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The Scope of Discovery under Rule 33 of the Federal Rules of Civil Procedure

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LAW NOTE

THE SCOPE OF DISCOVERY UNDER RULE 33 OF THE FEDERAL RULES OF CIVIL PROCEDURE

As the number of cases brought in the federal courts grows,[1] and as the number of states adopting the rules of procedure followed by these tribunals continues to increase,[2] the question of the outer limits of discovery under the Federal Rules of Civil Procedure looms ever larger. This problem is faced daily by hundreds of lawyers throughout the country whose dilemma is twofold: what information may their clients legitimately seek from an adverse party? And what information are their clients compelled to divulge to the other side?

In seeking facts under the federal discovery processes,[3] a party might initially proceed along one or both of two principal lines of inquiry. He could take testimony by deposition upon oral examination,[4] or he could propound a set of written interrogatories to the other party under Rule 33.[5]

1. In 1941, approximately 37,000 civil cases were commenced in the United States district courts. This number rose to 58,293 civil cases during 1961. 1961 Dir. of the Admin. Office of the U.S. Courts Ann. Rep. 148-149.

2. As of the year 1962, 18 states had adopted all or a substantial part of the Federal Rules of Civil Procedure. AM. JUR. 2D DESK BOOK 315 (1962).

3. FED. R. CIV. P. 26-37.

4. FED. R. CIV. P. 26.

5. FED. R. CIV P. 33. *Interrogatories to Parties.*

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person asking them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interroga-

Rule 33 of the Federal Rules of Civil Procedure provides that "interrogatories may relate to any matters which can be inquired into under Rule 26(b),"[6] which states that "unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Rule 33 also declares that "the provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule." A look at Rule 30(b)[7] reveals that the court is empowered to make any order which justice requires to protect the answering party from "annoyance, embarrassment, or oppression."

Therefore, in examining the scope of inquiry under Rule 33, it is necessary to bear in mind that this rule does not stand alone but is a part of a systematic and complete scheme for discovery on a liberal basis[8] and is to be utilized in conjunction with the other discovery procedure rules, which are all to be construed in pari materia.[9]

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tories or of sets of interrogatories to be served is not limited except as justice requires to protect the party form annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

6. FED. R. CIV. P. 26(b). *Scope of Examination.* Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

7. FED. R. CIV. P. 30(b). *Orders for the Protection of Parties and Deponents.* . . . Upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, . . . or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, . . . or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

8. Hartley Pen Co. v. United States Dist. Court, 287 F.2d 324 (9th Cir. 1961); Grover v. Schenley Prods. Co., 26 F. Supp. 768 (S.D.N.Y. 1938).

9. Crowe v. Chesapeake & Ohio Ry., 29 F.R.D. 148 (E.D. Mich. 1961); Enger-Kress Co. v. Amity Leather Prods. Co., 18 F.R.D. 347 (E.D. Wis. 1955).

Having observed the broad purposes of the rule and the somewhat vague limits on the range of its use, it would now be beneficial to consider in detail the specific instances under the rule where interrogatories have been allowed or disallowed by the courts. Consequently, for the purposes of this note, it is assumed that a set of interrogatories has been received by a party to a lawsuit, and he is presently seeking advice from his attorney as to what courses of action to take in response thereto. There are several approaches which counsel might follow, i.e., he might advise an objection to the set of interrogatories as a whole; or he might suggest answering certain questions in full, others in part, and some not at all.

I. OBJECTION TO THE SET OF INTERROGATORIES AS A WHOLE

Rule 33 states that "the number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression." Prior to the adoption of this amendment by the Supreme Court in 1948, there was a line of authority to the effect that the number of interrogatories should be relatively few and limited to the important facts of the case rather than numerous and concerned with relatively minor details, and that if more comprehensive examination of the adverse party was desired it should ordinarily be done by taking his deposition.[10] However, there are a considerable number of cases both before and after the amendment which hold *contra*.[11]

Nevertheless, in spite of this latter line of authority and the 1948 amendment, it is still arguable that a set of interrogatories might be objected to as a whole with a request that the number be limited. The Advisory Committee Note in support of this amendment stated:

10. Ball v. Paramount Pictures, 4 F.R.D. 194 (W.D. Pa. 1944); Fruit Growers' Co-op. v. California Pie & Baking Co., 3 F.R.D. 206 (E.D.N.Y. 1942); Coca-Cola Co. v. Dixie Cola Labs., 30 F.Supp. 275 (D. Md. 1939).

11. Caldwell-Clements, Inc. v. McGraw-Hill Publishing Co., 12 F.R.D. 531 (S.D.N.Y. 1952); Hoffman v. Wilson Line, 7 F.R.D. 73 (E.D. Pa. 1946); Canuso v. City of Niagara Falls, 4 F.R.D. 362 (W.D.N.Y. 1945); J. Schoeneman, Inc. v. Brauer, 1 F.R.D. 292 (W.D. Mo. 1940). *But see* Zenith Radio Corp. v. Radio Corp. of America, 106 F.Supp. 561 (D. Del. 1952).

> . . . it is provided that the number of or number of sets of interrogatories to be served may not be limited arbitrarily as a general policy to any particular number, but that a limit may be fixed only as justice requires to avoid annoyance, expense, embarrassment, or oppression in individual cases. The party interrogated, therefore, must show the necessity for limitation on that basis.[12]

Therefore, the limiting of interrogatories to a given number is not expressly forbidden today but depends upon the facts of the particular case.

Authority in the court to limit the number of interrogatories is also given by Rule 30(b), which, as mentioned previously, provides that the court may make any order which justice requires to protect a party from annoyance, embarrassment, or oppression. Consequently, the power exists under both Rules 33 and 30(b) to limit the number of items, and there is ample authority to the effect that the acceptance or rejection of interrogatories is a matter of discretion in the courts.[13] Another source has stated that the "task of determining what constitutes annoyance, expense, embarrassment or oppression is thrust upon the district courts."[14]

A New York district court recently exercised this discretion and held that it would be an abuse of the interrogatory precedure within the meaning of Rule 33 to allow one party to propound 200 questions in view of the fact that the party also intended to take depositions after the interrogatories were answered. Although this combination of discovery procedures is allowed under the rule,

> "interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require,"

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12. FED. R. CIV. P. 33 (Advisory Committee Note to 1948 Admendment).

13. Newell v. Phillips Petroleum Co., 144 F.2d 338 (10th Cir. 1944); Transmirra Prods. Corp. v. Monsanto Chem. Co., 26 F.R.D. 572 (S.D.N.Y. 1960); United States v. Procter & Gamble Co., 25 F.R.D. 252 (D.N.J. 1960); Volunteer Elec. Co-op. v. Tennessee Valley Authority, 139 F.Supp. 22 (E.D. Tenn. 1954); Porter v. Montaldo's, 71 F.Supp. 372 (S.D. Ohio 1946).

14. Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, p. 50 (1946).

the court applied the "rule of reason" and refused to allow the interrogatories.[15] However, it should be emphasized that this case, and the others cited with it below, do not lay down a flat rule of law to the effect that depositions may not follow interrogatories; these decisions are confined to their particular facts or to a similar set of facts. On the contrary, there is no such flat rule and there are numerous cases where the interrogatory and deposition precedures were considered as merely cumulative, and not oppressive or annoying.[16]

In conclusion, it would seem that a party could object to an entire set of interrogatories and request that the number be limited in accordance with Rule 33. Since the authority to grant this request lies within the sound discretion of the court, it may rule in the objecting party's favor upon a specific showing of necessity on grounds of annoyance, expense, or oppression. A general objection that the interrogatories are too numerous or burdensome will not suffice.[17] And there would appear to be additional grounds for such a ruling if the deponent also intends to take repetitive depositions subsequent to receiving the answers to its interrogatories.

II. INTERROGATORIES WHICH SHOULD BE ANSWERED

The interrogatories within this section are grouped into six categories — those that seek "relevant" information, those that seek the identity and location of witnesses, those that seek the identity and location of documents or other tangible things, those that seek the particularization of pleadings, those that seek information relating to the jurisdiction of the court, and those that seek information relating to the matter of damages. While it is true that all of the items within each

15. Breeland v. Yale & Towne Mfg. Co., 26 F.R.D. 119 (E.D.N.Y. 1960). *Cf.* Schotthofer v. Hagstrom Constr. Co., 23 F.R.D. 666 (S.D. Ill. 1958); Onofrio v. American Beauty Macaroni Co., 11 F.R.D. 181 (W.D. Mo. 1951); Frankson v. Carter & Weeks Stevedoring Co., 9 F.R.D. 713 (E.D.N.Y. 1949).

