishing expedition," and the supreme court denounced "fishing expeditions" as "contrary to first principles of justice."[4] But, with the adoption of the rules, the supreme court viewed the charge of "fishing expedition" in an entirely different light. It now says:

> No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.[5]

So, during the discovery procedure, objections grounded on competency or materiality are objections unknown to the law, and if the subject of the inquiry is germane to the case and is not privileged, the question must be answered. [Of course, all objections stemming from lack of materiality or competency retain their full stature at time of trial, and their abolition applies only to the discovery procedure.] In fact, the rule as amended (Rule 26(b)) expressly provides:

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

2. Barron and Holtzhoff, Federal Practice and Procedure §§ 642 and 648 (1950); Rose v. Bourne, Inc., 15 F.R.D. 362 (S.D.N.Y. 1953).
3. 16 F.R.D. 469, 471 (D.Conn. 1953).
4. Federal Trade Commission v. American Tobacco Co., 264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 696 (1924).
5. Hickman v. Taylor, 329 U.S. 495, 508, 67 S.Ct. 385, 392, 91 L.Ed. 451, 461 (1947).

And, although some of the discovery procedures are limited in their use to parties to the action while others are available against witnesses as well as parties; and although some discovery procedures may be used in the sole discretion of counsel, while others require a court order, all are governed by the same rule, Rule 26 (b), delineating the scope of discovery permitted. All apply the single test of relevant information not privileged, and the objection that the information would not be admissible in evidence because incompetent or immaterial does not lie.

With this preface, then, what are the discovery procedures? Excluding consideration of discovery at pre-trial conference, itself an effective means of discovery, but one not included in the discovery chapter of the rules, the six discovery processes are:

1. Depositions on oral interrogatories (Rule 30).
2. Depositions on written interrogatories (Rule 31).
3. Interrogatories to the parties (Rule 33).
4. Inspection and copying of documents and things (Rule 34).
5. Physical and mental examinations (Rule 35).
6. Requests for admissions (Rule 36).

Before discussing the several procedures separately, it may be well to compare their availability on capsule form. Perhaps this can most easily be done by outline:

I. Discovery procedures available without court order.
   A. Depositions on oral interrogatories.
      (1) If taken within the first 20 days after suit is started, plaintiff must obtain a court order.
   B. Depositions on written interrogatories.
      (1) If taken within the first 20 days atfer suit is started, plaintiff must obtain a court order.
   C. Interrogatories to the parties.
      (1) If taken within the first 10 days after suit is started, plaintiff must obtain a court order.
   D. Request for admissions.
      (1) If taken within the first 10 days after suit is started, plaintiff must obtain a court order.

II. Discovery procedures available only on court order.
   A. Inspection of documents and things.
      (1) Under the Wyoming rule (Rule 34 (b)) this is subject to an exception in the case of inspection of documents and things subject to discovery without a showing of necessity.
   B. Physical and mental examinations.

III. Discovery procedures available against either witnesses or parties.
   A. Depositions on oral interrogatories.
   B. Depositions on written interrogatories.

IV. Discovery procedures available only against parties and not against witnesses.
   A. Interrogatories to the parties.
   B. Inspection of documents and things.
   C. Physical and mental examinations.
      (1) Under the Wyoming Rule (Rule 35 (a)) agents of or persons under the control of a party may also be examined when their physical condition or blood relationship is in controversy.
   D. Request for admissions.

Generalizing, we have found that depositions on oral interrogatories, inspection of documents and requests for admissions are the most flexible of the discovery procedures. In a proper case, of course, physical examinations are invaluable, and for formal matters, depositions on written interrogatories and interrogatories to the parties do a workmanlike job, and they have the sometimes controlling advantage of being inexpensive.

With these expressions of personal preference for and against certain of the discovery procedures, I pass now to the mechanics of using the tools of the trade under the ground rules laid down by the court decisions. Perhaps the logical place to start is to ask:

1. *How do you put the ball in play under the discovery rules?*

As we have noticed, depositions, interrogatories to the parties and requests for admissions usually require no court order. With the single exception incorporated in Rule 26 (a) to the effect that plaintiff can't take a deposition within the first 20 days after the action is commenced, a deposition can be taken at any time "upon reasonable notice."[6] Depositions can be taken from both parties and witnesses, and the time limitation and requirement for reasonable notice is the same for either.

