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# Civil Procedure -- Deposition and Discovery -- Availability of Adversary's File Under the Federal Rules of Civil Procedure

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NOTES AND COMMENTS

Civil Procedure—Deposition and Discovery—Availability of  
Adversary's File Under the Federal Rules of  
Civil Procedure

Is the material gathered by an attorney in anticipation of or in preparation for trial a proper subject of discovery under the Federal Rules of Civil Procedure?<sup>1</sup> Since the Federal Rules were promulgated, the answers to this question have been plentiful and greatly diverse. By result, of course, they fall into two groups: (1) discovery denied, (2) discovery allowed.

<sup>1</sup> 28 U. S. C. A. following §723c.

Three reasons have been advanced for denying discovery: (1) The material sought would be only "hearsay" and not admissible in evidence.<sup>2</sup> (2) Allowing discovery would penalize careful and thorough preparation and put a premium on laziness.<sup>3</sup> (3) The material gathered by an attorney in preparation for trial is privileged and, therefore, excluded from discovery.<sup>4</sup> The second and third reasons overlap. To avoid expanding "privilege," it seems that some courts adopted the second reason.

The courts allowing discovery have rejected each of these reasons at one time or another. The admissibility in evidence as a test has been completely rejected.<sup>5</sup> To place the issue beyond question, the Supreme Court has approved<sup>6</sup> a proposed amendment to Rule 26(b) which reads: "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."

Though considerable weight has been given to the argument that to allow discovery would be unfair, penalize the diligent, and put a premium on laziness,<sup>7</sup> it has been ably pointed out that the public interest in having *all* the facts of cases ascertained by the court outweighs this argument.<sup>8</sup> It would seem that this squarely answers the argument with

<sup>2</sup> *In re* Citizens Casualty Co. of New York, 3 F. R. D. 171 (S. D. N. Y. 1942); *Matthies v. Peter F. Connolly Co.*, 2 F. R. D. 277 (E. D. N. Y. 1941); *Maryland, for Use of Montvila, v. Pan-American Bus Lines*, 1 F. R. D. 213 (D. Md. 1940); *Poppino v. Jones Store Co.*, 1 F. R. D. 215 (W. D. Mo. 1940); *Rose Silk Mills, Inc. v. Insurance Co. of North America*, 29 F. Supp. 504 (S. D. N. Y. 1939); *Kenealy v. Texas Co.*, 29 F. Supp. 502 (S. D. N. Y. 1939); *Sonken-Galamba Corp. et al. v. Atchison, T. & S. F. Ry. et al.*, 30 F. Supp. 936 (W. D. Mo. 1939); *Slydell v. Capital Transit Co.*, 1 F. R. D. 15 (D. C. 1939).

<sup>3</sup> *Sano Petroleum Co. v. Shell Oil Co.*, 3 F. R. D. 467 (E. D. N. Y. 1944); *Stark v. American Dredging Co.*, 3 F. R. D. 300 (E. D. Pa. 1943); *Courteau v. Interlake S. S. Co. et al.*, 1 F. R. D. 525 (W. D. Mich. 1941); *Stern et al. v. Exposition Greyhound*, 1 F. R. D. 696 (E. D. N. Y. 1941); *Conneway v. City of New York*, 32 F. Supp. 54 (E. D. N. Y. 1940); *McCarthy v. Palmer et al.*, 29 F. Supp. 585 (S. D. N. Y. 1939); *Murphy v. New York & Porto Rico S. S. Co.*, 27 F. Supp. 878 (S. D. N. Y. 1939).

<sup>4</sup> *Walling v. J. Friedman & Co. et al.*, 4 F. R. D. 384 (S. D. N. Y. 1944); *Sano Petroleum Corp. v. Shell Oil Co.*, 3 F. R. D. 467 (E. D. N. Y. 1944); *Byers Theaters, Inc. v. Murphy*, 1 F. R. D. 286 (W. D. Va. 1940); *see Colpak et al. v. Hetherick et al.*, 40 F. Supp. 350 (E. D. N. Y. 1941).

<sup>5</sup> *Hercules Powder Co. v. Rohm & Haas Co.*, 3 F. R. D. 302 (D. Del. 1943); *Blank v. Great Northern Ry.*, 4 F. R. D. 213 (D. Minn. 1943); *Hoffman v. Palmer et al.*, 129 F. (2d) 976 (C. C. A. 2d, 1942); *Mackerer v. New York Cent. R. R.*, 1 F. R. D. 408 (E. D. N. Y. 1940).

