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THE elimination of the "sporting theory" of justice, the simplification of procedure, and the prompt disposition of controversies on their merits are the great objectives of the new federal civil practice. One of the principal means for the attainment of these purposes is discovery, by which a disclosure may be obtained in respect to all pertinent information in the possession of any party to a litigation. An exception is, of course, made for privileged matter. It is one of the basic theories of the new procedure that every party to a law suit is under a duty to reveal to any other party all pertinent data in his control, with the sole exception just mentioned. Broad and liberal discovery is one of the outstanding contributions to civil procedure made by the new federal rules. Flexible facilities are accorded for that purpose. A veritable arsenal of weapons for discovery is provided, from which a skilled lawyer may select those best suited for his purpose, just as an experienced golfer chooses the club which best fits his immediate needs.

Discovery has three distinct purposes and uses. At times, it may be invoked for only one of these objects, while on other occasions resort may be had to it for two or even all three purposes. Clarity of thought requires that, in discussing and analyzing the subject, regard be had to the distinction between them. These three uses of discovery are as follows:

(1) To narrow the issues, in order that at the trial it may be necessary to produce evidence only as to a residue of matters which are found to be actually disputed and controverted.

(2) To obtain evidence for use at the trial.

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(3) To secure information as to the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured, as for instance, the existence, custody and location of pertinent documents or the names and addresses of persons having knowledge of relevant facts.

The new federal procedure provides four principal instruments for obtaining discovery: depositions, interrogatories to parties, production and inspection of documents, and requests for admissions.[1] There are occasions on which all four may be used interchangeably or to supplement each other. In other situations, only one, two, or three may be suitable.

I

DEPOSITIONS

The most potent and searching means of discovery provided by the new rules is depositions. After issue is joined, any party may take the deposition of any person whether or not the latter is a party to the litigation. The subject of the depositions, which may be taken either orally or on written interrogatories, may be "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party."[2] Such depositions may be taken either "for the purpose of discovery or for use as evidence in the action or for both purposes."[3] When the deponent is a party to the action, the proceeding is similar to that known as "examination before trial" in code practice, although it may cover a much broader field than that permitted in some of the code states. The rule specifically provides that the scope of the interrogation may include "the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of relevant facts."[4]

It is of the utmost importance that a proper note be struck at the outset of the operation or enforcement of any reform measure. Fortunately, federal judges caught the spirit of the new rules from the very beginning and applied them in conformity with it. In respect to

[1] While the rules provide still another type of discovery—physical and mental examination of parties—the latter impinges on a somewhat different field and is outside the scope of this article.

[2] Rule 26(b).

[3] Rule 26(a).

[4] Rule 26(b).

the discovery provisions, the pitch was set during the first few weeks after the rules became effective. There are several early decisions that formulated and enunciated a liberal interpretation of these provisions and that have stood out as beacon lights in their construction and application. In the District of Massachusetts, in an opinion rendered on September 30, 1938,—two weeks after the rules became effective,—Judge Ford laid down the following principles:[5]

> "It is perfectly apparent that Rules 26 to 37, inclusive . . . relating to depositions, discovery, depositions on oral examination and written interrogatories, interrogatories to parties, discovery and production of documents and things for inspection, copying, or photographing, and the admission of facts and genuineness of documents were formulated with the intention of granting the widest latitude in ascertaining before trial facts concerning the real issues in dispute, and permitting interrogatories to parties in connection with any relevant matter in order to make available the facts pertinent to the issues to be decided at the trial and eliminate all expense and difficulty that would be involved in their production at the trial. They were formulated with a view to simplifying the issues. . . .
>
> ". . . it seems apparent that the distinction between discovery of 'evidentiary' facts and 'ultimate or material' facts is abolished, as is also the holding under Equity Rule 58 that discovery could be obtained only of matters exclusively or peculiarly within the knowledge or control of the adverse party . . . and further, it is now established that parties may also be interrogated as to the identity and location of persons having knowledge of relevant facts. Also, under the old practice, neither the plaintiff nor the defendant was entitled to discovery of an inquisitorial character as to the ground of action or defense of the other. . . . Under the present rule discovery may be had now to ascertain facts relating not only to the party's own case but his adversary's also."

Less than a month later, Judge Moskowitz, in the Eastern District of New York, announced similar principles:[6]

> "...Only too frequently in the past have procedural rules been regarded as ends in themselves upon whose rigid altar has ultimate justice been sacrificed. Having been presented with a brief, simple set of Rules of Procedure, they should be construed as avenues to

[5] Nichols v. Sanborn Co., (D. C. Mass. 1938) 24 F. Supp. 908 at 910.

[6] Laverett v. Continental Briar Pipe Co., (D. C. E. D. N. Y. 1938) 25 F. Supp. 80 at 81, 82-83.

justice and not dead-end streets without direction or purpose. . . .

"Construed together, these two clauses [i.e., Rules 26(a) and (b)] permit the broadest type of examination. Limitations which have been placed upon deposition-taking by state courts, such as the necessity of having the affirmative upon the issue on which examination is sought, find no basis in the new Rules. It will not avail a party to raise the familiar cry of 'fishing expedition.' . . .

"These Rules should not be whittled away by strained judicial interpretations. They should be interpreted broadly and liberally. The purpose of the examination contemplated by these Rules is to narrow the issues, promote justice, and thus not make the trial of a law suit a game of chance or of wits. It is in that spirit that these new Rules should be construed."

