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DISCOVERY IN ILLINOIS AND FEDERAL COURTS

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INTRODUCTION

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

In order for the verdict to be arrived at fairly, two conditions must be met. First, there must be mutual knowledge of all rele-

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

2. G. RAGLAND, JR., DISCOVERY BEFORE TRIAL ch. II, at 11 (1932).

3. Hickman v. Taylor, 329 U.S. 495, 516 (1947).

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

vant facts,[5] so that all such facts may be presented to the trier of fact. Second, there must be appropriate procedural devices so that such facts may be presented in an orderly manner. In the past, regulations of pleading and rules of evidence aimed at accomplishing these purposes. Under the "sporting theory"[6] of litigation then prevalent, knowledge of facts was obtained by pretrial investigation and by examination of witnesses at trial. Emphasis was placed on the frustration of mutual knowledge and perversion of orderly presentation of facts. The "sporting theory" muddled issues, confounded jurors, and led to a general distrust of litigation.[7] The devices finally settled upon to ensure mutual knowledge and orderly presentation of facts were those of discovery. They have evolved out of the difference in presenting evidence in equity and at law.[8]

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5. Hickman v. Taylor, 329 U.S. 495, 507 (1947); Biehler v. White Metal Rolling and Stamping Corp., 30 Ill. App. 3d 435, 441-42, 333 N.E.2d 716, 721-22 (1975), wherein the court stated:

> The purpose of discovery rules is to enable attorneys to better prepare and evaluate their cases. Ascertainment of truth and ultimate disposition of the law suit is better accomplished when parties are well educated as to their respective claims in advance of trial. The purposes of litigation are best served when each party knows as much about the controversy as is reasonably practicable; pretrial discovery procedures are intended to enhance the truth seeking process and good faith compliance with such procedures is both desirable and necessary.

Id.

6. Note, *Monier v. Chamberlain: Work Product—Further Erosion of the Work Product Sanctuary*, 1 JOHN MAR. J. PRAC. & PROC. 146, 148 (1967).

7. The sporting theory:

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

Harris, *The Rule-Making Power*, 2 F.R.D. 67, 77 (1941).

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

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

> Discovery in the specific sense now in question was something unknown to the Germanic law. Because of the very nature of its proof-system that law had no means of compelling one party to make disclosure for the benefit of the other. . . . It is, therefore, to the Roman law

Purposes of Discovery

The ultimate purpose of discovery, which requires full disclosure of facts, is to increase the probability of obtaining a fair decision on the merits of the litigation.[9] To this end discovery is compatible with the purpose of the common law trial. It is not a rejection, but rather a refinement, of the traditional adversary system.[10] To the extent that it rejects those limitations which frustrate the purpose of the common law trial, however, it is a rejection of the sporting theory of litigation.[11]

In order to ensure their ultimate purpose, discovery devices are designed: (1) to provide an adequate means of investigation, in order to obtain facts otherwise unavailable and to avoid surprise and perjury; (2) to give notice of claims and defenses and to narrow the issues, in order to expedite and reduce the cost of litigation; (3) to record and preserve facts; and, collaterally, (4) to encourage settlements.[12]

The common law depended almost entirely upon pleadings to give advance notice of claims and defenses of the parties and

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that we must go for the earliest recorded use of discovery . . . the *interrogation in iure*.

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

Millar, *The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure*, 32 ILL. L. REV. 261, 262-63 (1937) (emphasis in the original).

9. Hickman v. Taylor, 329 U.S. 495 (1947). *See also* Donovan v. Prestamos Presto Puerto Rico, 91 F.R.D. 222 (D.P.R. 1981); T.E. Quinn Truck Lines, Ltd. v. Boyd, Weir & Sewell, 91 F.R.D. 176 (W.D.N.Y. 1981).

10. Note, *Monier v. Chamberlain: Work Product—Further Erosion of the Work Product Sanctuary*, 1 JOHN MAR. J. PRAC. & PROC. 146, 154 (1967).

11. Coutrakon v. Distenfield, 21 Ill. App. 2d 146, 152, 157 N.E.2d 555, 558 (1959).

By its enactment of section 58(2) the General Assembly showed its purpose to broaden substantially the scope of available discovery. It acted in response to prevailing dissatisfaction with the procedural doctrines which had exalted the role of a trial as a battle of wits and subordinated its function as a means of ascertaining the truth.

Krupp v. Chicago Transit Authority, 8 Ill. 2d 37, 41, 132 N.E.2d 532, 535 (1956).

Pretrial discovery is designed to permit exploration and to avoid surprise. . . . It is directed toward making the judicial process one of determining the facts appertaining to the issue and rendering a just decision thereon, rather than the promotion of a battle of wits between counsel.

Pink v. Dempsey, 350 Ill. App. 405, 411, 113 N.E.2d 334, 336 (1953).

12. Hickman v. Taylor, 329 U.S. 495 (1947); Note, *Monier v. Chamberlain: Work Product—Further Erosion of the Work Product Sanctuary*, 1 JOHN MAR. J. PRAC. & PROC. 146, 148 (1967).

to limit the issues.[13] Discovery devices supplement the notice function of pleadings[14] by making available evidentiary facts not otherwise accessible. With the facts available, groundless claims and defenses can be weeded out, the real issues illuminated and the presentation of evidence at trial facilitated.[15] All this, in turn, expedites litigation and reduces its cost[16]—at least in theory.

The extent to which discovery actually does expedite litigation and reduce its cost is questionable.[17] In one case, "one interrogatory out of hundreds served would have required an answer including almost one million items."[18] In another case,

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13. Pleadings are designed to advise the court and the adverse parties of the issues involved and what is relied on as a cause of action, in order that the court may declare the law and that the adverse parties may be prepared to meet the issues.

Yeates v. Daily, 13 Ill. 2d 510, 514, 150 N.E.2d 159, 161 (1958).

14. Conley v. Gibson, 355 U.S. 41 (1957). "[T]he modern philosophy of pleading . . . has reduced the requirements of the petition and left for discovery and other pretrial procedures the opportunity to flesh out claims and to define more narrowly the disputed facts and issues." *Id.* at 47. *See* Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126 (5th Cir. 1959); Japanese War Notes Claimants Ass'n of Phil., Inc. v. United States, 373 F.2d 356, 359 (Ct. Cl. 1967). *But cf.* McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A.J. 123 (1952).

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

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

Fanning v. Lemay, 78 Ill. App. 2d 166, 171-72, 222 N.E.2d 815, 817 (1966), *rev'd in part on other grounds*, 38 Ill. 2d 209, 222 N.E.2d 815 (1967).

16. *Developments in the Law—Discovery*, 74 HARV. L. REV. 940 (1961).

17. SEGAL, SURVEY OF LITERATURE OF DISCOVERY FROM 1970 TO PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS *passim* (Fed. Judicial Center 1978); Armstrong, *The Use of Pretrial and Discovery Rules: Expedition and Economy in Federal Civil Cases*, 43 A.B.A.J. 693 (1957), *citing* JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE REPORT—PROCEDURE IN ANTI-TRUST AND OTHER PROTRACTED CASES (1951), 13 F.R.D. 62 (1953). *See also* Fine Arts Distributors v. Hilton Hotel Corp., 89 Ill. App. 3d 881, 884, 412 N.E.2d 608, 610 (1980), wherein the court stated that "any attempt by counsel to use discovery for strategic delay or calculated misinformation corrupts the truth-seeking process and must be sternly rebuked." *Id.*

18. Armstrong, *The Use of Pretrial and Discovery Rules: Expedition and Economy in Federal Civil Cases*, 43 A.B.A.J. 693, 695 (1957) *referring to* Zenith Radio Corp. v. Radio Corp. of America, 106 F. Supp. 561 (D. Del. 1952).

"the interrogatories and answers, nearly all printed but partly typewritten, are about nine inches thick."[19] It may well be that discovery—at least as sometimes employed—merely shifts the cost and time of litigation from the trial itself to the pretrial period.

To obtain facts, the common law relied on extra-judicial investigation and examination of witnesses at trial. Extra-judicial investigation did not require court intervention.[20] But the effectiveness of extra-judicial investigation depends to a great extent on the cooperation of prospective witnesses. The examination, if any, of uncooperative witnesses is limited by the rules of evidence at trial. Discovery provides a judicially sanctioned means of investigation without all the limitations of evidentiary rules. As a result, discovery both increases the probability that all facts will be presented to the trier of fact and decreases the likelihood of surprise[21] and perjury.[22]

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19. United States v. Aluminum Co. of America, 44 F. Supp. 97, 104 (S.D.N.Y. 1941).

20. Int'l Business Mach. Corp., v. Edelstein, 526 F.2d 37 (2nd Cir. 1975) (writ of mandamus issued against Judge Edelstein for interfering with a party's "time honored and decision honored" right to conduct an investigation).

21. "Pretrial discovery is designed to permit exploration and to avoid surprise. . . ." Pink v. Dempsey, 350 Ill. App. 405, 411, 113 N.E.2d 334, 336 (1953); "One advantage of discovery is the protection it gives the adversary against surprise." F. JAMES, JR., CIVIL PROCEDURE § 6.2, at 183 (1965), *citing* 6 J. WIGMORE, EVIDENCE § 1845 (3d ed. 1940). *But cf.* Mort v. A/S D/S Svendborg, 41 F.R.D. 225 (E.D. Pa. 1966), in which the plaintiff propounded several interrogatories to defendant in a personal injury case to determine the extent of defendant's knowledge of plaintiff's physical condition both before and after the occurrence on which the case was brought. The court in striking the interrogatories states:

> [I]t is apparent that the object of these interrogatories is not to discover facts in the discovery sense of the word, but instead to frustrate an effective cross-examination and to avoid the possibility of impeachment. Such was not the intent of the framers of our rules of discovery.

Id. at 227-28. *See also* E. I. Du Pont De Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416 (D. Del. 1959).

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

Id. at 422. *Contra* Norfin, Inc., v. International Business Mach. Corp., 74 F.R.D. 529, 532 (D. Colo. 1977); Monier v. Chamberlain, 35 Ill. 2d 351, 221 N.E.2d 410 (1966). *See also* Annot., 18 A.L.R. 3d 922 (1969).

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

Nevertheless, it has been suggested that pretrial discovery of evidence actually promotes perjury.[23] Critics point to a tendency, on the part of unscrupulous counsel, to encourage witnesses to style their testimony at trial so that it corresponds to statements sworn to at pretrial. The witness, once on the stand, will have been coached to adhere to his pretrial statements in order to avoid a charge of false swearing. Moreover, by eliminating the element of surprise, pretrial discovery is said to facilitate rehearsed, or worse, manufactured testimony.[24] However, "[o]nly where a limited or unequal discovery obtains has it been found that perjury, manufactured testimony, and kindred evils are fostered."[25] Full and fair pretrial disclosure affords each party an equal opportunity to manipulate testimony and to field questions at cross-examination. All things being equal, "there seems no reason to think that the chance [to perjure] invited by disclosure on the one hand is any greater than the chance protected by surprise on the other."[26]

Another discovery objective is the recordation and preservation of evidence that might otherwise be unavailable at trial.[27] Moreover, evidence is more likely to be accurately recorded "while the events . . . are fresher."[28] But, in light of the informal nature of the preliminary examination and the likelihood that the party will say more than he would in court, it may in fact retard rather than advance the probability of a fair trial.[29] "In a jury trial, a statement which is harmless legally may be quite prejudicial in the minds of the jury, and the fresh, uncoached testimony of a witness or party may be farther from the truth than well considered testimony given at the trial."[30] Proper preparation for discovery procedures—preparation which may

23. Comment, *Discovery: The Illinois Civil Practice Act and Iowa Procedure*, 19 IOWA L. REV. 589, 595 (1934), *citing Report of Committee on Legislation for 1913*, 4 MASS. B. ASS'N PROC. 105 (1914).

24. Hawkins, *Discovery and Rule 34: What's So Wrong About Surprise?*, 39 A.B.A.J. 1075, 1077 (1953).

25. G. RAGLAND, JR., DISCOVERY BEFORE TRIAL 251-52 (1932).

26. F. JAMES, JR., CIVIL PROCEDURE § 6.2, at 183 (1965).

27. Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940 (1961).

28. P. DYER-SMITH, FEDERAL EXAMINATIONS BEFORE TRIAL & DEPOSITIONS PRACTICE 5 (1939).

29. Kristel v. Michigan Cent. R.R. Co., 213 Ill. App. 518 (1919). *See also* Comment, *Discovery: The Illinois Civil Practice Act and Iowa Procedure*, 19 IOWA L. REV. 589, 595-96 (1934).

30. Comment, *Discovery: The Illinois Civil Practice Act and Iowa Procedure*, 19 IOWA L. REV. 589, 596 (1934). *See also* LaCoss v. Town of Lebanon, 78 N.H. 413, 416, 101 A. 364, 366 (1917). "Experience has shown that compelling a witness to produce a material writing at a given stage in the proceedings sometimes tends to prevent the discovery of the truth."

be more intense, in some cases, than the ensuing trial—is a prerequisite for avoidance of such difficulties.

Despite the fact that "[c]ompromise settlement is not the aim of the discovery rules[,] [t]here is a body of opinion that holds to the belief that it is a by-product of the discovery rules."[31] This "body of opinions" asserts that discovery aids voluntary dismissals[32] and settlements.[33] There are, however, differing opinions as to the extent of discovery's contribution to dismissals or settlements.[34] "A plaintiff's lawyer, unless he is awfully dumb, knows that the average defendant, if harassed by a lawsuit, will sooner or later throw in the sponge and, as a business expedient, make some kind of settlement."[35] Of course, the same is true of a defendant's lawyer who abuses discovery and uses it merely as an economic weapon to force unfair or unjust

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31. Cooper v. Stender, 30 F.R.D. 389, 393 (E.D. Tenn. 1962).

32. Zolla v. Grand Rapids Store Equip. Corp., 46 F.2d 319, 320 (S.D.N.Y. 1931).

33. McDermott, *Discovery Examination Before Trial—History, Scope, and Practice*, 21 MARQ. L. REV. 1, 3 (1936). "The party may find that he has no grounds for relief and may thus avoid expensive litigation." Ragland, *Discovery Before Trial Under the Illinois Civil Practice Act*, 28 ILL. L. REV. 875, 891 (1934). "Settlements are increased. A great many cases are eliminated before they reach the trial dockets." *Cf.* People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957).

> They were adopted as procedural tools to effectuate the prompt and just disposition of litigation, by educating the parties in advance of trial as to the real value of their claims and defenses.
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> . . . .
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> It is not inconceivable that a plaintiff with serious injuries would settle a substantial judgment against a defendant of modest means for a fractional sum, simply because he had no knowledge of any additional rights against the insurer. Thus, to deprive an injured party from learning of his rights against an insurer would, in effect, nullify the benevolent purpose of such statutes. . . .

Id. at 236-38, 145 N.E.2d at 592-93.

34. "Minnesota lawyers agree that discovery contributes to settlements before trial but disagree as to the extent of the contribution." Note, *Discovery: Boon or Burden*, 36 MINN. L. REV. 364, 372 (1952).

35. Hawkins, *Discovery and Rule 34: What's So Wrong About Surprise?*, 39 A.B.A.J. 1075, 1076 (1953). *See also* Armstrong, *The Use of Pretrial and Discovery Rules: Expedition and Economy in Federal Civil Cases*, 43 A.B.A.J. 693 (1957).

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

Id. at 695-96.

settlements. The same advantage can be obtained, however, by the mere threat of the trial with its attendant dangers of surprise and perjury.

SCOPE AND LIMITATIONS

The present scope of discovery in the Illinois and federal courts is far broader than that formerly available in equity and under the early statutes.[36] The Illinois Supreme Court Rules[37] and the Federal Rules of Civil Procedure[38] generally define the *scope of discovery to include any matter relevant to the subject matter of the pending action*, unless precluded by limitations such as the "work product" exemption, the "privilege" status of confidential communications, or "good cause."[39]

The limitation of fairness—the notion that the more adept adversary should be permitted to retain an informational advantage—has been dispelled in both the Illinois[40] and federal[41] courts on the basis that discovery is mutually available. Under the Illinois rules, fairness is strictly a monetary consideration. "The court may apportion the cost involved in originally securing and in furnishing the discoverable material, including when

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

37. "Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action. . . ." ILL. REV. STAT. ch. 110A, § 201(b)(1) (1979).

38. "[A]ny matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ." FED. R. CIV. P. 26(b).

39. *In re* San Juan Star Co., 662 F.2d 108 (1st Cir. 1981). The further limitation of protective orders gives the court broad powers to control the use of the discovery process and to prevent its abuse. It provides the necessary flexibility to ensure that the spirit of the rules will not be frustrated by a literal application of the rules to the prejudice of any party or persons. For example, the courts may require using interrogatories instead of depositions; they may reschedule the time or place of depositions; and may take appropriate measures to prevent the unnecessary disclosure of trade secrets or other such material. *See* ILL. REV. STAT. ch. 110A, § 201(c) (1979); FED. R. CIV. P. 26(c). *See also* Casson Constr. Co., Inc. v. Armco Steel Corp., 91 F.R.D. 376 (D. Kan. 1981); DeAntonio v. Solomon, 41 F.R.D. 447 (D. Mass. 1966). "It is clear that the scope of pretrial discovery is circumscribed by the privilege against self-incrimination." *Id.* at 449.

40. "We appreciate that application of the rules as here construed may occasionally penalize diligent counsel and reward his slothful adversary. But discovery rules work both ways. . . ." Monier v. Chamberlain, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966).

41. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." Hickman v. Taylor, 329 U.S. 495, 507 (1947).

appropriate a reasonable attorney's fee, in such manner as is just."[42] The current federal rules contain a comparable provision.[43]

The liberalization of the rules, however, has not been without some disapproval. Rule 26(b) has been criticized as overbroad and conducive to the abuse of pretrial discovery tactics, resulting in judicial delay, excessive cost, and undesirable settlements.[44] In an effort to narrow the scope of discovery under Rule 26, an ABA Report[45] recommended that discovery be limited to "any matter, not privileged, which is relevant to the *issues* raised by the *claims or defenses* of any party."[46] The Committee concluded that "sweeping and abusive discovery is encouraged by permitting discovery confined only by the "*subject matter*" of a case (existing Rule 26 language) rather than limiting it to the "issues" presented.[47]

The Advisory Committee on Civil Rules, however, concluded that the recommendation contained in the ABA Report was not worthy of submission to the bench and bar for comment.[48] The Advisory Committee's summarized response to the proposed change was that the present rule works well. Several members disputed the assumption that there was general abuse of discovery. Others asserted that abuse is limited to big or complex cases, which represent only a small percentage of all litigation and can be better managed through use of the Manual for Complex Litigation. It was thought that a change in language would lead to endless dispute and uncertainty about the meaning of the terms "issues" and "claims or defenses." It was pointed out that discovery could not be restricted to issues because its purpose, in many cases, is the determination of issues (*e.g.*, in wrongful death, product liability and medical malpractice suits). Many commentators feared that if discovery were restricted to issues or claims or defenses there would be a return to detailed pleading or a resort to "shotgun" pleading, with multitudes of issues, claims and defenses, leading to an increase in discovery motions without any reduction in discovery.[49]

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42. ILL. REV. STAT. ch. 110A, § 201(b)(2) (1979).

43. FED. R. CIV. P. 26(b)(4)(C).

44. *See* ABA, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE SECTION OF LITIGATION (Oct. 1977).

45. *Id.*

46. *Id.* at 2.

47. *Id.* at 3.

48. AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, ADVISORY COMMITTEE COMMENTS, 85 F.R.D. 521, 539 (1980).

49. *Id.* at 541.

Simply stated, there is no present empirical indication that the "changes suggested so far would be of any substantial benefit."[50] The Committee, however, did not wish to end the search for an effective means of curbing discovery abuse. For example, the Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, the Committee on Rules of Practice and Procedure added the following to Rule 26(b)(1):

> The frequency or extent of use of the discovery methods set forth in subdivision (a) may be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is either more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, the parties' available resources, and the values at stake in the litigation. The court may act upon its own initiative or pursuant to a motion under subdivision (c).[51]

The drafters believed that greater judicial involvement in the discovery process would be effective in guarding against redundant or disproportionate discovery and would reduce the amount of discovery allowed.[52] Notably, this proposed change seeks to limit potentially boundless discovery procedures via judicial intervention and not by restricting the scope of discovery to issues presented in the claim or defense.

Relevance

The term "relevant" (or, more properly, "legally relevant") is used in the law of evidence to connote admissibility at trial. Used as a criterion for discovery, "relevance" is definitionally broader. The federal rule states that material need not be "legally relevant" in terms of admissibility in order for it to be "relevant" as an object of discovery.[53] By judicial decision, Illinois has accepted the same proposition.[54]

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50. *Id.* at 542.

51. PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 90 F.R.D. 451, 479 (June 1981).

52. *Id.* at 482. For an excellent statement and analysis of the cumulative use of discovery devices, *see* Richlin v. Sigma Design West, Ltd., 88 F.R.D. 634 (E.D. Cal. 1980).

53. "It is not ground for objection that the information [sought to be discovered] will be inadmissible at the trial." FED. R. CIV. P. 26(b)(1).

54. "[W]e must reject at once as authority those cases limiting pretrial discovery to matters admissible in evidence [citations omitted] as being contrary to both the terms and intent of the Rule [former Ill. Sup. Ct. Rule 19-4(1)]." People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 237, 145 N.E.2d 588, 592 (1957).

The usual test determines whether the material sought by discovery is "relevant" to the subject matter involved in the pending action. "Subject matter" is a broader category than the precise issues presented by the pleadings.[55] " '[R]elevant to the subject matter' contemplates either evidence to be introduced at the trial or information that may lead to the discovery of evidence to be used at the trial."[56] For example, in the Illinois[57] and federal courts "the identity and locations of persons having knowledge of relevant facts"[58] is discoverable.

An even broader test is sometimes applied. It asks whether the material sought to be discovered does in fact fulfill a legitimate purpose of discovery.[59] For example, the plaintiff in a negligence action may seek discovery of the existence and extent of the defendant's liability insurance coverage. In the case of *Peo-*

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55. "Thus it is relevancy to the subject matter which is the test and subject matter is broader than the precise issues presented by the pleadings." Kaiser-Frazer Corp. v. Otis & Co., 11 F.R.D. 50, 53 (S.D.N.Y. 1951). *See also* People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957).

56. Cooper v. Stender, 30 F.R.D. 389, 393 (E.D. Tenn. 1962). *See also* Krupp v. Chicago Transit Authority, 8 Ill. 2d 37, 132 N.E.2d 532 (1956), in which the court stated: " 'Discovery before trial' presupposes a range of relevance and materiality which includes not only what is admissible at the trial, but also that which leads to what is admissible at the trial." *Id.* at 41, 132 N.E.2d at 535.

57. [T]he statute, [ILL. REV. STAT. ch. 110, § 58(3) (1967)], protects a party from being compelled to identify the witnesses he intends to use at the trial, (*i.e.*, witnesses in the technical sense), but does not preclude discovery regarding so-called 'occurrence witnesses' (or 'persons having knowledge of relevant facts,' as stated in Rule 19-4).

Hruby v. Chicago Transit Authority, 11 Ill. 2d 255, 258, 142 N.E.2d 81, 83 (1957). The current statute requires disclosure of expert witnesses who will testify at trial.

