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## DISCOVERY AND EXPERTS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

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The problem of delineating the boundaries of discovery under Rules 26-37 of the Federal Rules of Civil Procedure is constant, for the language of limitation in the rules themselves remains vague. The discretionary nature of these rules suggests determination of each case on its own record.<sup>1</sup> The burden so imposed on district judges and the lack of definite standards in the rules themselves governing the exercise of discretion have undoubtedly contributed to the adoption by many judges of rather inflexible ancillary rules for the application of discovery in questionable areas.<sup>2</sup> One of these areas concerns the extent to which expert witnesses<sup>3</sup> are subject to the discovery rules.<sup>4</sup>

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<sup>1</sup> Judge Kirkpatrick in *United States v. Kohler Co.*, 9 F.R.D. 289 (E.D. Pa. 1949) said at 291:

There is nothing mandatory about the discovery provisions of the Rules. On the contrary, the purpose and intent is evident throughout to leave their application to the discretion of the trial court—not, of course, an absolute discretion but one controlled and governed, not only by statutory enactments and the well established rules of the common law, but also by considerations of policy and of necessity, propriety and expediency in the particular case at hand.

<sup>2</sup> *Armstrong, Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments*, 5 F.R.D. 339, 354-5 (1946). Cf. *Leszynski v. Russ*, 29 F.R.D. 10 (D. Md. 1961).

<sup>3</sup> For present purposes, an expert may be defined as one who, by study, training, or experience in a particular subject or in a particular field, has acquired a knowledge and an ability to deduce conclusions in regard to matters connected therewith which are not generally possessed. 2 WIGMORE, *EVIDENCE* § 557 (3rd ed. 1940); 7 *id.*, § 1923; 20 *AM. JUR. EVIDENCE* § 783 (1938).

The nature of the expert information sought in the cases considered was chemical, medical, appraisal, engineering and accounting. Although the distinction is of questionable significance, the experts involved had professional experience, *i.e.*, something more than minimum qualifications.

<sup>4</sup> This question is generally considered as part of the larger problem of the limits of discovery into matters of trial preparation which has been a matter of controversy since the rules were adopted. See authority cited note 2 *supra*. *Taine, Discovery of Trial Preparations in the Federal Courts*, 50 *COLUM. L. REV.* 1026, 1026 (1950) states, "The question of the extent to which discovery of the trial preparations of an adverse party is to be permitted in federal court litigation has been one of the most vexing problems with which the courts have been confronted since the enactment in 1938 of the Federal Rules of Civil Procedure."

As a general proposition, the federal courts have seldom held that the discovery rules applied to experts or have confined such application of these rules to extremely narrow areas of expert information.<sup>5</sup> The bases for such decisions are found outside the rules themselves and proceed either from considerations prompted by the interference such discovery may cause with trial preparation or by the view that discovery extends only to facts.

It is submitted that neither of the above bases nor those corollary to them can withstand close scrutiny. Discovery was intended, among other purposes, as an issue formulation mechanism. It can not effectively perform this function if pre-trial mutual knowledge is not extended beyond facts at least to opinions and the support for such opinions which will be offered as evidence. Moreover, although the possibility of unreasonable interference with trial preparation may exist in the application of discovery to expert information, such possibility can usually be eliminated by delaying such discovery until all parties have obtained expert assistance and by imposing conditions or limitations upon it.

#### GENERAL OBSERVATIONS

Implicit in the discovery rules<sup>6</sup> is the principle that mutual knowledge of all relevant evidence and issues prior to trial<sup>7</sup> is essential to the just, speedy and inexpensive disposition of litigation,<sup>8</sup> unless such knowledge is sought in bad faith<sup>9</sup> or its acquisition unduly annoys, embarrasses or oppresses a party or witness.<sup>10</sup> The rules presuppose<sup>11</sup> that such knowledge affords the opportunity to intelligently evaluate a case for settlement and to agree on matters not in dispute, thereby disposing of a controversy without trial or shortening a trial so that

<sup>5</sup> See Winner, *Procedural Methods to Attain Discovery*, 28 F.R.D. 97, 101-03 (1962).

<sup>6</sup> FED. R. CIV. P. 26-37.

<sup>7</sup> *Hickman v. Taylor*, 329 U.S. 495 (1947).

<sup>8</sup> FED. R. CIV. P. 1 charges that the rules "... shall be construed to secure the just, speedy and inexpensive determination of every action."

<sup>9</sup> FED. R. CIV. P. 30(d).

<sup>10</sup> *Id.* 30(b) and (d).

<sup>11</sup> Empirical statistics do not exist to show that litigants prior to the adoption of the Federal Rules of Civil Procedure or in those jurisdictions which have no discovery or limited discovery suffer by fewer settlements, longer trials, or the more frequent prevalence of falsity, nor can conclusive data be assembled to demonstrate that broad discovery increases settlements, shortens trials, or enhances the likelihood that truth rather than falsity will prevail. See *Hoffman v. Palmer*, 129 F.2d 976, 997 (2d Cir. 1942) *aff'd* 318 U.S. 109 (1943). Moore, however, has stated, "[I]t cannot be doubted that the full and equal mutual discovery in advance of trial provided for by the Rules has increased the efficiency of the administration of justice in federal courts." 4 MOORE, FEDERAL PRACTICE ¶ 26.02 (2d ed. 1950).

only the real issues are litigated; for protection against unfair surprise, because discovery is considered the means to detect and expose false claims, defenses, and evidence and to record testimony while memory is fresh and preserve it in the event a witness dies or leaves the jurisdiction, thereby minimizing the injustice inherent in delay of trial.<sup>12</sup>

Discovery extends to any person<sup>13</sup> and any matter not privileged which is relevant to the subject matter involved in litigation, whether or not the disclosure would be admissible at trial, so long as the disclosure sought appears reasonably calculated to lead to the discovery of admissible evidence.<sup>14</sup> The court has the power, upon good cause shown, to make any order which justice requires to protect a party or witness from annoyance, embarrassment or oppression.<sup>15</sup> During the taking of a deposition, the court may terminate examination or limit its scope upon a showing that it is being conducted in bad faith.<sup>16</sup> Conversely, if a deponent refuses to answer any question propounded on oral examination, a motion may be made to compel an answer.<sup>17</sup>

The principal phrases of limitation upon discovery are, "relevant to the subject matter involved in litigation,"<sup>18</sup> "reasonably calculated to lead to the discovery of admissible evidence,"<sup>19</sup> "bad faith,"<sup>20</sup> "unreasonably to annoy, embarrass or oppress,"<sup>21</sup> and "good cause."<sup>22</sup> These are broad and vague, without definition in the rules nor adequately defined in the cases. By their very nature, they are perhaps indefinable.<sup>23</sup> The problems presented in giving meaning to these terms require a pragmatic exercise of discretion without yielding to a doc-

<sup>12</sup> See 6 WIGMORE, *op. cit. supra* note 3, §§ 1845-63 and 4 MOORE, *op. cit. supra* note 11, ¶ 26.02.

<sup>13</sup> FED. R. CIV. P. 26(a).

<sup>14</sup> FED. R. CIV. P. 26(b).

This provision governs not only the scope of depositions upon oral examination and written interrogatories under rules 30 and 31, but also the scope of interrogatories to parties under rule 33 and the scope of discovery and production of documents . . . under rule 34. 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 646 (1951).

<sup>15</sup> FED. R. CIV. P. 30(b).

<sup>16</sup> FED. R. CIV. P. 30(d).

<sup>17</sup> FED. R. CIV. P. 37(a).

<sup>18</sup> FED. R. CIV. P. 26(b).

<sup>19</sup> *Ibid.*

<sup>20</sup> FED. R. CIV. P. 30(d).

<sup>21</sup> *Ibid.*

<sup>22</sup> FED. R. CIV. P. 30(b), 34.

<sup>23</sup> "What constitutes 'good cause' under Rule 34 necessarily turns on the facts and circumstances of each particular case, and in the last analysis rests within the sound discretion of the trial court." Harlan, J., dissenting in *United States v. Proctor and Gamble*, 356 U.S. 677, 686 (1958).

Compare Judge Layton's opinion in *E. I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 23 F.R.D. 237 (D. Del. 1959), with Judge Kirkpatrick's opinion upon reconsideration of the same case. 24 F.R.D. 416 (D. Del. 1959). See also *United Air Lines, Inc. v. United States*, 26 F.R.D. 213 (D. Del. 1960).

trinaire absolutism permitting unrestrained discovery in every instance or to a formalism denying discovery on technical grounds or on the basis of a priori principles which make discovery an empty gesture. Appellate courts cannot instill much stability and certainty, for application of these rules has been left to each district judge's discretion.<sup>24</sup> Adequate power, however, to effect mutual prior disclosure of evidence and examination of issues in good faith and to cope with attempted abuses of discovery which may result in annoyance, embarrassment or oppression to a party or witness, is lodged with the district judges.<sup>25</sup>

The rules make a clear distinction between the right to discovery and the right to use information discovered at trial.<sup>26</sup> The burden<sup>27</sup> therefore rests upon the one seeking to prevent disclosure to satisfy the court that there is ground for so doing,<sup>28</sup>—except when examination of documents is sought, where the burden is then upon the party seeking such discovery to show good cause for an intrusion into private files and records.<sup>29</sup> Discovery is much broader in its scope than examination permitted at trial.<sup>30</sup> This was a major change from prior discovery practice.<sup>31</sup> The present rules remove restrictions upon taking

<sup>24</sup> When a discovery issue does reach an appellate court, it concerns whether the trial court's action was an abuse of discretion, not the appropriateness of the order. *Tiedman v. American Pigment Corporation*, 253 F.2d 803, 808 (4th Cir. 1958); *Bank of America National Trust and Savings Association v. Hayden*, 231 F.2d 595 (9th Cir. 1956). Cf. *Clery Bros. v. Christie Scow Corp.*, 176 F.2d 370 (2d Cir. 1949). In *United States v. Proctor and Gamble*, 356 U.S. 677, 681 (1958), however, Mr. Justice Douglas stated, "On the merits we have concluded that 'good cause,' as used in Rule 34, was not established" where appellees sought a transcript of grand jury proceedings. The dissent by Mr. Justice Harlan, joined in by Justices Frankfurter and Burton, pointed out at 685, "The Court reverses the judgment below without so much as adverting to what seems to me the real and only question in the case: Did the district court *abuse its discretion* by ordering the government to furnish the appellees with the transcript of the grand jury proceedings?"

<sup>25</sup> 4 MOORE, *op. cit. supra* note 11.

<sup>26</sup> 3 BARRON & HOLTZOFF, *op. cit. supra* note 14, § 295. See Pike & Willis, *The New Federal Deposition-Discovery Procedure*, 38 COLUM. L. REV. 1179 (1938).

<sup>27</sup> In *United Air Lines, Inc. v. United States*, 26 F.R.D. 213 (D. Del. 1960), Wright, C. J., said at 217:

The court's decision... ultimately is no more than a comparative evaluation of competing claims of need and prejudice. But to inject notions of burden of persuasion into an analysis of such a subjective nature is to create a disparity in legal standards between 26 and 34, a result contrary to the language and philosophy of the discovery rules.

<sup>28</sup> See authorities cited note 26 *supra*. See also *Teller v. Montgomery Ward*, 27 F. Supp. 938 (E.D. Pa. 1939).

<sup>29</sup> "Examination into a person's files and records... must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task." *Hickman v. Taylor*, 329 U.S. 495, 497 (1947).

<sup>30</sup> *State of Md. ex. rel. Montvila v. Pan American Bus Lines, Inc.*, 1 F.R.D. 213 (D. Md. 1940).

<sup>31</sup> 4 MOORE, *op. cit. supra* note 11, ¶26.03; 2 BARRON & HOLTZOFF, *op. cit. supra* note 14, § 641.

depositions and discovery generally, but retain restrictions upon use during trial of information discovered.<sup>32</sup>

Although the discovery rules provide an integrated procedural device,<sup>33</sup> decisions under one rule are not necessarily applicable to proceedings under another, and failure to proceed under one rule rather than another may be important or decisive.<sup>34</sup> However, the cases dealing with experts and discovery, other than those concerned principally with the question of good cause when experts' reports were sought, have been decided without regard to the procedural device utilized. The issue in the cases dealing with experts has been tendered to the courts in a number of different procedural ways, *e.g.*, motion for production of an expert's report under rule 34;<sup>35</sup> objections to interrogatories under rule 33;<sup>36</sup> motion to vacate notice of taking an expert's deposition with<sup>37</sup> and without<sup>38</sup> a motion to quash a subpoena duces tecum issued under rule 45 requiring production of an expert's report; motion to limit examination under rule 30(b);<sup>39</sup> motion to terminate examination under rule 30(d);<sup>40</sup> and motion under rule 37 to compel answers on oral deposition.<sup>41</sup>

Since the rules themselves place no limitation of general application upon discovery beyond the requirement of relevancy and the restriction

<sup>32</sup> See authority cited *supra* note 31.

<sup>33</sup> *Hawaiian Airlines v. Trans-Pacific Airlines*, 8 F.R.D. 449, 451 (D. Hawaii 1949).

<sup>34</sup> *Cf. Hickman v. Taylor*, 329 U.S. 495, 505-506 (1947).

<sup>35</sup> *E.g.*, *United States v. Five Cases*, 179 F.2d 519 (2d Cir. 1950); *United States v. 900.57 Acres*, 30 F.R.D. 512 (W.D. Ark. 1962); *United Air Lines, Inc. v. United States*, 26 F.R.D. 213 (D. Del. 1960); *United States v. Certain Parcels of Land*, 25 F.R.D. 192 (N.D. Cal. 1959).

