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DISCOVERY: A COMPETITION BETWEEN THE RIGHT OF PRIVACY AND THE RIGHT TO KNOW*

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The purpose of this article is to consider the implications incident to the July 1, 1970, amendments to the Federal Rules of Civil Procedure dealing with documentary discovery and the entry upon land and property of others for the purposes of discovery and inspection. The case for discovery, as an essential element of the judicial process, has been well and frequently stated. It is most strongly urged that the prospect for deciding a case rationally is enhanced by the fullest disclosure of all the facts that underlie the controversy. But this judicial idea in favor of compelled disclosure of information in the hands of the adversary runs counter to the persistent idea that all such forced submissions to discovery constitute, in varying degree at least, invasions of the rights of privacy of the person against whom such discovery is sought to be made.

To achieve some balance between these competing claims, state and federal rules governing compelled discovery have uniformly provided mechanisms for the judicial validation and surveillance of all such demands. The party seeking such discovery was required to gain judicial approval by way of court order, based upon a formal showing of entitlement, ranging from "good cause" to "strict necessity," depending upon the nature of the information involved. By terms of the amendments of July 1, 1970, documentary discovery under the Federal Rules, and entry upon the land and property of others for discovery and testing purposes, may now proceed extrajudicially and without the formerly required showing of good cause. In addressing ourselves to the wisdom of this radical change, we have focused in this article upon that form of compelled discovery that involves the forced entry upon the land or property of the adverse party for purposes of inspection, measuring, testing, or sampling.

Aside from any consideration of its practical consequences, this reduction of judicial involvement in the processes of discovery must be viewed as a serious reversal of that continuing trend in judicial administration marked by the increased and salutary participation by the court in the pretrial incidents of civil litigation. And there is every reason to believe that those factors of harassment, oppression, and industrial espionage, which moved courts to exercise strict surveillance over all demands for compelled discovery, were not merely specters conjured to support a rule of judicial intervention, but are a real measure of our current concern.

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*. Some of the materials in this article are drawn from Professor Hughes' forthcoming treatise on *Photographic Evidence* now in printing at Bobbs-Merrill Co., Inc.

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JUDICIAL CONTROL OVER PRETRIAL DISCOVERY

At this point, we consider the right of a party pursuant to request or court order to enter upon land or other property in the possession or control of his adversary for the purpose of "inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon . . . ."[1] In dealing with this aspect of discovery, our narrower concern is with the right to go into another's premises or other property for the purpose of photographing matters of legitimate interest to the moving party. But it is quite clear that this particular right is rooted in broader considerations that control the right to make such entry at all, for purposes of discovery.

While this right to go upon another's property for photographic purposes is distinguished from and treated separately from the compelled production of photographs, books, papers, and other tangible things, it shares much in common with the latter by way of legal limitations upon its use. It will be expedient, therefore, to incorporate by reference certain of the detailed analysis developed for the one phase of discovery, and equally applicable to the other.[2]

It is generally conceded that at common law the court had no authority to grant any person the right to go onto the land or other property of another for purposes of making discovery of the premises or objects located thereon.[3] But courts of equity were deemed to have the power to compel such entry for purposes of discovery, incident to an application for equitable relief.[4] In jurisdictions still remitted to this reduced opportunity for this type of discovery, the litigant will be advised to select his remedy with care.

The majority of American jurisdictions now have statutes or rules of court, pursuant to enabling acts that provide for discovery, inspection, and photo-

1. FED. R. CIV. P. 34 (a) (2), as amended July 1, 1970, reflects significant changes effected in this type of discovery by the July 1, 1970, amendment. These changes are:

(1) The revision of rule 34 causes it to operate extra-judicially, rather than pursuant to court order;

(2) The "good cause" requirement for ordinary documentary discovery or inspection has been eliminated. This reflects the prevailing judicial practice of not viewing this type of discovery as providing any kind of immunity simply because it deals with documents or entry upon the adverse party's property for necessary purposes associated with the litigation. Special protections are still retained with respect to work product and materials obtained or prepared in anticipation of litigation or in preparation for trial.

(3) In response to a frequently felt need in trial preparation, a provision for testing and sampling while inspecting the premises or property of the adverse party is added.

2. For extensive and valuable annotation concerning the exertion of judicial control over the several aspects of pretrial discovery and inspection, see Annot., 13 A.L.R.2d 657 (1950).

3. On the lack of common law authority to compel inspection of premises *see, e.g.*, O'Reilly v. Superior Court, 45 R.I. 491, 124 A. 1 (1924). *But cf.* Lincoln v. Langley, 99 N.H. 158, 106 A.2d 383 (1954).

