
Robert G. Johnston

Follow this and additional works at: http://repository.jmls.edu/lawreview

Part of the Law Commons

Recommended Citation
DISCOVERY IN ILLINOIS AND FEDERAL COURTS

By ROBERT G. JOHNSTON*

INTRODUCTION

The term discovery refers to the aggregate of pre-trial devices (other than the pleadings) by which facts are obtained and recorded in a judicial proceeding.1 Though virtually unknown at common law and of limited scope in equity,2 discovery today complements and to some extent supplants the functions and procedural devices of the common law trial. The common law trial is by tradition an adversary proceeding.3 It is now clearly seen as an adversary proceeding in which is undertaken a "search for truth."4 The adversaries, each of whom has full knowledge of all relevant facts, introduce these facts before an impartial trier of fact, in a manner most favorable to their position. From the facts introduced, the trier of fact determines the existent facts and the inferential facts; to these it applies the appropriate rules of law in order to arrive at its decision or verdict. Underlying the process is the principle that an impartial trier of fact, who is fully advised of the facts in question, is in the best position to determine "truth" — that ultimate fact which is the truth for that particular case.

In order for the verdict to be arrived at fairly, two conditions must be met. First, there must be mutual knowledge of all relevant facts,5 so that all such facts may be presented to the trier of fact. Second, there must be appropriate procedural devices so that such facts may be presented in an orderly manner. In the past, regulations of pleading and rules of evidence aimed

---


1 "A judicial proceeding is the course of conduct set in motion when a case is brought before a court, invoking its powers to grant remedies." C. Kelso, A PROGRAMMED INTRODUCTION TO THE STUDY OF LAW pt. 1 at 78 (1965).

2 G. Ragland, Jr., DISCOVERY BEFORE TRIAL ch. II (1932).


4 "Excessive emphasis upon the adversary aspects of our system, and hence upon the sporting chances of a trial, has yielded to universal recognition of the role of a trial as a search for truth." People ex rel. Noren v. Dempsey, 10 Ill.2d 288, 293, 139 N.E.2d 780, 783 (1957); "By the skillful and persuasive presentation of his case, the advocate not only serves his client, but also the court who wants that help, who wants it put in that way on both sides, and from that the truth will emerge." Lawrence, THE ART OF ADVOCACY, 50 A.B.A.J. 1121, 1124 (1964).

at accomplishing these purposes. Under the "sporting theory" of litigation then prevalent, knowledge of facts was obtained by pre-trial investigation and by examination of witnesses at trial. Emphasis was placed on the frustration of mutual knowledge of facts and perversion of orderly presentation of facts. This "sporting theory"

[S]o pervaded litigation at the issue-forming stage and at the fact-finding stage, that issues [were] confused, concealed and beclouded, and trials of issues of fact, especially before juries, [were] permeated with elements of drama, surprise and camouflage, so that litigation [was] universally condemned by the public, and many agencies and devices [were] sought as substitutes.7

The devices finally settled upon to insure mutual knowledge and orderly presentation of facts were those of discovery. They have evolved out of the difference in presenting evidence in equity and at law.8

Historical Development

In equity, evidence was introduced before the trier of fact by sworn statements and by depositions. Hence, some form of pre-trial procedure for obtaining and recording relevant material evidentiary facts was necessary. The pre-trial procedure devised to meet these needs was the pure bill for discovery. The procedure was initially a form of collateral relief sought within the suit itself. It was used to obtain facts necessary to support a claim for equitable relief. For example, a party asking for an accounting would also collaterally ask for discovery as part of

---

8 In England, discovery "was borrowed by the Court of Chancery, directly from the English ecclesiastical courts, — indirectly from the civil and canon law." Langdell, Discovery under the Judicature Act, 11 HARV. L. REV. 137, 138 (1897). The reason for the English origin occurring in Chancery was that "[t]he first chancellors were churchmen and accordingly procedure in courts of chancery was modelled in many respects after procedure in the ecclesiastical courts." G. RAGLAND, JR., DISCOVERY BEFORE TRIAL 13 (1932).

The actual origin of discovery seems to have occurred in Roman law. "The Athenian law, while recognizing a right in the party to question his adversary, had 'no provision for the examination of his opponent on certain specific points, such as is known in English law as examination for discovery.'" Millar, The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure, 32 ILL. L. REV. 261, 262 n. 4 (1937), citing BONNER, EVIDENCE IN ATHENIAN COURTS 57 (1905).

Discovery in the specific sense now in question was something unknown to the Germanic law. Because of the very nature of its proof-system that law had no means of compelling one party to make disclosure for the benefit of the other . . . . It is, therefore, to the Roman law that we must go for the earliest recorded use of discovery . . . . the interrogatio in iure.

That was an institution originating in the formulary period of the Roman procedure whereby the plaintiff was enabled to interrogate a prospective defendant, properly summoned, as to certain facts whose ascertainment was necessary or important for the proper setting on foot of the action.

The John Marshall Journal of Practice and Procedure

the same suit. The bill was "only resorted to when the evidence [rested] exclusively with the party called upon to disclose" facts. Consequently, it was limited in use to parties to the suit, and in scope to material evidentiary facts relevant to the equitable relief sought.

The common law had no form of pre-trial discovery. Furthermore, it prohibited the calling of an adverse witness at trial. Under these stringent common law limitations on obtaining and presenting facts, a party who had a right of action was often deprived of a remedy at law. In order to provide a remedy, equity extended the use of pre-trial discovery in such situations through use of a bill for discovery in aid of a law action. An equitable proceeding separate from the law action, the bill was filed to obtain facts to support the claim for legal relief. Similar to a pure bill for discovery, it was limited in use to parties to the law action, and in scope to material evidentiary facts relevant to the legal relief sought. However, the bill in aid of a law action was expanded in scope to allow the petitioner not only to discover facts exclusively within the knowledge of the respondent, but also to discover facts within the petitioner's knowledge so as to establish evidentiary admissions.

9 The basic reason for filing a complaint asking for a discovery and accounting, is that the complainant lacks certain knowledge and in developing the facts he may be able to obtain or discover necessary facts and information which he does not possess.


11 Vennen v. Davis, 35 Ill. 568, 577 (1864).


13 The common law did have one form of discovery prior to trial, the bill of particulars. It enabled a party to be apprised, prior to trial, of facts which were necessary to be able to plead. The bill of particulars did serve to make more certain a party's allegations in his pleadings, but it did not enlighten the opponent as to all the relevant facts of which he needed to be informed. See, e.g., Colby v. Wilson, 320 Ill. 416, 151 N.E. 269 (1926).

14 J. Wigmore, EVIDENCE §1846, at 380 (3d ed. 1940).

15 Courts of law had not the power at common law to compel a witness to give his deposition or to attend for that purpose, because depositions were not recognized as instruments of evidence except by consent. Courts of equity had that power because depositions were a means by which testimony was adduced in those courts, and the power was necessary to enable them to perform their functions.


17 Where a bill in equity is instituted in aid of a legal action, a person who has no interest in the subject matter of the suit, and against whom no relief is sought, cannot as a general rule properly be made a party defendant for the purpose of discovery. The reason for these rules is that persons not parties to the action may be examined in the trial of the action at law as witnesses.

18 Moore v. Backus, 78 F.2d 571, 576 (7th Cir. 1935).


20 In bills for discovery only in aid of a lawsuit the complainant is entitled to discovery not only in respect to facts which he cannot otherwise prove, but also as to facts the admission of which will relieve him from the necessity of adducing proof from other sources. In other words, a suit for discovery is proper not only when the complainant
Because of their limited scope and uses and their cumbersome procedures, these pre-trial discovery devices both in equity and at law were often ineffective and expensive. But they were the only ones available, and the courts seemed unable to improve on them. The courts' inability to devise effective forms of discovery by decision led eventually to legislative enactment. In both the Illinois and the federal systems, statutes were enacted to provide for pre-trial discovery. The Illinois Chancery Act, however, merely codified the previous system of pre-trial discovery available by decision, and included all of its limitations. On the other hand, the federal courts expanded, through their equity rules, the discovery practices of the old equity courts.

By the Equity Rules of 1912 a radical change was effected in the procedure of fact-discovery obtaining in the Federal Courts. The old method of discovery by bill and answer was definitely laid aside and in its place was installed that of written interrogatories separate from the bill. [The provision for written interrogatories] operated to cure an all pervasive evil of the old system, and in making, as it also did, the right to propound interrogatories a mutual one, it placed the defendant on that equal footing with the plaintiff, which the former's pre-existing privilege of filing a cross-bill had fallen far short of achieving.

Therein is without other means of proof, but also in aid of his other evidence, or even to dispense with the necessity of other evidence. Brandenburg v. Buda Co., 299 Ill. 133, 140, 132 N.E. 514, 517 (1921).

P. Dyer-Smith, Federal Examinations Before Trial & Depositions Practice §17, at 30 (1939) stated that some true form of pre-trial discovery was necessary because the pleadings "often concealed the facts, instead of revealing them." Cf. G. Ragland, Jr., Discovery Before Trial 1-5 (1932).

The English courts were given authority to administer broader discovery by parliamentary act. P. Dyer-Smith, Federal Examinations Before Trial & Depositions Practice §17 (1939); G. Ragland, Jr., Discovery Before Trial 1-5 (1932). In the United States, the Mississippi legislature in the Act of February 16, 1828, provided for "an equitable petition for discovery filed as a step in the common-law cause itself." Millar, The Mechanism of Fact Discovery: A Study in Comparative Civil Procedure, 32 Ill. L. Rev. 424, 446 (1987).

The Illinois Chancery Act preserves the ancient method of obtaining discovery before trial, namely, by inserting interrogatories in the chancery bill. G. Ragland, Jr., Discovery Before Trial 298 (1932). But see Lester v. Illinois, 150 Ill. 408, 23 N.E. 387 (1890).

The evident purpose and design of this statute [Ill. Rev. Stat. ch. 51, §9 (1890)] was to furnish to a party litigant a speedy and summary mode by which, under the order of the court, to obtain written evidence pertinent to the issue which might be in the possession and control of his adversary, and thus obviate the necessity of a bill of discovery, seeking the same end. It is manifest that it contemplates the production of evidence on the trial of the cause which the party applying therefor is entitled to introduce in support of his case, and which the other party withholds. A defendant is not required to disclose matters of evidence relied upon in the defense, and thus inform the plaintiff of his case farther than the pleadings show. Unless a showing is made, upon good and sufficient cause, that the evidence sought, or that the books and papers required to be produced, contain evidence pertinent to the issue on behalf of the party applying therefor, the application should be denied.

Id. at 418-19, 23 N.E. at 388.

Millar, The Mechanism of Fact-Discovery: A Study in Comparative
Legislation, supplemented by rules of court, has lifted the limitations of the early decisions and codes. In Illinois, section 58 of the Civil Practice Act, giving the courts authority to administer discovery, "did away with the requirement of a separate suit and of interrogatories in the bill, and it provided that discovery of that kind could thereafter be had by motion filed in the cause in which the matter sought to be discovered would be used." In addition to permitting discovery to be obtained in the same action at law, the new procedures included its use against nonparties, a drastic departure from the prior practice. The federal and Illinois rules of discovery, both as they were originally enacted and in their present form, are "in and of the policy which is an integral part of our present judicial system — that of affording the fullest opportunity for exploration of an opponent's case prior to trial."

**Purposes of Discovery**

The ultimate purpose of discovery, requiring as it does the full disclosure of facts, is to increase the probability of obtaining a fair decision on the merits of the litigation. To this end discovery is compatible with the purpose of the common law trial. It is not a rejection, but rather a refinement, of the traditional adversary system. However, to the extent that it rejects those limitations which frustrate the purpose of the common law trial, it is a rejection of the "sporting theory" of litigation. In order to ensure their ultimate purpose, discovery devices...
are designed: (1) to give notice of claims and defenses and to narrow the issues, in order to expedite and reduce the cost of litigation; (2) to provide an adequate means of investigation, in order to obtain facts otherwise unavailable and to avoid surprise and perjury; (3) to record and preserve facts; and, collaterally, (4) to encourage settlements.\(^2\)

The common law depended almost entirely upon pleadings to give advance notice of claims and defenses of the parties and to limit the issues.\(^2\)\(^9\) Discovery devices complement the notice function of pleadings\(^2\) to the extent that they make available evidentiary facts not otherwise accessible. Since the facts are available, groundless claims and defenses can be weeded out, the real issues can be seen more clearly, and the presentation of evidence at trial can be facilitated.\(^3\) All this, in turn, expedites litigation and reduces its cost\(^3\)\(^3\) — at least in theory. The extent to which discovery actually does expedite litigation and reduce its cost is open to serious doubt.\(^3\)\(^4\) In one case, “one interrogatory out of

31
ordinated its function as a means of ascertaining the truth.
Krupp v. Chicago Transit Authority, 8 Ill.2d 37, 41, 132 N.E.2d 532, 535 (1956).

Pretrial discovery is designed to permit exploration and to avoid surprise. ... It is directed toward making the judicial process one of determining the facts appertaining to the issue and rendering a just decision thereon, rather than the promotion of a battle of wits between counsel. Pink v. Dempsey, 350 Ill. App. 405, 411, 113 N.E.2d 334, 336 (1953).


30 Pleadings are designed to advise the court and the adverse parties of the issues involved and what is relied on as a cause of action, in order that the court may declare the law and that the adverse parties may be prepared to meet the issues. Yeates v. Daily, 13 Ill.2d 510, 514, 150 N.E.2d 159, 161 (1958).


32 It is perfectly apparent that Rules 26 to 37 ... were formulated with the intention of granting the widest latitude in ascertaining before trial facts concerning the real issues in dispute ... in order to make available the facts pertinent to the issues to be decided at the trial .... Nichols v. Sanborn Co., 24 F. Supp. 908, 910 (D. Mass. 1938).

If a party feels that the pleading does not adequately advise him of the claim against which he must defend, section 45(1) of the Civil Practice Act provides for a motion to make more definite and certain, and a bill of particulars may be sought in accordance with section 37. The provisions for discovery in the Civil Practice Act and the Supreme Court Rules, provide the method for obtaining information pertinent to the litigation.


34 Armstrong, The Use of Pretrial and Discovery Rules: Expedition and Economy in Federal Civil Cases, 43 A.B.A.J. 693 (1957), citing JUDICIAL
hundreds served would have required an answer including almost one million items. In another case, "the interrogatories and answers, nearly all printed but partly typewritten, are about nine inches thick." It may well be that discovery — at least as sometimes employed — merely shifts the cost and time of litigation from the trial itself to the pre-trial period.

To obtain facts, the common law relied on extra-judicial investigation and examination of witnesses at trial. But the effectiveness of extra-judicial investigation depends to a great extent on the cooperation of prospective witnesses. The examination, if any, of uncooperative witnesses is limited by the rules of evidence at trial. So discovery provides a judicially sanctioned means of investigation without all of the limitations of evidentiary rules. As a result, discovery both increases the probability that all facts will be presented to the judge and decreases the likelihood of surprise and perjury.

"Discovery of evidence before the trial has been criticized as encouraging perjury to meet the discovered testimony." This criticism is based on the contention that:

If discovery can be prostituted by compelling one lawyer to furnish his adversary with signed statements of a witness prior to


"Pretrial discovery is designed to permit exploration and to avoid surprise. . . ." Pink v. Dempsey, 350 Ill. App. 405, 411, 113 N.E.2d 334, 336 (1953); "One advantage of discovery is the protection it gives the adversary and the litigant."

F. JAMES, JR., CIVIL PROCEDURE §6.2, at 183 (1965), citing 6 J. WIGMORE, EVIDENCE §1845 (3d ed. 1940). But cf. Mort v. A/S D/S Svendborg, 41 F.R.D. 225 (E.D. Pa. 1966), in which the plaintiff propounded several interrogatories to defendant in a personal injury case to determine the extent of defendant's knowledge of plaintiff's physical condition both before and after the occurrence on which the case was brought. The court in striking the interrogatories stated: [I]t is apparent that the object of these interrogatories is not to discover facts in the discovery sense of the word, but instead to frustrate an effective cross-examination and to avoid the possibility of impeachment.

Such was not the intent of the framers of our rules of discovery. Id. at 227-28. See also E. I. Du Pont De Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416 (D. Del. 1959).

One of the defendant's objects, as has been said, in asking for these documents is to find grounds upon which to impeach the plaintiff's experts. I do not believe that the mere hope that the records [sought] might turn up some statements . . . which would be inconsistent with some of their conclusions as to infringement would of itself be sufficient to constitute good cause for production.

Id. at 422.

Ragland, Discovery Before Trial Under the Illinois Civil Practice Act, 28 ILL. L. REV. 875, 891 (1934); Note, Discovery: Boon or Burden, 36 MINN. L. REV. 364, 373 (1952).

the witness being called to the stand, the witness, of course, will be
well prepared under the skillful guidance of unscrupulous counsel
to circumvent his signed statement and thus avoid a charge of
perjury.\textsuperscript{40}

However, "[o]nly where a limited or unequal discovery obtains
has it been found that perjury, manufactured testimony, and
kindred evils are fostered."\textsuperscript{41}

This consideration may well cancel out fully, over the long run,
the evil to be feared from full disclosure. The evils on both sides
are of the same kind. Both involve the chance for unscrupulous
men to commit or suborn perjury more effectively and without op-
portunity to meet it; and there seems to be no reason to think that
the chance invited by disclosure on the one hand is any greater
than the chance protected by surprise on the other.\textsuperscript{42}

Another purpose of discovery is that of recording and pre-
serving evidence that might otherwise be unavailable at trial.\textsuperscript{43}
Such evidence is more likely to be recorded and preserved "while
the events . . . are fresher."\textsuperscript{44} But, "in light of the informal
nature of the preliminary examination and the likelihood that
the party will say more than he would in court,"\textsuperscript{45} it may in fact
retard rather than advance the probability of a fair trial. "In
a jury trial, a statement which is harmless legally may be quite
prejudicial in the minds of the jury, and the fresh, uncoached
testimony of a witness or party may be farther from the truth
than well considered testimony given at the trial."\textsuperscript{46} Proper
preparation for discovery procedures — preparation which may
be more intense, in some cases, than the ensuing trial — is the
prime requisite for avoiding such difficulties.