The same requirements are applied where documents are sought under rule 34 and where a subpoena duces tecum is issued under rule 45 to compel the production of documents on taking an oral deposition under rule 26. *Continental Distilling Co. v. Humphrey*, 17 F.R.D. 237 (D.D.C. 1955).

<sup>36</sup> *E.g.*, *United States v. Nysco Laboratories, Inc.*, 26 F.R.D. 159 (E.D.N.Y. 1960); *E. I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del. 1959); *American Oil Co. v. Pennsylvania Petroleum Products Co.*, 23 F.R.D. 680 (D.R.I. 1959).

<sup>37</sup> *E.g.*, *United States v. 6.82 Acres of Land, etc.*, 18 F.R.D. 195 (D.N.M. 1955); *Continental Distilling Corp. v. Humphrey*, 17 F.R.D. 237 (D.D.C. 1955).

<sup>38</sup> *E.g.*, *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, 8 F.R.D. 313 (W.D.N.Y. 1948); *United States v. 88 Cases of Bireley's Orange Beverage*, 5 F.R.D. 503 (D.N.J. 1946); *United States v. 720 Bottles Labeled 2 Fl. Oz.*, 3 F.R.D. 466 (E.D.N.Y. 1944).

<sup>39</sup> *E.g.*, *United States v. 50.34 Acres*, 12 F.R.D. 440 (E.D.N.Y. 1952).

<sup>40</sup> *Russo v. Merck & Co.*, 21 F.R.D. 237 (D.R.I. 1957); *McNemar v. N.Y., Chicago & St. Louis R.R.*, 20 F.R.D. 598 (W.D. Pa. 1957); *Beirne v. Fitch Sanitarium*, 20 F.R.D. 93 (S.D.N.Y. 1957); *Macrina v. Smith*, 18 F.R.D. 254 (E.D. Pa. 1955).

<sup>41</sup> *E.g.*, *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948); *Coxe v. Putney*, 26 F.R.D. 562 (E.D. Pa. 1961); *United Air Lines, Inc. v. United States*, 26 F.R.D. 213 (D. Del. 1960); *E. I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del. 1959).

arising from privilege, to conclude that denial or limitation of discovery of experts proceeded from bad faith in seeking disclosure, or circumstances of annoyance, embarrassment or oppression in the particular case before the court would be logical but erroneous. The issue in almost every case, except where an expert's report was sought,<sup>42</sup> has been taken by the courts to concern whether the discovery rules extend to experts, and if so, the scope of their application to experts generally.<sup>43</sup> Many courts have adopted limitations of general application, which have a particularly subverting effect in the area of expert evidence inasmuch as the same results could have been reached in the particular cases within the discretionary provisions of the rules. On the other hand, some opinions have viewed discovery as simply advancing the time of disclosure and have therefore permitted discovery of expert opinions.<sup>44</sup> No mention was made in such opinions whether the circumstances of the particular cases involved bad faith or whether annoyance, embarrassment or oppression to a party or witness would result in the cases before the courts by permitting discovery. The opinions range from allowing the deposition of an expert to be taken concerning his conclusions<sup>45</sup> to denying disclosure of the names of experts employed by a party.<sup>46</sup> Discovery of experts has been considered a vehicle for making use of an adversary's trial preparation and has, therefore, been denied.<sup>47</sup> This reasoning is similar to that

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<sup>42</sup> Where experts' reports were sought, whether under rule 34 or when rule 45 has been used with rule 26, the court has considered whether under the circumstances presented "good cause" was established and usually only incidentally touched upon the general question of the scope of discovery as it applied to experts. See note 27 *supra*.

<sup>43</sup> *E.g.*, Judge Bootle in *United States v. Certain Acres of Land*, 18 F.R.D. 98 (M.D. Ga. 1955), an eminent domain case where the government sought a protective order to prevent the taking of an appraiser's deposition, said at 100, "The question for decision boils down basically to the extent of discovery which will be ordered or permitted from an adverse party's experts." See also *United States v. 284,392 Square Feet of Floor Space*, 203 F. Supp. 75 (E.D.N.Y. 1962); *United States v. 88 Cases of Bireley's Orange Beverage*, 5 F.R.D. 503 (D.N.J. 1946); *United States v. 720 Bottles Labeled 2 Fl. Oz.*, 3 F.R.D. 466 (E.D.N.Y. 1944).

<sup>44</sup> *E.g.*, *Leding v. U.S. Rubber Co.*, 23 F.R.D. 220 (D. Mont. 1959); *United States v. 50.34 Acres*, 13 F.R.D. 19 (E.D.N.Y. 1952); *Bergstrom Paper Co. v. Continental Ins. Co.*, 7 F.R.D. 548 (E.D. Wisc. 1947) (discovery denied on other grounds); *United States v. 300 Cans*, 7 F.R.D. 36 (N.D. Ohio 1946).

<sup>45</sup> *E.g.*, *Sachs v. Alcoa Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948); *E. I. Du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del. 1959); *Russo v. Merck & Co.*, 21 F.R.D. 237 (D.R.I. 1957); *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 425 (N.D. Ohio 1947).

<sup>46</sup> *United States v. 6.82 Acres*, 18 F.R.D. 195 (D.N.M. 1955); *Hickey v. United States*, 18 F.R.D. 88 (E.D. Pa. 1952).

<sup>47</sup> *E.g.*, *United States v. Five Cases*, 179 F.2d 519 (2d Cir. 1950); *E. I. Dupont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del. 1959); *Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp.*, 23 F.R.D. 257 (D. Neb. 1959).

upon which the so-called "work product" exception to discovery is based. This exception has been extended by some courts to protect experts from discovery.<sup>48</sup> Considerations of fairness and policy proceeding at least in part from the expense of experts and from a concept that a property right exists in expert evidence have been given as reasons for excluding experts from the application of the discovery rules except when disclosure was necessary to establish a party's case.<sup>49</sup> Some courts have taken the view that only facts are the subject of discovery, not opinions and conclusions.<sup>50</sup> Where experts' reports have been sought, the courts have frequently refused to order production, holding that no showing or an insufficient showing of good cause was made.<sup>51</sup> Those cases permitting discovery of experts have been based on the view that since such testimony could be compelled at trial, it can earlier be compelled by discovery.<sup>52</sup> Phrased another way, discovery simply advances the time of disclosure.<sup>53</sup> Some courts have permitted discovery of the factual data upon which an expert's conclusions were based but not of the conclusions themselves.<sup>54</sup> One court would permit discovery where an expert's fee has been tendered.<sup>55</sup> Another opinion limited disclosure to counsel and technical experts.<sup>56</sup> Other courts have allowed discovery of an expert employee of a party

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<sup>48</sup> *E.g.*, *United States v. 7,534.04 Acres of Land*, 18 F.R.D. 146 (N.D. Ga. 1954); *Colonial Airlines v. Janas*, 13 F.R.D. 199 (S.D.N.Y. 1952); *Schuyler v. United Air Lines, Inc.*, 10 F.R.D. 111 (M.D. Pa. 1950); *Midland Steel Products Co. v. Clark Equipment Co.*, 7 F.R.D. 132 (W.D. Mich. 1945); see *Klein v. Leader Elec.*, 81 F. Supp. 624 (N.D.N.Y. 1948).

<sup>49</sup> *E.g.*, *Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp.*, 23 F.R.D. 257 (D. Neb. 1959); *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 84 (D. Mass. 1947); *Cf.* 4 MOORE, *op. cit. supra* note 11, ¶26.24.

<sup>50</sup> See cases cited in note 54 *infra*.

<sup>51</sup> *E.g.*, *Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp.*, 23 F.R.D. 257 (D. Neb. 1959); *United States v. 6.82 Acres*, 18 F.R.D. 195 (D.N.M. 1955); *Schuyler v. United Air Lines, Inc.*, 10 F.R.D. 111 (M.D. Pa. 1950); *United States v. Five Cases*, 9 F.R.D. 81 (D. Conn. 1949); *Midland Steel v. Clark*, 7 F.R.D. 132 (W.D. Mich. 1945).

<sup>52</sup> *E.g.*, *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948); *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 425 (N.D. Ohio 1947); see also *United States v. 48 Jars, etc.*, 23 F.R.D. 192 (D.D.C. 1958); *Russo v. Merck & Co.*, 21 F.R.D. 237 (D.R.I. 1957); *United States v. 50.34 Acres, etc.*, 12 F.R.D. 440 (E.D.N.Y. 1952); *Cf.* *Leding v. United States Rubber Co.*, 23 F.R.D. 220 (D. Mont. 1959).

<sup>53</sup> *E.g.*, *Bergstrom Paper Co. v. Continental Ins. Co.*, 7 F.R.D. 548 (E.D. Wis. 1947).

<sup>54</sup> *E.g.*, *United States v. 284,392 Sq. Ft. of Floor Space*, 203 F. Supp. 75 (E.D.N.Y. 1962); *United States v. 19,897 Acres*, 27 F.R.D. 420 (E.D.N.Y. 1961); *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376 (D.N.J. 1945); *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1953).

<sup>55</sup> *United States v. 50.34 Acres*, 13 F.R.D. 19 (E.D.N.Y. 1952).

<sup>56</sup> *Melori Shoe Corp. v. Pierce & Stevens, Inc.*, 14 F.R.D. 346 (D. Mass. 1953).



to the litigation.<sup>57</sup> Still other courts have allowed discovery in the area of a party's expertise.<sup>58</sup>

In large part, the irreconcilable results and the development of a priori principles in discovery cases dealing with experts rests upon a failure to appreciate the issue formulation purpose of discovery; the necessity that the advantages of discovery must apply mutually; the flexibility with which the rules should be applied and the authority of the court to limit or condition discovery in each case so that prior disclosure of evidence and formulation of the issues can be accomplished in good faith, without annoyance, embarrassment, or oppression to a party or witness. One suspects that resistance to change<sup>59</sup> and fear of depending upon the predilections of each district judge in the exercise of discretion, have developed on the part of some a preference for the certainty of a rule excluding experts from discovery. In addition, there is a tendency to treat such preliminary matters without the care and attention given trial matters. In any event, no sound body of coherently related propositional law is deducible from the cases, nor have general standards employed by various courts yet furnished an adequate method of attack in this "hazy frontier of the discovery process."<sup>60</sup>

#### MENTAL OR PHYSICAL CONDITION

Rule 35(a) requires upon a showing of good cause that a party submit to a mental or physical examination when his mental or physical condition is in issue.<sup>61</sup> Rule 35(b)(1) provides that the party causing the examination shall furnish a copy of a detailed written report of the examining physician, setting out his findings and conclusions, if requested by the party examined.<sup>62</sup> After such request and delivery,

<sup>57</sup> *Kendall v. United Air Lines, Inc.*, 9 F.R.D. 702 (S.D.N.Y. 1949); *Moran v. Pittsburgh-Des Moines Steel Co.*, 6 F.R.D. 594 (W.D. Pa. 1947).

<sup>58</sup> *Coxe v. Putney*, 26 F.R.D. 562 (E.D. Pa. 1961); *Beirne v. Fitch Sanitarium*, 2 F.R.D. 93 (S.D.N.Y. 1957).

<sup>59</sup> *Hoffman v. Palmer*, 129 F.2d 976 (2d Cir. 1942), *aff'd* 318 U.S. 109 (1943). In *United States v. 900.57 Acres*, 30 F.R.D. 512 (W.D. Ark. 1962) Miller, C.J., in sustaining objections to interrogatories and denying a motion to produce appraisal reports, said that discovery had not been sought in that district in an eminent domain case in 20 years and would be an "innovation."

<sup>60</sup> *Hickman v. Taylor*, 329 U.S. 495 (1947).

<sup>61</sup> That provision also contains the following:

The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other 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>62</sup> That provision also contains the following:

If the party examined refuses to deliver such report, the court on motion and notice may make an order requiring delivery on such terms as are just, and if a

the party causing the examination to be made is entitled upon request to receive from the party examined a like report of any examination previously or thereafter made of the same mental or physical condition. Implicit in these provisions is recognition of the mutuality of discovery.<sup>63</sup> Thus, the party whose mental or physical condition is not in issue is entitled to the opportunity to ascertain the nature of the physical condition in issue by examination.<sup>64</sup> But the rule does not stop at this point. It is not enough that all parties are afforded the opportunity to learn about the physical or mental condition in issue. The parties are entitled to know what the other side has learned of the issues. This right is not absolute, however, because there may be an encroachment on the physician-patient privilege.<sup>65</sup> Therefore, the choice of whether the parties are to have the right to learn what each other knows of the issue rests with the party having the privilege if such privilege exists.

Rule 35(b)(2) recognizes that a physician-patient privilege may exist unless it is waived by requesting and obtaining a report of examination or by taking the examiner's deposition.<sup>66</sup> Explicit in the language of this provision is recognition of the right to take the deposition of the examiner. Presumably where the deposition of the examiner is taken, the other parties to the litigation could take the deposition of the examined party's physician.<sup>67</sup> Although in actual practice in

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physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

<sup>63</sup> "The provision [Rule 35(b)] contemplates a full mutuality of disclosure." 7 Cyc. Fed. Pro. § 25.703 (3d ed. 1951).

<sup>64</sup> 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 821 (1951); 4 MOORE, FEDERAL PRACTICE ¶ 35.06 (2d ed. 1950).

This provision has been held valid against a contention that it violates constitutional rights of privacy and rights under the Fourth, Fifth, and Thirteenth Amendments to the United States Constitution. *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

"The Rule seems essential to prevent malingering and fraudulent testimony and recovery thereon, . . ." 7 Cyc. Fed. Pro. § 25.678 (3d ed. 1951).