4. Regarding the power of courts of equity to compel inspection of premises in absence of statutes, *see* Montana Co. v. St. Louis Mining & Milling Co., 152 U.S. 160 (1894); Union Oil Co. v. Reconstruction Oil Co., 4 Cal. 2d 541, 51 P.2d 81 (1935). For a strong opinion granting authority to injured workman to go onto employer's premises with his experts and photographers to examine and photograph machinery involved in an accident *see* State *ex rel.* American Mfg. Co. v. Anderson, 270 Mo. 533, 194 S.W. 268 (1917).

graphing of premises and articles thereon. In every case where challenged, the constitutionality of such provisions has been upheld. It is clear that the long and generally satisfactory experience of courts of equity in this area of discovery served to reassure modern courts of law of the inherent worth and workability of the rules statutorily provided.[5]

In making a determination to grant or deny an order for the compelled discovery or photographing of premises, courts are likely to be moved by a variety of considerations, singly or in the aggregate. It is clear that the trend is toward the liberalization of rights of discovery at both state and federal levels. At this point in time, all jurisdictions seem committed to the juridical idea that pretrial discovery makes an important contribution to the rational solution of legal disputes. But it is clear that the right to discovery is a qualified right that does not extend to making unnecessary and unwarranted excursions onto the property of another under the guise of supportable litigative need. Public policy supports reasonable and necessary demands for information in the hands of the adversary, in order that the case may be well and truly tried. But any such invasion of a person's property rights must, in the language of our Supreme Court, "be judged with care. . . . Properly to balance these competing interests is a delicate and difficult task."[6]

While these competing interests will seldom be in perfect balance, it is generally recognized that a trial court's discretion to grant or deny a motion for inspecting and photographing of premises or articles is very broad. And its determination will not be reversed, except upon a clear showing of abuse of discretion. Under this view, reversals appear limited to those cases where the trial court has chosen to ignore some clearly stated statutory requirement governing the right of discovery provided.[7]

Procedures To Invoke Right To Inspect and Photograph Premises and Things

In the preceding section of this article, we noted the significant changes effected by the amendments of July 1, 1970, to rule 34 of the Federal Rules of Civil Procedure, which governs the compelled production of documents and

5. In Montana Co. v. St. Louis Mining & Milling Co., 152 U.S. 160 (1894), the equity experience was cited in upholding a statute that permitted judicial authorization for inspection, photographing, and surveying of mining claims in litigation incident to such properties.

6. Hickman v. Taylor, 329 U.S. 495, 497 (1947).

7. For a statement of the rule of discretion applied to the trial court's finding of "good cause," *see* Williams v. Continental Oil Co., 215 F.2d 4 (10th Cir. 1954), *cert. denied*, 348 U.S. 928 (1955). *Cf.* Appleton v. Sauer, 271 Wis. 614 74 N.W.2d 167 (1956) (abuse of discretion shown); Bead Chain Mfg. Co. v. Smith, 1 N.J. 118, 52 A.2d 215 (1948) (reversing trial court, which had denied right of inspection on the ground the request was no more than a "fishing expedition" and ordering discovery with respect to whole categories of otherwise nonparticularized machines, dies, layouts, charts, and product samples on the ground that inspection and photographing of the property would "aid in ascertaining the rights of the parties"). *Id.* at 120, 62 A.2d at 216. *See also* Certain Underwriters v. Hawthorne Flying Serv., 63 So. 2d 308 (Fla. 1953) (abuse not shown).

things and entry upon land for inspection and other purposes. The federally applied rule with respect to entry upon the land or other property of an adverse party for purposes of discovery and related purposes incident to the pending litigation is stated in amended rule 34(a): "Any party may serve on any other party a *request* . . . (2) to permit entry upon *designated* land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)." (Emphasis added.)

It will be seen that the rule now operates extra-judicially (subject to a claim for protective order by the party against whom the discovery is sought) and without any required showing of "good cause" to support the request under the rule. The amendment also makes explicit provision for "testing and sampling" of tangible objects or things on the property of the adverse party, or of the operations carried on there. This would include the right to test the operating parts of a machine claimed to have caused injury or to test and take samples of its products if their nature or qualities are in issue.[8]

The July 1, 1970, amendment to federal rule 34 also spells out a detailed procedure for invoking recourse to the rule:[9]

FEDERALLY APPROVED FORMS FOR USE IN DOCUMENTARY DISCOVERY AND ENTRY ONTO LAND, ETC.

The request may, *without leave of court,* be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

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8. MacPherson v. Boston Edison Co., 336 Mass. 94, 142 N.E.2d 758 (1957).

9. FED. R. CIV. P. 34b (emphasis added). For forms of affidavits in support of motions for discovery under *former* rule 34, *see* 7 AM. JUR. *Pleading & Practice Forms* §§7:525, 7:528 (1956).

Form 24 adopted as part of the amendments of July 1, 1970, to the Federal Rules of Civil Procedure provides: "*Motion for Production of Documents, Etc.,* Plaintiff *A.B.* requests defendant *C.D.* to respond within ___ days to the following requests:

(1) That defendant produce and permit plaintiff to inspect and to copy each of the following documents:

(Here list the documents either individually or by category and describe each of them.)

(Here state the time, place, and manner of making the inspection and performance of any related acts [under the rule].)

(2) That defendant produce and permit plaintiff to inspect and to copy, test, or sample each of the following objects:

(Here list the objects either individually or by category and describe each of them.)

(Here state the time, place, and manner of making the inspection and performance of any [permissible] related acts.)

(3) That defendant permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph, test or sample (here describe the portion of the real property and the objects to be inspected).

