The Discovery Process in Highway Land Acquisition

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•LEGAL PHILOSOPHERS and practitioners have held different views with respect to the purpose of legal proceedings. Legal practice has been considered by some to be a substitute for "trial by battle," a medieval institution from which has evolved a more refined adversary procedure. To others, adversary practice has represented the only way to settle a dispute with the most efficient counsellor and the most telling presentation or facts at his command able to persuade effectively the arbiter, court, or jury.

This attitude toward adversary procedure when related to another of the substantive and philosophical goads of the legal process, to do justice or to pay fair compensation as in the field of land acquisition, has resulted in a gradual reduction in the opposition process. This has been accomplished through attempts at pretrial conferences and discovery procedures, which are judicial processes to reveal pertinent information to opponents before trial, as well as other legal mechanics. One objective of these mechanics, of course, is to reduce the courtroom drama.

PROCESS AND PROCEDURE

Of particular significance to agencies concerned with public works programs is land acquisition and its courtroom efforts. About 10 percent of highway land acquisitions culminate in trial. In the normal process of trial, of course, standard rules of evidence apply, but even these evidentiary rules, accepted over the years, have resulted in erecting various adversary barriers against a complete exchange of information between litigants.

A new area of legal effort has been created by the acceptance of the Federal Rules of Civil Procedure[1] and the discovery rules included therein. Discovery rules are applicable to every substantive field of civil law, including eminent domain proceedings. As a result, there rules have affected the statutory and the case law of eminent domain. In some respects, discovery meets different problems in this field. For in condemnation, sovereignty and public interest are involved. Should the exchange of information be the same in these cases as in other types of litigation? Are States and the Federal Government reachable by discovery to a greater extent than private citizens? Does the application of discovery rules to the field of eminent domain and experts such as appraisers introduce a new dimension to the problem which makes it necessary for public personnel to be more painstakingly file conscious than they otherwise would need to be?

The nature of discovery rules raises considerable concern on the part of both private and public litigants as to the contribution of the process to the fairness of courtroom proceedings. Public officials, at both the Federal and State levels have been concerned with the possibility that inadequate data will be disclosed; others have been concerned that the secrecy of trial preparation will be disturbed; all are of specific concern and quite distinct from broader questions such as executive privilege or policy.[2]

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[1] Federal Rules of Civil Procedure, 28 U.S.C. (1938).
[2] Porter, P.A. "Release of Government Information in Private Litigation," The Forum, Nov. 1963, p. 15.

EVALUATION AND IMPLICATIONS

This paper seeks to evaluate the fundamental nature of this process of discovery in litigation and its significance in the land acquisition process for both parties. Implications drawn from this evaluation can then serve as a basis for legal counsel and right-of-way personnel in State highway departments and at other levels of government to develop adequate procedures (a) to counter the inordinate use of discovery rules against State highway departments and the Federal Government in eminent domain cases and (b) to encourage its use where relevant to a determination of fair compensation for the property owner.

Public improvement agencies are intimately involved in land acquisition. The Federal-Aid Highway Act of 1956, for instance created at one fell swoop a tremendous land acquisition program for both the Federal Government and the individual States. It is anticipated that more than 750,000 individual parcels of land will have been acquired by 1972 for the National System of Interstate and Defense Highways alone at a cost of almost $7 billion. The ABC system of highways will probably affect twice this number of parcels by the same date.[3] Various other public improvement programs including urban renewal, housing, reclamation, and flood control also are involved in such proceedings.

Individual governmental units at the local and State levels and Federal governmental units may be engaged in litigation arising from the exercise of their eminent domain powers at any time. Many of these units are concerned with the applicability of general evidentiary rules to right-of-way acquisition and litigation. Questions regarding discovery of expert witness materials, appraisal records, appraiser names, or evidentiary reports, and data, have recently come forward in right-of-way litigation as these cases have accelerated in number.

THE DISCOVERY PROCESS

Nature of Discovery

Discovery may be considered a judicial process conducted before an actual trial according to certain rules of procedure as adopted by the courts or legislature of a particular jurisdiction and overseen by the judge of the court in which the action is pending. The basic purpose of this process is to furnish pertinent information to one adverse party which the other party may have in his possession or control.[4]

Modern discovery procedures may be conveniently dated by the inception of the Federal Rules of Civil Procedure in the U. S. District Courts on Sept. 16, 1938. The idea of discovery, however, is much older; it originated in the early equity courts as the bills of discovery,[5] as well as in some of the early code States such as California and New York. The purpose of the bill was to enable the party to prove his own case, not to disprove the case of his adversary.[6] This same criterion has been set by the courts today.

The Federal Rules, for example, provide for discovery and pretrial procedures in Rules 16, 26 to 37, and 45. Appendix A is a compilation of the rules highlighted in this paper. The Federal courts and all 50 States have some provision for discovery procedures; most States have adopted either the Federal Rules per se or have very similar statutory provisions for deposition and discovery procedures (Appendix C).