16. See, *e.g.*, Bullard v. Universal Millwork Corp., 26 F.R.D. 144 (E.D.N.Y 1960); Reid v. Harper, 17 F.R.D. 281 (S.D.N.Y. 1955); Branyan v. Koninklijke Luchtvaart Moatschappij N.V., 13 F.R.D. 137 (S.D.N.Y. 1953); Alexander v. Oberndorf, 13 F.R.D. 137 (S.D.N.Y. 1952); Machinoimpart v. Clark Equip. Co., 11 F.R.D. 55 (S.D.N.Y. 1951). Compare Stonybrook Tenants Ass'n v. Alpert, 29 F.R.D. 165 (D. Conn. 1961).

17. United States v. Nysco Labs., Inc., 26 F.R.D. 159 (E.D.N.Y. 1960); Mall Tool Co. v. Sterling Varnish Co., 11 F.R.D. 576 (W.D. Pa. 1951); Wolf v. United Air Lines, Inc., 9 F.R.D. 271 (M.D. Pa. 1949).

of these categories are "relevant," for the purposes of this article, the term "relevant" is used to describe all of those facts pertinent to the subject matter of the suit which do not fall in any of the other five categories.

A. THOSE THAT SEEK "RELEVANT" INFORMATION

As a general rule, the scope of discovery under Rule 33 is quite broad and is accorded liberal treatment.[18] It is expressly stated in the rule, which may be utilized in any civil action, irrespective of whether it was formerly denominated legal or equitable,[19] that "interrogatories may relate to any matters which can be inquired into under Rule 26(b)," and the scope of examination under Rule 26(b) is limited only by relevance and privilege.[20] Therefore, interrogatories can be used to obtain admissions,[21] to simplify and clarify issues before trial,[22] to elicit facts or conduct upon which a plaintiff bases his case,[23] and to ascertain facts and procure evidence or secure information as to where pertinent evidence exists or can be obtained.[24] It is generally no defense to say that the party propounding the interrogatory already has the information in his possession;[25] or that the data sought is inadmissible

18. United States v. National Steel Corp., 26 F.R.D. 599 (S.D. Tex. 1960); Berkley v. Clark Equip. Co., 26 F.R.D. 153 (E.D.N.Y. 1960); Aktiebolaget Vargos v. Clark, 8 F.R.D. 635 (D.D.C. 1949).

19. Bailey v. New Eng. Mut. Life Ins. Co., 1 F.R.D. 494 (S.D. Cal. 1940); Dixon v. Phifer, 30 F.Supp. 627 (W.D.S.C. 1939).

20. See Brewster v. Technicolor, Inc., 2 F.R.D. 186 (S.D.N.Y. 1941); Michels v. Ripley, 1 F.R.D. 332 (S.D.N.Y. 1939).

21. Drum v. Town of Tonawanda, 13 F.R.D. 317 (W.D.N.Y. 1952); Shrader v. Reed, 11 F.R.D. 367 (D. Neb. 1951); Hoffman v. Wilson Line, Inc., 7 F.R.D. 73 (E.D. Pa. 1946); Patterson Oil Terminals, Inc. v. Charles Kurz & Co., 7 F.R.D. 250 (E.D. Pa. 1945); Chandler v. Cutler-Hammer, Inc., 31 F.Supp. 453 (E.D. Wis. 1940).

22. United States v. Nysco Labs., Inc., 26 F.R.D. 159 (E.D.N.Y. 1960); O'Brien v. Equitable Life Assur. Soc'y of United States, 13 F.R.D. 475 (W.D. Mo. 1953); H. K. Porter Co. v. Bremer, 12 F.R.D. 187 (N.D. Ohio 1951).

23. Baim & Blank, Inc. v. Philco Distribs., Inc., 25 F.R.D. 86 (E.D.N.Y. 1957); McElroy v. United Air Lines, Inc., 21 F.R.D. 100 (W.D. Mo. 1957); Steelco Stainless Steel, Inc. v. Permanent Stainless Steel Corp., 11 F.R.D. 403 (N.D. Ohio 1951).

24. Onofrio v. American Beauty Macaroni Co., 11 F.R.D. 181 (W.D. Mo. 1951); Aktiebolaget Vargos v. Clark, 8 F.R.D. 635 (D.D.C. 1949); Cinema Amusements, Inc. v. Loew's, Inc., 7 F.R.D. 318 (D. Del. 1947).

25. Erone Corp. v. Skouras Theatres Corp., 22 F.R.D. 494 (S.D.N.Y. 1958); Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc., 21 F.R.D. 347 (S.D.N.Y. 1958); Grand Opera Co. v. 20th Century-Fox Film Corp., 21 F.R.D. 39 (E.D. Ill. 1957). *Contra*, United States v. Renault, Inc., 27 F.R.D. 23 (S.D.N.Y. 1960); Stone v. Marine Transp. Lines, 23 F.R.D. 222 (D. Md. 1959); Sunday v. Gas Serv. Co., 10 F.R.D. 185 (W.D. Mo. 1950).

in court;[26] or that the inquiry concerns matters relating to a claim or defense of the adverse party;[27] or that the information sought is equally available to the interrogator;[28] or that it is a matter of public record;[29] or to show that the interrogatories are not limited to facts which are exclusively or peculiarly within the knowledge of the interrogated party.[30] The inquiry must only be relevant to the subject matter of the action,[31] and the scope of "relevancy" is so broad that it is now possible to conduct "fishing expeditions."[32] Finally, there is no longer any distinction between "ultimate" or "material" facts as long as the information sought is relevant and not privileged.[33]

B. THOSE THAT SEEK THE IDENTITY AND LOCATION OF WITNESSES

Another matter which can be inquired into under Rule 26(b) is "the identity and location of persons having knowledge of relevant facts."[34] It is immaterial that such informa-

26. Harnung v. Eastern Auto. Forwarding Co., 11 F.R.D. 300 (N.D. Ohio 1951); Kendall v. United Air Lines, Inc., 9 F.R.D. 702 (S.D.N.Y. 1949); Brewster v. Technicolor, Inc., 2 F.R.D. 186 (S.D.N.Y. 1941).

27. Nelson v. Reid, 4 F.R.D. 199 (S.D. Fla. 1944); United States v. General Motors Corp., 2 F.R.D. 528 (N.D. Ill. 1942); RCA Mfg. Co. v. Decca Records, Inc., 1 F.R.D. 433 (S.D.N.Y. 1940).

28. Rowe Spacarb, Inc. v. Cole Prods. Corp., 21 F.R.D. 311 (N.D. Ill. 1957); Gutowitz v. Pennsylvania R.R., 7 F.R.D. 144 (E.D. Pa. 1945). *Contra*, United Cigar-Whelan Stores Corp. v. Phillip Morris, Inc., 21 F.R.D. 107 (S.D.N.Y. 1957); Wolf v. Dickinson, 16 F.R.D. 250 (E.D. Pa. 1954); Shank v. Associated Transp., 10 F.R.D. 472 (M.D. Pa. 1950).

29. Blau v. Lamb, 21 F.R.D. 411 (S.D.N.Y. 1957); Canuso v. City of Niagara Falls, 4 F.R.D. 362 (W.D.N.Y. 1945); Riordan v. Ferguson, 2 F.R.D. 349 (S.D.N.Y. 1942).

30. Onofrio v. American Beauty Macaroni Co., 11 F.R.D. 181 (W.D. Mo. 1951); Patterson Oil Terminals v. Charles Kurz & Co., 7 F.R.D. 250 (E.D. Pa. 1947); Lundin v. Stratmoen, 250 Minn. 555, 85 N.W.2d 828 (1957).

31. Transmirra Prods. Corp. v. Monsanto Chem. Co., 26 F.R.D. 572 (S.D.N.Y. 1960); United States v. Nysco Labs., Inc., 26 F.R.D. 159 (E.D.N.Y. 1960); Dimenco v. Pennsylvania R.R., 19 F.R.D. 499 (D. Del. 1956).

32. Hickman v. Taylor, 329 U.S. 495, 91 L.Ed. 451 (1947); Close v. Sanderson & Porter, 13 F.R.D. 123 (W.D. Pa. 1952); Glick v. McKesson & Robbins, Inc., 10 F.R.D. 477 (W.D. Mo. 1950); Gutowitz v. Pennsylvania R.R., 7 F.R.D. 144 (E.D. Pa. 1945).

33. V. D. Anderson Co. v. Helena Cotton Oil Co., 117 F.Supp. 932 (E.D. Ark. 1953); Kingsway Press, Inc. v. Farrell Publishing Corp., 30 F.Supp. 775 (S.D.N.Y. 1939); Nichols v. Sanborn Co., 24 F.Supp. 908 (D. Mass. 1938).