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

Signed _____ _____"

Attorney for the Plaintiff Address

> The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The party upon whom the request is served shall serve a *written response* within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item and category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37 (a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

The amended version of federal rule 34, both with respect to documentary discovery and for entry upon land, continues to apply to parties only. This limitation has much in its favor, particularly in view of the extrajudicial nature of the new procedures and of the elimination of any necessity for laying a foundation of "good cause" for the exercise of the discovery rights. But the situation frequently encountered in practice is where the premises or the suspect piece of machinery is at the time of discovery owned or in the possession of a nonparty. Where there is an element of fraudulent or collusive transfer or concealment, the difficulty could be dealt with summarily by recourse to rule 37 (a) dealing with sanctions. And in other situations, where the bona fides are not in question, and the need for the entry upon the property of a nonparty is importantly indicated, a bill in equity for such discovery might be sought. In support of this alternative procedure, rule 34 (c) as amended July 1, 1970, is clear: "This rule [34] does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land."[10]

Prior to its July 1, 1970, amendment, federal rule 34 (2) fairly typified the several statutes and rules applied in state court litigation to support the judicially controlled right to enter upon the land of an adverse party for inspection and discovery purposes. This derives from the fact that former rule 34 (2) itself was modeled upon already existing provisions in certain state jurisdictions and served in turn as the basis for at least twenty state enactments of discovery rules of this nature.[11] In these states, at least for now,

10. This statement of the nonpreemptive nature of rule 34 will correct the impression earlier held by some courts that had dismissed bills in equity for such discovery on the ground that rule 34 was intended to be preemptive in the field. *See* Advisory Committee's Note, 48 F.R.D. 487, 526 (1969).

11. For a listing of states adopting the federal rules of discovery in whole or in part *see* 1-A J. MOORE, FEDERAL PRACTICE §0.504 (2d ed. 1961). *See also* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 225 (1963), which states: "The excellence of the rules is such

federal cases decided under the former rule 34 (2) have persuasive effect as interpretative of a rule in which the still viable state rules had their origin.[12]

The party seeking this form of compelled discovery through entry upon the land or property of another party, will proceed under most state statutes or state court rules by way of motion or petition in the proper court and upon certain prescribed notice to the opposition. Support for the motion or petition will be expressed in an affidavit executed by either the moving party or his attorney. Since discovery of this type may refer to entry upon any of several kinds of property, and for a rather wide range of permissible purposes under the rules, the motion and its supporting papers will have to be addressed to the particular circumstances of the case at hand.

Despite the wide range of circumstances that may affect a party's right to make this entry upon the property of another party for purposes of discovery and inspection, under most state rules the principal requirements to be met are those of "sufficient designation," "good cause," and certain prior-to-trial notions of "relevance or materiality."[13] And aside from the elimination of the prior showing of "good cause," it may be assumed that federal rights to this kind of discovery will still turn upon considerations quite similar to those adhered to by the states. Each of these considerations are dealt with in succeeding sections of this article. Reference is also made therein to those overlapping criteria that operate in governance of the general discovery and compelled production of documents, books, papers, photographs, and things, as well as this matter of the entry upon land and other property.

Designation of the Property, and Its Possession in Adverse Party

A common feature of all rules, state and federal, that govern the right to inspect or photograph the premises or other property of a party, or the operations carried on there, is that they will not support an unlimited excursion onto such property with ill-defined objects in mind. Such rules, including federal rule 34 both as past and presently drawn, require that the land or

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that in 20 jurisdictions the rules have been adapted for state use virtually unchanged, and there is not a jurisdiction which has not revised its procedure in some way which reflects the influence of the federal rules."

12. *See* Hefter v. National Airlines, Inc., 14 F.R.D. 78 (S.D.N.Y. 1952); Certain Underwriters v. Hawthorne Flying Serv., 63 So. 2d 308 (Fla. 1953), for respective holdings that old rule 34(2) and a state rule derived from it were broad enough to support an order of entry upon property other than real estate – as for example, a vessel or an airplane in the possession or control of a party to the action. For discussion of the nature of this right of entry, *see* Canty v. Great Lakes Transit Corp., 2 F.R.D. 156 (W.D.N.Y. 1941) (order granted for inspection and photographing of a vessel under control of adverse party, although two years had elapsed since happening of claimed accident). *See also* Mulligan v. Eastern S.S. Lines, Inc., 6 F.R.D. 601 (S.D.N.Y. 1946). By terms of Fed. R. Civ. P. 27 (a) (3), for the perpetuation of testimony, the court is empowered to make such further orders "of the character provided for by Rules 34 and 35."

