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DISCOVERY AND PRE-TRIAL EXAMINATION IN THE FEDERAL COURTS

HERBERT R. BAER*

This evening I am going to talk to you about DISCOVERY. This is not the first time I have been concerned with discovery. In fact, during the 30 years that I have been engaged in legal activity I have been constantly confronted with the discovery problem.

As a law student I feared the discovery of final examinations lest my professors discover too little in my answers; as a trial lawyer I feared my opponent might discover a weak point or points in my case; during the war, as a government lawyer in the field, I was repeatedly unable to discover a sound basis for the regulations which emanated from Washington and which I was supposed to administer; and now as a law teacher I find that the bulk of my working hours are spent in research . . . . in short the discovery of law.

One of the consequences of the Federal Rules of Civil Procedure in so far as they relate to Discovery is that certain of those principles which, early in our legal careers, we learned were sacrosanct—no longer hold good. There are certain words or phrases that impress the young law student and lawyer. He acquires a liking for them and freely discourses on "res ipsa loquitur," "res gestae," "due process," and so on. But the two things that impressed me most and which I catalogued with the darkest of legal sins . . . were embodied in the words "RANK HEARSAY" and "FISHING EXPEDITION."

One of the definitions Webster gives for "rank" is "strong scented, offensive in smell or taste." Incidentally, have you ever noticed that if you object to something as hearsay you don't impress the court quite as much as if you say, "Your Honor, I object, this is rank hearsay?"

Well, whatever the offensive odor had to do with hearsay there was one thing certain—if what you were trying to do prior to the Federal Rules of 1938 smelled anything like a "fishing expedition" you were in the judicial doghouse for sure.

Now prior to my study of law I had thought fishing expeditions were something to be enjoyed, looked forward to and engaged in as frequently as other events would permit. But I soon learned my

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error when, on motion of my adversary to strike out some interrogatories I had served, the judge looked at me as if I had been found guilty of stealing a child's piggy bank, struck out my interrogatories and said, "Why, you are simply on a fishing expedition and I won't allow that in my court!"

But today, under the liberal discovery provisions of the Federal Rules, even "rank hearsay" may be the subject of proper inquiry in the pre-trial stages if it would appear "reasonably calculated to lead to the discovery of admissible evidence."\(^1\) And as to "fishing expeditions..." times have changed... you are no longer a sinner when you embark on one... in fact you are invited to do so. You have the blessing of the Supreme Court as appears from the words of Justice Murphy speaking for that court in the renowned \textit{Hickman v. Taylor} case.\(^2\)

No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end either party may compel the other to disgorge whatever facts he has in his possession.

You will find the provisions on Discovery and Depositions in Chapter V of the Federal Rules, specifically Rules 26 to 37 inclusive. Prior to the adoption of these rules there was very little that could be done by way of discovery in an action at law in a federal court no matter what the state procedure might have been. Interrogatories were not permissible on the law side. Depositions were very limited in scope. You are familiar with the old deposition \textit{de bene esse}.

By filing a bill of discovery on the Equity side in aid of your action at law you could obtain some relief. The courts were in conflict as to whether through such a bill you could only obtain discovery as to your own case or defence or could get it on any issue in dispute. But, neither at law, nor equity, could you use the deposition procedure merely for discovery purposes.

Now let us examine into the changes effected by the Federal Rules. In doing this we will consider both the rules themselves and cases which have been decided on interesting problems in which the courts have been called upon to construe the rules and frequently have taken conflicting views.

\(^1\) Rule 26 b as amended 1946.
\(^2\) 329 U. S. 495 (1947).
RULE 26. DEPOSITIONS PENDING ACTION.

Pursuant to this rule:

1. You may take the deposition of any one, a party or otherwise.

2. It may be upon oral examination or written interrogatories.

3. It may be taken to discover evidence or it may itself be used as evidence.

4. No leave of court is necessary to take the deposition unless the person to be examined is in prison or unless you as plaintiff wish to serve notice of the taking of the depositions within less than 20 days after the commencement of the suit. It is the service of the notice, and not the taking of the deposition to which the 20 day period refers. The defendant does not have to ask for leave of court but may serve notice at any time of the taking of depositions. The reason for requiring the plaintiff to get leave was to give defendant time to obtain counsel.

5. The examination may relate either to your own claim or defence or that of any other party.

6. You can inquire into the existence, custody, condition, location and description of any books or documents or tangible things. In addition you may ask the names and addresses of persons having knowledge of relevant facts. You get the names of your opponent's witnesses and find out where they are.

7. You can inquire into any matter that is relevant to the subject matter of the suit as long as it is not privileged . . . and provided the court has not by order restricted the scope of your inquiry under Rule 30(b) and (d).

8. And finally, remember it is not ground for objection that the testimony you seek to elicit is not admissible as evidence at the trial . . . you may get it "if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." 8

Procedure re taking of depositions.

1. How much notice must you give?
   Reasonable notice in writing to every other party to the action (Rule 30a).

2. Before whom can you take the deposition?
   If in the United States or its possessions before any person

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3. Rule 26 b.
authorized by local or United States law to administer oaths, or a person appointed by the court in which the action is pending, or such person as the parties may stipulate upon.
If taken abroad before a secretary of embassy or legation, consul, or consular agent of the United States or a person appointed by commission or letters rogatory. (Rule 28).

3. What must the notice contain?
Name and address of each person to be examined and the time and place of the examination.

4. Can you, as the party served, get the time extended or limit the scope of the examination?
Under Rule 30(b) if you have been served with notice to take depositions you can apply to the court and on good cause the court may make orders as follows:
(a) that the deposition not be taken,
(b) that it be taken at some other place or time,
(c) that it be only on written interrogatories,
(d) that certain matters should not be examined into or that the examination be confined to certain matters,
(e) that no one but the parties and counsel should be present,
(f) that secret processes, developments and research do not need to be disclosed,
(g) that certain documents be ordered put in sealed envelopes to be opened as directed by the court,
(h) that whatever is needed to protect a party or witness from annoyance, embarrassment or oppression be ordered.

5. Suppose that during the taking of the examination you feel it is being unreasonably done what can you do?
Refuse to go on and forthwith apply to the court, show what is being done that is unreasonable, etc. and the court can then make such orders as it sees fit, stop the entire examination or limit it, that is declare what may be done in the future. (Rule 30(d)).