Despite the fact that "[c]ompromise settlement is not the
aim of the discovery rules[, t]here is a body of opinion that
holds to the belief that it is a by-product of the discovery
rules."\textsuperscript{47} This "body of opinion" asserts that discovery aids voluntary dis-
misssals\textsuperscript{48} and settlements.\textsuperscript{49} There are differing opinions as to

\textsuperscript{40} Hawkins, Discovery and Rule 34: What's So Wrong About Surprise?,
\textsuperscript{41} G. RAGLAND, JR., DISCOVERY BEFORE TRIAL 251-52 (1932).
\textsuperscript{42} F. JAMES, JR., CIVIL PROCEDURE §6.2, at 183 (1965).
\textsuperscript{43} Developments in the Law — Discovery, 74 HARV. L. REV. 940 (1961).
\textsuperscript{44} P. DYER-SMITH, FEDERAL EXAMINATIONS BEFORE TRIAL & DESPO-
SITIONS PRACTICE 5 (1939).
\textsuperscript{45} Kristel v. Michigan Cent. R.R., 213 Ill. App. 518 (1919). See also
Comment, Discovery: The Illinois Civil Practice Act and Iowa Procedure, 19
IOWA L. REV. 589, 595-96 (1934).
\textsuperscript{46} Comment, Discovery: The Illinois Civil Practice Act and Iowa Pro-
cedure, 19 IOWA L. REV. 589, 596 (1934); cf. "[E]xperience has shown
that compelling a witness to produce a material writing at a given stage in
the proceedings sometimes tends to prevent the discovery of truth." La-
\textsuperscript{47} Cooper v. Stender, 30 F.R.D. 389, 393 (E.D. Tenn. 1962).
\textsuperscript{48} Zolla v. Grand Rapids Store Equip. Corp., 46 F.2d 319, 320 (S.D. N.Y.
1931).
\textsuperscript{49} "The party may find that he has no grounds for relief and may thus
avoid expensive litigation." McDermott, Discovery Examination Before
Trial — History, Scope, and Practice, 21 MARQ. L. REV. 1, 3 (1939). "Set-
the extent of discovery's contribution to dismissals or settlements.\(^50\) "A plaintiff's lawyer, unless he is awfully dumb, knows that the average defendant, if harassed by a lawsuit, will sooner or later throw in the sponge, and, as a business expedient, make some kind of settlement."\(^51\) Of course, the same is true of a defendant's lawyer who abuses discovery and uses it merely as an economic weapon to force unfair or unjust settlements. The same advantage can be obtained, however, by the mere threat of the trial with its attendant dangers of surprise and perjury.

No broad, organized study yet exists to support either the validity of the purposes of discovery or the effectiveness of its available devices.\(^52\) There are only the opinions and conclusions of attorneys, judges, and academicians based on their experiences. Indeed, some feel that "the subject needs 'no further exposition in support of the rules'."\(^53\) Perhaps the most persuasive argument for the use of discovery is the fact that its critics no longer argue against its use but concentrate on issues of proper scope and limitation.

\
\begin{quote}
...It is not inconceivable that a plaintiff with serious injuries would settle a substantial judgment because he had no knowledge of any additional rights against the insurer. Thus, to deprive an injured party from learning of his rights against an insurer would, in effect, nullify the benevolent purpose of such statutes. . . .
\end{quote}

\(\text{Id. at 236-38, 145 N.E.2d at 592-93.}\)

\(^{50}\) Minnesota lawyers agree that discovery contributes to settlement before trial, but disagree as to the extent of the contribution."\(^54\) Note, Discovery: Boon or Burden, 36 Minn. L. Rev. 365, 372 (1952).


Certainly there are few who will deny the fact that litigation is, and for some time has been, in the umbrella stage of appeasement or compromise, a condition which is in harmony with the spirit of our time. Anyone who merely raises the spector with the many tools available is almost assured of some favorable result. Instead of applying principle, settlement has become a matter of economic expediency. In fact there have been developed even more fertile fields for what are commonly referred to as legalized blackmail or 'strike' suits despite provisions for the giving of security for costs and other precautionary measures provided by the Rules or by law.

\(\text{Id. at 695-96.}\)

\(^{52}\) The Project for Effective Justice of Columbia Law School has conducted a field survey of discovery and submitted its report, FIELD SURVEY OF FEDERAL PRE-TRIAL DISCOVERY, to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. The report is not yet published.

SCOPE AND LIMITATIONS

The present scope of discovery in the Illinois and federal courts is far broader than that formerly available in equity and under the early statutes. The Illinois Supreme Court Rules and the Federal Rules of Civil Procedure generally define the scope of discovery to include any matter relevant to the subject matter of the pending action, unless it is precluded because of limitations such as the requirements for "good cause," the "work product" exemption, or the "privilege" status of confidential communications.

The limitation of fairness — that is, allowing the more adept adversary to retain whatever information he himself has obtained — has been dispelled in both the Illinois courts and federal courts on the basis that discovery is mutually available. Under the Illinois rules, fairness is treated strictly as a monetary consideration. "The court may apportion the cost involved in originally securing and in furnishing the discoverable material, including when appropriate a reasonable attorney's fee, in such manner as is just." In the absence of such an express provision in the federal rules, the federal courts "have ordered the

54 "Limited discovery, available only in equity, has been replaced by comprehensive discovery available in all actions." People ex rel. Noren v. Dempsey, 10 Ill.2d 288, 293-94, 139 N.E.2d 780, 783 (1957); Shaw v. Weisz, 339 Ill. App. 630, 91 N.E.2d 81 (1950); C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS §81 (1963).

55 "Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action . . . ." ILL. REV. STAT. ch. 110A, §201(b) (1) (1967).

56 "[A]ny matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Fed. R. Civ. P. 26(b); accord, 1967 Proposed Amendments, Rule 26(b)(1), 43 F.R.D. 211, 224. The proposed amendment makes it clear that this standard applies to all discovery procedures.

57 The further limitation of protective orders gives the court broad powers to control the use of the discovery process and to prevent its abuse. It provides the necessary flexibility to ensure that the spirit of the rules will not be frustrated by a literal application of the rules to the prejudice of any party or persons. For example, the courts may require using interrogatories instead of depositions; they may reschedule the time or place of depositions; and may take appropriate measures to prevent the unnecessary disclosure of trade secrets or other such material. See ILL. REV. STAT. ch. 110A, §201(c); Fed. R. Civ. P. 30(b); 1967 Proposed Amendments, Rule 26(c), 43 F.R.D. 211, 227. See also Antonio v. Solomon, 41 F.R.D. 447 (D. Mass. 1966). "It is clear that the scope of pretrial discovery is circumscribed by the privilege against self-incrimination. . . ." Id. at 449.


59 "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." Hickman v. Taylor, 329 U.S. 495, 507 (1947).

60 ILL. REV. STAT. ch. 110A, §201(b) (2) (1967).
... [party seeking discovery of an adversary's expert] to pay a portion of the expert's fees.\textsuperscript{61}

Relevance

The term "relevant" (or, more properly, "legally relevant") is used in the law of evidence to connote admissibility at trial. When "relevance" is used as a criterion for discovery, it is broader than when applied to the admissibility of evidence. The federal rule states that material need not be "legally relevant" in terms of admissibility in order for it to be "relevant" as an object of discovery.\textsuperscript{62} By judicial decision Illinois has accepted the same proposition.\textsuperscript{63}

The usual test determines whether the material sought by discovery is "relevant" to the subject matter involved in the pending action. "Subject matter" is a broader category than the precise issues presented by the pleadings.\textsuperscript{64} "'[R]elevant to the subject matter' contemplates either evidence to be introduced at the trial or information that may lead to the discovery of evidence to be used at the trial."\textsuperscript{65} For example, in Illinois\textsuperscript{66} and the federal courts "the identity and locations of persons having knowledge of relevant facts"\textsuperscript{67} is discoverable.

\textsuperscript{61} Dresser Indus. Inc. v. Doyle, 40 F.R.D. 478, 479 (N.D. Ill. 1966).
\textsuperscript{62} 1967 Proposed Amendments, Rule 26(b)(4)(c), 43 F.R.D. 211, 226, does contain such an express provision.
\textsuperscript{63} "It is not ground for objection that the testimony [sought to be discovered] will be inadmissible at the trial ..." FED. R. CIV. P. 26(b).
\textsuperscript{64} "[W]e must reject at once as authority those cases limiting pretrial discovery to matters admissible in evidence [citations omitted] as being contrary to both the terms and intent of the Rule [former Ill. Sup. Ct. Rule 19-4(1)]." People ex rel. Terry v. Fisher, 12 Ill.2d 231, 237, 145 N.E.2d 588, 592 (1957).
\textsuperscript{65} "Thus it is relevancy to the subject matter which is the test and subject matter is broader than the precise issues presented by the pleadings." Kaiser-Frazer Corp. v. Otis & Co., 11 F.R.D. 50, 53 (S.D. N.Y. 1951). See also People ex rel. Terry v. Fisher, 12 Ill.2d 231, 145 N.E.2d 588 (1957).
\textsuperscript{66} Cooper v. Stender, 30 F.R.D. 389, 393 (E.D. Tenn. 1962). See also Krupp v. Chicago Transit Authority, 8 Ill.2d 37, 132 N.E.2d 532 (1956), in which the court stated: "Discovery before trial" presupposes a range of relevance and materiality which includes not only what is admissible at the trial, but also what leads to what is admissible at the trial." Id. at 41, 132 N.E.2d at 535.
\textsuperscript{67} The statute, [ILL. REV. STAT. ch. 110, §58(3) (1967)], protects a party from being compelled to identify the witnesses he intends to use at the trial, (i.e., witnesses in the technical sense), but does not preclude discovery regarding so-called 'occurrence witnesses' (or 'persons having knowledge of relevant facts,' as stated in Rule 19-4). Hruby v. Chicago Transit Authority, 11 Ill. 2d 255, 258, 142 N.E. 2d 81, 83 (1957).
\textsuperscript{68} FED. R. CIV. P. 26(b). See also C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS §81, at 310 (1963) in which he states:
A distinction must be drawn between witnesses to the occurrences in question, and witnesses who will be called for trial by the adverse party. The names of occurrence witnesses may always be obtained by discovery. It is generally held that a party is not entitled to find out, by discovery, which witnesses his opponent intends to call at the trial, although the court may require disclosure of this information at a pre-trial conference.
The 1967 Proposed Amendments, Rule 26(b)(4)(B), 43 F.R.D. 211, 225, does, however, provide for discovery of expert witnesses to be called at trial.
A broader test is sometimes applied. It asks whether the material sought to be discovered does in fact fulfill a legitimate purpose of discovery. For example, the plaintiff in a negligence action may seek discovery of the existence and extent of the defendant's liability insurance coverage. In the case of *People ex rel. Terry v. Fisher* the court allowed such discovery, stating: “[I]t is our opinion that discovery interrogatories respecting the existence and amount of defendant's insurance may be deemed to be ‘related to the merits of the matter in litigation’ . . .” According to the court, discovery of the existence and extent of coverage was “relevant” because such discovery would facilitate and encourage settlement, one of the purposes of discovery. When the same question was presented for the first time in the District Court for the District of Columbia in *Cook v. Welty*, Judge Holtzoff held that the plaintiff should be granted discovery either by deposition or by interrogatories concerning the extent of defendant's liability coverage. He cited with approval the reasoning of the *Fisher* case. However, the court did note in the *Cook* case that the federal district courts are not in accord on the subject and that, in fact, divergent results obtain even within the same districts.

**Privilege**

Both the Illinois and federal rules place “privileged” material outside the scope of discovery. The federal rule merely states that “any matter, not privileged” is subject to discovery, without defining within the rule what is meant by “privileged.” The Illinois rule states that “[a]ll matters that are privileged against disclosure on the trial, including privileged communic-
tions between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure." Although neither rule provides complete statutory enumeration of privileged material, decisions on both the state and federal level have established a clearly defined concept of "privilege." It is interpreted to encompass only those confidential relationships safeguarded by society. That is, "privilege" does not necessarily protect material normally inadmissible at trial because of prejudice to one of the parties in the immediate action. The word "privileged" should be applied only to those confidential communications between parties which society deems it necessary to maintain as confidential in order that these parties may properly perform their functions within society.

Since the privileges afforded to certain confidential communications could amount to a suppression of evidence, four fundamental conditions must be met before any communication be afforded a "privilege":

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

In Illinois, confidential communications between a client and his attorney are protected by the common law, as formerly were confidential communications between spouses. While the attorney-client "privilege" remains in common law, the "privilege" afforded to the confidential communications between a husband and wife is now statutory (as is the privilege of confidential communication between physician and patient, psychiatrist and patient, clergyman and parishioner, and accountant and client). Originally, the attorney-client "privilege" protected the attorney; it is now retained to guarantee that a client may consult his attorney without fearing that the attorney may be compelled in a judicial proceeding to disclose what

---

74 ILL. REV. STAT. ch. 110A, §201(b) (2) (1967).
75 8 J. WIGMORE, EVIDENCE §2285 (McNaughton Rev. 1961).
76 See Dickerson v. Dickerson, 322 Ill. 492, 153 N.E. 740 (1926).
77 See People v. Palumbo, 5 Ill.2d 409, 125 N.E.2d 518 (1955).
78 ILL. REV. STAT. ch. 51, §5 (1967).
79 ILL. REV. STAT. ch. 51, §5.1 (1967).
80 ILL. REV. STAT. ch. 51, §5.2 (1967).
82 ILL. REV. STAT. ch. 110A, §51 (1967). Unlike the other "professional-client" privileges, this privilege belongs solely to the professional, the accountant, and does not seek to protect the client; see Dorfman v. Rombs, 218 F. Supp. 905 (N.D. Ill. 1963).
his client told him in confidence. His "privilege" is now that of the client, it may be waived by him.

In general, the four criteria for privileged communication quoted above obtain in the case of the attorney-client relationship. A more detailed list of prerequisites for attorney-client "privilege" in a particular circumstance was presented by Judge Wyzanski in United States v. United Shoe Machinery Corp. Prior to considering whether certain particular documents were protected by the attorney-client "privilege," he enumerated the following conditions:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal service or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

The relation obtaining between an attorney and a corporate client fits within such a framework, and indeed both in Illinois and Federal Courts.

---

83 Dean Wigmore teaches that the history of the attorney-client privilege finds its origin in the reign of Elizabeth I, "where the privilege already appears as unquestioned." It arose from "a consideration for the oath and the honor of the attorney rather than for the apprehensions of his client." The doctrine that the privilege was that of the attorney rather than the client began to give way to a new concept in the 1700's. The "new theory looked to the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal adviser. It proposed to assure this by removing the risk of disclosure by the attorney even at the hands of the law." By the middle of the 1800's, the privilege became substantially recognized as that of the client "to include the communications made, first, during any other litigation; next, in contemplation of litigation; next, during a controversy but not yet looking to litigation; and, lastly, in any consultation for legal advice, wholly irrespective of litigation or even of controversy." [Citation omitted]

84 Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 318 (7th Cir. 1963).

85 Lanum v. Patterson, 151 Ill. App. 36 (1909). See also Burlage v. Haudenshield, 42 F.R.D. 397 (N.D. Iowa 1967). "Discovery of privileged matter should be allowed when waiver of the privilege at trial seems reasonably probable." Id. at 398.


87 The fact that the Illinois Power Company is a corporation is immaterial for it is entitled to the same treatment under the law as any other 'client' — no more and no less. If it seeks legal advice from an attorney, and in that relationship confidentially communicates information relating to the advice sought it may protect itself from disclosure. Day v. Illinois Power Co., 50 Ill. App. 2d 52, 55, 199 N.E.2d 802, 804 (1964).
and in the federal system a corporation may claim the attorney-client "privilege." The corporate client situation, however, gives use to a special problem: To which employees ought the "privilege" to extend? For example, the Illinois court in Day v. Illinois Power Company held that the defendant corporation could not in that particular circumstance avail itself of the attorney-client "privilege." It stated that:

The type of corporation employee transmitting information to the attorney for the corporation must be considered in determining whether such information is privileged. If an employee or investigator making reports to an attorney for the corporation is in a position to control or take a part in a decision about any action the corporation might take upon the advice of its attorney, he personifies the corporation and when he makes reports or gives information to the attorney, the attorney-client privilege applies. Such employee must have actual authority, not apparent authority, to participate in a contemplated decision.

That is, to retain its attorney-client "privilege," the corporation must exercise care in selecting the person to transmit information to its attorney. This seems contrary to the general rule that the client may select any agency he wishes, to transmit his communication, without fear of jeopardizing his "privilege."

In the case of People v. Ryan the Illinois Supreme Court extended the rule that the client may select any agency he wishes to transmit the communication and still maintain the "privilege." In that case a driver involved in an automobile accident was named as a defendant in a civil action for damages and a criminal action for driving under the influence of intoxicating liquors. The driver gave a written statement concerning the accident to the investigator from her insurance company, which was defending the civil action. The written statement was subsequently turned over to the attorney retained by the driver to defend the criminal action. The prosecutor then served a subpoena on the attorney demanding the written statement. The attorney refused to produce it since his client had invoked the attorney-client "privilege." The attorney was declared in contempt of court. The case was appealed directly to the supreme court on the grounds of a substantial constitutional question but that court, rejecting jurisdiction, transferred it to the appellate court. The appellate court held that although the written statement

---

88 "It is our considered judgment that based on history, principle, precedent and public policy the attorney-client privilege in its broad sense is available to corporations, and we so hold." Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir. 1963).
89 50 Ill. App. 2d 52, 199 N.E.2d 802 (1964).
90 Id. at 58, 199 N.E.2d at 806.
91 "As a general rule, a communication by a client to his attorney by any form of agency employed or set in motion by the client is within the privilege." 97 C.J.S. Witnesses §276 (1957).
given to the investigator was initially clothed with the attorney-
client "privilege," since the investigator was an agent of the
insured, transmitting the communication to an attorney (yet
unchosen) in the civil action, the "privilege" was waived by
transmitting the written statement to the attorney defending the
criminal action. The Illinois Supreme Court reversing the judg-
ment, stated:

We think the rationale of those cases upholding the privileged
nature of communications between insured and insurer where the
insurer is under an obligation to defend is more persuasive. We
concede that such communications are normally made by the insured
to a layman and in many cases no lawyer will actually be retained
for the purpose of defending the insured. . . . [W]e believe that
the insured may properly assume that the communication is made
to the insurer as an agent for the dominant purpose of transmitting
it to an attorney for the protection of the interests of the insured.93

The court further stated: "We can see no logical reason for a
different result when a transcription for the first confidential
communication is transmitted with the consent of the insured to
the second attorney."94

In view of this argument, it seems unjustifiable to maintain
that the identity of the agent transmitting a confidential com-
munication on behalf of a corporate client may jeopardize that
corporate client's attorney-client "privilege."

Privilege in Federal Courts

The jurisdiction of the federal courts extends to both diver-
sity cases and federal question cases.95 Generally in diversity
cases the federal courts follow the state substantive law and the
federal procedural law pursuant to rule of Erie Railroad Co. v.
Tompkins.96 Federal courts have held that state laws creating
a "privilege" are substantive, and they have followed them in di-
versity cases.97 Therefore, "[t]here is no question but that in
diversity cases, the rule of Erie R. Co. v. Tompkins . . . requires
the federal courts to ascertain and follow what the state law is if
the state decisions are sufficiently conclusive, definite and final."98

The federal courts in diversity cases must follow the state cre-
ated "privilege" regardless whether that "privilege" is estab-

93 Id. at 460-61, 197 N.E.2d at 17.
94 Id. at 461, 197 N.E.2d at 18.
96 304 U.S. 64 (1938).
97 Palmer v. Fisher, 228 F.2d 603, 608 (7th Cir. 1955), cert. denied, 351 U.S. 965 (1956), overruled as to other holdings, Carter Prod., Inc. v. Eversharp, Inc., 360 F.2d 868 (7th Cir. 1966). Contra, Ex parte Sparrow, 14 F.R.D. 351, (N.D. Ala. 1953). "While this court does not consider the
question of privilege to be a matter of substance and therefore controlled by
Erie R. Co. v. Tompkins. . . ." Id. at 353.
98 Baird v. Koerner, 279 F.2d 623, 627 (9th Cir. 1960); cf. Hill v. Hud-
lished by the legislature or the courts. Even when "it seems unnecessary to solve any choice of law problem" where both the state and federal law acknowledge the same "privilege" the state law determines the scope of the privilege.