34. See, *e.g.*, McKeon v. Local 107, Teamsters Union, 28 F.R.D. 592 (D. Del. 1961); United States v. Renault, Inc., 27 F.R.D. 23 (S.D.N.Y. 1960); B. & S. Drilling Co. v. Halliburton Oil Well Cementing Co., 24 F.R.D. 1 (S.D. Tex. 1959); Reneau v. Panhandle & Pipe Line Co., 12 F.R.D. 257 (W.D. Mo. 1952).

tion is obtained from hearsay sources,[35] but it is generally held that a party may not be required to reveal the names and addresses of witnesses whom he proposes to introduce at the trial.[36]

C. Those That Seek the Identity and Location of Documents or Other Tangible Things

Rule 26(b) also authorizes inquiry concerning "the existence, description, nature, custody, condition and location of any books, documents, or other tangible things." And there is ample authority to the effect that such information is a proper subject for interrogatories.[37]

However, a question has arisen when the interrogatories, instead of seeking the identity and location of documents, call for information as to their content or ask that copies be attached to the answers thereto. Since the production of documents and other tangible things is governed by Rule 34,[38] which requires a showing of "good cause" before such an order will be made by the court, there is a distinct danger of emasculating that rule by allowing copies to be obtained

35. 4 Moore, Fed. Practice 1076 (2d ed. 1950). *Contra*, Poppino v. Jones Store Co., 1 F.R.D. 215 (W.D. Mo. 1940). Moore states that this decision is clearly incorrect. *Ibid.*

36. Richards v. Maine Cent. R.R., 21 F.R.D. 595 (D. Me. 1958); Aktiebolaget Vargos v. Clark, F.R.D. 635 (D.D.C. 1949); McNamara v. Erschen, 8 F.R.D. 427 (D.Del. 1948); Cogdill v. Tennessee Valley Authority, 7 F.R.D. 411 (E.D. Tenn. 1947). *Contra*, United States v. Shubert, 11 F.R.D. 528 (S.D.N.Y. 1951); Kling v. Southern Bell Tel. & Tel. Co., 9 F.R.D. 604 (S.D. Fla. 1949); State *ex rel* Willey v. Whitman, 91 Ariz. 120, 370 P.2d 273 (1962).

37. United States v. Becton, Dickinson & Co., 30 F.R.D. 132 (D.N.J. 1962); Harvey v. Eimco Corp., 28 F.R.D. 380 (E.D. Pa. 1961); United States v. Carter Prods., Inc., 27 F.R.D. 243 (S.D.N.Y. 1961); United States v. Renault, Inc., 27 F.R.D. 23 (S.D.N.Y. 1960); Berkley v. Clark Equip. Co., 26 F.R.D. 153 (E.D.N.Y. 1960).

38. Fed. R. Civ. P. 34 *Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.*

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may . . . order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of the designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control . . . .

Documents may also be produced under a joint Rule 26(b) and 45(b) procedure whereby a subpoena duces tecum may be issued to command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein. Unlike Rules 33 and 34, Rule 45 is not restricted to discovery from adverse parties.

under Rule 33 without a similar "good cause" showing. In 1949, one court remarked that there was "irreconcilable conflict" among the cases on this point,[39] but the more recent decisions are largely in agreement that copies may not be obtained by interrogatories.[40]

Some early cases from one jurisdiction drew a distinction between the production of originals of documents and a request for a copy or a statement of their contents.[41] However, in the most recent appellate decision on this point, *Alltmont v. United States*,[42] the Third Circuit stated that a distinction between copies of documents and the original documents "would border on the capricious"[43] and further declared,

> Since . . . Rule 33 [is] wholly silent as to the production of documents while . . . Rule 34 [is] directly and primarily concerned with their production for both inspection and copying, we think, construing them together, that the subject is covered solely by the latter to the exclusion of the former. Thus construed the rules are fully integrated in this respect.[44]

Nevertheless, some district courts have continued to require the production of documents in connection with interrogatories under Rule 33 when a sufficient showing of "good cause" has been made to justify production under Rule 34 and refusal of disclosure would simply result in delay by requiring the party to make another motion under Rule 34.[45]

39. Alfred Pearson & Co. v. Hayes, 9 F.R.D. 210 (S.D.N.Y. 1949).

40. Lumbermen's Mut. Cas. Co. v. Pistorino & Co., 28 F.R.D. 1 (D. Mass. 1961); United States v. 19.897 Acres of Land, More or Less, 27 F.R.D. 420 (E.D.N.Y. 1961); Harvey v. Levine, 25 F.R.D. 15 (N.D. Ohio 1960); E. I. DuPont de Nemours & Co. v. Phillips Petroleum, 23 F.R.D. 237 (D. Del. 1959); Strum v. Great Atl. & Pac. Tea Co., 16 F.R.D. 476 (D. Conn. 1954).

41. This view has been more or less confined by the District Court of the Eastern District of Pennsylvania to a particular class of material — statements of witnesses, accident reports and similar data acquired after an accident has occurred and usually in anticipation of litigation or in preparation for trial. Love v. Metropolitan Life Ins. Co., 8 F.R.D. 583 (E.D. Pa. 1948); DeBruce v. Pennsylvania R.R., 6 F.R.D. 403 (E.D. Pa. 1947); Nedimeyer v. Pennsylvania R.R., 6 F.R.D. 21 (E.D. Pa. 1946); Gorden v. Pennsylvania R.R., 5 F.R.D. 510 (E.D. Pa. 1946).

42. 177 F.2d 971 (3rd Cir. 1949), *cert. denied*, 339 U.S. 967, 94 L.Ed. 1375 (1950).

43. *Id.* at 977.

44. *Ibid.*

45. Bain & Blank, Inc. v. Philco Distribs., Inc., 25 F.R.D. 86 (E.D.N.Y. 1957); Novick v. Pennsylvania R.R., 18 F.R.D. 296 (W.D. Pa. 1955); V. D. Anderson Co. v. Helena Cotton Oil Co., 117 F.Supp. 932 (E.D. Ark. 1954); Hesch v. Erie R.R., 14 F.R.D. 518 (N.D. Ohio 1952); Maddox v. Wright, 11 F.R.D. 170 (D.D.C. 1951).

Of course, a party is not required under either rule to furnish documents which are not in his possession or control.[46]

Finally, the view that copies of documents may not be obtained in connection with interrogatories has been expanded in some decisions to the point where interrogatories are disallowed when they call for such complete information about the document as to be equivalent to furnishing the document itself.[47]

D. THOSE THAT SEEK THE PARTICULARIZATION OF PLEADINGS

The following cases indicate that a party should be in a position to furnish details regarding matters on which he bases his allegations: where a plaintiff has made allegations in the complaint of losses in income because of defendant's wrongful conduct, the plaintiff presumably is in a position to furnish the details on which he bases his allegation;[48] when interrogatories seek details of matters alleged in the complaint, they must be answered by the party who, having pleaded it, is assumed to be in a position to furnish such details;[49] when interrogatories seek particulars of matters alleged generally in the interrogated party's pleading, or otherwise deal with matters pertaining primarily to the interrogated party's case, objections based on the hardship, burden, or expense of the compilation of answers from the interrogated party's records are usually overruled upon the grounds that the interrogated party would be obliged to make an investigation before trial in any event, and the only burden imposed by the interrogatories is to advance the compilation to an earlier stage of the proceedings.[50]

Just as it is no defense to object to interrogatories on the grounds that they are burdensome, expensive, or oppressive when the inquiries are directed to matters alleged in the complaint, neither, it would seem, is it a valid defense that the

46. Nakken Patents Corp. v. Rabinowitz, 1 F.R.D. 90 (E.D.N.Y. 1940).
47. Stovall v. Gulf & So. Am. S. S. Co., 30 F.R.D. 152 (S.D. Tex. 1961); United States v. Renault, Inc., 27 F.R.D. 23 (S.D.N.Y. 1960); Harvey v. Levine, 25 F.R.D. 15 (N.D. Ohio 1960); Coyne v. Monongahela Connecting R.R., 24 F.R.D. 357 (W.D. Pa. 1959).
48. Carter v. Atlanta Enterprises, Inc., 19 F.R.D. 362 (N.D. Ga. 1956).
49. RCA Mfg. Co. v. Decca Records, Inc., 1 F.R.D. 433 (S.D.N.Y. 1940).
50. Kainz v. Anheuser-Busch, Inc., 15 F.R.D. 242 (N.D. Ill. 1954). *Accord*, Adelman v. Nordberg Mfg. Co., 6 F.R.D. 383 (E.D. Wis. 1947); Bowles v. McMinnville Mfg. Co., 7 F.R.D. 64 (E.D. Tenn. 1946).

interrogatories call for particularization of allegations in the pleadings. While interrogatories may not require comparison and expressions of opinion, there is a clear distinction between requiring a party to give an opinion and requiring it to point out in particular to what defect or act the pleading is directed.[51]

The reasoning behind such decisions is pointed out by Moore in his treatise on federal practice: "A party is not entitled to make broad allegations in his pleadings and then refuse to substantiate them by particularizing, whether the particularization takes the form of 'facts' or 'legal theory.' At the trial, the party should have to support his allegations by proof, expert opinion, or legal argument."[52]

In view of these decisions, it is imperative that a party draft his pleadings carefully or he may have to respond to interrogatories to which he would otherwise have had a valid defense.