When and how do you use the deposition after it has been taken?
1. You may do nothing with it at all. You may have used it simply for discovery, you have the evidence, you obtained the names and addresses of witnesses, and you go on from there, or
2. You may, to the extent that it would be admissible in evidence, offer it into evidence at the trial or motion or interlocutory proceeding, in accordance with the following rules:
(a) You may use it to contradict or impeach the deponent when he is on the stand as a witness,
(b) If the deponent was a party or an officer, director or managing agent of a corporation or association or partnership the adverse party may use it for any purpose, that is to prove facts or to impeach,
(c) You may use the deposition of a party or witness for any purpose if the court finds:
   1. The witness is dead,
   2. He is further than 100 miles away or out of the United States and the party using the deposition did not procure his absence,
   3. The witness can't attend because of age, illness or imprisonment,
   4. He was subpoenaed and you couldn't get him to court,
   5. That exceptional circumstances exist to make it desirable in the interest of justice to allow the deposition to be used.

3. You can introduce only a part of a deposition in evidence but, if you do, your adversary can demand that all of it relevant to the part introduced be put in.

4. You do not make a person your witness by taking his deposition. If you do introduce any part of his deposition you make him your witness unless you used it to impeach or contradict him or unless the witness was your adversary or an officer, director, managing agent of a corporation or association or partnership that is your opponent.

5. You may rebut any relevant evidence contained in any deposition no matter whether you or your opponent introduced it.

Objections

When depositions are taken orally any objections as to evidence are noted by the officer before whom the deposition is taken and the questions answered subject to the objection. You do not waive any objection as to competency of witnesses or as to the evidence if you do not make it at the time of taking the deposition unless the ground urged is one that could have been overcome when the testimony was being taken. When the deposition is offered into evidence you make your objections as to the admissibility of evidence even though you did not do so at the hearing except if you fall under the rule just stated.
RULE 31. DEPOSITIONS BY WRITTEN INTERROGATORIES.

Prepare your questions, serve them on all the other parties, and in 10 days the other parties may serve cross interrogatories; then you can serve re-direct in 5 days and then the other party or parties can serve re-cross interrogatories within 3 days. Copies of all are sent to the officer taking the deposition by the party who requested the examination. He then proceeds to take the examination by asking the deponent to answer the various interrogatories.

RULES 33 AND 34. INTERROGATORIES TO PARTIES AND PRODUCTION OF DOCUMENTS.

We should note that the provisions we have discussed relate to depositions which may be taken of any person including a party. They may be orally taken or by way of written interrogatories.

Now Rule 33 relates solely to the matter of interrogatories addressed to parties. Note the following:

1. Any party may serve on any adverse party written interrogatories. If the party is a corporation, etc. the questions are to be answered by an officer or agent. Individual party answers himself.

2. You may serve interrogatories without leave of court except if you are plaintiff and you wish to serve them within 10 days of the commencement of suit you must get leave.

3. The interrogatories must be answered in writing under oath within 15 days after service and be signed by the answering party. The court can enlarge the 15 day time limit.

4. If you don't like the interrogatories you can, within 10 days after service, make written objections thereto, serve these and give notice of a motion for a hearing of the objections.

5. You can inquire into anything under this rule by interrogatory that you could under the deposition proceeding.

6. You can use the answers for evidence or impeachment.

7. You may take depositions and then interrogatories or vice versa. You may serve as many sets of interrogatories and ask as many questions as you wish but the court may make such protective orders as he deems fit to avoid harassment, annoyance, expense, etc.
Discovery and production of documents, etc. under Rule 34.

To obtain an inspection of documents, photos, tangible objects, etc. in the possession or custody of a party you apply to the court for an order that the party produce the desired paper, object, etc. for inspection, copying or photographing. The matter sought must not be privileged.

You must give notice of your motion and show "good cause" in your application.

You may also apply for an order to inspect real estate, make surveys, etc.

The scope as to what you can obtain production of is as broad as the examination under Rule 26b, that means the document, etc. does not have to be admissible in evidence itself. It is enough if it is reasonably calculated to lead to the discovery of admissible evidence.

The order specifies the time, place and manner of making inspection and copying, etc.

Contrast Rule 34 with Rule 26 and Rule 45.

Under Rule 45 a subpoena may be issued commanding a person to produce documents and tangible things mentioned therein.

Rule 26 as to depositions incorporates the subpoena duces tecum powers of Rule 45.

So actually, it is clear that a party may be in a position where he will have to produce documents, etc. when his deposition is taken under Rule 26, or produce them prior to or during the trial by virtue of an order under Rule 34, or produce them at the trial as a result of having been served with a subpoena duces tecum under Rule 45.

Note. While you need an order to get production under Rule 34 a subpoena duces tecum issues as a matter of course—no order is needed but the party served may raise objection and serve a notice to quash the subpoena.

I think that we have at this time reached the point where it would be well worth while to consider some of the decided cases interpreting those rules which we have thus far considered.

3a. Actual possession of the document is not essential if the party is in a position to procure production of the original or a certified copy. Thus a party may be required to obtain copies of tax returns that have been filed by him. See Reeves v. Pennsylvania Railroad Co., 80 F. Supp. 107 (D. Del. 1948).

4. See United States v. Smith, 117 F. 2d 911 (9th Cir. 1941) holding that production could be ordered under Rule 34 at the trial and, contra, United States v. American Optical Co., 2 F.R.D. 534 (S.D.N.Y. 1942) holding that a motion under Rule 34 could be granted as a matter of right only before the trial had commenced.
It appears that no matter how thoroughly rules are drawn, how carefully they are phrased, cases will arise in which a question of interpretation and construction comes up. It is then that the courts are called upon to act and frequently they do not respond in the same way.

HICKMAN V. TAYLOR AND ITS AFTERMATH.

No case in the field of Discovery under the Federal Rules of Civil Procedure has caused the spilling of more ink, is of greater significance to the practising attorney, or has been more frequently cited than Hickman v. Taylor. While most of us here are more or less familiar with the Hickman case, we cannot adequately appraise the decisions following it without a reexamination of the facts and decision in that case.

A tugboat had capsized in the Delaware river. Five of the nine seamen on board were drowned. The action in question was brought by the widow of one of the deceased seamen to recover for his death under the Jones Act. A public hearing was had before the United States Steamboat Inspectors at which the four survivors testified. Their testimony was recorded and made available to all parties. Shortly thereafter, Samuel Fortenbaugh, attorney for Taylor and Anderson who were the owners of the tugboat, privately interviewed the survivors and took their signed statements. Fortenbaugh also interviewed other persons and made some memoranda of what was told to him orally.

After the institution of the suit the plaintiff served 39 interrogatories directed to the tug owners but it is only with the 38th that we are concerned. That read:

State whether any statements of the members of the crews of the Tugs J. M. Taylor and Philadelphia or of any other vessel were taken in connection with the towing of the car float and the sinking of the tug John M. Taylor. Attach hereto exact copies of all such statements if in writing and if oral set forth in detail the exact provisions of any such oral statements or reports.