At least for cases where jurisdiction is based on diversity and where the state in which discovery is sought has established a "privilege" by statute, the cases of Palmer v. Fisher and Ex parte Sparrow have established that the law of the state wherein discovery is sought controls, irrespective of the trial states recognition of the "privilege." An interesting distinction of this principle was developed in Application of Cepeda. In that case the plaintiff in a libel suit in California sought a deposition from a magazine writer living in New York. While New York does not afford any "privilege" to journalists, California does. Under California statute, journalists need not disclose the source of any information procured for any publication.

The District Court for the Southern District of New York ruled on the two diversity issues involved in Cepeda. The first question — that of whether state or federal law was to be applied — having been decided in favor of state law, the court went on to state the second question:

[T]he case at bar presents a somewhat novel situation for the place of trial and the place of deposition are located in different states. More important, the place of trial, namely, California, recognizes a privilege in this area, whereas New York, the place of deposition, does not. Thus, the second question posed is whether the law of the deposition state, wherein there is no privilege, or the law of the trial state, wherein there is a privilege, is to be applied. After discussing both Ex parte Sparrow and Palmer v. Fisher, the court concluded:

Thus, the sum total of both cases would seem to be that where a deposition is being taken in a state whose declared public policy has carved out a privilege in favor of a certain class of communication, a federal court sitting in that state will apply that pronounced public policy to questions propounded on a deposition of an out-of-

---

102 228 F.2d 603 (7th Cir. 1955), cert. denied, 351 U.S. 965 (1956), overruled as to other holdings, Carter Prod., Inc. v. Eversharp, Inc., 360 F.2d 868 (7th Cir. 1966).
105 Id. at 468.
107 228 F.2d 603 (7th Cir. 1955), cert. denied, 351 U.S. 965 (1956), overruled as to other holdings, Carter Prod., Inc. v. Eversharp, Inc., 360 F.2d 868 (7th Cir. 1966).
state suit, even though the trial state does not recognize the privilege.

... When viewed in this light the cases cited supra, applying the public policy of the deposition state recognizing a privilege, are distinguishable from the situation at bar and, in fact, support the conclusion that in the instant case, the law of the place of trial, which recognizes the privilege, should apply.\(^{108}\)

The special circumstances involved in *Cepeda* limit its applicability as a ruling on "privilege." In general, and despite *Cepeda*, the state statutory "privilege" of the state wherein discovery is sought remains the controlling statute in diversity cases. While it would appear proper to also have the state "privilege" apply if jurisdiction is based on a federal question, or if the state common law establishes the "privilege," these questions have not yet been fully resolved by the courts.

Some federal courts have held that "privilege" is to be ascertained by state law even in a federal question case.\(^{109}\) In *Baird v. Koerner*\(^{110}\) the court found that state law was applicable in determining whether an attorney could be compelled to testify pursuant to a petition of a special agent of the United States Internal Revenue Service seeking aid of the district court to compel testimony of an attorney as to the identity of a person who might be able to pay an internal revenue tax.

The court held that the state statute was applicable in determining the scope of the attorney-client "privilege":

> [B]ecause the attorney is created by state law, and differs from state to state, so the nature and extent of the privilege that exists between attorney and client varies. We find in Corpus Juris Secundum, 35 C.J.S. Federal Courts §131 (b), the general statement: 'On the question of privileged communications, the federal courts follow the law of the state of the forum.'\(^{111}\)

The court further stated:

> In summation, we find (1) that because the relationship of client and attorney is created and controlled by the law of the various states; and that such creation and control is recognized, followed, and approved by the federal courts, the nature and extent of the privilege created between a lawyer and his client by the attorney-client relationship requires the federal courts to follow the state law; (2) that some considerable number of federal cases enunciate the rule that the state law governs the rule of privilege; (3) that some federal cases apply the law of the forum state, but do so without enunciating the principle under which they act; (4) that no federal statute forbids the use of the law of the forum state, and that if there is any definite rule set up by federal statute, it requires us to follow the law of the forum state, and (5) any federal 'common law' which may exist does not require us to ignore the


\(^{110}\) 279 F.2d 623 (9th Cir. 1960).

\(^{111}\) Id. at 628.
The John Marshall Journal of Practice and Procedure

forum state law . . . and we hold the law of the forum state should, and does control — here the State of California.1

But the matter is far from clear. For example, underlying Anderson v. Benson113 there is an implication that in the absence of a state statute establishing a “privilege” between attorney and client, the “privilege” might not exist in federal court. In his second memorandum opinion in the Radiant Burners case,114 Chief Justice Campbell casts further doubt on the point. The defendant relying on Palmer v. Fisher115 had contended that the federal court should apply Illinois state law to the attorney-client “privilege,” thus extending the “privilege” to corporate clients. Judge Campbell discounted the defendant’s contention, stating that: “In Palmer, the Court of Appeals was considering a statutory and not a common law privilege.”116 Although later reversing Judge Campbell’s primary holding that the attorney-client “privilege” cannot be invoked by a corporate client, the court of appeals did not discuss the above language.117

**Good Cause**

“Good cause” is expressly required under the federal rule to obtain leave of court for the production of documents.118 It is equally required, under both federal and Illinois rules, for physical and mental examinations. As a concept, “good cause” does not lend itself to generic definition. It has been variously described and is often confused with necessity.

“Good cause” has been defined as something more than relevancy, and as such confined to those rules by which it is expressly required.119 To equate it to relevancy is redundant: “The specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, for the relevancy standard has already been imposed”120 by other rules. This view is supported by the United States Supreme Court decision in Schlagenhauf v. Holder.121 The Court directed the trial judge to re-examine his order requiring the defendant-driver in an automobile

---

112 Id. at 632.
115 228 F.2d 603, cert. denied, 351 U.S. 965 (1956), overruled as to other holdings, Carter Prod., Inc. v. Eversharp, Inc., 360 F.2d 868 (7th Cir. 1966).
117 Radiant Burners, Inc. v. American Gas Ass’n, 320 F.2d 314 (7th Cir. 1963).
120 Id. at 924.
accident case to appear for a series of physical examinations. The Court stated:

The courts of appeals in other cases [footnote omitted] have also recognized that Rule 34's good-cause requirement is not a mere formality, but is a plainly expressed limitation on the use of that Rule. ... They are not met by mere conclusory allegations of the pleadings — nor by mere relevance to the case — but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination.122

"Relevance" is a more easily satisfied test in discovery procedures than is "good cause." To compel the production of all relevant documents could constitute an extreme harassment and/or an unnecessary invasion of privacy.123 Similarly, the invasion of the individual's privacy by a physical or mental examination is so serious that a strict standard of "good cause," supervised by the district court, is manifestly appropriate.124 The "good cause" requirement is designed to protect against such abuses in the production of documents and in the ordering of physical and mental examinations which might otherwise be permitted under the relevancy test. Parenthetically it might be added that the sought-for material can ordinarily be identified, located, and revealed by deposition or interrogatory.125

"Good cause" has also been defined as something more than relevancy126 or as the equivalent of relevancy127 and as such applicable to all the rules of discovery, regardless of any express language in the rules. The "good cause" requirement under this description is treated merely as a question of the burden of proceeding.128 Thus, under the rules which expressly require "good cause," the burden of obtaining leave of court to discover rests upon the party seeking discovery. On the other hand, under the rules which do not expressly require "good cause," the burden of obtaining order of court to limit discovery rests upon the party subject to discovery. The trouble with this view is that "it interprets [the express language of the rules in regard to "good cause"] as redundant and thereby violates elementary canons of construction."129

122 Id. at 118.
**Work Product**

The "work product" exemption afforded to otherwise discoverable material was created in *Hickman v. Taylor*.\(^{130}\) It is still applied by federal courts without any significant change. In Illinois, however, its scope was recently narrowed in *Monier v. Chamberlain*.\(^{131}\) *Hickman v. Taylor* involves a suit brought under the Jones Act concerning a maritime accident. The representative of the heirs of a crew member killed in that accident sought to discover statements (taken by defendant's attorney) of surviving crew members shortly after the accident. The United States Supreme Court did not consider the material to involve confidential communication between client and attorney, and hence did not find it privileged on that ground.\(^{133}\) However, the Court held the statements to be exempt from discovery inasmuch as they constituted the "work product of a lawyer."

Taken together, the *Hickman* case and the rules\(^{134}\) pertinent to discovery outline the requirements for application of the "work product" exemption. First, the sought-for material must be relevant;\(^{135}\) an adverse finding at this point precludes discovery. And, if discovery involves the production of documents or the inspection of copies or photographs,\(^{136}\) or if it seeks the mental/physical examination of persons,\(^{137}\) then the "good cause" requirement must additionally be met.\(^{138}\) Providing the material fulfills these requirements and is otherwise not privileged, it may then be examined to determine its "work product" status. If the material sought has been "collected by an adverse party's counsel in the course of preparation for possible litigation"\(^{139}\) then it is "work product" and as such is entitled to a qualified exemption. In some cases, if "necessity" is shown for securing

---

\(^{130}\) 329 U.S. 495 (1947). Actually the term "work product" was first used in the appellate decision of this same case, 153 F.2d 212, 223 (3d Cir. 1945). *1967 Proposed Amendments, Rule 26(b)(3)*, 43 F.R.D. 211, 225, only requires showing of "good cause" for "work product."

\(^{131}\) 35 Ill.2d 351, 221 N.E.2d 410 (1966).

\(^{132}\) 329 U.S. 495 (1947).

\(^{133}\) Id. at 506, 508.


\(^{136}\) "Upon motion of any party showing good cause therefor... the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing... of... documents... ." *Fed. R. Civ. P. 34.*

\(^{137}\) "[T]he court in which the action is pending may order... [the party] to submit to a physical or mental examination by a physician... . The order may be made only on motion for good cause shown... ." *Fed. R. Civ. P. 35(a).*

\(^{138}\) The court in *Hickman* did not discuss satisfying the requirement of "good cause" as the "petitioner was proceeding primarily under Rule 33." 329 U.S. at 504.

\(^{139}\) Id. at 505. "Work product" does not mean "that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases." Id. at 511.
the “work product,” discovery may still be obtained. But in *Hickman* the court has established an absolute exemption for all such “work product” that would reveal the opinions or mental impressions of adversary’s counsel.\(^{140}\)

The former rule in Illinois defined “work product” as “memoranda, reports of documents made by or for a party in preparation for trial.”\(^{141}\) While essentially the definition obtaining in *Hickman*, the Illinois rule made somewhat broader provision for absolute exemption.\(^{142}\) It had exempted from discovery all material falling within the “work product” definition, except that which was independently admissible at trial as evidence.\(^{143}\) However, the decision of the Illinois Supreme Court in *Monier v. Chamberlain*\(^{144}\) declared a new rule, one which is narrower than either the former state rule or the current federal rule.

In *Monier v. Chamberlain*,\(^{145}\) the court permitted discovery of material which defendant had contended to be the “work product” of his attorney. The court found that:

Only those memoranda, reports or documents which reflect the employment of the attorney’s legal expertise, those ‘which reveal the shaping process by which the attorney has arranged the available evidence for use in trial as dictated by his training and experience’ [citation omitted] may properly be said to be ‘made in preparation for trial’ . . . [and thus qualify as a “work product” exemption].\(^{146}\)

The court attempted to clarify the delineation between what is

---

\(^{140}\) Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways. . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

We do not mean to say that all written materials obtained or prepared by an adversary’s counsel with an eye toward litigation are necessarily free from discovery in all cases.

*Id.* at 511. 1967 Proposed Amendments, Rule 26(b)(3), 43 F.R.D. 211, 225 would seem to eliminate the absolute exemption.

\(^{141}\) ILL. REV. STAT. ch. 110, §101.19-5 (1965).


\(^{143}\) Stimpert v. Abdnour, 24 Ill.2d 26, 179 N.E.2d 602 (1962).

\(^{144}\) 35 Ill.2d 351, 221 N.E.2d 410 (1966). "Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party’s attorney." ILL. REV. STAT. ch. 110A, §201(b) (2) (1967). For the chronology between the supreme court decision in *Monier* and the final drafting of Rule 201(b) (2) see Tone, *Comments on the New Illinois Supreme Court Rules*, XLVIII CHI. BAR REC. 46, 49 (1967).

\(^{145}\) 35 Ill. 2d 351, 221 N.E. 2d 410 (1966).

\(^{146}\) *Id.* at 359-60, 221 N.E.2d at 416.
and what is not "work product" by citing examples:

Thus, memoranda made by counsel of his impression of a prospective witness, as distinguished from verbatim statements of such witness, trial briefs, documents revealing a particular marshalling of the evidentiary facts for presentation at the trial, and similar documents which reveal the attorney's 'mental processes' in shaping his theory of his client's cause, are documents 'made in preparation for trial' and exempt from discovery... [as 'work product']. Other material, not disclosing such conceptual data but containing relevant and material evidentiary details must, under our discovery rules, remain subject to the truth-seeking processes thereof.\(^\text{1}\)

In effect, however, the court in Monier re-established the principle that "work product" should be absolutely exempt from discovery, whether or not "necessity" exists:

We have considered the propriety of requiring under the Illinois discovery practice, as under Federal Rule 34 [citation omitted], that 'good cause' be shown before otherwise properly discoverable material, or material ordinarily protected from discovery under a broader 'work product' doctrine than the one adopted here, need be disclosed. We have concluded that the attendant problems which arise under the 'good cause' doctrine render adoption of that theory undesirable... 

... We believe that narrowing the scope of the 'work product' doctrine — and rendering material encompassed thereby absolutely exempt from discovery, while at the same time freeing relevant and material evidentiary matter — is preferable to the Federal position.\(^\text{2}\)

As with privileged communications "work product" may involve the use of agents. The extent to which the "work product" exemption may be claimed when the agent is not an attorney is an issue of considerable controversy and disagreement.\(^\text{3}\)

\(^{1}\) Id. at 360, 221 N.E.2d at 416.

\(^{2}\) Id. at 360-61, 221 N.E. 2d at 417. The court in arriving at its decision seemingly confused "good cause" with "necessity."

authorities maintain that "statements of nonexpert witnesses, taken by a claim agent or investigator under ordinary circumstances, with a view to assessing and possibly resisting a claim . . . are to be treated as work product"\(^{150}\) that "where the lawyer has supplied the formula for taking the statement or the pattern of questions to be asked [by a layman] and this has significantly shaped the statement, it may well be treated as work product"\(^{151}\) and that "[r]eports and statements of experts are likely to be treated as work product,"\(^{152}\) to a greater extent in the federal rules than in the Illinois rules.\(^{153}\) Assuming that such material may constitute "work product" and so be exempt from discovery, the exemption may be forfeited, even in the absence of "necessity," by the conduct of the party claiming the exemption. Examples of such conduct are counsel's use of a statement to refresh a witness's recollection\(^{154}\) or by submitting an expert's report.\(^{155}\)

\textbf{Necessity/Good Cause}

Much confusion appears to exist within the judiciary concerning the application of the concepts of "good cause" and "necessity" to the law of discovery. As established in \textit{Hickman v. Taylor}\(^{156}\) "necessity" is required to justify the discovery of material otherwise protected by the "work product" exemption. "Good cause" is required by the Federal Rules of Civil Procedure for the discovery and the production of documents and things for inspection, copying, or photographing,\(^{157}\) and for obtaining by means of discovery the physical and mental examination of

\(^{150}\) F. JAMES, JR., CIVIL PROCEDURE §6.9, at 208 (1965).

\(^{151}\) \textit{Id.} at 207.

\(^{152}\) \textit{Id.} at 208.

\(^{153}\) The standard order of the Circuit Court of Cook County, Illinois, used in motions to produce — commonly referred to as the "Monier order" — excludes experts from discovery who are merely consultants in preparation of the case and will not testify at trial. This exclusion is compatible with the narrow definition of "work product" since such experts are privy to the attorney's thoughts and tactics in the case.


\(^{155}\) Normally, an expert witness not an employee of the party is not subject to examination by an opposing party by way of deposition unless the circumstances indicate a need for it. . . .

When a party offers the affidavit of an expert witness in opposition to, or in support of, a motion for summary judgment, it waives its right not to have the deposition of said expert taken. The testimony of the expert, for all practical purposes, has already been offered in the case, and the taking of his deposition by the party against whom the affidavit was used is nothing more than cross-examination.


\(^{157}\) FED. R. CIV. P. 34. The requirement to proceed upon motion showing good cause is eliminated in \textit{1967 Proposed Amendments, Rule 34 (a)}, 43 F.R.D. 211, 255.
persons.\textsuperscript{158} It has been\textsuperscript{159} and still is required under the Illinois Supreme Court rules for obtaining the physical and mental examination of parties and other persons.\textsuperscript{160} In a laudable attempt to avoid the problems inherent in the application of the doctrine of “necessity,” the Illinois Supreme Court stated in \textit{Monier v. Chamberlain}.\textsuperscript{161}

We have considered the propriety of requiring under the Illinois discovery practice . . . that ‘good cause’ be shown before otherwise properly discoverable material or material ordinarily protected from discovery under a broader ‘work product’ doctrine than the one adopted here, need be disclosed. We have concluded that the attendant problems which arise under the ‘good cause’ doctrine render adoption of that theory undesirable.\textsuperscript{162}

The “broader work product doctrine” referred to in \textit{Monier} is undoubtedly the rule established in \textit{Hickman}.\textsuperscript{163} However, in \textit{Hickman} the United States Supreme Court discussed “necessity” rather than “good cause.” The use of the term “good cause” instead of “necessity” in \textit{Monier} illustrates the treatment of these concepts in the federal cases. In \textit{Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company},\textsuperscript{164} a civil antitrust suit in which the defendant claimed the “work product” exemption for certain documents which the plaintiff sought to discover, the court stated: “For plaintiffs to overcome this \textit{prima facie} showing that these documents are entitled to protection from discovery based on “work product,” they must first convince the court that these documents are essential to the preparation of their case.”\textsuperscript{165} The court cited \textit{Hickman v. Taylor}\textsuperscript{166} as controlling. It then went on to discuss various situations in which necessity could overcome the “work product” exemption. However, all of this discussion (and the opinions of the cited authorities) used the term “good cause” and not “necessity.” After enumerating and discussing, in terms of “good cause,” the special circumstances — e.g., non-availability of witnesses, exclusive or superior opportunity for knowledge, on-the-spot statements, and change in circumstances — which might create “necessity,” the court stated in summation:

\begin{quote}
After a showing of good cause, as outlined above, in \textit{camera} inspection of these documents by the court would be appropriate. [Citation omitted] The respective motions of defendants for orders of protection for the work product of counsel are hereby granted without prejudice to plaintiffs’ right to move for and obtain the
\end{quote}

\begin{itemize}
\item \textsuperscript{158} \textit{FED. R. CIV. P. 35(a)}.  \\
\item \textsuperscript{159} \textit{ILL. REV. STAT.} ch. 110, §101.17-1 (1965).  \\
\item \textsuperscript{160} \textit{ILL. REV. STAT.} ch. 110A, §215(a) (1967).  \\
\item \textsuperscript{161} 35 Ill.2d 351, 221 N.E.2d 410 (1966).  \\
\item \textsuperscript{162} \textit{Id.} at 360, 221 N.E.2d at 417.  \\
\item \textsuperscript{163} 329 U.S. 495 (1947).  \\
\item \textsuperscript{164} 211 F. Supp. 736 (N.D. Ill. 1962).  \\
\item \textsuperscript{165} \textit{Id.} at 740.  \\
\item \textsuperscript{166} 329 U.S. 495 (1947).  \\
\end{itemize}
production of all or part of such documents upon a showing of good cause and relevancy under the standards heretofore outlined in this memorandum, and upon a showing that such documents are not entitled to any other protection or privilege.\(^{167}\)

Other district courts have equated "good cause" and "necessity."\(^ {168}\) Yet other courts have distinguished to some extent between "necessity" and "good cause" by holding that "necessity" is something more than ordinary "good cause," although it is of the same nature. A nebulous distinction of this type was made in the case of *E. I. DuPont De Nemours & Co. v. Phillips Petroleum Co.*\(^ {169}\) in which the court stated:

Broadly speaking, the [work product exemption] rule is nothing more than an extension of the requirement for a showing of good cause for the production of documents to information of all kinds developed by a lawyer in preparing his case for trial, with the addition (binding upon this Court under the Alltmont decision, supra) that in such cases the courts are, in effect, put to the very difficult task of finding very good cause as distinguished from good cause.\(^ {170}\)

Finally, there are those cases that discuss allowing discovery of "work product" solely in terms of "necessity." In *Gulf Construction Company v. St. Joe Paper Company*,\(^ {171}\) the court held that there was a sufficient showing of "necessity" for the defendant to discover correspondence in the possession of plaintiff's attorney between the plaintiff and a third party, on the grounds that nothing other than this correspondence could properly reveal the facts and the defendant could not obtain production of the correspondence from the third party. The circumstance that certain facts could only be made available to the plaintiff by discovery of "work product" of the defendant's attorney was held to constitute "necessity" in *Stone v. Grayson Shops*.\(^ {172}\)

Perhaps the best example of the application of the concept of


\(^{168}\) In the case of O'Donnell v. Breuninger, 9 F.R.D. 245 (D.D.C. 1949), a suit for alienation of affections, in which the defendant, upon taking the deposition of the plaintiff husband, sought to discover the results of the plaintiff's attorney's investigation concerning the registration of the plaintiff's wife and the defendant in the same hotel. The court concluded: "Even if the information sought could be considered part of the so-called 'work product of the lawyer,' necessity is shown for requiring plaintiff to respond to the question put." *Id.* at 248. Earlier, the court, in discussing the qualified nature of the "work product" exemption, stated:

[Where a party makes more than an ordinary request for relevant, non-privileged facts in the possession of his adversaries or their counsel, he must make a proper showing of good cause, that is, of the necessity for production of the material or that denial of production will cause hardship or injustice.]

