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Comments on Rule 34

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COMMENTS ON RULE 34

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The enactment of a statute is often the starting point of litigation to construe the meaning of the wording, phrasing, paragraphs, and often the entire statute. The various rules of civil procedure have had this court treatment since their adoption by the federal courts and the several state courts, and Rule 34 [1] which pertains to discovery and production of documents and things for inspection, copying, or photographing is one of the most litigated rules.

Parts of Rule 34 [2] pertinent to this comment are:

> Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or . . . The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

The wording of the above rule has caused recurrence of the old controversy between the basic general principle that evidence should be made known to all parties and that considerations of the general good impose certain restraints upon the invasion of files and papers of attorneys. This controversy has arisen because of the necessity of producing signed statements of parties and witnesses to an accident in many cases, and recently the Colorado Supreme Court had occasion to make a decision on the point with regard to a statement signed by a party.

In *McCoy v. District Court of Larimer County* [3] it was held that Rule 34 [4] does not give the plaintiff in an action for damages for personal injuries an unqualified right to examine a statement signed by him and delivered to the defendant during an investigation conducted prior to the time suit was filed, and that, in the absence of a showing of good cause, defendant's attorney was not required to produce the statement. There was no indication in

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* Written while a student at the University of Denver College of Law.
[1] Colorado Rules of Civil Procedure and Federal Rules of Civil Procedure.
[2] *Ibid.*
[3] Advance Sheet, August 22, 1952, 246 P. 2d 619.
[4] Colo. R. C. P.

the opinion that the rule would be otherwise in the case of a statement of a witness to an accident.

The decision in *McCoy v. District Court of Larimer County, supra,* is in accord with the majority of decisions on the point under Federal Rule 34. Although a few early Federal District Court decisions held that there need not be a showing of good cause,[5] and one case did not require a showing of good cause because the statement was not taken by the defendant's attorney,[6] the majority of those lower court decisions are to the effect that good cause must be shown to require the defendant's attorney to produce the plaintiff's statement or a witness' statement.[7] Since the three major cases of *Martin v. Capitol Transit Co.*,[8] *Safeway Stores, Inc. v. Reynolds*,[9] and *Allmont v. United States*,[10] decisions from the Court of Appeals have consistently held that a showing of good cause was necessary. The Colorado Supreme Court cited *Martin v. Capitol Transit Co., supra,* with approval and the rule expressed in that case is as follows:

> Rule 34 authorizes the District Court to order production of documents, papers, etc., upon motion of a party "showing good cause" not upon a mere allegation or recitation that good cause exists. The rule contemplates an exercise of judgment by the court, not mere automatic granting of a motion. The court's judgment is to be moved by a demonstration by the moving party of its need, for the purpose of the trial, of the document or paper sought.

Nearly all of the Federal cases cite the famous case of *Hickman v. Taylor* [11] as supporting the theory of a required showing of good cause.

The decisions in code states on the point set down the general rule that the statements are part of the attorney's work and are not subject to discovery by the opposite party.[12] However, under

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[5] Tague v. Delaware L & W. R. Co., 5 F.R.D. 337; Kershner v. Palmer, 7 F.R.D. 252.

[6] DeBruce v. The Pennsylvania R. Co., 6 F.R.D. 403.

[7] Stark v. American Dredging Co. 3 F.R.D. 300; Gordon v. The Pennsylvania R. Co. 5 F.R.D. 510; Nedemeyer v. The Pennsylvania R. Co. 6 F.R.D. 21; Hanke v. Milwaukee Electric Railway and Transport Co. 7 F.R.D. 540; Hoffman v. Chesapeake & O. R. Co. 7 F.R.D. 574; Berger v. Central Vermont Ry Inc. 8 F.R.D. 419; Reeves v. The Pennsylvania R. Co. 8 F.R.D. 616; Bennett v. New York Cent. R. Co. 9 F.R.D. 17; Hudalla v. Chicago M. S. P. & P . R. Co. 10 F.R.D. 363 (cited by the Colorado Supreme Court); Brauner v. United States 10 F.R.D. 468.

[8] 170 F. 2d 811.

[9] 176 F. 2d 476.

[10] 177 F. 2d 971.

[11] 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451.

[12] Missouri Pacific R. Co. v. Hall, 325 Mo. 102, 27 S.W. 2d 1027; Sack v. All States Holding Corp., 268 Appl. Div. 793, 49 NYS 2d 148; Scavone v. Bush, 84 NYS 2d 40.

special circumstances discovery of such statements has been allowed.[13] It appears that the special circumstances under which discovery was allowed would constitute a showing of good cause that would allow discovery under Rule 34.

