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Discovery: Boon or Burden

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NOTES

DISCOVERY: BOON OR BURDEN?

This Note is an analysis of the practical operation of discovery techniques in federal district court, founded principally on the Minnesota district. It is presented for three reasons. First, it may have value to practitioners in Minnesota who hitherto have not encountered the federal discovery rules.[1] Second, the cases analyzed are of the type and background of those normally arising in state district courts. Third, the relatively uncrowded Minnesota district dockets present a favorable medium for the study of the function-

1. As of January 1, 1952, Minnesota district courts have been using Rules of Civil Procedure based on, and with only minor variations from, the Federal Rules of Civil Procedure. The changes concerning the taking of depositions are: the inclusion of an express expense limitation in Rule 30.02; the addition of a provision relating to arbitration procedure in Rule 26.07; the insertion of a clause protecting an attorney's "work-product" from discovery, in Rule 26.02.

ing of discovery.[2] No extended effort will be made to cover discovery procedures generally[3] or to collate the results obtained herein with the other statistical studies available in the field.[4]

I. Judicial Construction of Discovery

A. *Function of Appellate and Trial Courts*

One principal impression is derived from the rulings on discovery which have been made in the Minnesota federal district: practical flexible operation exists because the trial courts have kept themselves free from formalistic method. Discovery is not susceptible to a traditional legal approach because it is based on factual, not legal, relationships and because its rulings must be founded on incomplete information. And too, the factors of expense, annoyance, oppression and embarrassment which are considered in discovery are not matters of cognizance in the determination of the controlling substantive law of a case. Additionally, discovery rulings are of an interlocutory nature and are not normally appealable,[5] and if the trial courts can be relied upon to rule independently those rulings should not be controlled by appellate precedents. The incursion of the United States Supreme Court into this domain, therefore, may justify some perturbation. In *Hickman v. Taylor*[6] the Supreme Court stated that the work product of a lawyer in the preparation of a case was protected from the discovery techniques.[7] In doing so it exercised the appellate function in customary

2. The 1950 Report of the Administrative Office of the United States Courts, the Table C 5, at p. 155, shows that 48.7% of civil cases which go to trial are disposed of in less than 6 months, and that the median time for such cases is 7.1 months.

3. A thorough coverage is given by Note, 31 Minn. Law Rev. 712 (1947). See also Dyer-Smith, Federal Examination Before Trial (1939); Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure,* 41 Mich. L. Rev. 205 (1942); Pike and Willis, *The New Federal Deposition-Discovery Procedure,* 38 Col. L. Rev. 1179, 1436 (1938); Sunderland, *Discovery Before Trial Under the New Federal Rules,* 15 Tenn. L. Rev. 737 (1939).

4. Ragland, Discovery Before Trial (1932); Speck, *The Use of Discovery in United States District Courts,* 60 Yale L. J. 1132 (1951); Note, 59 Yale L. J. 117 (1949) (analyzing statistics of the Administrative Office of the United States Courts).

5. See Note, 31 Minn. L. Rev. 712 n. 1 (1947).

6. 329 U. S. 495 (1947).

7. The case arose on a contempt hearing for refusal to obey the trial court's order. Minn. R. Civ. P. 26.02 (1952) provides: "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."

fashion since it verbally handled the problem as if it were one of substantive law.[8] Such thinking could in time nullify the value of discovery by substituting precedent for the sound judgment of the trial judge and by providing a means of evasion and circumvention for the legal fraternity. Whatever the reaction in other districts,[9] however, the district court of Minnesota has shown an awareness of, but no apparent pressure from, *Hickman v. Taylor.* In *Nelson v. Western Electric Co.*,[10] where the defendant objected to discovery of statements obtained by a claim manager, the court clearly indicated that its judgment of the situation before it was not to be destroyed by any overruling compulsive force from the *Hickman* case.[11] The court gives thorough consideration to all the factors which affect discovery of information in a case.[12]

B. *Special Leave for the Taking of Depositions*

A plaintiff can, with leave of court, take depositions before the twenty-day period required by the Rules has elapsed.[13] The cause he need show to get such permission is in some doubt: it may be that the rule is intended to protect only the defendant who has not had time to get a lawyer,[14] and it may be that exceptional circum-

8. The common law privilege of immunity from confidential disclosures is perhaps a substantive right. The Court, however, after saying the instruments in question were not privileged, held that discovery could not be had on grounds of public policy under the showing made by the party seeking it. This was therefore an overruling of the trial court on its judgment of the facts, but couched in such broad terms that to properly limit the holding to its facts is impossible. It should be noted that discovery must be procedural to be within the rule-making power. See Sibbach v. Wilson & Co., 312 U. S. 1 (1941).

9. The *Hickman* case is cited, or qualified, or commented upon in a great number of the discovery rulings. It has also evoked a considerable response among the academic brethren. See, *e.g.*, Taine, *Discovery of Trial Preparations in the Federal Courts*, 50 Col. L. Rev. 1026 (1950); Notes, 31 Minn. L. Rev. 712, 731 (1947), 62 Harv. L. Rev. 269 (1948); 42 Ill. L. Rev. 238 (1948); 32 Iowa L. Rev. 580 (1948).