*Id.* at 247 (emphasis added).


\(^{170}\) *Id.* at 420.


\(^{172}\) 8 F.R.D. 101 (S.D.N.Y. 1948).
The court allowed the plaintiff to discover the facts contained in a report of the defendant's heating expert. The report concerned his examination of a propane stove which in exploding had killed plaintiff's decedents. The court dismissed the defendant's claim to the "work product" exemption, stating:

[T]he equipment was not only disconnected during the course of the inspection . . . certain important parts were removed by . . . Union Carbide [the defendant] to their shop before being returned. Under such circumstances, the best evidence of the condition in which this equipment was, right after the explosion, are the notes made of such condition by the expert, Peacock, presumably incorporated in his report, now the subject of the motion. This report would certainly be more reliable than the recollection, some two years later, of these plumbers, who worked in conjunction with the defendants, and without memoranda to refresh their recollection.

Thus the 'necessity or justification' [citation omitted] exists, to obtain discovery of the otherwise protected 'work product' of the lawyer. Moreover, these very facts constitute the 'good cause' requisite for the issuance of the order of inspection and copying under F.R.C.P. 34.1

"Good cause" (as such and not as "necessity") has been defined as "such circumstances as give the court reason to expect that the beneficial objections of pre-trial discovery will be achieved." Perhaps a comparable definition of "necessity" might be: such circumstances, existing at the time when discovery is sought, as give the court reason to believe that a capable attorney could not, by reasonable diligence, obtain the same factual information which his adversary has already obtained.

**Experts' Reports**

The discovery of experts' reports, although involved in many cases in the federal courts, has only been an issue in three reported decisions in Illinois.1 In essence, the Illinois courts have held that, on the basis of the "work product" or "material in preparation for trial" exemption, experts' reports are not subject to discovery. In view of the recent narrowing of the scope of the "work product" exemption in Illinois, experts' reports may also lose their immunity to discovery.

_Yowell v. Hunter_, the first Illinois case dealing with the

---

174 Id. at 378.
178 403 Ill. 202, 85 N.E.2d 674 (1949).
discovery of material prepared by an expert, involved a will contest the basic issue of which was whether the testator's signature had been forged. The court was there concerned with allowing pre-trial discovery of photographs taken by a handwriting expert of documents signed by the testator. The Illinois Supreme Court held that the photographs were exempt from discovery, since they "were actually prepared in preparation for trial and as such were not subject to production under Rule 17." \(^{179}\) "Rule 17" referred to the Supreme Court Rule then in force concerning the discovery of documents and books, which provided the following exemption: "This Rule shall not apply to memoranda, reports, or documents prepared by or for either party in preparation for trial, or to any communication between any party or his agent and the attorney for such party." \(^{180}\) That is, in order to exempt the photographs from discovery the court had only to find that they were made by or for a party in preparation for the trial. This the court found to be the case, stating: "The question might occur as to what is or is not preparation for trial but as we view the photographs prepared by the experts in this case it is apparent that all of them were made in preparation for trial." \(^{181}\)

The second case, that of *City of Chicago v. Harrison-Halsted Building Corporation*, \(^{182}\) was a condemnation proceeding in which the defendant sought to discover by interrogatories the amount and basis of the plaintiff's offer to purchase the property made prior to instituting the suit. After stating that discovery could not be precluded simply because plaintiff's offer was in the nature of an attempt to compromise and, hence, inadmissible at trial, the court held that the material was nevertheless not subject to discovery:

> [T]he defendant was not entitled to the information sought by the discovery proceedings. The undisputed evidence is that the appraisals were made by the two witnesses as experts in the real estate field at the request of counsel for plaintiff for his use in the trial. This being true, the evidence was privileged and need not be disclosed either at time discovery is sought or at the trial. \(^{183}\)

Although the reasoning and the terminology employed by the court is somewhat confusing, the only basis on which the material sought in this case could have been protected from discovery was the former Illinois Supreme Court rule precluding the discovery disclosure of memoranda, reports or documents made by or for a party in preparation for trial. \(^{184}\)

---

\(^{179}\) *Id.* at 210, 85 N.E.2d at 679.


\(^{181}\) *Id.* at 436, 143 N.E.2d at 43-44.

\(^{182}\) *Id.* at 436, 143 N.E.2d at 43-44.

\(^{183}\) *Id.* at 210, 85 N.E.2d at 679.

The latest case dealing with the discovery of an expert's report was *Kemeny v. Skorch*, in which the defendant sought to discover the report of a medical expert who had examined the plaintiff and who might be called to testify at trial. The court held that while the report was not protected by the attorney-client privilege, it was exempt from discovery as material made for or by a party in preparation for trial. But the court clearly stated that it so held only because it was bound to, and proceeded emphatically to berate the rule which had required such a result. The language raises the strong possibility that if the supreme court rule directed to the Illinois version of the "work product" exemption should ever be narrowed, the court would certainly take advantage of that narrowing to allow discovery of experts' reports.

While the narrowing of the "work product" exemption asked for by the court in *Kemeny* may appear to have been provided by *Monier* and the new Illinois Supreme Court Rules, a closer analysis raises the question of whether the court in *Kemeny* could have allowed the discovery of all experts' reports, even on the basis of the new Illinois "work product" exemption. Certainly it could be argued that the photographs taken by the handwriting expert in the *Yowell* case would indicate which of the available documents were thought to be the most favorable evidence for presentation at trial. Hence they could be seen as "documents revealing a particular marshalling of the evidentiary facts for presentment at the trial, and [...] documents which reveal the attorney's 'mental processes' in shaping his theory of his client's cause," both of which categories are exempt from discovery. The same argument could be made concerning the particular factors which might have influenced the real estate experts' offer in the *Harrison-Halsted* case, or concerning the

---

187 In the instant case, while the report is not privileged, it was certainly a report made by or for a party in preparation for trial and hence not available on discovery proceedings. The language of the rule is clear and cannot be evaded by a cogent argument against its usefulness. We must therefore hold that the document is not available to defendants on pre-trial proceedings. It may become relevant upon trial and if so, it would not be exempt as a privileged document. *Id.* at 169, 169 N.E.2d at 493.
188 We say all this to put in its true perspective the role of this particular type of witness. He is part of the trial apparatus of a personal injury case. As such, every possible step should be taken to channel his contributions in a direction that will serve the ends of justice. One such step is to make his reports as non-partisan, objective and scientific as are the other notable activities of his profession. To that end, we believe that the rule should be revised, but while it stands we have no choice but to interpret it fairly. *Id.* at 171, 159 N.E.2d at 494.
importance of particular medical aspects of the examination in the Kemeny case.\textsuperscript{189}

Thus, the first impression gained upon combining \textit{Monier} with the dicta in \textit{Kemeny} is that in Illinois experts' reports may no longer be protected from discovery. But the situation is not clear-cut. If the discovery is sought for the purpose of ascertaining the other party's contemplated use of an expert, or the identity of the expert to be used, it ought certainly to fall within the "work product" exemption even under the narrow scope afforded that exemption in Illinois, since such discovery would clearly "disclose the theories, mental impressions, or litigation plans of the party's attorney."\textsuperscript{190} At the moment neither conclusion can be reached with any great degree of certainty, pending appeal and review.

While the number of decisions in Illinois concerned with the discovery of experts' reports are few, the issue has been tested frequently in federal courts. But as yet there has been no consistency in either the decisions or the rationales underlying them.\textsuperscript{191} Illustrative of the divergent views of the federal courts in deciding this question are the cases resulting from a patent infringement suit brought in the District Court in Tennessee, in which the defendant sought to discover the reports of two expert witnesses. The plaintiff, Cold Metal Process Co., had employed Dr. Buerger, a professor of metallurgy at Massachusetts Institute of Technology, as an expert to determine if metal products made by their competitors infringed their patent. Dr.

\textsuperscript{189} For an analogous situation of identifying expert witnesses who will be called at trial, see ILL. REV. STAT. ch. 110, §58(3) (1967) and note 66 supra. \textit{But see note 153 supra.} It is interesting to note the changes proposed for both the federal and Illinois rules (set out below) immediately subsequent to the respective supreme court cases modifying the work product exemption which would have excluded the conclusions of an expert obtained in preparation for trial from discovery:

\textquote{The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or except as provided in Rule 35, the conclusions of an expert.} ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (1946), 5 F.R.D. 433, 457 (1946).

Notwithstanding the foregoing exceptions, the opinion of an expert obtained in preparation for litigation, or its existence, location, or custody is not discoverable. However, if the opinion is based upon facts learned through an investigation, those facts may be discoverable under the conditions set forth in clause (ii) of this subparagraph (d).


191 1967 Proposed Amendments, Rule 26(b)(4), 43 F.R.D. 211, 225-26, attempts to establish a consistent standard by providing for discovery of experts' facts and opinions upon a showing of "necessity" or, in the alternative, discovery of the identity of experts who are to testify at trial and facts and opinions relevant to the testimony.
Buerger terminated his employment with the plaintiff prior to the completion of his work. Dr. Sachs, a professor at Case Institute of Technology, whose background was similar to that of Dr. Buerger, took over the investigation. Defendant subsequently sought discovery from both Dr. Buerger and Dr. Sachs. Objections were raised to questions on both depositions directed to the conclusions reached in the reports. Essentially, there was no difference between the two experts as to the relationship to either of the parties or to the facts involved in their study. The only variable was that of point of time when each was in the employ of the plaintiff. This difference did not merit consideration by either of the courts, and can be assumed not to have been pertinent to the availability of facts for either expert, in view of the nature of their investigations. But on the one hand the District Court in Massachusetts (the forum of the deposition where a ruling was sought) held that discovery could not be obtained from Dr. Buerger, because in his role as an expert in the employ of the plaintiff he was an agent in a confidential attorney-client communication; while on the other hand the District Court for the Northern District of Ohio (the forum of the deposition where a ruling was sought) held that Dr. Sachs was compelled to answer the questions posed during the discovery deposition. Upon appeal, the Sachs decision was upheld as to both result and reasoning. The court of appeals stated:

Dr. Sachs is not an attorney but is an expert in X-ray metallography, who was engaged by counsel for the Cold Metal Process Company to make certain tests and X-ray photographs of samples of metal furnished him. His services were procured in preparation for the trial of a patent case. The information obtained by Dr. Sachs is not deemed to fall within the attorney-client privilege protecting the 'work product of the lawyer' this information appears to be essential to a vital issue in the case and is evidentiary in character.

We think, therefore, that as correctly reasoned by the district judge, Hickman v. Taylor [citation omitted] does not sustain the position of appellant that the witness, Sachs, was privileged to decline to divulge the requested information by refusing to answer the questions put to him. The reasoning is neither extensive nor particularly enlightening in these two cases. Taken together, they do indicate the current divergence of view in the federal courts regarding the discovery

196 Sachs v. Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948).
197 Id.
of experts' reports. A noted commentator has attempted to reconcile these divergent findings:

The Court should not ordinarily permit one party to examine an expert engaged by the adverse party, or to inspect reports prepared by such expert, in the absence of a showing that the facts or information sought are necessary for the moving party's preparation for trial and cannot be obtained by the moving party's independent investigation or research.198

This statement, in effect, gives to an expert's report a qualified exemption similar to that afforded the "work product" of the lawyer. That is, the expert's report would be subject to discovery upon a showing of "necessity." The rationale for allowing discovery appears to be based on a combination of "good cause" and "necessity."199

The federal courts have considered various grounds for exempting the expert's report from discovery; namely, the attorney-client privilege,200 the "work product" exemption,201 and a concept of fairness or the existence of a property right in the party employing the expert in the expert's report.202 It is clear that in general an expert cannot claim the attorney-client privilege as either the attorney or the client, a possible exception, however, might be found in a case such as in which the doctor-defendant (or the employee of a corporate defendant) may intend to give expert testimony in his (or its) own behalf.203 Thus, if an expert's report is to be protected from discovery by virtue of the attorney-client privilege, it must be so protected on the basis that the expert is an agent of the client for the purpose of making a confidential communication to the attorney.204 The expert's report would not be protected by the attorney-client privilege if the expert is held to be an agent of the attorney (that is, if the expert falls within that class of agents of the attorney who, by their presence during the confidential communication from the client to the attorney, do not negate the confidential nature of that communication). That the attorney-client privilege would not protect the expert's report if the expert were an agent of the attorney rather than of the client is fairly well settled by Hickman v. Taylor,205 which establishes that the attorney-client privilege does not protect material gathered in preparation for trial by the attorney or, implicitly, by the attorney through his

199 See text at note 173 supra.
204 People v. Ryan, 30 Ill. 2d 456, 197 N.E. 2d 15 (1964).
agents. This type of relationship would not, however, preclude a valid claim of “work product,” since there is “no logical basis for making any distinction between statements of witnesses secured by a party’s trial counsel personally in preparation for trial and those obtained by others for the use of the party’s trial counsel.”

Although no cases have been decided, as yet, on this basis, it would seem that the expert’s report would be protected if the expert were the member of a profession, such as accounting, which is in itself entitled to a privilege by state statute, for example, the court so ruled as regards the accountant in *Dipson Theatres v. Buffalo Theatres.* This would not be the case in Illinois, inasmuch as the client could not claim the accountant’s privilege. But, in instances where the client can claim a privilege afforded to a confidential communication between himself and a member of a profession, there is no reason why the chain of privileges should not remain intact if the client then confidentially communicates the material to his attorney. The courts have attempted to distinguish the expert’s finding of fact on the one hand and his conclusions on the other in allowing or disallowing discovery. The basis for this distinction must be founded upon “necessity” and “work product,” although the courts do not always discuss the issue in these terms. It can easily be seen that if the expert’s report is to be treated as “work product,” then “necessity” might exist for allowing discovery of the expert’s findings of fact. Where the facts are not practically available to the adversary (either because they are in the sole control of the other party and hence not available, or, although theoretically available, they have been materially changed by a lapse in time), “necessity” would exist. “Necessity” could hardly be said to exist in-so-far as discovering the conclusions contained in the expert’s report is concerned, except perhaps in an instance where the expert is the only one available in the field or if he so outranks all other experts in a particular field that he can be said, for all practical purposes, to be the only expert.

The protection of the expert’s report on the basis of fairness, or on the basis that the party employing the expert has a property right in the expert’s report (as was held in *Lewis v.*

---

208 Allmtont v. United States, 177 F.2d 971, 976 (3d Cir. 1950).
210 See case cited & text in note 82 supra.
United Airlines Transport Corporation\textsuperscript{212}, has not been widely accepted although it has been discussed in many cases as an ancillary consideration. The concept of fairness should not protect the expert's report, or at least not the factual findings contained therein, if "necessity" does in fact exist and is coupled with an offer by the adversary of just compensation. Indeed, just compensation by and of itself ought logically to defeat altogether the property right concept.\textsuperscript{213}

**DISCOVERY DEVICES**

In order to effect the purposes of discovery, the Illinois and federal rules provide devices for obtaining and recording facts prior to trial. The basic devices\textsuperscript{214} are deposition on oral examination,\textsuperscript{215} interrogatories,\textsuperscript{216} and production of documents and other tangible things, including persons for physical or mental examination.\textsuperscript{217} In addition, the rules provide for imposition of sanctions for failure to comply with rules and orders of court relating to discovery.\textsuperscript{218}

**Depositions**

Upon reasonable notice a party may take the deposition of any competent person on oral examination in a manner as would exist at trial, in order that the facts obtained and recorded may be subsequently used at trial.\textsuperscript{219} Although there is great similarity between the Illinois and federal rules pertaining to deposition,\textsuperscript{220} the Illinois rules, unlike the federal rules, differentiate

\textsuperscript{212} 32 F. Supp. 21 (W.D. Pa. 1940).
\textsuperscript{213} See text at & authorities cited note 61 supra.
\textsuperscript{214} In addition to the basic devices, ILL. REV. STAT. ch. 110A, §216 (1967) and FED. R. CIV. P. 36 provide for admission of fact and genuineness of documents. This device is designed to expedite proof at trial and is similar to the interrogatories of the bills of discovery in that written demand is made upon the adversary to admit evidentiary facts. ILL. REV. STAT. ch. 110A, §218 (1967) and FED. R. CIV. P. 16 provide for pretrial conferences in which the parties, under judicial supervision, define and formulate the issues and limit the proof to be presented, usually entering into a stipulation of uncontested matters, number of witnesses, etc.
\textsuperscript{215} See text at notes 219-78 infra.
\textsuperscript{216} See text at notes 279-340 infra.
\textsuperscript{217} See text at notes 341-456 infra.
\textsuperscript{218} See text at notes 457-89 infra.
\textsuperscript{219} ILL. REV. STAT. ch. 110A, §202 (1967); FED. R. CIV. P. 26. ILL. REV. STAT. ch. 110A, §210 (1967) and FED. R. CIV. P. 31 also provide for deposition on written interrogatories in which the party desiring the deposition serves questions, which constitute direct examination, on the adverse parties, who in turn serve questions which constitute cross examination, etc. These questions are then put to deponent orally by the official who records the answers verbatim. ILL. REV. STAT. ch. 110A, §217 (1967) and FED. R. CIV. P. 27 provide for perpetuating testimony prior to commencement of an action or pending appeal. The party who wishes to perpetuate testimony petitions the court after notice is given to prospective adversaries. If the petition is granted, then the examination is taken and recorded for possible future use. See Suffolk v. Chapman, 31 Ill.2d 551, 202 N.E.2d 535 (1964); Martin v. Reynolds Metals Corp., 297 F.2d 49 (9th Cir. 1961).
discovery depositions from evidence depositions. The reasoning behind the differentiation is that if parties know a deposition is for discovery purposes and is thus limited in use at trial, examination will be facilitated and objections to the questions drastically reduced.