The tug owners, through Fortenbaugh, their attorney, answered all the interrogatories except this 38th claiming that it called for matter that was privileged and was an attempt to obtain indirectly counsel's private files.

At this point we might note that Rule 26b which provides for the taking of depositions of any person, including a party, states that the deponent "may be examined regarding any matter not privileged which is relevant to the subject matter . . ." and that Rule 33 provides for the service of interrogatories on any adverse party and states that such interrogatories "may relate to any matters which can be inquired into under Rule 26b." Further Rule 34 provides that one party may notice an adverse party to produce for inspection and copying papers or documents that are not privileged.

There was some confusion on the part of counsel and the lower courts as to what rule or rules were applicable in this case. The District Court concluded that Rules 33 and 34 were applicable while the Circuit Court of Appeals stated Rule 26 was the applicable rule.

The Supreme Court held that it was clear the plaintiff was proceeding under Rule 33 because she addressed interrogatories and was not proceeding by way of deposition. Since Rule 34 applies only to parties it could not be used to compel the attorney to produce the papers in question. Rule 33 is also limited to parties. Therefore the only proper procedure available to the plaintiff was to take Fortenbaugh's deposition under Rule 26 and serve him with a subpoena duces tecum to produce the statements involved. The Supreme Court brushed aside the procedural improprieties and turned to the basic question as to whether or not the attorney would be obliged to produce the statements sought.

When the problem was presented to the District Court that court sat in banc. It held that the requested matters were not privileged and ordered the tug owners and their counsel Fortenbaugh to

... produce all written statements obtained by Fortenbaugh as counsel and agent for defendants, (and to) state in substance any fact concerning this case which defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda . . .

The tug owners and Fortenbaugh refused, the court adjudged the defendants and their counsel in contempt and ordered them imprisoned until they complied. They never complied.

It so happens that Sam Fortenbaugh was a classmate of mine in law school and in the course of teaching the Hickman case to my students I wrote Sam a letter and asked him what actually happened as to his conviction — had he ever spent any time in jail pending the appeal to the Circuit Court of Appeals? I received an interesting
letter from him and I'll read you an excerpt or two from it. He writes,

I am aware that law school case books dwell on the case and I am an object of some curiosity . . . . The opinion is correct in stating that a court order was entered impounding me until I purged myself of such contempt. As a matter of fact, without such an order, there could have been no appeal at this stage of the proceeding. The fact remains that I was not even finger printed and the appeal with supersedeas was filed forthwith. I had no opportunity to be a martyr and have my picture taken between the bars. Maybe I missed an opportunity to go dramatic.

As a homely sideline on the case, Captain Taylor insists that we were victorious in the Supreme Court of the United States because he fell asleep in that august chamber and thus convinced the judges that he was not worried about any imprisonment.

And then Sam adds a final paragraph to his letter which is so typical of the reactions of trial attorneys. He concludes,

Upon the trial of the case, I offered in evidence the very statements which I had sought to preserve in the discovery proceedings. Counsel for the plaintiff objected to their admission and the court sustained him. As you can divine, there was nothing harmful in the statements and our battling on the discovery point was entirely one of principle.

The 3rd Circuit Court of Appeals reversed the District Court. It also sat in banc. It held that the matters sought were "privileged as the work product of the lawyer."

The plaintiff filed a petition for certiorari to the Supreme Court. That court first refused the petition. A petition for a reargument was filed and both the CIO and AF of L joined as amici curiae and the certiorari was then granted.

While the Supreme Court affirmed the decision of the Court of Appeals in that it reversed the contempt conviction and held that the interrogatory in question need not be answered it did so on quite different grounds. Briefly the Supreme Court held:

1. The federal discovery rules are to be given a "broad and liberal treatment". No longer can one raise the time honored cry of "fishing expedition". "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."
2. The statements in question did not fall under the attorney and client privilege. They are not protected by any privilege. They were not made in confidence by a client to his attorney. There is no privilege as to information given an attorney by a witness nor as to writings prepared by counsel for his own use or writings which reflect his mental impressions.

3. *But* before the court will order the production of documents from an attorney's files of the type here demanded the party seeking discovery must show necessity and justification for such discovery.

4. No such necessity and justification was shown in this case, in fact it appeared that the identity of the witnesses in question was known and their testimony was already on file and open to inspection in the office of the United States Steamboat Inspectors.

5. To allow the discovery of the type sought here in the absence of showing necessity would contravene *public policy*.

   The Supreme Court made it clear that it was not placing a protective shield on all written materials obtained or prepared by counsel, in fact in a proper case such discovery might be ordered as where the witnesses were no longer available, but before intrusion into the privacy of an attorney's files would be ordered the applicant must satisfy the court that such intrusion is *necessary* and *justifiable*. The court said,

   Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

   As to the oral statements made to counsel and the memoranda the attorney made from them the court stated it did not believe that any necessity could be shown under the circumstances of this case to justify such production.

   If there should be a rare situation justifying production of these matters, petitioner's case is not of that type.

   In fact, the court said that if attorneys were to be forced to testify as to what they remember a witness told them or what they saw fit to write down after talking to a witness, "The standards of the profession would thereby suffer".

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DECISIONS FOLLOWING THE HICKMAN CASE.

We should not fail to note that the decision in the Hickman case related solely to discovery of statements obtained by an attorney from witnesses with an eye to litigation. The court did not decide whether the same showing of necessity and justification would be required if the plaintiff had been trying to obtain discovery of statements obtained by the defendants themselves or by their claim agents. The status of the lawyer and his function in the judicial process was emphasized throughout the court's opinion.

It was inevitable that litigation would develop which would call upon the courts to determine whether the rule of the Hickman case requiring a showing of necessity or justification for discovery would apply when the documents sought were not obtained by and in the attorney's files but were obtained and held by the defendant or its other agents. We will consider cases where that question was raised.

APPLICABILITY OF HICKMAN RULE TO DOCUMENTS OBTAINED BY PERSONS OTHER THAN ATTORNEYS.

The question was presented in Allmont v. United States.\(^6\) The action was in admiralty against the United States, the libellants seeking to recover damages for personal injuries alleged to be due to the negligence of the defendant, etc. Proceeding under Admiralty Rules corresponding to the Rules of Civil Procedure, the libellant served interrogatories on the United States and sought the names and addresses of witnesses and demanded that copies of statements obtained from witnesses be attached, including statements taken by the F.B.I. The district court ordered the United States to furnish copies of the statements but the United States refused, contending that the statements were privileged within the rule of Hickman v. Taylor, that is that the libellant could not get them as a matter of right but had to show necessity. The United States did, in answer to the interrogatories, furnish the names and addresses of the witnesses. It happened that the statements were taken by F.B.I. personnel who were also lawyers. The Court of Appeals reversed the District Court and ruled that libellant would have to show necessity before the United States would be obliged to furnish copies of the statements.