Each of the rules cited is interrelated and must be construed together.[7] This principle is particularly true in those States which have adopted the Federal Rules or have substantially the same provisions.[8] Discovery by means of written or oral interrogatory,

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[3] Goldstein, "Economic Evidence in Right-of-Way Litigation," 50 Geo. L. J. 205 (1961).
[4] 27 C.J.S. §20 (1959).
[5] Id. §1.
[6] Nashville, Chattanooga & St. Louis R.R v. T.S. Jenkins & Son, 276 S.W. 1, 53 A.L.R. 814 (1927).
[7] Taine, "Discovery of Trial Preparations in the Federal Courts," 50 Colum. L. Rev. 1041 (1950).
[8] South Dakota is an exception. Bean v. Best, 76 S.D. 462, 80 N.W. 24 565 (1957), each part of the discovery rules interpreted separately and the scope determined accordingly.

deposition, or production of documents or other tangible things is not limited to the specific provisions of Rules 26 to 37, but through an understanding of these rules as well as Rules 16, 45(a) and 45(d) as one interrelated process. In many ways pretrial procedures and discovery procedures are synonymous.

Federal Rule 16 provides for a pretrial conference to consider:

1. Simplification of issues;
2. Necessity or desirability of amendments to the pleadings;
3. Possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
4. Limitation of the number of expert witnesses;
5. 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; and
6. Such other matters as may aid in the disposition of the action.

Thirty-seven States and the District of Columbia presently have some provision for pretrial conferences (Appendix C). The majority of these State jurisdictions have followed the provisions of Federal Rule 16 verbatim. In California, Connecticut, Iowa, Maryland, North Carolina and New Jersey, the scope of the pretrial conference has been expanded to specifically include matters not included under the Federal Rule. The applicable rule in the 1962 Code of Iowa is a good example of such expansion (Appendix B).[9] New York, however, is among those States which make no provision for a pretrial conference.[10]

The purpose of the pretrial conference and procedure has been described in various ways, but the majority of these explanations appear to arise from the cited six considerations listed in the text of Federal Rule 16. All States having pretrial provisions list similar considerations. The proper application of discovery includes the use of Rule 16, as well as the deposition and discovery procedure[11] coupled with the subpoena power.[12]

Inasmuch as land acquisition involves the use of technical terms and expert witnesses, pretrial procedures tend to reduce the amount of trial preparation and court time required.[13] Thus, discovery can be used to simplify the issues before the actual trial, to arrive early at a "fair market value" through the use of appraisal reports and taking of depositions of appraisers and other qualified "expert witnesses," and to thus satisfy the constitutional requirement of just compensation. The purpose of pretrial preparation is not to harass the adverse party or merely to uncover the mistakes or weaknesses of the opponent, but to balance the interests of both parties so that the proceedings may be expedited.[14] The possibility of settlement is greatly increased, unnecessary expense to the parties may be eliminated, fair treatment may be given to both the landowner and the condemnor. Thus, the problem of crowed court dockets might be alleviated.

Concerning the advantages of pretrial, it has been said that:

> Pretrial is now generally considered one of the accepted means of obtaining "the fullest possible knowledge of the issues and facts before trial." It and the whole system of discovery help us "find the truth," and that is what a lawsuit is intended to do under our system of justice unde law.[15]

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[9] 2 Iowa Code 1962, R. Civ. P. §136.

[10] 1 Barron & Holtzoff, Fed. Prac. & P. §9.33 (1962 Pocket Part). Nor do Mississippi, Nebraska, New Hampshire, Ohio, Oregon, Rhode Island, South Carolina and Tennessee have statutory provisions for a pre-trial conference, though pre-trial conference may exist as a matter of judicial practice.

[11] Fed. R. Civ. P. 26-37.

[12] Fed. R. Civ. P. 45.

[13] Levin, "Pretrial Practices in Condemnation Cases," Legal Affairs Committee Ann. Meeting, AASHO (Dec. 1960); Allen, "The New Rules in Arizona," 16 F.R.D. 191 (1955).

[14] Lester v. People, 150 Ill. 408, 23 N.E. 388 (1890). As to the contemporary problem of crowded court dockets see Banks, L., "The Crisis in the Court," Fortune, Dec. 1961, p.86.

[15] Yankwich, "Crystallization of Issues by Pre-Trial: A Judge's View," 58 Colum. L. Rev. 470 (1958).

Consideration of the implications of pretrial and discovery procedure, particularly in recent land acquisition proceedings, has been discussed on a number of recent occasions.[16, 17, 18]

Although the Federal Rules of discovery had been used in land condemnation litigation with some confusion since their inception, they were made applicable to land condemnation in 1951 by direct provision in Rule 71A (Appendix A). Before adoption of this provision, procedure in Federal courts suffered from a lack of uniformity in the applicability of Federal statutes to condemnation procedures. Rule 71A(a) represents an effort to provide uniformity.[19] Accordingly, it has been held that discovery is available in condemnation proceedings.[20] The feeling was recently expressed that all opinions in condemnation cases before the adoption of this rule were mere dicta.[21]

Alaska, California, Delaware, Kentucky, Maryland and Missouri have adopted provisions similar to the Federal Rule.[22] In relating discovery practice to condemnation cases, Illinois passed the Civil Practice Act of 1956 which made the rules of discovery, including sanctions, appropriate in condemnation cases.[23] Other States which have recently adopted the Federal Rules or a similar version have not adopted Rule 71A, but they have recognized that section and reserved it for future legislation. This fact, together with recent court interpretations favoring liberal construction[24] of their rules following the spirit of the Federal Rules, indicates that the use of discovery in condemnation cases is a new and growing combination of procedural and substantive law.

Scope of Examination

The specification of the unity of pretrial and discovery practice and the reference in the Federal Rules and elsewhere to the use of this practice in condemnation indicates a public policy in favor of discovery in general. But such a policy has various limitations.

