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## NOTES

### CLARIFYING THE SCOPE OF CIVIL DISCOVERY UNDER THE FEDERAL RULES: THE PROPOSED AMENDMENTS

#### I. Introduction

The federal rulemakers have been in no hurry to change the broad, imaginative and effectively used discovery procedures which were adopted in 1938. These have served the practicing bar and bench well. Yet, as can always be expected, the procedures in vogue have outrun the statutory provisions—both the customs of practicing lawyers and the judicial construction of the existing statutes have expanded the rules far beyond their initial scope, or, in some cases, so confused that scope that clarification is now a necessity. To resolve the disputes in certain areas and the abuses that have come into existence in others, the Advisory Committee on Civil Rules has met the challenge of the times by proposing amendments to the existing federal rules on discovery and depositions.

The Advisory Committee on Civil Rules, the workhorse of the rulemaking structure, is appointed by the Chief Justice of the United States, and consists of attorneys, judges, and scholars.<sup>1</sup> The proposals to be discussed here have been submitted to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States,<sup>2</sup> which in turn will give them full consideration, along with additional suggestions submitted from the bench and bar. Pending any changes, and subsequent approval, they will then be presented to the Judicial Conference itself, and, ultimately, to the Supreme Court of the United States for final approval. It goes without saying that the renowned authors of these proposals are their greatest assets, and that subsequent acceptance of them rests largely on the present text and the recommendations of the Standing Committee.

The amendments contain significant changes in and clarifications of both the scope and the mechanics of the existing discovery provisions, Federal Rules 26-37. This Note will speak only to the changes in scope—specifically, what can be discovered. It should be noted, however, that the developments in the mechanical structure are no less substantial or important. It is in that area that the Project for Effective Justice of the Columbia Law School carried out an especially helpful field survey of discovery practice that showed the operations of the discovery rules at the law office level.

A brief introduction into the rearrangement of the discovery rules will aid readers in visualizing both the clarification intended by the amendments, and the

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1 Among the members of this Committee are: Hon. Dean Acheson, Chairman, Judge Wilfred Feinberg, Dean Charles W. Joiner, Prof. David W. Louisell, Judge Charles E. Wyzanski, Jr., Abraham E. Freedman, Esq., and Prof. Albert M. Sacks, Reporter.

2 The members of the Standing Committee are: Judge Albert B. Maris, Chairman, William E. Foley, Secretary, Judge George H. Boldt, Peyton Ford, Esq., Dean Mason Ladd, Prof. James Wm. Moore, J. Lee Rankin, Esq., Bernard G. Segal, Esq., Prof. Charles Alan Wright, and Judge J. Skelly Wright.

area of inquiry to be covered by this Note. Under the existing rules, each discovery device is separate and self-contained in a particular rule.<sup>3</sup> The problem with this arrangement is that there is no natural location in the discovery rules for provisions generally applicable to all discovery devices. This problem was not too troublesome when there were only a few provisions governing discovery generally, but there are now a series of amendments proposed to govern almost all the discovery devices. Thus, the first important step is the development of one rule which will address itself to discovery generally. Such is provided in new Rule 26, which makes it a convenient vehicle for the inclusion of new provisions dealing with the scope of discovery, and also for the inclusion of sections on protective orders, sequence and timing of discovery, and supplementation of responses which have a similar general applicability. Particularly as to scope, though, Rule 26 is significant. It contains a provision as to the general scope of discovery<sup>4</sup> and provisions on discoverability of insurance agreements, trial preparation materials and trial preparation experts, all of which are topics to be discussed in this Note.

The changes in scope of discovery are not restricted to Rule 26, however, but are also to be found in the appropriate rules dealing with particular devices. Among these, three deserve special discussion: (a) discovery of documents and things and entry upon land under Rule 34, (b) medical and physical examinations under Rule 35, and (c) interrogatories and requests for admission under Rules 33 and 36 respectively.

In speaking to the changes in the scope of discovery in the particular areas mentioned above, this Note will proceed in two ways. First, with a thorough analysis, it will consider the present rules and the state of the law which has developed around them. It should be pointed out that, because the focus rests on the changes in the rules, the discussion will consider the present rules and judicial construction of them only in the context of those changes. In this way the reader will not lose himself in discussion of the present, and, by spotlighting only the present law as it relates to a particular change, he can better reflect on the merit of that change. Second, it will present, in almost every instance, the text of the proposed amendment and, with the aid of the Advisory Committee's Notes, it will discuss the position taken and the reasons for it.

At the outset, it should not be forgotten that, because we are dealing with matters of procedure, clarifications of disputes arising in the lower courts most

3 For example, Rule 26 speaks to oral depositions, Rule 31 to written depositions, Rule 33 to interrogatories to parties, Rule 34 to discovery of documents, Rule 35 to mental or physical examinations, and Rule 36 to admissions.

4 That provision reads as follows:

*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.* Preliminary Draft of Proposed Amendments to Rules of Civil Procedure

for the United States District Courts relating to Deposition and Discovery, 43 F.R.D. 211, 224-5 (1967) [hereinafter cited as *Proposed Amendments*]. This provision is substantially the same as existing Rule 26(b).

often can be resolved by rulemaking rather than by decisional edict. It is with this in mind that these attempts at change deserve initial praise.

## II. Discovery of Documents, Trial Preparation Materials and Experts

### A. Rule 34 — *Discovery of Documents*

At present, Rule 34 of the Federal Rules of Civil Procedure allows a party, with a court order, to obtain production or examination — to copy or photograph certain documents and things within the possession or control of another party.<sup>5</sup> The distinguishing trait of Rule 34 discovery is its requirement of a showing of "good cause" for production and inspection of all documents, whether they be judicially classified as trial preparation materials or not. When dealing with documents not prepared for trial, however, the modern judicial tendency when construing the Rule has been to require merely a showing of relevancy to the subject matter in issue in order to satisfy the "good cause" requirement.<sup>6</sup> Still there are cases holding to a more restrictive view and requiring a showing not only of relevancy, but also of necessity to the moving party.<sup>7</sup> The proposed amendment is significant not for the language it adds to Rule 34, but for the language it deletes.<sup>8</sup> As to scope, two significant changes are noteworthy. First, the good cause requirement is eliminated.<sup>9</sup> The modern tendency to require only a showing of relevancy to obtain production is recognized by language adopted in the new general provision of the discovery rules, Rule 26, which requires only that the discoverable matter be not privileged and that it be "relevant to the subject matter involved in the pending action."<sup>10</sup> That the courts have developed a stricter notion of good cause for trial preparation materials is recognized by separating these materials from Rule 34 documents in an appropriate description. Second, the Rule extends to the testing and sampling of tangible things and objects or operations on land<sup>11</sup> — *i.e.*, to matters of contemporary technology. As the comments to the amendments point out, "[I]f the operation of a particular machine is the basis of a claim for negligent injury, it will often be necessary to test its operating parts or to sample and test the products it is producing."<sup>12</sup>

5 FED. R. CIV. P. 34.

6 See *Connecticut Mutual Life Ins. Co. v. Shields*, 17 F.R.D. 273 (S.D.N.Y. 1955), where the court stated that "the greater number of courts considering the question of good cause have decided that good cause is established when it appears that the papers sought are relevant to the subject matter of the action" *Id.* at 277.

7 See, *e.g.*, *Williams v. Continental Oil Co.*, 215 F.2d 4 (10th Cir. 1954), *cert. denied*, 348 U.S. 928 (1955).

8 *Proposed Amendments* 255-56.

9 *Id.* A similar modification was proposed by the Advisory Committee in 1955 and has been adopted in several states. See 2A BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE*, § 791 (Wright ed. 1961).