Specifically the Court of Appeals ruled that it is immaterial that in

\(^6\) 177 F. 2d 971 (3d Cir. 1950), cert. denied, 339 U. S. 967 (1950).
one case counsel representing the defendant does the investigation himself and in another case does it by others employed by him, or his client.

In either situation the rationale of the opinion of the Supreme Court in the Hickman case requires that the same showing of good cause for the production of such statements of witnesses should be made by the adverse party seeking copies of them.7

The Court of Appeals recognized that the Hickman rule of necessity was declared in a case involving statements obtained by counsel but it specifically gave the decision broader sweep to cover statements obtained by the party. Thus it said,

While the language of the Supreme Court was (in the Hickman case) necessarily directed to statements obtained personally by Fortenbaugh as counsel for the adverse party since only such statements were involved in the Hickman case, we think that its rationale has a much broader sweep and applies to all statements of prospective witnesses which a party has obtained for his trial counsel's use.8

If the theory of the Court of Appeals in the Allmont case is sound then a party could not obtain discovery of statements obtained by claim agents of his adverse party without showing necessity.

In Hoffman v. Chesapeake & Ohio Ry. Co.9 District Judge Wilkin in Ohio had taken the same position as the Court of Appeals in the Allmont case and said,

The plaintiff is not entitled to statements made to defendant by witnesses in the absence of a showing why such information cannot be secured from the witnesses by deposition.

While some district court judges have declared that the Hickman case does not give to statements obtained by claim agents the same kind of immunity that pertains to statements obtained by counsel they have, when granting discovery, found that "good cause" for discovery was shown by the applicant.10

7. 177 F. 2d 971 at 976.
8. Ibid.
10. See Thomas v. Pennsylvania Railroad Co., 7 F.R.D. 610 (E.D. N. Y. 1947), and Royal Exchange Assurance v. McGrath, 13 F.R.D. 150 (S.D. N.Y. 1952). See also Lauritzen v. Atlantic Greyhound Corp., 8 F.R.D. 237 (E.D. Tenn. 1948), aff'd, 182 F. 2d 540 (6th Cir. 1950) where, upon a showing of necessity, defendant was obliged to produce for inspection photographs, names and addresses of witnesses on its bus and statements obtained by defendant from its passengers and other witnesses.
It is sometimes difficult to understand how a court reaches a given result in this discovery process. Take for example *Dulansky v. Iowa-Illinois Gas & Electric Co.* 11 There in an action for wrongful death plaintiff acting under *Rule 34* made two requests for production and inspection of documents, (1) the written report made by the driver of the defendant's bus that killed the child and (2) "all reports and written memoranda made by any officer, claim agent or other agent in the full time employ of this defendant or other employees pertaining to the accident... including statements made by any... eye witnesses to the accident." The court found good cause to require the production of the bus driver's statement but found there was no good cause shown to compel the production of the other matters sought in item (2).

**WHAT CONSTITUTES "NECESSITY" OR "GOOD CAUSE" SUFFICIENT TO REQUIRE PRODUCTION OF STATEMENTS OBTAINED FROM WITNESSES?**

We have seen that under the *Hickman* case discovery of statements of witnesses obtained by counsel would not be ordered in the absence of showing a necessity. We saw that the Court of Appeals in the *Alltmont* case held that the same showing of good cause applied to all statements obtained by defendant from witnesses whether through his counsel or not. In addition, *Rule 34* relating to the production for inspection of instruments, and applicable only to the parties in the cause, expressly states that "Upon motion of any party *showing good cause*" the court may order the production for inspection and copying any non-privileged document... etc.

It will be worth while, then, to consider what the courts have found constitutes or fails to constitute "good cause."

In the *Hickman* case the Supreme Court stated that "Production might be justified where the witnesses are no longer available or can be reached only with difficulty."

But assuming that the witness is available would "good cause" be established by showing that immediately after the accident the defendant obtained a statement from the witness and that now considerable time has elapsed from the taking of that statement and that plaintiff was not in a position to get an early statement as did the defendant? The courts have not agreed on this point.

In *De Bruce v. Pennsylvania RR. Co.* 12 Judge Kirkpatrick of the

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12. 6 F.R.D. 403 (E.D. Pa. 1947). Judge Kirkpatrick, incidentally, is the same district judge who ordered the production of the statements by attorney Fortenbaugh in the *Hickman* case.
Eastern District of Pennsylvania said that a copy of a statement procured from a witness could be obtained by interrogatory without showing good cause but said that if "good cause" was required it was established when the plaintiff showed that the accident occurred over a year ago, that the defendant through its claim department immediately interviewed witnesses and obtained their statements, and that the plaintiff was not in a position to do so until after a considerable lapse of time. Judge Kirkpatrick's theory was that the statement of the witness taken immediately after the accident was of "unique value in the development of the truth" and that every consideration of fairness requires that it be made available to both sides.

The same view was taken by the court in Thomas v. Pennsylvania RR. Co.\(^\text{13}\) where the defendant was required to produce witnesses' statements taken soon after the accident notwithstanding the fact that plaintiff's counsel had after the commencement of the action taken the depositions of the same witnesses. The court was of the opinion that plaintiff's counsel should be able to determine if the story told on the depositions was the same as told to defendant's claim agent after the accident.

Other cases take the position that if the witnesses are available for examination no good cause exists for demanding the production of statements taken by the adversary.\(^\text{14}\)

In Hanke v. Milwaukee Electric Ry. & Transport Co.\(^\text{15}\) the court ordered the defendant's claim agent to give plaintiff a list of the names and addresses of witnesses known to him. Plaintiff could then interview the witnesses and, if the witness failed to give a statement to the plaintiff, the court stated he would then order the defendant to produce any signed statement it had of such witness.

In Reynolds v. United States\(^\text{16}\) three civilian employees of private organizations were killed when an Air Force B29 bomber in which they were travelling as observers crashed. The flight was for the purpose of testing electronic equipment. Suit was brought against the United States by their widows under the Federal Torts Claims Act and damages sought for wrongful death. The plaintiffs proceeded both by interrogatories under Rule 33 and sought production under Rule 34 of the official investigation report prepared by officers

\(^{13}\) Supra note 10.
\(^{15}\) 7 F.R.D. 540 (E.D. Wis. 1947).
\(^{16}\) 192 F. 2d 987 (3d Cir. 1951), rev'd, 345 U. S. 1 (1953).
of the Air Force and the statements taken by the government from surviving crew members. To show "good cause," the plaintiffs made affidavits that the documents sought contained evidence necessary to prepare for trial, that the documents were in the possession of the United States, and that plaintiffs knew no way to obtain knowledge of their contents, or the cause of the accident, other than by production.