Very often the condemnor, a public agency, is concerned with the confidentiality of its internal materials which may have usefulness in a particular trial. A State highway department, for instance, may have gathered, in preparation for condemnation proceedings, appraisal reports prepared by an expert in anticipation of litigating the issue of "just compensation." Similarly, the opinion of the appraiser, the factual material gathered as to the value of the land taken, as well as the highest and best use of the remainder parcel are items that might be best to hold until trial; there may be an absolutely senseless and incompetent matter that is in the files of the agency but being poorly drawn, should not be exposed to public scrutiny. On the other had, the condemnee may wish to obtain such information feeling that it would make the best case for him, and, in fact, the success or failure of a case may sometimes hinge on the pretrial discovery stage despite the courtroom expertness of the attorneys.

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[16] Naftalin, "Pretrial Practice in State Condemnation Cases for Highway Purposes," HRB Bull. 294, p. 15 (1961). See additional references in the recent Ann. Rept. (1962, 1963) of the Comm. on Condemnation and Condemnation Procedure of the Am. Bar Ass'n.

[17] Buscher, "Pre-Trial Discovery Tactics," HRB Spec. Rept. 76, p. 78 (1962).

[18] Holloway, J. P., "Use of Pre-Trial Discovery Rules in Eminent Domain," Proc., WASHO (1962). Also the California Law Revision Commission has directed a recent Study concerning Pretrial Conferences and Discovery in Eminent Domain Proceedings.

[19] 3 Barron & Holtzoff, Fed. Pract. & P. §1516 (1958).

[20] United States v. 1,278.83 Acres of Land, More or Less, 12 F.R.D. 320 (E.D. Va. 1952).

[21] State ex rel. Willey v. Whitman, 91 Ariz. 120, 370 P.2d 273 (Sup. Ct. 1962).

[22] Alaska R. Ct. P. & Admin. 72(a) (1963); Cal. R. P. §1262; Del. Code A, Sup. Ct. R. Civ., 71A (Cum. P.P. 1962); Ky. Rev. Stat. §177.081(4) (eff. June 19, 1952); Md. R. Civ. P. U12 (unann. ed. 1963); 4 Mo. R.S. 1959, Sup. Ct. R. 86.01.

[23] Corboy, "Discovery Practice—Documents, Tangible Articles, Real Estate," 3 U. Ill. L.F. 797 (1959).

[24] Arkansas State Hwy. Comm'n v. Stanley, 353 S.W.2d 173 (1962); Shell v. State Rd. Dep't, 135 So. 2d 857 (Fla. 1961); State ex rel. Reynolds v. Circuit Ct., 15 Wis. 2d 311, 112 N.W.2d 686 (1961); Power Authority v. Kochan, 216 N.Y.S.2d 8 (Sup. Ct. 1961).

The limits of examination by deposition and discovery for cases pending in the U. S. District Courts are set forth in Rule 26(b) of the Federal Rules (Appendix A). Whereas this rule reads as though it defines the scope of depositions, it has also come to be recognized as setting forth the limits for the entire discovery procedure.

A number of States have adopted Rule 26(b) without any substantial additions or deletions (Appendix C). Three States[25] have adopted it with the exception of the last sentence. Seven States[26] have added to their comparable Rule 26(b) a proposed amendment[27] to the Federal Rules which was not adopted by the U. S. Supreme Court. In addition, two other States[28] have made certain other additions to their version of Rule 26(b).

Under Rule 26(b) the examination is not limited to a party to the action but is permitted to be made of any person having knowledge of relevant, unpriviledged facts. When a deposition is sought to be taken, no distinction is made between a party and a mere potential witness. This is quite different from the situation under Rules 33 and 34 (Appendix A), in which only the adverse party may properly be examined.

DISCOVERY AND LAND ACQUISITION

Explanation of "Any Matter," "Not Privileged"

One of the most troublesome areas of the discovery rules with regard to land acquisition involves the determination of the proper scope of examination as to subject matter. Any matter, not privileged, which is relevant to the subject matter of the pending action is properly discoverable according to Rule 26(b). The courts, however, have been far from unanimous in their delineations of the scope of discovery, especially in the interpretation of the meaning of "any matter."

The most significant point in this regard, especially for appraisal records in land acquisition cases, is the distinction between "fact" and "opinion." Although no such distinction is made in the rules, the courts have interpreted Rule 26(b) as if there were.

Before making a decision as to whether the material sought constitutes fact or opinion, the extent to which one party must divulge "the identity and location of persons having knowledge of relevant facts" is determined. Discovery of such persons is specifically provided for under Rule 26(b).[29] The court must decide whether the person taking the deposition is actually seeking the identity of persons having knowledge of relevant facts, or whether he is attempting to secure a list of the witnesses his opponent intends to call at the trial. There is a division of authority on this latter point.

Apparently "it is permissible under Rule 26(b) to inquire into the identity and location of persons having knowledge of relevant facts, for the purpose of discovery. This provision must not be confused with an attempt to secure a list of witness whom the adverse party intends to call at the trial, however."[30] In a number of other cases discovery was similarly denied where the object was simply a list of witnesses to be called.[31]

One court has ruled that a showing of some special circumstances will justify nonadherence to the general rule prohibiting discovery of witnesses.[32] On the other hand,

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[25] Illinois, South Dakota, Tennessee.