In November 1938, the Circuit Court of Appeals for the Fourth Circuit, in an opinion rendered by Judge Chesnut, expressed similar views:[7]

"We do not doubt that depositions of witnesses before trial may ordinarily be taken by a party to the cause for the purpose of discovery. Indeed rule 26 expressly so provides; and in our opinion the procedure under the rule is entitled to be liberally construed in accordance with the final sentence of rule 1. . . ."

The principles governing the scope of depositions as formulated in the decisions of the courts may be summarized as follows:

(1) Any person, whether or not he is a party to the action, may be examined.

(2) The interrogation may relate to any relevant matter, not privileged, irrespective of whether its purpose is to narrow the issues, to obtain evidence for use at the trial or to ascertain where such evidence may exist and may be secured. Consequently, the rules as to admissibility of evidence, particularly those relating to competency, do not govern. Specifically, inquiry may be made into the "existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts."

This principle was very aptly formulated by Judge Hincks in the District of Connecticut in the following words:[8]

[7] National Bondholders Corp. v. McClintic, (C. C. A. 4th, 1938) 99 F. (2d) 595 at 599.

[8] Lewis v. United Air Lines Transport Corp., (D. C. Conn. 1939) 27 F. Supp. 946 at 947. Poppino v. Jones Store Co., (D. C. W. D. Mo. 1940) 1 F. R. D. 215, holds to the contrary but is not in accord with the prevailing view.

"... That the examination may develop useful information by way of discovery which may not be admissible or material upon the precise issue is aside from the point; to the extent that the examination develops useful information it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible."

(3) The examination may relate to facts bearing on the claim or defense of the adverse party as well as that of the examining party.

(4) The examination need not be limited to ultimate facts, but may extend to evidentiary matters.

(5) The discovery need not be limited to matters exclusively or peculiarly within the knowledge or control of an adverse party. It may extend to matters of which the examining party has personal knowledge. Since the purpose of the discovery may be to narrow the issues or to procure evidence to be introduced at a trial, manifestly it seems an undue restriction that may hamper the purposes of the discovery to preclude the examining party from probing into matters of which he himself has knowledge. It may be obviously desirable for him to ascertain to what extent the facts will be admitted by his adversary. It may also be requisite for him to place them in such shape that they will be admissible at the trial. That the examining party may have knowledge of the facts may appear entirely inconsequential when full weight is accorded to the purposes of the discovery.[9]

(6) At the examination the production of documents may be required by means of a subpoena duces tecum.[10]

The potency of depositions as an instrument of discovery results not only from the wide latitude accorded to the inquiry, but also from the fact that the interrogation is conducted orally, except in the exceptional instances in which the parties choose to resort to written interrogatories. Obviously the witness may be closely interrogated and his conscience may be deeply probed in order to extract admissions which he may be reluctant to make or elicit information which he may hesitate to reveal. As the rules of evidence are not applicable, the inquiry

[9] National Bonholders Corp. v. McClintic, (C. C. A. 4th, 1938) 99 F. (2d) 595; Nichols v. Sanborn Co., (D. C. Mass. 1938) 24 F. Supp. 908; Laverett v. Continental Briar Pipe Co., (D. C. E. D. N. Y. 1938) 25 F. Supp. 80; Lewis v. United Air Lines Transport Corp., (D. C. Conn. 1939) 27 F. Supp. 946; Bachrach v. General Investment Corp., (D. C. S. D. N. Y. 1940) 31 F. Supp. 84; Benevento v. A. & P. Food Stores, (D. C. E. D. N. Y. 1939) 26 F. Supp. 424. Rule 26(a) and (b).

[10] Rule 45(d); Eastern States Petroleum Co. v. Asiatic Petroleum Corp., (D. C. S. D. N. Y. 1938) 27 F. Supp. 121.

is not subject to the usual limitations which such rules impose. It may, indeed, partake of the nature of a cross-examination. There is no doubt, therefore, that the rules relating to depositions constitute a powerful weapon in the administration of justice in the federal courts in civil cases.

There are certain limitations, however, which have been proposed in respect to the area which may be covered by such examination. Some of these restrictions may be well founded. It seems appropriate at this point to turn our attention to them.

First, it has been suggested that a deposition may not be taken for the purpose of obtaining information for use on cross-examination in impeaching collaterally a witness who, it is expected, may be called at the trial.[11] An expression of a doubt may, perhaps, be ventured as to whether this isolated ruling should be deemed to constitute the law, especially in view of the fact that there is but one reported decision on this point. It does not appear to be controverted that a deposition may be taken for the purpose of obtaining information for the cross-examination of a witness as to a relevant matter. By the same token, it would seem that material for impeaching a witness might likewise be procurable by deposition, unless one were to construe the word "relevant," as it appears in Rule 26(b), in a literal sense.

Second, a question has arisen on at least two occasions whether a party may take the deposition of an expert witness retained by his adversary, in order to ascertain in advance of the trial the results of the expert's investigations and the nature of the opinions which he has rendered to his client and intends to advance as a witness at the trial. Rule 26 is silent on this point. Judge McVicar, in the Western District of Pennsylvania, held that material of this type was privileged, and, therefore, not subject to disclosure, as Rule 26(b) expressly excludes privileged matters from the scope of depositions.[12] The court added the following pungent observations on this point:

> "To permit a party by deposition to examine an expert of the opposite party before trial, to whom the latter has obligated himself to pay a considerable sum of money, would be equivalent to taking another's property without making any compensation therefor."

[11] Lynch v. Henry Pollak, Inc., (D. C. S. D. N. Y. 1939) 1 F. R. D. 120.

[12] Lewis v. United Air Lines Transport Corp., (D. C. W. D. Pa. 1940) 32 F. Supp. 21 at 23.

