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DISCOVERY AND PRE-TRIAL UNDER THE MINNESOTA RULES

DAVID W. LOUISELL*

THE United States Supreme Court in *Hickman v. Taylor* said:

"The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure." [Italics added.]

This remark is equally pertinent to the new Minnesota Rules of Civil Procedure. Their adoption works an innovation in the previous Minnesota practice as great as that worked in the federal practice in 1938 by the adoption of the federal rules. But the effective date of the new Minnesota Rules, January 1, 1952, found at least a part of the Minnesota Bar ready and even eager to use the new state discovery mechanism, having become acquainted with its utility and efficiency in federal practice. Further, more than thirteen years of experience under the federal discovery rules has produced a wealth of interpretive decisions, treatises, and law review commentary. The general acceptance of the discovery...
mechanism by the bench and bar of the United States\textsuperscript{6} seems to have its counterpart among Minnesota judges and lawyers.\textsuperscript{6} Therefore an exhaustive treatment of discovery here would be a work of supererogation. But a resumé of the author's chief points in his remarks on discovery and pre-trial during the University of Minnesota Law School's Institute on the New Rules, December 19-21, 1951, may be helpful, especially to the members of the bar whose practice has not involved frequent use of the federal discovery rules.

I. THE MINNESOTA DISCOVERY RULES COMPARED TO THE FEDERAL RULES

The Minnesota lawyer who has mastered Federal Rules 26 to 37 has little to learn about the corresponding Minnesota rules, which are practically identical. Few other divisions of the new Minnesota rules correspond more closely to the federal model than the discovery rules.\textsuperscript{7} The following are the only significant differences:

(i) Minnesota Rule 26.07, governing depositions in controversies submitted to arbitrators, has no federal counterpart.

(ii) Minnesota Rule 30.02 provides for protective orders for parties and witnesses which justice requires to protect them from “expense” as well as “annoyance, embarrassment or oppression,” whereas the corresponding Federal Rule 30(b) omits to specify “expense.” But protection against unreasonable expense is implicit in the federal rule.\textsuperscript{8} Minnesota Rule 30.02, unlike its federal counterpart, also contains the express admonition that “The power of the court under this rule shall be exercised with liberality toward the accomplishment of its purpose to protect parties and witnesses.”

(iii) Minnesota Rule 35.01, unlike its counterpart Federal

Rev. 364 (1952), particularly helpful to the Minnesota lawyer in that it is a study of discovery in the Minnesota federal district.


7. This close correspondence may help explain the absence of cause for much criticism of our discovery rules. Cf. Deinard, The Adjustment of the Scheme of the Federal Rules to the Peculiarities of Minnesota Practice, 36 Minn. L. Rev. 695 (1952). Of course, in respect of the discovery rules, there were not the complex problems of adaptation to conditions of Minnesota practice that existed in respect of certain of the other rules.

Rule 35(a), expressly takes note of the situation where "blood relationship" is in controversy, and provides for "a mental or physical or blood examination" whereas the federal rule expressly provides only for "a physical or mental examination." But a "blood examination" is included within the federal rule's concept of a "physical examination." Also, while the Minnesota rule, like its federal counterpart, provides for examination "of a party," only the former expressly provides for examination "of a person under control of a party."

(iv) Minnesota has no rule to correspond with Federal Rule 37(e), which provides under specified conditions for issuance of a subpoena under the United States Code against a citizen or resident of the United States who is in a foreign country. Also, Minnesota has no rule to correspond with Federal Rule 37(f), which exculpates the United States from liability for expenses and attorneys fees under Rule 37.

(v) Probably the most significant difference between the Minnesota and federal discovery rules is the last sentence of Minnesota Rule 26.02, which does not appear in its counterpart Federal Rule 26(b) or elsewhere in the federal rules:

"The production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial, or of any writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert, shall not be required."

Consideration of the significance of this provision invokes a study of the much discussed case of Hickman v. Taylor. In that case plaintiff, the administrator of a deceased crew member who had drowned when the tug on which he was working sank in the Delaware river, brought suit under the Jones Act against the tug owners, and by use of the federal discovery mechanism sought to compel the defendants' attorney to make available to plaintiff (a) written statements which such attorney had obtained from surviv-

10. But in Beach v. Beach, 114 F. 2d 479, 481 (D.C. Cir. 1940), a suit by a wife against her husband for maintenance, the wife's child, although not nominally a party was regarded as a party "in substance" and an order for the child's blood examination was held proper.
12. 329 U. S. 495 (1947) ; cf. Schmitt v. Emery, 211 Minn. 547, 2 N. W. 2d 413 (1942), where a statement taken by defendant bus company's claims agent from the bus driver, himself an individual defendant, by direction of the company's attorneys for use in anticipation of litigation, was held a privileged communication between attorney and client.
ing members of the crew and other witnesses; and (b) oral statements by witnesses to such attorney, whether or not the attorney had reduced them to memoranda. As to the written statements, the Supreme Court held that the facts of this case did not justify discovery of them. Such facts included defendants' bona fide responses to numerous other elucidating interrogatories; plaintiff's knowledge of who the witnesses were; and the availability to plaintiff of the testimony taken at an official government investigation. In respect of the written statements the Supreme Court held no more than that, under the circumstances of the case, plaintiff had not established a right to discovery of them; he had not justified discovery of them because he had not shown a genuine need for their discovery. This, as the opinion of the Court makes clear, is by no means a holding that discovery of the written statements of witnesses obtained by an adversary's attorney can never be justified; rather, that a proper balancing in this case of the reasons for discovery against reasons precluding "unwarranted excursions into the privacy of a man's work" produced a preponderance in the latter's favor.

The Court's conclusion that the witnesses' oral statements to defendants' attorney were not subject to discovery is both more firmly and more broadly based than its conclusion against discovery of the written statements.

"But as to oral statements made by witnesses to Fortenbaugh [the attorney], whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. . . . The standards of the profession would thereby suffer." [Italics added.] 13

Thus, as to discovery of the attorney's memoranda and mental impressions—roughly termed the "work product of the lawyer"—the Court not only concluded that the circumstances of the case did not, but that they could not, justify production. The necessity for inviolability of the lawyer's true "work product" for his proper functioning in our adversary system, seems clearly to require this much of the Court's decision. Indeed, most experienced trial lawyers would probably argue for a more air-tight guarantee against disclosure of their "work product," e.g., a memorandum.

13. Id. at 512-513.
intended only for the dictating lawyer’s and his collaborators’ eyes of his appraisal of his legal theories, the cogency of available evidence, the chances for success, risks, dangers and weak points, and like products of the searching of the conscientious advocate’s soul. The Federal Advisory Committee’s solution for the problem of Hickman v. Taylor was:

“The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney’s mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert.”

The following conclusions are suggested from a consideration of the last sentence of Minnesota Rule 26.02 vis-a-vis Hickman v. Taylor and the Federal Advisory Committee’s proposal:

(a) So much of the Minnesota rule as precludes discovery of an attorney’s “mental impressions, conclusions, opinions or legal theories” is a wholesome acceptance of the result of Hickman v. Taylor as to the lawyer’s “work product.” Our rule’s conclusive prohibition of this type of discovery accords with the Federal Advisory Committee’s proposal and is more fortunate than the somewhat qualified language of Hickman v. Taylor, which implies that discovery of the lawyer’s “work product” might be permissible under some circumstances. An advocate cannot function with the requisite efficiency, client devotion, dignity, or intellectual honesty, if he is bound to disclose to his adversary what is essentially his “work product.”

(b) The Minnesota Rule protects against discovery of statements obtained or prepared in anticipation of litigation or preparation for trial not only by the opposing lawyer, but also by the adverse party, his surety, indemnitor, or agent. In this it exceeds the rationale of Hickman v. Taylor but accords with the Federal Advisory Committee’s proposal. However, contrary both to such proposal and to Hickman v. Taylor, the Minnesota Rule invariably

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14. Reprinted in 4 Moore’s Federal Practice § 30.01[3], pp. 2006-07. This proposal was not adopted, presumably because the Supreme Court then had before it Hickman v. Taylor, and did not wish to be embarrassed in the decision of that case by adopting an amendment directed to the problem of that case. Id. at § 30.01[5], p. 2011.
precludes discovery of such statements, even though such statements do not contain the attorney's "mental impressions, conclusions, opinions, or legal theories," and without regard to the necessities of the case. In this respect the Minnesota rule goes beyond the legitimate protection of the lawyer's function necessitated by the realities of adversary litigation, and constitutes an unjustified restriction on discovery per se. The Federal Advisory Committee's proposal for a solution of the problem of Hickman v. Taylor drew a clear-cut distinction between those parts of writings prepared for litigation which do, and those which do not, reflect an attorney's "mental impressions, conclusions, opinions, or legal theories." The former always were to be exempt from discovery; the latter were to be exempt unless considerations of fairness, hardship or justice required discovery. It is submitted that this proposal is fairer and better accords with the philosophy of discovery than the Minnesota provision which precludes discovery of all of such writings always.15

(c) Minnesota's invariable preclusion of the discovery of the conclusions of an expert, except those of an examining physician whose deposition may be taken under Rule 35, accords with the Federal Advisory Committee's foregoing proposal. Perhaps both too readily analogize conclusions of an expert to the lawyer's conclusions, overlooking that the latter's advocacy functions, and simultaneous duties as an officer of the court, necessarily place him in a unique status in adversary litigation, as Hickman v. Taylor clearly recognizes.16 Prohibition of discovery of experts' conclu-

15. It will be noted that the effect of the Minnesota provision, at least literally construed, is to prevent discovery of a writing in toto if any part of it reflects an attorney's mental impressions, conclusions, opinions, or legal theories, whereas the Federal Advisory Committee's proposal would only preclude discovery of so much of the writing as is proscribed. While the latter in drawing this dichotomy invites potentially perplexing problems of severing documents, it is sounder in principle. The New Jersey and Utah rules effect the Federal Advisory Committee's proposal, rather than Minnesota's invariable preclusion of discovery of writings prepared for litigation. See 4 Moore's Federal Practice § 26.23[6], p. 1127.