E. Those That Seek Information Relating to the Jurisdiction of the Court

Although some courts have held that the discovery procedures may not be utilized by a plaintiff to inquire into the jurisdiction of the court,[53] the better view would seem to be that interrogatories may be so used when the defendant has questioned that jurisdiction by appropriate motion.[54] In such instances, discovery is usually restricted to matters relating to jurisdiction, with inquiry into other issues deferred until the court has decided the jurisdictional issue,[55] and a motion filed by the defendant to dismiss for want of jurisdiction will be held in abeyance until such interrogatories are answered.[56]

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51. Dugan v. Sperry Gyroscope Co., 35 F.Supp. 902 (E.D.N.Y. 1940). *Accord,* Gerber v. United States Lines Co., 15 F.R.D. 500 (S.D.N.Y. 1954); Gagen v. Northam Warren Corp., 15 F.R.D. 44 (S.D.N.Y. 1953); United States v. Columbia Steel Co., 7 F.R.D. 183 (D. Del. 1947).

52. 4 Moore, Fed. Practice 2306, n.19 (2d ed. 1950).

53. Lenz v. Sudden & Christenson, Inc., 4 F.R.D. 401 (E.D. Pa. 1945); Tradesmen's Nat'l Bank & Trust Co. v. Charlton S.S. Co., 3 F.R.D. 363 (E.D. Pa. 1944); Fox v. House, 29 F.Supp. 673 (E.D. Okla. 1939).

54. Boone v. Southern Ry., 9 F.R.D. 60 (E.D. Pa. 1949); Silk v. Sieling, 7 F.R.D. 576 (E.D. Pa. 1947); Goudy v. American Petroleum Transp. Co., 10 F.R. Serv. 33.326, Case 1 (E.D. Pa. 1947).

55. Goudy v. American Petroleum Transp. Co., *supra* note 54.

56. General Indus. Co. v. Birmingham Sound Reproducers, Ltd., 26 F.R.D. 559 (E.D.N.Y. 1961).

Likewise, a defendant may propound interrogatories to the plaintiff on facts directed toward the court's jurisdiction.[57]

F. Those That Seek Information Relating to the Matter of Damages

In the 1933 case of *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*,[58] the court stated that "the remedy of discovery is as appropriate for proof of a plaintiff's damages as it is for proof of other facts essential to his case," and the argument that damages were not part of the "issues" in a lawsuit was specifically rejected.

This case is still good law, and today when the controversy involves a simple suit for damages, particularly if the trial is to be by jury, discovery prior to trial as to damages is usually allowed.[59] And this has been so even though the action was for damages arising out of patent, copyright or trademark infringement.[60]

However, in such infringement suits, where the plaintiff seeks an injunction and an accounting, the court will not ordinarily permit him to obtain discovery on the question of damages until after the question of liability has been determined.[61] And when damages are demanded in addition to an injunction and an accounting in such suits, the courts are split as to whether discovery should be permitted.[62]

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57. Tselentis v. Michalinos Maritime & Commercial Co., 104 F.Supp. 942 (S.D.N.Y. 1952); Frederick Hart & Co. v. Recordgraph Corp., 7 F.R.D. 43 (D. Del. 1947); Pueblo Trading Co. v. Reclamation Dist. No. 1500, 4 F.R.D. 471 (N.D. Cal. 1945).

58. 289 U.S. 689, 77 L.Ed. 1449 (1933).

59. Butze v. T. J. W. Corp., 29 F.R.D. 474 (M.D. Pa. 1962); American Oil Co. v. Pennsylvania Petroleum Prods. Co., 23 F.R.D. 680 (D.R.I. 1959); Idle Wild Farm, Inc. v. W. R. Grace & Co., 22 F.R.D. 334 (S.D.N.Y. 1958). *Contra*, Parmelee Transp. Co. v. Keeshin, 25 F.R. Serv. 33.317, Case 1 (N.D. Ill. 1957); Ball v. Paramount Pictures, Inc., 4 F.R.D. 194 (W.D. Pa. 1944).

60. Fairchild Stratos Corp. v. General Elec. Co., 31 F.R.D. 301 (S.D.N.Y. 1962); Donohue v. W. W. Sly Mfg. Co., 20 F.R.D. 20 (N.D. Ohio 1956); Greenbie v. Noble, 18 F.R.D. 414 (S.D.N.Y. 1955). *But see* Lyaphile-Cryochem Corp. v. Charles Pfizer & Co., 7 F.R.D. 362 (E.D.N.Y. 1947).

61. Polaroid Corp. v. Commerce Int'l Co., 20 F.R.D. 394 (S.D.N.Y. 1957); Enger-Kress Co. v. Amity Leather Prods. Co., 18 F.R.D. 347 (E.D. Wis. 1955); Ful-Vue Sales Co. v. American Optical Co., 11 F.R.D. 185 (S.D.N.Y. 1951). *Cf.* Falcon Indus., Inc. v. R. S. Herbert Co., 15 F.R.D. 394 (E.D.N.Y. 1954).

62. Compare Hayden v. Chalfant Press, Inc., 281 F.2d 543 (9th Cir. 1960); Marshwood Co. v. Jamie Mills, Inc., 10 F.R.D. 590 (N.D. Ohio 1950); Rubsam v. Harley C. Loney Co., 10 F.R.D. 344 (E.D. Mich. 1950).

When the action is for an accounting and an injunction, but the suit is not for infringement, several courts have allowed pretrial discovery as to damages.[63] Finally, there are cases holding that a plaintiff may not obtain discovery as to damages accruing since the commencement of the action without first filing a supplemental complaint.[64]

III. INTERROGATORIES WHICH SHOULD BE ANSWERED IN PART

Interrogatories which are too general and all-inclusive need not be answered,[65] but in one case the court allowed the interrogatories although the terms used therein were susceptible of more than one meaning since "the answer can be in the alternative, and qualified so as to cover all of the meanings which the term or word is susceptible of bearing."[66] In actual practice, the courts frequently require an answer to one part of an interrogatory while sustaining an objection to other parts of the same item.[67]

IV. INTERROGATORIES WHICH MAY BE REFUSED

Since the scope of discovery is given such liberal treatment by the courts today, it is difficult to state with any certainty when an objection to an interrogatory will be sustained or refused. The definite trend is toward broad discovery by means of interrogatories, but, of course, there are limitations. These limitations are set forth in this section under ten categories with a development of the law for each classifica-

63. Klauder v. Minneapolis-Honeywell Regulator Co., 30 F.R.D. 29 (E.D. Pa. 1962); Hirshhorn v. Mine Safety Appliances Co., 8 F.R.D. 11 (W.D. Pa. 1948); American Mfg. Co. v. S.S. Exermont, 1 F.R.D. 574 (S.D.N.Y. 1940).

64. Dipson Theatres, Inc. v. Buffalo Theatres, Inc., 11 F.R. Serv. 34.413, Case 1 (W.D.N.Y. 1948); Cinema Amusements, Inc. v. Loew's Inc., 7 F.R.D. 318 (D. Del. 1947). *Contra*, Conmar Prods. Corp. v. Lamar Slide Fastener Corp., 2 F.R.D. 154 (S.D.N.Y. 1941). Moore disagrees with *Dyson Theatres* and *Cinema Amusements* in the belief that such a rule is unduly narrow and, in effect, puts the cart before the horse. 4 MOORE, FED. PRACTICE 1234 (2d ed. 1962).

65. Transmirra Prods. Corp. v. Monsanto Chem. Co., 26 F.R.D. 572 (S.D.N.Y. 1960); Wing v. Challenge Mach. Co., 23 F.R.D. 669 (S.D. Ill. 1959); Hartford Empire Co. v. Glenshaw Glass Co., 4 F.R.D. 210 (W.D. Pa. 1943).