Judge McLellan, in the District of Massachusetts, likewise declined to direct a physician, whose deposition was being taken and who had been retained by the adverse party, to express an opinion as an expert.[13] The court remarked:

> ". . . And to me it seems that as a discretionary matter, under the circumstances of the instant case, the defendant should not be permitted to obtain from an expert witness an opinion for which the plaintiff has to pay."

Third, a question frequently arises whether the examination may extend to information obtained or documents originating subsequently to the accrual of the claim. This problem is often confronted in connection with investigations made and statements of witnesses obtained by an insurance carrier or by the defendant himself after the event giving rise to the claim. Again the rule is silent on this point, unless, indeed, such information and documents should be regarded as privileged, and therefore within the exception. The courts seem to be hopelessly divided on this point, not only as between districts, but at times as between different judges in the same district. The courts may, indeed, invoke the discretionary authority granted to them by Rule 30(b) to exclude any specified matter from the inquiry for good cause shown. The line of authorities which permit the extension of the examination to matters of the type just described is represented by *Bough v. Lee*,[14] decided by Judge Leibell in the Southern District of New York, who held that there was no confidential relation between an insurance carrier and his insured so as to render any of such matters privileged.

The leading authority adhering to the opposite view is *McCarthy v. Palmer*,[15] decided by Judge Moskowitz of the Eastern District of New York, who made the following trenchant remarks on this point:

> ". . . While the Rules of Civil Procedure were designed to permit liberal examination and discovery, they were not intended

[13] Boynton v. R. J. Reynolds Tobacco Co., (D. C. Mass. 1941) 36 F. Supp. 593 at 595.

[14] (D. C. S. D. N. Y. 1939) 28 F. Supp. 673. The following cases also permit such an examination: Kulich v. Murray, (D. C. S. D. N. Y. 1939) 28 F. Supp. 675, Conger, J.; Price v. Levitt, (D.C.E.D.N.Y. 1939) 29 F. Supp. 164, Campbell, J.; Seligson v. Camp Westover, (D. C. S. D. N. Y. 1941) 1 F. R. D. 733, Mandelbaum, J.; Colpak v. Hetterick, (D. C. E. D. N. Y. 1941) 40 F. Supp. 350, Campbell, J.; Brewer v. Hassett, (D. C. Mass. 1942) 2 F. R. D. 222, Ford, J. See also Pike and Willis, "Federal Discovery in Operation," 7 UNIV. CHI. L. REV. 297 at 303 et seq. (1940).

[15] (D. C. E. D. N. Y. 1939) 29 F. Supp. 585 at 586.

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."

Judge Hulbert, in the Southern District of New York, adopted the same view, stating:

"It is not the function of the defendant to make available to the plaintiff the result of its investigations in preparing for trial. . . ."[16]

It would be obviously in the interests of orderly procedure that this divergence of views be definitely settled, either by an authoritative decision of an appellate court or by an amendment of the rules. At present, the question whether or not the inquiry may extend into the matters above discussed may be resolved largely by the fortuitous circumstance of the identity of the judge to whom the matter is presented for decision.

We have thus far outlined the field that may be covered by the inquiry at the taking of depositions. In so far as this remedy is invoked for the purpose of discovery, it fulfills its purpose when the information is received by the examining party. In so far as the depositions are to constitute evidence for use at the trial, it is necessary to consider under what circumstances and to what extent the rules permit them to be utilized in that manner. If the deponent is a witness who is not a party to the action, the deposition may be read in evidence, if his personal appearance cannot be procured at the trial because of death, distance, age, sickness, or other similar circumstance.[17] In other words, the testimony may be used as a deposition *de bene esse*, subject, however, to less rigid restrictions than existed heretofore. If the deponent is a party to the action or if at the time he was examined he was an

[16] French v. Zalstem-Zalessky, (D. C. S. D. N. Y. 1940) 1 F. R. D. 508 at 509. The following cases applied the same principle: Conneway v. City of New York, (D. C. E. D. N. Y. 1940) 32 F. Supp. 54, Moscowitz, J.; Maryland v. Pan-American Bus Lines, (D. C. Md. 1940) 1 F. R. D. 213, Chesnut, J.; Schweinert v. Insurance Co. of North America, (D. C. S. D. N. Y. 1940) 1 F. R. D. 247, Hulbert, J.; Gitto v. Italia, (D. C. E. D. N. Y. 1940) 31 F. Supp. 567, Moscowitz, J.; Stern v. Exposition Greyhound, (D. C. E. D. N. Y. 1941) 1 F. R. D. 696, Moscowitz, J.; Rose Silk Mills v. Insurance Co of North America, (D. C. S. D. N. Y. 1939) 29 F. Supp. 504, Coxe, J.

[17] Rule 26(d) (3).

officer, director, or managing agent of a corporation, partnership or association, which is a party, the deposition may be read in evidence without regard to the foregoing limitations. In addition, a deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.[18] The admissibility of depositions in evidence is, of course, governed by the same rules of law as would be applicable if the witness were present and testified in person.[19]

II

INTERROGATORIES

Another instrument of discovery provided by the Federal Rules of Civil Procedure consists of interrogatories. Any party is permitted to serve upon any adverse party written interrogatories to be answered by the latter under oath. In the event that the party to whom interrogatives are directed is a corporation, association, or partnership, the answers must be made by an officer competent to testify in its behalf. It will be observed that this means of discovery differs from depositions in two important respects. First, it may be used only as against adverse parties to a litigation and is not applicable to witnesses generally. Second, it does not permit an oral interrogation, but is limited to the service of written interrogatories and the submission of written responses.