16. "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. 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." 329 U. S. at 510-511 (1947).
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sions is bottomed on the idea that it is unfair\textsuperscript{17} to permit a person to profit from the expenses of another.\textsuperscript{18} While often this does seem unfair in litigation as elsewhere in human affairs, invariable preclusion of such discovery may ultimately conflict with the public interest in accurate adjudication. It may be doubted whether Rule 26.02's provision is the final answer to this difficult and complex problem, which goes to the philosophic roots of judicial administration, or whether perhaps Professor Moore's suggestion is a morally sounder yet practical solution. His suggestion in substance is that while ordinarily the court should not permit a party to examine an expert engaged by an adverse party, nevertheless the court should have discretion to order such examination where it is really necessary, and upon condition that the examining party pay a reasonable portion of the expert's fees.\textsuperscript{19}

(d) Even our Rule 26.02's stringent provision against production or inspection of writings "obtained or prepared \ldots in anticipation of litigation or in preparation for trial" does not preclude use of discovery to find out whether or not statements were made by witnesses and the identity and location of witnesses. The "existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts" may be inquired about. The prohibition is against the "production or inspection" of the writings.

II. THE PHILOSOPHY OF THE DEPOSITION-DISCOVERY RULES

So much has been said of the underlying philosophy of the de- position-discovery rules—a law suit should be an intensive search for the truth, not a game to be determined in outcome by considerations of tactics and surprise\textsuperscript{20}—that little need be added here. The widespread acceptance of the rules by the bar attests to its acceptance of that philosophy, as well as acknowledgment that the rules comprise an efficient mechanism to help effectuate it. While fully accepting both of these premises, the author sees nothing in

\textsuperscript{17} Quaere: whether the conclusion of unfairness does not proceed from an assumption that expert knowledge relevant to civil adjudication is but a species of private property, within the owner's exclusive dominion. But no one would deny the adversary's right to share in such knowledge, to the extent that legitimate cross-examination at the trial enables him to.


\textsuperscript{19} Id. at § 26.25, p. 1158.

these rules at odds with the fundamentals of the common law method of adversary adjudication. There is nothing in these rules to suggest a retreat from the common law's hard-headed conception of litigation as adversary and competitive, and from its historic notion that a struggle—warfare, if you will—between vitally interested partisans, is most apt to expose the truth. The author thus sees in these rules nothing akin to Judge Jerome Frank's suggestion for placing on public agencies part of the duty of pre-trial ascertainment of the facts in civil cases.21 The rules simply develop discovery, which has its antecedents in English chancery practice, into an efficient technique for fact ascertainment, to take its place in the common law's arsenal along with the advocate's other efficient weapons such as testimony in open court, cross-examination, impeachment, forensic skill, and mastery of legal principles. As stated by Mr. Justice Jackson in concurring in the decision of Hickman v. Taylor:

"...[Counsel for plaintiff] bases his claim to [the conversations of defendants' counsel with witnesses] on the view that the Rules were to do away with the old situation where a law suit developed into 'a battle of wits between counsel.' But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."22

The author believes, and a study tends to confirm,23 that the deposition-discovery rules do not minimize the value of true expertness and skill in advocacy. They do minimize the chances for and significance of the trick tactic, but contrariwise they enhance the value of thorough and penetrating advocacy.

III. MENTAL, PHYSICAL AND BLOOD EXAMINATIONS

At the December, 1951 Institute, it was predicted that Rule 35, providing for mental, physical and blood examinations, would effect little change in the existing Minnesota practice whereby an injured plaintiff usually submits voluntarily to an examination by a physician upon request of the defendant, knowing that if he does not voluntarily submit he will be required to do so by court order.

21. See Frank, Courts on Trial 94-99 (1949), noted in 35 Minn. L. Rev. 689 (1951); Frank, Book Review, 56 Yale L. J. 589, 594 (1947); In re Fried, 161 F. 2d 453, 464 (2d Cir.) (opinion by Judge Frank), cert. granted, 331 U. S. 804, cert. dismissed on motion of petitioner, United States v. Fried, 332 U. S. 807 (1947).

22. 329 U. S. at 516 (1947).

As early as 1899, it was held by Mr. Justice Mitchell for the Court in *Wanek v. City of Winona*\(^2^4\) that a plaintiff in an action for personal injuries could be compelled by the court to submit to a physical examination in order to ascertain the nature and extent of his injuries, under penalty of dismissal of his action for failure to submit. In view of this background to Rule 35, there seems to be little reason to anticipate an attack on it analogous to that made on the corresponding federal rule in *Sibbach v. Wilson & Co.*\(^2^5\).

In that personal injury action plaintiff contended that Federal Rule 35's requirement of submission to a physical examination violated the restriction in the act authorizing promulgation of the rules, that the "rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."\(^2^6\) The attack failed but only by the narrow margin of a five to four vote in the United States Supreme Court, the dissenting opinion of Mr. Justice Frankfurter mustering support to an extent perhaps surprising to the Minnesota lawyer, accustomed to compulsory physical examinations for many years under *Wanek v. City of Winona*. But the basic approach of the dissenting justices in *Sibbach v. Wilson & Co.*—that the "inviolability of a person" has such historic roots in Anglo-American law that it is not to be curtailed "unless by clear and unquestionable authority of law"\(^2^7\)—has its remnant of operative scope in that under Federal Rule 37(b)(2)(iv), as under its counterpart Minnesota Rule 37.02(2)(d), violation of an order for examination by a physician, unlike violations of other discovery orders, may not be punished by arrest of the violator.

While Minnesota Rule 35, practically viewed, will for the most part only cause a continuation of pre-rules practice, it should be noted that, like the corresponding federal rule, it expressly provides for compulsory exchange of physicians' reports upon demands of the parties, and for waiver under stated conditions of the patient's privilege of confidential communication with his physician.\(^2^8\) Thus, when the injured plaintiff submits to a physical examination by defendant's physician, the plaintiff upon demand may obtain a copy of such physician's detailed written report. But after he gets such copy, the plaintiff upon request must turn over to the defendant a like report of any examination, previously or

\(^{24}\) 78 Minn. 98, 80 N. W. 851 (1899).

\(^{25}\) 312 U. S. 1 (1941).


\(^{27}\) 312 U. S. at 17 (1941).

\(^{28}\) Provided for by Minn. Stat. § 595.02(4) (1949).
thereafter made, of the same physical condition. Further, plaintiff, by getting the report of the defendant’s physician, or by taking the deposition of defendant’s physician, waives any privilege he may have in the instant action or any other involving the same controversy, regarding the testimony of every other physician who has examined or may thereafter examine plaintiff in respect of the same physical condition. Thus, the consequences of plaintiff’s discovery of the conclusions of defendant’s physicians, are sufficiently onerous to induce most plaintiffs’ attorneys, except in unusual circumstances, to refrain from such discovery.

Where because of the refusal of a plaintiff voluntarily to submit to an examination by defendant’s physician it is necessary for defendant to seek a compulsory order under Rule 35, such order “may be made only on motion for good cause shown.” In federal practice a showing usually deemed sufficient is made by defendant’s affidavit that he has good reason to believe that plaintiff’s injuries are not as extensive as plaintiff claims. There would seem to be no reason to anticipate that our courts will require a stronger showing, especially in view of the Minnesota policy, as old at least as Wanek v. City of Winona, favoring compulsory physical examinations in personal injury cases. But doubtless our courts, like the federal courts, will be careful to protect the rights of the person to be examined and will refrain from ordering unduly painful or dangerous examinations.

The Minnesota courts may have to thresh out as have the federal courts, how directly or immediately “in controversy” the mental or physical condition or blood relationship of a person must be in order to justify compulsory examination by a physician under Rule 35. Wadlow v. Humberd was a suit for libel based on an article published by defendant physician in a medical journal wherein he stated that plaintiff was suffering from various physical and mental conditions. The defense was truth, and defendant moved for physical and mental examination of plaintiff under Federal Rule 35 on the ground that the physical and mental condition of

29. The right of a party under Rule 35 to take the deposition of his adversary’s physician is the one exception to Rule 26.02’s preclusion of discovery of the conclusions of an expert. See note 18 supra and accompanying text.
33. 27 F. Supp. 210 (W.D. Mo. 1939).
plaintiff were "in controversy." But the trial court, apparently thinking that Rule 35 contemplates compulsory physical and mental examinations only in personal injury cases, denied the motion because "the mental or physical condition of a party cannot be immediately or directly in controversy in a libel suit." But the rationale of Beach v. Beach is all the other way. In that case a wife, alleging she was pregnant by her husband, sued him for maintenance, and the husband, denying paternity, counterclaimed for divorce on the ground of adultery. A child was born to the wife pending suit. On motion of the husband, the trial court ordered the wife and also the child, although the latter was not nominally a party to the suit, to submit to a blood grouping test for comparison of their blood with that of the husband. This order was affirmed, the court of appeals holding that the blood grouping of a person is a physical condition "in controversy" where the underlying issue is paternity. The court rejected the rationale of Wadlow v. Humberd.

The first sentence of Minnesota Rule 35 reads in part: "In an action in which the mental or physical condition or the blood relationship of a party, or of a person under control of a party, is in controversy. . . ." The inclusion of the italicized words, which are absent from the corresponding federal rule, would seem to require the result of Beach v. Beach in a similar case before the Minnesota court in which paternity is the underlying issue. But in cases not involving blood relationship, Minnesota Rule 35, like its federal counterpart, is susceptible of interpretation as to how directly or immediately "in controversy" the physical or mental condition must be to justify compulsory examination. However, our rule's express inclusion of "blood relationship" as one of the things that may be thus "in controversy," implies a repudiation of Wadlow v. Humberd's restriction of Rule 35 to personal injury actions. Blood relationship rarely is in issue in such actions and a severing of our Rule 35 so that part of it would be and part of it would not—be-

34. 114 F. 2d 479 (D.C. Cir. 1940), commented on in Note, 31 Minn. L. Rev. 712, 723 (1947).
35. This would seem true in proceedings to determine paternity brought under Minn. Stat. c. 257 (1949), as well as other cases. Even though such proceedings are brought in the name of the state, the mother is a party to the proceedings so as to entitle her to appeal from a support order as an "aggrieved party" under the appeals statute, Minn. Stat. § 605.09 (1949). State v. Sax, 231 Minn. 1, 42 N. W. 2d 680 ((1950) (four to three decision). "In the majority of jurisdictions, the mother is a party by express provision or by implication from the context of the statute." Id. at 5, 42 N. W. 2d at 683. "In this state the proceeding is civil in nature—the state merely loans its name to be used as plaintiff" (citing four Minnesota cases)." Id. at 6, 42 N. W. 2d at 684.
cause it literally cannot—be restricted to personal injury actions, is hardly justifiable interpretation.