<sup>65</sup> Rule 35 is in derogation of a statutory privilege and should be strictly construed. *Sher v. DeHaven*, 199 F.2d 777 (1952), *cert. denied* 345 U.S. 936 (1953); *Benning v. Phelps*, 249 F.2d 47 (2d Cir. 1957); *Dulles v. Quan Yoke Fong*, 237 F.2d 496 (9th Cir. 1956); *Fong Sik Leung v. Dulles*, 226 F.2d 76 (9th Cir. 1955).

The courts are not agreed whether federal law or state law controls the issue of privilege in various types of cases. Cf. 2 BARRON & HOLTZOFF, *op. cit. supra* note 64, § 651, at 320; 4 MOORE, *op. cit. supra* note 64, ¶¶ 26.23 (9), 34.15; *Leszynski v. Russ*, 29 F.R.D. 10 (D. Md. 1961).

<sup>66</sup> Fed. R. Civ. P. 35(b) (2) reads as follows:

By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the controversy, regarding the testimony of every other person who has examined or may thereafter examine his in respect of the same mental or physical condition.

See Commentary, 4 FED. RULES SERV. 917 (1941).

<sup>67</sup> There appear to be no cases on this point.

personal injury cases, which comprise the large bulk of those in which rule 35 is used,<sup>68</sup> the defendant usually obtains an examination of the plaintiff voluntarily,<sup>69</sup> the deposition of an examining physician is seldom taken,<sup>70</sup> for the parties content themselves with exchanging medical reports.<sup>71</sup> Although counsel often feel dissatisfied with the medical reports obtained in personal injury litigation, there apparently are no reported decisions upon what is and what is not a "detailed written report of the . . . physician setting out his findings and conclusions."<sup>72</sup>

At least in litigation where the mental or physical condition of a party is in issue and the principal witnesses on damages are experts, the bench and bar actively operate under discovery.<sup>73</sup> In principle, however, since it involves a possible invasion of a privilege, there is less reason to permit discovery than in anti-trust, condemnation, food and drug, patent or other litigation, where the principal testimony is or will be expert. One might assume that underlying the practical results is recognition of the fact that a plaintiff in personal injury litigation invariably has been medically examined prior to institution of the suit. Therefore, when the defendant obtains a report from an

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<sup>68</sup> *Wadlow v. Humbred*, 27 F. Supp. 210 (W.D. Mo. 1939) would confine application of rule 35 to personal injury cases where the mental or physical condition was directly in controversy. The language of the rule, however, being unlimited, is not confined to such suits. 7 Cyc. FED. PRO. § 25.681 (3d ed. 1951). The Advisory Committee Note to the 1955 Proposed Amendment to Rule 35(a), which amendment would specifically provide its applicability where blood relationship is in issue and extend the application of the rule to agents or persons under the custody or legal control of a party, states, "The amendment also makes clear, by necessary implication, that examinations under this role may be had in other than personal injury actions, contrary to what was said in *Wadlow v. Humbred* . . ."

<sup>69</sup> It seems clear that a party should not be precluded from obtaining a report of examination where he voluntarily submits to examination. 7 Cyc. FED. PRO. § 25.702 (3d ed. 1951). In this connection, the 1955 proposed amendment would clarify rule 35(b). The Note of the Advisory Committee to this proposed amendment states, "The amendment is consistent with, and supplements, the line of cases which has held that a party may proceed under Rule 35(b) to obtain a report of an examination of him by his adversary's physician, even though he has submitted voluntarily to the examination, rather than requiring an order under Rule 35(a). *Keil v. Himes*, 13 F.R.D. 451 (E.D. Pa. 1952); *Dumas v. Pennsylvania R. Co.*, 11 F.R.D. 496 (N.D. Ohio 1951); and cases cited in 4 MOORE'S FEDERAL PRACTICE, ¶ 35.06 n.1 (2d ed. 1950)."

<sup>70</sup> This observation is based on experience. It has no documentary support.

<sup>71</sup> Although the argument has apparently never been discussed in a reported decision, it may be argued where an oral deposition was sought that a protective order might be obtained either by the physician or the opposing party, limiting discovery to requiring delivery of a written report on the ground that inasmuch as the information sought was available in that form, to require the physician and opposing counsel to attend a deposition would be annoying, oppressive or burdensome to either or both physician and opposing party.

<sup>72</sup> FED. R. CIV. P. 35(b)(1).

<sup>73</sup> See Winner, *Procedural Methods to Attain Discovery*, 28 F.R.D. 97, 101-03 (1962), and Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962).

examining physician, the parties are in a similar position with regard to expert evidence, and were it not for the privilege where it exists, the right to discover the other side's evidence would be completely mutual. Where the privilege does not exist, the right to discover the other side's evidence is available. Despite the privilege, however, discovery of the other side's evidence normally occurs, for plaintiffs waive their privilege and request copies of the medical reports of examining physicians.<sup>74</sup> Many plaintiffs' and defendants' attorneys in personal injury litigation recognize that more is to be gained by way of intelligent settlement, better trial preparation and shorter trial time by discovery, and little is to be lost by it, for both sides are in a similar position.<sup>75</sup> The same reasoning applicable to analysis of rule 35 in practice has equal validity in anti-trust, patent, food and drug, condemnation, and other litigation where the parties intend to present expert evidence at trial.<sup>76</sup>

#### INTERFERENCE WITH TRIAL PREPARATION

In denying discovery of expert information, many courts have expressly or impliedly rested their decisions upon: (1) an unwillingness to permit one party to make use of another party's trial preparations; (2) the view that it is unfair to permit such discovery unless necessary to establish a party's case because of the expense of experts and/or because of a desire to protect a property right, either of the party or expert, in the the expert's opinion; and (3) an extension of the "work product doctrine." These grounds will be discussed *seriatim*. They are aspects of the more general position that such discovery would be an unwarranted interference with trial preparation.

**1. Making Use of an Opponent's Trial Preparation.** This position may be summarized as follows: Where the factual data upon which an expert will base his opinions is available from other sources, it

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<sup>74</sup> See authorities cited note 73 *supra*. However, Louisell, *Discovery and Pre-Trial Under The Minnesota Rules*, 36 MINN. L. REV. 633 (1952), states at 642, "the consequences of plaintiff's discovery of the conclusions of defendants' physicians, are sufficiently onerous to induce most plaintiffs' attorneys, except in unusual circumstances, to refrain from such discovery."

<sup>75</sup> It appears, however, that the practice is developing of plaintiffs' counsels refraining from taking the deposition of the examining physician or requesting a report of the examining physician. There may be many reasons for plaintiffs' attorneys taking this course of action and relying on privilege. It is submitted that a prime reason proceeds from the inadequacy of medical reports received. A general report which contains little or no detail can be valueless in appraising a case for settlement, narrowing the issues, or even finding out the medical facts and has little value for purposes of cross-examination.

<sup>76</sup> See authorities cited *supra* note 73.

can not be obtained from an adversary. To permit such discovery would afford a party the opportunity to make use of an opponent's trial preparation, thereby penalizing the diligent and placing a premium on laziness. Inasmuch as any expert possessing the underlying facts can reach his own conclusions, such discovery becomes an unwarranted interference with trial preparation. This view appears to have originated with *McCarthy v. Palmer*.<sup>77</sup> Judge Moscovitz said in that case:

While The Rules of Civil Procedure were designed to permit liberal examination and discovery, they were not intended to be made the vehicle through which one litigant could make use of his opponent's preparation of his case. To use them in such a manner would penalize the diligent and place a premium on laziness. It is fair to assume that, except in the most unusual circumstances, no such result was intended.<sup>78</sup>

Although *McCarthy v. Palmer* did not involve a discovery issue,<sup>79</sup> it has often been cited and quoted<sup>80</sup> as determinative of discovery issues. The reasoning quoted has been applied in discovery cases concerning experts without regard to the posture of the case and without evaluation of the circumstances surrounding the issue when presented.<sup>81</sup> Thus, in *United States v. 7534.04 Acres of Land*,<sup>82</sup> Chief Judge Hooper sustained objections to interrogatories seeking the names of appraisers, copies of appraisals, methods of appraisal and breakdown of valuation in an eminent domain case, saying:

The land is open to inspection by all parties, no information concerning the same is sought from the government that is not readily available to the defendants. The information sought therefore is necessarily information obtained by the government in preparation of the trial of the case and in the opinion of this court is not obtainable by interrogatories.<sup>83</sup>

<sup>77</sup> 29 F. Supp. 585 (E.D.N.Y. 1939), *aff'd* 113 F.2d 721 (2d Cir.), *cert. denied* 311 U.S., 680 (1940).

<sup>78</sup> *Id.* at 586.

<sup>79</sup> The case involved a personal injury. It was brought under the Railroad Retirement Act of 1937. The discovery rules were but incidentally discussed in holding that where the plaintiff inspected a document produced by the defendants after demand, the document became admissible on behalf of the defendants even though the plaintiff refused to place it in evidence.

<sup>80</sup> Taine, *Discovery of Trial Preparation in the Federal Courts*, 50 COLUM. L. REV. 1026, 1028 (1950), discusses the tremendous influence the quoted language has attained and remarks upon the number of times it has been quoted.

<sup>81</sup> See *United States v. 900.57 Acres*, 30 F.R.D. 512 (W.D. Ark. 1962); *United Air Lines, Inc. v. United States*, 26 F.R.D. 213 (D. Del. 1960); *United States v. Certain Parcels of Land*, 25 F.R.D. 192 (N.D. Cal. 1959); *United States v. 7,543.04 Acres*, 18 F.R.D. 146 (N.D. Ga. 1954); *Colonial Airlines v. Janas*, 13 F.R.D. 199 (S.D.N.Y. 1952); *Schuyler v. United Air Lines*, 10 F.R.D. 111 (M.D. Pa. 1950); *Midland Steel Products Co. v. Clark Equipment Co.*, 7 F.R.D. 132 (W.D. Mich. 1943).

<sup>82</sup> 18 F.R.D. 146 (N.D. Ga. 1954).

<sup>83</sup> *Id.* at 146.

Similarly, in *Colonial Airlines v. Janas*,<sup>84</sup> a suit to recover for the diversion and improper expenditure of corporate funds, wherein the defendants sought production of a public accountant's report based on examination of the books and records of Colonial Airlines, it was held that no good cause was shown under rule 34 because Colonial Airlines was willing to allow an inspection of the books and records upon which the report was based. Judge Goddard expressly stated that a party ought not obtain by discovery the results of his adversary's trial preparation.<sup>85</sup>

The defendant generally will be in a position to exploit a plaintiff's trial preparation if unlimited discovery of experts is permitted, for in the usual case where experts are involved, a plaintiff's suit will be based in whole or in part upon an expert's opinions. If the defendant has no expert at the time suit is filed, the possibility exists that a party sued could retain an attorney who by interrogatories under rule 33 would obtain the names of the plaintiff's experts. Thereafter, without limitation upon such discovery, the plaintiff's experts could be deposed under rule 26, to ascertain not only their conclusions but every factor considered and every assumption, theory, test, evaluation, method, comparison, and judgment used or made. The deposing party then could hire an expert to advise him upon the merits of the deposition testimony of his adversary's experts, saving considerable expense in determining whether to settle or proceed to trial. In such a situation, discovery becomes a vehicle to take unfair advantage of another's trial preparation. It is annoying, embarrassing, and oppressive.

An even greater fear exists in the circumstances outlined. It proceeds from the obvious distrust with which courts, juries, laymen, and attorneys view expert testimony.<sup>86</sup> Where discovery would permit one party to obtain another's expert evidence before hiring his own expert, the fear exists that an accommodation expert may agree with portions of the adversary's expert testimony but draw different conclusions to support his employer's position or use different tests or methods or make any one or more changes in areas where there can be little support beyond expert judgment. In other words, either intentionally

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<sup>84</sup> 13 F.R.D. 199 (S.D.N.Y. 1952).

<sup>85</sup> *Id.* at 200.

<sup>86</sup> This observation has been frequently pointed out. The reasons for this distrust are discussed in 2 WIGMORE, EVIDENCE § 563 (3d ed. 1940). Much of the literature on the subject is collected, *id.* 645 n.2. 2 ORGEL, VALUATION UNDER EMINENT DOMAIN § 247, at 261 (2d ed. 1953), comments upon the shortcomings of expert valuation testimony.

or subconsciously through partisanship, incompetence or dishonesty, manufacture counter evidence.<sup>87</sup> Where experts are concerned, the risk of false testimony, whether intentional, careless or simply error, may be considered sufficiently greater than with other evidence in general so as to warrant excluding such testimony from discovery mainly because the sanctions of perjury, which tend to compel truthful testimony, are as a practical matter not applicable to expert opinion.<sup>88</sup>

There is an additional consideration which weighs against discovery in the area of experts. It proceeds from the fact that a party is not bound by an expert's opinions unless and until that expert is called as a witness and testifies during a trial. Therefore, if an expert does not hold up on cross-examination during a deposition, or if a party does not want to risk impeachment of an expert during trial based upon an earlier deposition, the particular expert need not be called as a witness. Another expert not under the same handicap could be retained and called as a witness during trial. With this risk in mind, a holding precluding discovery into the area of expert information would appear justified.

These views, going beyond the language of the cases, have seldom been articulated but are at least subconsciously present<sup>89</sup> when discovery is denied on the ground that it permits a party to make use of an

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<sup>87</sup> This reason against discovery generally, *i.e.*, fear of manufactured counter evidence, is analyzed in 6 WIGMORE, *op. cit. supra* note 86, § 1845.