Necessarily, a great deal of the efficacy that attaches to oral examinations in the taking of depositions is lost when resort is had to written interrogatories. At the very outset, the interrogated party is fully apprised of all of the questions which will be addressed to him. He is accorded time to ponder and reflect on his answers and to formulate them in writing with exactness and caution. Naturally, he may take the advice of counsel and secure the assistance of other persons in framing his replies. Opportunity to do so would necessarily be lacking at a rapid oral questioning. Moreover, the examining party is handicapped and hampered by the fact that he is required to formulate all of his questions in advance of receiving answers to any of them. Consequently, even if he is surprised by an unforeseen reply and feels that as a result of pressure exerted by additional searching questions, the response once given may be changed or modified, opportunity to pursue such a course

[18] Rule 26(d) (1) and (2).

[19] Rule 26 (e).

is not accorded. Attempts at evasion, which might be met by a persistent oral examination, cannot easily be dealt with. The flexibility and the potency of oral depositions is in a large part lacking in written interrogatories.[20]

Nevertheless, interrogatories fulfill important functions. While, perhaps, they are less likely to result in securing admissions on sharply controverted matters, they are useful in narrowing the issues as to items which though formally denied in the pleadings are not seriously disputed. Resort may successfully be had to interrogatories for the purpose of obtaining details as to matters concerning which the allegations of the pleadings are general in character. Interrogatories constitute a simple mode of obtaining names and addresses of persons having knowledge of pertinent facts and who could, therefore, be examined as witnesses, or of securing information as to the existence of documentary evidence. After obtaining such information by means of interrogatories, depositions of witnesses may be taken or the inspection of the documents may be required under Rule 34, which will be considered hereafter. An attempt may even be made to secure damaging admissions by taking the deposition of a party whose answers to interrogatories are disingenuous or lacking in candor. His replies to interrogatories may be used for purposes of impeachment if the oral examination leads to contradiction. Other possibilities in the use of interrogatories will be presented and molded by the exigencies of litigation.

From the very inception, the principle was enunciated by the courts that the scope of examination on interrogatories is coextensive with that permitted under the rules relating to depositions.[21] Specifically, interrogatories need not be confined to securing evidence that would be admissible at the trial, but may include inquiries for the purpose of eliciting information leading to the procurement of such evidence.[22] They need not be limited to ultimate facts, but may extend to detailed

[20] An illuminating and penetrating discussion of this matter is found in Professor E. R. Sunderland's constructive article on "Scope and Method of Discovery before Trial," 42 YALE L. J. 863 at 875 (1933).

[21] Nichols v. Sanborn Co., (D. C. Mass. 1938) 24 F. Supp. 908; Landry v. O'Hara Vessels, (D. C. Mass. 1939) 29 F. Supp. 423; Kingsway Press v. Farrell Pub. Corp., (D. C. S. D. N. Y. 1939) 30 F. Supp. 775; Dixon v. Phifer, (D. C. W. D. S. C. 1939) 30 F. Supp. 627; Chandler v. Cutler-Hammer, (D. C. E. D. Wis. 1940) 31 F. Supp. 453; J. Schoeneman, Inc. v. Brauer, (D. C. W. D. Mo. 1940) 1 F. R. D. 292; Byers Theaters v. Murphy, (D. C. W. D. Va. 1940) 1 F. R. D. 286.

[22] Byers Theaters v. Murphy, (D. C. W. D. Va. 1940) 1 F. R. D. 286; Fox v. Fisher, (D. C. E. D. Tenn. 1941) 39 F. Supp. 878.

items of evidence.[23] That the proceeding may constitute a "fishing expedition" is not a valid objection to interrogatories.[24] As a matter of fairness, if there appears to be a reasonable probability or even possibility that there may be fish in the pond, there is no reason why the litigant should not be permitted to endeavor to catch them. A liberal attitude on this point will promote the ends of justice. Similarly, it is immaterial whether the matters to which the inquiries relate are within the knowledge of the interrogating party.[25] The reasons for adopting this view have been fully explained in our discussion of depositions. The interrogatories may relate to the case or defense of the party to whom the inquiries are directed.[26] Necessarily, as is also the case with depositions, the rules of evidence do not circumscribe the scope of the inquiry or limit the nature of the facts to which the interrogatories may be directed. As was observed by Judge Bright in the Southern District of New York, "we are to decide now whether the facts to be elicited are relevant and not whether they will be ultimately admissible."[27]

There are, indeed, certain natural boundaries beyond which the inquiry may not be pursued. A party may not be asked concerning his contentions, opinions, or matters that involve conclusions of law.[28] This principle, however, should not be confused with the doctrine that interrogatories may be employed with the view to narrowing the issues,

[23] Dixon v. Sunshine Bus Lines, (D. C. W. D. La. 1939) 27 F. Supp. 797; Coca Cola Co. v. Dixi-Cola Laboratories, (D. C. Md. 1939) 30 F. Supp. 275; Kingsway Press v. Farrell Pub. Corp., (D. C. S. D. N. Y. 1939) 30 F. Supp. 775; United States v. American Solvents & Chemical Corp., (D. C. Del. 1939) 30 F. Supp. 107; J. Schoeneman, Inc. v. Brauer, (D. C. W. D. Mo. 1940) 1 F. R. D. 292.

[24] Boysell Co. v. Hale, (D. C. E. D. Tenn. 1939) 30 F. Supp. 255; Byers Theaters v. Murphy, (D. C. W. D. Va. 1940) 1 F. R. D. 286.

[25] Kingsway Press v. Farrell Pub. Corp., (D. C. S. D. N. Y. 1939) 30 F. Supp. 775.