However, there is one major difference in the mechanics of taking the deposition of a party from the mechanics used in taking the deposition of a non-party witness. That difference is that no subpoena is required in the case of a party, while a non-party witness need not attend the deposition unless he is served with a subpoena.[7] In this connection, it seems to be fairly well settled that in the case of a corporate party, depositions of officers and directors may be taken merely on notice, but depositions of employees of the party require the service of a subpoena.[8] A subpoena, of course, must be issued by the clerk of the court, but the notice can be issued by counsel, and its form is simplicity itself. All that is required by the rule as to the form of the notice (Rule 30 (a)) is that it state (1) the time and place for taking the deposition, and (2) the name and address of each person to be examined. No more is required, and it has

6. Rule 30 (a): "A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing. . . ."
7. Collins v. Wayland, 139 F.2d 677 (9th Cir. 1944), cert. denied, 322 U.S. 744; Pietzman v. City of Illmo, 141 F.2d 956 (8th Cir. 1944), cert. denied, 323 U.S. 718.
8. Spaeth v. Warner Bros. Pictures, 1 F.R.D. 729 (S.D.N.Y. 1941); Jensen v. Buckeye S. S. Co., 2 F.R.D. 411 (N.D.N.Y. 1942).

been held that although it is permissible to state the subject matter which will be covered in the examination, the better practice is to omit any such statement.[9] A copy of this notice is then served on either the party or his attorney, and the manner of service is covered by Rule 5 which permits service to be made either personally or by mail.[10]

The subpoena, if a subpoena be required, must be served on the person commanded to attend, and no substituted service is permitted under the provisions of Rule 45 (c). Moreover, the fact that a subpoena is required because the witness is not a party does not dispense with the requirement for a notice, and the notice to take deposition is required in all instances, although the subpoena is not necessary where a party's deposition is to be taken.[11]

The procedure for taking depositions by written interrogatories is essentially the same, except that Rule 31 requires that copies of the written interrogatories be served with the notice and that the name, office and address of the person before whom the deposition will be taken be additionally set forth in the notice.

Interrogatories to the parties and requests for admissions are even simpler to get started. They are limited by their very title to parties to the action, and all that is required is that they be served on the adverse party. Again, this service is governed by the provisions of Rule 5, and it may be personal service or merely service by mail on the attorney for the party to whom the interrogatories are directed. The one trick difference between the two is that interrogatories to the parties (Rule 33) must be answered within 15 days, but the request for admissions must fix the time (not less than 10 days) within which they must be answered.

Rule 34 (a) permits the inspection and copying of documents and things upon court order. All that is required to utilize this rule is a simple motion setting forth good cause, and usually the only cause required is that the documents may contain information relevant to the subject matter of the case, asking that the court fix a time and place at which the inspection may be conducted. This motion cannot be made ex parte, and it is handled as any other motion in the case.

Wyoming has adopted the most recent recommendation of the Advisory Committee, and Wyoming has adopted an amendment which has not as yet been incorporated into the federal practice. Rule 34 (b) permits some inspection without court order, and it provides that inspection may be had as to documents which "are subject to discovery without a showing of necessity or justification" and that such information may be required to be attached to interrogatories served under Rule 33.

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9. Barrezueta v. Sword, Inc., 27 F.Supp. 935 (S.D.N.Y. 1939).
10. Barron and Holtzhoff, Federal Praictice and Procedure § 712 (1950).
11. Associated Transport v. Riss & Co., 8 F.R.D. 99 (N.D. Ohio 1948); Barron and Holtzhoff, Federal Practice and Procedure § 712 (1950).

The unbounded enthusiasm with which Rule 33 has been used in the past should be effectively tempered by the qualification included in Rule 34 (b) saying that a party upon whom burdensome interrogatories are served need not prepare the tedious answers if he affords opportunity for examination of the documents upon which his answers must be based. Relying upon individual experience, this rule should eliminate much of the trouble with endless picayunish interrogatories which has been encountered under the initial draft of Rule 33.

The physical and mental examinations permitted under Rule 35 again require a motion showing good cause, a hearing on notice to the other party, and an order of the court fixing the time, place, manner, conditions and scope of the examination.