10. Civil No. 1664, D. Minn. 3d Div., Oct. 23, 1950.

11. It said, after quoting from the *Hickman* case, "It is important to make certain that the statements in question do not constitute the 'work product of the lawyer' directing preparation for and trial of defendant's case. *Based on the files and proceedings herein,* I have concluded that the production of statements signed by such witnesses at the instance of a claim agent or claims manager of defendant or its insurer, seems proper. The delivery of such statements to defendant's counsel, *under the existing circumstances,* does not insulate them with the shield of privilege." [Emphasis supplied.]

12. See United States v. Deere & Co., 9 F. R. D. 523 (D. Minn. 1949).

13. Fed. R. Civ. P. 26(a); Minn. R. Civ. P. 26.01 (1952).

14. Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co., 9 F. R. D. 432 (S.D. N.Y. 1949). After a reasoned analysis of the 1948 Amendment to the Rules the court reached this conclusion primarily because of the Reviser's Note, given in 5 F. R. D. 453.

stances are needed.[15] Among the exceptional circumstances which all recognize is the determination of preliminary questions of jurisdiction, venue and service,[16] but use of discovery by the defendant does not mean waiver of lack of jurisdiction.[17] If parties proceed without leave of court during this period, the court, which otherwise could limit the scope of the questioning to the preliminary issue involved, might refuse to supervise disputes arising out of the taking of the depositions.[18] In any event, where there is no agreement defendant will usually raise the defense of harassment to requests to take early depositions. In the few situations in which the problem has been presented to the Minnesota federal district court it has either delayed decision until it was no longer necessary, or has not provided a written opinion.

C. *Objections to Interrogatories and Motions to Compel Answers*

Perhaps the most important single factor in the efficient operation of the discovery rules is the handling of objections to interrogatories and motions to compel answers.[19] In this regard the Minnesota district court has utilized a practical approach. Without any noted exceptions, its rulings manifest careful consideration, even where multiple objections were made to numerous interrogatories.

While the general rule permits questions which may reasonably lead to something relevant, thus eliminating the defense of "fishing expedition," still irrelevance and immateriality may be objectionable, particularly where other defects are also present.[20] Other

15. M. P. M. v. Columbia Broadcasting System, Inc., 15 Fed. R. Serv. 496 (S.D. N.Y. 1951). The view may be a holdover from pre-Amendment cases, or an attempt to discourage excessive motions before the court and races for the taking of depositions.

16. Abrams v. Bendix Home Appliances, 92 F. Supp. 633 (S.D. N.Y. 1950); Silk v. Sieling, 10 Fed. R. Serv. 526 (E.D. Pa. 1947); See Commentary, *Discovery on Jurisdictional Issues,* 9 Fed. R. Serv. 979 (1946).

17. Blank v. Bitker, 135 F. 2d 962 (7th Cir. 1943).

18. Application of Wisconsin Alumni Foundation, 4 F. R. D. 263 (D. N.J. 1945). The reasons for refusing would lose some of their forcefulness after a stipulation on the taking of questions was no longer needed.

19. The many problems involved in the taking of depositions and interrogatories are treated in: 4 Moore, Federal Practice §§ 26-33 (2d ed. 1950); Cushman, *Depositions in Practice,* 3 Miami L. Q. 378 (1949); Freedman, *Discovery as an Instrument of Justice, 22* Temp. L. Q. 174 (1948); Note, 31 Minn. L. Rev. 712 (1947); 23 Minn. L. Rev. 694 (1939).

20. Henderson v. Chicago, St. P., M. & O. Ry., Civil No. 2038, D. Minn. 3d Div., Oct. 22, 1951; Lange v. Chicago, St. P., M. & O. Ry., Civil No. 565, D. Minn. 2d Div., Dec. 1, 1949; H. J. Heinz v. Great Northern Ry., Civil No. 2711, D. Minn. 4th Div., Sept. 13, 1948.

objections familiar to the law of evidence may also be sustained.[21] If a question seeks a legal theory of defense or conclusions[22] or if a question is so worded that it compels a party to admit something he does not concede,[23] the court may consider it objectionable. Peculiar to the interrogatory is the objection that the answer is one of common knowledge or is as well known to the interrogator as to the objector.[24] The defenses of harassment, oppression and annoyance created by the Rules have not been explicitly defined.[25]

A deponent or a party opponent may be asked whether he has knowledge of certain documents and if so to provide copies of those documents. This is properly a request for production of documents and should be made under Rule 34.[26] And this applies as well to written statements, also treated as "documents."[27] But there is no complete bar, as is evidenced by *Schuh v. Prudential Ins. Co.*[28] In that case, defendant's interrogatories inquired as to some letters specifically, others generally, and asked for copies. Plaintiff objected, contending this was too general and also within the scope of Rule 34. The court held it was not too general under the

21. H. J. Heinz Co. v. Great Northern Ry., Civil No. 2711, D. Minn. 4th Div., Sept. 13, 1948. The objection was on the grounds of hearsay, as to the operation of connecting lines, and it was sustained but the party was directed to answer to the best of his information and belief as to information its agents had acquired.

22. Henderson v. Chicago, St. P., M. & O. Ry., Civil No. 2038, D. Minn. 3d Div., Oct. 22, 1951.

23. H. J. Heinz v. Great Northern Ry., Civil No. 2711, D. Minn. 4th Div., Sept. 13, 1948.

24. Ouradnik v. Chicago, Great Western Ry., Civil No. 1467, D. Minn. 3d Div., April 5, 1948. The court in this case directed as well that the time of answering the interrogatories be shortened, as the case would come on for trial before an answer would normally arrive.