The differentiation between discovery depositions and evidence depositions under the state rules effects the manner in which the examination is taken and the use to which it may be put at trial. Since its purpose is mainly investigatory, the range of questioning in a discovery deposition is broader and the rules of evidence more relaxed than is the case for an evidence deposition. A discovery deposition, however, may be used at trial for admission, for impeachment by prior inconsistent statements, for any exception to the hearsay rule, or for any purpose for which an affidavit might be used.

An evidence deposition may be used for all the purposes for which a discovery deposition may be used; it may additionally be used to introduce the testimony of an otherwise unavailable witness. The category "unavailable witnesses" includes persons who have died or who are out of the county and whose absence was not procured by the party offering the deposition, or who are unable to attend or testify due to age, sickness, infirmity or imprisonment, or whose attendance cannot be procured by

---

222 Fitzpatrick & Goff, Discovery and Depositions, 50 NW.U.L. Rev. 628 (1955).

Defendant upon the trial sought to impeach the witness, Yvonne McAvoy, after she testified that she developed double vision and had referred to it in her discovery deposition. A discovery deposition was taken of this plaintiff, and defendant sought to show by this deposition that she made no mention whatever of double vision when asked concerning her complaints of injury or ill-being. Defendant called the court reporter to the witness stand and asked the witness to read from her shorthand notes all the questions and answers appearing in the discovery deposition. She testified that she correctly transcribed her shorthand notes as to all questions and answers appearing in the discovery deposition. The deposition was offered in evidence for the purpose of impeachment, which the court, upon objection, refused to admit. It appears there were many matters in the discovery deposition which would have no relation to the point of impeachment.

It would have been error to allow the reporter to read to the jury the entire deposition or to receive the deposition in evidence, which contained matters having no bearing upon the subject of impeachment. Id. at 488-89, 138 N.E.2d at 60.

subpoena by the party offering the deposition.225 The unavailability of a witness is determined at time of trial.226

The federal rule provides for a single deposition.227 It does not differentiate between a discovery deposition and an evidence deposition. However, the rule does provide for its use for purposes of admissions, impeachment by prior inconsistent statements, and any exception to the hearsay rule.228 If the witness is unavailable at time of trial, the deposition may be used to introduce testimony of that witness. The rule defines unavailability in much the same terms as does the state rule, except that it broadens the definition of unavailability to include any witness who is more than one hundred miles from the place of trial.229 Rule 26(d)(2) also allows an adverse party to introduce, by use of a deposition, the testimony of "any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association."230

Illinois Supreme Court Rule 212 states: "If only a part of a deposition is read or used at the trial by a party, any other party may at that time read or use or require him to read any other part of the deposition which ought in fairness to be considered in connection with the part read or used."231 Its counterpart in the federal rules states: "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."232 Under the literal language of the rules, the state test is broader than the federal rule. The state rule requires the trial court to exercise its discretion to determine "fairness," while the federal rule requires the trial court to determine legal relevancy.233 But in Smith v. City of Rock Island234 the Illinois appellate court stated that the reason for the rule was "to avoid the unfairness and distortion which may result if a party is permitted to read isolated parts of a deposition or portions out of context without permitting the opponent to read or require the other party to read other relevant portions of the same deposition."235 The United States

225 ILL. REV. STAT. ch. 110A, §212(b) (1967).
231 ILL. REV. STAT. ch. 110A, §212(c) (1967).
235 Id. at 397-98, 161 N.E.2d at 374.
Court of Appeals for the First Circuit stated a similar reason in *Westinghouse Electric Corporation v. Wray Equipment Corp.*

The rule affords:

[A] method for averting, so far as possible, any misimpressions from selective use of deposition testimony. The opposing party is entitled under the rule to have the context of any statement, or any qualifications made as a part of the deponent's testimony also put into evidence.

The court further stated:

[T]he spirit of the rule dictates that the opposing party should be able to require the introduction of the relevant parts of the deposition testimony at least at the conclusion of the reading of the deposition.

A deposition may be taken without leave of court at any time after all defendants have or should have appeared, pursuant to Illinois Supreme Court rule; and after twenty days after commencement of the action, pursuant to federal rule. Commencement of the action for this purpose has been defined as service of summons and complaint on the defendants or as service of the answer on the plaintiff. The purpose of the restriction is to enable the defendant to retain counsel and to be appraised of the claim against him. By leave of court, a deposition may be taken prior to the time specified under the rules, upon proof of "good cause." The plaintiff is ordinarily required to demonstrate that he would be prejudiced if the deposition were not taken. Once leave of court has been obtained, the plaintiff must serve notice upon the defendants.

A party desiring to take a deposition must serve reasonable written notice on all other parties. The notice must specify the time and place of the deposition, and must describe the intended deponent by name or other identifying information. The notice need not identify the person before whom the depo-

---

237 Id. at 494.
238 Id.
239 ILL. REV. STAT. ch. 110A, §201(d) (1967). Small claims (under $500.00) cases are an exception, leave of court must be obtained for all discovery. ILL. REV. STAT. ch. 110A, §§201(g), 287 (1967).
240 FED. R. CIV. P. 26(a).
244 ILL. REV. STAT. ch. 110A, §201(d) (1967).
246 American Exchange Nat'l Bank v. First Nat'l Bank, 82 F. 961 (9th Cir. 1897). See Mims v. Central Mfrs. Mut. Ins. Co., 178 F.2d 56 (5th Cir. 1949), in which the court held that depositions of different witnesses in scattered localities on the same date was not reasonable.
247 FED. R. CIV. P. 30(a); ILL. REV. STAT. ch. 110A, §206 (1967).
sition is to be taken\textsuperscript{248} nor the matter on which examination is sought.\textsuperscript{249} Under the state rules, however, the notice must specify whether the deposition is for purposes of discovery or evidence.\textsuperscript{250}

If the deponent is a party, service of notice of deposition alone is sufficient to require his appearance.\textsuperscript{251} If he is not a party, a subpoena must be served to require his attendance.\textsuperscript{252} If the deponent is not an individual (for example, if it is a corporation), then the deponent’s representative must, under federal rules, be an officer or managing agent of the deponent.\textsuperscript{253}

Although the definition of a managing agent has caused some difficulty, it is adequately defined in *Newark Insurance Company v. Sartain*.\textsuperscript{254} In that case the court stated that a managing agent was a person who:

1. Acts with superior authority and is invested with general powers to exercise his judgment and discretion in dealing with his principal’s affairs (as distinguished from a common employee, who does only what he is told to do; has no discretion about what he can or cannot do; and is responsible to an immediate superior who has control over his acts);

2. Can be depended upon to carry out his principal’s directions to give testimony at the demand of a party engaged in litigation with his principal; and

3. Can be expected to identify himself with the interests of his principal rather than those of the other party.\textsuperscript{255}

All other persons associated with a corporation or other association must be subpoenaed in order to obtain their appearance.\textsuperscript{256}

The Illinois rule contains express provisions for obtaining the appearance of a deponent.\textsuperscript{257} It provides in part that “[s]ervice of notice of the taking of the deposition of a party or person who is currently an officer, director, or employee of a party is sufficient to require the appearance of the deponent. . . .”\textsuperscript{258} But, under the rule, persons who are not parties or are not under the control of a party such as a corporation must be served


\textsuperscript{250} ILL. REV. STAT. ch. 110A, §202 (1967).

\textsuperscript{251} Collins v. Wayland, 139 F.2d 677 (9th Cir. 1944), cert. denied 322 U.S. 744; Peitzman v. City of Illmo, 141 F.2d 956 (8th Cir. 1944), cert. denied 323 U.S. 718.


\textsuperscript{253} FED. R. CIV. P. 26(d)(2).

\textsuperscript{254} 20 F.R.D. 583 (N.D. Cal. 1957).

\textsuperscript{255} Id. at 586.


\textsuperscript{257} ILL. REV. STAT. ch. 110A, §204 (1967).

\textsuperscript{258} Id.
with subpoenas in order to obtain their appearance. Subpoenas may be served by registered or certified mail delivered to the deponent at least seven days before the date of deposition.\textsuperscript{259}

The state rule also requires that leave of court be obtained before a subpoena is issued for a physician or surgeon to appear for deposition.\textsuperscript{260} Such a requirement, obviously designed for the benefit of the medical profession, is entirely incompatible with the functions of discovery. The vast bulk of civil cases today (to which this requirement is specifically directed) involve personal injury litigation. These cases naturally involve at least one medical expert, whose testimony has become an important part of the technique of personal injury litigation.

He generally is a persuasive, fluent, impressive witness. . . .

. . . As such, every possible step should be taken to channel his contributions in a direction that will serve the ends of justice. One such step is to make his reports [by the use of discovery] as non-partisan, objective and scientific as are the other notable activities of his profession.\textsuperscript{261}

In addition to burdening the court, counsel, and litigants with hearings for leave to take a medical expert’s deposition, the requirement for pre-subpoena hearing involves an implied determination of the relevancy of the medical facts, a matter which ought properly to be an integral matter of the case itself. If leave to take the deposition should be denied and if the doctor should subsequently be called as a witness at trial, then the functions of discovery are frustrated and the “sporting theory” of litigation resurrected.

Depositions may be taken at those places specified in rules or at other places variously designated by order of court.\textsuperscript{262} As may be expected, distinctions are made between parties and non-parties in determining where a person may be required to appear. The state rule provides that, in the absence of an order of court, a “deponent may be required to attend only in the county in which he resides or is employed or transacts his business in person. . . .”\textsuperscript{263} The rule also empowers the court to require a nonresident plaintiff or a person under his control to appear within or without the state on “terms and conditions that are just.”\textsuperscript{264} Such power was within the common law authority of the courts to supervise discovery.

The federal rule is silent as to the place a party must ap-

\textsuperscript{259} Id.

\textsuperscript{260} Id. \textit{See} N.D. ILL. GEN. R. 42 which states: “No party . . . shall . . . serve a subpoena . . . for a deposition upon any doctor except upon motion and order of court.”


\textsuperscript{262} FED. R. CIV. P. 45 (d); ILL. REV. STAT. ch. 110A, §203 (1967).

\textsuperscript{263} ILL. REV. STAT. ch. 110A, §203 (1967).

\textsuperscript{264} Id.
pear for deposition. Ordinarily the deposition of the plaintiff is taken in the district where the action is maintained, but for convenience of the parties the court may order that it be taken elsewhere. Federal Rule of Civil Procedure 45 requires a deponent who is a resident of the district where the deposition is to be taken to appear “in the county wherein he resides or is employed or transacts his business in person.” If the deponent is not a resident of the district, the rule requires him to appear in the county in which he was served or up to forty miles from place of service. However, as in the state rules, the court may enter a protective order designating the place of deposition.

The scope of examination is broad and subject to few limitations. The “[e]vidence objected to shall be taken subject to the objection” (excepting of course matters which are “privileged” or are “work product”). Thus, objections are ordinarily made and recorded at the deposition and ruled upon when the deposition is used. There is, however, a provision for suspending the deposition pending a ruling on grounds that the questions are being made in bad faith, or that they embarrass, annoy, or oppress the deponent. Such an objection, unlike objections to the evidentiary value of questions, is to protect a witness in the absence of direct judicial control over the proceedings.

Untimely objections are waived under both the state and federal rules. For example, error in the manner or form of the notice is waived unless written objection is promptly made to the party serving the notice. Disqualification of the officer before whom the deposition is taken is waived unless objection is made before the taking of the deposition, or is made as soon as qualifying is or with reasonable diligence should be known. Errors as to the oath, competency of the witnesses, 


FED. R. Civ. P. 45(d) (2).

Id.

Id.

FED. R. Civ. P. 30(e); ILL. REV. STAT. ch. 110A, §206(e) (1967).


FED. R. Civ. P. 30(d); ILL. REV. STAT. ch. 110A, §206(d) (1967).


Oates v. S. J. Groves & Sons, 248 F.2d 388 (6th Cir. 1957); In re Kettles, 365 Ill. 168, 6 N.E.2d 146 (1936).


In 1959, when Susan was a little over nine years old, her discovery deposition was taken. No objection was made by the plaintiff’s attorney to her competency.

The objection was raised at the trial but the court properly held that he could not then inquire into conditions which existed two
form of the questions, and others which could also be corrected if objections were promptly presented are waived if not made in time to correct the error. Errors in the manner of transcription or certification are waived unless a motion to suppress the deposition transcript is made with reasonable promptness.

Interrogatories

Under the Illinois rules, interrogatories may be served after all defendants have appeared or are required to appear. Under federal rules they may be served ten days after the action is commenced. Under both rules interrogatories may be served after commencement of the action, but prior to the time designated by the rules, with leave of court. The state rule states that "[u]nless otherwise ordered, depositions and other discovery procedures shall be conducted in the sequence in which they are noticed or otherwise initiated." The federal rule is silent on the question of priority, but the courts provide, by decision, substantially the same requirement as the state rule. Priority of notice is ordinarily the basis for determining the priority of the particular discovery procedure. But the party first serving interrogatories does not thereby acquire priority for the purpose of taking depositions. The rule of priority is not applied years before and that the objection to the taking of the deposition had been waived.

Id. at 47, 198 N.E.2d at 683. Cf. Stowers v. Carp, 29 Ill. App. 2d 52, 172 N.E.2d 370 (1961) in which the court entered a protective order denying leave of the defendant to take a minor's deposition on the grounds of lack of competency.

277 Cordle v. Allied Chem. Corp., 309 F.2d 821 (6th Cir. 1962). Concerning the issue whether the doctor was a treating or merely an examining physician, the court stated:

Dr. Garred's testimony was taken and submitted at the trial on deposition. The objections now directed at the doctor's testimony were not made at the time of taking the deposition. Objections to the competency of a witness and to the competency, relevancy and materiality of testimony taken on deposition, are waived if not made before or during the taking of the deposition, if the ground of the objection is one which might have been corrected if made at that time. . . . [Citations omitted]. We think these objections fall in that category. The doctor could have been instructed not to state the history and symptoms as given him by the plaintiff and hypothetical questions could have been framed, based on the history and symptoms of the plaintiff, as his counsel must certainly have known them at that time.

Id. at 825-26. Questions calling for legal conclusions are objectionable under the state decisions, but may not be under the federal decisions. But under such questions and answers thereto are not admissible. See text at notes 326-31 infra.


279 ILL. REV. STAT. ch. 110A, §201(d) (1967).

280 FED. R. CIV. P. 33.

281 FED. R. CIV. P. 33; ILL. REV. STAT. ch. 110A, §201(d) (1967).

282 ILL. REV. STAT. ch. 110A, §201(e) (1967).


mechanically. Regardless of the priority of notice, the courts may schedule the priority of the discovery procedures,285 may stay one discovery procedure until the completion of another,286 or may provide for alternate or simultaneous discovery procedures.287 Furthermore, a party having priority may lose its right to priority by undue delay or bad faith.288

The Illinois rule provides that answers and objections to interrogatories must be served and filed within twenty-eight days.289 The federal rule allows fifteen days for answers and ten days for objections to interrogatories.290 The state rule requires the interrogating party to notice hearing on objections to interrogatories, on the theory that the interrogating party may be satisfied with the information obtained from other answers or other discovery procedures.291 The federal rule, on the other hand, requires the interrogated party to notice hearing on the objections at the earliest practicable time.292 Failure to notice hearing on the objections may waive the objections.293 Objections to interrogatories must be timely and specific; if not, they are ordinarily waived.294 Should objections to a specific inter-
rogatory be filed concurrently with an answer to that interrogatory, those objections are waived. 295

Interrogatories, like all discovery procedures, require full, fair disclosure. 296 Although neither rule provides for such a motion, incomplete or evasive answers are objectionable and may be stricken on timely motion. 297 Answers to interrogatories may be used at trial for certain limited purposes such as admissions or impeachment by prior inconsistent statement. 298 Since interrogatories may be directed only to parties, the distinction between such impeachment and admission may be one of degree rather than one of kind. 299 But since interrogatories and answers thereto are not considered pleadings, 300 the admissions are ordinarily evidentiary, not judicial. 301 As such, they are subject to explanation. 302

Neither the Illinois nor the federal rule expressly limits the number of interrogatories or sets of interrogatories which may be served. However, both attempt to control the abusive or vexatious use of interrogatories. The Illinois rule states that “[i]t is the duty of an attorney directing interrogatories to restrict them to the subject matter of the particular case, to avoid undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party.” 303 The federal rule states that “[t]he number of interrogatories . . . to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression.” 304 Both rules provide for additional or supplemental interrogatories. 305 The Illinois rule further provides that “upon request made at any time before the trial, a party must furnish the identity and location of persons, in addition to those previously disclosed, having knowledge of relevant facts.” 306 Since interrogatories and

---

299 Oberkircher v. Chicago Transit Authority, 41 Ill. App. 2d 68, 190 N.E.2d 170 (1965).
the other discovery procedures are cumulative, not alternative or exclusive, the use of one does not necessarily preclude the use of another.\textsuperscript{307}

Interrogatories may be served upon one party by another. They may not be served on persons who are not party to the action. Rule 213 of the Illinois Supreme Court provides that interrogatories may be served on "any other party."\textsuperscript{309} The federal rule is more limited; it provides that interrogatories may be served only on "any adverse party."\textsuperscript{309}

Defining an "adverse party" has produced confusing and conflicting opinions in federal decisions. Ordinarily an "adverse party" is defined judicially as any party on the opposite side of an issue raised by the pleadings.\textsuperscript{310} For example, some decisions state that a plaintiff and a third-party defendant are adverse only when the latter answers the original complaint.\textsuperscript{311} But, as pointed out in \textit{Carey v. Schuldt},\textsuperscript{312} in which the plaintiff-longshoreman who sued a shipowner for injuries was allowed to serve interrogatories on the third-party defendant-stevedore, such decisions overlook the fact that:

[This] approach forecloses inquiry into the real issue by mechanically hinging 'adversity' on the ritualistic exchange of pleadings. This formal ceremony does not alter the realities of the litigation. It has no bearing on the issue of whether the parties are 'adverse.'\textsuperscript{313}

The court also pointed out that:

Conflicting interests, without more, does not constitute 'adversity.' To be 'adverse' the parties must oppose each other on an issue in the case. 'Adversity' does not mean that one party must be seeking a judgment or recovery against the other party. But it does mean that one party strives to win a point at issue at the expense of the other. When two parties are contesting an issue, and the outcome of the litigation will be, or may be, different as to either party due to the determination of that issue, then they are 'adverse' within the meaning of Rule 33.\textsuperscript{314}

Both the federal rule, specifying "any adverse party," and the state rule, permitting interrogatories to be served on "any other party," encounter a further problem — in a multiparty action, not all parties are involved in every contested issue in the case. In such situations some facts may be relevant to a con-

\textsuperscript{309} ILL. REV. STAT. ch. 110A, §213(a) (1967).
\textsuperscript{310} Carey v. Schuldt, 42 F.R.D. 390 (E.D. La. 1967).
\textsuperscript{312} Id. at 394.
\textsuperscript{313} Id. at 393.
tested issue between two parties; and some facts may be irrelevant to the same issue, between the same parties, and yet be relevant to the case as a whole. Thus a party may direct an interrogatory seeking facts relevant to the case as a whole and yet not relevant to any contested issue between the interrogating party and the interrogated party. The federal rule, at least, permits interrogatories to be directed to any facts relevant to the case as a whole. Since such information could presumably be obtained by other discovery procedures regardless of whether the interrogated party were a party to the action, there appears to be no reason other than expense to limit the interrogatories to contested issues, and this is a matter for which the court may provide in any event.