2. *What are the ground rules under the discovery procedure?*

The ground rules of the discovery procedure are far from stringent. At the risk of wearisome repetition, Rule 26 (b) says that discovery may be directed toward any matter which is (1) relevant to the subject matter involved, and (2) which is not privileged. The rule then expressly allows as to:

(a) "The existence, description, nature, custody, condition and location of any books, documents, or other tangible things."

(b) "The identity and location of persons having knowledge of relevant facts."

The only other limitation contained in the Rules on the scope of the discovery procedure is that of Rule 30 (b) which permits the court to impose restrictive orders for good cause shown and for the protection of the parties.

The developing case law decided under the rules has resulted in a few additional canons of fair play in the use of the discovery procedure, but restrictions are comparatively narrow; and, in some instances, the decisions are not in harmony. Some of the problems most frequently encountered are:

(a) *The discovery of hearsay.*

Although a few of the early cases held that hearsay could not be obtained by discovery, it is now generally held that hearsay may be elicited.[12] Logically, since the hearsay objection is a competency objection and is not founded on relevancy, there should never have been any question as to the right to inquire into hearsay. However, because of the decisions of some lower courts that discovery was intended to be limited to facts admissible in evidence, several early decisions did prohibit inquiry into hearsay.[13]

12. Barron and Holtzhoff, Federal Practice and Procedure § 648 (1950); Standard Electric Corp. v. The Thetis, 132 F.Supp. 65 (S.D.N.Y. 1955); Laurens Mills v. John J. Ryan & Sons, 14 F.R.D. 191 (S.D.N.Y. 1953); See 35 C.J.S., Federal Courts § 133 (1943), where it is said that hearsay cannot be obtained, but where the text was necessarily written without reference to the amendment of Rule 26 (b).

13. Supra note 12 and particularly 35 C.J.S., Federal Courts § 133 (1943).

Following these decisions, Rule 26 (b) was amended to say, "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." That this amendment was aimed directly at hearsay is made clear by the note of the Advisory Committee which reads in part:

> The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. . . . Thus, hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26 (b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word "relevant" in effect meant "material and competent under the rules of evidence." . . . Thus it has been said that inquiry might not be made into statements or other matters which, when disclosed, amount only to hearsay. . . . The contrary and better view, however, has often been stated.[14]

(b) *The Work Product Rule.*

The chief limitation on the scope of discovery which has developed under the case law is the so-called "work product rule," but exactly what is and what is not work product is fuzzy to say the least. The rule was announced in *Hickman v. Taylor*.[15] There, defendant's attorney refused to produce for inspection by plaintiff's lawyer written statements from witnesses obtained by defendant's counsel. He was held in contempt for his refusal and in reversing, the supreme court outlined the work product rule. The court carefully spelled out that the reversal was not based on "attorney-client privilege," but held that there was an implied reservation under Rule 26 (b) that one lawyer is not entitled to pick the brains or appropriate the work of his adversary. It was held:

> In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances. That is not because the subject matter is privileged or irrelevant, as those concepts are used in these rules. Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney. . . . We do not mean to say that all written materials obtained or prepared by an adversary's counsel are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's files and where production of those facts is essential to the preparation of one's case, discovery may properly be had. . . . But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our

14. For full text of Advisory Committee Note, and for citation of case authority, see 3 Barron and Holtzhoff, Appendix p. 692.
15. 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

> legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted. . . . When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries and we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.[16]

Needless to say, the generality of language in *Hickman v. Taylor* has not resulted in clear-cut rules on the applicability of the work product rule. Substantial confusion exists in the cases as to whether the rule is limited to work actually done by an attorney in the course of his employment as an attorney, or whether it extends to others—investigators and experts—employed by the attorney.

For example, *Newell v. Capital Transit Co.*,[17] held that the work product rule does not extend to work done by a person employed as a claim agent even though he is also an attorney, but in *Hanke v. Milwaukee Transport Co.*,[18] it was held that the general claim agent would be required to give only the names of witnesses and that he would not be required to furnish a copy of their statements unless the witness refused to give a statement to plaintiff.