IV. DEPOSITIONS—RULES 26 TO 32; INTERROGATORIES TO PARTIES—RULE 33; DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS—RULE 34; ADMISSIONS—RULE 36

These rules are separately well summarized elsewhere. And the lucidity and conciseness of their language perhaps makes the text of the rules their own best résumé. Rather than merely to rephrase the provisions of these rules, the author would like to call attention to several of their predominant characteristics: (i) the breadth and scope of the discovery they make possible, (ii) their close integration into a unitary mechanism, and (iii) their implicit recognition of the sound judgment and essential integrity of practicing lawyers.

(i) Gone is the day when the cry of "fishing expedition" prevents a party from finding out relevant facts known by his adversary. Subject only to the protective orders of Rules 30.02 and 30.04, and to the last sentence of Rule 26.02 already discussed, a party may obtain any information, not privileged, which is relevant to the subject matter. "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." The information may relate "to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts." Thus, for example, we have rejected such hampering restrictions on discovery as the rules that a party can inquire only into those facts that are material to his own cause, and cannot pry into his opponent's case; or that discovery is allowable only in aid of the party with the burden of proof. Moreover, there need be no indication by the inquiring party as to whether he

37. Rule 26.02.
38. Rule 26.02.
seeks the information shee{}rly for discovery purposes, or for use at the trial, or for both purposes.41

(ii). The close integration of the discovery techniques is readily apparent. The same scope of examination available to a party in taking a deposition of an adversary party or other witness under Rule 26 and the other deposition rules, is also available to him in propounding interrogatories to an adverse party under Rule 33, or in moving for discovery and production of documents or things by an adverse party under Rule 34. This identity of scope of inquiry is conveniently achieved by cross reference of Rules 33 and 34 to Rule 26.02. And while Rule 36, providing for admission of the genuineness of documents and truth of facts by a party upon request of his adversary, contains no cross reference to Rule 26.02, it contains only the same basic restriction—that the documents or facts must be relevant and not privileged. There is similar close integration of the sanctions which underlie the rules, as we shall see.

The units of the discovery mechanism do not stand in isolation, others to be necessarily ignored when one is used. A party by the use of the economical means of interrogatories addressed to his adversary under Rule 33, may ascertain the identity and location of a person having knowledge of relevant facts. Then the party may follow up by taking the deposition of such person, using if the party desires a subpoena duces tecum to compel the person to bring a relevant document. The party’s examination of such person having resulted in knowledge of further relevant documents or things in possession of the adversary, the party may move under Rule 34, upon a showing of good cause, for their production for inspection, copying or photographing. And as a result of any or all of the techniques mentioned, the genuineness of certain documents or the truth of certain matters of fact may then appear with such certitude to the party as to prompt him to make a request for admission, thus perhaps obviating expensive or difficult methods of proof at the trial.

41. This paper is primarily concerned with Rules 26 to 37 as a discovery mechanism. The circumstances under which the fruits of discovery may be used at the trial are precisely stated in Rule 26.04. The genius of the deposition-discovery mechanism lies largely in the clear-cut distinction between the right to take depositions and get answers to interrogatories to a party, on the one hand, and the right to use the depositions and answers on the other. This distinction makes possible the utmost freedom in taking depositions and propounding interrogatories, because of the restrictions imposed upon their use. See Pike and Willis, The New Federal Deposition-Discovery Procedure, 38 Col. L. Rev. 1179, 1186-87 (1938); 4 Moore’s Federal Practice § 26.04, p. 1029.
With such a highly integrated mechanism, it is to be expected that there would be some potential overlapping in the functions and scope of the several techniques, and such is the case. For example, it would seem possible for a party either to move for the discovery and production of documents or things under Rule 34, when they are in the possession of an adverse party, or in the alternative to take the deposition of such party under Rule 26 and compel production of the documents or things by subpoena *duces tecum* under Rule 45. Indeed, where the person whose deposition is to be taken is an adverse party, as distinguished from a non-party witness, it is arguable that the subpoena *duces tecum* is unnecessary to compel production of the documents or things, since it is well established that a party is obliged to respond to a notice of the taking of his deposition even though not subpoenaed, and the documents or things might be designated in the notice, thus possibly obviating necessity for the subpoena *duces tecum*. But where the person whose deposition is to be taken is a witness other than a party, unless he will attend voluntarily a subpoena *ad testificandum* is of course essential to compel his attendance, and a subpoena *duces tecum* to compel his production of documents or things.

(iii) Implicit in the discovery rules is acknowledgment that they will be administered by a learned profession of judgment and integrity, which can be depended upon for a high degree of self-discipline and self-policing. This acknowledgment is not based upon delusive suppositions that advocates in an adversary system will freely abandon positions of strength out of considerations of sentiment or good fellowship; but rather that judgment, experience and mutual respect among fellow practitioners will normally dictate limitations of common sense substantially equivalent to those that would be imposed by a court.

The informality and ease with which the discovery techniques

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43. See 4 Moore's Federal Practice § 26.10, p. 1052; § 34.02, p. 2426.

44. See 4 Moore's Federal Practice § 26.10, p. 1051.

45. "As a matter of administration, examinations should be arranged between the parties on a professional basis, and resort to the court by motion or objection should be had only when a serious question is raised as to the good faith, legitimate purpose or reasonable scope of the examination." Marie Dorros, Inc. v. Dorros Bros., 274 App. Div. 11, 14, 80 N. Y. S. 2d 23, 27 (1st Dep't 1948).
may be used is an illustration of the confidence reposed in the bar. Thus, while the production of documents and things under Rule 34 and compulsory examinations by physicians under Rule 35 require a motion and showing of good cause, the most important and frequently used discovery technique—the deposition\textsuperscript{46}—ordinarily requires no leave of court but only counsel’s decision, and the same is true of interrogatories to parties under Rule 33 and requests for admissions under Rule 36. It is only when plaintiff is the initiating party, and then only when notice of the taking of the deposition is served within twenty days after commencement of action (and ten days, in the case of interrogatories under Rule 33 and requests for admissions under Rule 36) that leave of court must be obtained. Thus in the first instance the bar is for the most part left to exercise its own judgment as to the use of the discovery mechanism.

Nor is the exercise of such judgment much hamstrung by artificial restrictions on the extent of use. The only restriction which it seems accurate to characterize as artificial is so much of the last sentence of Rule 26.02, already considered, as invariably precludes discovery of writings obtained or prepared by the adverse party, his attorney, surety, indemnitor or agent in anticipation of litigation or in preparation for trial. Otherwise, the restrictions are wholly rational or based upon long standing policy: restrictions of relevancy, privilege, and such as justice may require to protect from annoyance, expense, embarrassment or oppression. Thus, a party is not limited to one deposition of a witness; the circumstances may justify several. And, where the witness is a party, he may not only be required to submit to depositions, but also to respond to interrogatories propounded under Rule 33. “Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered. . . . The number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party

\textsuperscript{46} In diversity litigation in the federal courts, the oral deposition is the most frequently used discovery device, often by a substantial margin, but interrogatories to parties under Rule 33 are another favorite. Litigation to which the federal government is a party presents unique practical problems of accessibility of information, resulting in the frequent use of Rule 33 interrogatories. See Note, \textit{Tactical Use and Abuse of Depositions under the Federal Rules}, 59 Yale L. J. 117, 118 (1949); Speck, \textit{The Use of Discovery in United States District Courts}, 60 Yale L. J. 1132, 1135, 1137 (1951). In diversity litigation at least, the pattern of use of the discovery techniques in the Minnesota federal district seems to accord with the general pattern. See Note, \textit{Discovery: Boon or Burden?}, 36 Minn. L. Rev. 364, 380, 381 (1952).
from annoyance, expense, embarrassment, or oppression." Indeed, within the confines of relevancy and privilege, any combination of the techniques is available, subject to the protective provisions of Rule 30.02.

Even the sanction machinery of the discovery mechanism seems for the most part so gauged as implicitly to acknowledge the bar's self-disciplining and self-policing capabilities, although as we shall see, in a few instances it holds over the lawyer "a big stick."

V. THE SANCTIONS OF DISCOVERY

The sanctions which underlie discovery invite simple categorization: (A) those which make discovery effective, and (B) those which protect against abuse.

(A) Sanctions which make discovery effective.

The effectiveness of discovery is guaranteed by a closely coordinated scheme of sanctions. Since compulsory production of documents and things under Rule 34 and compulsory examinations by physicians under Rule 35 are had pursuant to court order, violation of the original discovery order itself renders the violator subject to the consequences of Rule 37.02(2). But when a party or other witness refuses to answer a question propounded upon oral examination, or a witness refuses to answer an interrogatory submitted in the taking of a deposition by written interrogatories, or a party refuses to answer an interrogatory submitted under Rule 33, the refusal in each case is originally not a violation of a court order. Thus, if the proponent of the question wishes to force the issue so as to render the person refusing liable to the sanctions of Rule 37.02, he must first obtain a court order compelling answer. This is done under Rule 37.01. Then if the person refusing, whether a party or other witness, persists in his refusal, it may be considered a contempt of court under Rule 37.02(1). And such refusal, as well as violation of a court order to produce documents or things under Rule 34 or submit to an examination under Rule 35, subjects the party violator to "such orders in regard to the refusal as are just" under rule 37.02(2), ranging in degree from drawing an unfavorable conclusion against the disobedient party in respect of the matter his disobedience involves, to rendering judgment by default against the disobedient party or even issuance of an order.
directing his arrest. 48 (As already noted, violation of an order to submit to mental or physical or blood examination is excepted from the sanction of arrest but from no other of the sanctions of Rule 37.02(2)).