The District Court ordered production and disallowed a claim of privilege set up by the United States. Thereafter a formal claim of privilege was made to the District Judge by the Secretary of the Air Force, and in addition, the Judge Advocate General of the Air Force supplied the names and addresses of the survivors and offered to make them available to examination by the plaintiffs. The District Judge then amended his previous order and directed that the documents sought be produced before him for examination so that he could determine whether disclosure would violate the government's privilege against disclosing matters involving the national or public interest. The United States failed to comply with this order and the District Judge then acting under Rule 37 issued an order that the issue of negligence be taken as established in the plaintiff's favor and prohibited a defence by the government. Later a hearing on damages was held and judgment entered for the plaintiffs.

The Court of Appeals affirmed the action of the District Judge. It agreed that the judge was correct in finding "good cause." It also agreed that the mere furnishing the names and addresses of the surviving witnesses and making them available for examination was not, under the circumstances, a sufficient answer to plaintiff's demand. It placed emphasis on the value of statements taken immediately following the catastrophe.

The Court of Appeals also held that, at least in cases falling under the Federal Tort Claims Act, the government, through the Secretary of the Air Force, could not by claim of privilege deprive the District Court of judicial review of that claim. The procedure for examination in chambers by the trial judge was held a proper method by which the court could determine whether or not the government should be forced to make discovery. Having refused to submit to judicial review as to the claim of privilege, the government was held to suffer the same consequences a private individual would suffer under Rule 37.

The Supreme Court allowed certiorari and by a vote of 6 to 3 reversed the Court of Appeals. Chief Justice Vinson wrote the
majority opinion while Justices Frankfurter, Black and Jackson agreed with the views expressed by Judge Maris for the Court of Appeals.

The majority decision is interesting in that it does not give absolute power to either the executive or judicial branch of the government relative to the disclosure of the documents in question. The Chief Justice compared the situation here with that in which the privilege against self incrimination is invoked. In such a case the bare assertion of the privilege by the witness is not to be taken as conclusive. Neither is the court to make such extended inquiry into the basis of the claim so as to compel a disclosure of the thing the privilege is meant to protect.

There is a sound basis of compromise. The court must be satisfied from all the evidence and circumstances in the setting in which the question is asked that a responsive answer to the question, or, an explanation of why it cannot be answered, might be dangerous because injurious disclosure would result.

Applying this rule of compromise to the case before us, the Supreme Court laid down the following rules:

(1) Mere refusal to make discovery by counsel for the government on the ground of privilege is not enough . . . there must be "a formal claim of privilege lodged by the head of the department which has control over the matter after actual personal consideration by that officer."

(2) The court itself "must determine whether the circumstances are appropriate for the claim of privilege and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."

(3) "Privileged" as used in Rule 34 refers to privileges as that term is understood in the law of evidence and that law has established and recognizes a privilege against revealing military secrets.

(4) Under the circumstances of this case, in view of the fact that it appeared the plane had gone aloft to test secret electronic equipment, there was a reasonable danger that production of the accident investigation report would disclose military secrets. Consequently the claim of privilege was appropriate and should be honored. The judge cannot compel disclosure even to himself in private under these circumstances.

17. 345 U.S. 1 at 7.
18. 345 U.S. 1 at 8.
The majority concluded that there were here no circumstances showing great necessity for disclosure of the investigation reports. When the surviving witnesses were made available to the plaintiffs, sufficient disclosure was made. However, even the most compelling necessity, on the part of the plaintiffs, to obtain discovery "cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."19

In connection with this problem of governmental privilege I would like to refer to Fireman's Fund Indemnity Co. v. United States,20 a case from the District Court in the Northern District of Florida. Here there was a libel against the United States following a collision with a vessel in charge of Navy personnel. Libellant sought the production of all statements obtained by the government through its investigation. The Secretary of the Navy filed a claim of privilege. District Judge De Vane said there was no question of the right of the Secretary of the Navy to decline to produce records where the public interest requires such refusal, but he said that it appeared to him, during the course of the argument, that the documents sought by the libellant had already been furnished to the proctor representing the government.

"If this is true," he continued, "these documents have lost their privileged and confidential status."

This conclusion struck me as very interesting. If in the Reynolds case it had appeared that the Secretary of the Air Force had shown the accident investigation report to the government's counsel would Chief Justice Vinson have declared the privileged status of the report lost?

CAN PLAINTIFF COMPEL PRODUCTION OF HIS OWN STATEMENT TAKEN BY DEFENDANT?

Those of you who are negligence lawyers are familiar with the situation that frequently embarrasses the plaintiff's attorney. An investigator for the insurance company of the defendant got to the plaintiff before the plaintiff obtained an attorney. The investigator took a signed statement from the plaintiff which presumably gave the plaintiff's version of the accident. That statement in due course found its way into the files of defendant's counsel, and, when plaintiff's counsel tried to settle the case, he was chided with the statement by defence counsel that, "We have a signed statement from

19. 345 U. S. 1 at 11.
your man and as far as we are concerned he has talked himself right out of court."

Can plaintiff now obtain discovery of his own statement which is in the files of the defendant?

The cases are in conflict. Is it possible for the plaintiff to show "good cause" for the production of his own statement?

In Safeway Stores, Inc. v. Reynolds\(^2\) the plaintiff had slipped on the floor of defendant's store. Two weeks after the accident he gave a signed statement to an attorney for the insurer of the defendant. He now sought its production under Rule 34. Plaintiff's counsel in applying for production said,

We need it to know what our man said at that time shortly after the accident . . . . . . This statement is needed to help us prepare for trial, to give us some advance warning of any material change in his statement made to defendant's investigator different than what he gave us as to the claim.

The District Court ordered production but the Court of Appeals reversed finding no showing of "good cause" and no prejudice to plaintiff if statement not produced.

The opposite point of view was reached in Hayman v. Pullman\(^2\) where plaintiff sought damages for physical and mental distress she suffered at the hands of one of defendant's porters. She proceeded by way of interrogatories under Rule 33 and asked the names and addresses of passengers who had filed written complaints about the action of the porter she described in her complaint and concluded the interrogatory with the sentence,-

Attach to your answer a copy of each of these protests or complaints including those written by the plaintiff . . . .

The district Judge ordered the interrogatory answered and the copy of the statements given including that of the plaintiff. As to the plaintiff's own statement the court said,

The complaint made by the plaintiff at the time her alleged cause of action arose even though it may be self serving if in the possession of the defendant should be produced. The only reason that may be assigned for refusing to do it is to make the element of surprise available to the defendant . . . . No possible right of the defendant may be prejudiced by disclosing all the evidence it possesses pertaining to the instant action.