66. General Elec. Co. v. Independent Lamp & Wire Co., 244 Fed. 825 (D.N.J. 1915).

67. See, *e.g.*, United States v. Nysco Labs., Inc., 26 F.R.D. 159 (E.D.N.Y. 1960); Erone Corp. v. Skouras Theatres Corp., 22 F.R.D. 494 (S.D.N.Y. 1958); Caldwell-Clements, Inc. v. McGraw-Hill Publishing Co., 12 F.R.D. 531 (S.D.N.Y. 1952).

tion. It should be noted that in almost every category there is a split of authority, and it is difficult to lay down any general rules. Consequently, the success of any objection really depends upon the facts of the particular controversy, and the problem in each case is to convince the court that an answer to the interrogatory would not serve the interests of justice. These objections must be specific, and the burden of proof that the interrogatory should be disallowed is on the objecting party.[68]

Therefore, it should be pointed out that, as a result of this burden of proof, it may at times be better to answer the interrogatory by saying, "I don't know," which is a valid reply when made in good faith and under oath in accordance with Rule 33.[69]

A. THOSE THAT SEEK IRRELEVANT INFORMATION

Although the scope of inquiry by means of interrogatories is quite broad, it is, as mentioned above, not without limits. "Both law and reason dictate that the scope of interrogatories under the rule [Rule 33] should not be entirely without limitation";[70] ". . . Sometimes in construing 'relevancy' the meaning of the word has been extended beyond any apparent relation to the issues involved. . . . Such matters only should be inquired about as may have some connection with the facts sought to be proved";[71] ". . . The questions propounded in the interrogatories must reasonably tend to shed light on some aspect of the controversy, whether for the purpose of preparing for trial, or upon the trial itself. . . . This limitation is a rule of necessity to keep the inquiry from going to absurd and oppressive bounds."[72]

Therefore, interrogatories must have some bearing on the subject matter of the action,[73] and cannot be directed to

68. United States v. Nysco Labs., Inc., *supra* note 67; Kensington Village, Inc. v. Mengel Co., 14 F.R.D. 187 (S.D.N.Y. 1953); Pappas v. Loew's, Inc., 13 F.R.D. 471 (M.D. Pa. 1953).

69. See, *e.g.*, Caldwell-Clements, Inc. v. McGraw-Hill Publishing Co., *supra* note 67; Riordan v. Ferguson, 2 F.R.D. 349 (S.D.N.Y. 1942); RCA Mfg. Co. v. Decca Records, Inc., 1 F.R.D. 433 (S.D.N.Y. 1940).

70. Byers Theaters, Inc. v. Murphy, 1 F.R.D. 286 (W.D. Va. 1940).

71. Hydraulic Dev. Corp. v. Lake Erie Eng'r Corp., 2 F.R.D. 174 (W.D.N.Y. 1941).

72. Porter v. Central Chevrolet, Inc., 7 F.R.D. 86 (N.D. Ohio 1946).

73. See, *e.g.*, Maple Drive-In Theatre Corp. v. Radio-Keith-Orpheum Corp., 17 F.R.D. 226 (S.D.N.Y. 1955); Bordonaro Bros. Theatres v. Loew's, Inc., 7 F.R.D. 210 (W.D.N.Y. 1947).

purely collateral matters,[74] nor concern matters admitted by the pleadings.[75]

In the final analysis, there are few specific limitations and the propriety of interrogatories in each case is determined to a large extent by the facts of the case,[76] bearing in mind that courts tend to be very liberal when applying the concept of relevancy.[77]

B. THOSE THAT CALL FOR CONCLUSIONS, COMPARISON OR OPINION

The court in *United States v. Selby*[78] stated that the assertion and discussion of legal theories, and classification of facts in support thereof, should be by lawyers at trial and in whatever pre-trial procedures the court may require and not by interrogatories. This represents the prevailing view today, and there is a wealth of authority to the effect that interrogatories may not call for opinions or conclusions,[79] comparisons,[80] contentions,[81] conclusions of law,[82] or explanations.[83]

However, some courts have permitted interrogatories which call for mixed conclusions of law and fact,[84] or which elicit

74. See, *e.g.*, Singer Mfg. Co. v. Axelrod, 16 F.R.D. 460 (S.D.N.Y. 1954); Balasz v. Anderson, 77 F.Supp. 612 (N.D. Ohio 1948).

75. O'Rourke v. RKO Radio Pictures, Inc., 27 F.Supp. 996 (D. Mass. 1939).

76. Grogan v. Pennsylavania R.R., 11 F.R.D. 186 (W.D.N.Y. 1950); Canuso v. City of Niagara Falls, 4 F.R.D. 362 (W.D.N.Y. 1945).

77. United States v. National Steel Corp., 26 F.R.D. 599 (S.D. Tex. 1960); Stanzler v. Loew's Theatre & Realty Corp., 19 F.R.D. 286 (D.R.I. 1955); V.D. Anderson Co. v. Helena Cotton Oil Co., 117 F.Supp. 932 (E.D. Ark. 1953).

78. 25 F.R.D. 12 (N.D. Ohio 1960).

79. Schotthofer v. Hagstrom Constr. Co., 23 F.R.D. 666 (S.D. Ill. 1958); Robinson v. Tracy, 16 F.R.D. 113 (W.D. Mo. 1954); Sutton v. Warner Bros., 12 F.R.D. 192 (E.D. Pa. 1951); Lenerts v. Rapidol Distrib. Co., 3 F.R.D. 42 (N.D.N.Y. 1942).

80. General Motors Corp. v. California Research Corp., 9 F.R.D. 568 (D.Del. 1949); Porter v. Montaldo's, 71 F.Supp. 372 (S.D. Ohio 1946); Savannah Theatre Co. v. Lucas & Jenkins, 10 F.R.D. 461 (N.D. Ga. 1943).

81. United States v. Maryland & Va. Milk Producers Ass'n, 22 F.R.D. 300 (D.D.C. 1958); Sutherland Paper Co. v. Grant Paper Box Co., 8 F.R.D. 416 (W.D. Pa. 1948); Landry v. O'Hara Vessels, Inc., 29 F.Supp. 423 (D. Mass. 1939).

82. Payer, Hewitt & Co. v. Bellanca Corp., 26 F.R.D. 219 (D. Del. 1960); United States v. Watchmakers of Swit. Information Center, 168 F.Supp. 904 (S.D.N.Y. 1958); Caggiano v. Socony Vacuum Oil Co., 27 F.Supp. 240 (D. Mass. 1939).

83. Hercules Powder Co. v. Rohm & Haas Co., 3 F.R.D. 328 (D. Del. 1944); Boysell Co. v. Colonial Coverlet Co., 29 F.Supp. 122 (E.D. Tenn. 1939); Looper v. Colonial Coverlet Co., 29 F.Supp. 125 (E.D. Tenn. 1939).

84. Bullard v. Universal Millwork Corp. 25 F.R.D. 342 (E.D.N.Y. 1960).

conclusions incidental to facts.[85] And other courts state that the fact that an interrogatory calls for conclusions, contentions, or opinions is not a bar to discovery as long as the information sought is relevant.[86] Finally, there is authority permitting the eliciting of expert opinions.[87]

C. Those That Seek Redundant or Repetitious Information

Objections to interrogatories have been sustained in several cases where the item objected to was covered by other interrogatories: where an interrogatory was repetitious, redundant and tautological to another interrogatory, an answer thereto would not be required;[88] and interrogatories should be denied where they are substantially required to be answered by interrogatories hereinbefore allowed.[89]

D. Those That Seek Privileged Matter

As stated previously, Rule 26(b) expressly excludes privileged matter from the scope of discovery,[90] and the term "privileged," as used in this rule, refers to those evidentiary privileges recognized at the actual trial.[91] Thus if an objection on the ground that the matter is privileged would be

85. Banana Serv. Co. v. United Fruit Co., 15 F.R.D. 106 (D. Mass. 1953).

86. United States v. Renault, Inc., 27 F.R.D. 23 (S.D.N.Y. 1960); American Oil Co. v. Pennsylvania Petroleum Prods. Co., 23 F.R.D. 680 (D.R.I. 1959); Gagen v. Northam Warren Corp., 15 F.R.D. 44 (S.D.N.Y. 1953).

87. United States v. Nysco Labs., Inc., 26 F.R.D. 159 (E.D.N.Y. 1960); United States v. Certain Acres of Land, 18 F.R.D. 98 (N.D. Ga. 1955); Kendall v. United Air Lines, Inc., 9 F.R.D. 702 (S.D.N.Y. 1949).

88. Payer, Hewitt & Co. v. Bellanca Corp., 26 F.R.D. 219 (D. Del. 1960).

89. B. B. Chem. Co. v. Cataract Chem. Co., 25 F.Supp. 472 (W.D.N.Y. 1938). *Accord,* Reneau v. Panhandle & Pipe Line Co., 12 F.R.D. 257 (W.D. Mo. 1952); Woods v. Kornfeld, 9 F.R.D. 196 (N.D. Pa. 1949). *But cf.* Rediker v. Warfield, 11 F.R.D. 125 (S.D.N.Y. 1951), where interrogatories were not objectionable as not propounded in good faith merely because co-defendant had theretofore answered interrogatories concerning the same matter, in absence of showing that they were unnecessarily repetitious.