[26] Idaho, Maryland, Minnesota, Missouri, New Jersey, Washington, and West Virginia.

[27] See discussion of proposed Amendment following.

[28] California and Maryland.

[29] Aktiebalaget Vargas v. Clark, 8 F.R.D. 635 (D.D.C. 1949); Fidelis Fisheries v. Thorden, 12 F.R.D. 179 (S.D.N.Y. 1952); Frankel v. Sussex Poultry Co., 71 A.2d 754 (Super. Ct. Del. 1950).

[30] Aktiebalaget Vargas v. Clark, 8 F.R.D. 635 (D.D.C. 1949).

[31] Fidelis Fisheries v. Thorden, 12 F.R.D. 179 (S.D.N.Y. 1952); United States ex rel. TVA v. Bennett, 14 F.R.D. 166 (E.D. Tenn. 1953); Ex parte Wood, 253 Ala. 375, 44 So. 2d 560 (1950); Frankel v. Sussex Poultry Co., 71 A.2d 754 (Super. Ct. Del. 1950); Ex parte Driver, 255 Ala. 118, 50 So. 2d 413 (1951); Huntress v. Tucker, 104 N.H. 270, 184 A.2d 562 (1962).

[32] Wilson v. Kanyon, 120 N.Y.S.2d 638 (Suffolk County Ct. 1953).

disclosure of witnesses has been ordered by some courts.[33] New Hampshire, for example, in a personal injury action ordered disclosure of a list of names and addresses of witnesses, ruling that those witnesses were not the exclusive property of either party, and that in the interest of justice their testimony should be introduced in the action.[34]

Whether or not the names of witnesses must be disclosed has an important bearing on land acquisition cases, because many of the witnesses to be called will be appraisers and other persons having expert knowledge of the subject matter. Consequently, those persons having knowledge of relevant facts will quite often coincide with the witnesses to be called at the trial. To compel disclosure in accordance with Rule 26(b) would often violate the provision denying discovery of the names of potential witnesses. Once the appraiser's identity had been disclosed, he would be subject to the full range of the discovery procedure as to his knowledge of the property. The cases have generally held that the condemnor could refuse to answer interrogatories seeking the names, addresses, and positions of persons who had aided in compiling the appraisal data.[35]

New Jersey, recognizing this problem and attempting to protect the expert witness, amended their Rule 26(b) in 1955. The amendment states:

> A party may require any other party to disclose the names and addresses of proposed expert witnesses; except as provided in R.R. 4:25-2, such disclosure shall be solely for the purpose of enabling the party to investigate the qualifications of such witnesses in advance of trial.[36]

In 1960, New Jersey handed down an interpretation of its rule. In a personal injury action, the plaintiff was required to disclose the name and address of his expert witness, but the defendant could not take the deposition of the expert as to facts within his knowledge on the theory that the expert was a person having knowledge of relevant facts.[37] In arriving at this decision, it found that the language of the rule was clear and interpreted the word "solely" in a literal fashion. By analogy, this would indicate a policy of protecting the work of an appraiser from discovery, even though the appraiser's name must be disclosed.

There is also some discrepancy as to whether information which is known or is equally available to the interrogator is discoverable. One position is that the interrogator is not limited to facts exclusively or peculiarly within the knowledge of the adverse party, even where the interrogator has at his disposal an adequate or even better source of information.[38] As recently as 1959, however, in a condemnation proceeding, California held that although there was no valid objection to the discovery of relevant, unprivileged factual data, discovery would be denied because the data were readily available to the defendant by other means.[39]

On the other hand, some States have adopted, by statute, a more liberal approach and have tried to remove some of the uncertainty surrounding the proper scope of examination. Thus, New Jersey[40] and Idaho[41] have added a sentence to their rules governing the scope of examination which reads: "Nor is it ground for objection that the examining party has knowledge of the matters as to which testimony is sought." In compelling discovery of matters already within the knowledge of the interrogator, the ratio-

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[33] Reynolds v. Boston & Maine Transp. Co., 98 N.H. 251, 98 A.2d 157 (1953); Unger v. Los Angeles Transit Lines, 4 Cal. Rep. 370 (Dist. Ct. App. 1960).

[34] Reynolds v. Boston & Maine Transp. Co., 98 N.H. 251, 98 A.2d 157 (1953).

[35] Hickey v. United States, 18 F.R.D. 88 (E.D. Pa. 1952); United States ex rel. TVA v. Bennett, 14 F.R.D. 166 (E.D. Tenn. 1953); United States v. 7,534.24 Acres of Land, 18 F.R.D. 146 (N.D. Ga. 1954); United States v. 6.82 Acres of Land, 18 F.R.D. 195 (D.N.M. 1955); United States v. 19.897 Acres of Land, 27 F.R.D. 420 (E.D.N.Y. 1961); United States v. 900.57 Acres of Land, 30 F.R.D. 512 (W.D. Ark. 1962).

[36] N.J. Rules 4:16-2.

[37] Kusner v. Howard S. Stainton Co., 59 N.J. Super. 93, 157 A.2d 154 (1960).

[38] Onofrio v. American Beauty Macaroni Co., 11 F.R.D. 181 (W.D. Mo. 1951).

[39] United States v. Certain Parcels of Land, 25 F.R.D. 192 (N.D. Cal. 1959).

[40] N.J. Rules 4:16-2.