Equal confusion exists as to statements obtained by investigators employed by insurance companies, and some cases refuse to require the disclosure of such information,[19] while other demand its production.[20]

However, the developing weight of authority points to the availability of statements made to an insurance investigator, and insurance companies are fast losing the formidable advantage they have maintained as a result of the activities of their investigator-gremlins who arrive on the scene of the accident so quickly that their presence is part of the res gestae.

The right to take depositions of experts employed by the other side is even more confused. The reasons for prohibiting discovery as applied to experts vary from court to court, but inquiry into expert opinion has been prohibited on the general ground that "it is unfair";[21] on the ground that a party has a property right in the work of his expert;[22] on the ground that an analogy should be drawn between the work of an attorney and the work of an expert in preparing for trial;[23] and on the ground that such disclosure would be against public policy.[24] On the other hand, some

16. 329 U.S. at 509.
17. 7 F.R.D. 732 (D.D.C. 1948).
18. 7 F.R.D. 540 (E.D.Wis. 1947)
19. Gajowski v. Empie, 11 F.R.D. 60 (N.D.N.Y 1951).
20. Floe v. Plowden, 10 F.R.D. 504 (E.D.S.C. 1950); McNelley v. Perry, 18 F.R.D. 360 (E.D.Tenn. 1955); Browner v. Fireman's Ins. Co., 9 F.R.D. 609 (S.D.N.Y. 1949).
21. Boynton v. R. J. Reynolds Tobacco Co., 36 F.Supp. 593 (D.Mass. 1941).
22. Lewis v. United Air Lines, 32 F.Supp. 21 (W.D.Pa. 1940).
23. Bergstrom Paper Co. v. Continental Ins. Co., 7 F.R.D. 548 (E.D.Wis. 1947).
24. Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 425 (N.D.Ohio 1947).

of the very cases refusing to permit unrestricted inquiry into expert opinion recognize that upon a proper showing, some inquiry may be made, and the only circuit court decision in the field permits examination of the other party's expert.[25]

Barron and Holtzhoff concludes that the work product rule is necessary, but that it should be carefully limited if the spirit of the rules is to be accomplished. It is here said:

> A poker player is entitled to keep his hole card concealed until he choose to uncover it. But a lawsuit is not a game. Any evidence that will legitimately lead to a just judgment and is not privileged should be subject to disclosure. There are certain necessary exceptions. The better and the prevailing view seems to be that statements secured by counsel are not subject to discovery in the absence of unusual circumstances such as those pointed out in *Hickman v. Taylor,* but that statements obtained by a party, his employee or his insurer are not exempt from disclosure.[26]

With cautious prescience, the Supreme Court said in *Hickman v. Taylor* that all that is contained in an attorney's files is neither privileged nor is it immune from discovery under the work product rule, and it is uniformly held that the age-old device of tucking damaging documents away in counsel's file does not grant them some sort of immunity from discovery.[27] The privilege which exists between attorney and client is the testimonial privilege, and it is a privilege of the client. The work product rule is not a rule of privilege in its strict sense, but it is a rule created to prevent one lawyer from picking the brains of his adversary and to prohibit the taking of unfair advantage of the diligent and thorough attorney.

The work product rule has not been and it probably never will be clearly defined, but seemingly it is a rule which should be limited to protecting the industry of an attorney employed and acting in his capacity as counsel in the case.

(c) *Income tax returns.*

Once more we find that the courts are divided on the question of the availability of copies of federal income tax returns under the discovery procedure. If relevant, there is no apparent reason for denying the right to examine them, although it has been held that they are privileged.[28] This concept of privilege is criticized in Barron and Holtzhoff:

> These rulings are contrary to the weight of authority and apparently are based upon a misconception of the statutory mandate of the Internal Revenue Code, 26 U.S.C.A. § 55, that the Bureau of Internal Revenue shall regard original tax returns as confidential

25. Sachs v. Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948).
26. Federal Practice and Procedure § 652 (1950).
27. Blank v. Great Northern Ry., 4 F.R.D. 213 (D.Minn. 1943); In re Citizens Casualty Co., 3 F.R.D. 171 (S.D.N.Y. 1942); Dumas v. Pennsylvania Ry., 11 F.R.D. 496 (N.D. Ohio 1951).
28. O'Connell v. Olsen & Ugelstadt, 10 F.R.D. 142 (N.D. Ohio 1949); Loew's, Inc. v. Martin, 10 F.R.D. 143 (N.D.Ohio 1949). See also, Austin v. Aluminum Co. of America, 15 F.R.D. 490 (E.D.Tenn. 1954).