Even in the absence of a court order compelling discovery, certain failures to make discovery invoke significant penalties if the failures are wilful. Thus, under Rule 37.04 if a party wilfully fails to appear before the officer who is to take his deposition, after being served with proper notice, or fails to submit answers to interrogatories under Rule 33, the court on motion may "strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

Then too the discovery rules expressly provide for significant financial sanctions conducive to efficiency in discovery. Thus by Rule 30.07, if the party giving the notice of the taking of a deposition fails to attend and proceed therewith, or by neglecting to subpoena a non-party witness fails to procure his attendance, and if another party attends, thus incurring waste of time and expense, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees. Further, Rule 37.01 imposes a significant financial sanction conducive to careful formulation of judgment as to whether or not a question propounded is a proper one which should be answered. Thus, if a party or witness refuses to answer a question which the court, on motion, determines should have been answered, and the court finds that the refusal was without substantial justification, the court "shall" require the refusing party or witness and the party or attorney advising the refusal or both of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. Contrariwise, if the motion to compel an answer is denied and the court finds that the motion was made without substantial justification, the financial burden falls upon the examining party or the

48. The sanctions against a party are also applicable where the refusals or failures are those of "an officer or managing agent" of the party. Rules 37.02(2), 37.04. It is suggested that when a party moves for sanctions against an adversary party who refuses to make discovery, there is no reason why the movant should seek but one sanction exclusively; e.g., the movant might appropriately ask that his adversary be ordered to answer interrogatories within a specified period, and that if he fails to do so, his action be dismissed.
attorney advising the motion or both of them.\textsuperscript{49} Thus is placed directly on attorneys a somewhat unique sanction to refrain from the frivolous, to weigh carefully considerations of relevancy and privilege, and to advise in accordance with their best judgment.\textsuperscript{50}

In addition to the financial sanctions expressly imposed by the discovery rules, other provisions of Minnesota law, realistically viewed, may be considered relevant as sanctions conducive to discovery, even though less directly so. Recovery or potential recovery of the costs of discovery, by taxation thereof against the opposing party, can be a factor in a party's decision to use or not to use discovery. Some of the discovery techniques are inexpensive almost to the point of costlessness, at least so far as out-of-pocket expenses are concerned. It costs little but counsel's time to propound interrogatories under Rule 33, to move for the production of documents and things under Rule 34, or to make requests for admissions under Rule 36. The taking of a deposition on written interrogatories under Rule 31 is often relatively inexpensive at least as compared with the oral deposition. It is the use of the latter device that often involves substantial out-of-pocket disbursements including those to compensate the reporter for taking and transcribing the testimony.\textsuperscript{61} In given circumstances the attorney's advice and party's decision as to whether or not to take a deposition might well be affected by the degree of confidence in recovering the expenses as

\textsuperscript{49} Similarly, in granting or refusing orders under Rule 30.04 to limit or terminate a deposition in progress, "the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable." But attorneys are not expressly included.

\textsuperscript{50} In this connection it is interesting to note the philosophy of the discovery rules respecting objections to questions. Obviously the notary before whom the deposition is taken has no power to rule upon objections (at least in the absence of an authorizing stipulation under Rule 29). Objections are not waived by failure to make them during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time—such as objections going to the form of the question. Rule 32.03(1), 32.03(2). Thus in many cases lawyers will refrain from making objections that go to competency, relevancy or materiality—or at least from pressing such objections—during the taking of the deposition, realizing such objections can be made at the trial. The type of question which requires keen analysis as to whether the objector should insist upon his objection, even to the extent of risking a court order under Rule 37.01 with its accompanying sanctions, is usually a question involving privilege or of a similar type where the harm consists in "letting the cat out of the bag" and where non-admissibility at the trial may provide no adequate remedy.

\textsuperscript{51} Where the free availability of deposition discovery is abused, and in certain complicated cases, the expenses of taking depositions can be very substantial. See Note, 59 Yale L. J. 117, 126-131 (1949). As already noted, Minnesota Rule 30.02 recognizes the danger in expressly providing "expense" as a ground for protective orders.
taxable costs. The Minnesota statute on disbursements provides in part:

"In every action in a district court, the prevailing party shall be allowed his disbursements necessarily paid or incurred."

In *Wentworth v. Griggs* the Court allowed taxation against the losing party of the prevailing party's disbursements for notary fees for depositions taken in another state. These depositions were apparently used at the trial. Where depositions are taken solely for discovery, or where in any event they are not used at the trial, should the fact of such non-use preclude taxation of the disbursements incurred in taking them; or should the court determine whether the taking of the depositions was reasonable and substantially helpful in the resolution of the issues, and if so, allow the disbursements despite non-use of the depositions at the trial? On this the rules are silent.

There is some guidance, but no final answer, in the varying practices that have evolved in the federal districts under the Federal costs statute and discovery rules. Professor Moore in reviewing the federal cases concludes that the costs of taking a deposition will be taxed in favor of the prevailing party if the taking of the deposition was reasonably necessary, even though it may not have been used at the trial. But he qualifies this conclusion by observing that the taxation of costs of depositions, as of costs generally, is a matter within the sound discretion of the trial court, and that some courts have refused to impose on the losing party costs incurred by his adversary in taking "discovery" depositions as a matter of general preparation for trial and not for use in evidence. His qualification seems to state the rule in the Minnesota federal district.

Theoretically at least, a good case can be made for making taxability of deposition costs dependent upon the reasonableness of taking the deposition under the circumstances and the utility of the

52. Minn. Stat. § 549.04 (1949). But of course the statute is not construed as broadly as its literal phraseology would suggest. See Shterk v. Veitch, 135 Minn. 349, 160 N. W. 863 (1917).

53. 24 Minn. 450 (1878).


55. See 4 Moore's Federal Practice § 26.36, pp. 1207-08.

56. Republic Machine Tool Corp. v. Federal Cartridge Cor., 9 Fed. Rules Serv. 534 (D. Minn. 1946); see Note, 36 Minn. L. Rev. 364, 369-370 (1952), where it is stated: "In the taxation of costs, perhaps more than in any other field in discovery, the judgment of the trial judge as to the entirety of the case should be controlling. . . ." [Italics added.]
deposition in assisting in a resolution of the contested issues. A deposition although not used as evidence, may have led to procurement of essential evidence which, realistically viewed, determined the outcome of the trial. But of course this doctrine requires the exercise of judicial discretion, in addition to the increased measure of discretion necessitated generally by the discovery rules. And, as with the exercise of discretion generally under the discovery rules, a proper appraisal of the reasonableness of taking a deposition and of its utility, would require deliberate, careful and patient judicial consideration.

Nothing yet has been said of the sanctions to induce compliance with requests, made under Rule 36, for the admission of the genuineness of relevant documents or the truth of relevant matters of fact. If a party served with a request takes no action respecting it, "each of the matters of which an admission is requested shall be deemed admitted." Thus the initiative under Rule 36 is on the served party to deny, or state why he cannot truthfully admit or deny, or object if the requests for admissions are improper. Rule 37.03 provides simply that if a party, after being served with such a request, serves a sworn denial thereof, and if the party requesting the admission thereafter proves such genuineness or truth, the court on application of the latter party shall order the offending party to pay the reasonable expenses incurred in making such proof, including reasonable attorney's fees, unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance.

(B) Sanctions against abuse of discovery.

Rule 30.02 sets forth with specificity protective orders which a court may issue, upon motion seasonably made by any party or the prospective witness, after notice is served for taking the oral deposition of the witness. The range of these orders is from an order fixing the place of taking the deposition, to one prohibiting altogether the taking. It seems clear that the specifically enumerated orders are sufficiently inclusive to take care of most contingencies requiring

57. As early as Wentworth v. Griggs in 1878, our court recognized the distinction between taxation of costs of depositions reasonably and unreasonably taken: "But two of these items of five dollars each were allowed for taking two depositions of the same witness, and there is no necessity suggested in the affidavit to the disbursements, nor apparent from the record nor the nature of the case, for taking two depositions of the same witness. Without a necessity for it appearing both items should not be allowed." 24 Minn. at 452 (1878).
protection which are apt to arise. Nevertheless the rule, substantially like its federal counterpart, goes on to provide generally that the court "may make any other order which justice requires to protect the party or witness from annoyance, expense, embarrassment or oppression." While Rule 30.02 provides for protective orders before commencement of taking the deposition, substantially the same protection is available after commencement under Rule 30.04. The norm for protective orders thus established by Rule 30.02, is equally applicable to interrogatories to parties and discovery of documents and things by reason of cross references in Rules 33 and 34 to Rule 30.02. And it also is applicable, along with a few additional sanctions, to depositions upon written interrogatories under Rule 31.58

While Rule 35, providing for compulsory examinations by physicians, contains no cross reference to Rule 30.02, it does require initially an authorizing court order which "shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is made." And while Rule 36, providing for requests for admissions, similarly contains no cross reference to Rule 30.02, it also contains its own protective provision by authorizing written objections by the addressee of the requests, on the ground that some or all of the requests are privileged or irrelevant or otherwise improper in whole or in part.

Thus the courts have ample power to protect against at least most potential abuses of the discovery rules. Further, denying taxation of costs for frivolous, unnecessary or useless depositions can also be a significant sanction against abuse. In federal practice, the principal abuses seem to have occurred chiefly in the so-called "big cases"—principally anti-trust and patent cases.59 There is very little abuse in the Minnesota federal district.60 Perhaps the thing to fear under our new rules—especially because of Rule 30.02's specific encouragement to the liberal exercise of the protective powers, a provision not in the corresponding federal rule—is not so much a failure of adequate protective orders, as an undue curtailment of legitimate discovery.