10 *Proposed Amendments* 224. Unlike existing Rule 34, the amendment will operate extrajudicially to conform to existing legal practice.

11 *Id.* at 256.

12 Advisory Committee's Note, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts relating to Deposition and Discovery, 43 F.R.D. 211, 257 (1967) [hereinafter cited as *Committee's Notes*].

### B. Trial Preparation: Materials

In 1947, in the now famous case of *Hickman v. Taylor*,<sup>13</sup> the Supreme Court set up a qualified immunity for the discovery of materials prepared by an attorney for trial. The Court stated:

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 the mental impressions of an attorney.<sup>14</sup>

Though the *Hickman* case did not speak to Rule 34 or its "good cause" requirement, lower courts were quick to define Rule 34 "good cause" in the *Hickman* manner not only for trial material prepared by a lawyer, but also for trial material prepared by non-lawyers. Thus the present trend is to read "good cause" in two ways: when asking for non-trial preparation materials as if it means a showing of relevancy, and when asking for trial preparation materials, no matter by whom prepared, as if it means a showing of necessity. And so, though a party may show that certain relevant documents were not prepared by a lawyer, but were prepared by non-lawyers for litigation, he may not succeed in having these documents produced unless he shows "good cause" amounting to necessity. A good example of this is *Guilford National Bank v. Southern Railway Company*<sup>15</sup> where, upon a request for the discovery of statements of witnesses obtained by claims agents, the Fourth Circuit, disregarding the "work product" question, said:

The specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, for the relevancy standard has already been imposed by Rule 26(b). Thus, by adding the words "showing good cause therefor," the Rules indicate that there must be greater showing of need under Rules 34 and 35 than under the other discovery rules.<sup>16</sup>

The question of the *Hickman* doctrine itself extending to other areas has arisen and the courts have split over the answer. The issue has been advanced as to whether the work product immunity extends only to statements and other material obtained by trial counsel, or whether it gives a qualified protection also to statements obtained by claims agents, investigators or insurers. Division among the courts of appeal is shown by contrasting the decision of the Third Circuit in *Alltmont v. United States*<sup>17</sup> with that of the Fifth Circuit in *Southern Railway Company v. Campbell*.<sup>18</sup> The Third Circuit, in striking an analogy between claims agents and attorneys, argued:

13 329 U.S. 495 (1947). The discovery there used was an interrogatory with a request that the documents asked about be attached.

14 *Id.* at 510.

15 297 F.2d 921 (4th Cir. 1962), *cert. denied*, 375 U.S. 985 (1964).

16 *Id.* at 924.

17 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950).

18 309 F.2d 569 (5th Cir. 1962).

[W]e can see no logical basis for making any distinction between statements of witnesses secured by a party's trial counsel personally in preparation for trial and those obtained by others for the use of the party's trial counsel. In each case the statements are obtained in preparation for litigation and ultimately find their way into trial counsel's files for his use. . . . The adverse party could certainly have no greater or different need for copies of the statements in the one case than in the other. In each case he has had the same opportunity through interrogatories to learn all the pertinent facts which his opponent has gleaned from the witnesses as well as the names and addresses of those witnesses so that he himself may interview them or secure their deposition if he wishes.<sup>19</sup>

The court proceeded to argue that a failure to apply the "work product" doctrine to these statements would in the end discriminate against the party whose attorney delegates part of his work in preparing for trial to others and in favor of the party whose counsel does all the work himself.<sup>20</sup> But the Fifth Circuit, in *Campbell*, failed to recognize this logic, though it did not fear to face the challenge of the "work product" doctrine extension which had been made by the Fourth Circuit in *Guilford*. It interpreted strictly, and, holding that the statements taken by the claims agents are not generally considered to be the "work product" of a lawyer in preparation for the defense, allowed their production.<sup>21</sup>

Commentators, while recognizing the force of the arguments made in *Alltmont*, have pointed out that the *Hickman* case rests on a policy decision, insuring the independence of the lawyer and, indirectly, the adversary system.<sup>22</sup> As to the notion that failure to extend the doctrine would favor the lawyer who does the work himself, the Court in *Hickman* refused to consider an analogous problem of whether a particular rule would favor corporate defendants as against injured persons.<sup>23</sup>

There is a similar division in the district courts. With respect to statements made by an insured to his insurer and subsequently conveyed to an attorney, one court has said that such were not part of the "work product" of a lawyer within the meaning of *Hickman*,<sup>24</sup> while another has thought the opposite.<sup>25</sup> A split as to statements obtained by investigators for the insurance company likewise exists.<sup>26</sup>

The proposed amendment, written as a general provision governing discovery in subsection (b)(3) of Rule 26, and entitled "Trial Preparation: Materials" reads:

*Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things prepared in anticipation*

19 *Alltmont v. United States*, 177 F.2d 971, 976 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950).

20 *Id.*

21 309 F.2d 569, 572 (5th Cir. 1962).

22 *See, e.g., C. WRIGHT, FEDERAL COURTS* 315 (1963).

23 329 U.S. 495, 507 (1947).

24 *See Gottlieb v. Bresler*, 24 F.R.D. 371 (D.D.C. 1959).

25 *See Burns v. Mulder*, 20 F.R.D. 605 (E.D. Pa. 1957).

26 *Compare Burke v. United States*, 32 F.R.D. 213 (E.D. N.Y. 1963), *with Snyder v. United States*, 20 F.R.D. 7 (E.D.N.Y. 1956).

*of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor, except that a statement concerning the action or its subject matter previously given by the party seeking the statement may be obtained without such a showing.*<sup>27</sup>

This provision thus resolves the conflicts discussed above. Considered with the improvements to Rule 34, the two amendments have accomplished two significant clarifications: first, they have eliminated the confusion arising from using the good cause provision of Rule 34 for two distinct types of materials; second, the separate and distinct trial preparation materials provision has incorporated not only the *Hickman* rule itself, but by expanding the scope to include trial preparation materials from non-lawyers, it has encompassed both the decisions like *Alltmont* which extend the *Hickman* rule beyond lawyers, and those like *Guilford*, which, while not recognizing explicitly an extension, prefer the same result by relying on a strict reading of Rule 34 for production of documents prepared in anticipation of litigation. The requirement of a showing of good cause for materials prepared by an attorney and for materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf reflects the view that the lawyer's mental impressions should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side.<sup>28</sup> But the commentaries also point out that the new good cause provision can still be meaningfully applied so as not to wholly prevent production of materials prepared for trial. Factors to be considered in satisfying the standard are the importance of the materials in the preparation of a case and the difficulty of obtaining them by other means, or the inability to get the substantial equivalent by other means either because a witness is hostile, has a lapse of memory, is changing his story, or the story itself cannot be as "fresh" as when given at the time of the occurrence.<sup>29</sup>

A final conflict exists in the case law regarding the discovery by a party of his own statement. The situation would seem to arise frequently in personal injury litigation where the eventual defendant obtains a statement from the injured person before the person has retained counsel, and subsequently refuses to give the party a copy of his statement. For example, in one situation, two weeks after an accident in a Safeway store, the victim, without counsel from an attorney, gave a statement to an attorney for the insurer of the store owner before either party had begun litigation. Confronted with a request for production of this statement, the court stated that such a demand lacked "any real reason or necessity for the production, and there is nothing to show that a denial of production will unfairly prejudice the plaintiff or cause him undue hardship or injustice."<sup>30</sup> Yet the Fourth Circuit, confronted with a similar situation, has held otherwise:

<sup>27</sup> *Proposed Amendments* 225.

<sup>28</sup> *See Committee's Notes* 231-32.

<sup>29</sup> *Id.* at 232.

<sup>30</sup> *Safeway Stores, Inc. v. Reynolds*, 176 F.2d 476, 478 (D.C. Cir. 1949).