<sup>6</sup> Pursuant to 28 U. S. C. A. §723c, the proposed amendments were approved by the Supreme Court and transmitted to the Attorney General who reported them to Congress at the beginning of the 80th regular session. By Rule 86 these amendments will become effective on the day which is three months subsequent to the adjournment of the first regular session, but, if that day is prior to September 1, 1947, then these amendments will become effective on September 1, 1947. Amendments to Federal Rules of Civil Procedure, 6 F. R. D. 229, 249, 91 L. ed. 380, 391 (1947).

<sup>7</sup> 2 MOORE'S FEDERAL PRACTICE (1946 Cum. Supp.) §26.12, p. 162.

<sup>8</sup> *Hoffman v. Palmer et al.*, 129 F. (2d) 976 (C. C. A. 2d, 1942); *Seligson v. Camp Westover*, 1 F. R. D. 738 (S. D. N. Y. 1941).

the exception of the expense involved in the preparation for trial. The proposed amendment to Rule 30(b) would add expense as a basis for a court order protecting the parties or deponents.<sup>9</sup> The Supreme Court did not accept this amendment, but it would seem that protection from expense may be included within a liberal interpretation of "oppression" as now provided in Rule 30(b).

On the matter of privilege some distinctions have been drawn between agents of insurance companies and attorneys. The argument of privilege has been rejected as to insurance investigators,<sup>10</sup> even though the results of the investigation have been turned over to an attorney.<sup>11</sup> Some courts have restricted privilege to its evidential meaning and have allowed examination of an adversary's file.<sup>12</sup> It has been held generally that reports made in the regular course of business are subject to discovery.<sup>13</sup>

Against this background of inconsistent, diverse, and confusing answers to this important question, the recent case of *Hickman v. Taylor et al.*<sup>14</sup> becomes very significant. This was an action for death of plaintiff's decedent. The death occurred from drowning after the sinking of defendants' tug under unusual circumstances. The plaintiff served interrogatories on the tug owners and asked in the thirty-eighth interrogatory that the statements of all crew members be attached, or, if oral, be set forth in detail. Defendants and defendants' counsel refused to answer said thirty-eighth interrogatory. The District Court for the Eastern District of Pennsylvania, sitting *en banc*, found the question proper and ordered both the defendant tug owners and their counsel Mr. Fortenbaugh to answer said interrogatory and to "produce all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel and agent for Defendants; state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh's memoranda containing

<sup>9</sup> Advisory Committee Report of Proposed Amendments to Rules of Civil Procedure, June 1946 (Government Printing Office, Washington: 1946), p. 39, 5 F. R. D. 433, 456 (1946).

<sup>10</sup> *Kulich v. Murray et al.*, 28 F. Supp. 675 (S. D. N. Y. 1939); *Bough et al. v. Lee et al.*, 28 F. Supp. 673 (S. D. N. Y. 1938).

<sup>11</sup> *Blank v. Great Northern Ry.*, 4 F. R. D. 213 (D. Minn. 1943); *Colpak et al. v. Hetterick et al.*, 40 F. Supp. 350 (E. D. N. Y. 1941); *Price v. Levitt et al.*, 29 F. Supp. 164 (E. D. N. Y. 1939); *Bough et al. v. Lee et al.*, 29 F. Supp. 498 (S. D. N. Y. 1939).

<sup>12</sup> *Leach v. Greif Bros. Cooperage Corp.*, 2 F. R. D. 444 (S. D. Miss. 1942); *Kane v. News Syndicate Co., Inc. et al.*, 1 F. R. D. 738 (S. D. N. Y. 1941).

<sup>13</sup> *Thiel v. Southern Pac. Co.*, 6 F. R. D. 219 (N. D. Cal. 1946); *Dowd v. American S. S. Co.*, 5 F. R. D. 240 (W. D. N. Y. 1945); *Eiseman v. Pennsylvania R. R.*, 3 F. R. D. 338 (E. D. Pa. 1944); *Stark v. American Dredging Co.*, 3 F. R. D. 300 (E. D. Pa. 1943); *Kane v. News Syndicate Co., Inc. et al.*, 1 F. R. D. 738 (S. D. N. Y. 1941).

<sup>14</sup> — U. S. —, 67 Sup. Ct. 385, 91 L. ed. 330 (1947).

statements of fact by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to Plaintiff."<sup>15</sup> Upon refusal, the defendants and defendants' counsel were adjudged in contempt.<sup>16</sup> The Circuit Court of Appeals for the Third Circuit, also sitting *en banc*, found the material sought to be privileged and reversed the judgment of contempt.<sup>17</sup> It should be noted, however, that the court expressly rejected the argument that to allow discovery would be unfair and would penalize the diligent and put a premium on laziness.<sup>18</sup> The importance of the problem and the great diversity of views among the district courts led to a grant of *certiorari*.<sup>19</sup>