58. Rule 31.04.
60. See Note, 36 Minn. L. Rev. 364, 374, 376-377 (1952).
VI. APPEALABILITY OF DISCOVERY ORDERS

When a trial court abuses its discretion by wrongfully permitting or denying discovery, may the aggrieved party promptly get review of the discovery order, or must he await determination of the case on the merits for such review? If the trial court wrongfully denies discovery, and the wronged party goes to trial without benefit of the information he was entitled to, on appeal from the judgment it may be difficult or impossible for him to establish that the improper discovery order constitutes prejudicial error. On the other hand, if the trial court wrongfully enforces discovery, "the cat is out of the bag" and appeal from the judgment will hardly undo the wrong. It perhaps will be a rare case when appeal from the judgment will, realistically viewed, afford adequate protection against improper discovery orders. But too free appealability of discovery orders would make for piece-meal and dilatory litigation discordant with modern concepts of judicial administration.61

There is some help, but no authoritative answer to the dilemma, in federal practice. With the exception of certain interlocutory orders respecting injunctions and receiverships, interlocutory admiralty decrees, non-final judgments in patent cases, and certain orders in bankruptcy, appeals in the federal system from district courts to courts of appeals lie only from "final decisions" of the district courts.62 As Professor Moore has pointed out, the general principle followed by the federal courts in determining appealability is that a "final decision" must be one which ends litigation; but there is a competing or qualifying principle that a decision is final which makes a dispositive adjudication of some independent phase

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61. In considering appealability of discovery orders it should be borne in mind that, even though discovery orders are not per se appealable, yet sanctions applied in connection with discovery orders may provide the necessary basis for appeal. Thus, disobedience of a discovery order may result in an order dismissing the action or judgment by default against the disobedient party under Rule 37.02(2) (c). Even the less drastic sanction of striking out part of a pleading might produce an order "involving the merits of the action or some part thereof" and hence be appealable under Minn. Stat. § 605.09(3) (1949). Cf. Lowe v. Nixon, 170 Minn. 391, 212 N. W. 896 (1927) (order striking part of answer appealable); Floody v. Chicago, S. & O. Ry., 104 Minn. 132, 116 N. W. 111 (1908) (order striking demurrer to complaint appealable); 4 Moore's Federal Practice § 26.37[2], p. 1212.

62. See Title 28, U. S. Code §§ 1291, 1292 (1948) in respect of decisions other than in bankruptcy cases. 11 U. S. Code §§ 47, 48 contain the general (but not all) the provisions for bankruptcy appeals.
or offshoot of the main litigation. However, as he also notes, most discovery orders do not finally dispose of the proceeding or of any independent offshoot of it, and therefore are not appealable; the claim of error must wait upon the appeal from the final judgment. And attempts to use mandamus and prohibition from the courts of appeals to the district courts under the federal “All-Writs” statute as substitutes for appeals from discovery orders, and to assimilate discovery orders to mandatory injunctions in the hope of establishing their appealability as interlocutory injunction orders have generally failed.

The subsection of the Minnesota statute prescribing appealable judgments and orders which most plausibly could be argued to embrace discovery orders is the second, which provides in part that an appeal may be taken to the Supreme Court:

“From an order granting or refraining a provisional remedy....”

63. See 4 Moore's Federal Practice § 26.37[1], pp. 1209-10. Thus, an order authorizing the taking of depositions for the perpetuation of testimony under Federal Rule 27 has been held final and appealable, Mosseller v. United States, 158 F. D. 380 (2d Cir. 1946). Minnesota Rule 27, like its federal counterpart, provides for depositions before action and pending appeal to perpetuate testimony. In respect of depositions before action, the rule attempts to clarify somewhat the statutory practice, and supersedes all but § 598.04 of c. 598, Minn. Stat. (1949); the provision for depositions pending appeal is new in Minnesota. Once an order under Rule 27 for perpetuation of testimony is made, the deposition is taken like other depositions under the rules. Rule 27.03 provides that the power of the court to entertain an action to perpetuate testimony is not limited by the rule. See Notes of Advisory Committee, Minnesota Rules of Civil Procedure (Tent. Draft 1950) pp. 118, 119. Because Rule 27 pertains to perpetuation, rather than discovery as such, it is not elsewhere considered in this paper.

64. See 4 Moore's Federal Practice § 26.37[1], p. 1210. An exception in federal practice is that an order adjudging a non-party witness guilty of contempt is appealable because the order is final as to him and he could not appeal from the judgment terminating the action between the parties, whereas an order adjudging a party guilty of contempt is only appealable if it is for criminal contempt, in which event, however, incidental sanctions for civil contempt may be reviewed along with the criminal contempt order. Id. §§ 27.37[3], pp. 1213-15. In Minnesota, a party’s conviction of civil contempt is appealable, but a conviction of criminal contempt is reviewable only by certiorari, State v. Willis, 61 Minn. 120, 63 N. W. 169 (1895); Campbell v. Motion Picture M. Operators, 151 Minn. 238, 186 N. W. 787 (1922); see Gulleson v. Gulleson, 205 Minn. 409, 286 N. W. 721 (1939); and the same is true of conviction of contempt of a non-party to the action, Proper v. Proper, 188 Minn. 15, 246 N. W. 481 (1933); State v. Leftwich, 41 Minn. 42, 42 N. W. 593 (1889). In Proper v. Proper it was said: “In result it is not of the slightest difference whether the review be by one method [appeal] or the other [certiorari].” 188 Minn. at 17, 246 N. W. at 482. But this must refer to the scope of review only, since it seems clear that reliance on the wrong method until after expiration of the time in which to use the right method of review, would make a great deal of difference indeed.


But the contention that a discovery order is one granting or refusing a "provisional remedy" within such subsection would encounter *In re Trusteeship Under Will of Melgaard.* In that case the district court, acting under § 9886 the antecedent of Rule 34, granted in part and denied in part an inspection of books and papers in the possession of one of the parties. The Supreme Court dismissed an appeal from the district court's order, holding that it was not an order in respect of a "provisional remedy" within the meaning of subsection two, and that no other provision of the Minnesota statute on appealable orders aided the contention that such order was appealable. It is interesting to note that the rationale of the Court's brief per curiam opinion, proceeded at least in part on the assumption that the provisions of § 9886 did not constitute genuine discovery provisions in the historic sense, but only provided for "a mere order of the court in a pending action." Since our new Rules 26 to 37 incontrovertibly provide for genuine discovery, such assumption seems to lose whatever pertinence it had when the *Melgaard* case was decided; and it is possible that an attempt to appeal from discovery orders will be made despite the *Melgaard* case. Such an attempt would have the support of Mr. Justice Stone's dissenting opinion in that case, in which he concluded that the order involved pertained to a "provisional remedy."

In any event, attempts to use prohibition and mandamus from our Supreme Court, to correct at least the more egregious errors of district courts in granting or denying discovery, would seem to have much more prospect of success than similar attempts in federal practice have met. In *Juster v. Grossman,* an action for

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68. 187 Minn. 632, 246 N. W. 478 (1933).
69. The statute was 2 Mason Minn. Stat. 1927 § 9886, later Minn. Stat. § 603.01 (1949) now superseded by Rule 34. The differences between the statute and the rule are stated by the Advisory Committee in its Notes, Minnesota Rules of Civil Procedure 134 (Tent. Draft 1950).
70. "Discovery under the common law was by bill in equity for discovery of facts residing in the knowledge of the defendant... or discovery and inspection of deeds, writings, or other things in his custody, but seeking no relief other than such discovery....

"Our statutes do not provide any such proceeding. The order for an inspection of books and documents is a mere order of the court in a pending action. The statute does not in terms require any formal application or notice." 187 Minn. 633, 246 N. W. 479 (1933); cf. Rule 34 beginning "Upon motion of any party showing good cause therefor and upon notice to all other parties...."

71. Obviously, however, Mr. Justice Stone did not favor appealability of orders of the type involved in the *Melgaard* case; he simply felt that the order was appealable as one "granting or refusing a provisional remedy" within the second subsection of what is now Minn. Stat. § 605.09 (1949), and that the court was bound "to take the statute as we find it" and recognize appealability.
72. 229 Minn. 280, 38 N. W. 2d 832 (1949).
wrongful death, plaintiff served upon defendants a notice for taking
the deposition of one of the defendants, Williams, under Minn. Stat.
§ 597.01 (1949), now superseded.\(^7\) Plaintiff's alleged reason for
taking the deposition was one of the statutory reasons, that Williams
intended to leave Minnesota and did not intend to return in time for
the trial. Williams' attorneys denied this, and commenced injunction
proceedings to enjoin plaintiff from taking Williams' deposition.
The district court made an order restraining plaintiff from pro-
ceeding with the taking of the deposition, and plaintiff applied
to the Supreme Court for a writ of prohibition restraining the
district court from interfering with plaintiff's right to take the
deposition. Holding that plaintiff had a right to take the deposition,
and that prohibition was a correct remedy, the Court made the
alternative writ of prohibition absolute and annulled the restraining
proceedings taken by the district court. The Court set forth, as it
has a number of times recently,\(^4\) the following as the three essen-
tials for a writ of prohibition:

"(1) The court, officer or person against whom it [a writ of
prohibition] is issued must be about to exercise judicial or
quasi-judicial power; (2) the exercise of such power by such
court, officer or person must be unauthorized by law; and (3)
the exercise of such power must result in injury for which there
is no other adequate remedy at law."\(^5\)

It would seem that these three essentials may equally apply where
a district court's order under the new discovery rules is wrongful.
In the Juster case the district court had taken affirmative steps—
isissuance of a restraining order—to prevent the taking of the
deposition. An order under Rule 30.02 that a deposition shall not
be taken or that interrogatories to a party shall not be answered,
or an order under Rule 30.04 terminating the taking of a deposition,
would seem to be affirmative steps substantially equivalent to the
restraining order of the Juster case, and, where erroneous, equally
subject to the Supreme Court's control by prohibition.