In a sense, expert evidence generally is manufactured for each particular case. Where an automobile accident occurs, for example, the witnesses are limited generally to those who know of it through their senses. There is, however, no similar limitation upon the number of persons who may make a study upon which expert testimony is to be based. *United Air Lines, Inc. v. United States*, 26 F.R.D. 213, 217 (D. Del. 1960). In addition, the factors underlying the expert's conclusions are not limited in time to a momentary occurrence, for the expert may draw upon experience, studies previously made by himself or others, and tests conducted for the specific purpose of evidence.

<sup>88</sup> 2 ORGEL, *op cit supra* note 86, § 247, at 261, states, "The partisan character of expert or opinion testimony is, of course, obvious and this is emphasized by the fact that an expert witness may usually escape the consequences of an excessive zeal for the interests of his employer by pointing out that he is testifying to his 'opinion' and not to 'facts'."

<sup>89</sup> In part, this fear helps explain the race to first discover, and because of the nature of expert testimony this fear is heightened. It has been pointed out in Comment, *Tactical Use And Abuse of Depositions Under The Federal Rules*, 59 YALE L.J. 117, 134 (1950) that:

The abuses of expense and delay are accentuated when one party gains the right to take depositions before the other. Since the party who has priority is usually entitled to complete his depositions before the deponent can take his in turn, the examiner can tie the deposing party down to his story while securing the material and time to coach his own witnesses effectively. In those cases where depositions are short, the effect of priority is not very great. Priority, however, becomes an extremely important tactical advantage when depositions are extended.

Similarly, where experts are concerned, priority would be an extremely important tactical advantage.

opponent's trial preparation. But such reasoning and the reasoning of the cases ignores the power of the court to limit or condition discovery and ignores or misconceives the issue formulation function which only discovery can perform. The rules do not contemplate discovery or no discovery, but rather mutual discovery under safeguards imposed by the court where such are indicated. Counsel and the courts must, however, insure that adequate safeguards are employed so that more will be gained by all parties and the court than lost by discovery.

The argument based upon making use of an opponent's trial preparation and thereby interfering with such preparation ignores the power of the court to provide as a condition of discovery that the party seeking it retain his experts, obtain their conclusions in written form, and commit himself to one or more such experts prior to permitting discovery. Such a condition is not unreasonable where experts are concerned, for all parties will usually obtain the conclusions of the experts in a written report form prior to trial and present expert testimony at trial. A court could permit the deposition of an expert where the party seeking it has no expert on condition that he would thereby be precluded from calling any expert at trial,<sup>90</sup> unless the interests of justice required a modification of such condition. A court could require the simultaneous exchange of experts' reports, or provide that depositions be permitted only after the exchange of reports, or that no expert testimony will be permitted at trial unless the reports of experts have been exchanged. An order could require that sealed copies of experts reports be filed with the court prior to permitting depositions, or that no direct testimony may be introduced at the trial which is not supported in the expert's report, or require that such reports be detailed or that a deposition may be taken with only certain named persons present.<sup>91</sup> The court can make any order which justice

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<sup>90</sup> An example of the flexibility a court has in dealing with discovery problems appears in *Klein v. Yellow Cab Co.*, 7 F.R.D. 169 (D. Ohio 1944). The plaintiff in a personal injury action objected to the defendant's motion to compel him to submit to a physical examination by defendant's surgeon as too painful. The court stated that before finally ruling on the motion, the plaintiff should submit all reports of examination by his physician, hospital records, and statements of what his physician would testify to in respect to the alleged injuries, or in the alternative, if the plaintiff preferred, he should stipulate that no medical evidence would be introduced by him which was obtained through cystoscopic examination.

<sup>91</sup> *Melori Shoe Corp. v. Pierce & Stevens, Inc.*, 14 F.R.D. 346 (D. Mass. 1953). The order was entered to protect trade secrets.

However, 15 U.S.C. § 30 (1958) provides that in antitrust actions brought under 15 U.S.C. §§ 1-7 and § 15, "the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceeding shall be valid or enforceable."



requires.<sup>92</sup> These suggestions for minimizing or eliminating the possibility of one litigant's taking unreasonable advantage of an opponent's trial preparation where experts are concerned are not listed as the only methods, but merely as the obvious ones arising from the court's broad power.<sup>93</sup>

It may be argued that if all litigants have experts available to testify, there is no need for discovery. Such a position, however, ignores or misconceives the issue formulation function which discovery must perform. Seldom, if ever, will the issues concern the underlying facts.<sup>94</sup> Rather, the issues will concern the validity, relevancy and credibility of tests made, methods used, underlying assumptions, theories, comparisons, etc. A party seeking discovery of experts, if he has his own experts, seldom desires to learn about information readily available. Rather, he seeks to learn the use to which his opponent's experts have put the available information. Such can not be learned without discovery. Judge Tamm, in *United States v. 48 Jars*,<sup>95</sup> a suit for seizure and condemnation of an article under the Food, Drug, and Cosmetic Act, in overruling objections to interrogatories pointed out:

The questions propounded by the libellant are directed to tests, if any, and experts, if any, that will support the position of the claimants on the issue of whether the claims made for the article are false or misleading. It appears from the questions themselves that they are requesting matter of such a nature that it is within the possession or knowledge of the claimants only and that the libellant can in no way obtain such information through independent investigation or research.<sup>96</sup>

Similarly, in *United States v. Nysco Labs., Inc.*,<sup>97</sup> also a suit under the Food, Drug and Cosmetic Act for misbranding and also before the court on objections to interrogatories, Judge Bartels said:

Realistically speaking, the resolution of the entire case depends upon medical and expert testimony and opinion, . . . . To the extent that information concerning medical and scientific facts is within the knowledge or possession of the defendants, the Court believes such information should be disclosed. . . . To clarify and narrow the issues, interrogatories

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<sup>92</sup> FED. R. CIV. P. 30(b).

<sup>93</sup> Many of the limitations and conditions a court may impose upon discovery generally are discussed at 4 MOORE, FEDERAL PRACTICE ¶ 30.06-15 (2d ed. 1950).

<sup>94</sup> See *United States v. Nysco Laboratories, Inc.*, 26 F.R.D. 159, 162 (E.D.N.Y. 1960); *E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416, 421 (D. Del. 1959) and Friedenthal, *supra* note 73, at 455.

<sup>95</sup> 23 F.R.D. 192 (D.D.C. 1958).

<sup>96</sup> *Id.* at 198. The court relied upon an unpublished opinion of Judge Hincks in the case of *United States v. 132 Cartons* (D. Conn. March 27, 1950),

may be employed to exact admissions from the opposing party. The Government is entitled to know what the defendant's position and contentions are on relevant points.<sup>98</sup>

If obtaining this type of information from an opponent is making use of his trial preparation, it can not be considered unreasonable if the parties are in the same position relative to experts, for the right to discovery is reciprocal, and the advantages to be gained far outweigh the disadvantages. Learning precisely where and why the experts differ, not only in their conclusions, but in the support for these conclusions, narrows, clarifies and formulates precisely the actual issues involved. Moreover, such knowledge affords an intelligent basis for settlement inasmuch as all parties can evaluate each other's position prior to trial. Without such knowledge, it is submitted that many cases where experts appear go to trial for no other reason than that an intelligent evaluation for settlement purposes can not be made. Additionally, discovery is considered a means to expose false claims and defenses.<sup>99</sup> Much of the criticism of experts is based on the incompetence, partisanship or dishonesty which all too many display on the witness stand. The use of such experts, however, is possible because of the difficulty in exposing their incompetence, partisanship or dishonesty. This difficulty exists primarily because their opinions and the support for them are unknown until trial, when it is too late to effectively prepare cross-examination or rebuttal testimony.<sup>100</sup> Advance preparation for cross-examination of experts is more essential than advance warning of factual testimony. It is submitted that many of the unqualified or dishonest experts would refuse to mount the witness stand knowing that counsel is armed with knowledge of expected testimony and,

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<sup>97</sup> 26 F.R.D. 159 (E.D.N.Y. 1960).

<sup>98</sup> *Id.* at 162.

<sup>99</sup> 4 MOORE, *op. cit. supra* note 64, ¶ 26.02; 6 WIGMORE, *op. cit. supra* note 86, §§ 1845-63.

<sup>100</sup> In *United States v. 132 Cartons* (D. Conn. March 27, 1950), as quoted in *United States v. 48 Jars, More or Less*, 23 F.R.D. 192, 198 (D.D.C. 1958), Judge Hincks said:

Libellant insisted that the discovery was necessary not to elicit their opinions as experts but rather to ascertain the factual scope and nature of the research done so that it possibly may be in a better position to cross-examine these witnesses on trial and prepare a rebuttal to the claimant's defense. Having in mind that the field in question here is one of scientific controversy wherein without prior discovery cross-examination cannot be expected successfully to perform its historic function, and effective evidence in rebuttal, though perhaps in existence, cannot be produced forthwith upon the close of the claimant's defense, I feel that here there is sufficient showing of necessity, within the rule of *Hickman v. Taylor*...if applicable here, to allow the discovery to proceed.

See also *Seminar on Practice and Procedure*, 28 F.R.D. 37, 101 (1962), and Friedenthal, *supra* note 73, at 485.

because counsel had time to prepare cross-examination and rebuttal testimony, the means to expose incompetence or dishonesty. Further, such prior knowledge would tend to require better prepared expert witnesses and to tone down the excessive zeal prompted by partisanship.

The evils which appear to exist in the application of discovery to experts by affording the opportunity to make unfair use of an opponent's trial preparation, on careful examination do not exist if the court and counsel properly perceive the issue formulation function only discovery can perform and impose or agree to conditions or limitations upon discovery so that its advantages can be reciprocally obtained. Under a practice based on discovery, justice will seldom require the complete denial of prior disclosure.<sup>101</sup> The problem, however, is to employ in each case the means to accomplish discovery in good faith without annoyance, embarrassment or oppression.

2. **Unfairness.** The first two reported cases<sup>102</sup> dealing with experts refused to permit discovery on the basis of fairness and policy, not in the particular case but as a general principle. This view is also implicit in that advanced by Professor Moore.<sup>103</sup> The *Lewis* and *Boynton* cases and Moore's view have had a great impact in developing the law restricting discovery in the area of expert information. The considerations of fairness proceed principally from the expense of experts. Implicit in this view is the assumption that a property interest in favor of the party or the expert exists in the expert's opinions. Necessity, however, under this view is an exception to the prohibition upon discovery.

The rule adopted in the *Lewis* case was stated by Judge McVicar as follows:

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 therefore.<sup>104</sup>

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<sup>101</sup> 4 MOORE, *op. cit. supra* note 64, ¶ 30.06 states at 2027, "in view of other protective orders which the court is authorized to make and which would give adequate protection against a particular abuse, without entirely denying a right to discovery, it will be seldom that a court will forbid the taking of a deposition altogether."

<sup>102</sup> *Boynton v. R. J. Reynolds Tobacco Co.*, 36 F. Supp. 593 (D. Mass. 1941); and *Lewis v. United Air Lines Transport Corp.*, 32 F. Supp. 21 (W.D. Pa. 1940).

<sup>103</sup> 4 MOORE, *op. cit. supra* note 64, ¶ 26.24.

<sup>104</sup> 32 F. Supp. 21, 23 (1940). *United Air Lines* contended that the opinions of its expert were privileged relying on 70 C. J. 432 § 581, and the English authorities which include within the protection of the attorney-client privilege communications of experts either to the client or to the attorney. Without concluding whether the attorney-client privilege applied, the court in adopting its ruling relied upon the language from

Judge McLellan in the *Boynton* case framed his rule in the following language:

An expert employed by one of the parties ought not to be compelled to furnish expert testimony to the other just because the latter offers him compensation. It is his privilege, if not his duty, to refuse compensation from one of the parties when he has already accepted employment from the other, and such refusal ought not of itself to result in his being ordered to testify.<sup>105</sup>

Professor Moore's view appears to be a synthesis of the views of the *Lewis* and *Boynton* cases and an extension of them.

The court should not ordinarily permit one party to examine an expert engaged by the adverse party, or to inspect reports prepared by such expert, in the absence of a showing that the facts or the information sought are necessary for the moving party's preparation for trial and cannot be obtained by the moving party's independent investigation or research. However, since one of the purposes of the Federal Rules as stated in Rule 1 is to facilitate the inexpensive determination of causes, the court should have discretion to order discovery upon condition that the moving party pay a reasonable portion of the fees of the expert.<sup>106</sup>

The *Lewis* and *Boynton* cases, Moore, and the cases which have followed them,<sup>107</sup> take the position that to permit discovery of experts is unfair inasmuch as it is the equivalent of taking another's property<sup>108</sup>

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*McCarthy v. Palmer*, 29 F. Supp. 585 (E.D.N.Y. 1939), to the effect that the rules were not designed to permit one party to explore the investigations made by the other litigant. The court concluded after the language above quoted that if any tests made resulted in a change in the cylinder in issue which would prevent conducting the same tests with the same results, the expert would be compelled to disclose those tests actually made and results of such tests.

This decision, frequently relied on, was rendered on rehearing. Judge McVicar originally was of the opinion that the expert should be compelled to answer the questions posed and that the motion for an order compelling answers should be granted. *Lewis v. United Air Lines Transport Corp.*, 31 F. Supp. 617 (W.D. Pa. 1940).

<sup>105</sup> 36 F. Supp. 593, 595 (1941). This case was an action by an administrator for the death of the decedent resulting from a motor vehicle accident. The issue arose upon a motion for an order directing a doctor to answer questions during a deposition concerning an expert opinion, without the defendant being forced to pay an expert's fee. At the time of deposition, the doctor had already formed an opinion as to the causal connection between the accident and the death. After concluding that a court had the power to compel an expert to divulge an opinion already formed without tender of an expert's fee, Judge McLellan determined that under the circumstances there presented, his discretion should not be exercised to compel answers to the questions posed.