Though the proper procedure was not followed by the plaintiff,<sup>20</sup> the court recognized that the rules create integral procedural devices and took up the question on its merits. The reversal of the district court was unanimously affirmed, but not on the basis of privilege. While the scope is not delineated, the court expressly excludes from privilege information an attorney secures from witnesses, memoranda, briefs, or other writings prepared by counsel for his own use in prosecuting his client's case, and writings which reflect an attorney's mental impressions, conclusions, opinions, or legal theories.<sup>21</sup>

The basis of the court's decision is that no party as a matter of right can have discovery of the files and mental impressions of the opposing party's counsel. Relevant and non-privileged facts are not to remain hidden in counsel's files, but to inquire into them it must be shown that denial of such production would unduly prejudice the preparation of petitioner's case or cause him hardship or injustice. The problem is to balance the two extremes—the degree of privacy essential to the effective work of a lawyer, and the reasonable and necessary inquiries supported by public policy.

This problem has been a source of great controversy among the members of the bar. The Advisory Committee on Rules for Civil Procedure recognized the unsatisfactory state of the district court decisions. After leaving the matter entirely at the discretion of the court in the

<sup>15</sup> *Id.* at —, 67 Sup. Ct. at 388, 91 L. ed. at 333.

<sup>16</sup> *Hickman v. Taylor et al.*, 4 F. R. D. 479 (1945).

<sup>17</sup> *Hickman v. Taylor et al.*, 153 F. (2d) 212 (1945).

<sup>18</sup> "Nor do we balk at the notion that the hare may by discovery avail himself of the diligence of the tortoise." *Id.* at 219.

<sup>19</sup> *Cert. denied*, — U. S. —, 66 Sup. Ct. 961, 90 L. ed. 848 (1946), *but granted on rehearing*, — U. S. —, 66 Sup. Ct. 1337, 90 L. ed. 1068 (1946).

<sup>20</sup> Petitioner thought that he was proceeding under Rule 33. The district court based its order on both Rules 33 and 34. The circuit court of appeals found that Rule 26 was the principal rule involved, though it recognized that Rule 33 was involved as far as the defendants were concerned. The Supreme Court states that the proper procedure would be to take the defendants' attorney's deposition under Rule 26 and to attempt to force production of the material by a subpoena *duces tecum* under Rule 45.

<sup>21</sup> — U. S. —, —, 67 Sup. Ct. 385, 392, 91 L. ed. 330, 337 (1947).

preliminary draft,<sup>22</sup> the committee submitted the following proposed amendment to the Supreme Court:

"The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert."<sup>23</sup>

After spirited debate, both the Assembly and the House of Delegates of the American Bar Association in convention at Atlantic City voted their opposition to this amendment as proposed.<sup>24</sup> The committee on the Bill of Rights of the Association filed a brief *amicus curiae* upholding the decision of the circuit court of appeals.<sup>25</sup> The brief requested the court not to act on the proposed amendment until the bar as a whole had an opportunity to reach a more satisfactory solution.

The Supreme Court did not promulgate the proposed amendment to Rule 30(b). They found the amendment unnecessary. In the majority opinion Mr. Justice Murphy said:

"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 system of 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.

"Rule 30(b), as presently written, gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to written statements of witnesses."<sup>26</sup>

The court feels that forcing the production of oral statements made to an attorney would greatly lower the standards of the profession.

In a concurring opinion Mr. Justice Jackson points out that even though a literal interpretation of the rules would permit the result reached by the district court, all the history of discovery would deny this result. "Certainly nothing in the tradition or practice of discovery

<sup>22</sup> Armstrong, *Advisory Committee Recommendations*, 66 F. Supp. Advance Sheet No. 3, Sept. 2, 1946, XIX at XXXV.

<sup>23</sup> Committee report, cited *supra* note 9; also *id.* at XXXVI.

<sup>24</sup> (1947) 33 A. B. A. J. 149.

<sup>25</sup> (1946) 32 A. B. A. J. 882.

<sup>26</sup> — U. S. —, —, 67 Sup. Ct. 385, 394, 91 L. ed. 330, 339 (1947).

up to the time of these Rules would have suggested that they would authorize such a practice as here proposed."<sup>27</sup>

A strong argument has been made for amending Rule 30(b) to the effect that no court shall order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation or litigation or in preparation for trial.<sup>28</sup> Such an amendment would seem to provide a means of hiding relevant and non-privileged facts in the investigator's file. This result would clearly defeat the purpose of a judicial trial. The attorney held in contempt in the *Hickman* case has suggested that the court should distinguish between the objective facts and the subjective facts.<sup>29</sup> The objective facts should be produced no matter where they may be found. The subjective facts represent the work of counsel on the objective facts—the so-called "work product of a lawyer," and should be protected from discovery.