58. FED. R. CIV. P. 26(b). *See also* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 81, at 357 (1970) which states:

> A distinction must be drawn between witnesses to the occurrences in question, and witnesses who will be called for trial by the adverse party. The names of occurrence witnesses may always be obtained by discovery. It is generally held that a party is not entitled to find out, by discovery, which witnesses his opponent intends to call at the trial, although the court may require disclosure of this information at a pretrial conference.

FED. R. CIV. P. 26(b)(4)(B), 43 F.R.D. 211, 225, does, however, provide for discovery of expert witnesses to be called at trial.

59. *See* Wilk v. American Medical Association, 635 F.2d 1295 (7th Cir. 1980). The intervenor was allowed access to discovery had by the original plaintiff in a multidistrict antitrust suit "to secure the just, speedy, and inexpensive determination of every action." This is the expressed intent of the Federal Rules of Civil Procedure, Rule 1. *Id.* at 1299. The court reasoned that since the two complaints were nearly identical in their allegations, what was relevant for discovery purposes in the original action must be eventually discoverable in the intervenor's action.

ple ex rel. Terry v. Fisher[60] the court allowed such discovery, stating: "[I]t is our opinion that discovery interrogatories respecting the existence and amount of defendant's insurance may be deemed to be 'related to the merits of the matter in litigation' . . . ."[61] According to the court, discovery of the existence and extent of coverage was "relevant" because such discovery would facilitate and encourage settlement, one of the purposes of discovery.[62] Consistent with the rule of the *Fisher* case, the 1970 revision of the federal rules expressly expanded the scope of discovery to include disclosure of insurance coverage. Committee notes indicate that resolution of the issue by rule amendment was necessary because of the sharp conflict in the cases and the difficulty of obtaining appellate review on the issue. Disclosure will conduce to settlement and avoid protracted litigation in some cases.[63]

Privilege

Both the Illinois and federal rules place "privileged" material outside the scope of discovery. The federal rule merely states that "any matter, not privileged"[64] is subject to discovery, without defining within the rule what is meant by "privilege." The Illinois rule states that "[a]ll matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery proce-

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60. 12 Ill. 2d 231, 145 N.E.2d 588 (1957). A defendant's financial resources are not ordinarily discoverable in a tort case. *See* Vollert v. Summa Corp., 389 F. Supp. 1348 (D. Hawaii 1975); Miller v. Doctor's General Hospital, 76 F.R.D. 136 (W.D. Okla. 1977) (defendants' net worth relevant where plaintiff initiated claim for punitive damages).

61. 12 Ill. 2d at 239, 145 N.E.2d at 593; *cf.* Saunders v. Schultz, 20 Ill. 2d 301, 170 N.E.2d 163 (1960):

> The *Fisher* case merely authorized the disclosure of liability insurance for discovery purposes only, since such insurance is obtained in accordance with the statutory mandate for the protection of innocent victims, and has a practical effect on the conduct of litigation. Those circumstances are quite distinguishable from the instant case, where whatever medical or hospital insurance plaintiff had was certainly not procured for the benefit of a defendant tortfeasor, nor would such a party be entitled to benefits of such insurance, or be relieved of liability thereby. (Restatement of Torts, § 920(e)). Consequently, the trial court committed no error in sustaining plaintiff's objection to these interrogatories.

Id. at 313-14, 170 N.E.2d at 170.

62. *But see* Cooper v. Stender, 30 F.R.D. 389 (E.D. Tenn. 1962). "[W]e are not so sure that the giving to plaintiffs the limits of a defendant's liability insurance policy will bring about more compromise settlements than will the withholding of such information." *Id.* at 393.

63. FED. R. CIV. P. 26(b)(2).

64. FED. R. CIV. P. 26(b)(1).

dure."[65] Although neither rule provides complete statutory enumeration of privileged material, state and federal decisions have established a clearly defined concept of "privilege." Privilege does not necessarily protect material inadmissable at trial because of prejudice to one of the parties. Communications are treated as privileged only where confidentiality is essential to a relationship which society deems necessary to preserve.

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

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[66]

In Illinois, confidential communications between a client and his attorney are protected by the common law,[67] as formerly were confidential communications between spouses.[68] While the attorney-client "privilege" remains in common law, the "privilege" afforded to the confidential communications between a husband and wife is now statutory[69] (as is the privilege of confidential communication between physician and patient,[70] psychiatrist and patient,[71] clergyman and parishioner,[72] and accountant and client[73]). Originally, the attorney-client "privilege" protected the attorney; it is now retained to guarantee that a client may consult his attorney without fearing that the attorney may be compelled in a judicial proceeding to disclose what

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65. ILL. REV. STAT. ch. 110A, § 201(b)(2) (1979).
66. 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton Rev. 1961).
67. *See* Dickerson v. Dickerson, 322 Ill. 492, 153 N.E. 740 (1926).
68. *See* People v. Palumbo, 5 Ill. 2d 409, 125 N.E.2d 518 (1955).
69. ILL. REV. STAT. ch. 51, § 5 (1979).
70. ILL. REV. STAT. ch. 51, § 5.1 (1979).
71. ILL. REV. STAT. ch. 51, § 5.2 (1979).
72. ILL. REV. STAT. ch. 51, § 48.1 (1979).
73. ILL. REV. STAT. ch. 111, § 5533 (1979). Unlike the other "professional-client" privileges, this privilege belongs solely to the professional, the accountant, and does not seek to protect the client. *See* Dorfman v. Rombs, 218 F. Supp. 905 (N.D. Ill. 1963).

his client has told him in confidence.[74] Since the "privilege" is now the client's; only the client may waive it.[75]

In general, the four criteria for privileged communication quoted above obtain in the case of the attorney-client relationship. A more detailed list of prerequisites for attorney-client privilege in a particular circumstance was presented by Judge Wyzanski in *United States v. United Shoe Machinery Corp.*[76] Prior to considering whether certain particular documents were protected by the attorney-client "privilege," he enumerated the following conditions:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer, (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) *an opinion of law or* (ii) *legal service or* (iii) *assistance in some legal proceeding*, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[77]

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74. ILL. REV. STAT. ch. 110½, § 51 (1979).

> Dean Wigmore teaches that the history of the attorney-client privilege finds its origin in the reign of Elizabeth I, 'where the privilege already appears as unquestioned.' It arose from 'a consideration for the *oath and the honor* of the attorney rather than for the apprehensions of his client.' The doctrine that the privilege was that of the attorney rather than the client began to give way to a new concept in the 1700's. The 'new theory looked to the necessity of *providing subjectively for the client's freedom of apprehension* in consulting his legal adviser. It proposed to assure this by removing the risk of disclosure by the attorney even at the hands of the law.' By the middle of the 1800's, the privilege became substantially recognized as that of the client 'to include communications made, first, during any other litigation; next, in contemplation of litigation; next, during a controversy but not yet looking to litigation; and, lastly, in any consultation for legal advice, wholly irrespective of litigation or even of controversy.' [Citation omitted]
>
> The policy of the privilege has been grounded on subjective considerations since the latter part of the 1700's. 'In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory.' [Citation omitted]

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

75. Lanum v. Patterson, 151 Ill. App. 36 (1909). *See also* Suburban Sew'n Sweep, Inc. v. Swiss Bernina, Inc., 91 F.R.D. 254 (N.D. Ill. 1981) (corporation was denied the attorney-client privilege for documents retrieved from trash bins in an alley behind the client's place of business, by its adversary); Burlage v. Haudenshield, 42 F.R.D. 397 (N.D. Iowa 1967). "Discovery of privileged matter should be allowed when waiver of the privilege at trial seems reasonably probable." *Id.* at 398.

76. 89 F. Supp. 357 (D. Mass. 1950).

77. *Id.* at 358-59 (emphasis added).

The relation obtaining between an attorney and a corporate client fits within such a framework, and indeed both in the federal and Illinois systems a corporation may claim the attorney-client privilege. The corporate situation, however, gives rise to special problems. First, to which corporate employees does the privilege extend. Second, when does "house-counsel" actually establish the attorney-client relationship with the corporation.

The federal courts have identified two theories of attorney-client privilege for corporations.[78] One theory is described as the "subject-matter" privilege. Under this theory, confidential information imparted to the attorney "in the ordinary course of business relating to the subject matter of employment," for the purpose of assisting counsel in the rendering of legal advice to the corporation, is privileged.[79] The other theory is described as the "control group" theory. Under this theory, "only those communications made by the so-called 'control group' of the corporation, namely those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given," are protected by the privilege.[80]

The subject matter theory clearly extends to more employees of the corporation than does the control group theory. In *Upjohn Co. v. United States*[81] the Supreme Court rejected the control group theory in favor of the subject matter theory. While limiting the application of the subject matter theory on a case-by-case basis, the Court noted that the reason for the attorney-client privilege is to encourage full, fair disclosure by the client to the attorney. Such disclosure most likely fulfills the public policy goals of "observance of law and administration of justice."[82] It allows the attorney who has full knowledge of the facts to give the client sound legal advice upon which the client may reasonably rely.

The Court observed that in the case of an individual client, the person communicating to the attorney and the person to whom the attorney is giving legal advice is the same person. But in the case of the corporate client the corporate employee communicating to the attorney and the corporate employee to whom the attorney is giving legal advice are probably not the same

78. *See* Upjohn Co. v. United States, 600 F.2d 1223, 1225 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

79. *Id.* at 1226.

80. *Id. See also* Casson Constr. Co., Inc. v. Armco Steel Corp., 91 F.R.D. 376, 384 (D. Kan. 1981) (court stated that the control group theory is the most widely used test).

81. 449 U.S. 383 (1981).

82. *Id.* at 389.

person. The court further observed that those employees possessing information most relevant to the representation of the corporation, or those for whom uninhibited communications with the corporation's attorney would be most significant, are frequently not within the control group. In such cases, rigid adherence to the control group test defeats the purpose of the privilege.[83]

In *Day v. Illinois Power Company*,[84] the Illinois appellate court seemed to take a middle ground between the two theories. It recognized the need to involve agents other than members of the control group, yet cautioned against an unfettered choice of agents.

> The type of corporation employee transmitting information to the attorney for the corporation must be considered in determining whether such information is privileged. If an employee or investigator making reports to an attorney for the corporation *is in a position to control or take a part in a decision about any action the corporation might take upon the advice of its attorney*, he personifies the corporation and when he makes reports or gives information to the attorney, the attorney-client privilege applies. Such employee must have *actual authority*, not apparent authority, to participate in a contemplated decision.[85]

Recently the Illinois Supreme Court in *Consolidation Coal Company v. Bucyrus-Erie*,[86] addressed the difficulties inherent in the selection of agents.[87] In a thoughtful opinion by Justice Underwood the court concluded, compatibly with *Day*, that a modified control group theory of the attorney-client privilege would best suit Illinois' policy favoring full disclosure and, at the same time, would provide a realistic definition of the corporate client.

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83. *Id.* at 392.

84. 50 Ill. App. 2d 52, 199 N.E.2d 802 (1964).

85. *Id.* at 58, 199 N.E.2d at 806 (emphasis added). *See also* Johnson v. Frontier Ford, Inc., 68 Ill. App. 3d 315, 382 N.E.2d 826 (1979). In order for the privilege to attach, the attorney-client relationship must exist, the communication must: be confidential; relate to matters for which the attorney was retained; be made during the course of the attorney client relationship, and where a corporate client is involved; and be with someone associated with the corporation who is in position to control or to take substantial part in decisions about actions which the corporation might take upon advice of the attorney.

86. No. 54752 (Ill. Sup. Ct. Feb. 2, 1982).

87. Whether the corporation can claim the attorney-client privilege is dependent upon whether a proper agent has been selected to transmit relevant information to the corporation's attorney. In addition, the issue whether the attorney-client privilege applies may ultimately affect the issue of a work product exemption. For a more detailed analysis of the work product exemption, addressed in *Consolidation Coal*, *see* notes 133-165 and accompanying text *infra*.

The traditional control group theory limits the agents who may claim the corporate attorney-client privilege to those managing agents who make final decisions.[88] It has been criticized as overly inclusive and insensitive to "modern 'corporate realities.' "[89] By contrast, the subject matter approach taken in *Upjohn* is often viewed as over-inclusive in its extension of the attorney-client privilege to employees or agents whose roles in the decision making process may be wholly advisory.[90] The control group test formulated by the court in *Consolidation Coal* strikes a balance between the competing policies of disclosure and privilege by including within the control group any employee, not ordinarily a member of the control group, "whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision as to legal action by those of actual authority. . . ."[91] The ruling is entirely consistent with *Day* and, as in *Day*, takes the middle ground between the two theories.[92]

Despite *Consolidation Coal*, in order to retain its attorney-client privilege, the corporation must exercise care in selecting the person to transmit information to its attorney. This seems contrary to the general rule that the client may select any agency he wishes, to transmit his communication, without fear of jeopardizing his privilege.[93]

In the case of *People v. Ryan*[94] the Illinois Supreme Court extended the rule that the client may select any agency he wishes to transmit the communication and still maintain the "privilege." In *Ryan*, a driver involved in an automobile accident was named as a defendant in a civil action for damages and a criminal action for driving under the influence of intoxicating liquors. The driver gave a written statement concerning the accident to the investigator from her insurance company, which was defending the civil action. The written statement was subsequently turned over to the attorney retained by the driver to defend the criminal action. The prosecutor then served a subpoena on the attorney demanding the written statement. The defendant invoked the attorney-client privilege, and her attor-

88. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

89. Consolidation Coal Co. v. Bucyrus-Erie Co., No. 54752, slip op. at 9 (Ill. Sup. Ct. Feb. 2, 1982) citing *Upjohn* at 392-93.

90. No. 54752, slip op. at 8 (Ill. Sup. Ct. Feb. 2, 1982).

91. *Id* at 12.

92. *See* note 84 and accompanying text *supra*.

93. "As a general rule, a communication by a client to his attorney by any form of agency employed or set in motion by the client is within the privilege." 97 C.J.S. *Witnesses* § 276 (1957).

94. 30 Ill. 2d 456, 197 N.E.2d 15 (1964).

ney, resisting production of the statement, was held in contempt of court.

On appeal, the court acknowledged the privileged nature of the communications between the insurer and the insured. Moreover, the court conceded that the investigator would have been a proper agent for transmittal of the insured's statement to any attorney engaged to defend against a claim for damages. Had such been the case, the attorney-client privilege would have been upheld. The appellate court held the privilege waived, however, as soon as the statement was transmitted to the attorney hired to defend the *criminal* action. The defendant appealed.

The Illinois Supreme Court approved those decisions which permit the insured to assume that statements given an insurance company, obligated to defend against a damages claim, may be transmitted to an attorney with no loss of privilege.[95] Perceiving "no logical reason for a different result when a transcription for the first confidential communication is transmitted with the consent of the insured to a second attorney,"[96] hired to represent the insured in a matter independent of the private claim the supreme court reversed the appellate court judgment and upheld the privilege. In light of *Ryan*, it seems incongruous to maintain that the identity of the agent transmitting a confidential communication on behalf of a corporate client may jeopardize that corporate client's attorney-client "privilege."

An additional complexity arises from the requirement enunciated in *United States Shoe Machinery*.[97] The requirement is that the attorney to whom the communication is made be acting in the capacity of attorney at the time.[98] Potential difficulty results where in-house counsel is employed by a corporate client.

The problem was neatly illustrated in *North American Mortgage Investors v. First National Bank of Milwaukee*.[99] In that case, the party asserting the attorney-client privilege sought to protect an internal memorandum, described "as an analysis of the participation agreement" between the litigants[100] from discovery. The court denied the communication privileged status because its author, albeit former in-house counsel for the defendant was, when he wrote the memorandum, its Mortgage

95. *Id.* at 460-61, 197 N.E.2d at 17.
96. *Id.* at 461, 197 N.E.2d at 18.
97. 89 F. Supp. 357 (D. Mass. 1950).
98. *Id.* at 358-59.
99. 69 F.R.D. 9 (E.D. Wis. 1975).
100. *Id.* at 11.

Banking Officer.[101] Thus, the communication was not written by one acting in a legal capacity.

Privilege in Federal Courts

The jurisdiction of the federal courts extends to both diversity cases and federal question cases.[102] Generally, in diversity cases, the federal courts follow the state substantive law and the federal procedural law pursuant to the rule of *Erie R.R. Co. v. Tompkins*.[103] Federal courts have held that state laws creating "privilege" are substantive.[104] Thus, "[t]here is no question but that in diversity cases, the rule of *Erie R.R. Co. v. Tompkins* . . . requires the federal courts to ascertain and follow what the state law is if the state decisions are sufficiently conclusive, definite and final."[105] The federal courts in diversity cases must follow the state created "privilege" regardless whether that "privilege" is established by the legislature or the courts.[106] Even when "it seems unnecessary to solve any choice of law problem,"[107] as where both the state and federal law acknowledge the same "privilege," state law determines the scope of the privilege.[108]

Federal precedent is dispositive of the conflict of law question arising where, in a diversity suit, the state wherein discovery is sought recognizes a privilege by statute but the forum does not. Under *Palmer v. Fisher*[109] and *Ex parte Sparrow*,[110] the law of the state in which discovery is sought controls regardless of the trial state's recognition of the privilege. These deci-

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101. *Id.*

102. 28 U.S.C. §§ 1331-1332 (1980).

103. 304 U.S. 64 (1938).

104. Palmer v. Fisher, 228 F.2d 603, 608 (7th Cir. 1955), *cert. denied*, 351 U.S. 965 (1956), *overruled as to other holdings*, Carter Prod., Inc. v. Eversharp, Inc. 360 F.2d 868 (7th Cir. 1966). *Contra Ex parte* Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953). "While this court does not consider the question of privilege to be a matter of substance and therefore controlled by Erie R. Co. v. Tompkins." *Id.* at 353.

105. Baird v. Koerner, 279 F.2d 623, 627 (9th Cir. 1960). *Cf.* Hill v. Huddleston, 263 F. Supp. 108, 110 (D. Md. 1967).

106. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

107. United States v. Summe, 208 F. Supp. 925, 927 (E.D. Ky. 1962).

108. *See* Palmer v. Fisher, 228 F.2d 603 (7th Cir. 1955), *cert. denied*, 351 U.S. 965 (1956), *overruled as to other holdings*, Carter Prod., Inc. v. Eversharp, Inc., 360 F.2d 868 (7th Cir. 1966); Anderson v. Benson, 117 F. Supp. 765 (D. Neb. 1953).

109. 228 F.2d 603 (7th Cir. 1955), *cert. denied*, 351 U.S. 965 (1956), *overruled as to other holdings*, Carter Prod., Inc. v. Eversharp, Inc., 360 F.2d 868 (7th Cir. 1966).

110. 14 F.R.D. 351 (N.D. Ala. 1953). For more recent discussions *see* Union Planters Nat'l Bank of Memphis v. ABC Records, Inc., 82 F.R.D. 472 (W.D. Tenn. 1979); *In re* Westinghouse Electric Corp., 76 F.R.D. 47 (W.D. Pa. 1977).

sions acknowledge that the recognition or nonrecognition of a privilege will almost invariably have a greater impact upon the deposition state than upon the trial state. The deposition state is, in effect, a second forum; it *is* the forum for deposition purposes. *Fisher* and *Sparrow* would thus defer to the deposition state's policy toward privilege.

Mitsui & Co., Inc. v. Puerto Rico Water Resources Authority,[111] compares favorably with the proposition that a privilege recognized by the deposition state should be recognized by the forum. The *Mitsui* court did not, however, adopt this rule on the authority of *Fisher* and *Sparrow*. In *Mitsui*, the trial forum recognized a privilege while the state in which discovery was sought did not. Two of the parties, resisting disclosure, attempted to invoke the trial forum's rule. In ruling that the law of the deposition state would apply, the *Mitsui* court invoked the "interest analysis methodology." This approach considers the interests of the *parties* to the relationship, the deposition state, the forum state, and the state where the communication occurred.[112]

Ruling in favor of disclosure, the district court, sitting in Puerto Rico, stated that full disclosure would best comport with the parties' expectations and New York's interest against the confidentiality of the communication.[113] Puerto Rico's interest in maintaining confidentiality was negligible since the communications occurred in New York and exclusively between New York citizens. Moreover, the party proponent of disclosure was a Puerto Rican corporation.[114] *Mitsui*, in a departure from the old inflexible forum-oriented rule also goes a step further in its analysis than did *Fisher* and *Sparrow* (which balanced the policy interests of the trial and deposition states but found the deposition states' interests always controlling) by considering the expectations of individual litigants. *Mitsui*, unlike *Erie* or *Fisher* and *Sparrow* leaves open the possibility that the trial forum's interests might predominate.

Some federal courts have held that "privilege" is to be ascertained by state law even in a federal question case.[115] In *Baird v. Koerner*,[116] the court found that state law was applica-

111. 79 F.R.D. 72 (D.P.R. 1978).
112. *Id.* at 78.
113. *Id.* at 79.
114. *Id.*
115. Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963).
116. 279 F.2d 623 (9th Cir. 1960). The more recent holding in *Upjohn* might cast doubt upon *Baird* as precedential authority. To date, however, *Baird* has not been expressly overruled and the scope of the *Upjohn* ruling has yet to be articulated.

ble in determining whether an attorney could be compelled to identify his client pursuant to a petition of a special agent of the United States Internal Revenue Service. The *Baird* court's theory was that the authority to practice law is properly determined by state criteria. As the criteria differ from state to state, "so the nature and extent of the privilege that exists between attorney and client varies."[117] Thus the state is uniquely able to define the scope of the attorney-client privilege. The court documented its position with reference to numerous federal cases enunciating the rule that state law governs privilege and observed that no federal statute expressly forbids use of state law.[118]

But the matter is far from clear. For example, underlying *Anderson v. Benson*[119] is an implication that in the absence of a state statute establishing a privilege between attorney and client, the privilege might not exist in federal court. In his second memorandum opinion in the *Radiant Burners* case,[120] Chief Judge Campbell casts further doubt on the point. The defendant, relying on *Palmer v. Fisher*,[121] had contended that the federal court should apply Illinois state law to the attorney-client privilege, thus extending the privilege to corporate clients. Judge Campbell discounted the defendant's contention, stating that: "In Palmer, the Court of Appeals was considering a statutory and not a common law privilege."[122] Although later reversing Judge Campbell's primary holding that the attorney-client privilege cannot be invoked by a corporate client, the court of appeals did not discuss the above language.[123]

Good Cause

"Good cause" is expressly required under both federal and Illinois rules, for physical and mental examinations.[124] As a concept, "good cause" does not lend itself to generic definition. It

117. *Id.* at 628.

118. *Id.* at 632.

119. 117 F. Supp. 765 (D. Neb. 1953).

120. Radiant Burners, Inc. v. America Gas Ass'n, 209 F. Supp. 321 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir. 1963).

121. 228 F.2d 603 (7th Cir. 1955), *cert. denied*, 351 U.S. 965 (1956), *overruled as to other holdings*, Carter Prod., Inc. v. Eversharp, Inc., 360 F.2d 868 (7th Cir. 1966).

122. Radiant Burners, Inc. v. American Gas Ass'n, 209 F. Supp. 321, 322 (N.D. Ill. 1963), *rev'd* 320 F.2d 314 (7th Cir. 1963).

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

124. FED. R. CIV. P. 35; ILL. REV. STAT. ch. 110A, § 215 (1979).

has been variously described and is often confused with necessity.