[26] RCA Mfg. Co. v. Decca Records, (D. C. S. D. N. Y. 1940) 1 F. R. D. 433.

[27] Brewster v. Technicolor, (D. C. S. D. N. Y. 1941) 2 F. R. D. 186 at 188.

[28] Caggiano v. Socony Vacuum Oil Co., (D. C. Mass. 1939) 27 F. Supp. 240; Teller v. Montgomery Ward & Co., (D. C. E. D. Pa. 1939) 27 F. Supp. 938; Lanova Corp. v. National Supply Co., (D. C. W. D. Pa. 1939) 29 F. Supp. 119; Landry v. O'Hara Vessels, (D. C. Mass. 1939) 29 F. Supp. 423; Doucette v. Howe, (D. C. Mass. 1939) 1 F. R. D. 18; Doucette v. Eastern States Transp. Co., (D. C. Mass. 1939) 1 F. R. D. 66; Coca Cola Co. v. Dixi-Cola Laboratories, (D. C. Md. 1939) 30 F. Supp. 275; Chandler v. Cutler-Hammer, (D. C. E. D. Wis. 1940) 31 F. Supp. 453; Chemical Foundation v. Universal-Cyclops Steel Corp., (D. C. W. D. Pa. 1942) 2 F. R. D. 283; Byers Theaters v. Murphy, (D. C. W. D. Va. 1940) 1 F. R. D. 286.

and to that extent accomplish the same end as that for which motions for bills of particulars are employed in some of the code states. It has proven particularly useful to invoke interrogatories for this purpose in patent suits. For example, the plaintiff may be asked by interrogatories to state which claims of a patent he charges to have been infringed by the defendant.[29] Similarly, a plaintiff in a patent infringement action has been permitted to inquire of the defendant, concerning defenses interposed in the answer, in what respect the patent is asserted to be inoperative or the disclosure is claimed to be insufficient, or the claim vague and indefinite, or in what respect the plaintiff is alleged to have failed to comply with applicable statutes or rules.[30]

In several districts a limitation not prescribed, and probably not contemplated, by the draftsmen of the rules was imposed on Rule 33 by judicial construction. In the District of Maryland, Judge Chesnut made the following comments on this matter:[31]

> "It should also importantly be borne in mind that extensive examination of the adverse party by interrogatories is cumbersome and likely to prove inefficient, as compared with the now available method of taking his deposition. . . .
>
> ". . . the number of interrogatories should be relatively few and related to the important facts of the case, rather than very numerous and concerned with relatively minor evidentiary details. It is not proposed to lay down any general rigid or inflexible rule with regard to what number of interrogatories is proper because cases must necessarily vary in their range of relevant facts. But in general it may be observed that it will be only the exceptional case where more than fifteen or twenty interrogatories can conveniently and efficiently be submitted. Where a more comprehensive examination of the adverse party is desired it should ordinarily be done by taking his deposition."

The lead of the District of Maryland in limiting the number of interrogatories and confining them to important facts of the case, rather than permitting them to extend to evidentiary details, has been fol-

[29] E. I. Dupont, De Nemours & Co. v. Byrnes, (D. C. S. D. N. Y. 1939) 1 F. R. D. 34.

[30] Dugan v. Sperry Gyroscope Co., (D. C. E. D. N. Y. 1940) 35 F. Supp. 902; McInerney v. Wm. P. McDonald Construction Co., (D. C. E. D. N. Y. 1939) 28 F. Supp. 557.

[31] Coca Cola Co. v. Dixi-Cola Laboratories, (D. C. Md. 1939) 30 F. Supp. 275 at 278, 279.

lowed in the District of Rhode Island[82] and in the Western District of Pennsylvania.[83]

On the other hand, Judge Reeves in the Western District of Missouri declined to adopt such a limitation. He called attention to the fact that Rule 33 is just as broad in its implications as is the rule relating to depositions. He added: "It makes no difference, therefore, how many interrogatories are propounded. If the inquiries are pertinent the opposing party cannot complain."[84]

It now becomes appropriate to consider the manner in which answers to interrogatories may be used. In so far as they furnish information useful in preparing for trial, the answers have fulfilled their purpose as soon as they are served. An important question arises, however, as to the mode in which they may be used in evidence at the trial. It should be observed, as has been discussed above, that the rules expressly provide that depositions may be read into the evidence at the trial. There is no corresponding provision in the rule relating to interrogatories. The answers may not be used as depositions, and, therefore, may not be read as evidence at the trial. They may, indeed, be used as admissions as against the party who submitted the answers or for the purpose of impeachment on cross-examination if he takes the witness stand. On this basis, answers may be read in evidence as against the party making them, but not in his favor.[85] It would seem to follow that in an action in which there are several coparties, the answers to interrogatories may not be admitted at the trial as against any of them except the person who submitted the responses. For example, if there are several defendants, the answers served by one of them to interrogatories propounded to him may be read at the trial by the plaintiff and admitted as against that defendant, but not as against his codefendants.

[82] New England Terminal Co. v. Graver Tank & Mfg. Corp., (D. C. R. I. 1940) 1 F. R. D. 411.

[83] Chemical Foundation v. Universal-Cyclops Steel Corp., (D. C. W. D. Pa. 1942) 2 F. R. D. 283; Stewart-Warner Corp. v. Staley, (D. C. W. D. Pa. 1941) 2 F. R. D. 199; Knox v. Alter, (D. C. W. D. Pa. 1942) 2 F. R. D. 337; Graver Tank & Mfg. Corp. v. James B. Berry Sons Co., (D. C. W. D. Pa. 1940) 1 F. R. D. 163. The state of Maryland, in adapting the federal discovery rules to state practice, expressly limited the number of interrogatories to thirty. Pike and Willis, "The New Maryland Deposition and Discovery Procedure," 6 MD. L. REV. 4 at 12 (1941).