The document was requested, and its production ordered, on the basis that there was "good cause" therefor, arising out of the circumstances under which the statement was taken and the lapse of time thereafter. If fairness, alone, does not require that a cooperative employee be furnished a copy of a statement he supplies, when unrepresented by counsel and still in confinement with his injuries, the lapse of many months and the dimming of memory provides much reason for his counsel to examine any substantial contemporary declaration or admissions. Aside from what assistance it may be in the preparation of a case for trial, the production of such a statement, after the lapse of time, permits a more realistic appraisal of cases and should stimulate the disposition of controversies without trials.<sup>31</sup>

Commentator Moore feels that an amendment should resolve the issue, but that even under the rules as they stand and under the *Hickman* case, a party to a lawsuit who has given a statement at a time when he was not represented by counsel and who was not provided a copy of the statement by his adversary should be entitled, without more, to a copy of that statement.<sup>32</sup> The proposed amendment takes this position,<sup>33</sup> and its validity seems unquestionable. There are noteworthy reasons for this. First, unlike that of another witness, a party-witness's statement may be admissible in evidence against him as an admission by a party;<sup>34</sup> the tendency of jurors to be unduly influenced by such admissions makes it important for a party to be aware of the extent to which he has committed himself so that he may honestly explain them. And second, lapse of memory, inaccuracy because of passage of time, and the failure to have an attorney present are decisive and just considerations. State statutes have taken this approach<sup>35</sup> and for the Federal Rules to do otherwise would only serve those potential litigants quick enough to interview others who have been less hasty in retaining an attorney.

### C. Trial Preparation: Experts

The present rules do not expressly answer the question, nor have the courts provided any clear assurance, as to whether a litigant can obtain discovery of information held by an adverse party's expert. Certain decisions have denied discovery of such information altogether as privileged.<sup>36</sup> The Supreme Court's decision in *Hickman v. Taylor* makes it difficult, however, to sustain the argument that opinions of an expert, although procured by counsel, are within the attorney-client privilege. While the precise issue considered in *Hickman* was the right

31 New York Cent. R.R. v. Carr, 251 F.2d 433, 435 (4th Cir. 1957).

32 See 4 J. MOORE, FEDERAL PRACTICE ¶ 26.23 [8.—4] (2d ed. 1967) [hereinafter cited as MOORE].

33 See note 27 *supra* and accompanying text.

34 See C. McCORMICK, EVIDENCE § 239 (1954). It is responsive to this point to quote Justice Jackson's concurring pronouncement in *Hickman v. Taylor* that "it seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case." *Hickman v. Taylor*, 329 U.S. 495, 515 (1947).

35 See, e.g., MINN. STAT. ANN. § 602.01 (1947); N.Y. CIV. PRAC. § 3101(e) (McKinney 1963); FLA. STAT. ANN. § 92.33 (1960). For a further discussion of a party's right to discover his own statement, see Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1039 (1961).

36 See, e.g., *American Oil Co. v. Pennsylvania Petro. Prod. Co.*, 23 F.R.D. 680, 685-86 (D.R.I. 1959).



to discover statements of ordinary witnesses, significant note should be made of the broad language used in disposing of the issue of privilege:

[T]he protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.<sup>37</sup>

Thus, if memoranda prepared by an attorney himself are not privileged, it does not seem that reports prepared for him by experts can be so classified. Just as in the *Hickman* decision, however, the non-privileged nature of the information is not conclusive as to whether or not discovery should be allowed.<sup>38</sup>

Theories allowing for discovery of such expert information have been similarly advanced. It has been argued that, since the expert can be asked on cross-examination at the trial the basis for his conclusions, discovery should be allowed since "discovery procedure simply advances the stage at which disclosure can be compelled from the time of the trial to the period preceding it."<sup>39</sup> Yet, as has been frequently pointed out, the fact that a party's expert might be compelled to testify at the trial does not mean that the opposing party has a right to compel his testimony at the pre-trial stage. It is an oversimplification to say that discovery simply advances the stage at which disclosure can be compelled, for the scope of discovery before trial oftentimes is far broader than the scope of testimony at the trial.<sup>40</sup>

More often than not, discovery has been denied for reasons of unfairness to the party who engaged the expert. In *United States v. 23.76 Acres of Land*,<sup>41</sup> it was stated that "by the more modern and better-reasoned cases, discovery in this area, if denied, is denied on the ground of unfairness."<sup>42</sup> A more poignant expression of this theory was given in *Lewis v. United Air Lines Transport Corporation*,<sup>43</sup> where a third party defendant sought to take the deposition of an expert who had been engaged by the defendant to make tests of an allegedly defective airplane engine cylinder. The court stated:

To permit a party by deposition to examine an expert of the opposite party before trial, to whom the latter has obligated himself to pay a considerable sum of money, would be equivalent to taking another's property without making any compensation therefor. To permit parties to examine the expert witnesses of the other party in land condemnation and patent actions, where the evidence nearly all comes from expert witnesses, would cause confusion and probably would violate that provision of Rule 1 which

37 329 U.S. 495, 508 (1947).

38 MOORE ¶ 26.24, at 1528.

39 See *Bergstrom Paper Co. v. Continental Ins. Co.*, 7 F.R.D. 548, 550 (E.D. Wisc. 1947).

40 See MOORE ¶ 26.24, at 1529.

41 32 F.R.D. 593 (D. Md. 1963).

42 *Id.* at 597.

43 32 F. Supp. 21 (W.D. Pa. 1940).

provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."<sup>44</sup>

Of course, a theory of unfairness cannot always operate on a one-way street. In some instances justice will lie on the side of the party to whom knowledge of all relevant facts is unavailable, even though in most cases a party can obtain the information by consulting his own experts.

The fundamental proposition of all discovery — that mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation — is well beyond dispute. Yet a more practical fact is also beyond contradiction, *i.e.*, that litigants often pay experts substantial fees for obtaining their advice, and it is financially oppressive to permit a party to take advantage of his opponent by obtaining that party's expert witness's opinion before trial without paying any part of the cost. In these cases, then, the public interest in facilitation of litigation meets head-on the personal interest in spending large sums to win an appropriate verdict. A balancing process appears to be the only adequate answer. It is true that some showing of good cause is implicit in those cases which speak to the "fairness of the situation." For example, in *Golden v. R. J. Schofield Motors*,<sup>45</sup> discovery was allowed because the expert's statement was based upon an inspection and examination of the disassembled automobile involved in the suit, and because the defendant was not in a position to obtain the information elsewhere; but in *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*,<sup>46</sup> a plaintiff was denied leave to take the deposition of an accountant who had been engaged by defendants to examine plaintiff's books in order to ascertain what facts the accountant might have discovered or might claim to have discovered in his examination of the books. The *Dipson* court pointed out that the books were in the possession of the plaintiff, who could have made, and in part had made, his own examination of them.<sup>47</sup>

There is some tendency in the cases to distinguish between discovery of the facts found by an expert and the conclusions he has formed, allowing the former but not the latter — which undoubtedly are of greater worth to a party.<sup>48</sup> Thus, in *Walsh v. Reynolds Metals Company*, the court pointed out that conclusions are not objective facts (the primary goal of the parties), and that they are not otherwise unavailable to a party because he can draw his own conclusions from his facts.<sup>49</sup> But the difficulty of separating fact from opinion is burdensome, and this attempted distinction has been sharply criticized.<sup>50</sup>

It is to the trend towards a consideration of fairness and to a requirement of an inherent good cause for the requested discovery that the proposed amendment to Rule 34 addresses itself.<sup>51</sup> Subsection (b) (4) (A) reads:

<sup>44</sup> *Id.* at 23.

<sup>45</sup> 14 F.R.D. 521 (N.D. Ohio 1952).