Good cause has, however, been defined as something more than relevancy.[125] A minimum requirement of relevance is already imposed as a limitation upon all discovery by other rules. Thus, to equate good cause with relevancy would render the good cause standard, specifically required by Rule 35 for physical and mental examinations, superfluous.[126] Viewed as the more restrictive standard, good cause need be shown only if the applicable rule expressly requires it.

The United States Supreme Court, in *Schlagenhauf v. Holder*,[127] officially endorsed this interpretation of good cause. *Schlagenhauf* entailed review of a trial court order requiring the defendant-driver in an automobile accident to appear for a series of physical examinations. Directing the trial judge to reexamine his order, the Supreme Court announced that:

> [The good cause requirements] are not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination.[128]

Clearly, under *Schlagenhauf*, the good cause and relevancy requirements trigger different procedural results. Absent good cause language, the burden of proceeding is upon the party subject to discovery. Under the rule which expressly requires good cause, the burden of obtaining leave of court to proceed rests upon the party seeking the examinations. *Schlagenhauf* also overrules the view that good cause, though a procedural obstacle to discovery,[129] is definitionally synonymous with relevancy,[130] and as such, applicable to the rules of discovery. The *Schlagenhauf* Court's reading of Rule 35 is in accord with elementary canons of construction. Were good cause distinguishable in the procedural sense only,[131] the explicit mandate of Rule 35 would be reduced to redundancy.[132]

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125. Guilford Nat'l Bank v. Southern Ry., 297 F.2d 921 (4th Cir. 1962).

126. *Id.* at 924.

127. 379 U.S. 104 (1964).

128. *Id.* at 118.

129. United Air Lines, Inc. v. United States, 26 F.R.D. 213 (D. Del. 1960).

130. Connecticut Mut. Life Ins. Co. v. Shields, 17 F.R.D. 273 (S.D.N.Y. 1955).

131. United Air Lines Inc. v. United States, 26 F.R.D. 213 (D. Del. 1960). *See* F. JAMES, JR., CIVIL PROCEDURE § 6.10 (1965).

132. Crowe v. Chesapeake & O. Ry., 29 F.R.D. 148, 150 (E.D. Mich. 1961).

Moreover, the severity of the intrusion into an individual's privacy when a physical or mental examination is ordered, warrants a standard stricter than relevancy. The good cause requirement, defined per *Schlagenhauf*, protects against abuse in the ordering of examinations which the relevancy test might permit. Sought after medical information can frequently be obtained unintrusively, for instance, by deposition of the injured person or examining physicians.

Work Product

The "work product" exemption against disclosure of otherwise discoverable material was created in *Hickman v. Taylor*.[133] It is still applied by federal courts without any significant change. In Illinois, however, its scope was narrowed in *Monier v. Chamberlain*.[134] *Hickman v. Taylor*,[135] involved a suit brought under the Jones Act concerning a maritime accident. The representative of the heirs of a crew member killed in that accident sought to discover statements (taken by defendant's attorney) of surviving crew members. The United States Supreme Court did not consider the material to involve confidential communication between client and attorney, and hence did not find it privileged on that ground.[136] The Court, however, held the statements to be exempt from discovery inasmuch as they constituted the work product of a lawyer.

Collectively, the *Hickman* case and the pertinent discovery rules[137] outline the requirements for application of the "work product" exemption. Preliminarily, the sought for material must be relevant;[138] an adverse finding at this point precludes

133. 329 U.S. 495 (1947). Actually the term "work product" was first used in the appellate division of this same case, 153 F.2d 212, 223 (3d Cir. 1945). *See* FED. R. CIV. P. 26 (b)(3), which requires a special showing for trial preparation materials (expressed *not* in terms of 'good cause' because of confusion surrounding previous applications). The elements necessary for the special showing are:

1. substantial need; and
2. inability to obtain the substantial equivalent of the materials by other means.

The courts, however, should protect against disclosure of mental impression, conclusions or legal theories of an attorney. One exception to the special showing requirement permits a party, or a person who is not a party, to obtain a copy of his statement.

134. 35 Ill. 2d 351, 221 N.E.2d 410 (1966).

135. 329 U.S. 495 (1947).

136. *Id.* at 506, 508.

137. FED. R. CIV. P. 26.

138. FED. R. CIV. P. 26 (b). "Petitioner has made more than an ordinary request for relevant, non-privileged facts." Hickman v. Taylor, 329 U.S. 495, 508 (1947).

discovery. Additionally, if discovery involves the mental[139] or physical[140] examination of persons, the "good cause" requirement must be met.[141] If the material fulfills these requirements and is otherwise not privileged, it may then be examined to determine "work product" status. If the material sought has been "collected by an adverse party's counsel in the course of preparation for possible litigation"[142] then it is "work product" and as such is entitled to a qualified exemption. In some cases, if "necessity" is shown for securing the "work product," discovery may still be obtained.[143] *Hickman*, however, establishes an absolute exemption for any work product that would reveal the opinions or mental impressions (opinion work product) of counsel.[144]

The former rule in Illinois defined "work product" as "memoranda, reports of documents made by or for a party in prepara-

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139. "[T]he court in which the action is pending may order . . . [the party] to submit to a physical or mental examination by a physician. . . . The order may be made only on motion for good cause shown." FED. R. CIV. P. 35(a).

140. *Id.*

141. The court in *Hickman* did not discuss satisfying the requirement of "good cause" as the "petitioner was proceeding primarily under Rule 33." 329 U.S. at 504.

142. *Id.* at 505. "Work product" does not mean "that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases." *Id.* at 511.

143. *See* Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480 (4th Cir. 1973). Work product exempt from discovery in prior terminated litigation retains its privileged status in subsequent litigation. In order that the party now seeking discovery be allowed to obtain such privileged materials, "substantial need and undue hardship specified in Rule 26(b)(3) and recognized in *Hickman*" must be shown.

On remand the district court ordered production of certain materials and defendant appealed. 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975). This time the Court of Appeals held that "*opinion* work product material, as distinguished from material not containing mental impressions, conclusions, opinions, or legal theories, is *immune* from discovery although the litigation in which it was developed has been terminated." 509 F.2d at 732. (emphasis added.)

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

tion for trial."[145] While essentially a derivative of *Hickman*, the Illinois rule made somewhat broader provision for absolute exemption.[146] It unqualifiedly exempted from discovery all material falling within the "work product" definition, except that which was independently admissible as evidence at trial.[147] The decision of the Illinois Supreme Court in *Monier v. Chamberlain*,[148] however, declared a new rule, narrower than either the former state rule or the current federal rule.

In *Monier*,[149] the court permitted discovery of material which defendant contended to be the "work product" of his attorney. The court found that:

> Only those memoranda, reports or documents which reflect the employment of the attorney's legal expertise, those 'which reveal the shaping process by which the attorney has arranged the available evidence for use in trial as dictated by his training and experience' [citation omitted] may properly be said to be 'made in preparation for trial' . . . [and thus qualify as a "work product" exemption].[150]

Essentially, a distinction was made between conceptual data reflective of the attorney's "mental processes in shaping his theory" of the case and factual data containing relevant and material evidence. The former would be exempt under Illinois' new work product definition; the latter would not. For example, memoranda of counsel's impressions of a prospective witness qualify as work product. The verbatim statements of the witness remain subject to discovery without any showing of need.[151]

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be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

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

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

Upjohn suggests that a lawyer's paraphrased account of a witness's oral statement may be entitled to protection as potentially revealing the lawyer's mental impressions. Witness's statements recorded verbatim would, of course, not be entitled to such protection.

145. ILL. REV. STAT. ch. 110, § 101.19-5 (1979).

146. Eizerman v. Behn, 9 Ill. App. 2d 263, 282, 132 N.E.2d 788, 797 (1956).

147. Stimpert v. Abdnour, 24 Ill. 2d 26, 179 N.E.2d 602 (1962).

148. 35 Ill. 2d 351, 221 N.E.2d 410 (1966). "Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." ILL. REV. STAT. ch. 110A, § 201(b)(2) (1979). For the chronology between the supreme court decision in *Monier* and the final drafting of Rule 201(b)(2) *see* Tone, *Comments on the New Illinois Supreme Court Rules*, 48 CHI. BAR. REC. 46, 49 (1967).

149. 35 Ill. 2d 351, 221 N.E.2d 410 (1966).

150. *Id.* at 359-60, 221 N.E.2d at 416.

151. *Id.* at 360, 221 N.E.2d at 416.

Concomitant with its refinement of the work product definition, the *Monier* court reestablished the principle that materials which qualify as work product are absolutely exempt, whether or not necessity exists. Articulating this deviation from the federal rule, the court expressed a clear preference for the absolute exemption of a narrowed category of work product accompanied by full disclosure of all relevant and material evidence.[152]

Implementation of the absolute exemption for pure opinion work product, created by both the *Monier* and *Hickman* courts, requires that a very distinctive line be drawn between those materials which reflect the attorney's mental processes and those which do not. Illustrative, is the *Monier* distinction between memoranda of counsel's impressions of prospective witnesses and records of the verbatim statements of such witnesses.[153] Both *Monier* and *Hickman* left open, however, the issue whether a witness's oral statement, reviewed and summarized by counsel, qualifies as work product.

Summarized statements are *sui generis*. Unlike statements taken verbatim, summaries tend to reveal the attorney's mental impressions and litigation plans; unlike the pure opinion work product contained in an attorney's recorded impressions, summarized statements reveal the attorney's thought process "in varying degrees"[154] and thus elude automatic characterization as opinion work product. The questionable status of summarized statements as work product or not was recently addressed by the United States Supreme Court in *Upjohn Co. v. United States*[155] and, shortly thereafter, by the Illinois Supreme Court in *Consolidation Coal Company v. Bucyrus-Erie Company*.[156]

In *Upjohn*, the federal government sought summaries of statements of Upjohn's foreign managers, officers and other employees taken by house-counsel and outside counsel in anticipation of an IRS tax investigation. The Supreme Court determined that some of the documents clearly fell within the corporate attorney-client privilege. Moreover, the Court held that the trial court's application of the substantial need standard (properly applied by the federal courts to *ordinary* work product) to the balance of the summarized material was in error. Because summaries tend to reveal the mental impressions and

152. *Id.* at 360-61, 221 N.E.2d at 417. The court in arriving at its decision seemingly confused "good cause" with "necessity."

153. Monier v. Chamberlain, 35 Ill. 2d 351, 360, 221 N.E.2d 410, 415-17 (1966).

154. Consolidation Coal Co. v. Bucyrus-Erie Co., No. 54752, slip op. at 3 (Ill. Sup. Ct. Feb. 2, 1982).

155. 449 U.S. 383 (1981).

156. No. 54752 (Ill. Sup. Ct. Feb. 2, 1982).

litigation plans of the attorney, *i.e.*, are potentially *opinion* work product, "a far stronger showing of necessity and unavailability by other means"[157] than that necessitated by the substantial need standard was required. Without determining the status of all the documents in issue, the Court reversed and remanded to allow the trial judge to decide if the IRS could satisfy the more stringent standard.

In *Consolidation Coal*, a mining company who filed an action for damages against the manufacturer of an allegedly defective excavator sought summaries of witnesses' statements taken by the manufacturer's attorney and the report of an in-house expert. The summaries were both typed and handwritten. The expert who prepared the report was merely asked to analyze pieces of the excavator and give an opinion as to what happened. An attorney was not directly or indirectly involved in making the request. After an *in camera* inspection, the Illinois Supreme Court found that the summaries, but not the expert's report, were exempt from disclosure since they tended to reveal the mental impressions and litigation plans of the attorneys.

The court observed that in the case of summaries, strictly factual data may be "inextricably intertwined"[158] with exempted material. Determined that Illinois courts not be subejcted to the perhaps impossible, and in any case, time consuming task of distilling exempted material from summaries, the *Consolidation Coal* court held that "attorney's notes and memoranda of oral conversations with witnesses or employees . . . [would] not [be] routinely discoverable."[159] Equally determined that what might be the only probative evidence in a case not be shielded from discovery, the court ruled that discovery of summaries would be permitted "if the party seeking disclosure conclusively demonstrates the *absolute impossibility* of securing similar information from other sources."[160]

Monier's rejection of the federal good cause standard was meant to avoid the need for judicial intervention at the discovery stage. The *Consolidation Coal* court expressed concern that by carving out an exception to the rule, that summaries would henceforth be exempt from discovery, it would undermine the expectation reflected in *Monier*, that discovery be self-executing.[161] Thus, the exception to the new rule for summaries was narrowly worded in terms of "absolute impossibility"; disclosure

157. 449 U.S. 383, 402.
158. No. 54752, slip op. at 4 (Ill. Sup. Ct. Feb. 2, 1982).
159. *Id.*
160. *Id.* at 5 (emphasis added).
161. *Id.* at 4.

of summaries may be compelled only under the most limited of circumstances.[162]

Both *Upjohn* and *Consolidated Coal* address the competing policies in modern litigation favoring full disclosure of all material facts and protecting the attorney's role in the adversary system. Both the *Upjohn* and *Consolidated Coal* opinions seek to strike a delicate balance between those policies. Like many other questions in the law, the choice of when, in any one case, one policy should be favored over another principally rests with the trial judge. *Upjohn* and *Consolidated Coal* provide the trial courts with needed guidelines in this area, but can be fully expected to generate a rash of disputes in the immediate future. Firm and consistent application of those guidelines by the trial courts is essential to provide predictability in this area and to minimize continued judicial intervention in the discovery process.

As with privileged communications "work product" may involve the use of agents. The extent to which the "work product" exemption may be claimed when the agent is not an attorney is an issue of considerable controversy and disagreement.[163] Some authorities maintain that "statements of nonexpert witnesses, taken by a claim agent or investigator under ordinary circumstances, with a view to assessing and possibly resisting a claim . . . are to be treated as work product";[164] that "where the

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162. *Id.*

163. C.J. Lumbard, dissenting in American Express Warehousing Ltd. v. Transamerica Ins. Co., 380 F.2d 277 (2d Cir. 1967) stated:

> Some district judges in this circuit have held, as Judge Ryan did, that the work-product doctrine protects only the work normally performed by an attorney as distinct from that usually done by an investigator. *See* Burke v. United States, 32 F.R.D. 213 (E.D.N.Y. 1963) (Bartels, D.J.); Brown v. New York, N.H. & H.R.R., 17 F.R.D. 324 (S.D.N.Y. 1955) (Dawson, D.J.); Szymanski v. New York, N.H. & H.R.R., 14 F.R.D. 82 (S.D.N.Y. 1952) (Sugarman, D.J.); Bifferato v. States Marine Corp., 11 F.R.D. 44 (S.D.N.Y. 1951) (Weinfeld, D.J.). Other judges have held that the doctrine extends to investigation performed by nonlawyers under the direction of attorneys. *See* Snyder v. United States, 20 F.R.D. 7 (E.D.N.Y. 1956) (Bruchhausen, D.I.); Slifka Fabrics v. Providence Washington Ins. Co., 19 F.R.D. 374 (S.D.N.Y. 1956) (Levet, D.J.). The conflict of decisions in the district courts of this circuit is paralleled by a similar conflict among courts of appeals, *compare, e.g.*, Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950), holding that statements obtained by nonlawyers for the use of attorneys are work-product, *with, e.g.*, United States v. McKay, 372 F.2d 174 (5th Cir. 1967), and among commentators. *Compare, e.g.*, Wright, Discovery 35 F.R.D. 39, 50-51 (1964), *with, e.g., Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1031 (1961).

Id. at 285.

164. F. JAMES, J., CIVIL PROCEDURE § 6.9, at 208 (1965). *See also* APL Corp. v. Aetna Cas. & Sur. Co., 91 F.R.D. 10 (D. Md. 1981); Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1 (N.D. Ill. 1981).

lawyer has supplied the formula for taking the statement or the pattern of questions to be asked [by a layman] and this has significantly shaped the statement, it may well be treated as work product";[165] and that "[r]eports and statements of experts are likely to be treated as work product,"[166] to a greater extent in the federal rules than in the Illinois rules.[167] Assuming that such material may constitute "work product" and so be exempt from discovery, the exemption may be forfeited, even absent "necessity," by the conduct of the party claiming the exemption. Examples of such conduct are counsel's use of a statement or an expert's report[168] to refresh a witness's recollection.[169]

A division of authority remains over whether the work product exemption is applicable to materials prepared in anticipation of previously terminated litigation.[170] A substantial number of courts have held the qualified immunity of the work product privilege applicable to such materials.[171] Some courts have held, however, that the protection extends to the previously prepared documents only if there is a close relationship between the previous and present case.[172]

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165. *Id.* at 207.

166. *Id.* at 208.

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

168. Normally, an expert witness not an employee of the party is not subject to examination by an opposing party by way of deposition unless the circumstances indicate a need for it.

. . .

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

Cox v. Commonwealth Oil Co., 31 F.R.D. 583, 584 (S.D. Tex. 1962).

169. *See* Justice v. Pennsylvania R.R. Co., 41 Ill. App. 2d 352, 191 N.E.2d 72 (1963).

170. *See generally* Annot., 41 A.L.R. FED. 123 (compiling cases pro and con).

171. *See, e.g., In re* Murphy, 560 F.2d 326 (8th Cir. 1977); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480 (4th Cir. 1973); Burlington Industries v. Exxon Corp., 65 F.R.D. 26 (D.C. Md. 1974). *But see* United States v. International Business Machines Corp., 66 F.R.D. 154 (S.D.N.Y. 1974).

172. *See, e.g.*, Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136 (D. Del. 1977); Midland Investment Co. v. Van Alstyne, Noel & Co., 59 F.R.D. 134 (S.D.N.Y. 1973).

"Opinion work product" has been viewed as absolutely immune from discovery, Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d

Experts

The discovery of an adversary's expert witness is provided for under both the Illinois Civil Practice Act[173] and the Federal Rules of Civil Procedure.[174] The Illinois rule provides simply that upon motion of any party, an expert witness shall be identified in advance of trial so that the adversary may reasonably prepare to meet the expert's testimony. There are a dearth of reported cases in Illinois arising under this provision; however, there is some indication that, as applied, it parallels the federal rule.[175]

Federal rule 26(b)(4), enacted in response to past judicial restrictions on the discovery of an expert's information, is designed to provide all parties will full knowledge of the relevant facts and to avoid surprise. Previously, the federal courts had considered various grounds for exempting the expert's report from discovery, including the expert's status as an expert, the attorney-client privilege, the "work product" exception, and a concept of fairness or the existence of a property right in the expert's report by the party employing the expert. These judicial restrictions produced "in acute form the very evils that discovery ha[d] been created to prevent."[176] Most notably, the drafters recognized that effective cross examination of an expert requires advance preparation. Certain limitations continue to exist, however, in "fairness to the party employing the expert and to discourage abusive practices."[177]

The federal rule differentiates between an expert whom the party expects to call as an expert witness at trial and an expert engaged to assist in trial preparation, but not expected to tes-

480 (4th Cir. 1973); or very nearly absolutely immune, *In re* Murphy v. Pfizer, Inc., 560 F.2d 326 (8th Cir. 1977). In Truck Ins. Exchange v. St. Paul Fire and Marine Ins. Co., 66 F.R.D. 129 (E.D. Pa. 1975), however, the court rejected the view that "opinion work product" enjoys an absolute immunity from discovery, holding that such materials were discoverable because they were "at issue" in the case before it. *Accord* Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926 (N.D. Cal. 1976); *cf. In re* Grand Jury Proceedings, 73 F.R.D. 647 (M.D. Fla. 1977).

173. ILL. REV. STAT. ch. 110 § 60 (1979).

174. FED. R. CIV. P. 26(b)(4).

175. Nieukirk v. Board of Fire & Police Commissioners, Peoria, 98 Ill. App. 3d 109, 112-13, 423 N.E.2d 1259, 1262 (1981). (suggesting that Illinois' historical application is parallel to the Federal Rule of Civil Procedure 26(b)(4)).

176. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE RELATING TO DISCOVERY, ADVISORY COMMITTEE COMMENTS, 48 F.R.D. 487, 499 (1970).

177. *Id.* at 504-05.

tify.[178] A party may, by way of interrogatories, require an adversary to identify an expert engaged to testify. He may further require disclosure of the subject matter and the facts and opinions on which the expert is expected to testify as well as a summary of the underlying grounds for each opinion. Beyond this expressly permissible range of inquiry, the court may, on motion, order further discovery by other means. In such a case, the court is authorized to order the party seeking discovery to pay the expert a reasonable fee and to reimburse the opponent for a portion of the fees and expenses incurred in obtaining the information from the expert.

Facts and opinions held by nontestifying experts who are retained specifically to assist in trial preparation are expressly exempted by the rule unless the party seeking disclosure can show exceptional circumstances or proceeds pursuant to Rule 35(b).[179] The burden rests initially with the party asserting the exemption to show facts that justify excluding relevant data from disclosure. It then shifts to the party seeking disclosure to show exceptional circumstances under which it would be impracticable to obtain such information by other means. Most courts have refused to find the exceptional circumstances necessary to override the qualified discovery immunity given to facts known or opinions held by a nontestifying expert who has been retained or specially employed in anticipation of litigation.[180] Moreover, some courts have required a showing of exceptional circumstances merely to obtain the *names* of an adversary's nontestifying experts.[181] In the rare case in which exceptional circumstances are shown, the court will ordinarily require the party obtaining discovery to reimburse his opponent for a portion of the expert's fee.[182]

A nontestifying expert retained or specially employed in anticipation of litigation but whose information was not acquired in preparation for trial is treated as an ordinary witness.[183] Thus, an expert's information acquired because he was an actor

178. FED. R. CIV. P. 26(b)(4)(A), (B). *See* Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure*, 1976 U. ILL. L. F. 895, 917, 932 (1976) [hereinafter cited as Graham].

179. FED. R. CIV. P. 26(b)(4)(B). *See* FED. R. CIV. P 35(b) (providing that "[a] party may suggest the appropriateness of a hearing or rehearing en banc").

180. *See* 4 MOORE'S FEDERAL PRACTICE ¶ 26.66[4] (2d ed. 1980-81 Supp.).

181. *Compare* Perry v. W.S. Parley & Co., 54 F.R.D. 278 (E.D. Wis. 1971) (neither name of expert nor his opinions yielded) *with* Sea Colony, Inc. v. Continental Ins. Co., 63 F.R.D. 113 (D. Del. 1974) (name of expert yielded but not his opinions).

182. *See* Graham, *supra* note 178, at 941.

183. Grinnell Corp v. Hackett, 70 F.R.D. 326 (S.D.N.Y. 1976).

or viewer regarding events giving rise to the lawsuit is fully discoverable.[184] Furthermore, a party is entitled to depose an adversary's experts on facts or opinions which emanate from the expert's prior experience. This information is subject to disclosure whether or not the expert was a witness to or actor in the events giving rise to the litigation. For example, in *Grinnell Corp. v. Hackett*,[185] the District Court for the Southern District of New York ruled that information acquired by the plaintiff's nontestifying expert, pursuant to attaining a master's degree, was freely discoverable under the general discovery provisions of Rule 26(b)(1) without the permission of the court. The court rejected the magistrate's view that these experts could only be deposed in their capacity as actors and/or witnesses in the events giving rise to the action. This interpretation is reinforced, according to the court, by the language and structure of Rule 26 as well as by the policies underlying the federal discovery rules.[186]

The status of a nontestifying expert who is consulted in anticipation of litigation depends on the nature of the consultation. A party may not obtain discovery against an *informally* consulted, not retained or specially employed nontestifying expert.[187] Discovery of the identity of the informally consulted expert, facts and opinions acquired by him in anticipation of litigation, and other collateral information concerning the expert is thus precluded.[188] One court has indicated, however, that disclosure may be required in extraordinary circumstances.[189]

The determination of when an expert would be considered "informally consulted" is not without difficulty. Recently, the Tenth Circuit in *Agers v. Jane C. Stormont Hospital and Training*,[190] announced that the status of each expert must be determined on an *ad hoc* basis. Although relevant, the fact that a fee was charged is not dispositive, and the fact that the expert was considered of no assistance because of his insufficient credentials, his unattractive demeanor, or his excessive fees does not render the expert informally consulted. Rather, several factors should be considered, including:

(1) the manner in which the consultation was initiated;

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184. *Id.*

185. 70 F.R.D. 326 (S.D.N.Y. 1976).