[41] Idaho R. Civ. P. 26(b).

nale sometimes used by the courts is that a party is entitled to elicit such information for the purposes of cross-examination, or for the purpose of impeaching the credibility of the witness at the trial. The converse reasoning is that it constitutes an invasion of the "work product" of an expert or attorney, or that it would give to one party a "free ride" and promote laziness.

With regard to the discoverability of matter which one party intends to use as evidence in establishing his case, it has been held that the moving party cannot be allowed to pry indiscriminately into the opponent's case to ferret out evidence by which the case will be proved.[42]

Furthermore, matters are discoverable if they are not privileged. The uncertainty surrounding the concept of "privilege" makes it so significant in land acquisition cases where the expert witness is so important. Thus, information gathered by an appraiser in preparation of a land acquisition proceeding has been held to be privileged matter,[43] which need not be disclosed either at the time discovery is sought or at the trial; but this is by no means a unanimous holding. Attempts have been made to place such reports within the scope of the immunity set forth in the landmark Hickman Case,[44] whereas other courts have rejected such an interpretation. The Hickman case is invariably the basis for the reasoning of the Federal courts, whereas a number of State courts rely on the amendment proposed to the Supreme Court in an effort to limit the scope of the examination and to protect a party's expert witness from the necessity of disclosing information.[45]

As enacted by Idaho, the amendment reads as follows:

> The deponent shall not be required to produce or submit for inspection any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation and in preparation for trial unless the court otherwise orders on the ground that a denial or production or inspection will result in an injustice or undue hardship; nor shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions or legal theories, or, except as provided by rule 35, the conclusions of an expert.[46]

Although the amendment does not mention any privilege which is to attach to the writing of any of the enumerated persons, some courts have read it as if a privilege were granted.

A third major area of disagreement as to the scope of examination concerns that sentence of Rule 26(b) which states that "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 Federal courts, in accordance with the policy of liberal construction of the Rules, allow a wide range of discovery in this regard, and discovery is permitted of what might normally be regarded inadmissible evidence.

South Dakota, which has adopted a substantial portion of the Federal discovery procedure but has not included that sentence in Rule 26(b), has developed the unique position that the discovery rules are to be interpreted individual as to scope.[47] Another jurisdiction has recently restricted discovery to the bounds of the trial itself regarding evidence.[48] On the other hand, New Hampshire, while not adopting the Federal Rules, has

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[42] Smith v. American Employers' Ins. Co., 102 N.J. 530, 163 A.2d 40 (1957).
[43] City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 143 N.E.2d 40 (1957).
[44] Hickman v. Taylor, 329 U.S. 495 (1947).
[45] Idaho, Illinois, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Missouri, Nevada, New Jersey, Pennsylvania, Texas, Utah, Washington and West Virginia have adopted similar amendments to their comparable rules 26(b), 30(b) or 34.
[46] Idaho R. Civ. P 26(b). Compare to Kentucky version in Appendix D.
[47] Bean v. Best, 76 S.D. 462, 80 N.W.2d 565 (1957).
[48] Wright v. Philadelphia Transp. Co., 24 D.&C.2d 334 (Pa. 1961).

held that the liberal interpretation given to the rules allows evidence to be discovered, although it may be inadmissible at the trial.[49]

Relevancy

The development of Rule 26(b) through court interpretations has led ultimately to the establishment of "relevancy" as the basic criterion for determining the scope of a discovery examination. Relevancy is not generally to be equated with "relevant" as ordinarily used in the admissibility of evidence. Rather, the relevancy of the subject matter is the test, and subject matter is broader than the precise issues presented by the pleadings.[50] Elsewhere the real test is considered to be whether an answer would serve any substantial purpose, either in leading to evidence or in narrowing the issues.[51]

With such a vague definition of relevancy, control of the discovery procedure in effect rests with the discretion of the court. For example, the discovery of documents was denied in a recent action under the Federal Tort Claims Act, because a "minimal showing of general relevancy and no more" was not considered sufficient good cause for compelling disclosure.[52] Besides the several restrictions incorporated into Rule 26(b) itself, there are provisions in the subsequent rules that vest the courts with the authority to issue protective orders for the benefit of the deponent.

Rule 30(b) sets forth a number of specific orders which the court may issue at its discretion on a showing of "good cause" by the person to be examined. It is also provided that "the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." With this broad power, a court can substantially control the scope of the discovery procedure.

Good Cause

In keeping with the policy that all rules for discovery are to be read in pari materia, these protective provisions were specifically incorporated into Federal Rules 31, 33, and 34, thereby giving the courts wide discretion in every aspect of the discovery procedure.

It is worth noting that Rule 30(b), which concerns depositions on oral examination, requires a showing of good cause by the deponent before one of the restrictive orders will be issued. The courts have generally interpreted this as implying that depositions may be had as a matter of right, and that they can only be denied for good cause shown. Inasmuch as the rules are to be liberally construed to effect a greater measure of discovery, the courts quite naturally have shown some reluctance in issuing any orders that would narrow the scope of the examination and inhibit the discovery procedure.

Rule 33, providing for interrogatories to parties, permits any party to "serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party."

Both the scope of examination of Rule 26(b) and the restrictive provisions of Rule 30(b) are applicable to interrogatories. As was the case under Rule 30(b), the serving of interrogatories to be answered by an adverse party is considered by the courts to be a matter of right; therefore, a protective order will be granted by the court only on a showing of good cause by the party interrogated.