90. "Privilege" as an objection applies to interrogatories under Rule 33 just as it may be the basis of an objection to questions on examination of a party whose deposition is being taken under Rule 26. Munzer v. Swedish Am. Line, 35 F.Supp. 493 (S.D.N.Y. 1940).

91. United States v. Reynolds, 345 U.S. 1, 97 L.Ed. 727 (1953); Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958); Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp, 23 F.R.D. 257 (D. Neb. 1959); Wild v. Payson, 7 F.R.D. 495 (S.D.N.Y. 1946). But compare Ellis-Foster Co. v. Union Carbide & Carbon Corp., 159 F.Supp. 917 (D.N.J. 1958).

proper at the actual trial, it is a proper one at the discovery stage.[92] Such recognized grounds of privilege are the professional privilege,[93] the privilege as to communications between husband and wife,[94] the privilege against disclosure of matters injurious to the public interest,[95] the privilege against self-incrimination,[96] and the qualified protection afforded trade secrets and secret processes. Privilege is not a blanket of immunity, though, covering all kinds of transactions and all communications made in reliance on a mutual agreement not to divulge them. On the contrary, it is limited by public policy to a very few relationships and professional employments, and even as to them, the character of the protected communications is severely restricted.

The professional privilege is generally limited to the attorney-client and physician-patient relationships.[97] With regard to the former, the protection of the privilege does not extend to all information obtained by an attorney in preparing his case. In *Hickman v. Taylor*[98] the court stated:

> It is unnecessary here to deliniate the content and scope of that (attorney-client) privilege as recognized in the federal courts. For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is

92. 4 MOORE, FED. PRACTICE 1281 (2d ed. 1962).

93. Attorney-Client: Wonneman v. Stratford Sec. Co., 23 F.R.D. 281 (S.D.N.Y. 1959); Connecticut Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y. 1955); *In Re* Prudence-Bonds Corp., 76 F.Supp. 643 (E.D.N.Y. 1948); Grover v. Schenley Prods. Co., 26 F.Supp. 768 (S.D.N.Y. 1938); physician-patient: Padavani v. Liggett & Myers Tobacco Co., 23 F.R.D. 255 (E.D.N.Y. 1959); Miller v. Pacific Mut. Life Ins. Co., 116 F.Supp. 365 (W.D. Mich. 1933); Baum v. Pennsylvania R.R., 14 F.R.D. 398 (E.D.N.Y. 1953).

94. Merlin v. Aetna Life Ins. Co., 180 F.Supp. 90 (S.D.N.Y. 1960); Federal Deposit Ins. Corp. v. Alter, 106 F. Supp. 316 (W.D. Pa. 1952); Salamon v. Indemnity Ins. Co., 10 F.R.D. 232 (S.D.N.Y. 1950).

95. Mitchell v. Roma, 265 F.2d 633 (3d Cir. 1959); United States v. Kohler Co., 9 F.R.D. 289 (E.D. Pa. 1949); Brewer v. Hassett, 2 F.R.D. 222 (D. Mass. 1942).

96. Kaeppler v. James H. Matthews & Co., 200 F.Supp. 229 (E.D. Pa. 1961); Sippit Cups, Inc. v. Michaels Creations, Inc., 180 F.Supp. 58 (E.D.N.Y. 1960); United States v. 47 Bottles, more or less, 26 F.R.D. 4 (D.N.J. 1960).

97. See note 93 *supra*.

98. 329 U.S. 495, 508, 91 L.Ed. 451, 461 (1947).

> equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions, or legal theories.

Therefore, the attorney-client privilege is not a "catch-all," but is generally limited to matters coming into the lawyer's possession by means of communications made to him by his client or advice given thereon to his client in the course of his professional employment. It extends only to communications between the attorney and client and not to correspondence, with other parties, in the attorney's possession;[99] nor to information and statements obtained by an attorney from third persons;[100] nor to communications between parties, between counsel for different parties, or between a party and counsel of another party,[101] nor to the dates of retainers of counsel;[102] nor to business transactions conducted by counsel while acting as a business agent for a party.[103] And one court has held that a corporation may not claim the attorney-client privilege on the grounds that it is purely personal and that the primary element of secrecy essential to a claim of this privilege is not possible with a corporation.[104]

Neither is a corporation protected by the privilege against self-incrimination.[105]

There is also a "governmental" privilege claimed by the United States, but discovery rules may be applied against the United States just as fully as against any other party.[106] Nevertheless, it should be remembered that material is privileged when its disclosure would be injurious to the public interest, and the government acts very broadly within the scope of this privilege. Therefore, for example, the identity

99. McCall v. Overseas Tankship Corp., 16 F.R.D. 467 (S.D.N.Y. 1954).
100. Gulf Constr. Co. v. St. Joe Paper Co., 24 F.R.D. 411 (S.D. Tex. 1959); McNelley v. Perry, 18 F.R.D. 360 (E.D. Tenn. 1956); Dumas v. Pennsylvania R.R., 11 F.R.D. 496 (N.D. Ohio 1951).
101. E. W. Bliss Co. v. Cold Metal Process Co., 1 F.R.D. 193 (N.D. Ohio 1940).
102. Danisch v. Guardian Life Ins. Co. of America, 18 F.R.D. 77 (S.D.N.Y. 1955); Steingut v. Guaranty Trust Co. of N. Y., 1 F.R.D. 723 (S.D.N.Y. 1941).
103. Comercio E Industria Continental, S.A. v. Dresser Indus., Inc., 19 F.R.D. 265 (S.D.N.Y. 1956).
104. Radiant Burners, Inc. v. American Gas Ass'n, 207 F.Supp. 771 (E.D. Ill. 1962).
105. Wilson v. United States, 221 U.S. 361, 55 L.Ed. 771 (1911); Hale v. Henkel, 201 U.S. 43, 5 L.Ed. 652 (1906).
106. United States v. Proctor & Gamble, 356 U.S. 677, 2 L.Ed.2d 1077 (1958); Warren v. United States, 17 F.R.D. 389 (S.D.N.Y. 1955); United States v. General Motors Corp., 2 F.R.D. 528 (N.D. Ill. 1942).

of persons who furnish information of violations of law to officers charged with enforcement of that law may be withheld,[107] and military and state secrets are protected from disclosure under Rule 33.[108]

Rule 30(b) provides that the court may make an order "that secret processes, development or research need not be disclosed." However, as can be seen, this is not an absolute bar to the revealing of such information but is a matter of discretion with the court. Rule 26(b) limits the scope of its examination to matters not privileged, but trade secrets and secret processes have at best a qualified privilege at common law.[109] Nevertheless, courts have frequently held that while there was no absolute right to refuse to divulge a trade secret, the court could protect against unnecessary disclosure in pretrial discovery proceedings without prejudice to a new determination at the trial.[110] However, a mere objection without proof that the matter sought will require a disclosure of secret processes is not a sufficient defense,[111] and this privilege has been refused altogether when it was felt that the information sought was relevant.[112]

Finally, any of these privileges may be waived by the client,[113] and where the court cannot clearly determine whether

107. Roviaro v. United States, 353 U.S. 53, 1 L.Ed.2d 639 (1957); United States v. Shubert, 11 F.R.D. 528 (S.D.N.Y. 1951); United States v. Kohler Co., 9 F.R.D. 289 (E.D. Pa. 1949). This is the so-called "informer's privilege."

108. United States v. Reynolds, 345 U.S. 1, 97 L.Ed. 727 (1953); Haugen v. United States, 153 F.2d 850 (9th Cir. 1946); Pollen v. Ford Instrument Co., 26 F.Supp. 583 (E.D.N.Y. 1939). Compare Royal Exchange Assur. v. McGrath, 13 F.R.D. 150 (S.D.N.Y. 1952).

109. V. D. Anderson Co. v. Helena Cotton Oil Co., 117 F.Supp. 932, 941 (E.D. Ark. 1953); 8 WIGMORE, EVIDENCE §2212 (3d. ed. 1940).

110. Korman v. Nobile, 184 F.Supp. 928 (W.D. Mich. 1960); International Nickel Co. v. Ford Motor Co., 15 F.R.D. 357 (S.D.N.Y. 1954); Glick v. McKesson & Robbins, Inc., 10 F.R.D. 477 (W.D. Mo. 1950); Lever Bros. v. Proctor & Gamble Mfg. Co., 38 F.Supp. 680 (D. Md. 1941); Cooney v. Guild Co., 1 F.R.D. 246 (S.D.N.Y. 1940).

111. Nekrasoff v. United States Rubber Co., 27 F.Supp. 953 (S.D.N.Y. 1939).

112. United States v. National Steel Corp., 26 F.R.D. 603 (S.D. Tex. 1960); Caldwell-Clements, Inc. v. McGraw-Hill Publishing Co., 12 F.R.D. 531 (S.D.N.Y. 1952); Radio Receptor Corp. v. General Motors Corp., 1 F.R.D. 167 (S.D.N.Y. 1939).