186. *Id.* at 332. *See also* Barkwell v. Sturm Ruger Co., Inc., 79 F.R.D. 444 (D. Alaska 1978).

187. Agers v. Jane C. Stormont Hospital, 622 F.2d 496, 501 (10th Cir. 1980).

188. *Id.*

189. *Id.* at 501 n.4.

190. 622 F.2d 496 (10th Cir. 1980).

(2) the nature, type and extent of information or material provided to or determined by, the expert in connection with his review;

(3) the duration and intensity of the consultative relationship; and

(4) the terms of the consultation, if any, (*e.g.*, payment, confidentiality of test data or opinions, etc.)[191]

The *Agers* court, although purporting to express no view on whether the informally consulted expert's information might be discoverable upon a showing of extraordinary circumstances, concluded that "[i]f the expert is considered to have been only informally consulted in anticipation of litigation, discovery is barred."[192]

The status of a party's nontestifying *in-house* expert is not entirely clear. Rule 26(b)(4) grants a qualified immunity to facts known or opinions held by an expert who has been "retained or specially employed" by another in anticipation of litigation. The Advisory Committee Notes indicate that the rule excludes an expert who is simply a general employee of the party not specially retained.[193] By implication then, the in-house expert should be treated as an ordinary, deposable witness. The question is whether the in-house expert, once assigned to assist in a particular litigation, is converted from a general employee to a specially employed expert. Two federal cases illustrate the diverse approaches to the issue.[194]

In *Virginia Electric & Power Co. v. Sun Shipbuilding & D.D. Co.*,[195] the defendant resisted the plaintiff's motion to compel the production of certain documents derived from regular employees of the defendant on the grounds that the documents contained opinions, findings and factual analyses of experts specially employed or retained in anticipation of litigation. The court held that regular employees of a party, although assigned to a particular case, are not entitled to qualified immunity from discovery simply because they are experts and the documents sought contain their expert opinions and findings. Although such documents may be limited in their susceptibility to a request for production as "trial preparation material,"[196] they are not *per se* immune from discovery because they were derived from the expert employee assigned to the case. The court con-

191. *Id.* at 501.

192. *Id.* at 502.

193. Grinnell Corp. v. Hackett, 70 F.R.D. 326 (S.D.N.Y. 1976).

194. Seiffer v. Topsy's International, Inc., 69 F.R.D. 69 (D. Kan. 1975); Virginia Elec. & Power Co. v. Sun Shipbuilding & D.D. Co., 68 F.R.D. 397 (E.D. Va. 1975).

195. 68 F.R.D. 397 (E.D. Va. 1975).

196. *Id.* at 406.

ceded that the Advisory Committee Notes could be interpreted as intending a distinction between an expert who is simply a general employee, and an expert who *was* simply a general employee but who has been specifically assigned to a particular case. The court did not, however, adopt such a construction. Rather, it perceived a "distinction between 'retained' and 'specially employed' *viz*, the difference between hiring the expert as an independent contractor and hiring him as an employee *pro hac vice*."[197] The court further observed that assigning a regular employee to work on a specific case and thereby converting him into an expert "specially employed" is inconsistent with the notion that an expert should be impartial and owe his allegiance to his calling, not to the litigant employer.

The underlying purpose of the discovery rules and their liberal orientation would seem to compel the conclusion reached in *Virginia Electric*. If the limitations upon discovery are rooted in the doctrine of "unfairness," the in-house expert should be treated, for purposes of discovery, as an ordinary witness. In *Seiffer v. Topsy's International, Inc.*,[198] however, the Kansas district court felt constrained to hold otherwise. Whereas the plaintiff in *Virginia Electric* sought to obtain documents derived from the defendant's general employees, in *Seiffer*, the third-party defendants sought to depose a general partner in a co-defendant's accounting firm. The complex litigation involved alleged violations of both state and federal securities laws. At the heart of the controversy was the correctness and thoroughness of several audit reports prepared by Touche Ross Inc. (Touche) for Topsy International, Inc. (Topsy). The underwriters, who were third-party defendants and who had asserted third party claims against Touche, sought to depose John Van Camp, one of Touche's general partners. The underwriters asserted that Van Camp was clearly deposable as a party to the action. Touche sought a protective order halting the deposition on the ground that Van Camp was an expert specially employed in anticipation of litigation and therefore entitled to a qualified discovery immunity.

The court granted the protective order on behalf of Touche, holding that Van Camp was an expert specially employed in anticipation of litigation and that the underwriters had failed to demonstrate exceptional circumstances sufficient to overcome the qualified discovery immunity granted such an expert. The court's reasoning was threefold: first, Van Camp was not simply a general employee of Touche but was specifically assigned to

197. *Id.* at 407.
198. 69 F.R.D. 69 (D. Kan 1975).

assist in any litigation arising out of the Topsy audits; second, he had no previous involvement in the particular audits at issue; and third, pursuant to a request by Touche's attorneys, Van Camp had reviewed the Topsy audits, and his findings had already been held undiscoverable as "trial preparation material." In addition, the court rejected the underwriters' view that a person occupying Van Camp's status as general partner was not intended to be exempt from discovery under Rule 26 (b)(4)(B). *Rodriguez v. Hrinda*,[199] which arguably supported the underwriters' position, was distinguished. In *Hrinda*, the court held that the defendant/doctors in a medical malpractice action could not invoke Rule 26 (b)(4)(B) against the plaintiff's deposition request since they were the alleged tortfeasors. By contrast, Van Camp was not involved in the Topsy audits which were the basis of the plaintiffs' and underwriters' claim of injury.

The *Seiffer* result seems to have been controlled by Van Camp's noninvolvement with the audits. Concededly, any involvement in the alleged wrong would have disqualified Van Camp as an expert. Following *Hrinda*, he would then have been deposable as a party to the suit. Despite the fact that Van Camp was not involved, however, his "status" as a general partner of the corporate party defendant should have rendered him an ordinary witness subject to discovery by the opposing party. Had Van Camp been asked to testify in the capacity of general partner and ordinary witness, reliance on Rule 26 (b)(4)(B) would have clearly been misplaced. Moreover, as an ordinary witness, Van Camp's testimony would not have been limited to the conclusions which, according to the court, were protected by rule 26 (b)(4)(B). He could have been asked to testify as to the facts of the case.

Seiffer is the proverbial tempest in a teapot. One wonders why Touche was so anxious to immunize him as a specially retained expert. Even if they had been unsuccessful, those matters which would have been addressed by Van Camp, as an expert witness, had already been held undiscoverable as trial preparation material.[200] For the identical reason, it is perplexing that the underwriters argued so hard against the 26 (b)(4)(B) motion. One wonders just what Van Camp really knew.

Finally, the court's indirect reliance on the "trial preparation material" provision of Rule 26 (b)(3) is misplaced. Al-

199. 56 F.R.D. 11 (W.D. Pa. 1972).

200. Seiffer v. Topsy's Int'l, 69 F.R.D. 69, 73 (D. Kan. 1975).

though the "protective review letter" submitted to Touche's attorneys on behalf of Van Camp might properly have been designated undiscoverable as trial preparation material, this fact should not have influenced the determination whether Van Camp was an expert specially employed or a general employee.

An expert's testimony *qua* expert includes opinions. In forming these opinions, the expert applies his special knowledge of the general subject area to a specific factual context. Thus, in order to testify, the expert must be able to, for example, examine the subject of a competency hearing,[201] view the property in a condemnation case,[202] or inspect the product in a products liability case.[203] This is generally accomplished via the various discovery devices.

The propriety of the means by which a party obtains relevant data for his expert was of threshold significance in an Illinois case; *Sarver v. Barrett Ace Hardware, Inc.*[204] The plaintiff in *Sarver*, a products liability case, contended that the defendant sold him an unreasonably dangerous hammer; it chipped when used.[205] Defendant's expert, in order to test the metallurgical properties of the hammer, believed it necessary to remove a piece of the metal from the hammer and drill holes in it to evaluate composition and structure.[206] Defendant moved for production of the hammer for "destructive testing" which the trial court allowed. When plaintiff's attorney refused to comply with the order he was "found to be guilty of direct contempt and was fined $100."[207]

The Illinois Supreme Court, in denying an appeal from that order stated that "the language of Supreme Court Rules 201 and 214 is broad enough to include the physical testing of tangible objects, even when that testing involves alteration or partial destruction of the object."[208] Furthermore, the court stated that "this type of testing is permissible as long as the rights of the opposing litigant are not unduly prejudiced."[209] The plaintiff in *Sarver* would not be prejudiced by this testing because the defendant's expert was required to submit a plan to the court for approval detailing how and what the testing would consist of and the proposed condition of the hammer when testing was

201. *See* FED. R. CIV. P. 35.
202. *See* FED. R. CIV. P. 34.
203. *Id.*
204. 63 Ill. 2d 454, 349 N.E.2d 28 (1976).
205. *Id.* at 457, 349 N.E.2d at 29.
206. *Id.*
207. *Id.* at 458, 349 N.E.2d at 29.
208. *Id.* at 459, 349 N.E.2d at 29.
209. *Id.*

complete. Thus, the court held that "testing," whether "destructive" or not, authorized in the sound discretion of the trial court, falls within the purview of "inspection" under Rule 214, and disclosure of the "nature" and "condition" of tangible things under Rule 201(b)(1)."[210]

DISCOVERY DEVICES

In order to effect the purposes of discovery, the Illinois and federal rules provide devices for obtaining and recording facts prior to trial. The basic devices[211] are deposition on oral examination,[212] interrogatories,[213] and production of documents and other tangible things, including persons for physical or mental examination.[214] In addition, the rules provide for imposition of sanctions for failure to comply with rules and orders of court relating to discovery.[215]

Each device fulfills one or more of the goals of discovery. A deposition is most effective for investigating the facts and for preserving evidence. Interrogatories are useful for ascertaining the names of persons having knowledge of the facts and the existence of documents, and for limiting the issues at trial. Production of things and medical examinations is effective for obtaining facts and for preserving evidence at trial.

Depositions

Upon reasonable notice a party may take the deposition of any competent person on oral examination in a manner as would exist at trial, in order that the facts obtained and recorded may be subsequently used at trial.[216] Although there is great

210. *Id.* at 460, 349 N.E.2d at 30.

211. In addition to the basic devices, ILL. REV. STAT. ch. 110A, § 216 (1979) and FED. R. CIV. P. 36 provide for admission of fact and genuineness of documents. This device is designed to expedite proof at trial and is similar to the interrogatories of the bills of discovery in that written demand is made upon the adversary to admit evidentiary facts. ILL. REV. STAT. ch. 110A, § 218 (1979) and FED. R. CIV. P. 16 provide for pretrial conferences in which the parties, under judicial supervision, define and formulate the issues and limit the proof to be presented, usually entering into a stipulation of uncontested matters, number of witnesses, etc. This article, however, addresses only the investigatory aspects of discovery devices.

212. *See* notes 211-280 and accompanying text *infra*.

213. *See* notes 281-334 and accompanying text *infra*.

214. *See* notes 335-400 and accompanying text *infra*.

215. *See* notes 401-444 and accompanying text *infra*.

216. ILL. REV. STAT. ch. 110A, § 202 (1979); FED. R. CIV. P. 26. ILL. REV. STAT. ch. 110A, § 210 (1979) and FED. R. CIV. P. 31 also provide for deposition on written interrogatories in which the party desiring the deposition serves questions, which constitute direct examination, on the adverse parties, who in turn serve questions which constitute cross examination, etc. These

similarity between the Illinois and federal rules pertaining to deposition,[217] the Illinois rules, unlike the federal rules, differentiate between discovery depositions and evidence depositions.[218] The reasoning behind the differentiation is that if parties know a deposition is for discovery purposes and thus limited in use at trial, objections to the questions will be drastically reduced and examination facilitated.[219]

The differentiation between discovery depositions and evidence depositions under the state rules affects the manner in which the examination is taken and the use to which it may be put at trial. Since its purpose is mainly investigatory, the range of questioning in a discovery deposition is broader and the rules of evidence more relaxed than they would be for an evidence deposition. A discovery deposition, however, may be used at trial as an admission, for impeachment by prior inconsistent statements, for any exception to the hearsay rule, or for any purpose for which an affidavit might be used.[220]

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questions are then put to deponent orally by the official who records the answers verbatim. ILL. REV. STAT. ch. 110A, § 217 (1979) and FED. R. CIV. P. 27 provide for perpetuating testimony prior to commencement of an action or pending appeal. The party who wishes to perpetuate testimony petitions the court after notice is given to prospective adversaries. If the petition is granted, then the examination is taken and recorded for possible future use. *See In re* Application of Eisenberg, 654 F.2d 1107 (5th Cir. 1981); Martin v. Reynolds Metals Corp., 297 F.2d 49 (9th Cir. 1961); Suffolk v. Chapman, 31 Ill. 2d 551, 202 N.E.2d 535 (1964).

217. Coutrakon v. Distenfield, 21 Ill. App. 2d 146, 157 N.E.2d 555 (1959).

218. ILL. REV. STAT. ch. 110A, § 202 (1979).

219. Fitzpatrick & Goff, *Discovery and Depositions*, 50 NW. U. L. REV. 628 (1955).

220. ILL. REV. STAT. ch. 110A, § 212(a) (1979). Allen v. Meyer, 14 Ill. 2d 284, 152 N.E.2d 576 (1958); Security Savings & Loan Ass'n v. Comm'r of Savings & Loan Ass'ns, 77 Ill. App. 3d 606, 611, 396 N.E.2d 320, 324 (1979); Oberkircher v. Chicago Transit Authority, 41 Ill. App. 2d 68, 190 N.E.2d 170 (1963); Haskell v. Siegmund, 28 Ill. App. 2d 1, 170 N.E.2d 393 (1960); Bessette v. Loevy, 11 Ill. App. 2d 482, 138 N.E.2d 56 (1956). In *Bassette*:

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

An evidence deposition may be used for all the purposes for which a discovery deposition may be used; it may additionally be used to introduce the testimony of an otherwise unavailable witness.[221] It may be used by either party regardless of who noticed the deposition,[222] as long as the notice of the taking of the deposition identified it as an evidence deposition.[223]

The category "unavailable witnesses" includes persons who have died or who are out of the county and whose absence was not procured by the party offering the deposition, or who are unable to attend or testify due to age, sickness, infirmity or imprisonment, or whose attendance cannot be procured by subpoena by the party offering the deposition.[224] The unavailability of a witness is determined at time of trial.[225] Ordinarily a witness is not unavailable in a legal sense absent a showing that the party asking to use the deposition used reasonable diligence in an effort to obtain the witness's presence at trial.[226]

The federal rule provides for a single deposition.[227] It does not differentiate between a discovery and an evidence deposition. However, the rule does permit use of the deposition to contradict or impeach a witness or for any other purpose allowed by the Federal Rules of Evidence.[228] The deposition may also be used to introduce testimony of unavailable witnesses. The rule defines unavailability in much the same terms as does the state rule, except that it broadens the definition of unavailability to include any witness who is more than one hundred miles from the place of trial.[229] Rule 26(d)(2) also allows an adverse party to introduce, by use of a deposition, the testimony of "anyone who at the time of taking the deposition was an officer, director, or managing agent . . . of a public or private corporation, part-

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> [I]t would have been error to allow the reporter to read to the jury the entire deposition or to receive the deposition in evidence, which contained matters having no bearing upon the subject of impeachment.

Id. at 488-89, 138 N.E.2d at 60.

221. ILL. REV. STAT. ch. 110A, § 212(b) (1979). *See* Redding v. Schroeder, 54 Ill. App. 2d 306, 203 N.E.2d 616 (1964); Cooper v. Cox, 31 Ill. App. 2d 51, 175 N.E.2d 651 (1961).

222. Dobkowski v. Lowe's, Inc., 20 Ill. App. 3d 275, 314 N.E.2d 623 (1974).

223. ILL. REV. STAT. ch. 110A, § 202 (1979).

224. ILL. REV. STAT. ch. 110A, § 212(b) (1979).

225. United States v. International Bus. Mach. Corp., 90 F.R.D. 377 (S.D.N.Y. 1981); Powers v. Kelley, 83 Ill. App. 2d 289, 227 N.E.2d 376 (1967).

226. Buckley v. Cronkhite, 74 Ill. App. 3d 487, 490, 393 N.E.2d 60, 64 (1979).

227. FED. R. CIV. P. 26.

228. *Id. See* Pursche v. Atlas Scraper & Eng'r Co., 300 F.2d 467 (9th Cir. 1961), *cert. denied*, 371 U.S. 911 (1962); Spector v. El Rancho, Inc., 263 F.2d 143 (9th Cir. 1959); Merchants Motor Freight, Inc. v. Downing, 227 F.2d 247 (8th Cir. 1955); Curry v. States Marine Corp., 16 F.R.D. 376 (S.D.N.Y. 1954).

229. FED. R. CIV. P. 30.

nership or association or governmental agency. . . ."[230]

Illinois Supreme Court Rule 212 states: "If only a part of a deposition is read or used at the trial by a party, any other party may at that time read or use or require him to read any other part of the deposition which ought in fairness to be considered in connection with the part read or used."[231] Its counterpart in the federal rules states: "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other portion."[232] According to at least one state court, the state rule requires the trial court to exercise its discretion to determine "fairness," while the federal rule merely requires the trial court to determine legal relevancy.[233] In practice, however, the federal and state requirements are probably identical. In *Smith v. City of Rock Island*[234] the Illinois appellate court stated that the reason for the rule was "to avoid the unfairness and distortion which may result if a party is permitted to read isolated parts of a deposition or portions out of context without permitting the opponent to read or require the other party to read other relevant portions of the same deposition."[235] The United States Court of Appeals for the First Circuit stated a similar reason in *Westinghouse Electric Corporation v. Wray Equipment Corp.*[236] The rule affords:

> [A] method for averting, so far as possible, any misimpressions from selective use of deposition testimony. The opposing party is entitled under the rule to have the context of any statement, or any qualifications made as a part of the deponent's testimony also put into evidence.[237]

The court further stated:

> [T]he spirit of the rule dictates that the opposing party should be able to require the introduction of the relevant parts of the deposition testimony at least at the conclusion of the reading of the deposition.[238]

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230. FED. R. CIV. P. 32(a)(2).

231. ILL. REV. STAT. ch. 110A, § 212(c) (1979).

232. FED. R. CIV. P. 32(a)(4).

233. Schmitt v. Chicago Transit Authority, 34 Ill. App. 2d 67, 179 N.E.2d 838 (1962).

234. 22 Ill. App. 2d 389, 161 N.E.2d 369 (1959).

235. *Id.* at 397-98, 161 N.E.2d at 374. *Accord*, Dombrowski v. Laschinski, 67 Ill. App. 3d 506, 385 N.E.2d 35 (1978); Morse v. Hardinger, 34 Ill. App. 3d 1020, 341 N.E.2d 172 (1976).

236. 286 F.2d 491 (1st Cir. 1961), *cert. denied*, 366 U.S. 929 (1961).

237. *Id.* at 494.

238. *Id.*

A deposition may be taken without leave of court at any time after all defendants have or should have appeared, pursuant to Illinois Supreme Court rule;[239] and after thirty days after commencement of the action, pursuant to federal rule.[240] Commencement of the action for this purpose has been defined as service of summons and complaint on the defendants[241] or as service of the answer on the plaintiff.[242] The purpose of the restriction is to enable the defendant to retain counsel and to be apprised of the claim against him.[243] By leave of court, a deposition under the state rule may be taken prior to the time specified under the rules, upon proof of good cause.[244] The plaintiff is ordinarily required to demonstrate that he would be prejudiced if the deposition were not taken.[245] Once leave of court has been obtained, the plaintiff must serve notice upon the defendants. A deposition under the federal rules may be taken prior to the time specified in the rules by leave of court, or without leave of court when a witness is about to absent himself from the jurisdiction.[246] A party desiring to take a deposition must serve reasonable written notice on all other parties.[247] The notice must specify the time and place of the deposition, and must describe the intended deponent by name or other identifying information.[248] The notice need not identify the person before whom the deposition is to be taken[249] nor the matter on which examination is sought.[250] Under the state rules, however, the notice must specify whether the deposition is for purposes of discovery

239. ILL. REV. STAT. ch. 110A, § 201(d) (1979). Small claims cases (under $500.00) are an exception; leave of court must be obtained for all discovery. ILL. REV. STAT. ch. 110A, § 201(g) (1979).

240. FED. R. CIV. P. 30(a).

241. Application of Royal Bank, 33 F.R.D. 296 (S.D.N.Y. 1963).

242. Application of Wisconsin Alumni Research Foundation, 4 F.R.D. 263 (D.N.J. 1945).

243. *See* PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE RELATING TO DISCOVERY, ADVISORY COMMITTEE COMMENTS, 28 U.S.C.A. FED. R. CIV. P. 26; Historical & Practice Notes *following* ILL. ANN. STAT. ch. 110, § 101.19-1 (Smith-Hurd 1956). Netter v. Ashland Paper Mills, INc., 19 F.R.D. 529 (S.D.N.Y. 1956).

244. ILL. REV. STAT. ch. 110A, § 201(d) (1979).

245. Brause v. Travelers Fire Ins. Co., 19 F.R.D. 231 (S.D.N.Y. 1956).

246. FED. R. CIV. P. 30(a), (b)(2).

247. American Exchange Nat'l Bank v. First Nat'l Bank, 82 F. 961 (9th Cir. 1897). *See* Mims v. Central Mfrs. Mut. Ins. Co., 178 F.2d 56 (5th Cir. 1949) (depositions of different witnesses in scattered localities on the same date not reasonable).

248. FED. R. CIV. P. 30(b); ILL. REV. STAT. ch. 110A, § 206 (1979).

249. Yonkers Raceway, Inc. v. Standardbred Owners Ass'n, Inc., 21 F.R.D. 3 (S.D.N.Y. 1957); Norton v. Cooper-Jarrett, Inc., 27 F. Supp. 806 (N.D.N.Y. 1939).