Both rules provide that if written interrogatories are served on a party other than an individual, the sworn answers "shall be made by an officer, partner, or agent, who shall furnish such information as is available to the party." This provision raises three important questions: the first concerns the definition of "agent"; the second, the extent to which an agent can truthfully swear to the answers of the party; and the third, the extent of the obligation to collect and compile information in order to answer.

A clear definition of "agent" is important if sanctions are sought to be imposed or if the answers are to be used at trial. The choice of the individual to make the answers rests with the interrogated party, but he should be one who meets the requirements for an adverse witness, for example a managing agent.

Information is considered available to a party, individual or

---

313 ILL. REV. STAT. ch. 110A, §213(c) (1967). See also FED. R. CIV. P. 33 which omits the word "partner."

In the final analysis, the cited cases have reached the conclusion that a managing agent of a corporation, partnership or association is any person who:

1. Acts with superior authority and is invested with general powers to exercise his judgment and discretion in dealing with his principal's affairs (as distinguished from a common employee, who does only what he is told to do; has no discretion about what he can or cannot do; and is responsible to his immediate superior who has control over his acts);

2. Can be depended upon to carry out his principal's directions to give testimony at the demand of a party engaged in litigation with his principal; and

3. Can be expected to identify himself with the interests of his principal rather than those of the other party.


[T]hird party defendant's contention that third party plaintiff's attorney was not the proper person to answer the interrogatory is not well taken. His further contention that said attorney's answer would not be binding on the corporation is groundless.

otherwise, if its attorney is in possession of it.318 This raises a perplexing problem. An attorney, for example, may concurrently represent both the trustees and the beneficiary of a land trust or he may concurrently represent two related corporations. In such situations the attorney has access to information from both entities. The rules requiring full disclosure would seem to demand that answers of one entity be made from all information in possession of either entity.

Ordinarily, in any multi-individual entity such as a partnership or corporation several individuals know some, but not all, of the facts contained in sworn answers to interrogatories. An individual swearing to the truthfulness of the answers of the parties will probably not have personal knowledge of all the facts contained in the responses. Thus the facts contained in the answers will have little if any evidentiary value. If the facts are to possess evidentiary value, either several individuals must swear to the answers, or complete knowledge must be imputed to the individual swearing to the truthfulness of the answers.319 If the latter is the case, the individual should qualify his answers to indicate the sources of the facts.

The extent to which a party is required to collect or compile information to make full disclosure in its answers is determined on the facts of each case.320 Although the decisions are often at odds, general patterns are discernable. Interrogatories are considered improper if they require compilations from material not in the possession of the interrogated party.321 If the material is generally available, or is made available, and if it requires no special skill to interpret, interrogatories requiring compilation to answer are considered proper.322 But if special skills are required for interpretation, compilation may be required, with reasonable expenses of the compilation being awarded. As a practical matter, simple compilation from material in the possession of the interrogated party will generally be required.

Some of the confusion created by interrogatories has been alleviated by the Illinois rule’s express, and the federal rule’s


implied, provision that an interrogated party may simply make available to the interrogating party those documents or material containing the answer, rather than making an answer.\textsuperscript{224} In some instances this provision may also alleviate the problem of an interrogatory calling for the interpretation of a document.\textsuperscript{225} For example, consider the case of a liability automobile insurer defending the insured under a reservation of rights. If the insured were to answer an interrogatory asking if there were coverage, it might find itself bound, or at least embarrassed, by that answer in a subsequent garnishment action if it chose eventually to deny coverage. Under the present posture of the rules, the insured could provide the interrogating party or its attorney with the policy of automobile liability insurance, thus permitting the interrogating party or its attorney to determine the probability of coverage.

The Illinois courts have refused to permit interrogatories to ask for conclusions, or presumably, opinions.\textsuperscript{226} The federal courts in some cases have permitted, and in other cases not permitted, such interrogatories.\textsuperscript{227} "But any rule which attempts to make rigid distinction between matters of fact and mere conclusions is bound to be unworkable. . . . It is now understood that the difference between 'fact' and 'opinion' or 'conclusion' is a difference of degree rather than of kind."\textsuperscript{228} The proper test of the propriety of an interrogatory is stated in Stonybrook Tenants Association, Inc. v. Alpert:\textsuperscript{229}

It is possible that some of the interrogatories propounded by the defendants call for opinions, contentions or conclusions. The correct approach in passing on the propriety of interrogatories in that respect is set out in Taylor v. Sound Steamship Lines, 100 F. Supp. 388, at 389 (D. Conn. 1951). In deciding that case, Chief Judge Hincks said: 'The applicable test, I think, should not be left to fine-spun distinctions between "knowledge" and belief based upon information from other sources. Rather, it is the practical test which has been well stated by Professor Moore when he poses the question "would an answer serve any substantial purpose."\textsuperscript{230}


However, one cannot require an interrogated party to attach documents to interrogatories without a court order obtained on a showing of good cause. Allmont v. United States, 177 F.2d 971 (3d Cir. 1949).


\textsuperscript{229} C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS §86, at 331 (1963). "While some courts have held that the discovery procedure is limited to the ascertainment of facts and nothing else, the line between fact and conclusion is frequently an uncertain and illogical one." B. & S. Drilling Co. v. Halliburton Oil Well Cementing Co., 24 F.R.D. 1, 7 (S.D. Tex. 1959).

\textsuperscript{230} 29 F.R.D. 165 (D. Conn. 1961).

\textsuperscript{230} Id. at 168.
Regardless of whether such an interrogatory is allowed or not, an answer to it is not admissible at trial.\(^3\)

A persistent and vexatious problem in interrogatory procedure arises when an interrogated party presents, as a witness to the transaction or occurrence, an individual whose name was not listed in response to the interrogatory seeking the names and location of such persons.\(^3\) The immediate dilemma is whether or not to permit such a witness to testify. To do so may frustrate the function of discovery and lead to a return of the "sporting theory" of litigation. Not to do so may unjustly exclude relevant, material evidentiary facts.

Although neither the Illinois nor federal rules expressly provide for this problem, the decisions recognize the power of the court to exclude the testimony of a witness not listed in answers to appropriate interrogatories.\(^3\) The sanction is discretionary and each case must be decided on its own facts. A distinction is made between unlisted witnesses known before answering the interrogatory, and those discovered after answering. In the former situation and in the absence of extraordinary circumstances, the exclusionary sanction at the very least is imposed.\(^3\) But in the latter situation the question arises as


\(^3\) The problem is not confined to witnesses, but extends to evidentiary facts. See Lunn v. United Aircraft Corp., 25 F.R.D. 186 (D. Del. 1960), ILL. REV. STAT. ch. 110A, §204(a) (1967) which requires leave of court to take the deposition of a medical expert presents a similar problem. If leave to take the expert's deposition is denied, may the expert testify to matters not revealed in his records at trial?

\(^3\) Wright v. Royse, 43 Ill. App. 2d 267, 198 N.E.2d 340 (1963). The propriety of the sanction presupposes that use is made of discovery. See Halverson v. Campbell Soup Co., 374 F.2d 810 (7th Cir. 1967), in which the court reversed the trial court for excluding the defendant's witness, on motion of the plaintiff who had not filed interrogatories, whose testimony went to the injuries alleged by the plaintiff and whose name was not listed in defendant's answers to interrogatories served by the third party defendant.


We find that the railroads could not have been prejudiced by the introduction of this testimony. In addition, we note that the appellants, after discovering that the witness did not live at the address stated in the interrogatories, did nothing until her testimony was offered at the trial. We feel the appellants were not complying with the spirit of Sec. 58 (3) of the Civil Practice Act, in not calling the attention of the appellee's attorney to this error. It would be cruelly unjust to permit a party to sit idly by, knowing an error had been made, and then ask to have a witness excluded when the time came for trial. A simple telephone call would have produced the correct address; we do not think that is too much to ask in the interests of justice.

\(^3\) Id. at 29, 220 N.E.2d at 54; Rosales v. Marquez, 55 Ill. App. 2d 203, 204 N.E.2d 829 (1965) (Witness listed as living in Mexico, but lived in Chicago); Battershell v. Bowman Dairy Co., 37 Ill. App. 2d 193, 185 N.E.2d 340 (1961) (Witness with a common name whose address interrogated
to whether the interrogated party is under a continuing duty
to supply names of witnesses or facts discovered after answer-
ing interrogatories. "Some district courts have adopted a rule
imposing a continuing duty to make disclosure of such informa-
tion; others impose it without a rule, but this is not uniform."335
The Illinois courts have refused to impose, either by rule or by
decision, a continuing duty to answer interrogatories.336 However,
considerable case law has developed to avoid the dilemma
presented when an unlisted witness is called to testify at trial.

In those cases in which the exclusionary sanction is not im-
posed, various factors are considered, for example, presence of
minimal surprise,337 whether the surprise or prejudice may be
alleviated by recessing for a formal or informal deposition,338 or
whether the testimony was merely cumulative and corrobative.339
Further, counsel in closing argument may comment on an un-
listed witness in order to affect the weight of the testimony.340

Production of Documents

In keeping with the purpose of modern discovery to facilitate
pretrial disclosure, both the United States and Illinois Supreme
Courts have provided by rule341 for the production of documents
for inspection, copying, reproduction or photographing and also
permit access to real estate for the purpose of inspecting, mea-
suring, surveying or photographing. The scope of the discovery
available under the rules providing for production of documents
is subject to the general limitations, in Illinois, of Rule 201342
and in the federal courts to "the matters within the scope of
the examination permitted by Rule 26 (b)."343

Since this method of discovery will be referred to through-

335 P. JAMES, JR., CIVIL PROCEDURE §6.4, at 191 (1965). See 1967 Pro-
posed Amendments, Rule 26(e)(1), 43 F.R.D. 211, 228.

336 The defendant is bound to give truthful answers to the interroga-
tories and . . . both good faith and the spirit of the Rule require it to
see to it that its answers are truthful as of the time of the trial as well
as of the time when the interrogatories are answered.


340 Recode v. Steffke Freight Co., 50 Ill. App. 2d 1, 187 N.E.2d 442
(1964).

341 Fed. R. Civ. P. 34. 1967 Proposed Amendments, Rule 34(a), 42
ch. 110A, §214 (1967).


343 Fed. R. Civ. P. 34.
out as "production of documents," it should be made clear that the term "documents" is widely inclusive. Under Illinois Rule 214, "[t]he word 'documents' . . . includes, but is not limited to papers, photographs, films, recordings, memoranda, books, records, accounts, and communications." The wording, slightly expanded to include recordings, reiterates former Illinois Supreme Court Rule 16-1. In addition, the Illinois rule encompasses the examination of tangible objects and permits access to real estate. Similarly, federal Rule 34 provides for discovery of "documents, papers, books, accounts, letters, photographs, objects, or tangible things" and also permits entry upon land.

Both the Illinois and federal rules provide for production of documents by leave of court or motion at any time after the filing of a complaint. However, the general provisions of Illinois Rule 201 provide that "[p]rior to the time all defendants have appeared or are required to appear, no deposition or other discovery procedure shall be noticed or otherwise initiated without leave of court granted upon good cause shown." Although the federal courts have ample authority under the rules to allow production of documents before the defendant has filed his answer, they may at their discretion deny a motion under rule 34 until the answer has been filed. The court may deny a motion filed prior to the defendant's answer, on grounds of insufficient showing of relevancy, lack of "good cause," or both, with provision for renewing the motion after the answer has been filed. In cases where production of documents is sought in an Illinois court prior to the defendant having filed his appearance, the same considerations, including the need for showing "good cause," would seem to apply.

That a party must, at the least, file a complaint before he may obtain production of documents appears to be the minimum requirement of the Illinois and federal rules. In Sullivan v.

344 ILL. REV. STAT. ch. 110A, §201(b) (1) (1967).
345 ILL. REV. STAT. ch. 110, §101.16-1 (1965).
346 FED. R. CIV. P. 34.
347 "At any time after the commencement of an action any party may move for an order. . . ." ILL. REV. STAT. ch. 110A, §214 (1967).
348 "Upon motion of any party . . . the court in which an action is pending may (1) order any party to produce. . . ." FED. R. CIV. P. 34. 1967 Proposed Amendments, Rule 34(a), 43 F.R.D. 211, 255-56, permits proceeding upon serving of a request without having to show good cause.
349 ILL. REV. STAT. ch. 110A, §201(d) (1967).
351 "[I]t is not the purpose of the rule to encourage unnecessary and vexatious discovery. There is no good purpose to be served by extensive discovery as to matters which will not be contested. Consequently, the court may refuse discovery until after an answer has been filed." W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE §800, at 460 (Rules ed. 1961).
Dickson, when a state prisoner, who had had denied a number of petitions for a writ of habeas corpus but did not have any such petitions pending, filed a "Motion for a Subpoena Duces Tecum," the court of appeals treated the motion as one under rule 34 and denied it, stating: "[T]here is no mechanism in federal civil procedure by which the relief requested, inspection [of documents], can be granted in the absence of a pending proceeding." But rule 27, which provides for depositions for perpetuating testimony, and in particular its provision that "the court may make orders of the character provided for by Rules 34 and 35," has been interpreted to allow obtaining production of documents before a suit has been commenced. Although the language of rule 27(a)(3) seems to limit obtaining production of documents only when a deposition is to be taken, it has been held that it does not:

In our opinion, a party may, in a proper case, proceed under Rule 27 for an order under Rule 34 without taking a deposition at all, and we think that this is such a case.

As originally promulgated, Rule 27 contained no reference to Rule 34 or Rule 35, and for that reason it was held in Egan v. Moran Towing & Transportation Co., D.C.S.D.N.Y., 26 F. Supp. 621 (1939), that advantage could not be taken of Rule 34 in a proceeding under Rule 27. As a result of this decision, there was added to the second sentence of Rule 27(a)(3), which read: 'The deposition may then be taken in accordance with these rules', a semicolon followed by: 'and the court may make orders of the character provided for by Rules 34 and 35'. In this connection, the Advisory Committee on Amendments to Rules says 'Since the second sentence in subdivision (a)(3) refers only to depositions, it is arguable that Rules 34 and 35 are inapplicable in proceedings to perpetuate testimony. The new matter clarifies'. (28 U.S.C.A. Rules 17 to 33, p. 353)

The clarification, however, is unclear. It is arguable that, read literally, the amendment permits the use of Rules 34 and 35 only when a deposition is to be taken. We think that the purpose — and common sense — should prevail over the awkward form in which the amendment is cast. The purpose is to make Rules 34 and 35 applicable in proceedings to perpetuate testimony. Common sense says that there will be cases in which they should be applicable where a deposition is not necessary or appropriate. It may frequently occur that the only thing likely to be lost or concealed is a paper or object that should be subject to inspection, etc., under Rule 34, or the physical or mental condition of a party, who should be subject to physical or mental examination by a physician under Rule 35. In such cases, the party seeking to perpetuate such evidence should not be required to couple his request with a request that a deposition be taken. We do not think that the language of amended Rule 27(a)(3) compels such a requirement. Mr. Moore

354 283 F.2d 725 (9th Cir. 1960), cert. denied, 379 U.S. 984 (1965).
355 Id. at 727.
356 FED. R. CIV. P. 27.
357 FED. R. CIV. P. 27(a)(3).
358 See Martin v. Reynolds Metals Corp., 297 F.2d 49 (9th Cir. 1961).
agrees with us (4 Moore's Federal Practice, 2d ed. Sec. 27.13, p. 1829). The conjunctive form of the sentence can and should be interpreted to mean that the right to a rule 34 order, like the right to take a deposition, depends upon the making of a proper showing, mentioned in the preceding sentence.\textsuperscript{350} The court's argument that production of documents under rule 27 be allowed without deposition finds additional support in the fact that a party may obtain the production of documents from a person to be deposed pursuant to rule 27 by serving him with a subpoena duces tecum pursuant to rule 45(d).\textsuperscript{360} In Illinois, rule 217\textsuperscript{361} provides for the taking of depositions for the purpose of perpetuating testimony. The person being deposed may be served with a subpoena which "may command the person to whom it is directed to produce documents or tangible things."\textsuperscript{362} If the deponent is a party he may be served with a notice of the taking of the deposition which "is sufficient to require the appearance of the deponent and the production of any documents or tangible things listed in the notice."\textsuperscript{363} However, the Illinois rules contain no language which can be interpreted to allow the production of documents prior to the filing of a complaint without taking a deposition.

While neither the Illinois nor the federal rules for obtaining production of documents contain any express limitation and, in fact, are broadly worded with respect to the time available to obtain production of documents, the courts have imposed temporal limitations. In \textit{Savannah Theatre Co. v. Lucas & Jenkins},\textsuperscript{364} a case which had been pending for more than five years, the plaintiff filed a motion for production of a large number of documents approximately one month prior to an already once postponed trial date. In denying the motion, the court held that such a motion would be granted only in the face of extraordinary circumstances justifying not only the late filing of the motion but also the probable resultant delay of the trial.\textsuperscript{365} A

\textsuperscript{350} \textit{Id.} at 55-56. \\
\textsuperscript{360} \textit{FED. R. CIV. P.} 45(d). \\
\textsuperscript{361} \textit{ILL. REV. STAT.} ch. 110A, §217 (1967). \\
\textsuperscript{362} \textit{ILL. REV. STAT.} ch. 110A, §204(a) (1) (1967). \\
\textsuperscript{363} \textit{Id.} at (a) (3). \\
\textsuperscript{364} \textit{FED. RULES SERV.} 34.12, Case 2 (S.D. Ga. 1944). \\
\textsuperscript{365} The Federal Rules of Civil Procedure relating to discovery are of course to be given a liberal construction to effectuate their manifest purpose to remove the element of chance and surprise from the actual trial and to provide a means whereby the parties may actually prepare their case so that the conduct of litigation and the administration of justice may be effected without lost motion. These rules in themselves provide no time limit within which the parties are required to proceed to secure the discovery authorized by the rules. However this feature is in effect provided for by the power of the court to control as to each of the methods of discovery the manner and extent of the investigation permitted and in which the propriety of time of application is necessarily included. No precise rule governing every case can be deduced. Circumstances vary with cases and even as to particular matters in a
necessary though not sufficient element of the “extraordinary circumstances” required by Judge Russell in Savannah is that of diligence in pursuing pre-trial discovery. In Illinois “[t]he trial of a case shall not be delayed to permit discovery unless due diligence is shown.”\[366\] The mere fact that discovery of documents is sought shortly before trial will not automatically result in denial of the motion, providing that the party seeking the discovery has been diligent, and that granting the motion will not delay the trial.\[367\]

Although not specifically precluded by the language of either the Illinois or federal rules, the rules for obtaining production of documents as a part of pre-trial procedure are not to be used for obtaining the production of documents during trial.\[368\] During trial, documents may be obtained by the use of a subpoena duces tecum,\[369\] or by notice in Illinois, providing that the witness is a party.\[370\]

---


\[367\] Thomas v. Pennsylvania R.R., 7 F.R.D. 610, 611 (E.D.N.Y. 1947): [T]his motion is made in good faith by plaintiff and not with any intention to delay the trial and . . . counsel for plaintiff has not been guilty of laches, but is diligent in preparation for the approaching trial and sincerely feels that this inspection of these written statements should be seen by him before the trial takes place and that such inspection can be made without delay of the trial or hardship on the part of the defendant. In my opinion, Rule 34 is here the proper remedy available to the plaintiff.

\[368\] United States v. American Optical Co., 2 F.R.D. 534 (S.D.N.Y. 1942), wherein the court stated: It seems to me that Rule 34, although for some undisclosed reason no time limit is fixed in it, properly is intended to be a part of the very elaborate pre-trial procedure provided by the new Federal Rules, which enables the parties to marshal the facts and documents necessary to the trial of a cause, before the trial begins. As a consequence a motion under Rule 34 may be granted, if ever as of right, I think, only before the trial of a cause has begun. After the trial has begun, the granting of a motion for discovery under Rule 34 lies wholly, I think, within the discretion of the Judge trying the case. . . .

\[369\] ILL. REV. STAT. ch. 110A, §237 (1967).
Federal Rule 34 is limited to parties to the pending action, though unlike Rule 33 it is not confined to 'adverse parties'. The Illinois rule contains no such limitation and, in fact, expressly states that "any party may move for an order directing any other party or person to produce..." The language reiterates former Illinois Supreme Court Rule 17. In a case in which the trial court refused the plaintiff's motion, under the former Illinois rule, for the production of the account books of a corporation not a party to the suit, on appeal the Illinois Appellate Court reversed and held that "[rule 17] provides that not only a party but any other person may be ordered 'to produce. ...'"