> and shall disclose them only upon application af the taxpayer or his attorney in fact. Thus a taxpayer has the right in his own interest, to introduce his tax returns in evidence if they are relevant and material. Therefore no good reason appears for permitting him to suppress them when contrary to his interest.[29]

Perhaps a stronger showing of relevancy should be required when effort is made to inquire into an adversary's income tax returns, but certannly there is no stautory prohibition against their disclosure save and except that the Internal Revenue Service cannot be required to make them public. As noted by Barron and Holtzhoff, the weight of authority refuses to apply any privilege to copies of income tax returns.[30]

3. *Fouls and penalties which may be applied.*

The penalties which may be assessed for failure to comply with the mandates of the discovery rules are covered by Rule 37, and they are many and varied.

Since depositions are but rarely taken before the court, the remedy of contempt is not immediately available when a witness refuses to answer a question during the course of a deposition at which a notary is presiding. When this situation is encountered, the procedure to be followed is to either go ahead with the deposition on all other points or immediately adjourn it. After the deposition is adjourned, (whether before or after the other subjects are covered) the questioner files a motion to compel the party (or witness) to answer, and that motion is heard after reasonable notice. A similar motion is filed if a party refuses to answer interrogatories under Rule 33 or if a party refuses to comply with any other phase of the discovery procedure (except failure to respond to a request by admissions; that failure constitutes an admission by failure to deny).

If the court grants the motion, the witness will be directed to answer; and, the court may assess reasonable expenses and an attorney's fee against the witness or the attorney (if the refusal to answer was based on advice of counsel) whenever the court feels that the refusal was without substantial justification. But, under the theory that what is sauce for the goose is sauce for the gander, the court may assess expenses and an attorney's fee if it determines that the motion was made without substantial justification.

Assuming that the party or witness disobeys any court order issued in support of the discovery procedure, the remedy of contempt is then immediately available. But, the court is not limited to this traditional action, and it has available much more insidious punishments. For example, the court may order:

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29. Federal Practice and Procedure § 798 (Supp. 1957).

30. Connecticut Importing Co. v. Continental Distilling Corp., 1 F.R.D. 190 (D.Conn. 1940); June v. George C. Peterson Co., 155 F.2d 963 (7th Cir. 1946); Wilty v. Clute, 2 F.R.D. 429 (N.D.N.Y. 1939); Fidelity & Casualty Co. v. Tar Asphalt Trucking Co., 30 F.Supp. 216 (D.N.J. 1939).

(a) That the matters regarding which the question asked be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order.

(b) That the disobedient party will not be permitted to support certain claims or defenses.

(c) That pleadings or parts thereof be stricken.

(d) That further proceedings be stayed until the order is compiled with.

(e) That the case be dismissed.

Additionally, if a party refuses to admit the truth of a fact or the genuineness of a document, the court may assess the reasonable expenses of proving such fact or document, including an attorney's fee.

Thus, the penalties for the apparent fouls are full covered in the rule, but some of the fouls are not so apparent, and the penalties for them are uncertain.

As originally enacted, there was confusion as to whether a party's deposition could be taken after interrogatories had been submitted to him and vice versa. Also, under the original rule, only one set of interrogatories could be served on a party in the absence of court permission to serve a second set. Now, the rule has been amended to expressly permit both depositions and interrogatories, and the number of interrogatories and the number of sets of interrogatories is unlimited "except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression."