250. Lenerts v. Rapidol Dist. Corp., 3 F.R.D. 42 (N.D.N.Y. 1942); Madison v. Cobb, 29 F. Supp. 881 (M.D. Pa. 1939).

or evidence.[251]

If the deponent is a party, service of notice of deposition alone is sufficient to require his appearance.[252] If he is not a party, a subpoena must be served to require his attendance.[253] If the deponent is not an individual (*e.g.*, a corporation), then the deponent's representative must, under federal rules, be an officer or managing agent of the deponent.[254]

Although the definition of a managing agent has caused some difficulty, it is adequately defined in *Newark Insurance Company v. Sartain*.[255] In that case the court stated that a managing agent was a person who:

> 1. Acts with superior authority and is invested with general powers to exercise his judgment and discretion in dealing with his principal's affairs (as distinguished from a common employee, who does only what he is told to do; has no discretion about what he can or cannot do; and is responsible to an immediate superior who has control over his acts);
>
> 2. Can be depended upon to carry out his principal's directions to give testimony at the demand of a party engaged in litigation with his principal; and
>
> 3. Can be expected to identify himself with the interests of his principal rather than those of the other party.[256]

All other persons associated with a corporation or other association must be subpoenaed in order to obtain their appearance.[257]

The Illinois rule contains express provisions for obtaining the appearance of a deponent.[258] It provides in part that "[s]ervice of notice of the taking of the deposition of a party or person who is currently an officer, director, or employee of a party is sufficient to require the appearance of the deponent. . . ."[259] But, under the rule, persons who are not parties or are not under the control of a party such as a corporation must be served with subpoenas in order to obtain their appearance. Subpoenas may be served by registered or certified mail delivered to the deponent at least seven days before the date of

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251. ILL. REV. STAT. ch. 110A, § 202 (1979).

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

253. Pennsylvania R.R. v. The Marie Leonhardt, 179 F. Supp. 437 (E.D. Pa. 1959); Czuprynski v. Shenango Furnace Co., 2 F.R.D. 412 (W.D.N.Y. 1942).

254. FED. R. CIV. P. 30(b)(6).

255. 20 F.R.D. 583 (N.D. Cal. 1957).

256. *Id.* at 586. *See* Terry v. Modern Woodmen of America, 57 F.R.D. 141 (W.D. Mo. 1972).

257. Fruit Growers Co-op. v. California Pie & Baking Co., 3 F.R.D. 206 (E.D.N.Y. 1942).

258. ILL. REV. STAT. ch. 110A, § 204 (1979).

259. *Id.*

deposition.[260]

The state rule also requires that leave of court be obtained before a subpoena is issued for a physician or surgeon to appear for deposition.[261] Such a requirement, obviously designed for the benefit of the medical profession, is entirely incompatible with the functions of discovery. The vast bulk of civil cases today (to which this requirement is specifically directed) involve personal injury litigation. These cases naturally involve at least one medical expert, whose testmiony has become an important part of the technique of personal injury litigation.[262]

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

Depositions may be taken at those places specified in the rules or at other places variously designated by order of court.[263] As may be expected, distinctions are made between parties and nonparties in determining where a person may be required to appear. The state rule provides that, in the absence of an order of court, a "deponent may be required to attend only in the county in which he resides or is employed or transacts his business in person. . . ."[264] The rule also empowers the court to require a nonresident plaintiff or a person under his control to appear within or without the state on "terms and conditions that are just."[265] Such power derives from the common law authority of the courts to supervise discovery.

The federal rule does not designate the place at which a party must appear for deposition. Ordinarily the deposition of the plaintiff is taken in the district where the action is maintained, but for convenience of the parties, the court may order

260. *Id.*

261. *Id. See* N.D. ILL. GEN. R. 42 which states: "No party . . . shall . . . serve a subpoena . . . for a deposition upon any doctor except upon motion and order of court."

262. Kemeny v. Skorch, 22 Ill. App. 2d 160, 170-71, 159 N.E.2d 489, 493-94 (1959).

263. FED. R. CIV. P. 45(d); ILL. REV. STAT. ch. 110A, § 203 (1979).

264. ILL. REV. STAT. ch. 110A, § 203 (1979).

265. *Id.*

that it be taken elsewhere.[266] Federal Rule of Civil Procedure 45 requires a deponent who is a resident of the district where the deposition is to be taken to appear "in the county wherein he resides or is employed or transacts his business in person."[267] If the deponent is not a resident of the district, the rule requires him to appear in the county in which he was served or up to forty miles from place of service.[268] However, as in the state rules, the court may enter a protective order designating the place of deposition.[269]

The scope of examination is broad and subject to few limitations. The "[e]vidence objected to shall be taken subject to the objections"[270] (excepting of course matters which are privileged or are work product). The purpose of taking evidence subject to objections is to avoid delays in the discovery process; a process largely intended to proceed without judicial intervention.[271] Thus, objections are ordinarily made and recorded at the deposition and ruled upon when the deposition is used.[272] There is, however, a provision for suspending the deposition pending a ruling on grounds that the questions are being made in bad faith, or that they embarrass, annoy, or oppress the deponent.[273] Such an objection, unlike objections to the evidentiary value of questions, is to protect a witness in the absence of direct judicial control over the proceedings.

Untimely objections are waived under both the state and federal rules.[274] For example, error in the manner or form of the notice is waived unless written objection is promptly made to the party serving the notice.[275] Disqualification of the officer before whom the deposition is taken is waived unless objection is made before the taking of the deposition, or is made as soon as the disqualification is, or with reasonable diligence, should be known.[276] Errors as to the oath,[277] competency of the witness,[278]

266. Ginsberg v. Railway Express Agency, Inc., 6 F.R.D. 371 (S.D.N.Y. 1945).

267. FED. R. CIV. P. 45(d)(2).

268. *Id.*

269. *Id.*

270. FED. R. CIV. P. 30(c); ILL. REV. STAT. ch. 110A, § 206(e) (1979).

271. Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518 (E.D. Tenn. 1977).

272. Banco Nacional v. Bank of America, 11 F.R.D. 497 (N.D. Cal. 1951).

273. FED. R. CIV. P. 30(d); ILL. REV. STAT. ch. 110A, § 206(d) (1979). *See also* Eggleston v. Chicago Journeymen Plumbers, 657 F.2d 890 (7th Cir. 1981).

274. FED. R. CIV. P. 32(c); ILL. REV. STAT. ch. 110A, § 211 (1979).

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

276. Cooper v. Cox, 31 Ill. App. 2d 51, 175 N.E.2d 651 (1961).

277. Houser v. Snap-on Tools Corp., 202 F. Supp. 181 (D. Md. 1962).

form of the questions,[279] and others which could also be corrected if objections were promptly presented are waived if not made in time to correct the error. Errors in the manner of transcription or certification are waived unless a motion to suppress the deposition transcript is made with reasonable promptness.[280]

Interrogatories

Under the Illinois rules, interrogatories may be served after all defendants have appeared or are required to appear.[281] Under federal rules they may be served on the plaintiff after commencement of the action or on other parties with or after service of summons and complaint.[282] Under both rules, interrogatories may be served after commencement of the action, but prior to the time designated by the rules, with leave of court.[283] Both rules also provide that, absent a court order to the contrary, the conducting of discovery by one party shall not operate

278. Hardman v. Helene Curtis Indus., Inc., 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964):

> In 1959, when Susan was a little over nine years old, her discovery deposition was taken. No objection was made by the plaintiff's attorney to her competency. . . . The objection was raised at the trial but the court properly held that he could not then inquire into conditions which existed two years before and that the objection to the taking of the deposition had been waived.

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

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

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

Id. at 825-26. Questions calling for legal conclusions are objectionable under the state decisions, but may not be under the federal decisions. But under either, such questions and answers thereto are not admissible. *See* notes 319-25 and accompanying text *infra*.

280. Kawietzke v. Rarich, 198 F. Supp. 841 (E.D. Pa. 1961); Cibis v. Hunt, 48 Ill. App. 2d 487, 199 N.E.2d 246 (1964).

281. ILL. REV. STAT. ch. 110A, § 201(d) (1979).

282. FED. R. CIV. P. 33(a).

283. FED. R. CIV. P. 33(a); ILL. REV. STAT. ch. 110A, § 201(d) (1979).

to delay another party's discovery.[284] This provision eliminates the system of priority in which the party first serving notices of discovery was entitled to have compliance with its discovery before it was required to comply with other parties' notice of discovery.

The Illinois rule provides that answers and objections to interrogatories must be served and filed within twenty-eight days.[285] The federal rule allows thirty days for answers and objections to interrogatories.[286] The state rule requires the interrogating party to notice hearing on objections to interrogatories, on the theory that the interrogating party may be satisfied with the information obtained from other answers or other discovery procedures.[287] The federal rule, similarly, requires the interrogating party to notice hearing on the objections.[288] Objections to interrogatories must be timely and specific; if not, they are ordinarily waived.[289] Should objections to a specific interrogatory be filed concurrently with an answer to that interrogatory, those objections are waived.[290]

Interrogatories, like all discovery procedures, require full and fair disclosure.[291] Although neither rule provides for such a motion, incomplete or evasive answers are objectionable and may be stricken on timely motion.[292] Under the state rule, answers to interrogatories may be used at trial for certain limited purposes such as admissions or impeachment by prior inconsis-

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284. ILL. REV. STAT. ch. 110A, § 201(e) (1979); FED. R. CIV. PRO. 26(d).

285. ILL. REV. STAT. ch. 110A, § 213(c) (1979).

286. FED. R. CIV. P. 33. A defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. *Id.*

287. ILL. REV. STAT. ch. 110A, § 213(c) (1979).

288. FED. R. CIV. P. 33.

289. "[T]he objections must be specific and supported by a detailed explanation why the interrogatory or class of interrogatories are objectionable." United States v. NYSCO Laboratories, Inc., 26 F.R.D. 159, 161 (E.D.N.Y. 1960).

> Since the time to object to these interrogatories has expired, no objections may now be filed without special leave, which will not be granted since no reason appears why additional time was needed to object to the form or substance of the interrogatories.

Sturdevant v. Sears, Roebuck & Co., 32 F.R.D. 426, 428 (W.D. Mo. 1963) (footnote omitted). Dempski v. Dempski, 27 Ill. 2d 69, 187 N.E.2d 734 (1963). *See also* Jones v. Rederai A/B Soya, 31 F.R.D. 524 (D. Md. 1962) (the party objecting did not object to the substance of the interrogatories, but rather denied its obligation to answer at all since it was not an adverse party).

290. Meese v. Eaton Mfg. Co., 35 F.R.D. 162 (N.D. Ohio 1964).

291. ILL. REV. STAT. ch. 110A, § 201(b) (1979). *See* Hickman v. Taylor, 329 U.S. 495 (1947).

292. Life Music, Inc. v. Broadcast Music, Inc., 41 F.R.D. 16 (S.D.N.Y. 1966).

tent statement.[293] They may be used under the federal rules to the extent permitted by the rules of evidence.[294] Since interrogatories may be directed only to parties, the distinction between such impeachment and admission may be one of degree rather than one of kind.[295] But since interrogatories and answers thereto are not considered pleadings,[296] the admissions are ordinarily evidentiary, not judicial.[297] As such, they are subject to explanation.[298]

Neither the Illinois nor the federal rule expressly limits the number of interrogatories or sets of interrogatories which may be served. Both, however, attempt to control the abusive or vexatious use of interrogatories. The Illinois rule states that "[i]t is the duty of an attorney directing interrogatories to restrict them to the subject matter of the particular case, to avoid undue detail, and to avoid the imposition of any unnecessary burden or expense on the answering party."[299] Under a similar federal provision,[300] courts have stricken entire sets of interrogatories for over-breadth.[301] In *Boyden v. Troken*, the court noted:

> It is the opinion of this Court that the plaintiff's set of interrogatories are improper and should be stricken.
>
> The plaintiff has filed 209 interrogatories containing no less than 432 separate questions. A careful survey of these numerous interrogatories disclose that a majority of them are irrelevant, overbroad and improper; only a relatively small percentage of the interrogatories seem designed to serve any useful purpose material to the instant action.[302]

The court went on to suggest that oral depositions and production of documents would be a more expeditious way of proceeding to obtain the information sought.

The Illinois rule provides for additional or supplemental in-

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293. ILL. REV. STAT. ch. 110A, § 212(a) (1979).

294. FED. R. CIV. P. 33(b).

295. Oberkircher v. Chicago Transit Authority, 41 Ill. App. 2d 68, 190 N.E.2d 170 (1963).

296. John v. Tribune Co., 28 Ill. App. 2d 300, 171 N.E.2d 432 (1960), *rev'd on other grounds*, 24 Ill. 2d 437, 181 N.E.2d 105 (1962), *cert. denied*, 371 U.S. 877 (1962).

297. *Cf.* Meier v. Pocius, 17 Ill. App. 2d 332, 150 N.E.2d 215 (1958) (pretrial depositions may be used by a party in same manner and to same extent as other admissions).

298. ILL. REV. STAT. ch. 110A, § 201(j) (1967). *See* Ray v. J. C. Penney Co., 274 F.2d 519 (10th Cir. 1959).

299. ILL. REV. STAT. ch. 110A, § 213(b) (1979).

300. FED. R. CIV. P. 33.

301. 60 F.R.D. 625 (N.D. Ill. 1973); *see also In re* United States Financial Securities Litigation, 74 F.R.D. 497 (S.D. Cal. 1975).

302. Boyden v. Troken, 60 F.R.D. 625, 626 (N.D. Ill. 1973); *see also* Richlin v. Sigma Design West, Ltd., 88 F.R.D. 634 (E.D. Cal. 1980); Jarosiewicz v. Conlisk, 60 F.R.D. 121, 126-127 (N.D. Ill. 1973).

terrogatories.[303] It provides, furthermore that "upon request made at any time before the trial, a party must furnish the identity and location of persons, in addition to those previously disclosed, having knowledge of relevant facts."[304] The federal rule requires the interrogated party to update the names of witnesses and correct misinformation.[305] Since interrogatories and the other discovery procedures are cumulative, not alternative or exclusive, the use of one does not necessarily preclude the use of another.[306]

Under Illinois Supreme Court Rule 213 and under Federal Rule 33, interrogatories may be served upon one party by another but may not be served on persons who are not party to the action.[307] Consequently, the federal and state rules create a potential problem in multiparty actions where not all parties are involved in every contested issue in the case. Some facts may be relevant to a contested issue between two parties; some facts may be irrelevant to the same issue between the same parties, and yet be relevant to the case as a whole. Thus, a party may direct an interrogatory seeking facts relevant to the case as a whole and yet not relevant to any contested issue between the interrogating party and the interrogated party. The federal rule, at least, requires that interrogatories be directed to facts relevant to the case as a whole.[308] Since such information could presumably be obtained by other discovery procedures regardless of whether the interrogated party were a party to the action, there appears to be no reason other than expense to limit the interrogatories to contested issues.

Both rules provide that if written interrogatories are served on a party other than an individual, the sworn answers "shall be made by an officer, partner, or agent, who shall furnish such information as is available to the party."[309] This provision raises three important questions: the definition of "agent"; the extent to which an agent can truthfully swear to the answers of the party; and the extent of the obligation to collect and compile information in order to answer.

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303. ILL. REV. STAT. ch. 110A, § 213(e) (1979).

304. *Id.*

305. FED. R. CIV. P. 26(e).

306. ILL. REV. STAT. ch. 110A, § 201(a) (1979); Stonybrook Tenants Ass'n, Inc. v. Alpert, 29 F.R.D. 165 (D. Conn. 1961); B. & S. Drilling Co. v. Halliburton Oil Well Cementing Co., 24 F.R.D. 1 (S.D. Tex. 1959).

307. ILL. REV. STAT. ch. 110A, § 213(a) (1979); FED. R. CIV. P. 33.

308. Carey v. Schuldt, 42 F.R.D. 390 (E.D. La. 1967).

309. ILL. REV. STAT. ch. 110A, § 213(c) (1979). *See also* FED. R. CIV. P. 33, which omits the word "partner."

A clear definition of "agent" is important if sanctions are sought or if the answers are to be used at trial. The choice of the individual to make the answers rests with the interrogated party, but he should be one who meets the requirements for an adverse witness, *e.g.*, a managing agent.[310]

Information is considered available to a party, individual or otherwise, if its attorney is in possession of it.[311] This raises a perplexing problem. An attorney, for example, may concurrently represent, in one action, both the trustees and the beneficiary of a land trust or concurrently represent two related corporations. In such situations the attorney has access to information from both entities. The rules requiring full disclosure demand that answers of one entity be made from all information in possession of either entity. Even if they didn't so demand, the simple expedient of serving interrogatories on both parties would solve the dilemma. But if only one of the two clients represented is a party to the action, a perplexing problem as to the scope of the disclosure is presented.

Ordinarily, in any multi-individual entity such as a partnership or corporation, several individuals know some, but not all,

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310. ILL. REV. STAT. ch. 110, § 60 (1979). *See also* Casson Constr. Co., Inc. v. Armco Steel Corp., 91 F.R.D. 376 (D. Kan. 1981). *Cf.* Day v. Illinois Power Co., 50 Ill. App. 2d 52, 199 N.E.2d 802 (1964).

> In the final analysis, the cited cases have reached the conclusion that a managing agent of a corporation, partnership or association is any person who:
>
> 1. Acts with superior authority and is invested with general powers to exercise his judgment and discretion in dealing with his principal's affairs (as distinguished from a common employee, who does only what he is told to do; has no discretion about what he can or cannot do; and is responsible to an immediate superior who has control over his acts);
>
> 2. Can be depended upon to carry out his principal's directions to give testimony at the demand of a party engaged in litigation with his principal; and
>
> 3. Can be expected to identify himself with the interests of his principal rather than those of the other party.

Newark Ins. Co. v. Sartain, 20 F.R.D. 583, 586 (N.D. Cal. 1957).

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

Segarra v. Waterman S. S. Corp., 41 F.R.D. 245, 248 (D.P.R. 1966). *Contra*, Pitman v. Florida Citrus Exch., 2 F.R.D. 25 (S.D.N.Y. 1941).

311. "Full and honest answers . . . would necessarily have included all pertinent information gleaned by [counsel] through his interviews with the witnesses." Hickman v. Taylor, 329 U.S. 495, 508 (1947). *Accord*, Segarra v. Waterman S. S. Corp., 41 F.R.D. 245, 248 (D.P.R. 1966). *Cf.* McNealy v. Illinois Cent. R.R., 43 Ill. App. 2d 460, 193 N.E.2d 879 (1963) (answers to interrogatories signed by an attorney cannot be used to impeach the individual party, or as admissions).

of the facts contained in sworn answers to interrogatories. An individual swearing to the truthfulness of the answers of the parties will probably not have personal knowledge of all the facts contained in the responses. Thus, the facts contained in the answers will have little, if any, evidentiary value. If the facts are to possess evidentiary value, either several individuals must swear to the answers, or complete knowledge must be imputed to the individual swearing to the truthfulness of the answers.[312] If the latter is the case, the individual should qualify his answers to indicate the sources of the facts.

The extent to which a party is required to collect or compile information to make full disclosure in its answers is determined on the facts of each case.[313] Although the decisions are often at odds, general patterns are discernable. Interrogatories are considered improper if they require compilations from material not in the possession of the interrogated party.[314] If the material is generally available, or is made available, and if it requires no special skill to interpret, interrogatories requiring compilation to answer are considered proper.[315] Even if special skills are required for interpretation, compilation may be required, with reasonable expenses of the compilation being awarded. As a practical matter, simple compilation from material in the possession of the interrogated party will generally be required.[316]

Some of the confusion created by interrogatories has been alleviated by the Illinois and federal provisions that an interrogated party may simply make available to the interrogating party those documents or materials containing the answer, rather than making an answer.[317] In some instances this provision may also alleviate the problem of an interrogatory calling for the interpretation of a document.[318] For example, consider the case of a liability automobile insurer defending the insured under a reservation of rights. If the insured were to answer an interrogatory asking if there were coverage, it might find itself bound, or at least embarrassed, by that answer in a subsequent garnishment action if it chose eventually to deny coverage.

312. Drum v. Town of Tonawanda, 13 F.R.D. 317 (W.D.N.Y. 1952).

313. Kainz v. Anheuser-Busch, Inc., 15 F.R.D. 242 (N.D. Ill. 1954).

314. Stanzler v. Loew's Theatre & Realty Corp., 19 F.R.D. 286 (D.R.I. 1955).

315. Life Music, Inc. v. Broadcast Music, Inc., 41 F.R.D. 16 (S.D.N.Y. 1966); Brown v. Dunbar & Sullivan Dredging Co., 8 F.R.D. 107 (W.D.N.Y. 1948); Cinema Amusements, Inc. v. Loew's, Inc., 7 F.R.D. 318 (D. Del. 1947).

316. Pappas v. Loew's, Inc., 13 F.R.D. 471 (M.D. Pa. 1953).

317. ILL. REV. STAT. ch. 110A, § 213(d) (1979); FED. R. CIV. P. 33(c). To expedite the difficulties attendant with production of documents, the federal rule requires production of documents in the manner they are ordinarily kept.

318. Pappas v. Loew's, Inc., 13 F.R.D. 471 (M.D. Pa. 1953).

Under the present posture of the rules, the insured could provide the interrogating party or its attorney with the policy of automobile liability insurance, thus permitting the interrogating party or its attorney to determine the probability of coverage.

The Illinois courts have refused to permit interrogatories asking for conclusions, or presumably, opinions.[319] "But any rule which attempts to make rigid distinction between matters of fact and mere conclusions is bound to be unworkable. . . . It is now understood that the difference between 'fact' and 'opinion' or 'conclusion' is a difference of degree rather than of kind."[320] The proper test of the propriety of an interrogatory, as stated in *Stonybrook Tenants Association, Inc. v. Alpert*,[321] is not based on "fine-spun distinctions" between knowledge and belief; the test instead should ask simply whether the interrogatory would serve a substantial purpose.[322]

The federal response to the issue is a rule which permits questions which would elicit answers of "opinion or contention that relates to fact or application of law to fact."[323] The obvious purpose of such questions is to limit or narrow the issues in preparation for trial rather than investigate the incident that is the basis for the action. For that reason, the court may postpone the time in which the interrogated party must answer until after all investigatory stages of discovery are completed.[324]

Regardless of whether such an interrogatory is allowed or not, an answer to it is not necessarily admissible at trial.[325] A persistent and vexatious problem in interrogatory procedure arises when an interrogated party presents, as a witness to the transaction or occurrence, an individual whose name was not listed in response to the interrogatory seeking the names and location of such persons.[326] The immediate dilemma is whether

319. Dempski v. Dempski, 27 Ill. 2d 69, 187 N.E.2d 734 (1963); Carlson v. Healey, 69 Ill. App. 2d 236, 215 N.E.2d 831 (1966). *See* O'Brien v. Stefaniak, 130 Ill. App. 2d 398, 264 N.E.2d 781 (1970).

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

321. 29 F.R.D. 165 (D. Conn. 1961).

322. *Id.* at 168.

323. FED. R. CIV. P. 33(b).

324. *Id.*

325. H. B. Zachry Co. v. O'Brien, 378 F.2d 423 (10th Cir. 1967); Harris v. Minardi, 74 Ill. App. 2d 262, 220 N.E.2d 39 (1966); Carlson v. Healey, 69 Ill. App. 2d 236, 215 N.E.2d 831 (1966); Kamholtz v. Stepp, 31 Ill. App. 2d 357, 176 N.E.2d 388 (1961).

326. The problem is not confined to witnesses, but extends to evidentiary facts. *See* Lunn v. United Aircraft Corp., 25 F.R.D. 186 (D. Del. 1960). *See*

or not to permit such a witness to testify. To do so may frustrate the function of discovery and lead to a return of the "sporting theory" of litigation. Not to do so may unjustly exclude relevant, material evidentiary facts.