25. In the most questionable interrogatory found, plaintiff in a personal injury suit after taking 260 pages of depositions served 974 interrogatories under Rule 33, asking for detailed explanations of defendant's plant operations. The case was settled before the court ruled on defendant's objections, so that the court did not have a chance to rule upon imposing a limitation. Notice, however, that a party who poses such questions is running a considerable risk of wasting his time because of possible inability to compel answers.

26. Ouradnik v. Chicago, Great Western Ry., Civil No. 1467, D. Minn. 3d Div., April 5, 1948.

27. Kenops v. Union Freightways, Inc., Civil No. 1714, D. Minn. 3d Div., Sept. 29, 1950; Alltmont v. United States, 177 F. 2d 971 (3d Cir.), *cert. denied*, 339 U. S. 967 (1950); *cf.* Hickman v. Taylor, 329 U. S. 495, 505 (1947).

28. Civil No. 3394, D. Minn. 4th Div., Sept. 11, 1950.

facts and that plaintiff had to produce the originals, though only for photostating.[29]

Nothing in these cases, individually or as a whole, justifies a conclusion that confusion exists.[30] Rather, the impression which is gained is one of a system concerned chiefly with immediate applications and responsive to a great many practical factors.[31]

D. *Taxing of Costs Involved in the Taking of Depositions*

Costs of depositions clearly necessary to the trial of a case are taxable to the opposing losing party.[32] But how the element of necessity is to be evaluated is a matter of dispute. It seems logical to view it in the light of the time of the taking and presentation of the depositions,[33] but, beyond this, necessity can be interpreted as requiring anything from mere good faith in the taking[34] to actual offering or reading in evidence.[35] The position of the Minnesota district court in this matter is that taxation of costs is discretionary with the trial court and that depositions not put into evidence which aid only he counsel taking, giving him an "over-all view of the general facts of the lawsuit," are distinguishable from those "intended to be used to facilitate the determination of the case" and hence are not taxable as costs.[36] A fortification for this

29. See Note, 35 Iowa L. Rev. 422 (1950).

30. For observations of the local bench and bar on the operation of discovery see Section II, *infra*.

31. Most decisions, for example, involve a number of questions which are objected to on a variety of grounds. The court usually sustains or overrules the objections without specifying the grounds in writing or adding any comment.

32. Schmitt v. Continental-Diamond Fibre Co., 1 F. R. D. 109 (N.D. Ill. 1940). This is true even though a pre-trial hearing has made the use of the deposition unnecessary, Federal Deposit Ins. Corp. v. Fruit Growers Service Co., 5 Fed. R. Serv. 643 (E.D. Wash. 1941), or if the decision was by summary judgment, Curacao Trading Co. v. Federal Ins. Co., 137 F. 2d 911 (2d Cir. 1943), *cert. denied*, 321 U. S. 765 (1944). If there was a stipulation as to costs of depositions it is controlling even though the depositions were not used. Liebert v. Netherlands Am. Steam Navigation Co., 5 Fed. R. Serv. 431 (S.D. N.Y. 1942).

33. Quaker Oats Co. v. General Mills, Inc., 7 Fed. R. Serv. 514 (N.D. Ill. 1943).

34. National Comics Publications v. Fawcett Publications, 93 F. Supp. 349 (S.D. N.Y. 1950), *rev'd on other grounds*, 191 F. 2d 594 (2d Cir. 1951).

35. Amerman v. Butte Copper & Zinc Co., 9 Fed. R. Serv. 533 (D. Mont. 1945), interpreting a local court rule.

36. Republic Machine Tool Corp. v. Federal Cartridge Corp., 9 Fed R. Serv. 534, 436 (D. Minn. 1946); *cf.* Copeman Laboratories Co. v. Borg-Warner Corp., 89 F. Supp. 161 (E.D. Mich. 1950); Brainard v. Joy Mfg. Co., 14 Fed. R. Serv. 488 (N.D. Ohio 1950) (memo of clerk).

reasoning and result is found in a district of Nebraska case in which the depositions, although proper preparation for trial and used slightly for impeachment, were not "critically significant in the submission of the case" and thus were held to be not taxable as costs.[37] Both courts distinguished as having added considerations the principal cases holding costs taxable,[38] and were on solid ground in doing so. 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 as it is extremely unlikely anyone can weigh and verbalize all the imponderables and thus rationalize the seemingly inconsistent cases.[39]

Perhaps it is basically incorrect that counsel should abuse but clients should pay, as when there is a refusal to answer without substantial justification.[40] A powerful impetus to happy operation of the discovery rules is provided by one ruling that an attorney who disregarded an order requiring answers had to pay the $100 fee of the opposing attorney himself.[41]

E. *Motions to Produce Documents Under Rule 34*

Two cases from the Minnesota district illustrate the practical approach to motions under Rule 34 and the major requirements for their use. In *Schuh v. Prudential Ins. Co.*[42] plaintiff had asked for a carte blanche to investigate the records of the defendant insurance company, stating that he expected to find much of value there. After determining that plaintiff had no definite line on where he was going the court denied the motion, criticizing the indiscriminate technique and telling plaintiff he might take his depositions first to

37. Andresen v. Clear Ridge Aviation, Inc., 12 Fed. R. Serv. 628, 636 (D. Neb. 1949). The court also held that where plaintiffs deliberately concealed themselves they were liable for added costs of serving the subpoenas.