13. *E.g.*, DeCourcy v. American Emery Wheel Works, 89 R.I. 450, 153 A.2d 130 (1959). *See also* Clark, *Two Decades of the Federal Rules*, 58 Colum. L. Rev. 435 (1958).

other property subject of the entry and related acts be sufficiently "designated."[14]

The property must be shown to be in the "possession, custody, or control" of the party against whom discovery is sought to be made. While this latter requirement is part of the language of federal rule 34 (a), as amended, similar requirements have been imposed under state statutes and rules less explicit in their terms. In some cases, entry and inspection have been denied because the objects to be inspected and photographed were not designated with sufficient particularity.[15] In others, the move for discovery of this type failed because there was no showing made that the objects sought to be photographed did in fact exist or where it was not clear which of several possible articles were the subject of the demand for inspection.[16]

It is significant that with all its enlargement of the opportunities for documentary discovery and entry on land, federal rule 34, as amended, still applies only to parties to a pending action. Both the movant and the person against whom discovery or right of inspection is sought must be a party to the action. The single exception arises under a seldom encountered proceeding adjunctive to the taking of a deposition to perpetuate testimony under Rule 27 of the Federal Rules of Civil Procedure. This limitation has been criticized as too restrictive, and suggestions have been made that would authorize a court order to nonparties to permit entry on their land or other property under controlled conditions.[17] The need for such an extension of the rule's reach is obvious in those recurring situations where an earlier custody or control of the premises by the party to the action has been terminated, or where such rights are themselves issuable in the action or cannot be effectively established in time to support a right of entry.[18]

The premises or articles sought to be inspected or photographed must be shown to be in the possession, custody, or control of the party against whom discovery is sought to be made. The requirement is not relaxed in those situations where the adverse party has sold the article in question and had it removed from the jurisdiction.[19] But where it may be shown that such a

14. FED. R. CIV. P. 34(b), *as amended*, July 1, 1970, requires that "[t]he request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity."

15. Pierce v. Submarine Signal Co., 25 F. Supp. 862 (D. Mass. 1939) (motion too broad and sweeping, without sufficient designation of objects sought).

16. Schoenberg v. Decorative Cabinet Corp., 27 F. Supp. 802 (E.D.N.Y. 1939) (no showing that cabinet sought to be photographed was in existence); Synek v. McCarthy, 8 F.R.D. 323 (S.D.N.Y. 1948) (unclear whether one or more machines of type petitioner wanted to photograph).

17. Federal rule 34, *as amended*, July 1, 1970, continues to apply only to parties. The revisors state that any need for extension of the rule to nonparties is not shown by the reported cases, nor apparently supported by the commentators, but that perhaps it will be shown by reports of difficulties from the bar. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PROPOSED AMENDMENTS TO CIVIL RULES (Nov. 30, 1967), *reproduced in* 43 F.R.D. at 211 (1967).

18. *Id.* at 257.

19. Fisher v. United States Fidelity & Guar. Co., 246 F.2d 344 (7th Cir. 1957) (automobile sold by plaintiff and taken out of state); Thomas French & Sons, Ltd. v. Carleton Venetian Blind Co., 30 F. Supp. 903 (E.D.N.Y. 1939) (rejecting order calling for inspection

transfer was a deliberate attempt to frustrate discovery, some adverse inference might be raised upon a theory of spoliation of evidential material. And the requirement of custody or control may be met where there has been a transfer under circumstances that will enable the court to conclude that the adverse party has at least a constructive possession sufficient to sustain an order for discovery. For example, where an insurance company had paid its insured for the loss and had taken possession of articles formerly owned and possessed by the insured against whom discovery is now sought with respect to those articles, the court concluded the interests of the insured and her insurance company were identical and that discovery should proceed "in the interests of justice . . . ."[20]

Good Cause Requirement

Prior to amendment of rule 34 it was generally conceded that any effort to compel a party to an action to allow another party to go upon his premises or other property for purposes of discovery represented an invasion of a fundamental right of privacy of the person against whom such discovery was sought.[21] Accordingly, under the earlier version of rule 34, and state rules dealing with the same juridical problem, such an invasion, if permitted, must have found support in the countervailing policy favoring the rational settlement of juridical disputes through official means. Thus, the rules almost uniformly and expressly required as a condition to the issuance of any court order permitting such extreme discovery procedures, a showing of "good cause" or other "special necessity" to justify the invasion of interests.[22] It is significant, too, that the federal courts have been so persuaded of the importance and justice of this protective limitation that they have, during the thirty-two years experience under the Federal Rules of Civil Procedure, imposed the limitation of "good cause," which was explicit under former rule 34, onto the operation of other rules where the limitation was not spelled out. For example, the "good cause" requirement was imposed by case law upon the issuance of the subpoena duces tecum for purposes of documentary discovery under rule 45 (b); and on any use of rule 33 looking toward interrogatories that would disclose the nature or contents of documentary materials or the nature of objects or things.[23] And, as expected, those states adopt-

of all ladder webs known to defendants); *cf.*, Meier Glass Co. v. Anchor Hocking Glass Corp., 11 F.R.D. 487 (W.D. Pa. 1951) (motion while not explicit as to adversary's custody or control, contained averments sufficient to raise a *presumption* of such custody and control sufficient to support the order).

20. Leone v. Lohmaier, 205 Misc. 467, 469, 128 N.Y.2d 618, 619 (Sup. Ct. 1954). For a liberal order of inspection and phtography of whole categories of machines, dies, layouts, charts, and product samples *see* Bead Chain Mfg. Co. v. Smith, 1 N.J. 118, 62 A.2d 215 (1948), reversing trial court that had refused discovery on the ground it was no more than a "fishing expedition." *Id.* at 120, 62 A.2d at 216.