Although federal Rule 34 is available only for obtaining documents in the "possession, custody, or control' of a party to the suit, discovery of documents in the possession, custody or control of a non-party may nevertheless be obtained by the use of federal Rules 26 and 45. But rules 26 and 45 cannot be used as a substitute for rule 34 unless the documents are be-

---

It is plain that Rule 33 providing for interrogatories contemplates that they shall be addressed only to an adverse party in a pending action. The same is true of the procedure for production of documents, etc., under Rule 34.
Id. at 420.
376 Fed. E. Civ. P. 34. But see Bifferato v. States Marine Corp., 11 F.R.D. 44 (S.D.N.Y. 1981), wherein the plaintiff's motion for the production of documents in the possession of defendant's attorney was granted, the court stating:
Rule 34 specifically permits discovery and inspection of matter which is in the 'possession, custody, or control' of a party. Possession by an attorney or a third party of the document or matter required to be produced cannot be used as a means of avoiding compliance with a direction for its production. The true test is control and not possession.
Id. at 46.
377 Rule 34 deals with discovery and inspection of documents independently of deposition. By that rule only documents in possession or control of a party to the action may be reached. But it seems plain that by virtue of other rules, Rule 26 and Rule 45, inspection of documents in possession of one who is not a party may be ordered as an adjunct to the deposition of the person who has the documents. Rule 45 deals with subpoenas, and in paragraph (d) it provides: 'A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court.' This is the same as saying that on order of the court the production of documents on the taking of a deposition may be compelled by appropriate subpoena. There is no express restriction to documents in possession of a party, and no reason exists for implying such a restriction.
378 A subpoena duces tecum, under Rule 45, is not intended as a substitute for a motion to produce under Rule 34, where, as in this
ing sought for such limited purposes as refreshing the memory of the deponent or verifying the documents which the deponent used to refresh his memory. The procedure whereby documents may be obtained at a deposition by listing the documents in the deposition notice is not available in the federal courts. The Illinois courts have not yet ruled upon the use of depositions in combination with a subpoena duces tecum, or, in the case of a party, the use of a notice listing documents as a substitute for obtaining production of documents under Illinois Rule 214.

Proceeding to obtain documents under federal Rules 26 and 45 does not evade the burden imposed by rule 34 of showing "good cause," although it does shift the burden of proceeding.

---

Case, the subpoena requires production of documents under the control of plaintiff, as distinguished from documents in the possession and control of an independent witness. Wirtz v. Local 169, AFL-CIO, 37 F.R.D. 349, 351 (D. Nev. 1965).


382 See text at note 362 supra.

383 See text at note 363 supra.

384 Because plaintiff seeks disclosure through alternative means, i.e., by deposition or through examination of documents within defendant's control, which are in turn founded on rules having substantial disparities in language and approach, it must be determined initially whether different standards are to be applied in determining the scope of permissible examination under each. Rule 26 allows parties to proceed to take depositions without leave of court, while 30(b) establishes a protective function to be exercised by the court only after the examination touches upon disputed matter. Rule 34, however, allows inspection of documents within a party's control only after a court order has been secured. This disparity in method arguably may indicate that the requirements imposed by 34 are stricter than those under 26 and 30(b). Under this interpretation, a party barred from examination of a document by 34 might still be allowed to inquire as to its contents under 26. Rule 34, however, specifically incorporates the scope of examination allowed by 26(b) and is 'subject to the provisions of Rule 30(b).'' This language clearly demonstrates that although the method by which the parties must proceed under each rule differs, there is no disparity between 26 and 34 in the legal standards which must be applied when a question as to the scope of permissible examination arises in a particular case. This accords with common sense, for 26 should not become a means to circumvent 34, see E. I. Dupont de Nemours & Co. v. Phillips Petroleum Co., D.C.D. Del. 1969, 23 F.R.D. 237, and the requirements of 34 should not be so strict as to force a party to use only the unreliable device of oral testimony to discover what is accurately set out on paper. What is said henceforth in reference to documents should, therefore, be considered applicable to examination upon deposition also.

Because there is no disparity in legal standards between Rules 26 and 34, there is also no formal burden of persuasion imposed on either party. Both 30(b) and 34 refer to the loose term 'good cause' as the governing principle, although in the former, the party desiring to withhold must make the showing, while in the latter, the 'burden' falls upon the party seeking discovery. This 'burden,' however, is not a burden of persuasion but simply governs the order in which each party must
Under rule 34, the movant must make an affirmative showing of "good cause" either in the motion or by a supporting affidavit. The showing must be complete and explicit as the court is not under any duty to search out "good cause."\textsuperscript{385}

What constitutes good cause takes into account considerations of practical convenience. Barron & Holtzoff state that "the court should be satisfied that the production of the requested document is necessary to enable a party to prepare his case or that it will facilitate proof or aid in the progress of the trial."\textsuperscript{386}

"Although Rule 45 does not in terms require a showing of good cause for the issuance of a subpoena duces tecum, that requirement of Rule 34 has been read into all procedures for obtaining discovery of documents"\textsuperscript{387} from parties\textsuperscript{388} as well as non-parties.\textsuperscript{389} Since there is no "good cause" requirement for obtaining production of documents in Illinois\textsuperscript{390} unless the documents are sought prior to the defendant having appeared,\textsuperscript{391} and since rule 214 is not limited to parties, there would seem to be no reason to resort to the provisions of Illinois Rule 204(a)\textsuperscript{392} in an attempt to evade rule 214. But it is to be noted that while rule 214 does not require a "showing of good cause" it does require the party seeking to obtain production of documents to proceed by motion. This suggests a reluctance on the part of the Illinois Supreme Court to allow parties to seek the production of documents without some direct court control, however, negative: the motion cannot be obviously devoid of "good cause."

\textsuperscript{385}See Martin v. Capital Transit Co., 170 F.2d 811 (D.C. Cir. 1948).
\textsuperscript{386}Roehling v. Anderson, 257 F.2d 615, 620 (D.C. Cir. 1958).
\textsuperscript{390}We have considered the propriety of requiring under the Illinois discovery practice, as under Federal Rule 34 (Fed. Rules Civ. Proc. Rule 34, 28 U.S.C.A.), that 'good cause' be shown before otherwise properly discoverable material, or material ordinarily protected from discovery under a broader 'work product' doctrine than the one adopted here, need be disclosed. We have concluded that the attendant problems which arise under the 'good cause' doctrine render adoption of that theory undesirable.
\textsuperscript{391}ILL. REV. STAT. ch. 110A, §201(d) (1967).
\textsuperscript{392}See text at notes 382-83 supra.
"The production of documents may not be required by interro- 
gatories under Rule 33" nor may interrogatories be used 
to obtain a "summarization or resume of a document," since 
"Rule 33 is not to be used to circumvent the requirement of 
showing good cause set forth in Rule 34." As noted, there is 
no "good cause" requirement under rule 214. Furthermore, the 
Illinois rule provides:

When the answer to an interrogatory may be obtained from 
documents in the possession or control of the party on whom the 
interrogatory was served, it shall be a sufficient answer to the inter-
rogatory to specify those documents and to afford the party serving 
the interrogatory a reasonable opportunity to inspect the documents 
and to make copies thereof or compilations, abstracts, or summaries 
therefrom.

However, the option to produce documents in answer to inter-
rogatories remains with the party upon whom the interrogatory 
is served, and interrogatories are not intended to be used as a 
substitute for properly proceeding under rule 214.

While depositions or interrogatories may be used to obtain 
information about the existence or control of documents which 
a party may later wish to inspect, depositions or interro-
gatories need not necessarily be used prior to moving for produc-
tion under Illinois Rule 214 or federal Rule 34. But in Illi-

394 Coyne v. Monongahela Connecting R.R., 24 F.R.D. 357, 358 (W.D. 
396 ILL. REV. STAT. ch. 110A, §213(d) (1967).
397 "Ordinarily, where a party does not have sufficient information to 
designate the documents that he desires to inspect he may acquire the 
information by use of interrogatories and depositions." Houdry Process Corp. 
398 While appellants maintain that each document sought must be 
specifically designated, and that if it is not known whether a particular 
document exists and is in the possession of appellants, plaintiff must by 
discovery deposition [citation omitted] and interrogatory [citation 
omitted] ascertain these facts before proceeding for discovery under 
Rule 17, it is apparent to us that the rule does not so contemplate. 
That discovery procedures were designed to be flexible and adaptable 
to the infinite variety of cases and circumstances appearing in the 
trial courts is clear from the language of the rule: 'A party may at 
any time move for an order' of production, and the court may 'make 
any order that may be just.' Provisions permitting greater flexibility 
or conferring wider discretion would be difficult to formulate, and it is, 
in our judgment, clear that resort to interrogatories and discovery depo-
sitions is not a necessary condition precedent to a motion for discovery 
of material, possession of which has not been theretofore definitely 
established in the party from whom production is sought. No other 
conclusion is compatible with the concluding provision of Rule 17 that 
in those instances where the party from whom production is requested 
denies possession or control, 'he may be ordered to submit to examina-
tion in open court or by deposition regarding the same.' 
399 United States v. United States Alkali Export Ass'n, 7 F.R.D. 256 
(S.D.N.Y. 1946).
nois some question has now arisen regarding the need for prior use of interrogatories due to the statement in People ex rel. General Motors Corporation v. Bua that:

[T]he production of post-1961 documents ought not have been ordered without some preliminary showing of materiality and relevancy. If such materiality or relevancy does exist we would think that this could be determined by a judicious use of interrogatories. While we indicated in Monier that the use of interrogatories was not a necessary condition precedent to discovery, it is clear that their prior use may be required by the trial judge, in the exercise of his discretion where, as here, such prior use will substantially expedite identification of relevant material.

Under both the Illinois and the federal rules the desired documents must be indicated with reasonable particularity. Rule 214 requires that the documents be “specified” while rule 34 requires them to be “designated”; the terms are synonymous.

Although not the first judicial interpretation of the word “designated” as used in rule 34, Judge Woolsey’s “Here it is” touchstone, delineated in United States v. American Optical Co., was the basis of a series of strict judicial interpretations of sufficient designation under rule 34. The situation maintained until United States v. United States Alkali Export Association, Inc. In 1946, when amendments to the Federal Rules of Civil Procedure were considered, most federal courts followed Judge Woolsey’s strict construction of designation. However, the Advisory Committee did not propose any amendment to change the word “designated.” Rather, it expressed its disapproval of the strict construction and supported the propriety of the more liberal

---


401 Ill.2d 180, 226 N.E.2d 6 (1967).

402 Id. at 194, 226 N.E.2d at 14.

403 ILL. REV. STAT. ch. 110A, §214 (1967).

404 FED. R. CIV. P. 34.

405 MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (2d ed. 1942).

406 E.g., “‘Designated’ documents, etc., are those which can be identified with some reasonable degree of particularity. It was surely not intended by the use of the word ‘designated’ to permit a roving inspection of a promiscuous mass of documents. . . .” Kenealy v. Texas Co., 29 F. Supp. 502, 503 (S.D.N.Y. 1939).

407 2 F.R.D. 534 (S.D.N.Y. 1942). I hold that such designation in a motion under Rule 34 must be sufficiently precise in respect of each document or item of evidence sought to enable the defendant to go to his files and, without difficulty, to pick the document or other item requested out and to turn to the plaintiff saying “Here it is.” That is the touchstone in such motions as these.

408 7 F.R.D. 256 (S.D.N.Y. 1946).
interpretation which allowed designation by category.\textsuperscript{409} The Advisory Committee relied on two United States Supreme Court cases (although not dealing with motions under rule 34) holding a notice pursuant to a state statute, to produce before a grand jury, documents related to any business or dealings between certain parties in a certain time period, proper\textsuperscript{410}; and a grand jury subpoena, commanding the production of communications between named parties in a certain time period relating to a number of business matters, proper.\textsuperscript{411}

In *United States v. United States Alkali Export Association, Inc.*, Judge Rifkind adopted the minority position and that of the Advisory Committee. He stated:

'\textsuperscript{412}[I]t is more the purpose of the rule that definite matters which are material and about which information is desired be designated rather than certain books be designated which may or may not contain the information desired.'

In the federal courts at the present time, designation by category is acceptable so long as the category is sufficiently defined\textsuperscript{413} to enable the party to know what documents he should produce.\textsuperscript{414}

Any previous questions regarding the sufficiency of specifying by category under the Illinois rules have been resolved by Justice Underwood in *Monier v. Chamberlain*.\textsuperscript{415} Justice Underwood stated:

\textsuperscript{409} An objection has been made that the word 'designated' in Rule 34 has been construed with undue strictness in some district court cases so as to require great and impracticable specificity in the description of documents, papers, books, etc., sought to be inspected. The Committee, however, believes that no amendment is needed, and that the proper meaning of 'designated' as requiring specificity has already been delineated by the Supreme Court.

\textsuperscript{410} Consolidated Rendering Co. v. Vermont, 207 U.S. 541 (1908).

\textsuperscript{411} Brown v. United States, 276 U.S. 134 (1928).

\textsuperscript{412} F.R.D. at 258.

\textsuperscript{413} The trend of the law has been to construe liberally Rule 34's designation requirement. Some courts, including early cases in this district, had required specification to the extent that the possessor could 'go to his files and, without difficulty, to pick the document or other item requested out and turn to the plaintiff saying "Here it is."' [citation omitted].

Recent opinions tend to reject this view and instead order discovery of documents relating to a specific subject matter, if the subject or category has been designated with some 'reasonable degree of particularity.'

This court views the latter trend as more consistent with the wide latitude that courts should give to discovery proceedings under the federal rules.

\textsuperscript{414} "Under the issue of specifically designating the desired documents I think a motion for their production is sufficiently specific if the desired documents are designated by categories which from the nature of the case enable a reasonable man to know what documents he should produce." Frank v. Tinicum Metal Co., 11 F.R.D. 83, 85 (E.D. Pa. 1950).

\textsuperscript{415} 35 Ill.2d 351, 221 N.E.2d 410 (1966).
The rule [now rule 214] provides for discovery of 'specified' material, and the degree of specificity required is the subject of vigorous argument. Basically, the question is whether each document or individual item must be particularly described and identified by the moving party, or whether it is sufficient to request production of such material by groups or categories of similar items. The specificity requirement of the rule is there for two purposes: to provide a reasonable description of the items requested, enabling those from whom discovery is sought to know what is being demanded of them, and to aid the trial court in ascertaining whether the requested material is exempted or privileged from discovery. What will suffice as a reasonable description may well vary from case to case depending on the circumstances of each, but we believe that designation by category ordinarily is sufficient for these purposes. . . . No instance in the portions of the order now being reviewed is pointed out to us, nor do we believe there are any, in which the description of the requested material is so inadequate as to leave defendant with any real uncertainty regarding what is and what is not included. Requiring minute particularization of each document sought might well unduly lengthen the discovery process by enabling the parties to engage in dilatory practices. Concerning the portions of the order before us, we believe that the categorical designations appearing in each paragraph thereof are sufficient for the purposes sought to be achieved by the specificity requirement of Rule 17, and that each of the enumerated categories calls for the production of documents which 'relate to the merits of the matter in litigation', as contemplated by the rule and intimated as proper on the earlier appeal herein.  

Medical Examinations

In any action in which the mental or physical condition of a party is in controversy, an order directing the party to submit to a medical examination may be obtained, upon notice and motion showing "good cause," under both the Illinois and federal rules.  

The propriety of the action in regard to a plaintiff has already been settled in Illinois and in the federal courts. The issue of requiring a defendant to submit to a medical examination has not been raised in Illinois, but the United States Supreme Court, in Schlagenhaus v. Holder held that federal Rule 35 applies to plaintiffs and defendants equally. A party's

---

419 Id. at 356-57, 221 N.E.2d at 414-15.
418 FED. R. CIV. P. 35. In addition to medical examination ordered upon motion by a party to the suit, both the Illinois, ILL. REV. STAT. ch. 110A, §215 (d) (1967), and the federal, e.g., DISTRICT COURT, N.D. ILL. CIV. R. 20, courts, may in their discretion order an impartial medical examination. "We believe that the appointment of an impartial medical expert by the court in the exercise of its sound discretion is an equitable and forward-looking technique for promoting the fair trial of a lawsuit." Scott v. Spanjer Bros., 298 F.2d 928, 930-31 (2d Cir. 1962).
419 People ex rel. Noren v. Dempsey, 10 Ill.2d 288, 139 N.E.2d 780 (1957).
employee cannot be ordered to submit to a medical examination under the federal rule but may be so ordered under the Illinois rule providing for examination of "a party or of a person in his custody or legal control." The Illinois rule as well as the federal rule require "good cause" and specify that the mental or physical condition of the party be "in controversy." Both "good cause" and the fact of the medical condition being "in controversy" must be affirmatively shown by the movant. The sufficiency of the showings are decided upon the particular facts of the examination sought.

Under the federal rule there is no time limitation in which to move for an order for a medical examination. Under the Illinois rule, a time limit has been imposed due to the provision for delivering to the examined party a copy of the report of the examination.

In Illinois, the rule specifically provides: "The order shall designate the examining physician." The federal rule, on

---

424 They [the "good cause" and "in controversy" requirements] are not met by mere conclusory allegations of the pleadings — nor by mere relevance to the case — but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination. Obviously, what may be good cause for one type of examination may not be so for another. The ability of the movant to obtain the desired information by other means is also relevant.

Rule 35, therefore, requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause,' which requirements, as the Court of Appeals in this case itself recognized, are necessarily related. 321 F.2d, at 51. This does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination. Nor does it mean that an evidentiary hearing is required in all cases. This may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing. It does mean, though, that the movant must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule.