Although neither the Illinois nor federal rules expressly provide for this problem, the decisions recognize the power of the court to exclude the testimony of a witness not listed in answers to appropriate interrogatories.[327] The sanction is discretionary and each case must be decided on its own facts. A distinction is made between unlisted witnesses known before answering the interrogatory, and those discovered after answering. In the former situation and in the absence of extraordinary circumstances, the exclusionary sanction at the very least is imposed.[328] In the latter situation the question arises as to whether the interrogated party is under a continuing duty to supply names of witnesses or facts discovered after answering interrogatories. The federal rules impose such a duty;[329] the Illi-

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also ILL. REV. STAT. ch. 110A, § 204(a)(1) (1979) which requires leave of court to take the deposition of a medical expert presents a similar problem. If leave to take the expert's deposition is denied, may the expert testify to matters not revealed in his records at trial? *Compare* discussion of *Smith* notes 440-443 and accompanying text *infra with* discussion of privileged information at notes 64-101 and accompanying text *supra*.

327. Wright v. Royse, 43 Ill. App. 2d 267, 193 N.E.2d 340 (1963). The propriety of the sanction presupposes that use is made of discovery. *See* Halverson v. Campbell Soup Co., 374 F.2d 810 (7th Cir. 1967) reversing trial court for excluding defendant's witness, on motion of the plaintiff who had not filed interrogatories, whose testimony went to the injuries alleged by the plaintiff and whose name was not listed in defendant's answers to interrogatories served by the third party defendant.

328. *See* O'Brien v. Stefaniak, 130 Ill. App. 2d 398, 266 N.E.2d 781 (1970). *See also* Dempski v. Dempski, 27 Ill. 2d 69, 187 N.E.2d 734 (1963) (neighbors); Greenberg v. Karris, 80 Ill. App. 2d 270, 225 N.E.2d 490 (1967) (fellow-employee who was with plaintiff at time in question); Dickeson v. Baltimore & O. C. T. R. R., 73 Ill. App. 2d 5, 220 N.E.2d 43 (1965)

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

73 Ill. App. 2d at 29, 220 N.E.2d at 54. *See* Rosales v. Marquez, 55 Ill. App. 2d 203, 204 N.E.2d 829 (1965) (witness listed as living in Mexico, but lived in Chicago); Battershell v. Bowman Dairy Co., 37 Ill. App. 2d 193, 185 N.E.2d 340 (1961) (witness with a common name whose address the interrogated party could have readily located, but was listed with no address).

329. FED. R. CIV. P. 26(e)(1). *See* McNally v. Yellow Cab Co., 16 F.R.D. 460 (E.D. Pa. 1954).

nois courts have refused, either by rule or by decision, to do so.[330] However, considerable case law has developed to avoid the dilemma presented when an unlisted witness is called to testify at trial.

In those Illinois cases in which the exclusionary sanction is not imposed, various factors are considered: presence of minimal surprise;[331] whether the surprise or prejudice may be alleviated by recessing for a formal or informal deposition;[332] or, whether the testimony was merely cumulative and corrobative.[333] Further, counsel in closing argument may comment on an unlisted witness in order to affect the weight of the testimony.[334]

Production of Documents

Federal and state rules provide for the production of documents for inspection, copying, reproduction or photographing; for production of things for inspection, testing and sampling; and entry to real estate for the purpose of inspecting, surveying, measuring, photographing and testing.[335] The scope of "production" discovery is subject to the general limitations, in Illinois, Rule 201, and in the federal courts to matters "within the scope of Rule 26(b)."[336] The term "documents" is widely inclusive. Under the state rule, "[t]he word 'documents' . . . includes, but is not limited to papers, photographs, films, recordings, memoranda, books, records, accounts, and communications."[337] Similarly, federal Rule 34 includes among "documents": writings; drawings; graphs; charts; photographs; phone-records; and other

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> [T]he defendant is bound to give truthful answers to the interrogatories and . . . both good faith and the spirit of the Rule require it to see to it that its answers are truthful as of the time of the trial as well as of the time when the interrogatories are answered.

Id at 16.

330. ILL. REV. STAT. ch. 110A, § 213 (1979). *See* Quatrano v. Marrocco, 61 Ill. App. 2d 1, 208 N.E.2d 632 (1965).

331. Ferraro v. Augustine, 45 Ill. App. 2d 295, 196 N.E.2d 16 (1964).

332. Dickeson v. Baltimore & O.C.T.R.R., 73 Ill. App. 2d 5, 220 N.E.2d 43 (1965) (psychologist employed after interrogatories answered); Freeman v. Chicago Transit Authority, 50 Ill. App. 2d 125, 200 N.E.2d 128 (1964), *aff'd*, 33 Ill. 2d 103, 210 N.E.2d 191 (1965) (engineer used to introduce plat of intersection); Miksatka v. Illinois N. Ry., 49 Ill. App. 2d 258, 199 N.E.2d 74 (1964); Hansel v. Friemann, 38 Ill. App. 2d 259, 187 N.E.2d 97 (1962).

333. Hansel v. Friemann, 38 Ill. App. 2d 259, 187 N.E.2d 97 (1962).

334. Deeke v. Steffke Freight Co., 50 Ill. App. 2d 1, 199, N.E.2d 442 (1964).

335. FED. R. CIV. P. 34; ILL. REV. STAT. ch. 110A, § 214 (1979). *See* Sarver v. Barrett Ace Hardware, Inc., 63 Ill. 2d 454, 349 N.E.2d 28 (1976) (allowed destructive testing of tangible objects).

336. *Id.*

337. ILL. REV. STAT. ch. 110A, § 214 (1979).

data compilations . . . ."[338]

Both the Illinois[339] and federal[340] rules provide for production of documents without leave of court at any time after the filing of a complaint. However, the general provisions of Illinois Rule 201 provide that "[p]rior to the time all defendants have appeared or are required to appear, no deposition or other discovery procedure shall be noticed or otherwise initiated without leave of court granted upon good cause shown."[341] The federal rule allows a demand to produce to be served on the plaintiff after commencement of the action and on the defendant with or after service of summons.[342] The federal and state rules are pretrial discovery devices and are not to be used immediately before or during trial as a substitute for a subpoena *duces tecum*.[343]

Although the federal and state rule for production of documents is limited to obtaining documents in the possession, control or custody of a party, both rules permit obtaining documents from nonparties by a separate action.[344] In addition, documents from a nonparty may be obtained under a subpoena *duces tecum* at that party's deposition.[345] The scope of examination is limited even under a subpoena *duces tecum*, however, by Rules 26 and 201 in the federal and Illinois courts,

338. FED. R. CIV. P. 34.

339. ILL. REV. STAT. ch. 110A, § 214 (1979).

340. FED. R. CIV. P. 34.

341. ILL. REV. STAT. ch. 110A, § 214 (1979).

342. FED. R. CIV. P. 34. *See* Sullivan v. Dickson, 283 F.2d 725 (9th Cir. 1960), *cert. denied*, 379 U.S. 984 (1965).

343. Savannah Theatre Co. v. Lucas & Jenkins, 8 Fed. R. Serv. 34.12 (S.D. Ga. 1944). *See* United States v. Am. Optical Co., 2 F.R.D. 534 (S.D.N.Y. 1942), wherein the court stated:

> It seems to me that Rule 34, although for some undisclosed reason no time limit is fixed in it, properly is intended to be a part of the very elaborate pre-trial procedure provided by the new Federal Rules, which enables the parties to marshal the facts and documents necessary to the trial of a cause, before the trial begins.
>
> As a consequence a motion under Rule 34 may be granted, if ever as of right, I think, only before the trial of a cause has begun.
>
> After the trial has begun, the granting of a motion for discovery under Rule 34 lies wholly, I think, within the discretion of the Judge trying the cause.
>
> [A]fter the trial begins the plaintiff always may avail himself—in case during the trial there is opened, as is here claimed, new vistas of fact—of a subpoena duces tecum for the production of documents and papers. That, in my opinion, is the proper procedure *after the trial has begun*.

Id. at 536-37 (emphasis in original).

344. FED. R. CIV. P. 34; ILL. REV. STAT. ch. 110A, § 214 (1979).

345. FED. R. CIV. P. 45.

respectively.[346]

While depositions or interrogatories may be used to obtain information about the existence or control of documents which a party may later wish to inspect,[347] depositions or interrogatories need not necessarily be used prior to moving for production under Illinois Rule 214[348] or federal Rule 34.[349] Under certain circumstances however, *e.g.*, where the order to produce is unusually burdensome, the courts have recognized a need for prior use of interrogatories. In *People ex rel General Motors Corporation v. Bua*,[350] the Illinois Supreme Court approved the use of interrogatories, at the trial judge's discretion, to determine the relevance of sought-for documents. Although not establishing an absolute precondition to discovery of documents, the *Bua* court would require prior use of interrogatories where such use would "substantially expedite identification of relevant material" and accordingly, alleviate the burden of complying with the order to produce.[351] Several federal court cases have followed suit.[352]

346. United Airlines, Inc. v. United States, 26 F.R.D. 213, 216 (D. Del. 1960); FED. R. CIV. P. 26(b); ILL. REV. STAT. ch. 110A, § 201(b) (1979).

347. "Ordinarily, where a party does not have sufficient information to designate the documents that he desires to inspect he may acquire the information by use of interrogatories and depositions." Houdry Process Corp. v. Commonwealth Oil Ref. Co., 24 F.R.D. 58, 62 (S.D.N.Y. 1959).

348. While appellants maintain that each document sought must be specifically designated, and that if it is not known whether a particular document exists and is in the possession of appellants, plaintiff must by discovery deposition [citation omitted] and interrogatory [citation omitted] ascertain these facts before proceeding for discovery under Rule 17, it is apparent to us that the rule does not so contemplate. That discovery procedures were designed to be flexible and adaptable to the infinite variety of cases and circumstances appearing in the trial courts is clear from the language of the rule: 'A party may at any time move for an order' of production, and the court may 'make any order that may be just.' Provisions permitting greater flexibility or conferring wider discretion would be difficult to formulate, and it is, in our judgment, clear that resort to interrogatories and discovery depositions is not a necessary condition precedent to a motion for discovery of material, possession of which has not been theretofore definitely established in the party from whom production is sought. No other conclusion is compatible with the concluding provision of Rule 17 that in those instances where the party from whom production is requested denies possession or control, 'he may be ordered to submit to examination in open court or by deposition regarding the same.'

Monier v. Chamberlain, 35 Ill. 2d 351, 355-56, 221 N.E.2d 410, 414 (1966).

349. United States v. United States Alkali Export Ass'n., 7 F.R.D. 256 (S.D.N.Y. 1946).

350. 37 Ill. 2d 180, 226 N.E.2d 6 (1967).

351. *Id.* at 194, 226 N.E.2d at 14.

352. *See, e.g.*, Jones v. Boyd Truck Lines, 11 F.R.D. 67 (W.D. Mo. 1951) (depositions and interrogatories should be used to obtain facts before using a request to admit). *See also* BENDER'S FORMS OF DISCOVERY § 10.02 (1981).

Under both the Illinois and the federal rules the desired documents must be indicated with reasonable particularity. Illinois Rule 214 requires that the documents be "specified"[353] while Federal Rule 34 requires them to be "designated";[354] the terms are synonymous.[355] Federal Rule of Civil Procedure 34(b) states that when a request for inspection is made the request shall set forth the items to be inspected individually or by category, and describe each item and category with reasonable particularity.[356] The term "reasonable particularity" is, of course, indefinite. The degree of knowledge that the movant has about the documents requested, as well as the nonmovants knowledge, and the particular facts of each case will determine the degree of particularity necessary for each request.[357]

Monier v. Chamberlain[358] describes Illinois' specificity rule. According to *Monier*, the rule is meant to apprise the party from whom discovery is sought of precisely what is demanded, and to permit the trial court to decide whether the material sought is privileged or exempt. The objects of discovery are described with sufficient precision if these purposes of the rule are served. Accordingly, the degree of requisite particularity varies case by case; designation by category may satisfy the particularity requirement in some cases, but not in others. Minute particularization is not necessarily commendable, especially if it serves no purpose but to "unduly lengthen the discovery process by enabling the parties to engage in dilatory practices."[359]

A party on whom a demand for production is made must respond by either producing the documents or objecting to the demand.[360] The federal rule allows the party thirty days to respond; the state rule allows the party twenty-eight days or the greater time specified in the demand to respond.[361] The response must be in writing and specifically directed to each cate-

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

354. FED. R. CIV. P. 34.

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

356. FED. R. CIV. P. 34(b). *See, e.g.*, Mitsui & Co. v. Puerto Rico Water Resources Auth., 79 F.R.D. 72 (D.P.R. 1978); Mallinckrodt Chem. Works v. Goldman, Sachs & Co., 58 F.R.D. 348 (S.D.N.Y. 1973) (reasonable particularity in designation of documents to be inspected means that the party from whom discovery is sought will be able to identify what the moving party is seeking).

357. *See, e.g.*, Mallinckrodt Chem. Works v. Goldman, Sachs & Co., 58 F.R.D. 348 (S.D.N.Y. 1973).

358. 35 Ill. 2d 351, 221 N.E.2d 410 (1966). *See* Bauter v. Reding, 68 Ill. App. 3d 171, 385 N.E.2d 886 (1979).

359. 35 Ill. 2d at 356-57, 385 N.E.2d at 414-15.

360. FED. R. CIV. P. 35; ILL. REV. STAT. ch. 110A, § 214 (1979).

361. *Id.*

gory requested. If a party alleges that he does not have control of the documents or that the documents don't exist, that party may be examined regarding his allegation.[362]

Medical Examinations

In any action in which the mental or physical condition of a party is in controversy, an order directing the party to submit to a medical examination may be obtained, upon notice and motion showing good cause, under both the Illinois[363] and federal rules.[364]

The propriety of a plaintiff's motion under these rules has long been accepted in Illinois[365] and in the federal courts.[366] More recently, the United States Supreme Court, in *Schlagenhauf v. Holder*,[367] held that federal Rule 35 applies to plaintiffs and defendants equally. A party's employee may, in some circumstances be ordered to submit to a medical examination under the federal rule[368] or the Illinois rule providing for examination of "a party or of a person in his custody or legal control."[369]

The Illinois rule and the federal rule require "good cause" and specify that the mental or physical condition of the party be "in controversy." Both "good cause" and the "in controversy" aspects must be affirmatively shown by the movant. The sufficiency of the showings are decided upon the particular facts of

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362. *Id.*

363. ILL. REV. STAT. ch. 110A, § 215 (1979).

364. FED. R. CIV. P. 35. In addition to medical examination ordered upon motion by a party to the suit, both the Illinois, ILL. REV. STAT. ch. 110A, § 215(d) (1979), and the federal, *e.g.*, N.D. ILL. CIV. R. 20, courts, may in their discretion order an impartial medical examination. "We believe that the appointment of an impartial medical expert by the court in the exercise of its sound discretion is an equitable and forward-looking technique for promoting the fair trial of a lawsuit." Scott v. Spanjer Bros., 298 F.2d 928, 930-31 (2d Cir. 1962).

365. People *ex rel.* Noren v. Dempsey, 10 Ill. 2d 288, 139 N.E.2d 780 (1957).

366. Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

367. 379 U.S. 104 (1964). *See In re* Conservatorship of Stevenson, 44 Ill. 2d 525, 256 N.E.2d 766, *cert. denied*. 400 U.S. 850 (1970). In a proceeding to declare defendant an incompetent and have a conservator appointed, a pretrial mental examination of defendant was properly ordered pursuant to Ill. Sup. Ct. R. 215 where plaintiff's petition showed without question that defendant's mental condition was in controversy insofar as it affected her ability to manage her estate, and supporting affidavits furnished "good cause" for an examination. *Id.* at 530, 256 N.E.2d at 769.

368. *See* Kropp v. General Dynamics Corp., 202 F. Supp. 207 (E.D. Mich. 1962). *See also* FED. R. CIV. P. 35.

369. ILL. REV. STAT. ch. 110A, § 215(a) (1979).

the examination sought.[370]

The federal rule imposes no time limitation upon proceeding for an order for a medical examination. Under the Illinois rule, a time limit is imposed to implement the provision for delivering to the examined party a copy of the report of the examination.[371]

In Illinois, the order must identify the examining physician.[372] The federal rule, merely states that "[t]he order . . . shall specify . . . the person *or persons* by whom [the examination] is to be made."[373] The federal rule provision has been held not to require the naming of the doctor who is to conduct the examination.[374] In both Illinois and the federal courts the movant may suggest the examiner, but the court need not appoint

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

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

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

Schlagenhauf v. Holder, 379 U.S. 104, 118-19 (1964).

371. *See* Jackson v. Whittinghill, 39 Ill. App. 2d 315, 188 N.E.2d 337 (1963).

372. ILL. REV. STAT. ch. 110A, § 215(a) (1979).

373. FED. R. CIV. P. 35(a) (emphasis added).

374. It is therefore ordered that the plaintiff submit to the examination moved by the defendant on July 25, 1944, in the Buffalo General Memorial Hospital, or some other suitable hospital in Buffalo, as the parties may agree upon, at such time as may be mutually agreeable between the parties; and that such examination shall be made by a physician or

him.[375] If the person to be examined objects to the suggested examiner, good reason must be adduced to sustain the objection. Examination of a woman by a male doctor, when the woman has previously been treated by male doctors of her own choice, has been held insufficient reason for objection.[376] Similarly, the fact that the plaintiff must travel from the state in which he resides to the state in which he filed the suit has been held sufficient to sustain the objection.[377] In Illinois, the rules do provide that "[a] party or person shall not be required to travel an unreasonable distance for the examination."[378]

Normally the examination is held at the convenience of the party to be examined,[379] and he is allowed to have his own physician present at the examination.[380] He is not entitled, however, to the presence of his attorney.[381] The language of the federal rule permits examination by more than one doctor.[382]

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surgeon of acknowledged professional standing, skill and experience, on behalf of the defendant. . . .

Klein v. Yellow Cab Co., 7 F.R.D. 169, 170 (N.D. Ohio 1944) (supplemental opinion). *But see* Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955) (although order held invalid on other grounds, it was stated that the order was also invalid since it failed to name the physician who was to conduct the examination).

375. "The court may refuse to order examination by the physician suggested but in that event shall permit the party seeking the examination to suggest others." ILL. REV. STAT. ch. 110A, § 215(a) (1979). *See* Gitto v. Societa Anonima Di Navigazione, Genova, 27 F. Supp. 785 (E.D.N.Y. 1939).

> [I]t is obvious that a defendant seeking a physical examination of a plaintiff has no absolute right to the choice of his own physician. . . .
>
> It naturally rests within the discretion of the Court to appoint the physician chosen by the defendant, if it is felt that the interests of justice will best be served in that manner.

Id. at 786.

376. Gale v. National Transp. Co., 7 F.R.D. 237 (S.D.N.Y. 1946).

377. Pierce v. Brovig, 16 F.R.D. 569 (S.D.N.Y. 1954).

> Plaintiff offers no reason for his inability to come to New York other than the statement that he is financially and physically unable to do so. A Georgia forum would have offered a more convenient, speedier, and possibly less expensive forum. Plaintiff, however, chose to bring the action in this forum. Plaintiff cannot now complain that he should not be examined in this forum.

Id. at 570. *See* Eskandani v. Phillips, 61 Ill. 2d 183, 334 N.E.2d 146 (1975). Respondent, residing in Illinois, was required by the Illinois courts to submit to a psychiatric examination by a doctor in aid of an out-of-state competency proceeding. The Illinois Supreme Court stated that Rule 215(a) applies in aid of pending proceedings in a sister state seeking a declaration of incompetency. *Id.* at 197-98, 334 N.E.2d at 153, 154.

378. ILL. REV. STAT. ch. 110A, § 215(a) (1979).

379. *See* Randolph v. McCoy, 29 F. Supp. 978 (S.D. Tex. 1939).

380. *See* Klein v. Yellow Cab Co., 7 F.R.D. 169 (N.D. Ohio 1944) (supplemental opinion).

381. Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595 (D. Md. 1960).

382. FED. R. CIV. P. 35(a) uses the language: "[T]he person or persons by whom [the examination] is to be made."

The Illinois rule, on the other hand, refers to a single physician throughout and may be interpreted to limit discovery accordingly. Critics consider the "single doctor" construction unrealistic and contend that nothing in the Illinois rule precludes examination by a variety of specialists if the case so requires.[383] The federal courts have ordered examinations by more than one doctor on the basis of both the language of Rule 35[384] and the nature of modern medical practice.

The federal courts, however, have been reluctant to order a party to submit to more than one medical examination.[385] Second examinations have, nevertheless, been granted when the court-appointed physician failed to cover all of the plaintiff's injuries,[386] or when there have been changes in the physical condition of the party since the first examination.[387] A stronger showing of necessity has and should be required for successive examinations.[388]

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383. W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 822, at 483 (Rules ed. 1961).

384. Marshall v. Peters, 31 F.R.D. 238 (S.D. Ohio 1962). "A reading of Rule 35(a) does not indicate an intent to establish a single examination limitation, and where alleged injuries fall into two entirely separate areas of medical specialization, examinations by practitioners in such fields are held to be authorized under the Rule." *Id.* at 239. *See* Little v. Howey, 32 F.R.D. 322 (W.D. Mo. 1963).

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

Id. at 323.

385. *See, e.g.*, Rutherford v. Alben, 1 F.R.D. 277 (S.D. W.Va. 1940). *See also* Little v. Howey, 32 F.R.D. 322 (W.D. Mo. 1963). The court allowed a second examination to enable the defendant to have plaintiff examined by another specialist, which he was not certain he could do at the time of the original examination. But the court implied that now that the confusion had been cleared, parties would not be able to obtain a second examination for this reason.

386. Mayer v. Illinois N. Ry., 324 F.2d 154 (7th Cir. 1963), *cert. denied*, 377 U.S. 907 (1964).

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

388. *Id.*

The early cases in Illinois concerning the number of medical examinations allowed are not clearly decided. Cases prior to *Noren v. Dempsey*[389] were clouded by the yet undecided question whether the court could even properly order a medical examination at all.[390] In a subsequent case,[391] the defendant moved for the additional examination six days before the date for trial, thereby making it impossible to comply with the requirements of former rule 17-1(3) for delivering of examination reports.[392] However, in *Buckler v. Sinclair Refining Company*,[393] defendant's motion for a fifth examination of the plaintiff was considered excessive and denied.

Illinois Rule 215 requires delivery of reports of the examination to the party examined within 21 days after completion of the examination but not later than fourteen days before trial. In *Harris v. Minardi*,[394] the defendant obtained a medical examination of the plaintiff on July 13, 1965 and submitted a report of the examination to plaintiff's attorney on July 16, five days before the trial. On appeal the Illinois appellate court held that the admission of the testimony of the examining physician over the plaintiff's objections constituted reversible error, since the

389. 10 Ill. 2d 288, 139 N.E.2d 780 (1957).

390. *See* Peoria, D. & E. Ry. v. Rice, 144 Ill. 227, 33 N.E. 951 (1893); Chicago & E.R.R. Co. v. Holland, 122 Ill. 461, 13 N.E. 145 (1887).

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

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

Id. at 323-24, 188 N.E.2d at 341. *See also* Buckler v. Sinclair Ref. Co., 68 Ill. App. 2d 283, 216 N.E.2d 14 (1966).

392. Reports had to be delivered "[w]ithin twenty days after completion of the examination, and in no event later than ten days before trial. . . ." ILL. REV. STAT. ch. 110, § 101.17-1(3) (1965) twenty days after completion of the examination has been changed to 21 days. Ten days before trial has been changed to 14 days. *Compare* ILL. REV. STAT. ch. 110A, § 215(c) (1979) *with* ILL. REV. STAT. ch. 110, § 101.17-1(3) (1965).