21. *E.g.*, Cuca v. Lackawanna Steel Co., 138 App. Div. 421, 122 N.Y.S. 732 (4th Dep't 1910).

22. *E.g.*, Bortzfield v. Sutton, 180 Kan. 46, 299 P.2d 584 (1956).

23. For a textual treatment of this problem of harmonizing "good cause" requirements under rules 34 and 45 (b), *see* 4 J. Moore, Federal Practice 2430 n.4 (2d ed. 1961). Alexander's Dep't Stores, Inc. v. E.J. Korvette, Inc., 198 F. Supp. 28 (S.D.N.Y. 1961).

ing the Federal Rules of Civil Procedure for their local use followed this federal lead of harmonizing the various methods for documentary discovery and inspection by requiring uniformly a showing of "good cause."[24]

Where the "good cause" limitation has been imposed upon the discovery and inspection method here considered, the statutes and the rules offer little by way of definition. But a number of factors have been looked to consistently by the courts, both state and federal, in reaching their determinations in particular cases that good cause for the demanded discovery had or had not been sufficiently shown.

In some cases, good cause has been equated with a showing that the premises or things sought to be inspected or photographed had a relevancy or a pertinency to some aspect of the case.[25] This rather unfettered view of "good cause" proceeded from statutory language emphasizing the relevant and unprivileged quality of the property against which any such order for discovery must apply.[26]

Under more recent authority, it seems clear that "good cause" imposed as a limitation upon the right to make discovery "is not a mere formality, but is a plainly expressed limitation on the use of that Rule."[27] And a court's order for discovery under statutes and rules requiring a *preliminary* showing of "good cause," must find support in a clear showing that such discovery is necessary, under these special circumstances, to an adequate preparation of the case and in furtherance of justice.[28]

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24. *E.g.*, Florida courts have consistently followed the federal lead by reading into FLA. R. CIV. P. 1.410 (subpoena duces tecum) the same requirement for "good cause" that is explicitly imposed by language of FLA. R. CIV. P. 1.350, which is a verbatim adoption of federal rule 34. As recognized in Brooker v. Smith, 108 So. 2d 790 (2d D.C.A. Fla. 1959), rules 1.350 and 1.410 are in *pari materia; accord,* Metz v. Smith, 141 So. 2d 617 (3d D.C.A. Fla. 1962). *See* Pembroke Park Lakes, Inc. v. High Ridge Water Co., 186 So. 2d 85 (3d D.C.A. Fla. 1966), which holds that unless good cause is shown, although not explicitly required in the rule, a subpoena duces tecum calling for the production of documents and things shall not issue.

25. United States v. National Steel Corp., 26 F.R.D. 603 (S.D. Tex. 1960) (pertinent and relevant equated with good cause); Arkansas State Highway Comm'n v. Stanley, 234 Ark. 428, 353 S.W.2d 173 (1962) (order permitted taking of test core samples from other land of defendant on ground that such test constituted only feasible way of finding out the extent of the minerals in place in similar land to be taken; state discovery statute applied).

26. The language of the Supreme Court in Hickman v. Taylor, 329 U.S. 495, 507 (1947), appeared to support the view that good cause meant little more than that the facts sought to be relevant to some aspect of the case: "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." Under the general rule, which now governs all methods of federal discovery, rule 26(b)(1), *as amended,* states in part: "Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action . . . ." This preserves the emphasis upon the terms "nonprivileged" and "relevant," which at this pretrial stage of the controversy must have meanings quite dissimilar from those applied to the same terms at the in-trial stage.

27. Schlagenhauf v. Holder, 379 U.S. 104, 118 (1964), *citing with approval* Guilford Nat'l Bank v. Southern Ry., 297 F.2d 921 (4th Cir. 1962), where discovery of witness's statements was denied because both parties had equal access to the witness shortly after the collision in question.

28. *Id.*

Under this expanded but highly generalized definition of good cause, a wide variety of considerations have moved courts to sustain or deny motions for the inspection and photography of premises and things. The showing that the information sought by such discovery is unavailable as a practical matter from other sources, or by other means, is deemed sufficient to constitute good cause. For example, where the landowner claimed valuable mineral deposits under land sought to be condemned for public use, the state was permitted to go upon other land owned by the defendant in that vicinity to make test borings for any mineral deposits in place.[29] Emphasis was put on the practical unavailability of any other means open to the state to get this highly useful information.[30]

It has also been held that certain extrinsic factors may bear upon the question of the sufficiency of good cause shown in support of a motion for discovery. Public inconvenience that might result from the particular form of discovery will be considered,[31] as will the risk that any gains to be realized may be offset by great or irreparable harm to the property that is the subject of discovery.[32] The possibility that trade secrets or other protected information may be incidentally exposed by the discovery process employed will either shape the terms of the order or result in a denial of the right of discovery in the particular case, on account of an insufficient showing of "good cause."[33]

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29. Arkansas State Highway Comm'n v. Stanley, 234 Ark. 428, 353 S.W.2d 173 (1962) (applied liberal construction to state discovery statute taken verbatim from FED. R. CIV. P. 34 (2)).