<sup>46</sup> 8 F.R.D. 313 (W.D.N.Y. 1948).

<sup>47</sup> *Id.*

<sup>48</sup> See, *e.g.*, *Currie v. Moore-McGormack Lines, Inc.*, 23 F.R.D. 660 (D. Mass. 1959).

<sup>49</sup> 15 F.R.D. 376, 378 (D.N.J. 1954).

<sup>50</sup> For a good discussion, see Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 473 (1962).

<sup>51</sup> An amendment to Rule 30(b) proposed in 1946 attempting to prohibit discovery of any part of a "writing" obtained in preparation for trial "that reflects . . . the conclusions of an expert" was not adopted. See MOORE ¶ 26.24, at 1530.

*Subject to the provisions of subdivision (b)(4)(B) of this rule and Rule 35(b) a party may discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial only upon a showing that the party seeking discovery is unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.<sup>52</sup>*

This subdivision speaks to the experts retained or specially committed in relation to trial preparation, and therefore does not limit the discovery of matters acquired from a person outside of trial preparation even though he happens to be an expert;<sup>53</sup> but it does preclude discovery from experts who are even informally consulted in preparation for trial. It is important to understand that this subdivision pertains broadly to any form of discovery from those experts so described. In allowing discovery of both facts and opinions or conclusions, the amendment does not adopt the arguments mentioned in the *Walsh* case, though the flexibility of the undue hardship and manifest injustice tests will surely allow more discovery of facts than opinions.<sup>54</sup>

There are situations where the opinions or techniques of experts may be central to the litigation. Among these are food and drug, patent, and condemnation cases, which present complex and troublesome issues as to which expert testimony is likely to be determinative. In *United States v. Nysco Laboratories, Inc.*,<sup>55</sup> an action by the federal government seeking an injunction under the Federal Food, Drug and Cosmetic Act<sup>56</sup> against the introduction into interstate commerce of certain capsules on the ground that defendants were violating the Act by misbranding the drug, the court held for discovery. The opinions of expert witnesses and certain interrogatories of the United States relating to these experts were allowed, but the defendant was required only to describe and identify the written opinions of the expert witnesses, and not to analyze and summarize them. And in *United States v. 50.34 Acres of Land*,<sup>57</sup> a condemnation proceeding, where it appeared that the appraisal reports on realty were obtained by the government for the express purpose of determining compensation which would have to be paid for the realty, that the reports were in the possession and control of the government, that neither the reports nor their authors were otherwise available, and that there was nothing to indicate that the reports were privileged matter, the defendant was entitled to inspect, copy, or photostat the documents.<sup>58</sup> The reasons for allowing discovery, particularly in these situations, is evident: expanded discovery allows for improved cross-examination and rebuttal at trial. The lawyer, even with the help of his own experts, frequently cannot anticipate the particular approach his adversary's

<sup>52</sup> *Proposed Amendments* 225.

<sup>53</sup> *See Committee's Notes* 234.

<sup>54</sup> *Id.*

<sup>55</sup> 26 F.R.D. 159, 162 (E.D.N.Y. 1960).

<sup>56</sup> 52 STAT. 1040 (1938).

<sup>57</sup> 13 F.R.D. 19 (E.D.N.Y. 1952).

<sup>58</sup> *Id.* at 21.

expert will take or the data on which he will base his opinion.<sup>59</sup> Still, there are similar cases in which the strongest arguments for discovery should have been recognized, yet the courts have continued to refuse disclosure.<sup>60</sup> To remedy these, subdivision (b)(4)(B) is proposed:

*As an alternative or in addition to obtaining discovery under subdivision (b)(4)(A) of this rule, a party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter. Discovery of the expert's opinions and the grounds therefor is restricted to those previously given or those to be given on direct examination at trial.*<sup>61</sup>

Though this section is especially appropriate for cases where expert testimony is the key to the trial and where many experts testify, the provision is also made applicable to situations where only a single expert takes the stand.<sup>62</sup> The safeguards in the amendment are provided to minimize the fear that one side will benefit unduly from another's preparation. Discovery is limited to trial witnesses and may be obtained only at a time when the parties know who their expert witnesses will be. And, as a practical matter, a party must have prepared his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts. In addition, discovery is limited to those opinions which have been previously given by the expert or which he will give on direct examination. The court, at the same time, has ample power to regulate both the time and scope of discovery and to see and correct any abuses which may arise.<sup>63</sup>

It must be remembered that both of these subdivisions, while they may overlap, are separated for specific purposes. The first speaks to the discovery of specially employed or retained experts' information, and allows for this only upon satisfaction of stringent standards. The second provision is more narrow, for it is applicable only to the expert who is to be a witness at trial, and discovery there is only by interrogatory to the adverse party himself with inquiry limited to the identity of the expert and to the subject matter of which he is to testify.

59 In *Franks v. National Dairy Products Corp.*, 41 F.R.D. 234 (W.D. Tex. 1966), the court stated:

In almost every case where expert testimony is involved, the conclusions of the experts and the tests and assumptions which support the experts' opinions, will be the areas where issues exist and, decisions frequently turn on the experts' testimony. . . . Without discovery, such evidence and issues will be unknown to opposing counsel until it is too late to effectively cross-examine an expert or prepare rebuttal evidence. More importantly, unless the position of each party is known along with the basis for taking such position, no intelligent evaluation can be made for settlement purposes. *Id.* at 237.

For an additional comment, see McGlothlin, *Proceedings of the Seminar on Protracted Cases for United States Judges: Some Practical Problems in Proof of Economy, Scientific and Technical Facts*, 23 F.R.D. 319, 467 (1958).

60 See, e.g., *United States v. Certain Parcels of Land*, 25 F.R.D. 192 (N.D. Cal. 1959), and *United States v. Certain Acres of Land*, 18 F.R.D. 98 (M.D. Ga. 1955).

61 *Proposed Amendments* 225-26.

62 See *Committee's Notes* 235, which indicate that this procedure had been earlier expressed in the decision of *Knighon v. Viltan & Fassio*, 39 F.R.D. 11 (D. Md. 1965).

63 *Committee's Notes* 235.

Then discovery procedures can be started with the expert, by any method, but again restricted only to those opinions given or to be given on direct examination. A minimum protection to the paying party is thus afforded.

A maximum protection is provided in subdivision (b)(4)(C). It has been a common suggestion and fear in this area that it is undisputedly unfair to permit one side to obtain, without cost, the benefit of an expert's work for which the other side has paid a substantial sum. To ameliorate this fear, the following is proposed:

*The court may require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery, and with respect to discovery permitted under subdivision (b)(4)(A) of this rule, require a party to pay another party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert.*<sup>64</sup>

The court may issue the order for sharing another party's fees as a condition to discovery, i.e., as a consideration for the party seeking the order, or it may delay it until after discovery is completed. The amendment will provide compensation to an expert discovered under procedures in subdivision (b)(4)(A) or (b)(4)(B), or to the party employing the non-witness expert from whom valuable information might be obtained by inquiry under (b)(4)(A). In its entirety, this provision, by imposing an additional burden upon the judiciary, eliminates the main obstacle to discovery in this area, and aids the entire amendment by striking an appropriate balance between personal pecuniary interests and the public's drive towards effective, open, and proper litigation.

### III. Discovery of Contents of Insurance Policies

The decisions under present Rule 26(b) are sharply divided on the issue of whether, in the ordinary negligence case, it is proper to require a party to disclose whether he has insurance, the name of the company, the limits of liability, and the terms of the policy. Where insurance would be provable at trial, it is entirely clear that the plaintiff may ascertain the facts of insurance by discovery.<sup>65</sup> In most cases, though, where insurance information is inadmissible at trial, the plaintiff is interested in it only so that he may ascertain whether he will be able to collect any judgment that he may obtain.