What amounts to "annoyance, expense, embarrassment or oppression" depends entirely on which side of the case you are on, and, although 79 interrogatories have been held to be burdensome,[31] it has also been held that the number of interrogatories is of itself no ground for claiming annoyance or appression.[32] Probably the only fair test to be used is that of whether the number of interrogatories is reasonable in the particular case, and that is the test most frequently applied.[33]

Claim of improper or excessive interrogatories must be made within 10 days after receipt of the interrogatories, and it is made by filing appropriate objections. Upon hearing, the court can either sustain or overrule the objections, or it can order that the interrogator be required to proceed by oral deposition.[34]

Under Rule 34, objection is sometimes made that inspection may disclose trade secrets and manufacturing controls; and, if such an objection

31. Checker Cab Mfg. Co. v. Checker Taxi Co., 2 F.R.D. 547 (D.Mass. 1942).
32. V. D. Anderson Co. v. Helena Cotton Oil Co., 117 F.Supp. 932 (E.D.Ark. 1953).
33. Canuso v. City of Niagara Fals, 4 F.R.D. 362 (W.D.N.Y. 1945); Hoffman v. Wilson Line, 7 F.R.D. 73 (E.D.Pa. 1946)
34. Onofrio v. American Beauty Macoroni Co., 11 F.R.D. 181 (W.D.Mo. 1951); Colo. Mill & Elevator Co. v. American Cyanamid Co., 11 F.R.D. 580 (W.D.Mo. 1951).

is well founded in fact, inspection and copying is usually denied.[35] Because a court order is required before there can be any inspection of documents, objection can be made in advance of any duty to permit inspection, and the reported decisions under this rule are rather meager.

Rule 35 permitting physical examinations was the most controversial of all of the discovery rules prior to their adoption, but in practice, it has given rise to the fewest problems. It was immediately attacked as unconstitutional, but it was held valid in *Sibbach v. Wilson & Co.*,[36] where the supreme court point out that Rule 37 (b) (2) (iv) does not permit arrest for refusal to submit to a physical examination. Admittedly, the granting or refusal of a motion for physical examination rests in the sound discretion of the court,[37] but in the exercise of that discretion, a party may be required to submit to an examination by a physician even though the party does not subscribe to the teachings of medical doctors.[38]

An interesting line of cases has developed as to the severity of the penalty assessed for incorrectly answering an interrogatory served under Rule 33 or for incorrectly admitting or failing to deny a request for admissions served under Rule 36. This latter rule by its terms requires that unless the request is denied, the matter "shall be deemed admitted." But, what if through advertence a mistake is made in answering the interrogatories or the request for admissions?

In *United States v. Lemons*,[39] defendants claimed mistake in answering a request for admissions. The court commented that whether such a claim of mistake could be advanced at that late date was a matter of first impression, but it held that such admissions were "not absolutely and conclusively binding upon a party and do not estop the party from denying their truth." However, the court said that the burden was strongly upon the party asserting the mistake to explain his oversight by clear and convincing testimony. In support of its conclusion, the court cited *Ark-Tenn Distributing Corp. v. Breidt*,[40] where there had been an inadvertent failure to deny (as opposed to an express admission in the Arkansas case), and where it was held that "technical considerations will not be allowed to prevail to the detriment of substantial justice."

In *Ridley v. Young*, interrogatories were submitted to defendant prior to trial, and in response to them he made certain admissions. He did not appear at the trial, but witnesses were called to testify contrary to the admissions made by him. The contradictory testimony was permitted, the court saying:

35. Canister Co. v. National Can Corp., 8 F.R.D. 408 (D.Del. 1948); Western States Machine Co. v. Hepworth Co., 1 F.R.D. 766 (E.D.N.Y. 1941); contra, V. D. Anderson Co. v. Helena Cotton Oil Co., 117 F.Supp. 932 (E.D.Ark. 1953).
36. 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1941).
37. Teche Lines v. Boyette, 111 F.2d 579 (5th Cir. 1940).
38. Strasser v. Prudential Ins. Co., 1 F.R.D. 125 (W.D.Ky. 1939).
39. 125 F.Supp. 686 (N.D.Ark. 1954).
40. 110 F.Supp. 644 (D.N.J. 1953).

> Answers made by a party to interrogatories submitted by his adversary are not evidence in a cause until introduced as such during the course of trial. When such answers are introduced in evidence they stand on the same plane as other evidence and may be treated as admissions against interest. . . . "Admissions are rarely, if ever, conclusive of the facts stated, but are open to explanation and contradiction."[41]

4. *Some perils and pitfalls of discovery.*

Aside from the question of formal penalties which may be assessed for ignoring or defying the discovery rules, there are a few practical hazards which are sometimes overlooked.