393. 68 Ill. App. 2d 283, 216 N.E.2d 14 (1966).

394. 74 Ill. App. 2d 262, 220 N.E.2d 39 (1966).

defendant had not submitted the report in accordance with the mandatory requirements of the rule.

A year later, however, in *Lilegdon v. Hanuska*,[395] a different division of the same court held that the sanction of exclusion for failure to deliver a medical report within the time prescribed in the rule is discretionary, not mandatory. In *Lilegdon*, the medical report was delivered to the plaintiffs' counsel on the day the case was assigned to trial, one day before the case actually commenced. Because the tardiness of the report did not, in the court's opinion, impair plaintiff's ability to meet the forthcoming medical testimony, defendant's doctor was permitted to take the stand.[396] Clearly, under *Lilegdon*, failure to comply with Rule 215's 21-day provision is not, *per se*, reversible error.

The federal rule does not require mandatory delivery of the examination report. It does provide, however, that the report shall be delivered at the examined person's request.[397] However, a request for the examiner's report or the taking of his deposition waives any privilege which may have attached to documents elicited from, or to the potential testimony of doctors for the movant who have, or will, conduct an examination for purposes of the same controversy.[398] Conversely, the courts have held that a tendering of the report of the examination is not sufficient to waive the examined party's privilege,[399] nor is delivery of the report pursuant to court order.[400]

SANCTIONS

The rules of discovery were adopted to improve the quality of and to expedite the litigative process. Unfortunately, as in the case of many other innovative and reform-oriented rules, the fertile minds of lawyers have found means to frustrate or pervert the commendable goals of discovery. The problems of "pushing" (overburdening your adversary with discovery) and "tripping" (obstructing your adversary's discovery) are commonplace.[401] Judicial control over discovery abuse is not con-

395. 85 Ill. App. 2d 262, 229 N.E.2d 314 (1967).

396. *Id.* at 272, 229 N.E.2d at 319.

397. FED. R. CIV. P. 35(b)(1).

398. FED. R. CIV. P. 35(b)(2).

399. Sher v. DeHaven, 199 F.2d 777 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 936 (1953).

400. Benning v. Phelps, 249 F.2d 47 (2d Cir. 1957). *Contra* Weir v. Simmons, 233 F. Supp. 657 (D. Neb. 1964).

401. Watkins, *1980 Amendments to Federal Rules of Civil Procedure*, 32 BAYLOR L. REV. 533 (1980).

sistently exercised.[402]

Both the Illinois and federal rules provide sanctions for failure to comply with discovery orders.[403] The Illinois rule, additionally, provides sanctions for abuse of discovery rules.[404] Rules pertaining to sanctions apply to all rules regarding discovery,[405] and, thus, safeguard the effectiveness of the entire discovery process.

The Illinois and federal rules pertaining to sanctions clearly distinguish between rules and orders. The Illinois rule provides sanctions if a party unreasonably refuses to comply with rules, or fails to comply with orders.[406] Therefore, a party who initiates discovery without court order must demonstrate that the other party's failure to comply with the rules is unreasonable or wilful. The federal rule provides sanctions simply upon a party's failure or refusal to comply with orders.[407]

The rules provide for such sanctions as staying the proceedings, debarring the offending party from filing further pleadings, debarring the maintaining of a claim or defense, debarring a witness's testimony, entering default judgments or dismissing the suit with or without prejudice, and striking any portion of the pleading.[408] The imposed sanction must be limited, however, to the issue to which the refusal or failure relates, and the sanction imposed should be the least drastic available to obtain the goal of discovery in that case.[409]

The rules further provide for the imposition of a fine or imprisonment, and the assessing of costs and reasonable attorney's fees.[410] The rules also enable the court to order any unspecified sanction deemed "just."[411]

Both the Illinois and federal courts ordinarily require, in order for the more stringent sanctions to be imposed, that the conduct of the noncompliant party affront the dignity of the court or constitute an admission that there is no merit to the claim or

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402. Comment, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978).

403. FED. R. CIV. P. 37; ILL. REV. STAT. ch. 110A, § 219 (1979).

404. ILL. REV. STAT. ch. 110A, § 219 (1979).

405. FED. R. CIV. P. 37; ILL. REV. STAT. ch. 110A, § 219 (1979).

406. ILL. REV. STAT. ch. 110A, § 219 (1979).

407. FED. R. CIV. P. 37.

408. *Id. See also* Chira v. Lockheed Aircraft Corp., 634 F.2d 664, 668 (2nd Cir. 1980) (an order to compel is a condition to obtaining a sanction under Rule 37(b)).

409. *Cf.* Israel Aircraft Indus., Ltd. v. Standard Precision, 559 F.2d 203, 208 (2d Cir. 1977).

410. FED. R. CIV. P. 37; ILL. REV. STAT. ch. 110A, § 219 (1979). The federal rule excludes contempt for failure to appear for a medical examination.

411. FED. R. CIV. P. 37; ILL. REV. STAT. ch. 110A, § 219 (1979).

defense to which the refusal relates.[412] Conduct that affronts the dignity of the court affects the court's interest in effectively performing its function and is appropriately deterred or punished by criminal contempt. Conduct that admits a meritless claim or defense affects the opposing litigant's interest; the gentler sanctions may be ineffective or unavailing. To impose the more stringent sanctions in the absence of a judicial finding of such conduct, however, raises serious constitutional questions of the denial of due process. For instance, in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*,[413] the trial court dismissed the plaintiff's action seeking recovery of assets seized by the United States during World War II under the Trading with the Enemy Act. The court ordered the plaintiff to produce voluminous documents which would have exposed the plaintiff and its officers to criminal sanctions under Swiss law. The plaintiff failed to fully comply with the order and the court, accordingly, dismissed the case. Meanwhile, the plaintiff had been negotiating with the United States and the Swiss authorities regarding safe compliance with the order. The Supreme Court, in reversing the trial court decision, opined "that Rule 37 should not be construed to authorize dismissal of this complaint because of the petitioner's noncompliance with a pretrial production order when it has been due to inability and not to wilfulness, bad faith, or any fault of petitioner."[414] Rule 37, although protecting the court's own processes, must be read in light of fifth amendment due process.[415]

Societe Internationale is generally understood to limit the more stringent sanctions of dismissal and default to situations involving bad faith. It is also understood to limit the ordinarily broad discretion of the trial judge in managing pretrial discovery. Absent bad faith, a litigant's failure to comply with court rules or orders does not raise the presumption of lack of merit in the claim or defense. Indeed, since *Societe Internationale*, courts of appeal have disfavored the more stringent sanctions and have been willing to vacate dismissals or defaults if the recalcitrant litigant tenders compliance.[416]

412. Agers v. Jane C. Stormont Hosp., 622 F.2d 496 (10th Cir. 1980); Berlinger's, Inc. v. Beef's Finest, Inc., 57 Ill. App. 3d 319, 372 N.E.2d 1043 (1978); *see* Epstein, Corcoran, Kreiger & Carr, *An Up-Date on Rule 37 Sanctions After National Hockey League v. Metropolitan Hockey Club, Inc.*, 84 F.R.D. 145, 169-73 (1980) (hereinafter cited as Epstein). *See also* Buehler v. Whalen, 70 Ill. 2d 51, 374 N.E.2d 460 (1978).

413. 357 U.S. 197 (1958).

414. *Id.* at 212.

415. *Id.* at 209.

416. Werner, *Survey of Discovery Sanctions*, 1979 ARIZ. ST. L. J. 299.

Since *Societe Internationale* the United States Supreme Court has twice addressed the question of sanctions: first in *National Hockey League v. Metropolitan Hockey Club, Inc.*,[417] and subsequently in *Roadway Express, Inc. v. Piper*.[418] In *National Hockey*, the Court upheld a district court's dismissal with prejudice of an antitrust action due to the plaintiff's failure to answer interrogatories. It should be noted that the history of this litigation is fraught with examples of the plaintiff's bad faith and disregard for its opponent and the court. Interrogatories remained substantially unanswered for seventeen months despite the trial judge's warnings that Rule 37 sanctions would be imposed and, "despite numerous extensions granted at the eleventh hour and, in many instances, beyond the eleventh hour."[419]

Although the court of appeals, in reversing the district court, found extenuating circumstances, the Supreme Court determined that there had been no abuse of discretion at the trial level.[420] It stated that the more stringent sanctions were justified by the plaintiff's grossly dilatory conduct and by their potential deterrent effect on the immediate party and upon federal court litigants generally.[421] Although it stressed deterrence and acknowledged the trial court's discretion in its choice of sanction, the Court did not materially alter its earlier requirement that wilfulness or gross negligence precede the imposition of stringent sanctions.[422] Nor did the Court lessen the standard by which wilfulness or gross negligence is determined.

Appellate cases decided in the wake of *National Hockey*, continued to view dismissals and defaults with disfavor.[423] *Wilson v. Volkswagen of America, Inc.*,[424] a Fourth Circuit decision is illustrative. In *Wilson*, the court reversed the district court's entry of a default judgment against the defendant-manufacturer in a products liability case for wilfully failing to produce documents after the court ordered compliance. Reviewing the pro-

417. 427 U.S. 639 (1976).

418. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). *See also* AFC Indus., Inc. v. E.E.O.C., 439 U.S. 1081 (1979) (over the vigorous dissent of three justices the Court denied certiorari from an order instructing the court to withdraw its order precluding evidence for failure of the government to fairly answer interrogatories).

419. *In Re* Professional Hockey Antitrust Litigation, 63 F.R.D. 641, 656 (E.D. Pa. 1974).

420. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976).

421. *Id.* at 643.

422. Epstein, *supra* note 412, at 146.

423. Werner, *Survey of Discovery Sanctions*, 1979 ARIZ. ST. L. J. 299, 319.

424. 561 F.2d 494 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978). *But see* Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir. 1981).

priety of the order, the appellate judge stated that the district judge's "range of discretion is more narrow than when imposing other less severe sanctions."[425] The court noted that the plaintiff had also been lax in complying with discovery and suggested that the marginal materiality of the requested documents rendered prejudice to the plaintiff, if any, minimal. Additionally, the court observed that "even if this claim of materiality and of proper production be disregarded, the question remains why a 'lesser sanction' did not represent a reasonable alternative to a default judgment."[426] The court clearly indicated that the least severe sanction which obtains the goals of discovery in the case is the only appropriate one. It rejected the imposition of sanctions simply for the sake of punishment.

In *Roadway Express, Inc. v. Piper*,[427] the Supreme Court again addressed the appropriateness of sanctions for failure to comply with discovery rules and orders. In *Roadway Express*, the district court dismissed a Title VII action against the plaintiffs' former employer. It also assessed $17,000 against the plaintiffs' lawyers for attorneys' fees and costs of the action under 28 U.S.C. § 1927. The lawyers appealed the assessment to the court of appeals which reversed the district court. The Supreme Court affirmed the court of appeals as to the impropriety of assessing attorney's fees under § 1927, but remanded the action to the district court to consider assessment of attorney's fees under Federal Rule of Civil Procedure 37 and under the inherent power of the court.

In remanding the case, the Court pointed out that Rule 37 subjects both parties and their lawyers to expenses, including attorney's fees, for failure to comply with discovery orders. In quoting *National Hockey*, it said: "Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such sanctions [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.' "[428]

The Court then discussed the inherent powers of the district court in assessing attorney's fees. It pointed out that courts have the inherent power to tax attorney's fees against litigants and their lawyers for actions committed "in bad faith, vexatiously, wantonly, or for oppressive reasons."[429] The Court remanded on this issue to allow the district court to decide

425. *Id.* at 503.
426. *Id.* at 520.
427. 447 U.S. 752 (1979).
428. *Id.* at 764.
429. *Id.* at 766.

"whether counsel's conduct in this case constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent power."[430]

The Court's discussion of Rule 37 is brief. The opinion reiterates the deterrence theory of *National Hockey* and ostensibly limits the award of attorney's fees to the time and effort spent in trying to get the plaintiffs to comply with discovery orders. The Court's discussion of the inherent power to assess attorney's fees, however, is extended. The opinion states that absent legislative action, the court's power is limited to actions committed in bad faith. The opinion indicates, however, that bad faith may be assumed from noncompliance. *Link v. Wabash Railroad*[431] is cited for the proposition that a court has inherent power to dismiss an action for failure of a party's attorney to appear for a scheduled pretrial conference. There is much discussion about the defendant's time and effort spent defending the entire action, and in trying to get compliance with discovery orders. According to the *Roadway Express* analysis, Rule 37, to the extent it authorizes dismissals or defaults and assessment of attorney's fees, is merely a codification of the inherent power of the courts.

The "inherent power" theory, however, is inconsistent with the bad faith limitation upon the more stringent sanctions. Considering this issue, the Illinois Supreme Court in *People ex rel. General Motors Corporation v. Bua*,[432] stated that the court's inherent contempt power is not the power to "summarily deprive a party of all right to defend an action."[433] The court took the position that the availability of such sanctions must be provided for by the legislature. The permissible presumption that the refusal to produce material evidence admits to a meritless claim or defense is not dispositive of whether due process is violated by defaulting a party who, despite good faith efforts, fails to comply with a pretrial discovery order.

In Illinois, the test for adjudging the relative culpability of a noncompliant party is "whether the conduct of the offending party seems to have been characterized by a deliberate and pronounced disregard for the rules or orders not complied with, or whether the actions of the party show a deliberate contumacious or unwarranted disregard of the court's authority."[434] The sanction applied should be consistent with the goals of discov-

430. *Id.* at 767.

431. 370 U.S. 626 (1962).

432. 37 Ill. 2d 180, 226 N.E.2d 6 (1967).

433. *Id.* at 189-90, 226 N.E.2d at 12.

434. 612 North Mich. Ave. v. Factsystem, Inc., 34 Ill. App. 3d 922, 926, 340 N.E.2d 678, 682 (1975).

ery to make relevant and necessary information available and to assist in the advancement of the litigation.[435] Since dismissals and defaults tend to be punitive rather than remedial, they should be applied only as a last resort.[436] Like the federal courts, the Illinois appellate courts often view the more stringent sanctions with disfavor and favor sanctions that allow the case to proceed on its merits. Though theoretically commendable, this attitude often frustrates the goals of discovery and fosters charges that discovery is ineffective. Such impatience was recently expressed by Justice Stamos, speaking for the Illinois Appellate Court, in *Fine Arts Distributors v. Hilton Hotel Corporation*.[437]

Fine Arts was an action by a tenant against a landlord for breach of contract and interference with contractual relations. Within the claim for damages was an allegation of loss of profits. For two years, the landlord made substantial, albeit sporadic efforts to obtain, through discovery, the tenant's financial records. He was unsuccessful. Defendant met with similar problems in trying to take depositions. The trial court finally dismissed the action and the tenant appealed.

The appellate court affirmed the trial court with a strongly worded opinion focusing on the litigation process generally, rather than solely upon the interests of the immediate litigants. While acknowledging that discovery sanctions are intended to facilitate discovery, not to punish. Nonetheless, the court admonished that discovery is an integral part of the "judicial proceedings" and "any attempt by counsel to use discovery for strategic delay or calculated misinformation corrupts the truth-seeking process and must be sternly rebuked."[438] Moreover, the landlord's "laggard pursuit of discovery in the case" would not be considered in tailoring a sanction suitable for the plaintiff.[439] Sanctions are neither a punishment for the recalcitrant nor a reward for the conscientious. The purpose of sanctions, according to this court, is to implement the litigative process. Like *National Hockey* and *Roadway, Fine Arts* may herald a more vigorous approach toward discovery abuse. The opinion is a departure from the usual judicial restraint approach to pretrial discovery abuses.

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435. United Excavating & Wrecking, Inc. v. Wroan & Sons, Inc., 43 Ill. App. 3d 101, 356 N.E.2d 1160 (1976).

436. *Id.*

437. 89 Ill. App. 3d 881, 412 N.E.2d 608 (1980).

438. *Id.* at 884, 412 N.E.2d at 610.

439. *Id.* at 885, 412 N.E.2d at 611.

In addition to pretrial sanctions, the courts may impose sanctions during trial for a litigant's failure to comply with discovery. In *Smith v. Ford Motor Co.*,[440] the Court of Appeals held that prejudicial error occurred in admitting plaintiff's medical expert's testimony where plaintiff failed to provide sufficient information in answers to interrogatories concerning such expert's proposed testimony. Plaintiff described Dr. Freston's proposed expert testimony as relating to the "medical treatment of the Plaintiff, as well as to his prognosis." The testimony of two other witnesses for the plaintiff was similarly described in the answers to interrogatories. At trial, Dr. Freston testified, over objection, to the causal link between plaintiff's internal injuries and a defective seatbelt, which was plaintiff's theory of Ford's liability in the case.

In reversing the decision of the trial court to admit this evidence, the Court of Appeals wrote that Ford was prejudiced by the admission of Dr. Freston's testimony because it had been led to believe that the testimony would be strictly hypothetical, *i.e.*, that Dr. Freston would not testify as to the causal link between defective seat belts and plaintiff's injuries. Moreover, defense counsel had only eleven minutes to prepare a responsive cross-examination in the midst of trial. Dr. Freston was scheduled to leave for an appointment in Detroit the following day, and "adjournment may well have constituted a significant disruption in the trial of the case."[441] Thus, "Ford's ability to cure the prejudice was significantly impaired."[442] Clearly, the liberal discovery policy expressed by Rule 26 is frustrated when misleading answers to interrogatories compel counsel to await trial for discovery of the vulnerable spots in an adverse expert's testimony.[443]

At least one case, however, illustrates a device other than exclusion for dealing with a party's failure to comply with discovery. In *LeMaster v. Chicago Rock Island & Pacific Railroad Co.*,[444] plaintiff responded to the defendant's failure to disclose by introducing to the jury, evidence of inadequate compliance. Thus, plaintiff's lawyer effectively impeached the defendant's witness leaving the jury with, according to the appellate court, the impression that defendant had dishonestly tried to defeat the plaintiff's claim. The admission of this type of impeachment

440. 626 F.2d 784 (10th Cir. 1980).

441. *Id.* at 799.

442. *Id.*

443. *Id., quoting* Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 485 (1962). *But see* Harris Trust & Sav. Bank v. Ali, 100 Ill. App. 3d 1, 425 N.E.2d 1359 (1981).

444. 35 Ill. App. 3d 1001, 343 N.E.2d 65 (1976).

evidence would, according to *LeMaster*, be discretionary with the trial judge.

APPEALABILITY AND REVIEWABILITY

A well established rule in both the federal system[445] and the Illinois state system[446] is that an order must be final rather than interlocutory to be immediately appealable. A final order is ordinarily defined as one which disposes of all issues between all parties.[447] The rule of finality is designed to avoid piecemeal disposition of a single controversy in order to limit delay and expense to the parties and congestion in the appellate courts.[448]

Orders entered pursuant to discovery rules in some circumstances may be final and, therefore, immediately appealable. Orders of dismissal, with or without prejudice, entered for noncompliance with discovery rules, or orders defaulting defend-

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445. Cobbledick v. United States, 309 U.S. 323 (1940):

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration.

Id. at 324-25.

446. Hayes v. Caldwell, 10 Ill. 33 (1848).

447. Robinson v. City of Genesco, 77 Ill. App. 2d 308, 222 N.E.2d 331 (1966). *See* Horizons Titanium Corp. v. Norton Co., 290 F.2d 421 (1st Cir. 1961). This case involved termination of an action filed solely in a jurisdiction other than that in which the principal case was filed. The court in holding the termination of the action as a final appealable order stated:

> The appealability of orders cannot be decided by rote. It is not the fact that the order below dealt with a motion to quash a subpoena duces tecum that is controlling, or, perhaps, not even that the motion was granted. Nor does it make any difference that the court's action was not a final judgment in the usual sense. What is critical is whether the party unsuccessfully seeking the subpoena has any other means of obtaining review. Here the order of the district court made a final disposition of the only proceedings in its district growing out of a particular controversy, and the only proceeding pending between these particular parties anywhere. It cannot be said to lack finality either because it was ancillary to some other proceeding in another district, or because before some other district judge, or on some other set of facts, a different decision might have been made. The motion to dismiss for lack of jurisdiction must be denied.

Id. at 423.

448. United States v. Nixon, 418 U.S. 683 (1974); Catlin v. United States, 324 U.S. 229 (1945); Robinson v. City of Genesco, 77 Ill. App. 2d 308, 222 N.E.2d 331 (1966).

ants and assessing damages, are obviously final.[449] Orders denying a deposition for perpetuation of testimony prior to commencement of an action or pending appeal,[450] or denying discovery proceedings in aid of an administrative agency's investigations,[451] or denying discovery in a jurisdiction other than where the principal action is filed,[452] are also final. The only purpose of these actions is judicial sanction of the discovery. The vast majority of orders entered pursuant to discovery rules, however, are interlocutory and therefore not immediately appealable.[453] Orders sustaining or overruling objections to questions posed in interrogatories or at the deposition of parties are interlocutory.[454] Protective orders imposing limitations on parties as to the manner or scope of discovery are also interlocutory.[455] Interlocutory orders are, moreover, ultimately appealable and, consequently, reviewable once a final order is entered.[456] Thus, once an appeal is taken from a final order, the interlocutory orders entered during the pendency of the action are then reviewable.

The interlocutory nature of most discovery orders affects their reviewability even when those orders are properly part of the record on appeal.[457] First, reviewability of these orders may be waived by the failure to make a timely objection or to pursue available remedies in the trial court.[458] Second, an order entered pursuant to discovery rules involves an exercise of judicial discretion that will be reversed only for an abuse of discre-

449. Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965); Collins v. Wayland, 139 F.2d 677 (9th Cir. 1944) *cert. denied*, 322 U.S. 744 (1944).

450. Crateo, Inc. v. Intermark, Inc., 536 F.2d 862 (9th Cir. 1976); *In re* Sims, 389 F.2d 148 (5th Cir. 1967).

451. E.E.O.C. v. Packard Elec., Div. G.M.C., 569 F.2d 315 (5th Cir. 1978).

452. Carter Products, Inc. v. Eversharp, Inc., 360 F.2d 868 (7th Cir. 1966).

453. *See* Grinnell Corp. v. Hackett, 519 F.2d 595, 596 (1st Cir. 1975) (discovery order is not usually final and hence not immediately appealable if the litigation is still pending in the district court).

454. Ryan v. Commissioner of Internal Revenue, 517 F.2d 13 (7th Cir. 1975); Cimijotti v. Paulsen, 323 F.2d 716 (8th Cir. 1963); Tidwell v. Smith, 27 Ill. App. 2d 63, 169 N.E.2d 157 (1960); Galler v. Galler, 24 Ill. App. 2d 183, 164 N.E.2d 526 (1960).

455. Harrell v. Summers, 28 Ill. App. 2d 282, 171 N.E.2d 248 (1961).

456. Atchison, Topeka & Santa Fe Ry. Co. v. Jackson, 235 F.2d 390 (10th Cir. 1956).

457. Iczek v. Iczek, 42 Ill. App. 2d 241, 249, 191 N.E.2d 648, 652 (1963) wherein the court stated, "It is axiomatic that on review this court can only hear and determine the case on the record before it."