The reasons given, both by commentators and judges, for allowing discovery are numerous, and are frequently mentioned together. Among these are: (1) that there exists no relevancy to the issues of liability and damages in such an inquiry, and, even though the insurer may be liable after judgment is entered, there is no reason to conclude relevancy and allow discovery at the commencement of the action; (2) that such matter is neither admissible as evidence at trial nor reasonably calculated to lead to the discovery of admissible evidence; (3) that this form of discovery would invade the defendant's

<sup>64</sup> *Proposed Amendments* 226.

<sup>65</sup> See *Orgel v. McCurdy*, 8 F.R.D. 585 (S.D.N.Y. 1948), where the existence of insurance was discoverable to show ownership and control of the vehicle in possession.

right to privacy before any determination of liability; and, (4) that discovery might become the vehicle for making full inquiry into all the confidential financial affairs of any luckless defendant. Those allowing for this type of discovery have spoken and argued just as strongly: (1) that such would promote the objectives of the Federal Rules to secure the "just, speedy, and inexpensive determination of every action"; (2) that it would allow parties a realistic appraisal of the value of their cases in advance of trial; (3) that the insurance company is the real defendant since it defends the action, conducts the investigation and negotiates any settlement; (4) that allowing discovery of insurance coverage would eliminate the possibility of fraudulent settlements obtained by a false disclosure concerning insurance coverage; (5) that the beneficiary stands in the place of the insured, or the contract relationship between the insurer and the insured inures to the benefit of an injured party; (6) that, unlike other assets which are often listed as public records, there is no way of obtaining knowledge of liability insurance coverage.<sup>66</sup> Perhaps the most frequently mentioned argument is that such discovery will promote settlements and thereby relieve court calendar congestion.<sup>67</sup> Yet even this contention — that knowledge of policy existence and limits will make settlements easy — has been ably answered:

It is undoubtedly true . . . that low insurance limits will expedite settlements. But it is likewise true that disclosure of high insurance limits will retard, if not prevent, settlement. Human nature, being what it is, it is not unreasonable to assume that, in the eyes of a plaintiff, the value of his case will increase in proportion to the amount of insurance coverage available.<sup>68</sup>

In general, plaintiff's lawyers have eagerly sought such discovery and insurance lawyers have just as eagerly fought it. In 1959, the *Insurance Law Journal*,

66 These reasons are suggested throughout the following well-written decisions: *Cook v. Welty*, 253 F. Supp. 875 (D.D.C. 1966); *Johanek v. Aberle*, 27 F.R.D. 272 (D. Mont. 1961); *Bisserier v. Manning*, 207 F. Supp. 476 (D.N.J. 1962); *Clauss v. Danker*, 264 F. Supp. 246 (S.D.N.Y. 1967); *Cooper v. Stender*, 30 F.R.D. 389 (E.D. Tenn. 1962); and in these commentaries: Frank, *Discovery and Insurance Coverage*, 1959 *INS. L.J.* 281; Fournier, *Pre-Trial Discovery of Insurance Coverage and Limits*, 28 *FORD. L. REV.* 215 (1959); Williams, *Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases*, 10 *ALA. L. REV.* 355 (1958); Note, *supra* note 35, at 1018.

67 See *Clauss v. Danker*, 264 F. Supp. 246, 248 (S.D.N.Y. 1967), where the court articulately argued:

This court has witnessed the dismal waste of time and effort, both on the part of the parties and the court, in cases where an early disclosure of limited policy limits would have led to prompt settlements that were not reached until the eve of trial, when such information was first revealed after needless pretrial discovery and preparation for trial. Aside from such unnecessary consumption of time and effort resulting from inability to learn such crucial information until the very last minute, the effect frequently is to disrupt the court's schedule and cause loss of trial time for many needy prospective litigants.

68 *Bisserier v. Manning*, 207 F. Supp. 476, 479 (D.N.J. 1962). Another court has responded similarly:

The law favors compromise settlements, but not at the expense of giving one party an advantage over the other in bringing about those settlements. But, we are not so sure that the giving to plaintiffs the limits of a defendant's liability insurance policy will bring about more compromise settlements than will the withholding of such information. Oftentimes cases are not settled because plaintiffs ask for greater damages than their cases justify. Compromise settlement is not the aim of the discovery rules. *Cooper v. Stender*, 30 F.R.D. 389, 393 (E.D. Tenn. 1962).

recognizing that the settlement argument can cut both ways, stated that a survey of judges and decisions showed that the trend was in the direction of barring such discovery.<sup>69</sup> If a numerical count of courts and decisions taking a certain position is a proper test for the validity of such a position, then the *Journal's* implications may be accepted.

Analogy has been successfully made to the Financial Responsibility Acts enacted in some jurisdictions which not only require owners and operators of motor vehicles to maintain liability insurance, but also establish minimum requirements for limits of liability. The increases in the number of automobiles in use and in the number of motor vehicle accidents have resulted in a stringency in regulations and in protective measures for the benefit of the public. Speaking to the discovery of these policies a federal district court said:

From the tenor and purpose of such legislation it is obvious that such insurance policies are definitely relevant to the subject matter of pending actions growing out of accidents covered by such policies, especially in view of the fact that this legislation apparently would require the defendant to disclose to the state authority the information concerning the insurance which plaintiffs seek, and this would be a matter of public record.<sup>70</sup>

In a state case, the court allowed discovery of a policy in light of the Safety Responsibility Act whose "ultimate object is to provide compensation for innocent persons who might be injured through faulty operation of motor vehicles."<sup>71</sup>

Constitutional protagonists have argued that to require the defendant to disclose the amount of an insurance policy would constitute an unreasonable search and seizure of his property in violation of the right guaranteed him under the fourth amendment of the Constitution; that to require such disclosure would deprive him of his property without due process of law; and that this would abridge his privileges and immunities under article IV, section 2, or would be a denial of the equal protection of the laws. Neither the Supreme Court nor any of the federal courts of appeal have passed on these issues, and the district courts and state courts which have spoken to the questions have not given any substantial answer. From these latter cases, however, it must be concluded that no court has said that the discovery of insurance is unconstitutional.<sup>72</sup>

The policy considerations mentioned above have surely gone beyond an interpretation of the language of the existing discovery rules. As the United States District Court for the District of New Jersey said:

The rule, as presently written, does not . . . permit discovery of insurance

<sup>69</sup> See Frank, *supra* note 65, at 314.

<sup>70</sup> Brackett v. Woodall Food Products, Inc., 12 F.R.D. 4, 6 (E.D. Tenn. 1951).

<sup>71</sup> Lucas v. District Court, 140 Colo. 510, 516, 345 P.2d 1064, 1067 (1959). The Illinois Supreme Court, in *People ex rel. Terry v. Fisher*, 12 Ill.2d 231, 238, 145 N.E.2d 588, 592-93 (1957), made a similar recognition:

Thus, under our statutes, as in California, liability insurance is not merely a private matter for the sole knowledge of the carrier and the insured, but is also for the benefit of persons injured by the negligent operation of insured's motor vehicle.