38. W. F. & John Barnes Co. v. International Harvester Co., 145 F. 2d 915 (7th Cir. 1944), *cert. denied*, 324 U. S. 850 (1945); Harris v. Twentieth Century-Fox Film Corp., 139 F. 2d 571 (2d Cir. 1943); Gotz v. Universal Products Co., 3 F. R. D. 155 (D. Del. 1943); Schmitt v. Continental-Diamond Fibre Co., 1 F. R. D. 109 (N.D. Ill. 1940).

39. *Compare* Hartig v. Schnoecknecht, 11 F. R. D. 166 (D. Conn. 1951) *and* Donato v. Parker Pen Co., 9 Fed. R. Serv. 533 (E.D. N.Y. 1945) *with* Republic Machine Tool Corp. v. Federal Cartridge Corp., 9 Fed. R. Serv. 534 (D. Minn. 1946).

40. Bellavance v. Frank Morrow Co., 2 F. R. D. 118 (D. R.I. 1941); *cf.* Burnham Chemical Co. v. Borax Consolidated, Ltd., 7 F. R. D. 341 (N.D. Cal. 1947).

41. Allen v. United States, 16 Fed. R. Serv. 37b.21 Case 1 (E.D. Pa. 1951). This sort of thing cannot be expected to engender much enthusiasm in the organized bar.

42. Civil No. 3394, D. Minn. 4th Div., Sept. 11, 1950.

ascertain what he wanted.[43] In *Hudalla v. Chicago, M., St. P. & P. R. R.*[44] plaintiff sought a copy of a statement he had previously given to defendant's claim agent. The court, in a considered analysis of the "good cause" requirement of the rule, held that good cause must be shown affirmatively and that a mere possibility of variance in plaintiff's earlier story did not of itself satisfy the requirement. Special circumstances must be stated, not bare allegations. The court refused to follow other decisions which passed lightly over good cause[45] but its actual denial was on the "insufficiency of factual bases" and the "stereotyped" claim of necessity. The practical nature of such a ruling is self-evident.[46]

Majority practice now, after early objections on constitutional grounds,[47] regards expense or burden on the party involved as no objection to the discovery of documents.[48] But if the court feels that the information asked for is unnecessary to the claim or out of all proportion to the case it may take a stricter view.[49]

43. This is similar to the prevalent practice of suggesting use of discovery instead of a motion to make pleadings more definite and certain. See Bowles v. Sigel, 5 F. R. D. 108 (D. Minn. 1946); Schempf v. Armour & Co., 5 F. R. D. 294 (D. Minn. 1946).

44. 10 F. R. D. 363 (D. Minn. 1950).

45. The court cited Dugger v. Baltimore & Ohio R.R., 5 F. R. D. 334 (E.D. N.Y. 1946); Barreca v. Pennsylvania R.R., 5 F. R. D. 391 (E.D. N.Y. 1946); Tague v. Delaware, L. & W. R.R., 5 F. R. D. 337 (E.D. N.Y. 1946); Ryan v. Lehigh Valley R.R., 5 F. R. D. 399 (S.D. N.Y. 1946).

46. More often comment and a rationale are omitted. *E.g.,* Crepeau v. Northern Pac. Ry., Civil No. 2014, D. Minn. 3d Div., Oct. 5, 1951, where the court granted the production of the names of all of defendant's employees and the names of all accounts affecting plaintiff but denied information as to type of business done, production of profit and loss statements, balance sheets, files, and memos used to refresh recollection during the taking of depositions; Henderson v. Chicago, St. P., M. & O. Ry., Civil No. 2038, D. Minn. 3d Div., Oct. 22, 1951, where motion for production of a drawing of the yards and defendant's rules for employees was granted, but a report of defendant's maintenance department on the cause of the accident was denied.

47. Sonken-Galamba Corp. v. Atchison, T. & S. F. Ry., 2 Fed. R. Serv. 380 (W.D. Mo. 1939); *cf.* Carter Bros., Inc. v. Cannon, 45 F. Supp. 679 (E.D. Tenn. 1942).

48. Michel v. Meier, 8 F. R. D. 464 (W.D. Pa. 1948); Hirshhorn v. Mine Safety Appliances Co., 8 F. R. D. 11 (W.D. Pa. 1948); *see* Hercules Powder Co. v. Rohm & Haas Co., 4 F. R. D. 452, 453 (D. Del. 1944); United States v. Schine Chain Theatres, Inc., 5 Fed. R. Serv. 474, 476 (W.D. N.Y. 1942).

49. See Garbose v. George A. Giles Co., 14 Fed. R. Serv. 573 (D. Mass. 1950), where the court said, "The motion is vexatious, prolix and expensive to defendants beyond the possible value of the plaintiff's claim. Standards for discovery in private anti-trust litigation furnish no justification for harassing defendants with demands so broad and multifarious as there are here presented."