<sup>106</sup> 4 MOORE, *op. cit. supra* note 64, at 1531.

<sup>107</sup> *E.g.*, *United Air Lines, Inc. v. United States*, 26 F.R.D. 213 (D. Del. 1960); *Smith v. Hobart Manufacturing Co.*, 188 F. Supp. 135 (E.D. Pa. 1960); *E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del. 1959); *United States v. 88 Cases of Bireley's Orange Beverage, etc.*, 5 F.R.D. 503 (D.N.J. 1946); *United States v. 720 Bottles Labeled 2 Fl. Oz.*, 3 F.R.D. 466 (E.D.N.Y. 1944).

<sup>108</sup> *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376 (D.N.J. 1954); *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1953); and *Lewis v. United Air Lines Transport Corp.*, 32 F. Supp. 21 (W.D. Pa. 1940).

without compensation because of the obligation to pay a considerable sum for the expert's opinion. Even if compensation is offered, however, an expert should not be compelled to furnish testimony for this reason alone, because permitting such discovery would afford the opportunity to take unwarranted advantage of an opponent's trial preparation.<sup>109</sup> If, however, the expert's information is necessary for trial preparation and cannot be obtained by independent investigation and research, discovery should be permitted,<sup>110</sup> and if deemed appropriate, the court could require that part of the expert's fee be paid by the party seeking discovery.<sup>111</sup>

Denying discovery for reasons proceeding from the expense of experts places undue emphasis upon the expert's expense rather than the justice, speed and expense of the entire litigation. It makes an unwarranted discrimination in favor of experts as opposed to other witnesses, who may suffer greater loss because of the time spent in having a deposition taken. Were compensation required because of expertise as a condition of compelling such testimony, it would follow that compensation should be made to each witness according to the loss he has suffered. The law, however, recognizes a duty on everyone's part to testify. The expert's expense, therefore, should no more preclude his discovery testimony than the loss any witness might suffer because of appearing for deposition.<sup>112</sup> The expense to a party is minimal if a court requires that a copy of an expert's report be furnished. Even where only one side has experts retained, no unfairness based on expense would exist to permit a deposition upon payment to the party of the expense he might incur to the expert at the expert's usual per diem rate.<sup>113</sup> Where all parties have experts or where discovery is postponed until all experts have completed their studies, the costs of taking depositions are substantially offset, and if discovery is limited to exchanging reports, the expense is insignificant. Considerations proceeding from the expense of experts, therefore, have no general

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<sup>109</sup> See cases cited note 107 *supra*.

<sup>110</sup> *E.g.*, *Russo v. Merck & Co.*, 21 F.R.D. 237 (D.R.I. 1957); *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376 (D.N.J. 1954); *Colden v. R. J. Schofield Motor Co.*, 14 F.R.D. 521 (N.D. Ohio 1952); *Moran v. Pittsburgh-Des Moines Steel Co.*, 6 F.R.D. 594 (W.D. Pa. 1947); and *Lewis v. United Air Lines Transport Corp.*, 32 F. Supp 21 (W.D. Pa. 1940); See also 4 MOORE, *op. cit. supra* note 64, ¶ 26.24; *But cf.* *E. I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del. 1959) and *United States v. 48 Jars*, 23 F.R.D. 192 (D.D.C. 1958).

<sup>111</sup> See 4 MOORE, *op. cit. supra* note 64, ¶26.24; and *United States v. 50.34 Acres*, 13 F.R.D. 19 (E.D.N.Y. 1952).

<sup>112</sup> See Friedenthal, *supra* note 73, at 479-80.

<sup>113</sup> See authority and case cited note 111 *supra*.

validity in supporting a rule denying discovery of experts, for the court has adequate power to protect the pocketbooks of the parties and experts.<sup>114</sup>

The concept that a property right<sup>115</sup> in expert information exists either in the expert or in a party, which merits protection from pre-trial disclosure, carries more weight than considerations proceeding from expense alone. Yet, the expense incurred either by a party or by the expert in the investigation necessary to arrive at the conclusions to which he will testify, appears to be the basis for holding that a property right exists in such conclusions.<sup>116</sup> Thus it becomes difficult to separate the opinions and conclusions themselves from the expense incurred in arriving at them.<sup>117</sup> Each of the three cases<sup>118</sup> which expressly recognize that such a property right exists in experts' opinions also recognizes that portions of the conclusions and the underlying facts were subject to discovery in circumstances of "necessity"<sup>119</sup> or expedition.<sup>120</sup> The property right concept has been explored to a considerable extent in those cases where a party has sought to subpoena an expert at trial and compel testimony. Although such cases in other jurisdictions are divided,<sup>121</sup> the federal cases permit such action<sup>122</sup> and recognize the

<sup>114</sup> Some courts have questioned the wisdom but not the power to compel a fee splitting arrangement. *E.g.*, *Hickey v. United States*, 18 F.R.D. 88 (E.D. Pa. 1952); *United States v. 88 Cases of Bireley's Orange Beverages*, 5 F.R.D. 503 (D.N.J. 1946); and *Boynton v. R. J. Reynolds Tobacco Co.*, 36 F. Supp. 593 (D. Mass. 1941).

<sup>115</sup> See cases cited note 108 *supra*.

<sup>116</sup> See cases cited note 107 *supra*.

<sup>117</sup> Although a court has the power to compel the disclosure of existing opinions, it cannot compel an expert to make an investigation or undertake a study to prepare for testifying. See *Boynton v. R.J. Reynolds Tobacco Co.*, 36 F. Supp. 593 (D. Mass. 1941); and 4 MOORE, *FEDERAL PRACTICE* ¶ 26.24 (2d ed. 1950). Among the reasons for such distinction is the expense to the expert.

<sup>118</sup> See cases cited note 108 *supra*.

<sup>119</sup> In *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376 (D.N.J. 1954), Judge Hartshorn at 378-79 said that the conclusions of an expert are not normally discoverable in view of "the property right of the expert himself, and of his client" in the expert's conclusions. In that case examination of a gas stove after an explosion involved removing parts for inspection by the expert. The court ordered the expert's notes on the condition of the stove after the explosion divulged but not the expert's conclusions.

In *Lewis v. United Air Lines Transport Corp.*, 32 F. Supp. 21 (W.D. Pa. 1940), Judge McVictor said, at 23, that if any tests made by the expert resulted in a change in the cylinder, in issue which would prevent conducting the same tests with the same results, the expert would be compelled to disclose those tests actually made as well as the results of such tests.

<sup>120</sup> In *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1953) Judge Mathes, after ordering the production of appraisal reports for *in camera* inspection, ordered the sales data contained therein divulged on the ground of expedition.

In that case, the court recognized that discovery might limit the realizable value of presently undisclosed opinions. It is submitted, however, that this objection could be cured by providing for disclosure only to certain named persons as is done where the court desires to protect trade secrets.

<sup>121</sup> See Annot., 77 A.L.R.2d 1182 (1961).

<sup>122</sup> 4 MOORE, *op. cit. supra* note 117, ¶ 26.24.

power of a court to compel answers to hypothetical questions. However, an expert can not be compelled to make investigations or otherwise prepare himself to answer questions for which his present knowledge is insufficient.<sup>123</sup> The rules are a product of the view that the public interest in justice is paramount to considerations of fairness to attorneys, witnesses or parties. Evidence, therefore, can not wilfully be withheld, nor does a property right exist in evidence, whether expert or not, which supersedes the interest of the courts to use it in ascertaining truth<sup>124</sup> except within the confines of privilege or when such evidence is shielded by an exclusionary rule designed to protect a constitutional right. Discovery of expert information takes away no property without compensation, for the right to discovery is reciprocal and the court has the power to order compensation.<sup>125</sup> Thus, the determination of whether a property right exists is not conclusive on the question whether discovery should be granted or prohibited. Rather, the problem presented by this objection concerns the weight it should be accorded and the methods which should be employed to ameliorate the objection.

Permitting discovery of expert information as an exception to the unfairness rule where the information sought is necessary to a party's trial preparation or where such information can not be obtained by independent investigation or research can readily be justified. A party to litigation should have the means to establish his case and therefore the opportunity to obtain whatever is necessary to this end. Necessity was the basis of the limited discovery permitted under earlier practice.<sup>126</sup> Such a restriction upon discovery, however, prevents any opportunity to learn what evidence is available and what issues exist which must be met at the trial. Under our notice pleading practice, without discovery, the parties are in an awkward position where no adequate mechanism is available to learn and frame the issues.<sup>127</sup> In addition, without the opportunity to learn prior to trial what each party will rely on for

<sup>123</sup> *Ibid.*

<sup>124</sup> See *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948).

<sup>125</sup> See authorities cited note 111 *supra*.

<sup>126</sup> 4 MOORE, *op. cit. supra* note 117, § 33.03.

<sup>127</sup> *Id.* § 26.02, at 1032: "In most cases under the Federal Rules the function of the pleadings extends hardly beyond notification to the opposing parties of the general nature of a party's claim or defense." Also on the previous page Moore states, "The promulgation of this group of Rules [the discovery rules] satisfied the long-felt need for legal machinery in the federal courts to supplement the pleadings, for the purpose of disclosing the real points of dispute between the parties . . ." See *Taejon Bristle Mfg. Co. v. Omnex Corp.*, 13 F.R.D. 448 (S.D.N.Y. 1953); *Radio Corp. of America v. Solat*, 31 F. Supp. 519 (S.D.N.Y. 1940); and *Pearson v. Hershey Creamery Co.*, 30 F. Supp. 82 (M.D. Pa. 1939).

expert information, the parties are prevented from properly evaluating a cause for settlement. Moreover, without discovery, little opportunity exists to expose a claim or defense based upon false, incompetent or exaggerated expert testimony.<sup>128</sup>

What circumstances constitute necessity so as to afford the opportunity to discover expert information is not clear from the cases. Under Professor Moore's view,<sup>129</sup> necessity must relate to the moving party's preparation for trial. Under his view, the information sought is discoverable only if it can not be obtained by independent investigation or research. The cases<sup>130</sup> which have found that such necessity existed concerned situations where because of destruction or change in an object, the existing expert information is the only information which could ever be available.<sup>131</sup> The moving party could not hire an expert who would have the means available to arrive at an opinion on the matters involved in the litigation.<sup>132</sup> In some of the cases,<sup>133</sup> the expert

<sup>128</sup> See authorities cited note 111 *supra*.

<sup>129</sup> 4 Moore, *op. cit. supra* note 117, ¶ 26.24.

<sup>130</sup> *E.g.*, Russo v. Merck & Co., 21 F.R.D. 237 (D.R.I. 1957); Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954); Colden v. R.J. Schofield Motors Co., 14 F.R.D. 521 (N.D. Ohio, 1952); Moran v. Pittsburgh-Des Moines Steel Co., 6 F.R.D. 594 (W.D. Pa. 1947).

<sup>131</sup> See cases cited note 130 *supra*.

<sup>132</sup> Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954), discussed at note 119 *supra*; and Colden v. R.J. Schofield Motors Co., 14 F.R.D. 52 (N.D. Ohio 1952). In the latter case Chief Judge Jones held that a sufficient showing of necessity was made, not under the unfairness rule but under the work product doctrine to warrant requiring production of an expert's report where due to disassembly of the automobile involved during the process of inspection and examination by the expert, the party seeking the report was not in a position to obtain the information sought from any other source. *Cf.* Lewis v. United Air Lines Transport Corp., 32 F. Supp. 21 (W.D. Pa. 1940).

<sup>133</sup> Russo v. Merck & Co. 21 F.R.D. 237 (D.R.I. 1957); Connecticut Mut. Life Ins. Co. v. Shields, 17 F.R.D. 277 (S.D.N.Y. 1955) and Moran v. Pittsburgh-Des Moines Steel Co., 6 F.R.D. 594 (W.D. Pa. 1947). See also Beirne v. Fitch Sanitarium, 20 F.R.D. 93 (S.D.N.Y. 1957) and Kendall v. United Air Lines, 9 F.R.D. 702 (S.D.N.Y. 1949).

In the *Moran* case, *supra*, the plaintiff's decedent was killed in an explosion of a liquified gas tank constructed by the defendant. The plaintiff sought to compel answers from a graduate civil engineer employed by the defendant. The engineer had final approval of the cylindrical tank and the chemical constituency of the steel used in constructing the tank. Judge Gourley stated that the answers will amount to a statement of facts as to why certain things were done or not done by the defendant and that unless such information was made available to the plaintiff, a full and complete picture would not be presented from which a determination could be made whether there was negligence in constructing the tank. The rule adopted was set out at 596 as follows:

Where an individual is an expert in a given field, and, therefore, qualified to submit an opinion, this will not deprive a party litigant from questioning said person, either by way of deposition or during trial, and asking why certain things were done or not done by the witness where said person is—

- (a) Employed regularly by the adverse party, and
- (b) Is the managing agent of a department, and
- (c) The person who decided all matters for the adverse party in the creation of the object from which the cause of action arises.



was an employee of a party and the only one having knowledge about the matter in issue. Under this view, in cases where such information is readily available, necessity can not be shown.<sup>134</sup> This view, however, ignores narrowing and clarifying the issues as an object of discovery.