[84] J. Schoeneman, Inc. v. Brauer, (D. C. W. D. Mo. 1940) 1 F. R. D. 292 at 293.

[85] Bailey v. New England Mutual Life Ins. Co. of Boston, (D. C. S. D. Cal. 1940) 4 FED. RULES SERV. 521.

While this point does not seem to have been ruled on in any written opinion that has come to the writer's attention, nevertheless, this conclusion seems to follow from the nature of interrogatories and the contents of the rule by which they are governed. On the other hand, a deposition becomes evidence for all purposes and consequently is admissible as against any party. This distinction is of some practical importance in cases involving multiple parties and may well affect the choice of discovery weapons.

III

PRODUCTION AND INSPECTION OF DOCUMENTS

Another instrument of discovery relates to the production of documents. Rule 34 empowers the court, on motion of any party showing good cause and upon notice to all other parties, to order any party to produce and permit the inspection and copying of any designated documents, books, accounts, objects or tangible things, not privileged, which constitute or contain material evidence. The court may also make an order requiring any party to permit entry on designated property for the purpose of inspecting, measuring, surveying, or photographing it or any designated relevant object or any operation thereon. It will be observed that the scope of such a discovery proceeding is much more narrow and restricted than that of depositions or interrogatories. First, such discovery may be had only by order of the court granted on motion for good cause. Second, the order must designate specific documents, papers or objects. Third, such an order may be issued only in respect to a document or object which constitutes or contains material evidence.

A majority of the courts passing on the matter have held that the discovery permitted by Rule 34 may be had only in respect to a document which constitutes admissible evidence or which contains such evidence and may not be extended to documents which may furnish leads for obtaining evidence.[36] The application must contain facts

[36] United States v. Aluminum Co. of America., (D. C. S. D. N. Y. 1939) 26 F. Supp. 711; Kenealy v. Texas Co., (D. C. S. D. N. Y. 1939) 29 F. Supp. 502; Slydell v. Capital Transit Co., (D. C. D. C. 1939) 1 F.R.D. 15; Radtke Patents Corp. v. Rabinowitz, (D. C. E. D. N. Y. 1940) 1 F. R. D. 126; Poppino v. Jones Store Co., (D. C. W. D. Mo. 1940) 1 F. R. D. 215; Gill v. Col-Tex. Refining Co., (D. C. S. D. Tex. 1940) 1 F. R. D. 255; Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Co., (D. C. Pa. 1940) 3 FED. RULES SERV. 354; Courteau v. Interlake S. S. Co., (D. C. W. D. Mich. 1941) 1 F. R. D. 525; Archer v. Cornillaud, (D. C. W. D. Ky. 1941) 41 F. Supp. 435.

making the necessary showing. A statement of a mere conclusion is not enough.[37] An indication of a reasonable probability that the documents or objects constitute or contain material evidence, is, however, sufficient. The courts do not require the applicant to go further and submit definite proof to that effect.[38] The documents or objects sought to be inspected must be designated. A roving inspection or a dragnet, or a fishing excursion is not permitted under Rule 34.[39] It is sufficient, however, to describe the desired records in such a manner that the party to whom the order is directed may be enabled to determine and select what is required, without designating the specific book or file or document to which the order relates.[40] By its express terms the rule may be invoked only against a party to the litigation.[41]

It has been held that recourse may not be had to Rule 34 in respect to records obtained by one party to the litigation from a third person, as such records are equally available to all parties and may be secured by any of them.[42] The rule may not be invoked for the purpose of procuring inspection of statements of witnesses secured by another party to the action or by his insurance carrier.[43]

While the rule is limited to the discovery of such documents and objects as constitute or contain material evidence, this doctrine has been broadly construed by some judges so as to include documents that con-

[37] Radtke Patents Corp. v. Rabinowitz, (D. C. E. D. N. Y. 1940) 1 F. R. D. 126; Sonken-Galamba Corp. v. Atchison, T. & S. F. Ry., (D. C. W. D. Mo. 1939) 30 F. Supp. 936.

[38] Beler v. Savarona Ship Corp., (D. C. E. D. N. Y. 1939) 26 F. Supp. 599; Brunn v. Hanson, (D. C. Idaho, 1939) 30 F. Supp. 602; Quemos Theatre Co. v. Warner Bros. Pictures, (D. C. N. J. 1940) 35 F. Supp. 949; Clark v. Chase Nat. Bank, (D. C. S. D. N. Y. 1941) 2 F. R. D. 94.

[39] Kenealy v. Texas Co., (D. C. S. D. N. Y. 1939) 29 F. Supp. 502; Sonken-Galamba Corp. v. Atchison, T. & S. F. Ry., (D. C. W. D. Mo. 1939) 30 F. Supp. 936; Vendola Corp. v. Hershey Chocolate Corp., (D. C. S. D. N. Y. 1940) 1 F. R. D. 359; Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Co., (D. C. W. D. Pa. 1940) 3 FED. RULES SERV. 354; Archer v. Cornillaud, (D. C. W. D. Ky. 1941) 41 F. Supp. 435.

[40] United Mercantile Agencies v. Silver Fleet Motor Express, (D. C. W. D. Ky. 1941) 7 F. R. D. 709.

[41] Federal Life Ins. Co. v. Holod, (D. C. M. D. Pa. 1939) 29 F. Supp. 852.