30. *Id. See also* Williams v. Continental Oil Co., 215 F.2d 4 (10th Cir. 1954), *cert. denied*, 348 U.S. 928 (1955), which permitted entry on land to make directional survey although survey involved pulling tubing in landowner's oil well with some danger to future productivity of said well. The court said it had no choice but to grant discovery since if movant could not get his information this way, he could not get it at all. An indemnity bond was required in order to cover possible damages. In Fastner Corp. v. Spotnails, Inc., 43 F.R.D. 204 (N.D. Ill. 1967), it was held that where items requested to be inspected and photographed were too heavy to deliver to claimant's office, the order to produce at that place should be denied despite a showing of good cause for such inspection under rule 34 in patent proceedings.

31. E. Tetonelly Sons, Inc. v. Fairfield, 122 F. Supp. 849 (D. Conn. 1954) (motion for order to tear up streets to inspect sewers held too inconvenient and against the public interest).

32. Williams v. Continental Co., 215 F.2d 4 (10th Cir. 1954), *cert. denied*, 348 U.S. 928 (1955) (weighing total need for discovery, if the facts were to be gained at all, against real danger that making demanded tests might damage or ruin the production of landowner's oil well). People *ex rel.* Calumet Gold Mining & Milling Co. v. De France, 29 Colo. 309, 68 P. 267 (1902) (order to inspect mines denied where no action pending). A landowner's acquiescence to the demanded inspection renders any judicial order unnecessary and improper. Phoenix Ins. Co. v. Cline, 3 F.R.D. 354 (D. Mass. 1942). *See also* Sacks v. Frank H. Lee Co., 18 F.R.D. 500 (S.D.N.Y. 1955) (parties had agreed to inspection, and court held there was no good cause shown for making any photographs as demanded in the motion).

33. Floridin Co. v. Attapulgus Clay Co., 26 F. Supp. 968 (D. Del. 1939) (order for discovery on premises granted, provided it involved no disclosure of confidential or secret information concerning landowner's processes). *Cf.* E. I. duPont deNemours & Co., Inc. v. Rolfe Christopher, 431 F.2d 1012 (5th Cir. 1970) in which the court held that aerial photo-

Even where requests for entry upon land or other property for purposes of inspection, photographing, and the like may proceed extrajudicially and without any prior showing of good cause therefore, these defensive considerations may be expected to be raised by way of a demand for a protective order by the party against whom discovery is sought. For example, federal rule 25 (c) provides "Upon motion by a party or by the person from [whom] discovery is sought, and *for good cause shown* . . . ." (emphasis added) a wide variety of protective orders may be sought to foreclose or limit any form of discovery under the federal rules. And one of the stated grounds for such protective order is "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way . . . ."[34] One of the arguments against requiring a prior court order supported by a showing of good cause for routine demands for documentary discovery and entry on the lands of another party, was that only about twenty-five per cent of such demands for discovery were ever seriously contested. Moreover, the great majority of those who so contested were ultimately judicially approved. By transferring the burden of the issue of "good cause" from the movant to the person seeking a protective order against the requested discovery, some judicial time may be saved. But in those matters that merit and receive defensive action, it is clear that our early conceptions of "good cause" will come into play as the court is forced to weigh the competing claim for privacy on the one side and the serious need for the information sought to be compelled on the other.

In connection with the compelled discovery of documents, photographs, books, papers, and other tangible things we have noted the qualified immunity against discovery that is held to attach, in general, to such materials created or obtained by a party or his attorney in anticipation of litigation or in preparation for trial.[35] It is clear that the same showings of "special necessity" and "justification" may be required to support a demand for the

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graphs taken while the secret production process of an industrial competitor was under construction supported a cause of action for damages and injunctive relief.

34. FED. R. CIV. P. 26 (c) (7). These protective provisions under current federal rule 26 (c) were moved from former federal rule 30 (b) and amplified by the amendment of July 1, 1970. The reference to "trade secrets," et cetera, is new and is said to reflect existing law. In such cases, the courts have not granted trade secrets and related matters complete and automatic immunity. Each case has involved a weighing of the competing claims between rights of privacy and the serious need for the discovery sought.

35. For explicit inclusion of procedures affecting the discovery of "work product" and other "trial preparation materials" *see* FED. R. CIV. P. 26 (b) (3), which provides: "Subject to the provisions of subdivision (b) (4) of this rule, [experts] a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b) (1) of this rule [general scope] and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

right to make discovery or to take photographs on the premises or property of another party to the action. Thus, where defendant sought permission to inspect and photograph certain tangible objects that had been created by plaintiff as part of its trial preparation, discovery was denied on the ground that such materials were not the proper subject for discovery under the federal rules.[36]

Imposition of Terms and Conditions

Under currently applied state statutes and rules, discovery that involves an entry onto the land of another party must find support in a prior showing of good cause and may be conditioned upon such terms as the court deems just. Under federal rule 26(c), as amended July 1, 1970, the party against whom such discovery has been requested may upon a showing of good cause seek such protective orders as justice may require "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . . " This right and duty of the court to impose terms and conditions on the right of discovery is broadly recognized and followed in practice to protect the rights of a party upon whom discovery is sought to be made.[37]