F. *Discovery in the States*

The discovery procedures used in the states have always been varied and complex,[50] with many differences from the federal practice adopted in 1938.[51] The cases from the jurisdictions employing discovery are too few to permit any reasonable speculation as to how discovery in Minnesota will differ from that in the federal courts. There is ample support, however, for the position that the Federal Rules are at least an adequate model for state practice.[52]

II. Opinions of the Bar on the Operation of Discovery[53]

Minnesota lawyers agree that discovery contributes to settlements before trial but disagree as to the extent of the contribution. One prominent personal injury attorney commented that it was only necessary to compare the dispositions of his suits commenced in state court, without the benefit of discovery, with his cases in federal court to see that many more settlements were reached because of discovery.[54] On the other hand, another large firm engaged in the same type of litigation stated that, in order to hold down costs, discovery was employed only after preliminary negotiation indicated that settlement was not probable, and that only when trial was anticipated did discovery by interrogatories and depositions come into play. Among those lawyers who felt that discovery did aid settlements materially, there was no settled opinion as to whether one type of case was affected more than others although some mention was made of personal injury (motor vehicle) cases.

50. See Ragland, Discovery Before Trial, app. (1932).

51. See, *e.g.*, Clark, *The Influence of Federal Procedural Reform,* 13 Law & Contemp. Prob. 144 (1948); Pike and Willis, *The New Maryland Deposition and Discovery Procedure,* 6 Md. L. Rev. 4 (1941); Ragland, *Discovery by Deposition,* [1950] U. of Ill. Law Forum 161; Comments, 2 La. L. Rev. 525 (1940), 16 Mo. L. Rev. 45 (1951), [1938] Wis. L. Rev. 517, 531; 34 Minn. L. Rev. 562 (1950).

52. Van Cise, *The Federal Discovery Practice Should be Adopted by All States,* 24 Wash. L. Rev. 21 (1949); Vliet, *Oklahoma Discovery Procedures,* 2 Okla. L. Rev. 294 (1949); Williams, *A Panel Discussion Concerning Discovery and Pre-Trial Procedure,* 21 Rocky Mt. L. Rev. 38 (1948); Note, [1949] U. of Ill. Law Forum 336.

53. To obtain opinions from a representative portion of the bar prominent in federal practice on the use and abuse of discovery in the Minnesota district, questions were posed to twenty-five lawyers, both plaintiffs' and defendants' counsel. Replies received are on file at the Library of the Law School, University of Minnesota. Comments relating to the judiciary were derived from personal interviews.

54. The analogy was made in personal injury cases between the conduct of counsel and a poker player with a concealed hand. Discovery discloses the cards held by both sides and cases are settled without taking the trial time of court and jury.

The costs of the discovery techniques, particularly depositions, were found not to hinder litigation when plaintiffs are incapable of bearing heavy costs. Although some lawyers stated that discovery reduced over-all trial expense, there is no doubt that the use of depositions can be very expensive[55] and, in a few cases, it might be a complete waste of time and money. All but one of the lawyers polled, however, declared that on the whole discovery was well worth the expense.

Estimates given by the attorneys as to the use of informal discovery procedure in cases commenced varied from 20 per cent to 90 per cent. Some firms never used any informal discovery.[56]

Both the bench and the bar were of the opinion that discovery did not delay litigation and that rather than promote perjury, it deterred it. Some have raised the objection that discovery leads to trial by deposition,[57] but most lawyers commented that even if it did occur, by keeping the witness within the true facts the value of the deposition far outweighs any such objection. In the opinion of the lawyers, the extensive use of depositions and other discovery to force a settlement has not occurred and is not likely to occur in Minnesota.

The bar was well satisfied with the attention the local federal judges give to motions and objections dealing with discovery, but a few lawyers expressed the opinion that if the state courts are unable properly to handle these court activities with speed, appointment of a master to hear objections and rule on motions dealing with discovery might be beneficial.[58]

55. Some expense is reduced by formal agreement between the parties to take depositions of parties and witnesses for both sides at the same time; the time saved alone reduces much of the expense to the busy attorney. But when it is necessary to take depositions in another city, even though the depositions are taken en masse the time consumed is great, and the expense correspondingly high.

56. To verify the use of informal discovery and further to establish the degree of validity attributable to the statistics gathered from the dockets and tabulated herein, lawyers were asked to note unfiled items of discovery in random cases in which they were counsel. The replies received indicated that interrogatories and production of documents were most often subject to informal agreements. The average number of cases commenced in which discovery was used but not filed was over 25 per cent. In most of the cases, however, some discovery had already been filed and the proportion of cases commenced in the Federal District Court in Minnesota which employed discovery would not be raised substantially. See Table 1, *infra.*

57. See Speck, *The Use of Discovery in United States District Courts,* 60 Yale L. J. 1132, 1133 (1951).

58. It must be noted that there are many differences between federal and state court practice and that many of the conclusions in this Note cannot apply directly to state practice.

The effects of the use of discovery on trial techniques were a subject of outspoken comment by the bar. Although elimination of surprise at the trial by the use of discovery will greatly benefit less experienced counsel, lawyers stated that it will never replace capability and experience in trial technique. The able lawyer will continue to produce consistently with or without discovery.

The judiciary uniformly express satisfaction with the operation of discovery. They do not believe that its prime value is the contribution toward settlements but is its use as a means to reduce the issues for trial and completely expose the facts to the trier. Appellate judges are especially interested in its reduction of the size of the record.