Of course there may be situations where, by reason of the
nature of the district court's action or failure to act respecting dis-
covery, mandamus from the Supreme Court would be more appro-

\(^7\) Superseded by Rules 26.01, 26.07, 28.01, 28.02 and 30.01.
\(^4\) E.g., State ex rel. United Elec. R. & M. Workers v. Enersen, 230
Minn. 427, 438, 42 N. W. 2d 25, 31 (1950); Bellows v. Ericson, 233 Minn.
320, 324, 46 N. W. 2d 654, 658 (1951). But note that in these cases the
Court, in addition to listing the quoted "three essentials" for prohibition,
speaks of its purpose being to keep inferior courts "from going beyond their
jurisdiction," to compel them "to observe the limits of their jurisdiction." Cf.
Riesenfeld, Judicial Control of Administrative Action By Means of The
\(^5\) 229 Minn. at 287, 38 N. W. 2d at 836. In Minnesota writs of pro-
priate than prohibition. At least since State ex rel. Security State Bank v. District Court in 1921, our Court has used mandamus to supervise the district courts' grant and denial of motions for change of venue on the discretionary ground of convenience of witnesses. While as the Court acknowledged in that case, such use of mandamus "is a perversion of the original scope and purpose of the writ" it is now a well established practice. Use of mandamus by the Supreme Court to compel proper discovery orders which a district court declines to make, would hardly be a more serious perversion than that sanctioned in the Security State Bank case. Thus it seems possible that the Supreme Court's power to issue original writs of prohibition and mandamus may be invoked to provide the efficient tools necessary to prevent abuses in administration of discovery rules by the district courts. It is also possible that the Court's prospective revision of the rules of its own prac-

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76. Cf. Payne v. Lee, 222 Minn. 269, 278, 24 N. W. 2d 259, 265 (1946) (prohibition used to determine disqualification of probate judge for bias, with the observation that mandamus from the district court would have been a more expeditious and suitable remedy).
77. 150 Minn. 498, 185 N. W. 1019 (1921).
78. Id. at 501, 185 N. W. at 1020. To Mr. Justice Dibell the perversion was so great as to cause him to dissent. Other than for this use of mandamus to control discretionary change of venue, the Court generally has restricted mandamus to its historic scope. Cf. Riesenfeld, Judicial Control of Administrative Action By Means of The Extraordinary Remedies in Minnesota, 33 Minn. L. Rev. 569, 575, passim (1949).
79. At first blush it might seem that certiorari is more appropriate than prohibition to review discovery orders, because of the general principle that prohibition will not be granted when certiorari provides an adequate remedy. In re Estate of Martin, 182 Minn. 576, 235 N. W. 279 (1931) (prohibition from Supreme Court not available to review order of probate court, where such order was reviewable in district court by certiorari); see Riesenfeld, supra note 74, at 447-448 [an analysis of prohibition as a means of judicial control of administrative action comparable to his penetrating analyses of mandamus and certiorari, 33 Minn. L. Rev. 569, 33 Minn. L. Rev. 685 (1949)]. But in Asplund v. Brown, 203 Minn. 571, 282 N. W. 473 (1938) the Court held that an order of the district court for inspection of books and documents under 2 Mason Minn. Stat. 1927 § 9886 (later Minn. Stat. § 103.01 (1949), now superseded by Rule 34) was not reviewable by certiorari because it was an intermediate order. Mr. Justice Stone for the Court in substance said that review of such an order by certiorari would be an evasion of the statutory proscription of appealability as decided in In re Trusteeship Under Will of Melgaard, note 68 supra. He also said: "Certiorari simply does not lie to an intermediate order." 203 Minn. at 573, 282 N. W. at 475. Further, the remedy by certiorari, practically viewed, might be as futile as an appeal. As stated in Juster v. Grossman, 229 Minn. at 288, 28 N. W. 2d at 837: "The remedy by appeal from the decision of the court preventing the taking of a deposition of this kind is entirely inadequate. A review of the court's decision by appeal or certiorari would in all probability not be heard for several months. In the meantime, the witness may be gone and the party seeking his deposition would have no remedy at all." [Italics added.] In Settem v. Etter, ...... N. W. 2d ...... (May 9, 1952), the Minnesota
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practice will result in provision for appeals from at least certain discovery orders, possibly on an expedited basis.\(^8\)

Where a party, either by reason of non-availability of review or by choice, postpones his attempt to get review of a discovery order until appeal after final decision on the merits, he may avoid a serious pitfall by considering carefully whether he should cause judgment to be entered and appeal from the judgment even though ordinarily he would be content to appeal from the order denying his motion for a new trial. It is true that in the *Melgaard* case the Court after citing a Washington case\(^8\) which held that an order granting inspection of documents was not appealable and was reviewable only on appeal from the final judgment, said, "Under our practice it could also be reviewed on appeal from an order denying a new trial."\(^8\) But this dictum is of doubtful validity today. At least it must be recognized that there is considerable confusion in the Minnesota cases as to whether an order made prior to trial may be reviewed on appeal from an order denying a new trial.\(^8\) A recent case, *Zywiec v. City of South St. Paul*, came to the Court on appeals from orders denying alternative motions for judgment notwithstanding the verdicts or for a new trial, after a second trial which had been had on the issue of damages only. In holding that it could not consider questions which had been determined by the trial court in the first trial, the Court said:

"The rule permitting a review of intermediate orders on an appeal from a judgment does not prevail on an appeal from an order... An appeal from an order brings up for review only the regularity of those things which were involved in the order."

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Supreme Court, in a per curiam opinion holding that an order denying a motion for summary judgment is an interlocutory or intermediate order and as such will not be reviewed by certiorari, said: "Although it may become necessary for this court to provide special methods of reviewing certain orders pending the time that formal provision is made to conform our appellate review to practice under the new rules of civil procedure, this is not a case for such action."

80. § 1 of the Enabling Act [Minn. Stat. § 480.051 (1949)] provides:

"The supreme court of this state shall have the power to regulate the pleadings, practice, procedure, and the forms thereof in civil actions in all courts of this state, other than the probate courts, by rules promulgated by it from time to time. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant." [Italics added.] The italicized words do not bar changes that modify only the mode of obtaining appellate review by the Supreme Court, or the timing of such review.


82. 187 Minn. at 633, 246 N. W. at 479 (1933).

83. See 1 Dunnell Minn. Digest § 395c, p. 446 (3d ed. 1951) and cases cited.
It does not bring up for review the regularity of prior orders or rulings of the court." 84

Hence it seems that, despite the Melgaard dictum, an attempt to urge the impropriety of a discovery order on appeal from an order denying a motion for a new trial, or denying the customary motion in the alternative, 85 might encounter a holding that a discovery order can only be reviewed on appeal from the judgment. This is but another illustration of the almost boundless complexity of the subject of appealable orders and judgments in Minnesota. 86

Another problem that may arise and have to be decided before revision of Minnesota's appellate practice is whether, the demurrer now being abolished by Rule 7.01, an order granting a motion to dismiss and an order denying a motion to dismiss accompanied by a certificate that the question presented is important and doubtful, in lieu of orders on demurrer, will be appealable under Minn. Stat. § 605.09(4) (1949). 87

VII. PRE-TRIAL

It is natural to follow discussion of discovery with discussion of pre-trial because often the latter may properly be conceived of as the fulfillment of the former. Pre-trial often offers the chance of bringing discovery measures to fruition. 88

The author's observation that the discovery rules do not negate

84. 47 N. W. 2d 465, 471 (Minn. 1951).
85. Now made under Rule 50.02 which supersedes Minn. Stat. § 605.06 (1949) except as to the last sentence pertaining to appeals.
86. Another recent illustration of the complexity of Minnesota appellate practice is afforded by Seagram-Distillers Corp. v. Long, 230 Minn. 118, 41 N. W. 2d 429 (1950). The district court made an order sustaining defendant's demurrer to plaintiff's complaint. Without notice to plaintiff, the clerk entered judgment for defendant, adjudging that the court sustained defendant's demurrer. After judgment had been entered, plaintiff appealed from the order sustaining the demurrer under Minn. Stat. § 605.09(4) (1949), providing that an order sustaining a demurrer is appealable. But the Supreme Court dismissed the appeal, holding that such an order is not appealable after entry of judgment.
88. Of course, discovery measures may have come to such full fruition as to obviate pre-trial, by laying the foundation for a successful motion for summary judgment under Rule 56. "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56.03 [Italics added]. This is another illustration of the close integration of the rules. The party taking a deposition need not specify in his notice whether he wants it for discovery purposes, or use at the trial, or as a basis for a motion for summary judgment.

Pre-trial sometimes can be at least a partial substitute for discovery measures. The pre-trial judge's quest for simplification of the issues and admissions of facts and documents not genuinely disputed, is essentially "discovery."
the common law's conception of litigation as adversary and competitive, is equally true of pre-trial. Pre-trial is not an attempt to obviate the struggle that is common law litigation, but to guarantee that the struggle will be real, not sham, and that the battles will be fought out in the heartland of the controversy, not on the fringes.

Minnesota Rule 16 on pre-trial is almost identical with the corresponding federal rule. Both refrain from requiring pre-trial; both provide that "the court may in its discretion" order pre-trial. This constitutes acknowledgement that the necessity for and the utility of pre-trial are in large part dependent on local conditions of legal practice and judicial administration. Thus, whereas by rule of court pre-trial is compulsory in some federal districts in most types of cases, in others, including the Minnesota federal district, it is had only on motion of one of the parties. The need for pre-trial is one thing in judicial districts with trial calendars that are current and quite another in districts as much as fifteen or eighteen months behind. And the possibilities for sound judicial administration of pre-trial are one thing in judicial districts embracing large geographical areas with only one or two judges, and quite another in metropolitan centers with numerous judges who could in rotation handle the pre-trial calendar.