There are, however, a few cases<sup>135</sup> which have found necessity to exist on the ground that the expert information, as opposed to readily available underlying facts, is exclusively within the knowledge or possession of the witness or party. Under this view, unless the procedures of experts can be inquired into and records of actual tests produced for examination before trial, the parties will not know before trial what evidence is available for introduction at trial.<sup>136</sup> This reasoning implicitly recognizes the issue formulation function which discovery must perform. It is submitted, however, that this reasoning supports a rule authorizing discovery of expert information rather than an exception to a rule precluding such discovery.<sup>137</sup> In almost every case where expert testimony is involved, the methods, tests, procedures, assumptions and comparisons of the experts which support the experts' opinions and conclusions, will be the areas where the issues exist.<sup>138</sup> Such evidence and issues will be unknown prior to trial without discovery. This kind of information can not be obtained by independent investigation or research.

In evaluating the weight to be accorded to the unfairness objection, it is essential to distinguish among the reasons motivating the party seeking disclosure of expert information. The unfairness of permitting discovery of expert information is evident when the moving party, although intending to call experts at trial, either has not hired experts, or having hired them has not obtained the results of their studies at the time disclosure of his adversary's expert information is sought. When a case is in such posture, it is difficult to conceive of discovery performing an issue formulation function, and the possibility of unreasonable inter-

<sup>134</sup> *E.g.*, *United States v. 6.82 Acres*, 18 F.R.D. 195 (D.N.M. 1955); *United States v. Certain Acres*, 18 F.R.D. 98 (M.D. Ga. 1955); *United States v. 7534.04 Acres*, 18 F.R.D. 146 (N.D. Ga. 1954), and *Dipson Theatres v. Buffalo Theatres*, 8 F.R.D. 313 (W.D.N.Y. 1948).

<sup>135</sup> *E.g.*, *United States v. Nysco Labs Inc.*, 26 F.R.D. 159 (E.D.N.Y. 1960); *E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del. 1959); *United States v. 48 Jars*, 23 F.R.D. 192 (D.D.C. 1958) and *Virginia Metal Prod. Corp. v. Hartford Acc. & Indem. Co.*, 10 F.R.D. 374 (S.D.N.Y. 1950).

<sup>136</sup> *E. I. DuPont de Nemours & Co.*, *supra* note 135.

<sup>137</sup> See Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 486 (1962).

<sup>138</sup> See Winner, *Procedural Methods to Attain Discovery*, 28 F.R.D. 97, 101-03 (1962) and McGlothlin, *Some Practical Problems in Proof of Economic, Scientific and Technical Facts*, 23 F.R.D. 467, 478 (1959).

ference with trial preparation exists. In such circumstances, considerations of expense and property rights are entitled to weight, and considerations of fairness are inherent in discovery as well as other procedural aspects of litigation. The solution to the problem posed, however, is not simply refusing to permit prior disclosure of expert information. The solution is to postpone discovery until the experts of all parties have completed their studies. At that time, prior disclosure of expert information should be encouraged on such conditions and with such limitations that the advantages of such disclosure are reciprocally obtainable.

3. **Extension of the "Work Product Doctrine."** Although declining to extend the attorney-client privilege<sup>139</sup> to encompass all matters obtained by an attorney in preparation for trial, the Supreme Court in *Hickman v. Taylor*<sup>140</sup> refused to permit discovery of such matters as of right. In holding that a showing of necessity or justification must be made to obtain discovery of such matters, the court grounded its decision upon the public policy underlying the orderly prosecution and defense of legal claims in the following language:

Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways aptly though roughly termed by the Circuit Court of Appeals in this case, as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.<sup>141</sup>

The divergence of opinions applying the so-called work product rule is proof that precise application of the doctrine is not easily accom-

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<sup>139</sup> An excellent analysis of this privilege is contained in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 349 (D. Mass. 1950).

<sup>140</sup> 329 U.S. 495 (1947).

<sup>141</sup> *Id.* at 511.

plished.<sup>142</sup> Beyond refusing to permit discovery as of right in the area of an attorney's trial preparation, the decision does little to guide the exercise of discretion. As far as extending the doctrine to expert witnesses, however, the underlying policy of the decision offers little support. The purported justification for extending this policy to experts is that retaining, advising and conferring with the expert makes him the attorney's agent or in effect co-counsel to whom the protection should extend.<sup>143</sup> Further support for this position is found in *Allmont v. United States*,<sup>144</sup> where statements obtained by agents of the Federal Bureau of Investigation were at stake. The third circuit took the position that statements obtained by the client, investigator or attorneys were within the protection of the work product doctrine.

Although most of the cases<sup>145</sup> which have considered the application

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<sup>142</sup> 4 MOORE, *op. cit. supra* note 117, ¶ 26.24 n.1 states that with one exception (*Moran v. Pittsburgh-Des Moines Steel Co.*, 6 F.R.D. 594 (W.D. Pa. 1947), which cited no cases) all cases decided since *Hickman* concerning discovery and experts cited *Hickman* even though they were in conflict.

Wright, *Recent Trends in the Practical Use of Discovery*, 16 NACCA L.J. 409, 415 (1955), discusses some of the problems created by the opinion.

An extreme example of divergent opinions arose in *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 425 (N.D. Ohio 1947), a patent infringement suit brought in the Northern Division of the Eastern District of Tennessee. Aluminum Company of America sought to depose two expert metallurgists engaged by counsel. Doctor George Sachs refused to answer certain questions and a motion was brought to compel answers in the N.D. Ohio. Judge Wilkin stated at 427 that, "The case turns on an application of the principles announced in *Hickman v. Taylor*," and ordered Dr. Sachs to answer the question posed. Judge Sweeney under similar circumstances in the District of Massachusetts, *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 684 (D. Mass 1947), refused to compel Dr. Martin J. Buerger to answer questions posed on his deposition. At the time Judge Sweeney ruled, the case involving Dr. Sachs was pending before the 6th Circuit. In support of his ruling, Judge Sweeney said at 687:

While the movant relies upon *Hickman v. Taylor*, *supra*, I can find nothing in that decision which will sustain its claim to examine Dr. Buerger as a matter of right. On the contrary, I think that the case of *Hickman v. Taylor*, *supra*, is ample authority for the denial of the motion."

On appeal from a contempt citation, the 6th Circuit in *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948) (*per curiam*), affirmed Judge Wilkin, holding that the attorney-client privilege did not apply nor did the case fall within the protection of the work product doctrine.

<sup>143</sup> This idea appears to have originated with *Lalace & Grosjean Mfg. Co. v. Haberman Mfg. Co.*, 87 Fed. 563 (2d Cir. 1898), where the court said, at 565, concerning an expert:

It does, however, appear that he has been retained by plaintiffs as an expert to assist them in the presentation of their case. As such the witness would seem to come within the privilege... as similar to that of counsel. More careful reflection has still further confirmed the impression that such privilege should be forfeited if the "scientific counsel" assume the role of a witness.

<sup>144</sup> 177 F.2d 971 (3rd Cir. 1949).

<sup>145</sup> *E.g.*, *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948); *E. I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del. 1959); *Leding v. U.S. Rubber Co.*, 23 F.R.D. 220 (D. Mont. 1959); *United States v. 50.34 Acres*, 13 F.R.D. 19 (E.D.N.Y. 1952); and *United States v. 300 Cans of Black Raspberries*, 7 F.R.D. 36 (N.D. Ohio 1947).

of the work product doctrine to experts have rejected such an extension, it has been applied to preclude discovery in a number of cases.<sup>146</sup> Extension of this doctrine to experts without qualification appears to be unsound. Unlike an attorney's, client's or investigator's recollection of potential witnesses' conversations or even the statements obtained from potential witnesses, expert information in the form of opinions and conclusions and the support therefor constitute evidence. In *Hickman* and *Allmont*, it appears that the potential witnesses involved were available for deposition. Accordingly, no good cause or necessity could be established why statements by such potential witnesses or the attorney's recollection of conversations with such witnesses should be produced. The only justification for permitting such discovery appeared to be the potential impeachment value of the material sought. If the deposition of an expert could be taken, then a holding that no good cause is established when an expert's report is sought could be justified, not on the basis of the work product rule, but because the report could have but potential impeachment value. On the other hand, if the expert's deposition can not be taken for whatever reason, and his report can not be produced under the work product doctrine, no means exists to learn before trial what the evidence will be, unlike the situation in *Hickman* and *Allmont*, nor does any means exist to narrow and clarify the issues which will be examined at trial arising out of the expert's information. It is submitted that ordinarily the most convenient means to learn what evidence is available and to narrow and clarify the issues is to compel the production of experts' reports, preferably by requiring a simultaneous exchange.

The rationale of the work product doctrine may have validity where the expert's function is to assist counsel before and during trial, but where he is not expected to testify. This latter situation, however, is comparatively rare. Yet, it suggests an area where discovery may be denied on the basis justifying the work product doctrine. The expert, although usually a witness during the trial, often performs functions before trial in assisting counsel to prepare direct and cross-examination.<sup>147</sup> If such matters were subject to discovery, the rationale of the work product doctrine would justify denial of discovery.

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<sup>146</sup> *E.g.*, *Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp.*, 23 F.R.D. 257 (D. Neb. 1959); *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55 (N.D. Ohio 1953); *Colden v. R. J. Schofield Motors Co.*, 14 F.R.D. 521 (N.D. Ohio 1952); *Schuyler v. United Air Lines*, 10 F.R.D. 111 (M.D. Pa. 1950); *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 684 (D. Mass. 1947).

<sup>147</sup> See note 143 *supra*.

The problem presented by a possible unwarranted interference with trial preparation is not solved in the area of expert information by a facile statement that the work product doctrine does or does not apply. Insofar as we are concerned with the conclusions to which he expects to testify and the support for them, including methods, tests, techniques and evaluations, the expert should stand in no different position than any other witness. In a given case, the answer to the problem may lie in confining discovery to the exchange of experts' reports; in another case, to limiting discovery to matters to which the expert expects to testify, or providing that certain specified matters may not be discovered. In any event, the doctrine should be given no general application precluding expert information from discovery.

### THE OPINION RULE

A commonly invoked restriction upon discovery is that "it is the ascertainment of facts that is the object of discovery proceedings as contrasted with opinions, conclusions or contentions."<sup>148</sup> To a large extent, there is a tendency to think of discovery as a medium solely for getting at facts. The contentions of the parties, the opinions of experts, and knowledge of the issues are not accorded much discovery significance.<sup>149</sup> It should be clear, however, that according to the concept of notice pleading and discovery, there was no intention by the drafters of the rules that parties should go to trial with issues only vaguely defined.<sup>150</sup> Unless discovery extends to contentions,

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<sup>148</sup> *Cinema Amusements v. Loew's, Inc.*, 7 F.R.D. 318, 320 (D. Del. 1947).

<sup>149</sup> Willis, *The Practical Operations of Federal Discovery*, 12 F.R.D. 131, 161 (1952).

<sup>150</sup> An extreme example of going to trial without issues or issues only vaguely defined is the usual eminent domain proceeding. Under rule 71 A (e), a notice of appearance is the only pleading called for from a property owner.

It has been stated that the only issue in a condemnation case is just compensation, *McCandless v. United States*, 298 U.S. 342, 348 (1936) and for this reason discovery is unnecessary. Dolan, *Federal Condemnation Practice—General Aspects*, 27 APPRAISAL J. 15, 18 (1959). This is only partly true. Condemnation trials present issues concerning the determination of what is the whole parcel; the highest and best use of the property; applicable zoning and probability of change in zoning; what sales are comparable and how each is compared to a property taken or partly taken; the cost of reproduction and the method used in determining such cost together with depreciation estimates and the methods used as well as supporting data; the gross and net income, expenses, a property's reasonable rental value, and the basis for selection of a capitalization rate; whether severance damage exists and if so its source, etc. Under present practice generally these issues are not known until trial when it is frequently too late to effectively cross-examine an expert or prepare rebuttal testimony. More importantly, unless the position of each party is known as well as the support for it, no intelligent evaluation can be made for settlement purposes.

opinions and issues, there is no effective way to determine them prior to trial.<sup>151</sup> The emphasis on mutual knowledge before trial to afford better preparation and therefore shorter trial time on the real issues, requires clearly defined issues, not only of fact, but of contentions as well, and particularly of expert evidence.<sup>152</sup> In cases in which experts are called to testify, the decisions frequently turn on such evidence.<sup>153</sup> In such cases, the issues will concern the validity of comparisons, methods, techniques, theories and conclusions to which the expert will testify; they will not be concerned, except incidentally, with the underlying facts.<sup>154</sup> Many of the articles,<sup>155</sup> texts<sup>156</sup> and cases<sup>157</sup> urging discovery of opinions and contentions as a means of clarifying issues concern nonevidentiary matters. Certainly, if such matters are or should be the subject of discovery on that basis, the opinions and contentions of experts admissible in evidence should be discoverable inasmuch as prior knowledge of them would have greater impact in clarifying and narrowing the issues.

No distinction between fact and opinion can be found in the rules. It is a relic from the limited discovery permitted under earlier practice. Equity Rule 58 was limited to "discovery by the opposite party or parties of facts and documents material to the support or defense of the cause."<sup>158</sup> The original Rule 33 of the Federal Rules of Civil Procedure in essence simply authorized interrogatories and provided for the mechanics of service.<sup>159</sup> The only indication of the scope interrogatories might take was contained in the Advisory Committee Note which simply stated, "This rule restates the substance of Equity Rule 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness) with modification to conform to these rules."<sup>160</sup> Whether Rule 33 as originally adopted was as broad as Rule 26 in authorizing discovery was therefore not only subject to debate, but the Committee Note perhaps justified a con-

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<sup>151</sup> Willis, *supra* note 149, at 161. See also 4 MOORE, *op. cit. supra* note 117, ¶ 33.17.

<sup>152</sup> See authorities cited note 151 *supra*.