Of course, there are situations where the pleadings alone are sufficient to meet these requirements. A plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury. This is not only true as to a plaintiff, but applies equally to defendant who asserts his mental or physical condition as a defense to a claim, such as, for example, where insanity is asserted as a defense to a divorce action.

the other hand, merely states that "[t]he order . . . shall specify . . . the person or persons by whom [the examination] is to be made." The federal rule provision has been held not to require the naming of the doctor who is to conduct the examination.\footnote{FED. R. CIV. P. 35 (a).} In both Illinois and the federal courts the movant may suggest the examiner, but the court need not appoint him.\footnote{It is therefore ordered that the plaintiff submit to the examination moved by the defendant on July 25, 1944, in the Buffalo General Memorial Hospital, or some other suitable hospital in Buffalo, as the parties may agree upon, at such time as may be mutually agreeable between the parties; and that such examination shall be made by a physician or surgeon of acknowledged professional standing, skill and experience, on behalf of the defendant . . . . Klein v. Yellow Cab Co., 7 F.R.D. 169, 170 (N.D. Ohio 1944) (supplemental opinion). } If the person to be examined objects to the suggested examiner, good reason must be adduced to sustain the objection. Examination of a woman by a male doctor, when the woman has previously been treated by male doctors of her own choice, has been held insufficient reason for objection.\footnote{"The court may refuse to order examination by the physician suggested but in that event shall permit the party seeking the examination to suggest others." ILL. REV. STAT. ch. 110A, §215(a) (1967).} Nor has the fact that the plaintiff must travel from the state in which he resides to the state in which he filed the suit been sufficient.\footnote{Gale v. National Transp. Co., 7 F.R.D. 237 (S.D.N.Y. 1946).} While there are no reported cases in Illinois on this latter objection, the rules do provide that "[a] party or person shall not be required to travel an unreasonable distance for the examination."\footnote{Gale v. National Transp. Co., 7 F.R.D. 237 (S.D.N.Y. 1946).} Normally the examination is held at the convenience of the party to be examined,\footnote{See Randolph v. McCoy, 29 F. Supp. 978 (S.D. Tex. 1939). But see case cited note 431 supra, as to when the party to be examined objects to traveling to forum of his choice.} and he is allowed to have his own physician present at the examination.\footnote{Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595 (D. Md. 1960).} He is not entitled, however, to the presence of his attorney.\footnote{Randolph v. McCoy, 29 F. Supp. 978 (S.D. Tex. 1939). But see case cited note 431 supra, as to when the party to be examined objects to traveling to forum of his choice.}
The language of the federal rule provides that the medical examination may entail more than one doctor. The Illinois rule, on the other hand, refers to a single physician throughout and may therefore be interpreted to limit discovery to examination by a single doctor. "[B]ut such a limitation is wholly inconsistent with the realities of modern medical practice. Where specialists from various branches of medicine are required, there is nothing in the rule to prevent the court from ordering examination by all of them." The federal courts have ordered examinations by more than one doctor on the basis of both the language of rule 35 and the nature of modern medical practice, even though, by the court's own admission, there is some confusion regarding the propriety of this practice.

The federal courts have been reluctant to order a party to submit to more than one medical examination. Second examinations have nevertheless been granted when the court-appointed physician failed to cover all of the plaintiff's injuries, or when there have been changes in the physical condi-

436 Fed. R. Civ. P. 35(a) uses the language: "[T]he person or persons by whom [the examination] is to be made."
438 "A reading of Rule 35(a) does not indicate an intent to establish a single examination limitation, and where alleged injuries fall into two entirely separate areas of medical specialization, examinations by practitioners in such fields are held to be authorized under the Rule." Marshall v. Peters, 31 F.R.D. 238, 239 (S.D. Ohio 1962).
439 Because there seems to be some confusion concerning the right to have more than one medical expert participate in the examination, a supplemental examination will be ordered in this case as a part of the original examination.

Ordinarily the examination under Order of Court (like that of August 9, 1962) should be made by the designated examining physician with the assistance of such other specialists, technicians and assistants as may necessarily be required in the judgment of the examining physician and in light of the complaints of the plaintiff. This examination should be conducted in accordance with current medical practice in the diagnosis of similar cases not involving litigation. The examination should cover all claims of injury being made by the plaintiff. More than one person may participate therein (citations omitted).

If defendants choose a competent physician to make the examination, such other persons may be designated to assist as would be required in a similar examination for diagnosis in the ordinary course of the medical practice.

440 See, e.g., Rutherford v. Alben, 1 F.R.D. 277 (S.D. W.Va. 1940). See also Little v. Howey, 32 F.R.D. 322 (W.D. Mo. 1963), wherein the court allowed a second examination to enable the defendant to have plaintiff examined by another specialist, which he was not certain he could do at the time of the original examination. But the court implied that now that the confusion had been cleared, parties would not be able to obtain a second examination for this reason.
tion of the party since the first examination. It seems fair to say that under certain circumstances, a second examination is authorized by the rule, but that the court should require a stronger showing of necessity before it will order such repeated examination.

The cases in Illinois concerning the number of medical examinations allowed are unclear as to the basis of decision. The cases prior to Noren v. Dempsey were clouded with the question of whether or not the court could even properly order a medical examination. In a subsequent case, the defendant moved for the additional examination six days before the date for trial, thereby making it impossible to comply with the requirements of former rule 17-1(3) for delivering of reports of the examination to the party who was examined. However, in Buckler v. Sinclair Refining Company, when a mistrial was declared, the defendant, who had obtained four examinations of plaintiff, again moved for an additional examination. The motion was denied.

The provisions of former Illinois Rule 17-1(3) concerning delivery of reports of the examination to the party examined have not been substantially changed in rule 215.

442 "Neither is there any sound reason that would limit a party to one examination of another party. The rule very wisely says that there must be good cause shown before an examination can be ordered." Vopelak v. Williams, 42 F.R.D. 387, 389 (N.D. Ohio 1967).

443 Id.

444 10 Ill.2d 288, 139 N.E.2d 780 (1957).


446 Jackson v. Whittinghill, 39 Ill. App. 2d 315, 188 N.E.2d 337 (1963), wherein it was stated:

It is obvious that the provisions of Paragraph 3 [of rule 17-1] would have been violated unless the case were removed from the trial call. The motions for continuance and additional medical examination were made six days before the date set for trial. The defendant had already obtained one medical examination of plaintiff. Apparently defendant's choice of an examiner was a poor one. He used a general practitioner, then decided examination by an orthopedic surgeon was desirable. It is obvious that an orthopedic problem was involved here. The purpose of Rule 17-1 is not to provide an expert witness for a litigant. Its purpose is one of discovery. The defendant was furnished medical information by plaintiff well in advance of trial and also obtained an examination. The defendant might very well have used a qualified orthopedic. The lack of judgment in this regard should not prejudice plaintiff. The trial court has broad discretion in matters of motions under 17-1 and for continuance. Under the circumstances here presented the court acted well within its discretion in denying both motions.


448 Reports had to be delivered "within twenty days after completion of the examination, and in no event later than ten days before trial." Ill. Rev. Stat. ch. 110, §101.17-1(3) (1965).


450 Twenty days after completion of the examination has been changed to 21 days. Ten days before trial has been changed to 14 days. Compare Ill. Rev. Stat. ch. 110A, §215(c) (1967) with Ill. Rev. Stat. ch. 110, §101.17-1(3) (1965).
v. Minardi, the defendant obtained a medical examination of the plaintiff on July 13, 1965 and submitted a report of the examination to plaintiff's attorney on July 16, five days before the trial. On appeal the Illinois appellate court held that the admission of the testimony of the examining physician over the plaintiff's objections constituted reversible error, since the defendant had not submitted the report in accordance with the mandatory requirements of rule 17-1(3).

However, in Lilegdon v. Hanuska, a different division of the same court held that the application of the sanction of exclusion in rule 17-1(3) for failure to deliver a medical report within the time prescribed in the rule is discretionary, not mandatory. In that case the medical report was delivered to the plaintiffs' counsel on the day the case was assigned to trial, one day before the case actually commenced. The appellate court found that the trial court did not abuse its discretion in permitting the examining physician to testify. The court stated:

"Out of the presence of the jury, the trial court considered at length the arguments of counsel, the mandatory or discretionary character of the rule, the events preceding the trial, including the dismissal of the case and its reinstatement and return to the active trial calendar, and the element of surprise to plaintiffs. The court finally permitted Dr. Petty to testify, stating, 'Incidentally, I can't help but say, although there is a claim of surprise, there has been no announcement here of any action that has been taken that prevents the plaintiff from being in a position to meet whatever the report may contain, or whatever testimony may be forthcoming.'

The federal rule does not require mandatory delivery of the report of the examination. It does provide that the report shall be delivered "[i]f requested by the person examined." Rule 35 further provides:

By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition. The courts have held that a tendering of the report of the examination is not sufficient to waive the examined party's privilege, nor is delivery of the report pursuant to court order.

---

452 Id. at 272, 229 N.E.2d at 319.
453 Fed. R. Civ. P. 35(b) (1).
454 Fed. R. Civ. P. 35(b) (2).
455 Sher v. DeHaven, 159 F.2d 777 (D.C. Cir. 1952), cert. denied, 345 U.S. 936 (1953).
SANCTIONS

Both the Illinois and federal rules provide sanctions for failure to comply with rules and orders of the courts pertaining to discovery. The Illinois rule additionally provides sanctions for abuse of the rules of discovery. Rules pertaining to sanctions refer to all other rules regarding discovery. The sanctions provided in each instance are drastic. However, without such sanctions the procedure for discovery would be ineffectual.

The Illinois and federal rules pertaining to sanctions clearly distinguish between rules and orders. The Illinois rule provides sanctions if a party unreasonably refuses to comply with rules, or fails to comply with orders. The federal rule provides sanctions if a party wilfully fails to comply with rules or refuses to comply with orders. Therefore, a party who initiates discovery without court order must demonstrate, under the rules, that the other party's failure to comply with the rules is unreasonable or wilful.

The rules provide for such sanctions as staying the proceedings, debarring the offending party from filing further pleadings, and assessing costs and attorneys' fees.

457 ILL. REV. STAT. ch. 110A, §219 (1967). See also ILL. REV. STAT. ch. 110A, §209 (1967), which provides for assessment of costs and attorneys' fees, for failure of a party to attend a deposition, which that party noticed, or for failure of a party to serve a subpoena to compel a witness to appear at a deposition which that party noticed.

458 FED. R. Civ. P. 37. See also FED. R. Civ. P. 30(g).

459 ILL. REV. STAT. ch. 110A, §219(d) (1967) provides for imposition of any of the enumerated sanctions if a party wilfully obtains or attempts to obtain information by improper means of discovery, or information to which he is not entitled. Further, the court under this rule may suppress information obtained through abuse of discovery. "It [rule 219(d)] extends the sanctions provided for in the new rule to general abuse of the discovery rules." Committee Comments following ILL. ANN. STAT. ch. 110A, §219(d) (Smith-Hurd Supp. 1967). The rule itself, and certainly its application, raise numerous due process questions. Assuming an intentional abuse, such as taking the deposition of a witness pursuant to subpoena without notice, aside from suppressing the transcript of testimony and providing for costs to the witness, the imposition of a fine or imprisonment and the assessment of reasonable attorney's fees against the offending person or party would seem the extent of the sanctions compatible with due process.

460 “The dismissal of an action with prejudice is a drastic remedy and should be applied only in extreme circumstances.” Bon Air Hotel, Inc. v. Time, Inc., 376 F.2d 118, 121 (5th Cir. 1967).


462 Although we are by no means sure we would agree with the proposition that a pleading may not be struck for contumacious failure of a party to comply with a subpoena duces tecum issued pursuant to Rule 45(d), [citations omitted], we find it unnecessary to decide this. The proceedings in Judge MacMahon's chambers on October 21 can properly be regarded as including an oral motion and order under Rule 34 for the production of the papers designated in the subpoena, and those on October 22 as including an oral motion and order under Rule 37(b) determining Penn's recalcitrance.

Jones v. Uris Sales Corp., 373 F.2d 644, 647-48 (2d Cir. 1967).

463 ILL. REV. STAT. ch. 110A, §219(c) (i) (1967).
ings, debarring the maintaining of a claim or defense, debarring a witness’s testimony, entering default judgments or dismissing the suit with or without prejudice, and striking any portion of the pleading. However, the imposed sanction must be limited to the issue to which the refusal or failure relates. The rules further provide for the imposition of a fine and/or imprisonment, and the assessing of costs and reasonable attorney’s fees. They also enable the court to enter any other order which is “just” in addition to the sanction actually specified.

The Illinois and federal rules require, in order for the stringent sanctions to be imposed, that the court must either find that the failure to comply with the rules or the orders of court, or even with both, is of such a nature as to affront the dignity of the court, or must be able to reasonably presume that the failure to comply is an admission that there is no merit to the claim or defense to which the refusal relates. To impose the more stringent sanctions available in the absence of such findings would raise serious constitutional questions of the denial of due process.

In considering the due process question, the United States Supreme Court stated in Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers: The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law. . . . [T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.

In considering the same question, the Illinois Supreme Court stated in People ex rel. General Motors Corporation v. Bua:
We have not heretofore recognized the inherent power of a court to strike pleadings and enter defaults as punishment for contempt. A court possessing plenary power to punish for contempt, may not, on the theory of punishing for contempt, summarily deprive a party of all right to defend an action.

... [Illinois] also rejected an argument that the sanction was appropriate on the theory that the failure to produce documents raised a presumption that they would reveal information showing the liability of the disobedient party. The court took the position that the availability of such sanctions must be provided for by the legislature. (Such is the case.) Yet the permissible presumption that the refusal to produce material evidence is an admission of the want of merit in the claim or defense still leaves open the question of whether due process is violated by defaulting a party, despite good faith efforts, for failure to comply with a pretrial discovery order.

In *Bon Air Hotel, Inc. v. Time, Inc.*, the Court of Appeals for the Fifth Circuit reversed a dismissal order entered against a bankrupt corporate plaintiff for failure to produce for deposition a specifically named officer of the corporation. The court avoided "the uncertain footing of a specific legal ruling on" the due process question in light of facts which showed good faith in attempting to comply with the court order, choosing rather to base its decision "on the broader, firmer ground that in the factual context . . . present, it was an error of judicial discretion . . . to dismiss the complaint." The court, first questioning whether the person ordered produced was an officer of the plaintiff, stated:

This record compels the conclusion that [plaintiff's] failure to comply was due to inability brought about neither by its own conduct nor by circumstances within its control. The plaintiff was in bankruptcy and the real party at interest, the trustee, did not control Coven. Counsel for plaintiff even hired a nationally known service which specialized in locating missing persons in an endeavor to locate Coven. One might wonder what more could be done.

The courts require certainty of notice and specificity in the record before applying the more stringent sanctions. To enter an order denying a party a trial on the merits without clearly giving the party adequate time to comply under the circum-

---

477 Id. at 189-90, 226 N.E.2d at 12.
479 376 F.2d 118 (5th Cir. 1967).
480 Id. at 121.
481 Id. In Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958) the Court determined that striking the plaintiff's complaint for failure to comply with a production order, in light of partial production and a specific finding of a good-faith attempt to comply, was an inappropriate sanction. The Court did not answer the due process question or indicate what an appropriate sanction would be.
stances, and specifying what is expected of him would also raise the due process question. The Illinois Supreme Court, in *People ex rel. General Motors Corporation v. Bua*,\(^{482}\) held that one paragraph of one order was not specific enough in its enumeration of the documents to be produced. The court found that:

While flexibility is necessary in discovery, due process requires that production orders be sufficiently specific to inform a person of his obligation thereunder, especially in light of the extreme sanctions available for a violation of such order.\(^{483}\) The court described the paragraph as "a catch-all demand for the production of documents without the slightest degree of specificity."\(^{484}\)

In *Johnson v. Thomas*,\(^{485}\) the court reversed a dismissal order of December 16, 1964, for failure to appear, pursuant to court order for deposition. The court stated:

As we have pointed out, the order of June 24, 1964, merely provided that the plaintiff was given 60 days to present herself to defendant's attorney, at some time to be agreed on, and have her deposition taken. There is no indication that there was any time agreed on, nor is there anything further in the record with reference to that particular order. The order of October 13, even if we would consider it a proper order in spite of the omissions in the notice, provided that the plaintiff must appear and give her deposition within 60 days. There is no indication of the person before whom the deposition should be taken, nor the time; therefore, it can be said that the orders are lacking in the specificity necessary as a predicate for the imposition of sanctions for failure of compliance.\(^{486}\)

The courts have hesitated to apply the more stringent sanctions even in extreme situations. In order to avoid precipitous application of the sanctions, the courts often extend opportunity after opportunity for compliance to the recalcitrant party.\(^{487}\) Even after entry of an order providing for a sanction, the courts appear willing to vacate if the recalcitrant party offers to comply.\(^{488}\) Indeed, the courts have been subject to criticism for failure to apply the available sanctions more fully and fre-

---

\(^{482}\) 37 Ill.2d 180, 226 N.E.2d 6 (1967).
\(^{483}\) Id. at 195, 226 N.E.2d at 15.
\(^{484}\) Id. at 194, 226 N.E.2d at 15.
\(^{486}\) Id. at 410, 221 N.E.2d at 46.
\(^{487}\) See *Bon Air Hotel, Inc. v. Time, Inc.*, 376 F.2d 118 (5th Cir. 1967); *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965); *Hawkins v. Potter*, 44 Ill. App. 2d 314, 194 N.E.2d 672 (1963). *See also* *Stickler v. McCarthy*, 37 Ill.2d 48, 224 N.E.2d 827 (1967), in which it was held that the striking of the defendant's answer was an abuse of discretion because the defendant was not given sufficient time to file a response to plaintiff's motion.

\(^{488}\) "Neither in his written motion to set aside the default, nor in the oral presentation of it, did Janney or his counsel offer his appearance for a deposition if the default were set aside." *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965); *Goldman v. Checker Taxi Co.*, 84 Ill. App. 2d 318, 228 N.E.2d 177 (1967).
Discovery in Illinois and Federal Courts

But in view of the imminent due process question, such hesitancy is understandable.

---

489 Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Colum. L. Rev. 480, 494-96 (1958); Developments in the Law — Discovery, 74 Harv. L. Rev. 940, 990-91 (1960). A case such as Stickler v. McCarthy, 37 Ill.2d 48, 224 N.E.2d 827 (1967), supports the criticism. In a lengthy analysis and description of the repeated and deliberate failure of the defendant to comply with rules and orders, the appellate court stated:

The judge demonstrated a competent grasp of the issues. He does not appear to have been vindictive, arbitrary, capricious or abrupt. He treated both sides courteously, considerately and fairly. He postponed hearings for the convenience of the defendant's counsel, he placed his jury room at the disposal of the parties and made himself quickly available to rule upon their disputes. He read the transcripts of the depositions, listened to arguments and made his decisions.

What the judge did was to insist upon compliance with his orders.

Stickler v. McCarthy, 64 Ill. App. 2d 1, 17, 212 N.E. 723, 731 (1965), modified, 37 Ill.2d 48, 224 N.E.2d 827 (1967). The appellate court affirmed the trial court's order. The supreme court, with little comment on the facts, reversed the appellate court and the trial court on the grounds that the defendant was not given a chance to file a written reply to the motion to enter judgment for failure to comply with rules and orders of court, despite the fact that the defendant was given several opportunities to present his position in oral argument in the presence of the court reporter.