Depositions on oral interrogatories give the examiner an opportunity to ask all of the experimental questions he can dream up, and to carefully avoid those some unfortunate questions at time of trial. But, some rein should be maintained on indulging your spirit of adventure because it is possible that the witness may not be available at trial. If he dies, or is too sick to attend, or if he is absent from the county (provided that his absence wasn't procured by the party offering the deposition) Rule 26 (d) (3) permits the use of the deposition for any purpose by any party.[42] Sometimes the answers to the venturesome questions have a hollow ring when read in open court.

On the other side of the fence is the situation where it is realized full well that the witness will not be available for trial, and where there is every intention to offer the deposition at trial. In a spirit of genuine good fellowship, opposing counsel suggests that to shorten the thing, all objections should be reserved until time of trial, and not to be outdone in camaraderie, counsel taking the deposition generously so stipulates. Alack and alas, Rule 32 (c) automatically reserves all objections as to competency, relevancy and materiality, but it says that objections as to the form of the question and objections as to matters which might be obviated or cured if promptly presented are irretrievably waived unless objection is made at the time of the deposition. But, when the deposition is offered, all objections have been reserved, and the witness is 1,000 miles away.

Probably 90% of the depositions taken under the Colorado rules are taken under one of these all-inclusive stipulations, and in 90% of that 90% of the depositions, the stipulation should not have been entered into. Even where there is no present intention to offer the deposition at time of trial, the necessity for doing so may arise at the last minute. If it does, the informal questioning resulting from the cheery atmosphere of the friendly deposition, coupled with the light hearted stipulation, will haunt you right out of court when objection is sustained that a vital question is leading.

Accordingly, even though the rule itself preserves until trial all objec-

41. 127 Colo. 46, 253 P.2d 433, 434 (1953).
42. However, under Rule 26 (f), "The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the withness of the party introducing the deposition."

tion as to competency, relevancy and materiality, if you nevertheless agree to stipulate, confine that agreement strictly to competency, relevancy and materiality.

Nor does Rule 35 (physical examinations) offer all of the carefree advantage which at first blush seems to be present. True it is that if a physical examination is demanded of your client, you have a God-given right to insist that a copy of the examination report be furnished you by the doctor selected by your adversary. But look before you leap! By requesting a copy of that examination report, you unequivocally subject all reports you have obtained to examination by the other side. Settlement values have been known to diminish rapidly when the other side learns how weak your medical testimony really is. But, settlement values have been known to skyrocket when the doctor employed by defendant finds greater disability than that found by plaintiff's physician. Rule 35 is a two-edged sword.

As a final word of warning, read with care and caution the requirement of Rules 33 and 36 that answers to interrogatories and denials of requests for admissions must be under oath. If you slip upon answers to interrogatories (or if you fail to answer in time) probably the worst that will happen is that you will receive first an informal reminder from counsel, and, if your adversary is the impatient type, a formal demand that you answer or that you have your client verify his answers. But, under Rule 36—the request for admissions—failure to properly deny is deemed an admission.

5. *Welcome aboard the discovery procedure merry-go-round.*

In conclusion, out of sympathy for the lawyer trying to assure the prospective client (who can pay a handsome retainer and who is present in the office) that his problem will be most expeditiously handled (while at the same time trying to explain on the telephone to that bum who won't pay why nothing has been done in his case for more than a year) two practical working tools are appended: (a) a timetable, and (b) a set of discovery forms. The timetable doesn't show all of the whistle stops, and the forms aren't literary masterpieces, but both have worked in practice during almost 20 years experience with the rules.

TIMETABLE

Depositions on oral interrogatories.

When:	At any time after commencement of action. If within first 20 days, leave of court must be obtained.
From whom:	Any person, party or witness.
Notice:	Reasonable notice must be given all parties, and notice must be given whether deponent is party or witness.
Subpoena:	Required for witnesses; not required for parties.
Objections and orders for protection of parties:	To be made promptly.
Motions to compel answer:	To be heard by court on reasonable notice.

Depositions on written interrogatories.

Substantially the same as depositions on oral interrogatories.

Cross-interrogatories:	Within 10 days after service of direct.
Redirect interrogatories:	Within 5 days after service of cross.
Re-cross interrogatories:	Within 3 days after service of redirect.