[42] Galanos v. United States, (D. C. Mass. 1939) 27 F. Supp. 298.

[43] Bennett v. Waterman S. S. Corp., (D. C. S. D. N. Y. 1939) 29 F. Supp. 506; Fluxgold v. United States Lines Co., (D. C. S. D. N. Y. 1939) 29 F. Supp. 506; Kenealy v. Texas Co., (D. C. S. D. N. Y. 1939) 29 F Supp. 502; Courteau v. Interlake S. S. Co., (D. C. W. D. Mich. 1941) 1 F. R. D. 525.

stitute admissions or that might be useful on cross-examination.[44] While such an application of the rule appears to be in accord with the liberal tendencies of the new procedure, nevertheless, in at least one district it has been held that Rule 34 may be invoked only for the purpose of obtaining evidence in support of the case or defense of the moving party.[45] It has also been suggested that the rule does not extend to documents which may be used on cross-examination for the purpose of impeaching a witness' credibility.[46]

At times, it happens that a party is unable to designate the particular document that he desires to inspect. In that event, he may obtain the necessary information by other discovery proceedings, such as interrogatories or depositions, and later move for discovery under Rule 34.[47]

It must be noted that as a practical matter it is possible to secure the production and inspection of a document in either of two ways. The deposition of a person having custody or control of the document may be taken under Rule 26 and the production of the document procured at the taking of the deposition by means of a subpoena duces tecum. The second mode of obtaining the same result is to procure a court order under Rule 34, directing the production and permitting the inspection of the designated document. The second method is possible only if the document or object is in the possession or control of a party to the action. On the other hand, by means of a subpoena duces tecum any person, irrespective of whether he is connected with the law suit, may be directed to produce a document at the taking of his deposition. Consequently, the appropriate course to pursue in order to secure a disclosure of a document in the possession of a third person is to take his deposition and serve him with a subpoena duces tecum. If the document or object is in possession or control of a party, either of the two courses indicated above may be pursued. If the desired document or object cannot be designated or described with sufficient precision to warrant an order under Rule 34, recourse may be had to interrogatories or a deposition. If a deposition is taken, a subpoena duces tecum may be served returnable at a later hearing or an order obtained under Rule 34.

[44] Connecticut Importing Co. v. Continental Distilling Corp., (D. C. Conn. 1940) 1 F. R. D. 190; Mackerer v. New York Central R. R., (D. C. E. D. N. Y. 1940) 1 F. R. D. 408.

[45] Poppino v. Jones Store Co., (D. C. W. D. Mo. 1940) 1 F. R. D. 215.

[46] Barwick v. Powell, (D. C. S. D. N. Y. 1941) 1 F. R. D. 604.

[47] Clark v. Chase Nat. Bank, (D. C. S. D. N. Y. 1941) 2 F. R. D. 94; Monarch Liquor Corp. v. Schenley Distillers Corp., (D. C. N. D. N. Y. 1941) 2 F. R. D. 51; Rosenblum v. Dingfelder, (D . C. S. D. N. Y. 1941) 2 F. R. D. 309.

The former course would seem to be the simpler. If interrogatories have been utilized to obtain the requisite data, then the inspection may be secured by an order under Rule 34.

It has been held that Rule 34 relating to inspection and production of documents and Rule 45(d) relating to subpoenas duces tecum in connection with depositions should be construed as being *in pari materia*. On the basis of this major premise, divergent results have been reached by different courts. In the District of Connecticut and in the Eastern District of New York the conclusion has been drawn that since depositions need not be limited to securing admissible evidence, a proceeding under Rule 34 should not be so restricted, as it would be unduly technical to deny a motion under Rule 34 and relegate the party to his remedy by way of a deposition at which the production of the document could be secured by a subpoena duces tecum.[48] On the other hand, another court starting from the same major premise arrived at the determination that since the two rules must be construed *in pari materia*, a subpoena duces tecum may not be used at the taking of a deposition unless it appears that the desired documents or objects probably constitute material evidence. In such a jurisdiction a subpoena duces tecum may not be employed in connection with an attempt to refresh a witness' recollection or to procure information for use on cross-examination,[49] although in the more liberal districts above mentioned, such a use of either a subpoena duces tecum or an order under Rule 34 is permissible.

As appears from the previous discussion, depositions under Rule 26 may be taken not only for the purpose of obtaining evidence that would be admissible at the trial but also for the purpose of discovery. It would seem reasonable and logical, therefore, that a subpoena duces tecum for the production of documents or objects at the taking of a deposition should not be confined to such documents or objects as would be admissible in evidence, as such a limitation would be inconsistent with the purposes of taking depositions. If so, one may venture the suggestion that no object is achieved by a similar restriction on the scope of Rule 34. Actually, as a practical matter, in most cases counsel may avoid the pitfalls of Rule 34 by taking a deposition and requiring the production of the desired document or object by means of a subpoena duces tecum.

[48] Connecticut Importing Co. v. Continental Distilling Corp., (D. C. Conn. 1940) 1 F. R. D. 190; Mackerer v. New York Central R. R., (D. C. E. D. N. Y. 1940) 1 F. R. D. 408.

[49] United States v. Aluminum Co. of America, (D. C. S. D. N. Y. 1939) 26 F. Supp. 711.