The history of the pre-trial movement is covered elsewhere. There was something akin to pre-trial in Scotch law as early as 1868. A procedure similar to pre-trial, known as the summons for directions, has been in use in England for some time. The first systematic use of pre-trial in this country seems to have been in Detroit, Wayne County, Michigan, about a generation ago when

89. See 3 Moore's Federal Practice § 16.07, p. 1109.
90. See Hotchner, How to Avoid a Lawsuit, This Week Magazine 7 (Feb. 24, 1952), an article in popular vein pointing out the shift to arbitration largely because of the delay in trials of civil cases in American cities.
91. Many Minnesota trial lawyers have long been familiar with the informal practice of some judges of calling counsel into chambers before trial for a conference which, in reality, amounts essentially to a "pre-trial conference." Attempts are made to simplify issues, iron out legal theories, and consider settlement. However commendable the accomplishments of these informal pre-trials, in non-urban areas they are often had—because of absence of the judge except during the trial term—only shortly before the actual trial, thus preventing the full potentialities of pre-trial, because it often takes time to effect the stipulations that counsel are willing to make at a pre-trial conference.
the judges on their own initiative and without statutory authorization began to use pre-trial in an attempt to ameliorate the deplorable arrearage in the trial calendar.\textsuperscript{94} The movement spread to Cleveland, Boston and other places. Thus the adoption of Federal Rule 16 effective in 1938 generated no novelty. Since 1938 a number of states have adopted pre-trial.\textsuperscript{95} By statute, Wisconsin has pre-trial provisions almost identical with those of Rule 16.\textsuperscript{96}

It will be noted that the only powers conferred on the district courts by the terms of Rule 16 are to direct the attorneys for the parties to appear before the court for a conference, and after the conference to make a pre-trial order reciting the action taken at the conference, which order unless modified controls the subsequent course of the action. But despite the limited powers directly conferred by the terms of Rule 16, we find courts at pre-trial taking such determinative steps as dismissing an action because barred by the statute of limitations,\textsuperscript{97} dismissing an action for breach of implied warranty because the notice of breach was deemed legally inadequate,\textsuperscript{98} granting judgment of cancellation of a certificate of naturalization because it was fraudulently obtained,\textsuperscript{99} dismissing an action because of ineffective service of process,\textsuperscript{100} and determining the legal sufficiency \textit{vel non} of defenses.\textsuperscript{101}

Of course, where a motion is pending at the time of the pre-

\textsuperscript{94} Ibid., Nims, Pre-trial 3 (1950). Respecting the effects of pre-trial on calendar arrearage in the District of Columbia, see Laws, \textit{Pretrial Procedure under the New Federal Rules}, 12 Mo. B. J. 95 (1941).

\textsuperscript{95} See 3 Moore's Federal Practice § 16.06, p. 1107, n. 4.

\textsuperscript{96} Wis. Stat. § 269.65 (1951). The federal and Minnesota pre-trial rules differ only in their clauses numbered (5), Minnesota Rule 16 (5) reading: "The advisability of a preliminary reference of issues to a referee," whereas Federal Rule 16 (5) reads: "The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury." Wisconsin's statutory provisions are identical with Federal Rule 16, except that the words "to a master" in Federal Rule 16 (5) are omitted from Wis. Stat. § 269.65(e) (1951).

\textsuperscript{97} Fink v. United States, 28 F. Supp. 556 (W.D. Wash. 1939).

\textsuperscript{98} Silvera v. Broadway Department Store, 35 F. Supp. 625 (S.D. Cal. 1940).


\textsuperscript{101} American Machine and Metals v. De Bothezat Impeller Co., 82 F. Supp. 556 (S.D. N.Y. 1949). On appeal from the judgment, 180 F. 2d 342, 348-350 (2d Cir.), \textit{cert. denied}, 339 U. S. 979 (1950), the court of appeals upheld the trial court's determination, without indicating any impropriety in its having made the determination at pre-trial. But pre-trial obviously is not the place to resolve genuinely contested issues of fact. Klitzke v. Herm, 242 Wis. 456, 8 N. W. 2d 400 (1943) was a suit for conversion of items of personality. At pre-trial the court eliminated some of the items from the suit, even though there was genuine controversy as to them. This was in substance an improper resolution at pre-trial of fact issues, and was reversed.
trial conference, there is nothing surprising about having the pre-trial judge decide that motion as well as conduct the pre-trial conference. In fact, such course often, if not normally, is dictated by considerations of sound judicial administration. But apparently in none of the instances just mentioned was there a motion pending when the pre-trial conference began requesting the determinative order made. The explanation for such determinative orders at pre-trial, despite the limited powers conferred by Rule 16, is in the fact that Rule 16 does not stand in isolation but in purpose and function is closely integrated with the other rules. It is only one of a number of the rules that have for their direct objective simplification and expedition. For example, if under Rule 12.02 or 12.03, a motion is made asserting that an adversary's pleading fails to state a claim, or for judgment on the pleadings, and matters outside the pleadings are presented to and not excluded by the court, the motion is treated as one for summary judgment under Rule 56. And Rule 56.04 itself provides that if summary judgment is not rendered upon the whole case and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel shall if practicable ascertain what material facts exist without substantial controversy and what are actually and in good faith controverted. This is the essence of the judge's function at pre-trial.

When the pre-trial conference is considered as one unit in an integrated system of rules, it is not surprising to find such determinative actions, extrinsic to Rule 16's literal scope, being taken at pre-trial. After all, when it becomes evident during the pre-trial conference that judgment must be rendered for a particular party, there is no good reason why that fact should not then be announced. If the circumstances are such that justice requires that the opposing party should have more time to present additional considerations, the pre-trial conference may of course be adjourned for that purpose.

102. Cf. Rule 9(a)(2) of Rules of United States District Court for the District of Columbia, 4 Fed. Rules Serv. 1029. This was amended on November 15, 1951 to read: "Motions made after notice of pre-trial or pending at time of pre-trial may be heard by the pre-trial judge in his discretion, and he may dispense with points and authorities." Fed. Rules Serv., Current Material, Local Court Rules. See Laws, Preliminary Proceedings Under the New Federal Rules, 12 Mo. B. J. 95, 98 (1941).

103. Of course a party might stand upon his right to receive timely written notice of motion under Rules 6.04 and 7.02, or Rule 56.03. But the court has power under Rule 6.04 to shorten the time for most motions. In any event, the court's decision of the issue, announced at pre-trial, would make effectuation of the decision a mere formal process.
Thus, taking Rule 16 for what it really is—one means in an integrated system for expediting and simplifying litigation—it is clear that the judge has ample power to effect the objectives of the pre-trial procedure. But the writer believes that an approach to pre-trial primarily in terms of the court's power and authority is a misleading and unwholesome approach. Pre-trial best succeeds when the judge thinks not in terms of power, but of persuasion; not in terms of his authority, but of reason. The proper question is not so much, what can the judge do? as, what should he do? Experienced and successful pre-trial judges are sometimes observed in attempts at pre-trial to persuade counsel to abandon unsound theories, but rarely if ever in attempts to coerce them to do so. The very wording of Rule 16 with its six express objectives implies the non-compulsory nature of pre-trial. Thus pre-trial is a conference to consider:

1. The simplification of the issues;
2. The necessity or desirability of amendments to the pleadings;
3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
4. The limitation of the number of expert witnesses;
5. The advisability of a preliminary reference of issues to a referee;
6. Such other matters as may aid in the disposition of the action.

With the philosophy and objectives of pre-trial in mind, what are the best means of achieving them? While opinion differs as to the period that should intervene between pre-trial and trial the consensus seems to be that the period ought to be two to six weeks. From the lawyer's viewpoint of avoiding unnecessary duplication of preparation, the shorter the period the better. Still, obviously the interval must be enough to permit counsel to achieve the stipulations of pre-trial. Another relevant consideration is the desirability of giving enough time for the lawyers and parties to think over dispassionately possible opinions from the judge about

104. See 3 Moore's Federal Practice § 16.08, pp. 1110-12; cf. Nims, Pre-trial 69-74 (1950). When pre-trial is had many weeks before trial, the sense of urgency which causes counsel to get to the meat of the problem and which seems to be engendered only by the imminency of trial, is too often lacking. Of course in some cases, especially complex cases, it may be desirable to hold a pre-trial conference shortly after the pleadings are closed in order to simplify the issues at an early stage and avoid unnecessary discovery. In such cases it may be wise to have several pre-trial conferences, as developments in the case may require. Cf. 4 Moore's Federal Practice § 16.08, p. 1111. The Rules of the United States District Court for the Southern District of New York, revised July 1, 1951, recognize the possible need of an early pre-trial conference, Rules 15 and 16, Fed. Rules Serv., Current Material, Local Court Rules.
settlement. Further, while ordinarily discovery measures should be completed by pre-trial, if the pre-trial conference develops the utility of further discovery measures and the circumstances are such that a party should be afforded the opportunity to undertake them, the interval before trial may have to be substantially increased. Conditions of the trial calendar may impose supervening practical considerations. But it seems to the writer that, ideally, at least from the lawyers' viewpoint, trial ought ordinarily to follow pre-trial by about two weeks. Another question is whether the pre-trial judge ought to be one other than the judge who is to preside at the trial. Despite some opinion that it is immaterial whether the pre-trial judge is the same as the trial judge, it seems to the writer that except before judges of unusual ability and tact, pre-trial is apt to suffer if the lawyers know that the judge who hears them at pre-trial will preside at the trial. Psychologically this knowledge is likely to repress the frankness by counsel essential to the best results at pre-trial. In metropolitan districts with a large staff of judges, the practice sometimes is for each in rotation to take the pre-trial calendar for several months at a time.

Some judges prefer to hold the pre-trial conference in chambers, thinking this best conduces to the informality productive of full and frank discussion. Others prefer the formality of the courtroom, possibly thinking it conduces to efficiency and dispatch of business. One experienced pre-trial judge has been observed to use the courtroom but leave the bench and occupy the clerk's seat, possibly effecting a compromise between the extremes of formality and informality! Some prefer that a transcript of the pre-trial conference be, and others that it not be, made.