The burdens imposed by discovery vary in degree, and in a given case they may operate to seriously interfere with a party's normal business activities.[38] In such a case, involved discovery relating solely to the issue of damages may be deferred until the moving party has established his right to recovery, or a discovery order, otherwise proper, may be delayed until a jurisdictional question has been resolved or a motion to dismiss the action has been ruled upon.[39]

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36. In Midland Steel Prods. Co. v. Clark Equip. Co., 7 F.R.D. 132 (W.D. Mich. 1945), a demand for production of certain tubes and axle housing was denied upon insufficient showing of good cause, but denial was without prejudice to renewal of demand where it was clear that the movant could sustain his right to inspect, measure, and photograph the articles requested as necessary to his trial preparation.

37. Williams v. Continental Oil Co., 215 F.2d 4 (10th Cir. 1954), *cert. denied*, 348 U.S. 928 (1955). In Klein v. Bendix Westinghouse Automatic Air Brake Co., 8 Ohio App. 2d 271, 221 N.E.2d 722 (Ct. App. Lorain County, Ohio 1966), conditions imposed on entry for purposes of inspection and photographing of drycleaning machine were held proper where they included forced use of independent testing laboratory and provision for costs.

38. *See, e.g.*, Frasier v. Twentieth Century-Fox Film Corp., 119 F. Supp. 495 (D. Neb. 1954), an anti-trust action for treble damages in which large-scale discovery rights were granted to plaintiff, involving the removal of thousands of documents from the defendant's offices for photographic copying and inspection. The court refused to cast onto the plaintiff the "intolerable burden" of assuming preliminarily the financial load that would fall on the defendants pursuant to the discovery. The court was moved by the fact that the defendants had already demanded and were granted the right to make discovery upon the plaintiffs—although on a much more limited basis than was later made available against the defendants.

39. Eibel Process Co. v. Remington-Martin Co., 197 F. 760 (N.D.N.Y. 1912) (order for discovery on defendant deferred until plaintiff made out prima facie case at the trial stage). Conversely, note that in J. Marcus & Sons, Inc., v. Federal Ins. Co., 24 App. Div. 922, 264 N.Y.S.2d 676 (3d Dep't 1965), the fact that premises had been inspected and photographed prior to commencement of the action did not preclude a further order for inspection, et

Where trade secrets or other forms of protected information are in danger of being revealed by the discovery demanded, the court may impose conditions designed to eliminate or control the risk of unfair disclosure. Thus, it may .be provided that the inspector used in the survey shall not be an expert who is also connected with any competitor of the property owner and in a position to gain an unfair advantage as an incidental effect of the right of inspection.[40] And where tests are to be performed on the premises or other property inspected, the court may require that the method, nature, and extent of the experiments be specifically described and previously approved and that the tests be conducted in the presence of the party subject to the order for discovery.[41]

In order to minimize the inconvenience to the landowner against whom the right of inspection was sought, the number of inspectors has been limited by terms of the order, and the time and location have been rigidly restricted to that reasonably necessary under the circumstances.[42] Where airplane parts to be inspected and photographed were cumbersome and expensive to transport and located in another jurisdiction at the time, the moving party was required by the order to inspect them where currently located or to pay the cost of transporting them to a more convenient place.[43]

Where the discovery contemplates the making of copies or photographs, the burden is clearly on the moving party to make arrangements to do so; the party against whom the order runs is under no obligation to make such copies or photographs unless he elects to do so as a matter of business convenience. While the discovery allowed should be undertaken with a minimum of inconvenience to the property owner, there is no requirement that

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cetera, after the suit had begun, in the absence of a clear showing that such order would result in unreasonable annoyance, expense, and disadvantage.

40. In Louis Weinberg Associates, Inc. v. Monte Christi Corp., 11 F.R.D. 514 (S.D.N.Y. 1951), an action was brought for breach of contract based on claim that defendant's bleaching and drying vats and methods were not competent to do a workmanlike job on plaintiff's goods. Plaintiff was granted leave to enter upon defendant's premises to measure, inspect, and photograph defendant's vats and machinery used in the process complained of. To protect defendant against disclosure of any of its trade secrets, data compiled by defendant's experts was not to be made available to plaintiff, the inspection was to be made by experts who were neutral to the matter, and their names were to be presubmitted so that defendant might register objections to their appointment. Furthermore, the inspection was to be performed on a nonworkday at defendant's plant.

41. Empire Mut. Ins. Co. v. Independent Fuel & Oil Co., 37 Misc. 2d 905, 236 N.Y.S.2d 579 (Westchester County Ct. 1962); Canter v. American Cyanimid Co., 5 App. Div. 2d 513, 173 N.Y.S.2d 623 (3d Dep't 1958) (modification of trial court's order to permit defendant to be present at testing of chicken vaccine made by the defendant).