113. Attorney-Client: Magida v. Continental Can Co., 12 F.R.D. 74 (S.D.N.Y. 1951); Smith v. Bentley, 9 F.R.D. 489 (S.D.N.Y. 1949); Brockway Glass Co. v. Hartford-Empire Co., 2 F.R.D. 267 (W.D.N.Y. 1942); Knaust Bros. v. Goldschlag, 34 F.Supp. 87 (S.D.N.Y. 1939); physician-patient: Munzer v. Swedish Am. Line, 35 F.Supp. 493 (S.D.N.Y. 1940); governmental privilege: Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958); United States v. Continental Can Co., 22 F.R.D. 241 (S.D.N.Y. 1958); Durkin v. Pet Milk Co., 14 F.R.D. 385 (W.D. Ark. 1953).

a privilege exists, decision of the question will be postponed until the factual picture in which the privilege is claimed has been clearly developed. [114] And one court has held that it will not restate interrogatories which call for information which is partly privileged and partly not privileged.[115]

Naturally, the party claiming the existence of the privilege has the burden of establishing its existence,[116] and foreign law or foreign privilege is not a valid excuse for a refusal to answer.[117]

E. Those That Seek Information Which Might Tend to Disprove the Answering Party's Case

In *United States v. Renault, Inc.*,[118] the court held that the plaintiff would not be compelled for defendant's benefit to seek evidence in response to defendant's interrogatories which might tend to disprove the violations alleged in plaintiff's complaint.[119]

F. Those That Depend Upon Previous Interrogatories Which Should Be Denied

Interrogatories which are expressly made to depend upon the allowability of several parts of a previous interrogatory must fail where the previous interrogatory is denied,[120] and objections have been sustained to interrogatories where the answers would be useful only in connection with information sought by other improper interrogatories,[121] Naturally, the success of these objections depends upon the court's treatment of the objections to the items on which these interrogatories depend.

114. St. Clair v. Eastern Air Lines, Inc., 21 F.R.D. 330 (S.D.N.Y. 1958). See also Lewis v. United Air Lines Transp. Corp., 27 F.Supp. 946 (D.Conn. 1939).
115. Terrell v. Standard Oil Co., 5 F.R.D. 146 (E.D. Pa. 1945).
116. Mattson v. Cuyuna Ore Co., 178 F. Supp. 653 (D. Minn. 1959). *Cf.* McNeice v. Oil Carriers Joint Venture, 22 F.R.D. 14 (E.D. Pa. 1958).
117. Societe Int'l Pour Participations Indus. et Commerciales, S.A. v. McGrath, 9 F.R.D. 680 (D.D.C. 1950) (Banker's privilege under Swiss law).
118. 27 F.R.D. 23 (S.D.N.Y. 1960).
119. *Cf.* United States v. General Motors Corp., 121 F.2d 376, 405 (7th Cir. 1941), *cert. denied*, 314 U.S. 618, 86 L.Ed. 497 (1941).
120. Richards v. Maine Cent. R.R. 21 F.R.D. 590 (D. Me. 1957).
121. Savannah Theatre Co. v. Lucas & Jenkins, 10 F.R.D. 461 (N.D. Ga. 1943).

G. THOSE THAT SEEK INFORMATION OCCURRING AFTER COMMENCEMENT OF THE ACTION

It has been held that matters occurring after the cause of action arises or after the action is brought are not properly subject to interrogatories.[122] However, there is contra authority to the effect that such examination is proper in that matters occurring after the date of the complaint may be made directly relevant by supplemental pleadings.[123]

H. THOSE THAT SEEK UNAVAILABLE INFORMATION AND WHICH REQUIRE BURDENSOME AND EXPENSIVE RESEARCH AND INVESTIGATION

As a general rule, a party must furnish information which is in his knowledge, possession, or control and can be obtained without great labor and expense.[124] However, as pointed out in *Ritepoint Co. v. Secretary Pin Co.*,[125] "... the rule [Rule 33] should not be so applied as to require a party to prepare for his adversary, in advance of trial, a complete summary of the evidence which will be presented at the trial of the action on the merits."

Therefore, if the interrogatories require extensive investigations, research, or compilation of data which would be unduly burdensome or expensive, they are frequently disallowed.[126] Also, objections are often sustained when the interrogatories require a party to examine its own records and to compile and correlate information therefrom for the benefit

122. Singer Mfg. Co. v. Brother Int'l Corp., 191 F.Supp. 322 (S.D.N.Y. 1960); Stanzler v. Loew's Theatre & Realty Corp., 19 F.R.D. 286 (D.R.I. 1955); Cinema Amusements, Inc. v. Loew's, Inc., 7 F.R.D. 318 (D. Del. 1947); Massachusetts Bonding & Ins. Co. v. Harrisburg Trust Co., 2 F.R.D. 197 (N.D. Pa. 1941).

123. United Cigar-Whelan Stores Corp. v. Philip Morris, Inc., 21 F.R.D. 107 (S.D.N.Y. 1957); Mall Tool Co. v. Sterling Varnish Co., 11 F.R.D. 576 (W.D. Pa. 1951); Conmar Prods. Corp. v. Lamar Slide Fastener Corp., 2 F.R.D. 154 (S.D.N.Y. 1941).

124. Tivoli Realty, Inc. v. Paramount Pictures, Inc., 10 F.R.D. 201 (D. Del. 1950); Brown v. Dunbar & Sullivan Dredging Co., 8 F.R.D. 107 (W.D.N.Y. 1948); Cinema Amusements v. Loew's, Inc., 7 F.R.D. 318 (D. Del. 1947).

125. 94 F.Supp. 457, 458 (D.N.J. 1950). *Accord*, United States v. Renault, Inc., 27 F.R.D. 23 (S.D.N.Y. 1960); United States v. Owens-Illinois Glass Co., 25 F.R. Serv. 33.31, Case 1 (N.D. Ohio 1957); Fishermen & Merchants' Bank v. Burin, 11 F.R.D. 142 (S.D. Cal. 1951).

126. See, *e.g.*, Konczakowski v. Paramount Pictures, Inc., 20 F.R.D. 588 (S.D.N.Y. 1957); Tivoli Realty, Inc. v. Paramount Pictures, Inc., 10 F.R.D. 201 (D. Del. 1950); Porter v. Montaldo's, 71 F.Supp. 372 (S.D. Ohio 1946).

of the interrogating party when such party has a right to investigate such records.[127]

However, it is no defense to merely assert that the preparation of the answer is burdensome or onerous; there must be a specific showing of reasons why the interrogatories should not be answered.[128] And even with such a showing, courts still tend to weigh the annoyance and expense involved against the value of the information sought.[129]

A different problem arises when the information is not within the knowledge, control, or possession of the interrogated party. In such cases, a party is not required to answer inquiries when the information sought is not readily available,[130] or must be acquired from a third party over whom he has no control,[131] or must be obtained from an independent source[132] — especially if the information is equally available to the interrogating party.[133] As stated in *Aktiebolaget Vargos v. Clark*,[134] "A litigant may not compel his adversary to go to work for him."

I. THOSE THAT SEEK THE PRODUCTION OF DOCUMENTS

This has already been fully discussed under section III(c) of this article where it was noted that, as a general rule, copies may not be obtained by interrogatories under Rule 33.[135]

However, it was also previously pointed out that some courts will require the production of documents in connection with

127. H. K. Porter, Inc. v. Bremer, 12 F.R.D. 187 (N.D. Ohio 1951); Wagner Mfg. Co. v. Cutler-Hammer, Inc., 10 F.R.D. 348 (S.D. Ohio 1950); Porter v. Central Chevrolet, Inc., 7 F.R.D. 86 (N.D. Ohio 1946).

128. Woods v. Kornfeld, 9 F.R.D. 196 (N.D. Pa. 1949); Bowles v. Safeway Stores, Inc., 4 F.R.D. 469 (W.D. Mo. 1945); Boysell Co. v. Hale, 30 F.Supp. 255 (E.D. Tenn. 1939).

129. Banana Distribs., Inc. v. United Fruit Co., 19 F.R.D. 493 (S.D.N.Y. 1956); United States v. Imperial Chem. Indus., Inc., 8 F.R.D. 551 (S.D.N.Y. 1949).

130. Tobacco & Allied Stocks v. TransAmerica Corp., 16 F.R.D. 537 (D. Del. 1954); Mall Tool Co. v. Sterling Varnish Co., 11 F.R.D. 576 (W.D. Pa. 1951); Chemical Foundation, Inc. v. Universal-Cyclops Steel Corp., 1 F.R.D. 533 (W.D. Pa. 1941).