III. Analysis of the Surveys of the Dockets in Federal District Court

This analysis is based on surveys of the civil dockets of divisions 1, 2, 3, 4 and 6 of the United States District Court in Minnesota. All surveys were made by examining the cases in five types of suits: real property, insurance, other contract, personal injury and other tort. It was assumed that no errors of omission or classification of entries existed unless apparent on the face of the dockets.

In divisions 3 and 4 the surveys were commenced with the first new volume of dockets begun in 1944 and were continued through the subsequent volumes up to December 15, 1951. For division 1, 2 and 6 the only dockets available were recent, dating from March, 1949, for division 1 and from January, 1950, for divisions 2 and 6. Only those cases which were closed at the date the surveys were taken are included in the compilations shown by the tables appended and in this analysis. The facts of the analysis are based on the appended tables. It will include some facts not tabulated but will not consider the informal use of discovery discussed previously.

A. *Use of Discovery by Type of Case*

Some discovery technique was found in over 29 per cent of the cases filed in the federal district court in Minnesota. Disregarding those cases which were disposed of by dismissal of plaintiff, and thus rarely pressed to any extent, the proportion of cases with discovery is raised to more than one-third of all cases filed. In comparison with the use of discovery in some other federal dis-

trict courts, the Minnesota district is significantly higher.[59] This result has been due in large measure to repeated and thorough use of all the discovery devices by about twenty-five lawyers in the district who appear often in federal court. The dockets attest to the fact that lawyers appearing rarely in federal court were far below the average in the use of the techniques available.

Proportionally, the discovery employed to the greatest extent was the oral deposition. It was used almost twice as often as the interrogatories to parties, although the latter was the only form of discovery to appear in every category of suit. Motions for production or inspection of documents ran a poor third, admissions were used on the whole to an even smaller extent, and depositions upon written interrogatories appeared to a negligible extent. Surprisingly, insurance cases seemed to provide the greatest opportunities for discovery. The proportion of such cases using discovery exceeded the proportion of personal injury cases employing discovery by about 5 per cent and of other tort cases by about 4 per cent. Contract cases other than insurance reflected the least use of discovery, the proportion of the cases being slightly over 29 per cent; by comparison, in insurance cases, usually more complex, discovery was used in over 45 per cent of the cases. So few cases involving real property were commenced in this district that no valid evaluation can be made of the use of discovery as a whole, or by specific technique, as an aid in such cases.

B. *Discovery as Affecting the Disposition of Cases*

The disposition of the cases examined in the Minnesota district does not satisfactorily corroborate the contention that discovery contributed appreciably to settlements before trial. While over 58 per cent of the cases commenced in this district were "stipulated and dismissed,"[60] almost one-fourth of the cases commenced were brought to the trial stage. The national average of trials in diversity of citizenship cases is considerably smaller,[61]

59. In five district courts surveyed, discovery was disclosed in from 14.1 per cent to 26.8 per cent of the cases; but in the Eastern District of Pennsylvania discovery was used in 37.3 per cent of the cases. See Speck, *supra* note 57 at 1135.

60. This is an abbreviation of the term of art employed by the office of the Clerk of Court. It signifies that both parties have agreed that an order of dismissal be entered, or in other words, that a settlement has been reached.

61. See Report of the Director of the Administrative Office of the United States Courts 151 (1950).

although this may be explained by the fact that trials may be reached more quickly in the Minnesota federal district court than on the average elsewhere.[62] However, it is significant that in divisions 1, 2 and 6 of the Minnesota district discovery was proportionally higher than in divisions 3 and 4 and yet virtually the same percentage of cases reached trial.

C. *Abuses Apparent from the Dockets*

Few abuses were evidenced by the dockets. The race to take depositions was the most easily discernible abuse but it occurred in only eight cases. On five occasions defendant took the deposition of plaintiff within a few days after service of the summons. Three times a plaintiff applied for leave to take depositions early but the hearings were delayed until no application to the court was necessary. Delay of litigation by dilatory discovery tactics is almost non-existent in Minnesota; only one example was found where by several motions and hearings the case was postponed to a later term. Usually delay by motions or objections is not likely to occur in the federal district court in Minnesota because of the very short trial calendars and the relatively quick availability of a hearing.[63] But in the Minnesota state courts in the metropolitan areas, where getting to trial takes well over a year because of clogged calendars, it is entirely possible and very probable that the first flood of court activity occasioned by the use of discovery under the recently adopted Minnesota Rules of Civil Procedure may delay proceedings until the next term and postpone the trial even longer. Until the mass of the legal fraternity adjust to these relatively unfamiliar devices of discovery some confusion will occur, followed by resort to court activity. After the early confusion is somewhat settled, however, state district court judges should be prepared to handle quite firmly those lawyers who might be making an excessive number of motions or objections dealing with discovery.

The abuse of discovery to harass the other party into a settlement did not occur often enough to warrant the conclusion that such is a practice among lawyers. Harassment was the subject of motion only three times, and twice protective orders were granted to limit the scope of the examination.[64] The idea that corporate

62. *Id.* at 152-155.