\(^2\) 176 F. 2d 476 (D. C. Cir. 1949).
\(^2\) 8 F.R.D. 238 (N.D. Ohio 1948).
Note. What about the procedure? Can you get copies of statements under Rule 33 or must you proceed under Rule 34?

There is a conflict in the cases here too, but in the Hayman v. Pullman case just discussed the court ruled that it would only result in useless delay if after the plaintiff had been informed the defendant had statements of witnesses by answers to interrogatories under Rule 33 he would have to demand production under Rule 34.

On the other hand in Alltmont v. United States,23 which we discussed earlier, the Court of Appeals of the Third Circuit held that Rule 33 could not be used to get a copy of a document but that upon learning of the existence of the document by interrogatories or otherwise production can then be had under Rule 34 on showing good cause.

In Raudenbush v. Reading Co.24 plaintiff proceeded under Rule 34 and sought production of a written statement he had given to defendant's claim agent one month after the happening of the accident and when the plaintiff was still confined to the hospital because of injuries sustained in the accident. Plaintiff assigned as reasons for getting a copy of the statement his inability to remember what he told representatives of the defendant at the time.

In denying discovery the District Judge said,

It appears that plaintiff is concerned that his testimony ... to be given may be at variance with statements made to the claims agent .... He made both statements .... If there is any discrepancy between his testimony ... and his previous statements of course these documents might conceivably be used for the purposes of cross examination and discrediting his testimony .... That standing alone does not impress us as good cause.

The judge concluded there was nothing shown to indicate fraud or overreaching and accordingly in reliance on Safeway Stores, Inc. v. Reynolds25 denied discovery.

COMPELLING DISCLOSURE OF OPINION OF ADVERSARY'S EXPERT.

It occasionally happens that one side or the other in a personal injury case wishes to learn what opinion the expert employed by his adversary has given. Thus, it may be that defendant would like to
see the opinion given to plaintiff by the medical expert employed by the plaintiff.

The problem presents two aspects:

1. In the given case is the opinion "privileged" either by virtue of statute or case law, and

2. Does your adversary have the right to get the opinion you paid the expert for if it appears there is no privilege of physician and patient involved?

An applicable decision is Holbert v. Chase which came up in the eastern district of South Carolina.

It was a personal injury case arising out of an auto accident. Diversity of citizenship was the basis of federal jurisdiction. The plaintiff had been attended by Dr. Hoshall, of Charleston. The defendant wished to take the deposition of Dr. Hoshall under Rule 26. Plaintiff claimed that Dr. Hoshall's examinations and opinions as to the plaintiff's physical condition were privileged and that defendants are not entitled to the information sought. The Doctor objected on the ground that the examination would result in him giving opinions to parties who had not paid for them. Plaintiff's attorneys appeared both for the plaintiff and the Doctor. Chief Judge Waring held:

1. That although at common law there was no physician and patient privilege and although there appears to be no statute in South Carolina setting up such a privilege he found one case (Cole v. Anderson Mills, 191 S. C. 458) which held that there is a physician and patient privilege . . . at least so declared by dictum in any event. Accordingly, he found good ground to claim privilege.

2. Secondly, Judge Waring said privilege was not the deciding factor. The rules do not, as Judge Waring sees it, require a physician employed by one party to give his opinions, or the results of his examination to the other party, if the other party is free to obtain a physical examination through his own physician.

The court thereupon denied the defendant the right to take Dr. Hoshall's deposition.

In contrast with this last case consider Sachs v. Aluminum Co. where in a patent suit the Aluminum Co. of America proceeded to

27. 167 F. 2d 570 (6th Cir. 1948).
take the deposition of one Dr. Sachs, an expert in x-ray metallography who was engaged by Cold Metal Process Co., the adverse party, to make certain tests of metal furnished him. Dr. Sachs' services had been procured by Cold Metal Process Co. in preparation of the patent case.

The court held, per curiam, that there was no privilege and that the District Judge, in light of Hickman v. Taylor, was correct in directing that the Doctor answer questions put to him by counsel for Aluminum Co. of America.

Query as to whether it is not unjust to require your expert to disclose the opinion, for which you paid, to your adversary who pays nothing! The courts in both Lewis v. United Air Lines Transport and Boynton v. R. J. Reynolds Tobacco Co. were strongly of the opinion that to compel such disclosure was not only not required under the rules, but "would be equivalent to taking another's property without making compensation therefor."

RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

A consideration of the question of whether or not your adversary can obtain discovery of the opinion of your expert naturally leads to a consideration of Rule 35 dealing with physical and mental examination of persons.

Largely, because there is usually no opposition on the part of plaintiff's counsel, defense attorneys assume, as a matter of course, that they are entitled to have the personal injury plaintiff examined. In some states statutes expressly provide for such examination; in others there are no statutes but the courts by decision have recognized that right.

What had been the rule in the federal courts prior to the Federal Rules of 1938?

I recall my introduction to the federal law very vividly. As a young defence counsel I had, under our state procedure, repeatedly demanded and obtained, without question on the part of plaintiff's attorney, a physical examination of the plaintiff. On one occasion I had before me a summons and complaint in a federal personal injury suit. I phoned plaintiff's attorney and sought to make the usual arrangement for a physical examination. He challenged my right to have one, referred to what he called the Botsford case, but after some

30. The quotation is from the Lewis case, supra note 28.
more talk as to a possible settlement agreed to let my doctor examine his client.

My interest was aroused; I looked up the *Botsford* case; it is *Union Pacific v. Botsford*\(^{31}\) and I am sure that many of you are familiar with its holding. Briefly, in that case, a majority of the court (7 to 2) held that the defendant was not entitled to, and the court had no power to order, a physical examination of plaintiff who sought damages because of personal injuries. A judgment of $10,-
000 for the plaintiff, whom defendant had not been able to have physically examined, was upheld. Some of you may remember the interesting language of Mr. Justice Gray, speaking for the majority,—

To compel any one, especially a woman, to lay bare the body or to submit it to the touch of a stranger without lawful authority is an indignity, an assault, and a trespass, and no order for process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases based upon special reasons and upon ancient practice coming down from ruder ages, and now mostly obsolete in England and never so far as we are aware introduced into this country.\(^{32}\)

Ten years later in *Camden & Suburban Ry. Co. v. Stetson*\(^{33}\) the question was again before the Supreme Court. It appeared the case arose in a federal court located in New Jersey and that New Jersey had a statute which provided that in a personal injury action the court could order the plaintiff to submit to a physical examination. The majority of the Supreme Court (8 to 1) held that notwithstanding the *Botsford* decision, when it appeared that a state statute authorized such examination, the federal court could order the examination by virtue of the Rules of Decision Act.