<sup>153</sup> See *e.g.*, United States v. Nysco Laboratories, Inc., 26 F.R.D. 159, 162 (E.D.N.Y. 1960); E. I. DuPont de Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416, 421 (D. Del. 1959); and Friedenthal, *supra* note 137, at 455.

<sup>154</sup> See Winner, *supra* note 138, 101-03; McGlothlin, *supra* note 138, at 478.

<sup>155</sup> *E.g.*, Willis, *supra* note 149, at 161.

<sup>156</sup> *E.g.*, 4 MOORE, *op. cit. supra* note 117, ¶ 33.17.

<sup>157</sup> *E.g.*, Broadway and 96th St. Realty Co. v. Loew's Inc., 21 F.R.D. 347 (S.D.N.Y. 1958).

<sup>158</sup> 4 MOORE, *op. cit. supra* note 117, ¶ 33.02, at 2257 n.1.

<sup>159</sup> *Id.* ¶ 33.03 for a discussion of discovery under Equity Rule 58.

<sup>160</sup> *Id.* ¶ 33.01, at 2255.

struction as narrow as earlier practice gave Equity Rule 58. After the rules went into effect, a number of cases arose excluding opinions, conclusions and contentions from the scope of interrogatories, the most significant of which was the opinion of Judge Chestnut in *Coca Cola v. Dixi-Cola Labs., Inc.*<sup>161</sup> Very few of the decisions give any reasoned explanation for their holdings.<sup>162</sup> Thus, a restriction of Equity Rule 58 was carried over to encrust Rule 33 of the Federal Rules of Civil Procedure. Although the 1946 amendment to Rule 33 made clear that interrogatories "may relate to any matters which can be inquired into under Rule 26 (b)," the restriction upon inquiry into matters of opinion not only remained,<sup>163</sup> but has been extended to limit discovery under Rule 26 and Rule 34.<sup>164</sup> The distinction<sup>165</sup> between fact and opinion is particularly without merit when we are concerned with experts. The facts of litigation where experts testify are opinions,<sup>166</sup> and the issues relate to method, technique and judgment.<sup>167</sup> They can not be learned before trial except by discovery. The underlying rationale of most of the decisions excluding opinions, and therefore expert opinions, from discovery appears to have no sounder foundation than the position that the purpose of discovery is limited to the ascertainment of facts. It is clear, however, that this view finds no

<sup>161</sup> 30 F. Supp. 275 (D. Md. 1939). Many of the cases so holding are cited in 4 MOORE, *op. cit. supra* note 117, ¶ 33.17 n.1.

<sup>162</sup> *Id.* ¶ 33.17.

<sup>163</sup> *E.g.*, Snyder v. Atchison, T.S.F.R.R. 11 FED. RULES SERV. 33,351, Case 1 (W. D. Mo. 1948), which appears to be the ultimate in technicality. An interrogatory asked whether a door in the defendant's railroad coach fell upon the plaintiff. The court in sustaining an objection to the interrogatory said that since the defendant was a corporation, "any answer that it might make would be but the expression of an opinion."

<sup>164</sup> *E.g.*, United States v. Certain Parcels of Land, 25 F.R.D. 192 (N.D. Cal. 1959). In denying a motion under rule 34 the court at page 193 said: "One of the lines of limitation, which federal courts have drawn, relates to the discovery of opinionative material." See also, United States v. 19,897 Acres, 27 F.R.D. 420 (E.D.N.Y. 1961); Berkley v. Clark Equipment Co., 26 F.R.D. 153 (E.D.N.Y. 1960); and United States v. Certain Parcels of Land, 15 F.R.D. 224 (S.D. Cal. 1953).

<sup>165</sup> What is fact and what is opinion is a matter of degree. "Very little, if any, of the 'factual' information possessed by a human being is not based upon inference, deduction or conclusion." Dusek v. United Air Lines, 9 F.R.D. 326, 327 (N.D. Ohio 1949). See also *Katasafaros v. Jones and Laughlin Steel Co.*, 15 FED. RULES SERV. 33,342, Case 3 (N.D. Ohio 1951); 7 WIGMORE, EVIDENCE §§ 1917-29 (3rd ed. 1940); and Friedenthal, *supra* note 137, at 481.

<sup>166</sup> In *E. I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del. 1959), a patent infringement suit, Judge Kirkpatrick at 421 stated, "looked at from a practical rather than a legalistic point of view, the facts of a case like this, are the opinions of experts, and the groundwork for those opinions comes within the ambit of a proper search for facts beyond the knowledge of the moving party."

<sup>167</sup> The "Prettyman Report," *Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 62 (1953), states at 79: "When experts differ in their conclusions, it is usually because they differ in their qualifications, the basic material used, or the processes by which they fashion their conclusions from the material used." See also McGlothlin, *supra* note 138, at 467.

justification in the language of the rules and ignores narrowing and clarifying issues as a main objective of discovery.<sup>168</sup>

In 1944, one case<sup>169</sup> denied inquiry into opinions on the ground that interrogatories were limited to admissible evidence. Whether or not such reasoning had merit when that decision was rendered, the 1946 amendments to Rule 33 and Rule 26 make it clear that the scope of interrogatories under Rule 33 is as broad as discovery under Rule 26, and emphasized that inadmissibility at trial was not ground for objection "if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."<sup>170</sup> In any event, such reasoning would not exclude expert opinion from discovery. Granting the validity of the rule excluding opinions from trial testimony, it has no application to experts.<sup>171</sup>

A reason related to admissibility in evidence was given in a condemnation case<sup>172</sup> as the basis for excluding expert information from discovery. The court said that the opinions of an appraiser were immaterial and incompetent as evidence until the appraiser was called as a witness during the trial and qualified as an expert. Such reasoning is specious for it would preclude discovery of anyone. The questions of materiality of evidence and competence of witnesses may always be raised at trial with any witness or with portions of testimony. Such a limitation based on testimonial qualification ignores the requirement that "evidence objected to shall be taken subject to the objections."<sup>173</sup> Moreover, it ignores the practical fact that a party to a condemnation

<sup>168</sup> See *Conley v. Gibson*, 355 U.S. 41, 47, 48 (1957); *Hickman v. Taylor*, 329 U.S. 495 (1947); 4 MOORE, *FEDERAL PRACTICE* ¶ 33.17 (2d ed. 1950); Willis, *supra* note 149, at 161; and *Discovery as to Opinions, Conclusions and Contentions*, 16 FED. RULES SERV. 874 (1952).

<sup>169</sup> *Henwood v. Louisiana & Ark. R. R.*, 7 FED. RULES SERV. 33.31, Case 2 (W.D. Mo. 1944).

<sup>170</sup> Rule 26(b).

<sup>171</sup> 7 WIGMORE, *op. cit. supra* note 165, §§ 1917-29.

<sup>172</sup> *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1953). Judge Mathes, although recognizing that a pretrial exchange of the opinions of appraisers in a condemnation case undoubtedly would tend to shorten cross-examination and otherwise expedite adjudication and would be in furtherance of the declared policy of the rules to secure the just, speedy and inexpensive determination of a lawsuit declined to permit discovery of appraisers' opinions. In addition to grounding his decision on the lack of established testimonial qualification prior to trial the court stated that appraisal opinions are not reasonably calculated to lead to the discovery of admissible evidence and have evidentiary value as potential impeachment material but could rarely aid trial preparation in any other way. The fallacy of the court's additional observations are obvious. The appraisal opinions may very well be admissible evidence and certainly are relevant to the subject matter involved in a condemnation case. Moreover, they have value beyond potential impeachment material. Knowledge of the precise areas of difference between the appraisers on both sides would clearly tend to narrow and clarify the issues in condemnation litigation. See also note 181 *infra*.

<sup>173</sup> Rule 30(c).



case retaining an appraiser usually does so with the expectation that he will qualify as an expert and testify in the event of trial. It may well be that many of the cases holding opinions outside the scope of discovery can be justified—not on the basis of an a priori rule, but on the ground that such inquiry is unduly annoying, oppressive, burdensome or embarrassing in the circumstances presented. Thus, if a witness is not qualified, either because he lacks the training, education or experience of an expert or because he lacks the means to form an opinion, to require such a person to answer may unduly annoy, embarrass or oppress the witness or a party.<sup>174</sup> Even if an answer is given, however, the harm may be remedied at trial because the rules governing admissibility at trial are narrower than those applicable to discovery. But, beyond the right to exclude such evidence at trial, it would be anomalous to preclude discovery on the basis of lack of established testimonial qualification and then admit expert opinion testimony from the same witness at trial.

An objection to inquiry into matters of opinion carrying some weight was expressed in *Ryan v. Lehigh Valley R.R.*<sup>175</sup> The court pointed out that to require an answer to an interrogatory calling for matters of opinion and contention would commit a party to a position too early. Further, the court added that a case ought to be decided on all the evidence and a party should not be foreclosed by answers to interrogatories from making any contention that the evidence might justify. The answers to these objections do not lie in denying discovery but rather postponing it until such time as the party is committed to a position and attributing to the answers to such interrogatories no more binding effect than the pleadings possess. At some time prior to trial, the party objecting to discovery on these grounds will have committed himself to call certain experts and to assert certain opinions and contentions. At that time, or at least at some point prior to trial, all parties will be in a position where discovery would not commit a party to experts, opinions and contentions too early. Moreover,

<sup>174</sup> In *Macrina v. Smith*, 18 F.R.D. 254 (E.D. Pa. 1955), a question in the field of neuroses was found unduly embarrassing when posed to an osteopath anaesthetist who had no training or practical experience in the field of neuroses.

In *Beirne v. Fitch Sanitarium*, 20 F.R.D. 93 (S.D.N.Y. 1957), the issue arose on motion to limit examination under Rule 30(d). In ruling that a series of hypothetical questions based on an assumed state of facts was improper, Judge Weinfeld said that if the hypothetical aspects of the questions were omitted the questions could be put to the witness. Cf. *Coxe v. Putney*, 26 F.R.D. 562 (E.D. Pa. 1961) where the court permitted hypothetical questions in a malpractice action where there was previous deposition testimony supporting the facts assumed in the hypothetical question.

<sup>175</sup> 5 F.R.D. 399 (S.D.N.Y. 1946).

answers to interrogatories do not preclude a party from making any contention which the evidence will justify. The answer to this part of the argument has been adequately expressed in the following language:

This argument, however, assumes too much. In liberalizing the rules on pleading the Advisory Committee meant to abolish the strait jacket effect which pleadings formerly had; . . . (see Rule 15 (b) amendments to pleadings, and Rule 54 (c) judgment in accordance with the evidence). Certainly interrogatories are not to be used as a new style strait jacket. But to say that interrogatories may be used as adjuncts to the pleadings is not to say that they are to be given more of a binding effect than the pleadings. "Even the pretrial order, which controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice," (Rule 16) is not given rigid effect in limiting the issues at the trial. Conceding that the party should have some leeway at the trial to adjust his legal arguments to the evidence that is adduced, it is not asking too much that he indicate prior to trial just what his basic legal contentions are.<sup>176</sup>

Similarly, granting that a party should have some leeway at trial to adjust his position based on the evidence adduced, it is not asking too much that he indicate prior to trial the expert evidence upon which he intends to rely.<sup>177</sup>

In *United States v. 19.897 Acres of Land*,<sup>178</sup> Judge Lavatt refused to compel answers to interrogatories calling for the disclosure of appraisal opinions on the ground that at the time propounded, the United States did not know which appraisers would be called as witnesses at trial and therefore the court did not want to commit the United States to state what particular factor or factors would be relied upon. The court, however, required the parties to exchange lists of comparable sales containing the names of seller and purchaser, location of the property, the date of sale and the date, book and page of deed recordation. Such lists were to be exchanged "simultaneously

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<sup>176</sup> Discovery, *supra* note 168, at 877.

<sup>177</sup> An aspect of this problem appeared in *United States v. Watchmakers of Switzerland Information Center, Inc.*, 2 FED. RULES SERV. 2d 33.353, Case 3 (S.D.N.Y. 1959). Although agreeing that interrogatories should be used to clarify the issues, the court refused to require answers calling for opinions and contentions on the ground that the issues should not be narrowed by forcing a party to answer under oath matters not within its knowledge. If, however, the matter subject to inquiry is material to the litigation, someone will establish the matter during trial or will have knowledge of it. If not, possibly the interrogatory is annoying, oppressive or burdensome. Moreover, Rule 33 only requires a party to "furnish such information as is available to the party."

<sup>178</sup> 27 F.R.D. 420 (E.D.N.Y. 1961).

on or before 30 days before the date fixed for trial."<sup>179</sup> As earlier pointed out, the parties will have committed themselves prior to trial to call certain experts, who in turn will be committed to certain factors in support of their opinions. Certainly, if the parties are in a position to exchange comparable sales data thirty days prior to trial, they would be in a position to answer the interrogatories to which objection was made.<sup>180</sup> This position precluding discovery of the opinions of expert appraisal witnesses but permitting disclosure of "factual data" has been taken in two other condemnation cases.<sup>181</sup> It is submitted that these cases misconceive the issue formulation function of discovery. Although knowledge of the sales each side will rely upon may be helpful in affording the opportunity prior to trial to examine such sales,<sup>182</sup> it does not go far enough. Such sales data will probably have been examined by each party prior to trial in any event, but the issues concerning them will seldom relate to sale dates, parties to such sales, areas or prices, but rather to the comparisons made, the adjustments in comparing the sales to the property in issue and the support for such adjustments. These issues can not be learned before trial except by discovery, and refusing to permit inquiry into opinions of experts ignores this important function which discovery alone must perform.