<sup>72</sup> For a particularly well-analyzed discussion of these allegations of unconstitutionality, see Note, *Discovery—Privilege, Relevancy, and Constitutionality in the Discovery of Automobile Liability Insurance under the Federal Rules*, 34 NOTRE DAME LAWYER 78 (1958).

coverage in advance of a judicial determination of liability or damages in a negligence action. If disclosure of insurance coverage is thought to be desirable, the discovery provisions of the Federal Rules of Civil Procedure should be amended to allow such discovery.<sup>73</sup>

Without stretching the language of the discovery provisions by judicial construction, state courts have similarly called for amendments.<sup>74</sup> The Advisory Committee resolves the issue in favor of disclosure in subsection (b):

(2) *Insurance Agreements; A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial.*<sup>75</sup>

The commentaries state that the amendment will allow the parties to make the same realistic appraisal of the case, though it may not induce settlement and avoid protracted litigation.<sup>76</sup> Insurance coverage is the limit of general inquiry under the amendment — and is to be distinguished from other assets — because it is obtained for the very purpose involved in the suit, it is available only from the defendant or his insurer, it does not involve a significant invasion of privacy, and, most importantly, because the insurance company most often controls the litigation. The words “may be liable” in the provision will require even an insurance company contesting its liability under a policy to disclose. In no instance, as is clearly pointed out, does discovery make the facts concerning insurance coverage admissible in evidence.<sup>77</sup>

#### IV. Extension of Medical Examinations Under Rule 35

Existing Rule 35 provides for the obtaining of a court order for the mental or physical examination of a party when the mental or physical condition is in controversy.<sup>78</sup> Even this simple provision has not gone without judicial gloss.

Though the rule specifically applies only to parties, there has been considerable controversy as to whether a court may order persons other than parties to submit to such examinations. In many types of litigation the mental or physical condition of a person not formally a party to a suit is of vital importance. For example, when a parent sues for the loss of services of his injured child or a husband seeks recovery for the loss of companionship and service of his in-

<sup>73</sup> *Bisserier v. Manning*, 207 F. Supp. 476, 480 (D.N.J. 1962). The district court in *Clauss v. Danker*, though denying the notion for discovery under the present Rules, did so “with reluctance and with the desire that the Rules be amended to permit such discovery”. *Clauss v. Danker*, 264 F. Supp. 246, 249 (S.D.N.Y. 1967).

<sup>74</sup> See, e.g., *Jeppesen v. Swanson*, 243 Minn. 547, 562, 68 N.W.2d 649, 658 (1955):

[I]t would be far better to amend the rules so as to state what may and what may not be done in that field than to stretch the present discovery rules so as to accomplish something which the language of the rules does not permit.

<sup>75</sup> *Proposed Amendments* 225.

<sup>76</sup> *Committee's Notes* 229-30.

<sup>77</sup> *Id.*

<sup>78</sup> FED. R. CIV. P. 35.



jured wife,<sup>79</sup> the physical condition of the child or wife is the exact issue around which the controversy centers. Courts have often, despite the rule's language, construed "party" in a liberal manner. In *Beach v. Beach*,<sup>80</sup> an action by a wife for maintenance in which she alleged that she was pregnant by her husband, the husband counterclaimed for divorce on the ground of adultery and moved that the court order both the wife and her newly born child to submit to a blood-grouping test in order to determine paternity. The court held, emphasizing that the mother's and child's interests were alike, that "one who is not a party in form may be, for various purposes, a party in substance"<sup>81</sup> and thus found the child a party within the meaning of Rule 35(a). The case also presented the question whether in a blood-grouping test for non-paternity the "physical condition" was in controversy so as to satisfy the rule. This the court decided in the affirmative, stating that "clearly the characteristics of one's blood which are expressed in terms of red and white corpuscles, or of haemoglobin, are part of one's physical condition."<sup>82</sup> To the extent that this stretches the meaning of Rule 35(a) which seems to speak to the situation of a physical or mental condition itself being the controversy, and not merely evidence of another controversy (as with blood-grouping tests), a new amendment seems in order. It has also been argued that when one is suing for a declaratory judgment as to his derivative citizenship,<sup>83</sup> with his father acting as his guardian ad litem, Rule 35 may be employed to compel the father to submit to a blood-grouping test if he wishes to continue in his capacity as guardian ad litem. Yet this argument was rejected in a number of cases in which claims of citizenship were involved and a blood test would have been useful in proving or disproving the claim, when the courts held that relatives of the would-be citizen were not parties, and therefore could not be compelled to submit to such a test.<sup>84</sup> The interpretation of the term party as used in the *Beach* opinion was noted in the Supreme Court case of *Schlagenhauf v. Holder*,<sup>85</sup> but the Court avoided any intimation as to its correctness. In that case, the Court dealt with the rule's requirement of a showing of "good cause" to obtain an examination, holding that such a requirement (which remains under the proposed amendment) could not be satisfied by a mere showing of relevance to the case.<sup>86</sup>

Extension of the rule in other situations has not been readily available. In *Kell v. Denver Tramway Corporation*,<sup>87</sup> a plaintiff in a personal injury action was unable to have the vision of the defendant bus driver examined even though the latter was allegedly color-blind. It appears that in this type of case, it would be most desirable to order a physical examination of an agent of the defendant.

79 See generally Annot., 62 A.L.R.2d 1291 (1958).

80 114 F.2d 479 (D.C. Cir. 1940).

81 *Id.* at 481.

82 *Id.*

83 This right is based on the Immigration and Nationality Act of 1952, 66 Stat. 235, (1952) which provides that persons born abroad to American citizens shall themselves be deemed nationals and citizens of the United States.

84 See, e.g., *Fong Sih Leung v. Dulles*, 226 F.2d 74 (9th Cir. 1955) and *Dulles v. Quan Yoke Fong*, 237 F.2d 496 (9th Cir. 1956).

85 379 U.S. 104, 115 (1964).

86 *Id.* at 121.

87 Civil No. A-81314, County Ct. Denver, Colo., Div. 4 (1953).

Though inherent power has been claimed to permit such examinations,<sup>88</sup> it is doubtful whether this is proper in a federal court, especially since there was no inherent power prior to the adoption of Rule 35.<sup>89</sup>

That justice would require certain persons other than parties to submit to examinations in actions brought for loss of services of a relative, in paternity suits, agency situations, and derivative citizenship cases seems undeniable. The proposed amendment to Rule 35 so speaks:

*(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.*<sup>90</sup>

Extension to "a person in the custody or under the legal control of party" embodies solutions to all but the agency situation referred to above. It is perhaps unfortunate that the Committee has not included this situation, dismissing its failure to do so with the comment that "[p]rovisions relating to employees in the State statutes and rules cited above appear to have been virtually unused."<sup>91</sup> There may be some suggestion that the Supreme Court might even find such an extension unacceptable. In 1955, the former Advisory Committee proposed to amend Rule 35(a) to extend it to cases in which the mental or physical condition or the blood relationship of a party, or of an agent or a person in the custody or under the legal control of a party is in controversy.<sup>92</sup> Although a number of states have enacted such a provision,<sup>93</sup> this amendment, like all other amendments proposed that year, was not adopted. Further, mention of the pronounced feeling of the Court in 1941 to physical examinations in general is worth consideration. In a decision at that time, the Supreme Court upheld present Rule 35 as a valid exercise of the Rules Enabling Act.<sup>94</sup> Yet four justices dissented, with Mr. Justice Frankfurter speaking:

So far as national law is concerned, a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts. I deem a requirement as to the invasion of the person to stand on a very different footing from questions per-

88 See *Dinsel v. Penn. R.R.*, 144 F. Supp. 880 (W.D. Pa. 1956).

89 Lack of inherent power was stated in *Union Pacific Ry. v. Botsford*, 141 U.S. 250 (1891).

90 *Proposed Amendments* 257.

91 *Committee's Notes* 259.

92 For further discussion of this proposal, see Note, *Physical Examination of Non-Parties under the Federal Rules of Civil Procedure*, 43 *IA. L. REV.* 375, 380-83 (1958).

93 See, e.g., *CAL. CIV. PRO. CODE*, § 2032 (West Supp. 1967); *N.Y. CIV. PRAC.* § 3121 (McKinney 1963); and *ILL. ANN. STAT.*, ch. 110A, § 215 (Smith-Hurd, Spec. Pamphlet, 1968).