63. *Ibid.*

64. Under Fed. R. Civ. P. 30(b). Minn. R. Civ. P. 30.02 (1952) contains a similar protective provision.

defendants have a tendency to abuse the privilege to take depositions, to the great expense of the plaintiff, is not supported in any manner by the cases examined in the federal district court. Nevertheless, in Minnesota the new Rules expressly provide protection from unjust expense.[65]

D. *The Use of Interrogatories to Parties*

While interrogatories were used in all types of suits, their most frequent appearance has been in personal injury and other tort cases. As inexpensive and convenient as interrogatories are, they do not approach the depositions in over-all use although in the rural divisions 1, 2 and 6, where discovery was more popular, interrogatories were used in less than 4 per cent fewer cases than were depositions in division 3. Not all the increase can be attributed to a poorer class of plaintiff or to a less experienced lawyer, since a large proportion of the cases were handled by the same lawyers and firms having extensive practice in the federal court generally.

In most cases interrogatories have been used solely to elicit information from the adverse party as the groundwork for further investigation, for further use of depositions of the party and his witnesses, for admissions and for motions for production of documents. In one case plaintiff obtained from defendant corporation, over its objection, an extensive list of all defendant's employees working on a certain floor of a building where an alleged negligent act of defendant occurred.[66] Interrogatories are frequently used to determine whether the opposing party has obtained statements from any witnesses and, if so, from whom; upon an affirmative reply, a motion for production or inspection of the documents follows.[67]

Interrogatories are chiefly a plaintiff's weapon, particularly in personal injury cases, and, to a lesser extent, in other tort cases. In any type of suit in which interrogatories were used, plaintiff submitted interrogatories to defendant in all but a few instances. Defendant used this discovery less than half as many times as plaintiff in all cases and less than one-third as many times in personal injury suits. It appears that interrogatories are of the least value

65. Minn. R. Civ. P. 30.02 (1952).

66. See Goldman v. General Mills, Civil No. 2690, D. Minn. 4th Div., Aug. 19, 1948.

67. The statements are not available through interrogatories, since a "statement" is a "document." See note 27, *supra* and text thereto.

in insurance and other contract cases. From the very nature of such cases plaintiff has less need for the groundwork to determine the existence of witnesses and documents.

There appeared to be some tendency for plaintiffs to over-use interrogatories to such a point that in personal injury and other tort cases defendants resorted to some court action in 25 per cent of the cases in which interrogatories were used. Generally the objections were to irrelevancy, ambiguity or trap questions, or invasion of the province of the motion to produce documents. Defendants' objections were upheld completely or in part in 80 per cent of the cases.

E. *"Trial by Deposition"*

The oral deposition has been and will very likely always be the discovery device most popular with and useful to lawyers. The opportunity to examine opposing parties or witnesses at length in the manner closely approximating the technique at trial, but without the pressure of the judge and jury, has occasioned comprehensive use of the deposition in all types of suits. The deposition eliminates surprise, reveals the strength or weakness of the particular deponent under trial conditions, and allows the examiner to run down any leads or new avenues of investigation elicited unexpectedly during the interrogation. The popularity of the deposition to examine witnesses is manifested by the fact that such depositions comprised over 82 per cent of all depositions taken. In some tort cases the number of depositions of witnesses has been very high, with up to thirty-four depositions in one case. Doctors are the witnesses most likely to have their depositions taken, for where there will be dispute as to damages there would seem to be no substitute for knowing just exactly what the medical testimony for the other party will be.

While proportionally depositions have been used in this district in more insurance and personal injury cases than in other suits, the highest average number of depositions per case occurs in other tort cases. In the latter cases the deposition was employed on the average of five times per case, and over 91 per cent of those whose depositions were taken were witnesses. In the insurance cases, the average number of depositions was 3.5 per case, and about 87 per cent of those taken were depositions of witnesses. In other contract cases, the average number of depositions dropped to about three, and witnesses comprised only about three-fourths of the deponents.

It was not apparent from the dockets that the deposition was a tool for one party, nor was this evident in any particular type of suit. And in contrast to the interrogatories, there was a marked lack of objections and resultant court activity centering around depositions; although five times as many depositions were taken as interrogatories, six times as much court activity took place in connection with the interrogatories. Expertise in trial examination, carried over into the taking of depositions, may be responsible for the comparative lack of court activity; in only one case was an objection to some part of the deposition sustained, and then only in part.

Depositions of witnesses upon written interrogatories have been used in but few cases. Although inexpensive, and when properly used a fair source of information,[68] this type of deposition has a serious drawback in that no probing of inconsistencies is possible. It is unlikely that this discovery device will be used to any appreciable extent except when necessitated by the pressure of more important work or by an impecunious client with a small case.

F. *Motions for Production or Inspection*

The discovery of "documents . . . or tangible things"[69] by motion was sought in only 3.5 per cent of the cases filed in this federal district. One explanation for this small usage may lie in the availability of the same objects by *ex parte* application to the court for a subpoena *duces tecum* upon taking the oral deposition of the party opponent.[70] The importance of instruments, records and inter-organizational reports in insurance and other contract cases has prompted more extensive use of the motion to produce than in tort suits.

Motions were granted only in part or denied in one-third of the cases in which they were made. In the insurance and other contract suits, however, less than one-fourth of the motions were not granted as sought. In personal injury cases one-third of the motions were denied completely and one-sixth were denied in part. It would appear that the federal judges have given extremely careful consideration to the scope of these motions and their permissibility in the situation presented to the court.