And so, up until 1938 when the Federal Rules became effective, you could not obtain, without consent, a physical examination of a personal injury plaintiff in a federal court unless a state law gave you such right of examination. Today the appropriate procedure is found in *Rule 35.* Let’s look at its provisions:

1. There is no absolute right to a physical or mental examination . . . it is in the court’s discretion.
2. It may be ordered whenever the mental or physical condition of a party is in controversy.

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31. 141 U. S. 250 (1890).
32. *Ibid* at 252. The italics are added.
33. 177 U. S. 172 (1900).
3. The order for examination is only made on motion upon a showing of "good cause."

4. The order specifies the scope, time, place and the person to make the examination.

Before considering paragraph (b) of the rule let us inquire a bit as to the construction to be placed on paragraph (a) outlined above.

It is to be noted that the examination may be ordered where the mental or physical condition of a party is in controversy. Clearly that would cover all suits for personal injuries.

But suppose the paternity of a child is in question? Can an accused father ask for blood grouping tests of the mother and child? That problem arose in Beach v. Beach34 and was answered by the majority in the affirmative. "Condition" of a party was held to include the characteristics of his blood.

It is interesting to note that Associate Justice Stephens dissented on the ground that the Botsford case made Rule 35 invalid.

Suppose that plaintiff brings a libel action and alleges defendant charges him with mental and physical peculiarities which plaintiff denies he possesses. May the defendant obtain a physical and mental examination of the plaintiff to support his plea of truth?

This question arose in Wadlow v. Humberd.35 The court denied the examination on the ground that historically such examination was limited to personal injury actions. Further it stated the mental or physical condition was not directly in controversy. The case seems to be out of line with the liberal purposes of the Federal Rules.

Suppose the plaintiff refuses to submit to a physical or mental examination despite the court order?

Rule 37 sets up the consequences for failure to comply with an order to submit to a physical or mental examination. Specifically on such refusal an order may be entered that would either:

(a) strike out the plaintiff's pleadings,
(b) dismiss his action,
(c) prohibit him from introducing evidence as to his physical or mental condition,
(d) deem the facts as to his condition as established in accordance with the contentions of the defendant.

Now you will note, that under these penalty provisions, the plaintiff for all practical purposes has the doors of the federal court closed to him if he fails to accede to the physical or mental examination.

34. 114 F. 2d 479 (D.C. Cir. 1940).
35. 27 F. Supp. 210 (W.D. Mo. 1939).
The statute which authorized the Supreme Court to adopt Civil Rules of Procedure for the Federal Court specifically said that, "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." \(^{36}\)

If, prior to the federal rules, a plaintiff in a personal injury case could obtain relief in a federal court without submitting to a physical examination, is he today deprived of a *substantive right* when the court dismisses his case because he refuses to submit to a physical examination? If he is, then *Rule 35* is invalid.

The question was answered in favor of the validity of the rule by a very narrow margin in the 5 to 4 decision of *Sibbach v. Wilson & Co.* \(^{37}\)

Justice Roberts for the majority declared that the rule was *procedural*. It does not, he said, effect substantive rights. Further the rules had lain in the lap of Congress and their failure to object to *Rule 35* indicates they deemed it within the ambit of the legislation authorizing the Supreme Court to adopt rules of civil procedure.

Justice Frankfurter, speaking for the dissent, did not characterize the rule as either procedural or substantive. Rather he thought the problem was controlled by the policy declared in the *Botsford* case. While, he said, legislation could change the *Botsford* rule, the inviolability of the person should not be curtailed unless the authority of law be clear.

He found in *Rule 35* a "drastic change in public policy in a matter deeply touching the sensibilities of people, or even their prejudices as to privacy," and concluded that such a drastic change should only be effected by legislation and not by rules designed to effectively dispatch the business of the civil side of the federal courts.

*Rule 35 (b) Mutual disclosure provisions.*

There are very interesting discovery provisions as to the contents of physicians reports of examinations contained in *Rule 35 (b)*. It provides in effect that:

1. The plaintiff who has been examined at the request of defendant may ask for a copy of the defendant doctor's report on his examination.

2. If the plaintiff does so ask and receives the copy of the report of defendant's doctor, then the defendant is entitled to receive

\(^{36}\) 28 U. S. C. Sec. 723.

\(^{37}\) 312 U. S. 1 (1941).
from the plaintiff a like report of any examination made for the same mental condition before or after such delivery.

3. Further if the plaintiff should take the deposition of the doctor examining for the defendant or request a copy of the report made by defendant’s examining doctor the plaintiff waives any privilege he might have as to the testimony of any one who has or thereafter examines him as to his physical or mental condition.

You will notice that the language of the rule, in so far as it requires the plaintiff examined to produce copies of examination reports, is very broad and says, “a like report of any examination, previously or thereafter made of the same mental or physical condition.”

Does this mean that a plaintiff must furnish defendant with copies of all hospital records pertaining to examination, etc.? No, according to Butts v. Sears Roebuck & Co.,\(^\text{38}\) where Judge Holtzoff said it is

... limited to medical examinations conducted at the request of the party, and the reports, copies of which are subject to production, are the reports made by the physician as the result of such examination.

**RULE 27. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL.**

*Perpetuation of Testimony.*

Prior to the adoption of the Federal Rules an expectant litigant could file a bill on the Equity side of the court to perpetuate testimony. It was deemed an original bill and subject to all requirements of service of process, venue, etc.

*Rule 27* provides a simple method for perpetuating testimony. It does not, however, abolish the power of the court to entertain the old style bill to perpetuate testimony.

*Procedure under Rule 27:*

1. The person desiring to perpetuate his own or any one else’s testimony may file a verified petition in the United States District Court that is located in the district of any expected party.

2. The contemplated action must be one that could properly be brought in a United States District Court. Where appropri-
state, diversity and jurisdictional amount must be present in the contemplated action.

3. The petition is entitled in the name of the petitioner and must show:
   (a) that petitioner expects to be a party in such action and is presently unable to bring it or cause it to be brought,
   (b) the subject matter of the action and petitioner's interest — in short, what is the contemplated action to be about,
   (c) the facts he desires to perpetuate and why,
   (d) the names and addresses of the anticipated adverse parties,
   (e) the names and addresses of the persons to be examined,
   (f) the substance of the testimony he expects to elicit, and
   (g) a prayer for relief, namely that an order issue authorizing him to take the depositions of the persons he desires to examine as set out in the petition.39

Notice and Service of Petition.

After the petition has been filed the petitioner must have service made on every person named as an adverse party of a copy of the petition and a notice stating the time and place the petitioner will apply for the order. He must give at least 20 days notice.

Service is to be made of the notice and copy of the petition as provided in cases for the service of a summons . . . namely by the United States marshall under Rule 4.