The pre-trial conference normally opens with a statement of the facts by plaintiff's lawyer from plaintiff's viewpoint, and of plaintiff's basic claims. This is often followed by questions from the judge to plaintiff's lawyer to fill in hiatuses. Then the defendant's lawyer makes a similar statement, also often followed by questions. From the two statements and answers to the questions, the basic contentions of facts and legal theories of the parties should emerge. Next it is natural to consider whether the pleadings should be amended to reflect the present claims of the parties. Often dis-


106. For comment on the points in this paragraph, see 3 Moore's Federal Practice § 16.09, pp. 1113-14; Nims, Pre-trial 85-86 (1950); Report of the Judicial Conference 20-21 (1944).
covery procedures, or revelations made at pre-trial, will point up the necessity or at least the desirability of amending the pleadings. Then counsel will be asked for stipulations respecting the admissibility of exhibits such as charts, x-rays, and other documentary items. If agreement of counsel waiving formal proof of such items is reached, as it customarily is in most lawsuits, the exhibits will be stamped with the pre-trial court's stamp, indicating that they are to be admitted subject only to objections pertaining to relevancy, or to competency other than objections on matters of formal proof. In other words, the necessity of formal proof of the authenticity of the exhibit at the trial is obviated. Often counsel, knowing that there is no genuine issue about the reasonableness of doctors' and hospitals' bills, will stipulate thereto, resulting in such bills being similarly stamped. The pre-trial judge may then suggest further admissions in an attempt to eliminate issues as to which there is no bona fide dispute, obtain a stipulation for limiting the number of expert witnesses on each side, and possibly set a day certain for trial. He may then inquire of counsel whether there have been attempts to settle the case, and suggest his opinion about the reasonableness of the offers and counteroffers. The philosophy of pre-trial judges differs widely as to how far the judge should intrude into the matter of settlement. Some experienced judges and lawyers feel that pre-trial suffers substantially if lawyers get the idea that it is primarily a device to coerce settlements in order to relieve congested dockets. But where the judge approaches settlement with restraint and objectivity, listening mostly, and making it abundantly clear that he is not trying to dictate to counsel, most experienced lawyers welcome his thoughts on what the case is worth. They are often valuable in the lawyer's later conferences with an unreasonable or indecisive client.

It is important that the pre-trial order required by Rule 16 be prepared promptly by the judge. Some experienced pre-trial judges prefer to dictate the order at the close of the conference in


108. When a pre-trial conference is had, there is a clear obligation on the court to enter a pre-trial order. Whatever the limitations on the power (as distinguished from the persuasive capacity) of the pre-trial judge to achieve at the pre-trial conference stipulations he desires—a matter already considered (see notes 97 through 103 supra and accompanying text)—once stipulations are reached and the pre-trial order entered, there is no want of authority to compel compliance with it. See 3 Moore's Federal Practice § 16.19, pp. 1126-1130; Nims, Pre-trial 176-181 (1950). "The decisions support, with uniformity, the authority of the Courts to compel compliance with pre-trial orders and to keep the parties to their pre-trial agreements."
the presence of the attorneys to a typist who then and there types
the original and copies, so that the judge can sign the order and
the attorneys receive their copies before they leave the conference.
This has the obvious advantage of producing a pre-trial order
formulated while the facts and issues are fresh in the judge's
mind, and subject to immediate correction by the attorneys if the
judge falls into some inaccuracy. A pre-trial order in a somewhat
complicated, but generally typical personal injury case, appears in
the Appendix hereto, in the hope that it will elucidate the nature of
the pre-trial conference, as well as the form of the order.

Of the essentials for successful pre-trial, the following seem to
be the most important: (i) Thorough preparation for pre-trial by
the lawyers. The lawyers must know their case when they come to
the pre-trial conference. They must be prepared to make decisions
and take positions of the same significance and permanence as those
made and taken during a trial itself. Otherwise pre-trial can be
a sheer waste of time. (ii) A high order of judicial skill. A trial itself
hardly tests more acutely the judicial caliber of the judge than the
pre-trial conference. All the attributes of the good judge—industry,
analytical capacity, knowledge of the law, reasonableness, common
sense, tact, objectivity, integrity and patience—shine as jewels when
displayed at the pre-trial conference.

As already stated, the need for pre-trial largely depends upon
the condition of the trial calendar. Rule 16 wisely leaves to the
district courts discretion as to whether to have pre-trial. Where the
arrearage in the trial calendar is great, the need for pre-trial seems
correspondingly great. Of course pre-trial imposes upon judges and
lawyers new work, but this additional burden should be offset at
least in part by diminution in the strain of trials resulting from the
simplification produced by pre-trial. Perhaps the most important
compensation, however, for undertaking the new work would be
the increased public confidence in the conduct of litigation which
doubtless would ensue from reasonably prompt trials of civil cases.
The public believes, and not without good reason, that "Justice de-
layed is justice denied." A
dated, therefore, especially where

Id. at 176. In Ringling Bros.-Barnum & Bailey C. Shows v. Olvera, 119 F. 2d 584, 586 (9th Cir. 1941), a pre-trial stipulation that the contract involved
was made in Florida was considered binding even though there was evi-
dence at the trial justifying the conclusion that it was executed in Texas.
"... [the pre-trial] order when entered controls the subsequent course of the
action, unless modified at the trial to prevent manifest injustice." Rule 16.

109. See Hotchner, How to Avoid a Lawsuit, This Week Magazine 7
(Feb. 24, 1952) where the author states: "Many Americans have been dis-
mayed with the long and expensive court delays that accompany lawsuits in
almost every city."
court calendars are in serious arrears, presents a challenge too grave to evade. Judges who have met the challenge in other jurisdictions have found in pre-trial rich professional opportunities.\textsuperscript{110}

VIII. Conclusion

The discovery and pre-trial rules substantially increase the discretion of trial judges. Under these rules, matters vital to the sound conduct of litigation are constantly being determined, more or less informally, by trial judges. The rules' potentialities for expeditious and accurate adjudication can be wholly nullified by incompetence in their administration. The rules create good tools, but not self-executing ones. They require good craftsmen. An able trial bench becomes more indispensable than ever to the administration of justice. The rules provide the form; able judges give them substance. The time-worn observation of the poet thus contains its germ of relevance to judicial administration in Minnesota today:

"For forms of government let fools contest; What'er is best administer'd is best".\textsuperscript{111}

\textsuperscript{110} See Laws, Pretrial Procedure under the New Federal Rules, 12 Mo. B. J. 95 (1941). The author, Chief Judge Bolitha J. Laws of the United States District Court for the District of Columbia, has a national reputation as an outstanding pre-trial judge. Probably many lawyers who have appeared before him would say that one of the outstanding characteristics of his conduct of pre-trial is his patience. Judge John IV. Delehant of the United States District Court for the District of Nebraska has also achieved an outstanding reputation as a pre-trial judge. His theory and method of pre-trial are well stated in Delehant, Pre-Trial Conferences in the Federal District Courts: Their Value for Counsel and for Judges, 35 J. Am. Jud. Soc’y 70 (1951).

\textsuperscript{111} Alexander Pope, Essay on Man, Epistle III, lines 303-304 (1688-1744).

PRE-TRIAL PROCEEDINGS ORDER

STATEMENT OF NATURE OF CASE:

Action for personal injuries.

Plaintiff dismisses the action against defendant, Gordon.

Plaintiff was a passenger in a taxicab owned by defendant 4 and driven by defendant 5. It is claimed that defendant 6 was engaged in a joint enterprise with defendants 4 and 5 in the operation of the cab.

The cab was proceeding on a highway in Virginia and struck a truck parked on the highway, owned by defendant 1 and driven by defendant 2. Plaintiff claims the driver of the cab was negligent and that also the driver of the truck was negligent in parking the truck on the highway and failing to protect it by flares required by law.

Defendant 4 claims that he was not the owner and operator of the cab and that he sold the cab prior to the accident.

Defendant 5 admits that he was the owner of the cab and that the plaintiff was a passenger. He claims that he was driving plaintiff to North Carolina; that in Alexandria they picked up a soldier with plaintiff's consent; that later the soldier was driving the cab and that while he was driving it the collision occurred. Defendant 5 claims that the soldier was as much the agent of the plaintiff as his agent.

Defendant 6 claims that the cab had been sold without notice to it to defendant 5 who was not a member of the association and disclaims liability.

Defendants 1 and 2 claim that the truck had become disabled on the highway and was parked as far to the right as possible; that the tail lights were lighted and that the truck was protected by flares.

Defendants 1 and 2 have a crossclaim against defendants 4, 5 and 6.
Defendants 4, 5 and 6 crossclaim against defendants 1 and 2.

Defendant 6 denies joint enterprise.

Defendant 1 crossclaims for property damage against defendants 4, 5 and 6 in the sum of $910.42, of which $505.54 was for damage to the vehicle and $404.88 was for loss of use of the truck.

Defendant 2 crossclaims against defendants 4, 5 and 6 for personal injuries. He claims 3 days loss of time at $15.00 a day and $18.00 medical expense.

Plaintiff sustained a fractured rib and injuries to her right leg which may be permanent, and other injuries of a temporary character.

Plaintiff claims loss of wages as a waitress of $23.00 a week and $27.00 a week tips for seven weeks amounting to $350.00. Cab fare paid to defendant 5, $50.00.

Medical and hospital bills to date amount to $138.50 and more bills are to accrue.

Plaintiff claims that the tail lights of the truck were not lighted.

STIPULATIONS: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

It is stipulated that the hospital and medical bills which are being marked may be admitted in evidence without formal proof subject to objection as to relevancy.

It is stipulated that the certified copy of the insurance certificate on file with the Public Utilities Commission of the D. of C. covering the cab may be admitted in evidence without formal proof subject to the objection of the defendants that it is not relevant or competent. The certificate was issued to defendant 4.

It is stipulated that the license covering this cab, issued to defendant 4 by the Superintendent of Licenses of the Dist. of Col. be admitted without formal proof subject to objections as to relevancy and competency.

It is stipulated that a certified copy of the judgment convicting defendant 5 of reckless driving in connection with this accident may be admitted without formal proof if otherwise admissible. Defendants contend that it is not admissible.

The defendants are to have a medical examination of the plaintiff.
Plaintiff is to furnish defense counsel with medical reports. It is stipulated that x-ray photographs and hospital records may be admitted in evidence without formal proof.

Plaintiff is to furnish to defense counsel and defense counsel are to furnish lists of witnesses whom they claim saw the accident.

Dated Dec. 14, 1948  (Signature of pre-trial judge)

REMARKS of Pre-trial Judge for consideration of Trial Judge:
(None)

(Signature of attorneys for plaintiff and defendants).