In some condemnation cases, objections have been made to certain interrogatories propounded in accordance with Rule 33. These objections were overruled because the purpose was no more than to ascertain the existence of documents supplied to the appraisers.[53] Similarly, discovery was also permitted where the moving party sought a

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[49] McDuffy v. Boston & Maine R.R., 102 N.H. 179, 152 A.2d (1959).

[50] Kaiser-Frazer Corp. v. Otis & Co. 11 F.R.D. 50 (S.D.N.Y. 1951); Rediker v. Warfield, 11 F.R.D. 125 (S.D.N.Y. 1951); Broadway & Ninety-sixth St. Realty Co. v. Loew's, Inc., 21 F.R.D. 347 (S.D.N.Y. 1958).

[51] Territory v. The Artic Maid, 135 F. Supp. 164 (D. Alaska 1955); American Oil Co. v. Pennsylvania Petroleum Prod. Co., 23 F.R.D. 683 (D.R.I. 1959).

[52] United Airlines, Inc. v. United States, 26 F.R.D. 213 (D. Del. 1960).

[53] United States v. 62.50 Acres of Land, 23 F.R.D. 287 (N.D. Ohio 1959).

list of the sales of properties which might have been or should have been considered in reaching an evaluation of the property.[54]

THE WORK PRODUCT, AN EXTENSION OF PRIVILEGE

Most litigation involves matters of evidence that are solely within the knowledge of the individual attorneys. These develop as part of the trial preparation and in pursuit of the confidential relation between attorney and client. Names of witnesses, testimony, and individual statements of fact make up the record of an attorney for trial presentation. In this respect, courts have tended to expand the privilege of attorney-client to various work papers that are required for the case. Yet, how far does this privilege extend? Should it include all documents and facts within the knowledge of experts or other witnesses to be called? Or is there some way of disengaging the attorney's work papers from those of witnesses? And does this negate the attorney-client privilege?

This subject has been discussed fully in the recent literature because of a 1947 case which answered many questions and raised a number of others. The interpretations of these additional points have provided the rationale for both Federal and State interpretations of these issues.

Hickman v. Taylor

The landmark Hickman case arose as the result of an accident involving the sinking of a tugboat. After the claim had arisen, but before the action was instituted, the plaintiff's attorney filed numerous interrogatories on the defendant under Rule 33. One interrogatory inquired whether any oral statements of members of the crew were taken in connection with the accident, and requested that exact copies of all such statements be attached and that the defendant set forth in detail the exact provisions of any such oral statements or reports. The defendant refused and was held in criminal contempt by the District Court, which permitted discovery[55] on the rationale that discovery of all matters relevant to a suit should be allowed to the fullest extent consistent with orderly and efficient functioning of the judicial process, and that the mere fact that statements of third parties have been taken by the attorney does not of itself give rise to the traditional privilege accorded to communications between attorney and client.

The Court of Appeals reversed the District Court and coined the concept of the "work product of the attorney."[56] This concept represented a new extension of the traditional privilege afforded to the attorney-client relationship by United States courts, though it was already firmly rooted in English law.[57] The Supreme Court[58] rejected the extended privilege theory but accepted the new category of work product on a public policy basis and denied discovery of the material sought. As a result the continuing problem of the scope of the work product was initiated. The Supreme Court in Hickman spoke of this problem as "a problem that rests on what has been one of the most hazy frontiers of the discovery process."[59]

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[54] United States v. 19.897 Acres of Land, 27 F.R.D. 420 (E.D.N.Y. 1961); In re Cross-Bronx Expressway, 82 N.Y.S.2d 55, 195 Misc. 842 (Sup. Ct. Bronx County 1948); Hewitt v. State, 216 N.Y.S.2d 615, 27 Misc. 2d 930 (Ct. Cl. 1960).

[55] 4 F.R.D. 479 (E.D. Pa. 1945).

[56] Hickman v. Taylor, 329 U.S. 495, 511 (1947). Taine, "Discovery of Trial Preparations in the Federal Courts," 50 Colum. L. Rev. 1033 (1950).

[57] Taine, "Discovery of Trial Preparations in the Federal Courts," 50 Colum. L. Rev. 1032 (1950).

[58] Hickman v. Taylor, 329 U.S. 495 (1947).

[59] Id. at 495, 514.

The Court qualified the work product category, and thus distinguished it from the absolute category of privilege with the following explanation:

> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. ... Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning.[60]

In other words, material sought to be discovered may be classified as the attorney's work product and still be discoverable, whereas any material which is "privileged" is per se nondiscoverable.

Necessity

The conditions on which work product material may be discovered are based primarily on a showing of necessity.[61] Necessity, however, may be shown in a number of circumstances and cannot be specifically defined so as to provide a formula to determine when discovery will be permitted or denied.

> "Good cause" is equivalent to necessity. It usually consists of a combination of need factors which justify discovery of what would otherwise not be discoverable. There is no all-embracing practical formula and definitions are of relatively little help.[62]

Need factors have been predicated on such considerations as the demands of justice, the purpose for which the material is sought, whether or not it is essential to the litigation, whether or not it is otherwise available, and whether or not undue hardship would result if discovery were denied. Thus, the question of necessity becomes circuitous and rests ultimately on the discretion of the court for a determination.