458. Simmons v. Ralph N. Budelman Excavating Co., 82 Ill. App. 2d 365, 227 N.E.2d 147 (1967); Knab v. Alden's Irving Park, Inc., 49 Ill. App. 2d 371, 199 N.E.2d 815 (1964); John v. Tribune Co., 28 Ill. App. 2d 300, 171 N.E.2d 432 (1960), *cert. denied*, 371 U.S. 877 (1962).

tion.[459] Third, the alleged abuse must constitute error that substantially or prejudicially affects the outcome of the action.[460]

Thus, the denial of a request to produce documents or denial of a motion to require compliance with discovery, absent a showing by the movant that such evidence exists and would impact the outcome, would not be reversible error.[461] By contrast, orders denying production of documents essential to establish an element of a cause of action, or orders permitting the use of depositions that were taken on inadequate notice to introduce critical evidence at trial, are likely to be reversible.[462] Despite limitations, the rationale underlying the finality requirement, is sound. Considering the number of discovery orders entered in an ordinary case, unbridled appeals from interlocutory discovery orders would inject chaos into the system. For this reason, similar limitations control the appeal of orders not involving discovery.

There are circumstances, however, in which an immediate interlocutory appeal may be desirable to protect a valuable right of a party. For example, in actions involving confidential privileges or sources,[463] or in actions involving trade secrets, an immediate interlocutory appeal may be necessary to protect a party from irreparable harm that could result from compliance with an order to reveal such information. Additionally, some discovery orders become moot during the course of litigation and are, therefore, not subject to review when the rule of finality is followed. Such orders include the compelling of answers to questions posed in interrogatories and at depositions, the production of documents involving privilege against or exemption from disclosure, or the submission to mental or physical examinations involving unwarranted invasion of privacy. The person subject to such an order is faced with a dilemma. If he does not comply, stringent sanctions for noncompliance may be imposed. If he does comply, any error committed in entering the order may be moot for purposes of review. Such a situation occurs, for example, when the defendant in a personal injury case is ordered to produce surveillance movies taken for the purpose of

459. Goldman v. Checker Taxi Co., 325 F.2d 853 (7th Cir. 1963).

460. N.L.R.B. v. Seine and Line Fishermen's Union of San Pedro, 374 F.2d 974 (9th Cir. 1967); Bell v. Swift & Company, 283 F.2d 407 (5th Cir. 1960).

461. N.L.R.B. v. Seine and Line Fishermen's Union of San Pedro, 374 F.2d 974 (9th Cir. 1967). *See also* Redding v. Schroeder, 54 Ill. App. 2d 306, 203 N.E.2d 616 (1964).

462. Goldman v. Checker Taxi Co., 325 F.2d 853 (7th Cir. 1963); Mims v. Central Mfrs. Mut. Ins. Co., 178 F.2d 56 (5th Cir. 1949).

463. *See* Radiant Burners, Inc. v. American Gas Ass'n, 209 F. Supp. 321 (N.D. Ill. 1962), *aff'd*, 320 F.2d 314 (7th Cir. 1963).

discrediting the plaintiff. Once the movies are produced for and seen by the plaintiff, a new trial could not correct any error in entering the order since the value to the plaintiff is tactical rather than evidentiary. For these reasons, despite the rule of finality, interlocutory orders may be immediately appealable under compelling circumstances.

There are essentially three ways to obtain immediate interlocutory review. One method is to petition an appellate court for a prerogative writ,[464] most commonly, the writ of mandamus. A second method is by statutory permissive appeals,[465] and a third is under a judicially created exception to the final-judgment rule, most notably the "collateral order" doctrine.[466]

Prerogative Writs

The use of prerogative writs such as mandamus and prohibition to obtain immediate interlocutory review has not been favored in either the federal or Illinois system. Although issuance of these writs is discretionary,[467] the courts are ordinarily reluctant to resort to these extraordinary remedies. Only exceptional cases justify invocation of these writs; for example, a lower court fails or refuses to exercise its jurisdiction,[468] or where supervisory control is necessary for proper judicial administration.[469] The former class of cases arises when a trial court refuses to exercise its authority when its duty is to do so. The latter class of cases is exemplified by *Schlagenhauf v. Holder*[470] and *People ex rel. General Motors Corporation v. Bua*.[471]

Schlagenhauf involved a petition for a writ of mandamus to require the trial court to set aside an order entered pursuant to Federal Rule 35 directing the petitioner to submit to a series of nine mental and physical examinations. The order requiring the examinations was entered in a negligence action in which plaintiffs sought damages for personal injuries sustained as passengers on a bus which collided with a tractor-trailer. The petitioner, a defendant driver therein, was ordered, on motion of

464. Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978).

465. *See* Curtis-Wright Corp. v. General Elec. Corp., 446 U.S. 1 (1980); Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. 1974); 28 U.S.C. 1292(b) (1976).

466. *See* Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949); Oswald v. McGarr, 620 F.2d 1190 (7th Cir. 1980); *In re* GMC Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979).

467. Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978).

468. LaBuy v. Howes Leather Co., 352 U.S. 249 (1957).

469. *Id.*

470. 379 U.S. 104 (1964).

471. 37 Ill. 2d 180, 226 N.E.2d 6 (1967).

a codefendant, to submit to the examinations. The petitioner challenged the power of the district court to order an examination of *any defendant*, an issue of first impression in the federal courts.[472] The court of appeals denied the petition for mandamus.[473] The Supreme Court granted certiorari, reversed and remanded.

The Court held that mandamus was an appropriate method by which the court of appeals could resolve the jurisdictional question whether a district court has the power to order mental or physical examinations of a defendant.[474] Although reaffirming the rule that the writ is not to be used as a substitute for appeal, "even though hardship may result from delay and perhaps unnecessary trial," the Court concluded: "The writ is appropriately issued . . . when there is [an] 'usurpation of judicial power' or a clear abuse of discretion."[475] Since the petitioner's basic allegation was a usurpation of power in ordering an examination of a defendant, and this was a substantial issue of first impresion, the Court upheld mandamus as an appropriate mode of review.

The Court ultimately upheld the power of the district court to order examinations of defendants and additionally set forth guidelines regarding the proper application of Rule 35 in this context. The Court warned, however, against review by mandamus in future cases in which a district court applied the guidelines as set forth: "The writ . . . is not to be used when the most that could be claimed is that the district courts have erred in ruling on matters within their discretion."[476]

Bua similarly involved a petition for a writ of mandamus. The petitioner, an automobile manufacturer, sought to compel the trial court to vacate an order striking its answer for noncompliance with orders to produce. The orders were entered in a products liability action in which the plaintiff sought recovery for personal injuries allegedly sustained as a result of defective design and manufacture of an automobile.

The Illinois Supreme Court, while recognizing that original mandamus is ordinarily an inappropriate remedy to regulate pretrial discovery, nevertheless concluded that "the historic extraordinary writ . . . is a valuable judicial tool which must be considered even though some of the normal criteria for its use

472. 379 U.S. at 110.
473. *Id.* at 109.
474. *Id.* at 110.
475. *Id.*
476. *Id.* at 112.

are absent."[477] Accordingly, the court chose to exercise its supervisory power over the trial court by considering the issues presented by the original mandamus petition. In issuing the writ, the court stressed the importance of the issues presented to the administration of justice and noted that the use of the discovery rules involved had evoked substantial controversy among the trial bar. This court, however, cautioned against unfettered use of the writ.[478]

Schlagenhauf and *Bua* illustrate that mandamus may be available as a means of reviewing interlocutory discovery orders, but "the fact still remains that only exceptional circumstances" justify invocation of this extraordinary remedy.[479] The United States Supreme Court more recently emphasized this concept in *Kerr v. United States District Court*.[480] In *Kerr*, the California Parole Authority, defendants in a class action suit brought by California state prisoners, petitioned the Ninth Circuit Court of Appeals for mandamus to compel the district court to vacate two discovery orders. The orders required the defendants to produce various documents including personnel and prisoner files. The Parole Authority claimed that the files were irrelevant, confidential and privileged, and sought an *in camera* inspection by the district court to evaluate their claim of privilege. The court ordered production of the files without an *in camera* inspection, although it did issue a protective order restricting the use of the documents and limiting the number of people who could inspect them.

The court of appeals denied the petition for mandamus and the Supreme Court affirmed. The Court observed that the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' "[481] In reaffirming its position that the remedy of mandamus is a drastic one to be reserved for the extraordinary situation, lest the policy against piecemeal litigation be defeated,

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477. 37 Ill. 2d at 192, 226 N.E.2d at 13.

478. The *Bua* court qualified its decision thusly:

> It is hoped that this exercise of our discretionary jurisdiction may be justified by encouraging the bench and bar to wisely use the tools of discovery to illuminate the actual issues in the case rather than to harass and obstruct the opposing litigant. In doing so we wish to give no encouragement to the litigant who would have us review normal pretrial discovery procedure by original *mandamus*.

People *ex rel.* Gen'l. Motors Corp. v. Bua, 37 Ill. 2d 180, 183, 226 N.E.2d 6, 14 (1967).

479. 379 U.S. 104.

480. 426 U.S. 394 (1976).

481. *Id.* at 402.

the court set forth the conditions necessary for its issuance: (1) the party seeking issuance of the writ must have no other adequate remedy to attain the desired relief; and (2) the moving party must satisfy the burden of showing that its right to issuance of the writ is clear and undisputable. Moreover, the court stated that issuance of the writ is itself generally a matter of discretion with the court to which the petition is addressed.[482]

The Court found that the court of appeals' decision did not foreclose the possibility of an *in camera* inspection and that the writ was denied because the governmental privilege had not been asserted with specificity and by the appropriate officials. Moreover, there existed an alternative to mandamus. Petitioners could return to the district court, assert privilege with the requisite specificity and through the appropriate officials, and then ask the district court to reconsider their request for an *in camera* inspection.

Although *Schlagenhauf* ostensibly expands the scope of federal mandamus, *Kerr* reaffirms the traditional view that mandamus is to be applied to the extraordinary case, and only when no other adequate means of review exists.

Permissive Appeals

Another method of obtaining immediate interlocutory review is by statutory permissive appeals. Under federal statute,[483] an interlocutory order, otherwise nonappealable, may be appealable if the trial court finds that: (1) the order involves a "controlling question of law"; (2) the question is one upon which there is "substantial ground for difference of opinion"; and (3) an immediate appeal may "materially advance the ultimate termination of the litigation." The court of appeals, in its discretion, may then permit an appeal to be taken from the order.[484]

Similarly, under the state rule,[485] an interlocutory order

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482. *Id.* at 403.

483. 28 U.S.C. § 1292(b) (1968).

484. *Id.; See* Grover Christe & Merritt v. Lo Bianco, 336 F.2d 969 (D.C. Cir. 1964) (Wright, J., dissenting); *cf., In re* Heddendorf, 263 F.2d 887 (1st Cir. 1959).

485. ILL. REV. STAT. ch. 110A, § 308 (1979); *cf. In re* Estate of Oelerich, 34 Ill. App. 2d 457, 176 N.E.2d 549 (1961), wherein the Court stated:

> The petitioner, Helen Oelerich, argues that neither order is final and appealable. We do not agree. We believe an order determining the question of jurisdiction of the person of an alleged incompetent, who claims to be a non-resident, is a definite and separate part of the litigation, sufficient to be appealable. If the court had granted respondent's motion and dismissed the proceedings it would have terminated the cause in the Probate Court, and would have been final and appealable. In this case we believe the order denying respondent's motion is also

may be immediately appealable if the trial court finds that: (1) it involves "a question of law as to which there is substantial ground for difference of opinion"; and (2) an immediate appeal may materially advance the ultimate termination of the litigation." Dual certification in the state system, by both the trial court and the appellate court, is also necessary before the appeal may be heard. The state rule, however, eliminates the federal requirement that the question be "controlling."

Decisions permitting interlocutory appeals from discovery orders under the "controlling question of law" provision are sparse. In *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*,[486] the court allowed an interlocutory appeal under the "controlling question of law" provision to review objections to interrogatories. It did not discuss the issue of appealability. In *Radiant Burners, Inc., v. American Gas Association*,[487] the court allowed an interlocutory appeal to review a ruling that corporations were not entitled to invoke the attorney-client privilege as a limitation on discovery. It did not mention the basis for its appellate jurisdiction or the issue of appealability. The only apparent basis for its appellate jurisdiction, however, is the "controlling question of law" provision.

Katz v. Carte Blanche Corporation[488] is a leading case construing the finality rule.[489] In *Katz*, a Truth in Lending case, defendant sought interlocutory review of an order granting class action status. The court pointed out that class action determinations, either affirmative or negative, ordinarily are not appealable until entry of a final order. In *Katz*, however, the court found little difficulty in satisfying two of the statutory requirements, wavering only on the issue whether a controlling question of law was implicated.[490] In discussing the controlling question of law requirement, the court concluded that the test was simply whether the order was likely reversible error, and if so, whether reversal would terminate the litigation entirely or merely result in retrial.[491]

Schlagenhauf and *Bua* focused only upon the use of mandamus to invoke interlocutory review. Both cases do, however, ex-

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appealable. It is not within the letter and spirit of the law to require respondent to submit to a trial as to her incompetency, when the affirmative finding of jurisdiction of her person is contrary to the record. *Id.* at 460, 176 N.E.2d at 550.

486. 335 F.2d 203 (7th Cir. 1964).

487. 320 F.2d 314 (7th Cir. 1963).

488. 496 F.2d 747 (3d Cir. 1974).

489. 28 U.S.C. § 1292(b) (1968).

490. 496 F.2d at 754-55.

491. *Id.* at 755.

emplify the scope of the federal statute and the state rule allowing permissive interlocutory appeals; both consider the scope of supervisory control over the lower courts; and both cases interpret the requirement that there be "substantial ground for difference of opinion."

In *Schlagenhauf*, the order directing the physical examinations of the defendant doctor, was not reviewable unless the results of the examinations were introduced into evidence at trial and a verdict obtained against the driver, or, a default judgment entered.[492] Moreover, since the issue would likely be mooted out and unreviewable after final judgment, interlocutory review would neither materially advance the ultimate termination of the litigation, nor result in reversal. The order was not therefore, on a controlling question of law.

In *Bua*, the order of default was reviewable on appeal after final order. Review would hinge, however, upon the result of lengthy litigation of damages. Interlocutory review of the order in *Bua* would, therefore, materially advance the ultimate termination of the litigation. The circumstances of *Schlagenhauf* would not satisfy the requirements of an interlocutory appeal while those of *Bua* would. Thus, the only avenue of interlocutory review in *Schlagenhauf* is mandamus.

Another form of permissive appeals, although very limited for review of discovery orders, is provided for under federal and state rules.[493] An order which terminates litigation as to a party or a claim in a multiple party or claim action is immediately appealable if the trial court finds that there is "no just reason for delaying enforcement or appeal."[494]

Recently, in *Curtis-Wright Corporation v. General Electric Company*,[495] the Supreme Court reviewed the use of this procedural device in the federal system, and provided some guidelines for trial courts in making the determination of whether there is "any just reason for delay." The Third Circuit Court of Appeals held that the trial court abused its discretion by certifying as final a large, liquidated claim, while a nonfrivolous counterclaim remained pending.[496] The Supreme Court reversed the

492. FED. R. CIV. P. 37 prohibits the sanction of contempt for failure of a witness to submit to a medical examination.

493. FED. R. CIV. P. 54; ILL. REV. STAT. ch. 110A, § 308 (1979).

494. Bache & Co., Inc. v. Taylor, 458 F.2d 395 (5th Cir. 1972). *See also* Cromaglass Corp. v. Ferm, 500 F.2d 601 (3d Cir. 1974) (court noted that an order striking one of many claims may be appealable under Rule 54 and the dissent urged that such an order may be appealable under 28 U.S.C. § 1291(b) if the claim struck is one for preliminary injunction).

495. 446 U.S. 1 (1980).

496. *Id.* at 7.

Third Circuit's decision, determining that the court of appeals had misinterpreted the standard for reviewing Rule 54(b) certifications.[497] The Court rejected the Third Circuit's view that the presence of nonfrivolous counterclaims weighs heavily against the grant of certification absent a showing of harsh or unusual circumstances. Rather, counterclaims are significant for Rule 54(b) certifications only to the extent that such claims are so interrelated that they are inseparable from the claims on which certification is sought.

Most discovery orders such as orders compelling answers to questions posed in interrogatories, or at depositions are not within the scope of these rules since they do not terminate litigation as to a party or a claim. An order dismissing a party or claim in a multiple party or claim action, however, would be immediately appealable if the trial court found no just reason for delay. For example, in *Schlagenhauf*, had the defendant driver chosen to test the order requiring the examination by suffering entry of a default money judgment against him rather than seeking a writ of mandamus, such judgment order would not have been final since it would not have terminated the litigation between all parties. That judgment order would have been immediately appealable only if the trial court had found "no just reason to delay enforcement or appeal."

The Supreme Court outlined the steps to be taken by the trial court in making its determination and examined the proper function of a reviewing court in such cases. The trial court must initially determine that it is dealing with a final judgment[498] and then consider whether there is "any just reason for delay." The latter requirement involves a discretionary determination that is to be exercised "in the interest of sound judicial administration."[499] This discretionary element requires the trial court to balance the judicial administrative interests against the litigants' interests and the equities involved.[500] The standard used at the trial level is used by the review court in determining whether there has been a discretionary abuse.[501] The reviewing court must scrutinize the trial court's evaluation but should not "disturb the trial court's assessment of the equities" unless it finds the trial court's conclusion "clearly erroneous."[502]

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497. *Id.* at 9.
498. *Id.* at 7.
499. *Id.* at 8.
500. *Id.*
501. *Id.*
502. *Id.* at 10.

Collateral Order

A third means of reviewing interlocutory orders prior to entry of a final order is under the "collateral order" doctrine articulated by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*[503] The *Cohen* Court recognized a small class of cases "which finally determine claims of right separable from, and collateral to, rights asserted in the action" and held an interlocutory order immediately appealable "because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."[504]

Under the collateral order doctrine, an order imprisoning or fining a person for contempt for failure to comply with discovery rules or orders may be immediately appealable. In the federal system, a distinction is made between criminal and civil contempt for purposes of appealability. A further distinction is made between civil contempt of a party and a nonparty. In the Illinois state system, no distinction is made between criminal contempt or civil contempt for purposes of appealability.[505]

In the federal system, an order holding a person in criminal contempt is immediately appealable. An order holding a party

503. 337 U.S. 541 (1949); *see also In re* Estate of Oelerich, 34 Ill. App. 2d 456, 176 N.E.2d 549, (1961).

504. 337 U.S. at 546-47. *Cohen* was followed in Swift & Co. Packers v. Compania Columbiana Del. Caribe, 339 U.S. 684, 689 (1950), where the court held an interlocutory order appealable and said that: "Under these circumstances the provision for appeals only from final decisions [citation omitted] should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process." The principle was again recognized in DiBella v. United States, 369 U.S. 121, 125 (1962), where the Court said that "the concept of finality as a condition of review has encountered situations which make clear that it need not invite self-defeating judicial construction."

505. Civil contempt differs from criminal contempt in its characteristics and its purpose. Ordinarily civil contempt involves a continuing term of imprisonment or a continuing fine until the contemnor complies with the order. In civil contempt, the contemnor carries the "keys [to the] prison in [his] pockets." *In re* Dinnan, 625 F.2d 1146, 1149 (5th Cir. 1980).

Criminal contempt involves a fixed term of imprisonment or a fixed fine. In criminal contempt, the contemnor serves his term or pays his fine. Aurora Steel Prods. v. United Steelworkers, 94 Ill. App. 3d 97, 101, 418 N.E.2d 492, 495 (1981). Criminal contempt requires that the contemnor be provided procedural safeguards associated with other criminal proceedings. The purpose of civil contempt is to coerce the contemnor to comply with the order. It focuses on and protects the adversary's interest. The purpose of criminal contempt is to punish the contemnor. It focuses on and protects the court's interest. However, at times it is impossible to tell which kind of contempt is involved. In such cases, the contempt order cannot stand. *In re* Dinnan, 625 F.2d 1146, 1149 (5th Cir. 1980). Ordinarily civil contempt orders involving litigants are interlocutory and criminal contempt orders are final once the sentence is fixed. However, civil contempt orders involving nonlitigants are final.

in civil contempt is not immediately appealable, but an order holding a nonparty in civil contempt is immediately appealable.[506] The distinction rests directly with the collateral order doctrine. An order holding a party in civil contempt is merely one of the many possible orders entered in the litigation. It is neither collateral to the principal action nor final. An order holding a nonparty in civil contempt is final as to that person and collateral to the principal action. A nonparty, under the circumstances, has no effective means of review unless he can immediately appeal the order when it is imposed.

By contrast, in the Illinois system, an order imprisoning or fining a party or a person for contempt for failure to comply with discovery rules or orders is immediately appealable.[507] The theory is that contempt is an original special proceeding, collateral to, and independent of, the case in which the contempt arises.

A contempt order against a nonparty is not always a necessary condition for immediate review of a discovery order under the collateral order doctrine. In *Covey Oil Company v. Continental Oil Company*,[508] a nonparty witness sought a protective order against disclosure of trade secrets contained in documents subpoenaed by the defendant in an antitrust case. The trial court denied the protective order, whereupon the nonparty witness sought immediate review of the denial under the collateral order doctrine. The court of appeals found the order collateral and, unless subject to immediate review, one that would be mooted and irreparable by any subsequent appeal. In holding the order appealable, the court rejected the appellee's argument that the nonparty witness could obtain review by disobeying the order and appealing from a subsequent contempt adjudication. The court stated: "[T]hese non-party witnesses should not be required to expose themselves to the hazard of punishment in order to obtain a determination of their claimed rights."[509]

Some courts, however, expressly reject the dicta in *Covey*. In *Ryan v. Commissioner of Internal Revenue*,[510] the court ex-

506. *In re* Attorney General of United States, 596 F.2d 58 (2d Cir. 1979); David v. Hooker Ltd., 560 F.2d 412 (9th Cir. 1977); Grinnell Corp. v. Hackett, 519 F.2d 595 (1st Cir.), *cert. denied* 423 U.S. 1033 (1975).

507. People v. Sherman, 9 Ill. App. 3d 547 (1973).

508. 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965). In United States v. Nixon, 418 U.S. 683 (1974), the Court held that President Nixon need not force a contempt citation in order to appeal an order for discovery since it would be unseemly for the President to be in contempt and thus would impinge on the separation of powers. But in *In re* Attorney General of United States, 596 F.2d 58 (2d Cir. 1979), the Second Circuit refused to extend the doctrine to cabinet members.

509. 340 F.2d at 996-97.

510. 517 F.2d 13 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975).

pressly ruled that an order requiring the plaintiff to answer an interrogatory, allegedly in violation of the party's fifth amendment privilege against self-incrimination, was not immediately appealable. The plaintiff claimed that the information sought tended to incriminate him and was not relevant to the civil action. He claimed that the information sought was for the purpose of initiating a criminal action. On that basis the plaintiff argued that the order was collateral to the principal action and was directed at him as a nonparty. The court ruled tha the order was not collateral, and alternatively, that even if it was collateral, the order was not final since no sanction was imposed on the plaintiff. The *Ryan* court, in conclusion, noted that the *Covey* dicta had not been followed in subsequent decisions by the Supreme Court or other courts of appeal.

The pretrial practice presently involves extensive use of discovery, and consequently, myriad interlocutory rulings. The long standing rule of finality thus has great impact on modern litigation. As a practical matter, the primary responsibility for developing and judiciously applying discovery law, rests with the trial courts. The infrequency with which the appellate courts review interlocutory discovery orders, is probably more reflective of deference to this trial court function than it is reflective of limitations imposed by the rule of finality. Accordingly, there is no immediate reason to change the rule of finality as it affects discovery law.