The general objection raised to leaving the matter within the discretion of the trial judge is that under the pressure of an overloaded docket of motions and trials the court will tend to establish a set rule and allow all discovery motions or deny all of them.<sup>30</sup> This objection hardly seems sound. Since the promulgation of the Rules, a showing of "good cause" has been required for a production of original documents under Rule 34. Any attempt to avoid the exercise of the discretion of the trial judge may very well be an attempt to restrict justice by eliminating the consideration of the facts peculiar to each case.

The question is not yet settled. In summary, the present situation may be described as follows:

1. By the proposed amendment to Rule 26(b) the argument that the matter sought by deposition is not admissible in evidence is no longer a valid reason for denying discovery.<sup>31</sup>

2. By the Supreme Court's decision in the *Hickman* case the plea of privilege is clearly restricted to privilege as the term applies in evidence.

3. The privacy essential to the effective work of an attorney makes it necessary for a party to show "good cause" before discovery of an adversary's file will be permitted.

"Good cause" will undoubtedly vary with the presiding judge. Like "due process," it may be best to define "good cause" only "by the grad-

<sup>27</sup> *Id.* at —, 67 Sup. Ct. at 397, 91 L. ed. at 343 (1947).

<sup>28</sup> *Discovery Procedure Symposium*, 5 F. R. D. 403 *et seq.*

<sup>29</sup> *Id.* at 410.

<sup>30</sup> *Id.* at 415; 2 MOORE'S FEDERAL PRACTICE (1946 Cum. Supp.) §26.12, p. 164.

<sup>31</sup> By the proposed amendments which have been approved by the Supreme Court and submitted to Congress the scope of the examination under Rule 26(b) and the protection of the parties under Rule 30(d) are made applicable to Rules 33 and 34.

ual process of judicial inclusion and exclusion, as the cases presented for decision may require."<sup>32</sup> In the *Hickman* case the court has by dictum included a situation where the witnesses are no longer available or can be reached only with difficulty,<sup>33</sup> and by inference it has excluded a situation where all of the witnesses are employees of the opposing party. Whether or not in a specific case an attorney will be forced to reveal his files is at the present writing unknown. If the court finds "good cause" the Supreme Court's answer apparently is "yes"; if no "good cause" is found, the answer is "no."

The result would seem to be that a district judge may find "good cause," a circuit court of appeals may find no "good cause" and the ultimate decision will rest with the Supreme Court as to whether or not "good cause" exists. While such a situation may be undesirable, it would seem to be unavoidable, if the sanctity of an attorney's files is to be invaded or not depending on the existence of "good cause."

WILLIAM A. DEES, JR.

#### Civil Procedure—Service of Process—Suability of Unincorporated Associations in North Carolina

North Carolina has consistently followed the common law rule that, in the absence of an enabling statute, an unincorporated association has no capacity to sue or to be sued in its common name; for the reason that, in the absence of statutes recognizing it, such association has no legal entity apart from that of its members.<sup>1</sup>

In 1943, the General Assembly of North Carolina, by amendment to G. S. 1-97, added subsection (6), which provides, in part: "Any unincorporated association or organization, whether resident or nonresident, desiring to do business in this state by performing any of the acts for which it was formed, shall . . . appoint an agent in this state upon whom all processes and precepts may be served. . . . If said unincorporated association or organization shall fail to appoint the process agent pursuant to this subsection, all precepts and processes may be served upon the secretary of state of North Carolina. . . . Service upon the process agent appointed pursuant to this subsection . . . shall be legal and binding on said association . . . and any judgment recovered in any action . . .

<sup>32</sup> Mr. Justice Miller in *Davidson v. New Orleans*, 96 U. S. 97, 104 (1877).

<sup>33</sup> *Hickman v. Taylor et al.*, — U. S. —, —, 67 Sup. Ct. 385, 394, 91 L. ed. 330, 339 (1947).

<sup>1</sup> *Hallman v. The Wood, Wire and Metal Lathers' International Union et al.*, 219 N. C. 798, 15 S. E. (2d) 723 (1941); *Citizens' Co. v. Typographical Union*, 187 N. C. 42, 121 S. E. 31 (1924); *Tucker v. Eatough*, 186 N. C. 505, 120 S. E. 57 (1923) noted (1932), 10 N. C. L. Rev. 313; *Kerr v. Hicks*, 154 N. C. 265, 70 S. E. 468 (1911); *Nelson v. Relief Department*, 147 N. C. 103, 60 S. E. 724 (1908); *but see Winchester v. Brotherhood of R. R. Trainmen*, 203 N. C. 735, 167 S. E. 49 (1932).