The decision in *McCoy v. District Court of Larimer County, supra,* raises the question as to what would constitute a showing of good cause sufficient to require production of the statements. The only clue in the court's opinion is in the following paragraph wherein the court was speaking of the facts in the case at hand:

> There is no suggestion that the declarant in each statement was not in full possession of his faculties when the instrument was signed, nor is there any reason given why his present version of the facts would differ from that contained in the written statement.

Keeping the court's comment in mind, we should note that in *Walsh v. Northland Greyhound Lines, Inc.,*[14] it was held that there was sufficient reason for discovery when it was alleged that the person making the statement was under sedatives at the time, that she was questioned until exhausted and that she believed the statement contained inaccurate information. In *Bearor v. Kapple* [15] discovery was allowed when plaintiff stated that he was ill when the statement was taken, that he was coerced with threats of being put in jail if he didn't sign the statement, and that he did not read the statement he signed. The court held that discovery was proper in *Toflegaard v. Hart* [16] upon a showing that defendant's agent coerced the plaintiff into signing the statement without an opportunity to read the statement, and plaintiff did not receive a copy of the statement. On plaintiff's affidavit that he had grounds for believing the statement had been fraudulently altered the court allowed discovery in *Nedemeyer v. The Pennsylvania R. Co.*[17] In a suit against the United States for damages arising out of a military plane crash it was held that the nature of the accident, the difficulty of obtaining information as to the cause of the accident, lapse of time and the fact that the witness was still in military service was good cause for allowing discovery.[18]

On the other hand, discovery of the statements have been denied for failure to show good cause under the circumstances of the following cases. Several cases [19] have denied discovery where the only cause shown was that the person who made the statement

[13] Walsh v. Northland Greyhound Lines, 244 Wis. 281, 12 N.W. 2d 20; Toflegaard v. Hart, 100 NYS 2d 729; Bearor v. Kapple. 24 NYS 2d 655.

[14] 244 Wis. 281, 12 N.W. 2d 20.

[15] 24 NYS 2d 655.

[16] 100 NYS 2d 729.

[17] 6 F.R.D. 21.

[18] Brauner v. United States, 10 F.R.D. 468.

[19] Scavone v. Bush, 84 NYS 2d 40; Croteau v. Belden, 30 NYS 2d 315; Hudalla v. Chicago M. S. P. & P. R. Co., 10 F.R.D. 363.

could not remember the contents of the statement. A desire on the part of the attorney to know what his adversaries or their clients believe to be the true facts was held not "good cause" in *Havrisko v. United States.*[20] The allegation that the statement was necessary to refresh recollection and avoid giving testimony at variance with the statement was held as insufficient good cause to warrant discovery.[21] Two cases have held that there cannot be discovery of the statements without a showing that the witnesses are unavailable,[22] and the fact that witnesses were in another state and the costs of taking their depositions was held not to be good cause in the cases of *Berger v. Central Vermont Ry., Inc.,*[23] and *Reeves v. The Pennsylvania R. Co.*[24]

[20] 68 F. Supp. 771.
[21] 49 NYS 2d 650.
[22] Bennett v. New York Central R. Co., 9 F.R.D. 17; Hanke v. Milwaukee Electric Ry and Transport Co., 7 F.R.D. 540.
[23] 8 F.R.D. 419.
[24] 8 F.R.D. 616.

BAR ADMISSIONS

The following information has been provided by the National Conference of Bar Examiners and may be of interest to *Dicta* readers:

ADMISSIONS TO THE BAR

		On Examination	*By Diploma (Rule 220 A)*	*On Motion*	*Total*
Colorado	1949	193	0	15	208
	1950	188	0	16	204
	1951	166	6	10	182
	1952	129	3	6	138
48 State Total	1949	11,773	1,571	573	13,344
	1950	12,015	1,626	475	13,641
	1951	11,568	1,573	498	13,141
	1952	10,465	1,435	555	11,900

FATALITY RATE ON BAR EXAMINATIONS DURING 1952

	Took Bar Examinations	*Total Passing*	*Percent Passing*
Colorado	230	129	56%
48 State Total	17,871	10,465	59%

PERCENTAGE PASSING BAR EXAMINATION DURING 1952

	Repeaters	*First Timers*
Colorado	38%	64%
48 State Average	40%	67%