The scope of the holding in the Hickman case is explicitly limited to include only the trial preparations of attorneys and does not include the work product of experts such as land appraisers, economists and realtors. The 1946 proposed amendment to the Federal Rules, discussed in a later section, was designed to provide for reports of experts. The Court, however, rejected the Advisory Committee's proposal and handed down the decision in Hickman, omitting experts and parties other than the attorney. In 1949, the vacuum was filled by an extension of the Hickman rationale in Alltmont v. United States,[63] an action against the U. S. Maritime Commission for personal injuries. The Court of Appeals reversed the District Court and held that it was improper to construe Admiralty Rule 31[64] as permitting the libellants, without any showing of good cause, to compel the respondent in answer to interrogatories to produce copies of written statements of prospective witnesses taken by its agents. In extending the Hickman rationale to include the attorney's agent, the court reasoned:

> ... We can see no logical basis for making any distinction between statements secured by a party's trial counsel and those obtained by others for the use of the party's trial counsel. In each case the statements are obtained in preparation for litigation and ultimately find their way into trial counsel's files for his use in representing his client at the trial.[65]

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[60] Id. at 495, 511, 512.

[61] 4 Moore, Fed. Prac., §26.23 at 1381 (2d ed. 1953).

[62] Taine, "Discovery of Trial Preparations in the Federal Courts," 50 Colum. L. Re. 1063 (1950).

[63] 117 F.2d 971 (1949); cert. denied, 339 U.S. 967 (1950).

[64] Admiralty R. 31 is the same as Fed. R. 33.

[65] Alltmont v. United States, 177 F.2d 971, 976 (1949).

Consequently, the Hickman protection has been extended to include agents other than the attorney who obtained statements for counsel's use.[66]

Since 1950 and the extension made by Alltmont, the courts have utilized the work product concept of Hickman in dealing with land appraisers, their opinions and factual reports, in condemnation cases and in dealing with expert testimony in general. A review of the condemnation cases of the past decade reveals a tendency of the courts to assume work product as a category and to deny or permit discovery on the basis of work product without explaining what is meant by the work product. It appears that the material sought will be considered work product, if it is shown that it is of a legal or technical nature requiring the abilities of counsel or an expert employed by counsel in direct anticipation and preparation of a cause of action. This will depend on the individual situation and cannot be given a more definite rule. Once the material sought is found to be work product, discovery will be denied unless factors of necessity are found to outweigh the merits of work product, thus demanding production in the interest of justice.[67]

WHAT IS SUBJECT TO DISCOVERY?

Facts vs Opinions

Many courts distinguish between "factual" and "opinionative" matter. As a result, the scope of examination has been circumscribed in Federal District Courts by Judicial interpretation. A number of States,[68] however, have explicitly placed the opinion or conclusion of an expert beyond the bounds of the examination by enacting the proposed 1946 Amendment to the Federal Rules (Appendix D).

In the Federal District Courts, discovery in land acquisition cases is usually permitted of factual data, but denied when opinionative matter is requested. For example, a Federal court observed that the reports of land appraisers included two types of information: (a) opinions of the appraisers, and (b) statements as to the factual bases on which the opinions were predicated. The court then declared that the landowner might inspect, copy or photograph the factual material, but that the opinion material, to be determined by the court at an in camera inspection, would be withheld from the landowner.[69]

Discovery has been denied, however, of not only the opinionative matter but also of the factual material contained in an appraiser's report.[70] No special circumstances were present to justify an exception to the general rule as to the nondiscoverability of opinionative matter,[71] and discovery of the facts of the appraisal report was denied on the ground that said facts were readily available to the landowner's appraisers. Accordingly, it was held in a recent case[72] that without a showing of necessity, discovery would be limited to the facts on which the opinions or conclusions were based, using a liberal approach in determining what was fact and what was opinion.

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[66] Snyder v. United States, 20 F.R.D. 7 (E.D.N.Y. 1956); Thompson v. Hoitsma, 19 F.R.D. 112 (D.N.J. 1956).

[67] Permitted: United States v. Certain Parcels of Land, 15 F.R.D. 224 (S.D. Cal. 1954). Limited to factual materials; State ex rel. Willey v. Whitman, 91 Ariz. 120, 370 P.2d 273 (1962), pre-trial discovery of opinion included; Shell v. State Rd. Dep't, 135 So. 2d 857 (Fla. 1961); State v. Riverside Realty Co., 152 So. 2d 345 (Ct. App. La. 1963), all questions of fact; denied: United States ex rel. TVA v. Bennett, 14 F.R.D. 166 (E.D. Tenn. 1953); State Rd. Dep't v. Shell, 122 So. 2d 215 (Ct. App. Fla. 1960). State Rd. Dep't v. Cline, 122 So. 2d 827 (Ct. App. Fla. 1960); State v. Bair, 83 Idaho 478, 365 P.2d 216 (1961); State ex rel. State Hwy. Comm'n v. Jensen, 362 S.W.2d 568 (Mo. Sup. Ct. 1962); Valley Stream Lawns, Inc. v. State, 164 N.Y.S.2d 482, 6 Misc. 2d 607 (N.Y. Ct. Cl. 1957).

[68] Idaho, Illinois, Iowa, Kentucky, Louisiana, Minnesota, Missouri, Nevada, New Jersey, Pennsylvania, Texas, Utah, Washington and West Virginia.

[69] United States v. Certain Parcels of Land, 15 F.R.D. 224 (S.D. Cal. 1954).

[70] United States v. Certain Parcels of Land, 25 F.R.D. 192 (N.D. Cal. 1959).