42. *See* United States v. National Steel Corp., 26 F.R.D. 603 (S.D. Tex. 1960) (time, place, manner of inspection, and number of inspectors limited); State *ex rel.* Boston & M. Consol. Co. v. District Court, 30 Mont. 206, 76 P. 206 (1904) (limiting time and space involved in the land inspection); 1417 Bedford Realty Co. v. Sun Oil Co., 21 App. Div. 2d 684, 250 N.Y.S.2d 455 (2d Dep't 1964) (modifying an order permitting plaintiff to take borings and tests on defendant's premises to increase amount of indemnity bond required of plaintiff and directing that inspection take place 40 days after issuance of order on 7 days written notice to defendant with copy of bond to be served with such notice.

43. Hefter v. National Airlines, Inc., 117 F. Supp. 475, 14 F.R.D. 78 (S.D.N.Y. 1952).

inspection and copying or photographing be simultaneously accomplished.[44] The order permitting inspection and taking of photographs may be so conditioned as to require the property owner to supply the movant with photographs earlier taken by him if it appears that the property is now unavailable for such inspection or has changed so radically in character as to make the inspection meaningless.[45]

CONCLUSION

It has been noted here that all American jurisdictions, state and federal, are committed to the juridical idea that pretrial discovery makes an important contribution to the rational settlement of civil litigation. This idea has received continuing emphasis since the federal rules relating to discovery in civil actions were adopted in 1938. The federal rules have had, and may be expected to exert, a wide-ranging and liberalizing effect upon state court practice as well. But it is clear that, whether local discovery practice finds support in a clearly defined statute, or rule of court or under some claim of inherent judicial power, the problems are pervasive and the solutions closely related.

In the last analysis, statutes and rules of court, however favorably drawn, do not in themselves guarantee a legal climate in which the idea of discovery may best serve the objects of judicial administration. Much depends upon the degree of cooperation between members of the bar and the bench and the normal courtesies that run between adversary counsel. The central difficulty that must be met is how to permit each side to get the information it legitimately needs for the proper handling of the case—without rewarding

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44. Aside from these and other limitations that may be imposed as terms and conditions upon the issuance of an order for discovery, the person against whom the order would run may resort to the protective features of FED. R. CIV. P. 26 (c) or similar provisions under state statutes or rules. Under rule 26 (c) the court "may make any order which justice requires to protect party or person from annoyance, embarrassment, or oppression."

FED. R. CIV. P. 26 (b) (4) (C) provides that when discovery is made upon an adverse party's expert, the court may "[u]nless manifest injustice would result . . . require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery . . . [and] the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert." It was held in Monks v. Hurley 28 F. Supp. 600 (D. Mass. 1939), that the order for discovery was broad enough to permit the removal of designated articles from defendant's premises to a more convenient place to photograph. *See* Hirshorn v. Mine Safety Appliances Co., 8 F.R.D. 11 (W.D. Pa. 1948), in which stockholders brought a derivative suit for claimed milking of corporation by directors and majority stockholders through sale of processes developed by company experts for personal profit of directors. The court held that since only by recourse to such secret records could the charge be established by plaintiff, the defendants had to make available for inspection and expert evaluation those records and reports. However, defendants had the right to be present at any sessions where the records were inspected and photographed; and the court clerk was to impound any depositions or other discovery orders that referred to any such secrets, making them available only to the parties and their lawyers.

45. *E.g.*, Lester v. Isbrandtsen Co., 10 F.R.D. 338 (S.D. Tex. 1950) (order in this form was granted to longshoreman suing to recover for injuries sustained in fall on ship owned and operated by defendant company).

or encouraging the incompetent attorney and without turning the mechanisms for fact investigation into devices for harassment, oppression, or indefensible invasions of rights of privacy. In the language of the Supreme Court: "Properly to balance these competing interests is a delicate and difficult task."[46]

Prior to the July 1, 1970, amendments to the Federal Rules of Discovery every effort to compel the production or inspection of documents or to make a forced entry upon the land or property of another for purposes of discovery, inspection, testing, or sampling was judicially viewed as something of an invasion of the right of privacy of the person against whom the discovery was sought. In response to this view and the sound reasons for its support, all courts, state and federal, exercised primary and continuing supervision upon all requests for such forms of discovery so that all aspects of these "competing interests" might be judicially safeguarded by forced recourse to judicial motion, hearing, and order. It is our considered view that the sudden withdrawal of such judicial surveillance of discovery by terms of the July 1, 1970, federal amendments finds support neither in logic nor in judicial experience. It is our recommendation that Florida adhere to its currently applied rules in governance of documentary discovery and entry on the land or property of another for purposes of discovery, with the court operating at all stages of the proceeding to test and validate all such requests for the forced production of information. Any changes in the Florida rules should represent a conscious effort to meet the needs of state court practice, with the emphasis on the kinds of cases that most frequently claim the attention of the local courts for resolution. That there is little to be gained by the slavish and uncritical adoption of rules designed to meet federal court needs has been borne out by earlier Florida experience, particularly in the matter of "cause of action" pleading. The risk to local practice is not merely that the rule tailored to federal requirements may not be applicable to local needs, but that its adoption will stifle state initiative in developing its own rules that comport with conditions encountered in state court practice.

46. Hickman v. Taylor, 329 U.S. 495, 497 (1947).