94 *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

taining to the discovery of documents, pre-trial procedure and other devices for the expeditious, economic and fair conduct of litigation.<sup>95</sup>

If this feeling is at all prevalent on the Court today, it is questionable whether it would approve an extension of physical examinations to persons not parties, remote from the litigation, without a good deal of disagreement.<sup>96</sup>

## V. Rule 33 Interrogatories to Matters of Opinion and Conclusion

Rule 33 today details a procedure by which an adverse party may be required to provide written answers to relevant written questions submitted to him.<sup>97</sup> This procedure is an alternative to the oral deposition. The deposition, on the basis of confrontation of a witness and immediacy of response, appears more advantageous to an inquiring party; but the interrogatory does have the characteristic of being less expensive and can be used efficiently to obtain answers to questions not normally in dispute. The scope of examination under Rule 33 is identical to that of the other discovery devices, but the rule is still not without its own problems. The foremost question is whether interrogatories may be used to ascertain opinions, contentions, and conclusions of the adverse party. As one commentator has ably put it, "[t]he decisions on the propriety of interrogatories inquiring about opinion, contentions, and conclusions are extremely numerous and quite inconsistent."<sup>98</sup> That the proposed amendment is meant to resolve this confusion must be clear, but it is worthwhile to review some of this confusion in the case law in order to see its reflection on the committee's proposal, and the response that the practicing bar should give to that proposal.

How far beyond inquiry into facts can these interrogatories go? Opinions as to the speed a defendant was traveling or intending to travel at the time of a collision,<sup>99</sup> as to whether an estate was solvent,<sup>100</sup> or as to a party's classification of his injuries as temporary or permanent and approximation of the date of partial or complete recovery<sup>101</sup> have been held to be matters of opinion and unable to be discovered. Questions asking a party to state what acts of a defendant are complained of as patent infringements,<sup>102</sup> or whether a party contended that an adverse party was in default at any time that he was a tenant<sup>103</sup> have been held improper as asking for a legal contention or conclusion. Most of the opinions give no explanation for their decision, except the general proposition that the discovery process is meant solely to lead to the ascertainment of facts. On the other hand, courts have held inquiries proper in situations not

95 *Id.* at 18. The other dissenting justices were Black, Douglas and Murphy.

96 There has been a fear as to the propriety of imposing sanctions on non-parties who fail to submit to physical examinations. The proposed amendment does not provide for sanctions against non-parties, but only against those parties who fail in good faith to produce the non-parties for examination. See *Proposed Amendments* 266-67.

97 FED. R. CIV. P. 33.

98 C. WRIGHT, *supra* note 22, § 86, at 330.

99 *Moorman v. Simon*, 8 F.R.D. 328 (W.D. Mo. 1947).

100 *Wolf v. United Air Lines*, 9 F.R.D. 271 (M.D. Pa. 1949).

101 *Lowe v. Greyhound Corp.*, 25 F. Supp. 643 (D. Mass. 1938).

102 *Babcock & Wilcox Co. v. North Carolina Pulp Co.*, 25 F. Supp. 596 (D. Del. 1938).

103 *Caggiano v. Socony-Vacuum Oil Co.*, 27 F. Supp. 240 (D. Mass. 1939).

legally distinguishable from the above-mentioned decisions.<sup>104</sup> In a patent suit which allowed an answer to an interrogatory as to whether a drawing that formed part of the patent in suit correctly illustrated the fabric described and claimed as plaintiff's invention, the court stated:

Why should the plaintiff at this time refuse to say what he thinks about it or what he will contend? If both parties agree that it is incorrect, a long step towards simplification will have been taken. If they do not agree, then there will be testimony, expert and otherwise, upon that point at the trial and nothing will have been lost. The plaintiff's objections to answering this interrogatory seem to me to be the last word in technicality and entirely out of touch with the spirit of the new rules.<sup>105</sup>

With the opinion rule in evidence under formal attack,<sup>106</sup> it is apparent that there is an increasing recognition that the difference between fact and opinion or conclusion is a difference of degree rather than of kind. This has been recognized by many other courts which have held: that a factual opinion or contention can be discovered, but a legal theory cannot;<sup>107</sup> that interrogatories as to mixed conclusions of fact and law are valid;<sup>108</sup> and that the eliciting of conclusions as incidental to evidentiary facts is proper.<sup>109</sup> It is to solve the direct dilemma of conflicting decisions and the increasing liberality in the development of intermediate grounds such as "factual opinions" that the following amendment to Rule 33 is proposed:

*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 objectionable merely because an answer to the interrogatory involves an opinion, contention, or legal conclusion, but the court may order that such an interrogatory be answered at a later time, or after designated discovery has been completed, or at a pre-trial conference.*<sup>110</sup>

In allowing interrogatories to opinions, there can be no objection that these are now to be admissible in evidence, for the rule explicitly states otherwise. Nor should it be an objection that these should not be discovered because the purpose of discovery is the discovery of admissible evidence. Prior to the use of the language in Rule 26(b) that "[i]t 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,"<sup>111</sup> it was well recognized that the narrowing of the issues was also a main purpose of discovery.<sup>112</sup> As to contentions and legal conclusions, interrogatories to these can also be used in

104 For a listing of cases so holding, see 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 768 (Wright ed. 1961).

105 *Schwartz v. Howard Hosiery Co.*, 27 F. Supp. 443, 444 (E.D. Pa. 1939).

106 See MCCORMICK, *supra* note 34, at §§ 11-12.

107 *Zinsky v. New York Cent. R.R.*, 36 F.R.D. 680 (N.D. Ohio 1964).

108 *Bullard v. Universal Millwork Corp.*, 25 F.R.D. 342, 344 (E.D.N.Y. 1960).

109 *Banana Service Co. v. United Fruit Co.*, 15 F.R.D. 106, 109-10 (D. Mass. 1953).

110 *Proposed Amendments* 251-52.

111 Fed. R. Civ. P. 26(b).

112 For further discussion of this point, see MOORE § 33.17, at 2354-55.

narrowing and sharpening the issues. This fundamental purpose of discovery needs little more defense than mentioning that in federal jurisdiction the old theory of pleading is dead, replaced by liberality in pleadings. If a party wishes further information about the claim asserted against him it is well recognized that he is to use the elaborate discovery rules developed for him. To the extent that interrogatories are used to clarify the contentions of the parties, they are an adjunct to the pleadings, and parties are not held rigidly within the limits of their pleadings when a case comes to trial. Mention in the amendment is made of the pre-trial conference provided for in Rule 16, and that this is another useful device in the clarification and simplification of the issues before trial. Though the amendment will not allow the discretionary conference to carry the whole burden of discovering contentions and conclusions now that the theory of pleading has received its appropriate burial, provision is made for a delay of discovery if a dispute can best be resolved in the presence of a judge.

One fear in the old theory of pleading days was that a party, once having stated his case in the pleadings, became bound to what he had said. An argument has been made that the cases allowing interrogatories as to contentions have revived, under a different name, a particular pleading—the unlamented bill of particulars—which was abolished in 1948.<sup>113</sup> To this fear the commentaries have said that the general rule governing the use of answers to interrogatories is that under ordinary circumstances they do not limit proof. They cite the case of *McElroy v. United Air Lines, Inc.*,<sup>114</sup> which said that the parties should not be bound by these answers, if, in the interim between answering time and trial, they obtain by subsequent investigation new or additional facts. The parties will not be prevented from offering this further information at trial.<sup>115</sup> With this as a background, it should be clear to an interrogating party that he should not be entitled to rely on the unchanging character of the answers he receives, and that argument of imposing an “unchangeable theory” upon a party by using the discovery devices will not receive judicial approval.