<sup>179</sup> *Id.* at 423. At page 422 the court said "it would tend to shorten the trial if both sides knew in advance of the trial, what sales of other properties each party may contend on the trial can possibly be relevant to the issue of value of the damaged parcel. Such advance notice would afford each party the opportunity to examine all such parcels and inquire into the terms and conditions of each sale before the trial for the purpose either of supporting or attacking the weight to be given to the same by the trier of the fact..."

<sup>180</sup> The interrogatories sought the names of the government's appraisers, the date of each appraisal, copies of the appraisal reports, lists of sales relied on, value as appraised, and statements of the appraisers' qualifications.

<sup>181</sup> *United States v. 284,392 Square Feet*, 203 F. Supp. 75 (E.D.N.Y. 1962) and *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1953). In the latter case, also discussed in the text accompanying footnote 172 and in that footnote, the court pointed out that an appraisal report might contain information regarding comparable sales which were not a matter of public record which information might itself afford the basis for or tend to corroborate the testimony of the experts of the party seeking discovery as well as affording a basis for cross-examination. Accordingly, after an *in camera* inspection of the report, such "factual data" was turned over to the party seeking discovery. See also *Berkley v. Clark Equipment Co.*, 26 F.R.D. 1953 (E.D.N.Y. 1960) where discovery of the conclusions of an accountant was denied.

<sup>182</sup> The practice of requiring an exchange of comparable sales data appears to have originated with Judge Carter of the United States District Court for the Southern District of California. His practice in condemnation cases is part of his pre-trial procedure and is discussed in his article, *Pre-Trial in Condemnation Cases, A New Approach*, 40 AM. JUD. SOC'Y 78 (1956). The Land Condemnation Pre-trial Order (outline and check list) adopted as part of the Amendments and Additions to the local Rules of the United States District Court for the Western District of Washington, effective October 1, 1962, in paragraph 15 provides for the exchange of comparable sales data. See also N.Y. CITY ADMIN. CODE § 15-16.0, N.Y. LAWS 1937, ch. 929, at 159-60; S.D. CAL. R. 9; and CALIFORNIA LAW REVISION COMM'N. STUDY No. 4, DISCOVERY IN EMINENT DOMAIN PROCEEDINGS (1963).

Whether discovery should be denied, limited, conditioned or permitted is not subject to any formula of broad scope so as to furnish an infallible touchstone for every specific case, nor can such a formula as the opinion rule even furnish a method of attack.<sup>183</sup> As with other discovery problems, the courts and attorneys should not be concerned with distinctions between facts, opinions, theories and contentions, but rather whether an answer to the inquiry would serve any useful purpose either in leading to admissible evidence or in narrowing and clarifying the issues. Beyond this, consideration should be given to whether answering the inquiry would unduly burden or prejudice the interrogated party,<sup>184</sup> and to determining how prior disclosure can be effected to eliminate undue burden or prejudice.

#### UNLIMITED DISCOVERY OF EXPERTS

The decisions which have permitted discovery in the area of expert opinions have been concerned principally with the problem whether any recognized privilege<sup>185</sup> existed protecting an expert's opinion from discovery<sup>186</sup> and whether an answer to the inquiry could be compelled at trial.<sup>187</sup> The federal courts have found little difficulty in concluding that no recognized privilege protects such opinions. It seems clear that the attorney-client privilege extends only to communications between a client and an attorney and does not extend to the knowledge

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<sup>183</sup> In speaking of the opinion rule, the court in *Caldwell-Clements, Inc., v. McGraw-Hill Publishing Co.*, 12 F.R.D. 531, 544 (S.D.N.Y. 1952) said "[I]t has been recognized that many such rules have gone too far and tend to defeat the purpose of the deposition-discovery rules."

<sup>184</sup> *United States v. Renault, Inc.*, 3 FED. RULES SERV. 2d 33.53, Case 3 (S.D.N.Y. 1960); *Territory of Alaska v. Arctic Maid*, 135 F. Supp. 164 (D. Alaska 1955); *International Nickel Co., Inc., v. Ford Motor Co.*, 15 F.R.D. 392 (S.D.N.Y. 1954); *Interborough News Co. v. Curtis Pub. Co.*, 14 F.R.D. 408 (S.D.N.Y. 1953); *Taylor v. Sound S. S. Lines*, 100 F. Supp. 388 (D. Conn. 1951); 4 MOORE, FEDERAL PRACTICE ¶ 33.17 (2d ed. 1950).

<sup>185</sup> The courts are not agreed whether federal law or state law controls the question of privilege in various types of cases. Cf. 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 651, at 320; 4 MOORE, *op. cit. supra* note 168 ¶¶ 26.23, 34.15; and *Leszynski v. Russ*, 29 F.R.D. 10 (D. Md. 1961) and note 65 *supra*.

<sup>186</sup> *E.g.*, *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948); *Leding v. United States Rubber Co.*, 23 F.R.D. 220 (D. Mont. 1959); *United States v. 50.34 Acres*, 13 F.R.D. 19 (E.D.N.Y. 1952) (opinion by Judge Galston); Judge Byers' opinion in the same case, 12 F.R.D. 440 (E.D.N.Y. 1952); *Kendall v. United Airlines*, 9 F.D.R. 702 (S.D.N.Y. 1949); and *Lewis v. United Air Lines*, 31 F. Supp. 617 (W.D. Pa.), *rehearing* 32 F. Supp. 21 (1940).

<sup>187</sup> *E.g.*, *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 425 (N.D. Ohio 1947) *aff'd sub. nom.* *Sachs v. Aluminum Co. of America*, *supra* note 186; *Bergstrom Paper Co. v. Continental Ins. Co.*, 7 F.R.D. 548 (E.D. Wis. 1947). This problem was considered in *Boynton v. R. J. Reynolds Tobacco Co.*, 36 F. Supp. 593 (D. Mass. 1941), but discovery was denied on other grounds.

of the client.<sup>188</sup> Even if the privilege extends to agents of the client or the attorney, it is still limited to communications between them and does not protect knowledge obtained by the agent aside from such communication.<sup>189</sup> Whether an expert can be compelled at trial to answer an inquiry in the area of his expertise has been of more concern.<sup>190</sup> The federal courts which have considered this problem have concluded that the court has the right to compel answers to such inquiries within the existing knowledge of the expert, but can not compel an expert to make investigations or otherwise prepare himself to testify.<sup>191</sup>

Once these two hurdles have been overcome, those decisions permitting discovery in the area of expert opinions appear to proceed from the premise that discovery simply advances the time of disclosure from trial to the period preceding trial.<sup>192</sup> These opinions<sup>193</sup> were not concerned with whether disclosure under the circumstances presented would be unduly burdensome, annoying or oppressive either to a witness or party. Discovery, however, is far broader in scope than inquiry permitted at trial, and the power of the court to limit, condition or prohibit disclosure is extensive and is not dependent upon whether an inquiry would be proper at trial. Whether the dangers which have been protected against in opinions refusing to permit discovery in the area of expert information materialize in cases where such discovery is permitted without limitation or condition will never be known. Nevertheless, the fear of these dangers is real and arises whenever discovery affords the opportunity to oppressively interfere with trial preparation. When a case is in such posture, the possibility exists that discovery is sought in bad faith or that annoyance or oppression to a party or witness will result from compelling disclosure.

As with a priori rules which have been the basis for denying prior disclosure of expert evidence, requiring such disclosure on the ground that discovery simply advances the time of disclosure is an oversimpli-

<sup>188</sup> See *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792 (D. Del. 1954); and *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 349 (D. Mass. 1950).

<sup>189</sup> *Ibid.* See also Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 455-69 (1962).

<sup>190</sup> See *Boynton v. R. J. Reynolds Tobacco Co.*, 36 F. Supp. 593 (D. Mass. 1941); Annot., 77 A.L.R.2d 1182 (1961). The Washington court permits compelling such disclosure at trial. *Sneddon v. Edwards*, 53 Wn.2d 820, 823 (1959), and cases cited therein. See notes 120-122 *supra* and accompanying text.

<sup>191</sup> See Annot., 77 A.L.R.2d 1182 (1961); 4 MOORE, *op. cit. supra* note 168, ¶ 26.24.

<sup>192</sup> This view appears to have originated with Mr. Justice Murphy's opinion in *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

<sup>193</sup> See cases cited, note 186, *supra*.

fication of too broad scope. Such a view fails to meet the real issues as they pertain to discovery of expert information. These issues concern whether requiring such prior disclosure unduly burdens or prejudices the witness or a party and the methods which should be utilized to effect such prior disclosure without unduly burdening the witness or party.

### CONCLUSION

The concepts embodying judicial discretion and authority represent the only valid answer yet offered to the varied problems which may arise in determining the scope and extent of discovery, no more nor less with experts than with other witnesses or evidence. These concepts are vague and remain so after analysis of the decisions applying them. Like standards of reasonableness that are common in the substantive law, they derive a large measure of their usefulness from this very vagueness, for they enable the district courts to achieve for each case the advantages of prior disclosure without the evils uncontrolled discovery could create. We thus have an adjustment by the courts rather than a determination by deduction. This adjustment is not susceptible to an accurate and scientific application according to precise and well understood principles. Certainly the a priori rules which have been used to solve the problems presented with discovery of expert information do not withstand close scrutiny. The problem with which district courts and attorneys should be concerned is not whether in the circumstances presented in a given case discovery should be permitted or denied, but rather, how can prior disclosure of expert information be best accomplished and the issues narrowed and clarified in good faith without oppression of either a party or witness.

Neither the opinion rule nor requiring a showing of necessity, as that term has been used in the cases, has much merit as general limitations upon discovery of expert information. These are seeds left over from an earlier practice which have grown into the weeds of a technicality frustrating the goals of discovery practice. The rationale of the cases holding that such discovery is an unwarranted interference with trial preparation has but limited validity when applied to expert information. Such objections can be remedied by limitation or condition without requiring denial of prior disclosure of expert information. Unrestrained discovery of experts is an oversimplification which fails to meet the issue. The keystone of discovery

is its reciprocity. When the parties are in a similar position, discovery should be encouraged; when they are not so situated, discovery should be conditioned or limited so that the parties may equally obtain the advantages discovery was designed to achieve.

Whether through pre-trial order,<sup>194</sup> or a rule of court, when a discovery issue is presented or when a case is set for trial, the court should ascertain whether the parties intend to call expert witnesses. If so, the court should order that the experts' investigations and studies be completed in detailed written form<sup>195</sup> by a specified date sufficiently in advance of trial to permit discovery. The court may then provide, on such conditions as the circumstances of each particular case warrant,<sup>196</sup> for the taking of the depositions of experts, for the exchange of experts' reports<sup>197</sup> or for the taking of depositions after the exchange of experts' reports. Such procedures are well within the courts' power and are suggested as possible means to place the parties in a reciprocal position so that the advantages of discovery may be mutually available. Such procedures in the area of expert information will help to narrow

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<sup>194</sup> Freund, *The Pleading and Pre-Trial of an Anti-Trust Claim*, 46 CORNELL L.Q. 555, 562 (1961) states, "Although not ordinarily considered to be a discovery device, [a pretrial conference] frequently serves a fact finding function and may on occasion supplant the more formal discovery methods."

<sup>195</sup> It is essential that such reports be detailed for the opinions alone are of limited value as is the underlying data without knowledge of the conclusions. What is necessary is the support for the conclusions as well as the conclusions. Knowledge of the underlying factual matter without knowledge of the conclusions are "mere stabs in the dark." *United Air Lines v. United States*, 26 F.R.D. 213, 217 (D. Del. 1960).

<sup>196</sup> If but \$1,000.00 is involved in a condemnation case, certainly the extent of discovery should not be the same as where the parties differ by \$100,000.00 in their estimates of just compensation.

Where a property has little relative value, condemnees are frequently forced to accept a condemnor's offer whether or not it represents just compensation. It would appear inequitable not to compel disclosure of the basis for such offers on condition that the condemnee seeking such disclosure be refused the right to call expert witnesses at the time of trial unless the interests of justice require modification of such condition. It frequently happens that an appraiser of such a property, knowing a condemnee cannot afford to go to trial, becomes careless and overlooks matters which should be considered and which might well affect the estimate of just compensation. If a property owner in such circumstances can show an ill considered estimate or that matters were overlooked, the condemnor might adjust its offer or the court might find that such condition on discovery should be modified and permit an expert witness to be called by the condemnee. Moreover, the risk of a low estimate based on partisanship might be modified if the appraiser knew his opinion and the support for it could be scrutinized in any event.

<sup>197</sup> The advance exchange of testimony in anti-trust litigation was urged in the *Prettyman Report*, *supra*, note 167, at 70, which was adopted by the Judicial Conference of the United States on September 26, 1951. See also *Seminar on Practice and Procedure*, 28 F.R.D. 37, 151 (1961). See note 182 *supra* setting out authorities urging or requiring the exchange of certain data in condemnation cases. The exchange of appraisal reports in condemnation cases has been required in both the Supreme Court for New York County, New York, and the Supreme Court for Kings County, New York. Searles and Raphael, *Current Trends in the Law of Condemnation*, 27 *FORDHAM L. REV.* 529 (1958-59).

and clarify the issues and afford the opportunity for better trial preparation, which in turn should shorten trials by confining the evidence to the real issues, or afford the basis for intelligent settlement. The same goals might be accomplished by other and different means, for the courts' power is flexible. No solutions designed to attain the goals of discovery have unvarying application.

Flexibility increases difficulty in the function of judge and attorney, and emphasis upon discretion makes prediction of results difficult. However, to effect pragmatically the result of mutual prior disclosure of evidence in good faith, without annoyance or oppression, in each individual case, is the way the rules contemplate the application of discovery to effect the just, speedy and inexpensive disposition of litigation as charged in Rule 1—again, no more or less with experts than with other witnesses or evidence.