68. See Note, 31 Minn. L. Rev. 712, 719 (1947).

69. Fed. R. Civ. P. 34. Minn. R. Civ. P. 34 (1952) is substantially the same.

70. Fed. R. Civ. P. 45(d)(1); Minn R. Civ. P. 45.04(1) (1952).

G. *Admissions*

The request for admission of facts or of the genuineness of documents, like the motion for production of documents, has had extremely small use in this district. In only 2.5 per cent of the cases commenced were admissions requested, the greater proportion again occurring in the commercial suits, insurance and other contract. Although no documentation was made of which party used admissions in which suits, it appeared that in all types of suits the great majority were requested by plaintiff. 80 per cent of the admissions requested were answered and the remainder undoubtedly were deemed admitted by operation of Rule 36. There were no objections to requests. No consistent connection between the request for admission and the summary judgment was found since in only three cases out of sixteen in which summary judgments were granted was the request for admissions used.

Since one purpose of discovery by admission was the reduction of issues before trial,[71] the use of admissions in the Minnesota district, in extent and character, might support the contention that all pre-trial discovery is of little use in simplifying the trial although valuable to prevent surprise.

71. See Note, 31 Minn. L. Rev. 712, 725 (1947).

TABLE 1.

THE USE OF DISCOVERY IN THE UNITED STATES DISTRICT COURT IN MINNESOTA

	Division 3 (Urban)	*Division 4 (Urban)*	*Divisions 1, 2, 6 (Rural)*
Number of Cases in Dockets Surveyed	466	810	94
Cases Showing Discovery:			
One or more types	32.4% (151)	26.8% (217)	35.1% (33)
Depositions	18.5% (86)	21.4% (173)	23.4% (22)
Interrogatories	10.3% (48)	10.7% (87)	14.9% (14)
Admissions	3.2% (15)	1.9% (15)	3.2% (3)
Production	2.6% (12)	4.4% (36)	1.1% (1)
Depositions by Written Interrogatories	.....	0.5% (4)	.....

TABLE 2.

DISPOSITION OF THE CASES EXAMINED

	Cases Commenced	*Summary Judgment*	*Settled by Trial*	*Dismissal of Plaintiff*	*Stipulated & Dismissed**
Divisions 3 & 4	1276	14 (1.1%)	314 (24.6%)	194 (15.2%)	754 (59.1%)
Divisions 1, 2, 6	94	1 (1.1%)	23 (24.5%)	21 (22.3%)	49 (52.1%)
Total Cases	*1370*	*15 (1.1%)*	*337 (24.6%)*	*215 (15.7%)*	*803 (58.6%)*

*For definition of this term see note 60, *supra*.

TABLE 3.
USE OF DISCOVERY BY TYPE OF CASE

Nature of Suit	*Cases Commenced*	*Depositions*	*Interrogatories*	*Production*	*Admissions*	*Interrogatories: Rule 31*	*Times Any Type Used*
Real Property	5	.....	2	....	....	....	2
Insurance	53	12	5	4	2	1	24
Other Contract	364	54	22	18	13	1	108
Personal Injury	797	182	99	23	13	2	319
Other Tort	151	33	21	4	5	....	63
Total Cases	*1370*	*281*	*149*	*49*	*33*	*4*	*516**

*This figure does not reflect the true total of cases using discovery (see Table 1) and only indicates the activity by suit category.

TABLE 4.

THE USE OF INTERROGATORIES TO PARTIES*

		Number of Interrogatories					*Motions to Compel*		
Nature of Suit	*Cases Interrogatories Used***	*Total*	*To Plaintiff*	*To Defendant*	*Objections by Plaintiff*	*Defendant*	*Granted*	*Granted In Part*	*Denied*
Real Property	2	3	1	2	....	....	....	....	....
Insurance	5	6	2	4	1	....	....	1	....
Other Contract	22	28	12	16	2	1	1	2	....
Personal Injury	99	123	30	93	4	25	6	16	7
Other Tort	21	34	13	21	2	6	1	7	1

*See Table 1 for the number of cases from the divisions of this district.
**See Table 3 for the number of cases commenced in each suit category.

TABLE 5.

THE USE OF DEPOSITIONS*

Nature of Suit	Cases Depositions Used**	Number of Depositions			Objections or Court Activity	Motions to Compel		
		Total	Of Parties	Of Witnesses		Granted	Granted In Part	Denied
Insurance	13	46	6	40	....	....	....	....
Other Contract	55	174	47	127	3	3	....	....
Personal Injury	184	550	99	451	3	3	....	....
Other Tort	33	156	12	144	1	....	1	....

*Depositions upon written interrogatories, under Rule 31, are included in this table; see Table 1 for the total of such depositions.
**See Table 3 for the number of cases commenced in each suit category.

TABLE 6.

THE USE OF MOTIONS FOR PRODUCTION OR INSPECTION*

Nature of Suit	Cases in Which Motions Made	Disposition of Motion		
		Granted	Granted In Part	Denied
Insurance	4	2	1	1
Other Contract	18	15	....	3
Personal Injury	23	12	4	7
Other Tort	4	4	....	....

*See Table 3 for the number of cases commenced in each suit category.

TABLE 7.

THE USE OF ADMISSIONS*

Admissions Sought**	Admissions Answered
2	2
13.	12
13	10
5	3

*See Table 3 for the number of cases commenced in each suit category.
**Same suit categories as in Table 6.