Interrogatories to the parties.

When:	At any time after commencement of action. If within first 10 days, leave of court must be obtained.
From whom:	Parties only.
Time to object:	Within 10 days after service.
Time to answer:	Within 15 days after service.
Motion to compel answers:	To be heard by court on reasonable notice.

Inspection and copying of documents and things.

When:	At any time after commencement of action. Motion must be heard on reasonable notice.
From whom:	Parties only.

Physical and mental examinations.

Same as for inspection and copying of documents and things.

Requests for admissions.

When:	At any time after commencement of action. If within first 10 days, leave of court must be obtained.
Time to object, admit or deny:	Within time fixed in notice which cannot be less than 10 days after service.

DISCOVERY FORMS

(Captions are omitted)

Motion for leave to take deposition within 20 days after action is commenced

Plaintiff avers:

1. Defendant ..... is the secretary of defendant ..... corporation, and he has in his possession the stock book and records of defendant corporation.

2. The deposition is for use at the hearing on plaintiff's application for a temporary injunction, and inquiry as to the information contained in such stock book and records prior to such hearing is essential to the preparation of plaintiff's case.

WHEREFORE, plaintiff prays that he be permitted to take the deposition of defendant ..... at 10:00 A.M. on January 15, 1958, at ..... , before ..... , a notary public.

(Place)

Notice to take deposition on oral interrogatory.

To the defendant above named, and to ..... , his attorneys of record:

Please take notice that plaintiff will take the deposition of ....., one of the defendants herein, whose address is ....., at 10:00 A.M., on January 1-5, 1958, at ..... , before ....., a notary

(Place)

public, at 10:00 A.M.

Notice to take deposition on written interrogatories:

To the defendant above named, and to ....., his attorneys of record:

Please take notice that at 10:00 A.M. on February 15, 1958, plaintiff will take the deposition of ....., whose address is ....., upon written interrogatories, copies of which are attached, and upon such cross-interrogatories as may be duly served by you, before and at the office ....., a notary public, whose address is .....

Interrogatories to the parties.

To the defendant above named, and to ....., his attorneys of record:

Pursuant to the provisions of Rule 33 you are requested to answer the following interrogatories:

1. State the names and addresses of all persons who within the past 5 years have kept the stock records of your corporation.

2. State the number of shares of stock of your corporation which, according to your stock transfer records, were transferred on July 7, 1956.

Objections to interrogatories to the parties.

Defendant objects to the following interrogatories served upon him by plaintiff on January 2, 1958:

1. Defendant objects to interrogatory No. 9 for the reason that .....

Motion for inspection of documents.

Plaintiff avers:

1. Defendant has in his possession or under his control correspondence between defendant and ....., and such correspondence is relevant to a matter involved in this action in that such correspondence will or may show a breach of defandant's fiduciary duty to plaintiff.

WHEREFORE, plaintiff prays that the Court fix a time and place at which plaintiff may inspect and copy all correspondence between defendant and .....

Motion for inspection of property.

Plaintiff avers:

1. Defendant is in possession and control of a store building at ....., the scene of the accident in which plaintiff was injured. The physical arrangement and condition of said store building is relevant to a matter involved in this action in that such arrangement and condition was the cause of plaintiff's injury.

WHEREFORE, plaintiff prays that the Court fix a time at which plaintiff may enter and photograph said store building.

Motion for physical examination.

Defendant avers:

1. There is a dispute between the parties as to the extent of the injuries suffered by plaintiff in the accident which is the subject of this case, and a physical examination of plaintiff is necessary to permit defendant to properly defend.

WHEREFORE, defendant prays that plaintiff be required to submit to a physical examination by ....., M.D., at his offices at ....., at such time as may be fixed by the Court to determine plaintiff's present physical condition and to determine the extent of the injuries suffered by plaintiff in said accident.

Request for admissions.

To the defendant above named, and to ....., his attorneys of record.

Pursuant to the provisions of Rule 36, you are requested to admit:

1. That on March 5, 1954, plaintiff and defendant both signed a written agreement, a photostatic copy of which is attached hereto as Exhibit A.

2. That on or about September 9, 1957, at ....., defendant orally stated to plaintiff that defendant would deliver no additional cattle to plaintiff.