IV

REQUESTS FOR ADMISSION

The last instrument of discovery which will be considered in this article consists of requests for admissions provided by Rule 36. After the pleadings are closed, any party may serve upon any other party a written request for the admission by the latter of the truth of any relevant matters of fact set forth in the request; or of the authenticity of any relevant documents described and exhibited with the request.[50] The party to whom a request is directed may respond by a sworn statement either specifically denying the matters in question or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.If neither of these courses is pursued, each of the matters stated in the request is deemed admitted. In other words, a burden is placed upon the person to whom the request is directed. Inaction on his part is equivalent to an admission. The fact that the response must be under oath would necessarily reduce to a minimum any attempts to treat such a request frivolously, since the penalties of perjury attach to a false denial or a false statement of reasons. Nevertheless, requests for admissions are a less efficacious and less potent means of discovery than the others that have been discussed. The latter are enforceable by sanctions of a rather drastic character, such as punishment for contempt of court, striking out a pleading, the making of an order precluding introduction of evidence on specified issues or providing that certain facts shall be deemed to be established in accordance with the claim of the party seeking the discovery. Thus, in connection with depositions, interrogatories to parties and inspection of documents, there are numerous and flexible methods of enforcement. In the case of requests for admissions, however, the only penalty for an improper refusal to make an admission which should have been reasonably made is the payment of expenses incurred by the party serving the request in making proof necessitated by his adversary's recalcitrant attitude.

The rule does not provide any method whereby a party receiving a request for admissions may test its propriety. Most of the courts that have passed upon the question have declined to entertain motions to vacate or suppress a request for admissions or any other proceedings to

[50] Walsh v. Connecticut Mutual Life Ins. Co., (D. C. E. D. N. Y. 1939) 26 F. Supp. 566; McCrate v. Morgan Packing Co., (D. C. N. D. Ohio, 1939) 26 F. Supp. 812; Nekrasoff v. United States Rubber Co., (D. C. S. D. N. Y. 1939) 27 F. Supp. 953; Smyth v. Kaufman, (C. C. A. 2d, 1940) 114 F. (2d) 40.

determine its propriety.[51] The party receiving the request is obliged to determine at his peril its relevancy and propriety. Judge Kirkpatrick in the Eastern District of Pennsylvania suggested that a party receiving such a request may advance under oath, as a reason for inability to admit or deny, the fact that the matters involved are privileged.[52] Judge McLellan in the District of Massachusetts intimated that irrelevancy of the matters comprised within the request may likewise be asserted as a reason for failing to admit or deny them.[53]

In spite of the lack of potent sanctions, the rule relating to requests for admissions is, nevertheless, exceedingly effective, particularly in narrowing issues. The extent to which resourceful and astute counsel may utilize this procedure is graphically illustrated in the case of *Walsh v. Connecticut Mutual Life Insurance Company*.[54] An action was brought on a life insurance policy to recover double indemnity for accidental death. The insurance company asserted, first, that in his application, the insured had made fraudulent statements in that he falsely alleged that he had not consulted any physician for a specified period and had never used alcoholic stimulants to excess; and second, that the death was not in fact accidental, but was due to the fact that the insured, while inebriated, engaged in a brawl which resulted fatally. Counsel for the insurance company filed a series of requests for admissions consisting of a large number of disconnected statements of facts, each setting forth some detail or circumstance tending to sustain the defendant's position in the litigation. The plaintiff, who was the beneficiary of the policy, responded that she was not called upon to reply to the requests. Thereupon, the defendant moved for a summary judgment. The court indicated that the defendant was, as a matter of law, entitled to a summary judgment, since the requests were entirely proper

[51] Nekrasoff v. United States Rubber Co., (D. C. S. D. N. Y. 1939) 27 F. Supp. 953; Unlandherm v. Park Contracting Corp., (D. C. S. D. N. Y. 1940) 1 F. R. D. 122; Securities and Exchange Commission v. Payne, (D. C. S. D. N. Y. 1940) 1 F. R. D. 118; Penmac Corp. v. Falcon Pencil Corp., (D. C. S. D. N. Y. 1942) 5 FED. RULES SERV. 496; Thomas French & Sons v. Carleton Venetian Blind Co., (D. C. E. D. N. Y. 1940) 1 F. R. D. 178; Modern Food Process Co. v. Chester Packing & Provision Co., (D. C. E. D. Pa. 1939) 30 F Supp. 520. *Contra*: Booth Fisheries Corp. v. General Foods Corp., (D. C. Del. 1939) 27 F. Supp. 268; Sulzbacher v. Travelers Ins. Co., (D. C. W. D. Mo. 1942) 6 FED. RULES SERV. 36a. 41.

[52] Modern Food Process Co. v. Chester Packing & Provision Co., (D. C. E. D. Pa. 1939) 30 F. Supp. 520.

[53] Momand v. Paramount Pictures Distributing Co., (D. C. Mass. 1941) 36 F. Supp. 568.

[54] (D. C. E. D. N. Y. 1939) 26 F. Supp. 566.

and the plaintiff's course in respect to them amounted to an admission. The judge added, however, that in view of the fact that the rules had been in effect but for about four months, and the bar had not become thoroughly familiar with them, he would accord to the plaintiff an opportunity to comply with the requests.

The foregoing analysis of the various instruments of discovery accorded by the present federal civil procedure inescapably leads to the conclusion that the rules, both by virtue of their express provisions and as a result of the liberal and enlightened manner in which they have been construed and applied by the courts, afford simple and efficacious means for a searching discovery, narrowing of the issues and obtaining evidence for use at the trial. They have proven a marked and noteworthy advance in the administration of justice. A number of states have adapted the federal practice in this respect for use in the local courts. The discovery remedies embody a far-reaching step in the direction of achieving the principal goal of the new procedure, to which reference was made at the opening of this discussion, namely, the elimination of the "sporting theory" of justice.