If the marshall cannot make such service the court may order service by publication and shall appoint an attorney for an adverse party who was not personally served as provided under Rule 4 (d). The attorney so appointed cross examines the party testifying.

On the return day of the notice of motion the court makes the order sought if satisfied that perpetuation of the testimony may prevent a failure or delay of justice.

The order

The order designates or describes the person whose testimony is to be taken; specifies the subject matter of the examination and states whether oral deposition or written interrogatories are to be used.

The court may make orders for production of documents, physical examinations, etc. as is provided for under Rules 34 and 35.

39. See Mosseller v. United States, 158 F. 2d 380 (2d Cir. 1946).
Use of Depositions

Rule 27 (a) 4 provides that a deposition to perpetuate testimony taken under Rule 27 or any deposition taken to perpetuate testimony under state law or otherwise which would be admissible as evidence in the state courts where taken can be used in an action later brought involving the same subject matter as a deposition taken under Rule 26 d.

Rule 27 (b). Perpetuating testimony pending appeal.

This provides for the taking of depositions when the case is on appeal, or before time to appeal has expired, to perpetuate testimony for use in the event there should be further proceedings in the district court.

The procedure is to make a motion in the district court on the same notice and service as if the action were pending in the court. that is not less than 5 days notice as provided in Rule 5 d.

The motion shall show (1) the names and addresses of the persons to be examined, (2) what the substance of the testimony to be elicited will be and (3) the reasons for perpetuating the testimony.

If the court finds the perpetuation is proper to avoid a failure or delay of justice it may make an order allowing the taking of the depositions and such orders as would be appropriate under Rule 34 and Rule 35.

In closing this discussion of perpetuating testimony under Rule 27 I especially wish to emphasize that:

1. The procedure under Rule 27 is ancillary or auxiliary to the contemplated action.

2. Like other ancillary proceedings it does not need independent grounds for federal jurisdiction. But the action to be brought in the future must have such grounds! That must appear in the petition under Rule 27.

3. The venue requirement for the petition is not the same as for an action . . . the only venue requirement is that the petition be filed in the district of any one of the expected adverse party or parties.

4. As was the old practice under the bill to perpetuate testimony, permission to perpetuate testimony will be denied if the subject matter of the expected action could be made the subject of an immediate action in any court, state or federal.40

RULE 36. ADMISSION OF FACTS AND GENUINENESS OF DOCUMENTS.

Most states have provisions whereby a party may ask another to admit the genuineness of a document. Others permit a party to ask for an admission of facts set out in the request. Penalties for refusal to admit vary from state to state.

Rule 36 establishes a very powerful tool for compelling admissions. It applies not only to admission of genuineness of documents but also to admissions of facts.

Procedure under Rule 36.

1. Any time after the commencement of an action a party may serve on any other party a written request that the adverse party admit

   (1) the genuineness of any relevant document described in and exhibited with the request, and/or
   (2) the truth of any relevant matters of fact set out in the request.

   Note: If a plaintiff wants to serve such request within 10 days from the start of the action he must get leave of court.

2. You must serve copies of the documents with the request unless they have already been furnished.

3. If the party on whom the request is served does nothing, he will be deemed to have admitted each of the matters requested.

4. To avoid admission, the party served must, within the period fixed by the request which cannot be less than 10 days after service of the request (unless the court on notice and motion allows a shorter or longer time) serve upon the party requesting admissions either:

   (1) A sworn statement denying specifically the matters of which an admission is requested, or setting forth in detail the reasons why he cannot truthfully admit or deny those matters, or
   (2) Written objections on the ground that some or all of the requested admissions are privileged, or irrelevant, or that the request otherwise improper in whole or in part. A notice of the hearing of the objection at the earliest practical time must accompany the objection.
If it appears that written objections apply to only a part of the request, the part that is not objected to must be answered within the required period. Good faith may require a party to deny a part, and admit the truth of a part of a request.

The provision for written objections and motion attacking the propriety of the demand was inserted in Rule 36 by amendment in 1946. Prior to that amendment a party was placed in a perilous position if he deemed a request was improper. While there was some conflict in the decisions, the courts generally held that a request for admissions could not be attacked by motion. The party served had to answer one way or another. Attorneys resorted to qualified answers and in some cases these were construed as admissions because of their failure to specifically deny. Today, by virtue of the written objection and motion procedure, that hazard is no longer present.

**Effect of admission**

Any admission made by a party pursuant to a request under Rule 36 is only for the purpose of the pending action and is not an admission for any other purpose nor can it be used against him in any other proceedings.

**RULE 37. CONSEQUENCES OR PENALTIES FOR REFUSAL TO MAKE DISCOVERY.**

*Refusal to answer.*

If a person whose deposition is being taken refuses to answer a question the examiner may stop the examination or go on and have the person examined, answer what he will, and then on reasonable notice to all persons affected may apply to the district court in the district where the deposition is being taken for an order compelling an answer.

If the court grants the motion and finds there was no substantial justification to refuse to answer, the court shall require the party deponent, or party and attorney advising refusal, or any of them, to pay the reasonable costs of the motion plus attorney's fees to the examining party.

Conversely, if the motion is found to be without substantial justification, the court shall order the examining party or his attorney advising the motion, or both, to pay the refusing party expenses and attorney's fees on the motion.
Failure to comply with court order.

(1) If a person refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken he may be held in contempt of that court.

(2) Other consequences:
If a person fails to obey an order that he answer oral questions or interrogatories or fails to comply with an order for production or inspection under Rule 34 or a physical or mental examination under Rule 35 the court may make such orders in regard to the refusal as are just and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defences, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering judgment by default against the disobedient party;

(iv) In lieu of or in addition to any of the above orders, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

Payment of expenses.

If a request for admissions is made under Rule 36 and a sworn denial is filed and then the requesting party proves the matter, he may apply to the court for expenses and reasonable attorney's fees in that connection. These will be allowed unless the court finds
there was good reason for the denial or that the admissions sought were of no real importance. No expenses or attorney's fees may be imposed against the United States under this rule.

Failure of a party to attend at taking of deposition or to serve answers.
If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition after having been served with proper notice, or if he fails to serve answers to interrogatories under Rule 33 after proper service of such interrogatories, the court on motion and notice may, under Rule 37 (d),
(a) strike out all or any part of any pleading of that party, or
(b) dismiss the action or proceeding or any part of it, or
(c) enter a judgment by default against that party.

CONCLUSION

From what we have just considered it is readily apparent that the discovery provisions of the Federal Rules cannot be treated lightly. The penalties for failure to comply are serious and most effective. Refusal may prove disastrous to both litigant and counsel.

Rule 37 is the last of the Federal Rules on Discovery and marks an appropriate place to bring this discussion to a close. I have enjoyed being with you and thank you all for the privilege of taking part in this Institute.