131. Cities Serv. Oil Co. v. Standard Towing Corp., 8 F.R.D. 421 (S.D.N.Y. 1948).

132. Cinema Amusements, Inc. v. Loew's, Inc., 7 F.R.D. 318 (D. Del. 1947).

133. Konczakowski v. Paramount Pictures, 20 F.R.D. 588 (S.D.N.Y. 1957); Leonia Amusement Corp. v. Loew's, Inc., 18 F.R.D. 503 (S.D.N.Y. 1955); Pappas v. Loew's, Inc., 13 F.R.D. 471 (N.D. Pa. 1953). *But see* Wolf v. Dickinson, 16 F.R.D. 250 (E.D. Pa. 1953).

134. 8 F.R.D. 635, 636 (D.D.C. 1949).

135. See note 40 *supra*.

interrogatories when a sufficient showing of good cause has been made which would justify production under Rule 34[136] with one court stating that it would simply treat the interrogatories as a motion for the production of documents under this rule.[137]

J. THOSE THAT SEEK THE LAWYER'S "WORK PRODUCT"

The most litigated and most troublesome question relating to the scope of discovery under the Federal Rules is the extent to which a party may inspect or discover information, statements, reports, or other documents obtained or prepared by the adversary's insurer, agent, or attorney in anticipation of litigation or in preparation for trial. However, this problem will receive only limited treatment in this note, for most of the questions arising under the "work product" doctrine concern the production of documents or reports under Rules 34 and 45.

In the celebrated case of *Hickman v. Taylor*,[138] the Court stated:

> . . . the protective cloak of this privilege [attorney-client] does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel, for his own use in prosecuting the client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.

Then, having decided that the "work product" of the lawyer in preparation for trial was not privileged, the Court provided safeguards against wholesale demands for discovery of such materials by formulating its rule that there had to be a showing of "necessity or justification" before discovery of the attorney's "work product" would be permitted.[139]

However, the application of the "work product" doctrine has proved to be difficult and, in some instances, inconsistent.

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136. See note 45 *supra*.
137. V. D. Anderson Co. v. Helena Cotton Oil Co., 117 F.Supp. 932 (E.D. Ark. 1954).
138. 329 U.S. 495, 508, 91 L.Ed. 451, 460 (1947).
139. *Id.* at 509-510, 91 L.Ed. 451, 461-462.

Since the Supreme Court did not lay down a firm rule as to the scope of discovery in the area of trial preparation materials, the true breadth of the power of inquiry in this field has been hammered out on a case-by-case basis, with one court saying that the *Hickman* case has opened a "veritable Pandora's Box."[140]

Although the Court's opinion in *Hickman v. Taylor* was carefully limited to the question of discovery of information and statements obtained by an attorney, other courts have given the decision a broad application, treating it as controlling in situations not involving access to an attorney's files. However, to the extent that it places limitations upon discovery, the *Hickman* case is direct authority only in the particular class of cases where one party is seeking the production and inspection of statements and other material acquired by his adversary's attorney in anticipation of litigation or in preparation for trial.[141]

It is generally considered that the "work product" rule only applies to material obtained by the lawyer personally, and there is a qualified immunity only where such material was the result of a basic professional relationship between the lawyer who obtained the information and the party, or where the training, skill, or knowledge of a lawyer was required to obtain the information.[142] Communications and information, both oral and written which were exchanged between defense attorneys in separate, consecutive actions by the same plaintiff were held to be within the "work product" principle,[143] and mental impressions or opinions of a lawyer are, for all practical purposes, absolutely immune from discovery.[144] However, the qualified immunity afforded by the

140. Vironi v. Wheeling & L. E. Ry., 10 F.R.D. 45, 47 (N.D. Ohio 1950).

141. See, *e.g.*, Gulf Constr. Co. v. St. Joe Paper Co., 24 F.R.D. 411 (S.D. Tex. 1959), where the court held that certain documents fell outside the *Hickman* rule because they were not personally prepared by the lawyer.

142. E. I. DuPont de Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416 (D. Del. 1959); Gulf Constr. Co. v. St. Joe Paper Co., *supra* note 141; Bifferato v. States Marine Corp. of Del., 11 F.R.D. 44 (S.D.N.Y. 1951); Cogdill v. Tennessee Valley Authority, 7 F.R.D. 411 (E.D. Tenn. 1947).

143. Transmirra Prods. Corp. v. Monsanto Chem. Co., 26 F.R.D. 572 (S.D.N.Y. 1960).

144. Hickman v. Taylor, 329 U.S. 495, 512, 91 L.Ed. 451, 463 (1947); Tobacco & Allied Stocks v. TransAmerica Corp., 16 F.R.D. 537 (D. Del. 1954); *In Re* Prudence-Bonds Corp., 76 F.Supp. 643 (E.D.N.Y. 1948); Dean v. Superior Court; 84 Ariz. 104, 324 P.2d 765 (1958).

"work product" rule is lost when the protected information is voluntarily disclosed to a third person.[145]

It is difficult to generalize as to what an appropriate showing of "necessity or justification" is, for this would depend on the facts of the particular case. However, it has been stated that there is a greater burden under the "work product" doctrine than there is under the Rule 34 requirement of a "good cause" showing.[146]

In conclusion, it should be pointed out that a decision that particular matter is not a part of the "work product" of a lawyer does not mean that discovery as to that matter will automatically be allowed. Where documents are involved, the "good cause" requirement of Rule 34 must still be satisfied. However, if documents are not involved and "work product" immunity is not found, it is no longer necessary to make a special showing of necessity or justification to obtain discovery.

Even where the "work product" doctrine is found to be applicable, it protects only documents obtained by or for an attorney in anticipation of litigation or in preparation for trial, and his mental impressions or conclusions. It still does not provide a shield against discovery by interrogatories of the facts relevant to the subject matter of the suit, or of the persons from whom such facts may be obtained, or of the existence or non-existence of documents or other tangible matter.

SUMMARY

The scope of discovery under Rule 33 of the Federal Rules of Civil Procedure is quite broad, and interrogatories propounded under this rule are given liberal treatment by the courts. To fully judge the power granted by this rule, it is necessary to read it in pari materia with Rules 26 and 34.

145. United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich. 1954). Compare Transmirra Prods. Corp. v. Monsanto Chem. Co., *supra* note 143. See also Vilastor-Kent Theatre Corp. v. Brandt, 19 F.R.D. 522 (S.D.N.Y. 1956), where the court held that the waiver of the attorney-client privilege does not of itself constitute a waiver of the qualified immunity from discovery of the "work product."

146. E. I. DuPont de Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416 (D. Del. 1959). See also 2A BARRON & HOLTZOFF, FED. PRACTICE & PROCEDURE 145 (1961), where it is stated that "the *Hickman* case clearly suggests that a stronger showing is required for production of the lawyer's work product than would be required for production of run-of-the-mill documents."

When served with a set of interrogatories, a lawyer has the following courses of action available to him: he may object to the set of interrogatories as a whole; or he may answer some of the questions in part, while objecting to the remaining portions of the same items; or he may object to certain items in their entirety; and he will answer those questions which fall within the scope of Rule 33.

In deciding which interrogatories to answer and which ones to refuse, an attorney is faced with the difficult task of weighing conflicting district court decisions, with little comfort from the paucity of appellate court rulings. Nevertheless, there is a pattern in the cases, and the following would seem to be the "general rules":

I. Interrogatories which should be answered:
   - A. Those that seek "relevant" information
   - B. Those that seek the identity and location of witnesses
   - C. Those that seek the identity and location of documents or other tangible things
   - D. Those that seek the particularization of pleadings
   - E. Those that seek information relating to the jurisdiction of the court
   - F. Those that seek information relating to the matter of damages

II. Interrogatories which may be refused:
   - A. Those that seek irrelevant information
   - B. Those that call for conclusions, comparisons, or opinion
   - C. Those that seek redundant or repetitious information
   - D. Those that seek privileged matter
   - E. Those that seek information which might tend to disprove the answering party's case
   - F. Those that depend upon previous interrogatories which should be denied
   - G. Those that seek information occurring after commencement of the action

H. Those that seek unavailable information and require burdensome and expensive research and investigation

I. Those that seek the production of documents

J. Those that seek the lawyer's "work product"

It should be pointed out, however, that the aforementioned "general rules" are only guides, for it is difficult to state with any certainty when an objection to an interrogatory will be sustained or refused. The definite trend is toward broad discovery, but there are, of course, limits, and these limits lie within the discretion of the court. Bearing in mind that the burden of proof is on the objecting party to make specific complaints to the interrogatories, it may at times be better to reply, "I don't know." If done in good faith and under oath in accordance with Rule 33, this is a valid answer.

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