## VI. Rule 36 — Requests for Admissions of Opinions

Present Rule 36(a) allows a party to serve upon any other party a written request for the admission of the genuineness of any relevant documents or the truth of any relevant matter of fact.<sup>116</sup> Its purpose is to expedite the trial by relieving the parties of the expense, both in time and in cost, of proving facts

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113 See James, *The Revival of Bills of Particulars Under the Federal Rules*, 71 HARV. L. REV. 1473, 1474 (1958) where the author stated:

The substance of what is sought is the same. These rulings do not call for facts as a witness would give them, from observation or knowledge, but for the contentions or claims of fact selected, combined and stated in terms of their legal consequences, as a pleader would set them forth. Contentions need not rest on a party's personal knowledge or observation, nor reflect the party's own selection or judgment. Indeed they will often represent instead the work product of his lawyer. Of just such stuff are bills of particulars made.

114 21 F.R.D. 100 (W.D. Mo. 1957). There the court emphasized that “[t]he discovery rules are not to be employed as a stratagem to maneuver an adverse party into an unfavorable position.” *Id.* at 102.

115 See *Committee's Notes* 254.

116 FED. R. CIV. P. 36(a).

which will not be disputed at trial. The existing requirement is that the matters to be admitted be "of fact." Though the question is perhaps not as broad as the discovery device of Rule 33, for there only information is sought and not a verification of the truth of something already apparent, there have been conflicts in the judicial decisions as to whether a request to admit matters of opinion and matters involving mixed law and fact is proper under the rule.<sup>117</sup> As to both categories, decisions can be found going either way, though the majority of courts seem to sustain objections as to admissions of mixed law and fact. For example, in *Minnesota Mining and Manufacturing Company v. Norton Company*,<sup>118</sup> a patent infringement action, the plaintiff sought to have the defendant admit to comments about an opinion which involved a legal conclusion as to a critical issue in the lawsuit. In denying this request, the court stated that "[t]he liberal limits of discovery under the Federal Rules have not wholly eliminated surprise, but have only eliminated unfair surprise."<sup>119</sup> Apart from the difficulty in separating the Rules' requirement of a fact from an opinion or legal conclusion, there is a more positive reason for allowing admissions of this latter nature. Though a matter of opinion may facilitate proof, even more significant is the fact that admissions of matter involving law as well as fact may clearly narrow the issues in any litigation. The commentaries mention a good case in point<sup>120</sup> that involved an action against a general contractor and others for damages for the death of a subcontractor's employee on a construction site. On the eve of trial, the plaintiff affirmatively answered a request for an admission of a defendant to the effect that "[a]t the time of the accident in suit, the premises on which said accident occurred were occupied or under the control of defendant John McShain, Inc."<sup>121</sup> The plaintiff had originally denied this request by an answer filed more than a year before. This admission involving law as well as fact thus removed one of the issues from the lawsuit, and thereby reduced the proof required at trial.<sup>122</sup>

In order to avoid considerable litigation, comment, and frustration, the proposed amendment broadens the scope of admissions under Rule 36 as follows:

*A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request, including the genuineness of any documents described in the request.*<sup>123</sup>

This recognizes that the nice distinctions between facts and conclusions are un-

117 As to opinions, compare, e.g. *Jackson Buff Corp. v. Marcelle*, 20 F.R.D. 139 (E.D.N.Y. 1957), with, e.g., *Photon, Inc. v. Harris Intertype, Inc.*, 28 F.R.D. 327 (D. Mass. 1961). In the latter decision, the court discarded some requests as opinions and held another group answerable, citing the approach of Professor Moore: "Where the borderline of fact and opinion is shadowy . . . the preferable course would be to hold that the request requires an answer." . . . *Id.* at 328, quoting from § 36.04, at 2713.

118 36 F.R.D. 1 (N.D. Ohio 1964).

119 *Id.* at 3.

120 *McSparran v. Hannigan*, 225 F. Supp 628 (E.D. Pa. 1963).

121 *Id.* at 636.

122 This admission was conclusive as to McShain's liability, for once control of the premises was established, he was to be designated a statutory employer and thus immune from common law claims for negligence. *Id.* at 635.

123 *Proposed Amendments* 260.

workable and unjustified, and that certain inquiries beyond simple facts can serve the judicial process by pinpointing issues as well as by saving time and money. Under court supervision, no longer will it be necessary to indulge in the fantasies of separating law from fact. The only requirement for an admission will be that it be relevant to the subject matter of the pending action.<sup>124</sup>

## VII. Conclusion

A fundamental purpose of the discovery provisions of the Federal Rules of Civil Procedure has been to reduce the "sporting element" of litigation. It is evident that the broader expansion of the scope of discovery through the proposed amendments is in keeping with this purpose. Discovery of insurance policy limits, allowing interrogatories and admissions to proceed beyond mere facts, eliminating the strict requirement of good cause for discovery of another party's documents (and distinguishing these from trial preparation materials), and providing access to an adversary's expert witnesses, will reinforce this fundamental purpose. Still, the fact that these changes will further eliminate the guessing game will be more a result of their approval than a reason for it.

Substantive reasons for acceptance of the amendments, however, also exist. First, the suggestions discussed and analyzed in this Note are not wholly new and unforeseen changes in the scope of pre-trial discovery. The amendments, as can readily be seen, have their origin in the case law. The positions taken have been presented and accepted by district courts throughout the federal system. Yet for every decision used as authority for the amendments' positions, there is a decision on the books which would support a different, or even contrary, position. It is in this dilemma that there lies a second reason for their acceptance: clarification of the existing decisions. It is undisputed that uniformity in procedure should be the goal of the federal judicial system. This is essential both for the betterment of the system itself, and for the litigants who seek justice within it. No party should be provided a procedural right in one federal court and denied the same right in another. No litigant should be left in the dark as to the procedural aspects of his lawsuit, with the result that procedural disputes turn into costly and alarming controversies themselves.

But to savor amendment for the clarification it brings cannot be the ultimate reason for approval of these particular amendments. The final and conclusive basis for urging approval must come from the merit of the positions taken in the provisions themselves. The only remedy for positions without merit — if such be the case — is for the Advisory Committee to return to their drafting boards and try again. Yet it is the feeling of this author that these amendments cannot be assailed for the positions taken. The tests for merit must be the measures of fairness, justice, and efficiency, and these have been the standards that have guided the Advisory Committee. Difficulty in making distinctions between facts and opinions and conclusions prompts the expansion of interrogatories and admissions beyond mere inquiries as to facts. Usefulness of blood tests and of physical examinations of non-parties in certain instances necessitates a change in

124 See *Committee's Notes* 262.

Rule 35. The same holds true for discovery of insurance policies. Elimination of any showing of a requirement beyond relevancy to the subject matter for production of a party's documents is matched by the proposed incorporation of the *Hickman v. Taylor* doctrine into the Rules themselves, and by an extension of that doctrine to trial preparation materials formulated by non-attorneys. Here, as with the provision on discovery of an expert's information, a balance has been struck between the desire for openness and the justice owed a paying, working party. Justice, too, has been a matter of degree. The amendments provide for a very limited discovery of an expert's information, but for a broader discovery of an expert's identity and subject matter when he is also to be a witness. Safeguards then, in the name of justice and fairness to litigants, are provided not only in a position allowing or not allowing discovery, but also in protective devices within these positions.

In the end, each member of the bench and practicing bar must familiarize himself with the present provisions and existing case law, the proposed amendments offered, and the changes and/or improvements each has made. It is to this familiarization that this Note has ultimately been directed. At the outset, initial praise was offered for the amendments as meaningful elements of clarification. It is only after a thorough analysis that this author urges final praise in the form of approval, acceptance and implementation.

*James E. Mackin*