[71] United States v. 4.724 Acres of Land, 31 F.R.D. 290 (E.D. La. 1962).

[72] United States v. 284,392 Sq Ft of Floor Space, 203 F. Supp. 75 (E.D.N.Y. 1962).

Only one Federal case involving land acquisition has ordered the production of appraisal reports for inspection and copying by the landowner without limiting discovery to factual material.[73] The landowner's motion for production of the appraisal reports was granted, but the landowner was willing to pay part of the appraiser's expenses and neither the reports nor their authors were otherwise available. On a motion by the government in this proceeding for an order limiting the matters to be inquired into in the taking of the deposition of the appraiser by oral examination, the court restricted the deposition to such matters as pertain to the fair market value of the subject matter of the litigation as of the date of taking with no limitation on the discovery of opinionative matter. This decision, however, has been distinguished,[74] criticized,[75] and questioned[76] in subsequent cases. In several other cases, the courts have followed similar rationale but have restricted discovery to factual data.[77]

State courts have been much less inclined to make the fact-opinion distinction. An Iowa case[78] is the only example in which discovery of opinionative matter in a condemnation proceeding was denied. But here the conclusion of an expert was protected by the 1946 Amendment to the Federal Rules which Iowa adopted. Virginia acknowledged that it at times had "made some distinction between the opinion of an expert and the evidence of a witness to facts."[79] However, it permitted discovery of the appraiser's opinion on the ground that the appraiser was not the exclusive agent of the condemnor.

Yet, a far-reaching California condemnation case[80] indicated that the appraiser's reports and their contents were within the attorney-client privilege.[81] The privilege here did not extend to preclude the questioning of the expert as to his opinions and conclusions regarding the value of the lands and interest condemned, the reasons for the opinions, or to test the worth of the opinions by such inquiry on cross-examination as will be relevant to the subject matter.

An even more recent California condemnation case[82] opined that material, whether factual or opinionative, is not privileged merely because it is the result of an expert's mental calculations, where the information on which it is predicated did not emanate from the attorney's client. Factual data is unprivileged because it did not emanate from the client, and an opinion formed by the expert thereon is similarly unprivileged. As a result of this decision, the reports and opinions of an appraiser are subject to discovery in California, because the appraiser would derive his information not from the government or condemning body but from an inspection of land itself.

Discovery of appraisal reports was permitted in Wisconsin, though part of the file of the attorney general was prepared for litigation.[83] The attorney-client privilege here

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[73] United States v. 50.34 Acres of Land, 13 F.R.D. 19 (E.D.N.Y. 1952).

[74] In United States v. Certain Parcels of Land, 25 F.R.D. 192 (N.D. Cal. 1959), the court decided that discovery of opinion had been permitted because of a showing of "compelling reasons " In United States v. 900.57 Acres of Land, 30 F.R.D. 512 (W.D. Ark. 1962), the court decided that discovery of opinion had been permitted on the basis of the "extraordinary facts" of the case.

[75] The court said that it "cannot concur" in the opinion of United States v. 50.34 Acres of Land.

[76] In United States v. 284,392 Sq Ft of Floor Space, 203 F. Supp. 75 (E.D.N.Y. 1962), decided by the same court, it was held that the decision in United States v. 50.34 Acres of Land was "not in accordance with the most accepted authorities."

[77] United States ex rel. TVA v. Bennett, 14 F.R.D. 166 (E.D. Tenn. 1953); Hickey v. United States, 18 F.R.D. 88 (E.D. Pa. 1952); United States v. 900.57 Acres of Land, 30 F.R.D. 512 (W.D. Ark. 1962).

[78] Bryan v. Iowa State Hwy. Comm'n, 251 Iowa 1093, 104 N.W.2d 562 (1960); 2 Iowa Code 1962, R. Civ. P. 141(a).

[79] Cooper v. Norfolk Redevelopment & Housing Authority, 197 Va. 653, 90 S.E.2d 788 (Sup. Ct. App. 1956).

[80] Mowry v. Superior Ct., 20 Cal. Rep. 698 (Dist. Ct. App. 1962).

[81] This part of the case was overruled by San Diego Professional Ass'n v. Superior Ct., 23 Cal. Rep. 384, 373 P.2d 448 (1962).

[82] Oceanside Union School Dist. v. Superior Ct., 23 Cal. Rep. 375, 373 P.2d 439 (1962).

[83] State ex rel. Reynolds v. Circuit Ct., 15 Wis. 2d 311, 112 N.W.2d 686 (1961).

did not preclude the expert appraisers from disclosing any relevant opinions they had formed, whether reported or not. Nor was such information deemed to be protected from discovery as part of the work product of the attorney. A similar instance occurred in Arizona where facts gathered by an adverse party's prospective witness and his opinion were subject to pretrial discovery.[84] No validity was accorded the objection that the State was invading the work product of the landowner's attorney. The rules of civil procedure respecting discovery by interrogatories, said the court, fail to make any distinction between facts and opinions.

These cases indicate a tendency for a number of State courts to exclude opinion from the attorney-client privilege and work product categories of the Federal courts and leave opinionative material within the scope of examination. In only one case have Federal courts agreed with this trend and that has been distinguished as previously described. The Federal courts simply deny or permit discovery on the basis of whether or not the material sought is considered opinion or fact by the court.

The confusion concerning the discoverability of expert opinion prompted Pennsylvania to amend its rules after two cases of a similar nature reached opposite decisions.[85] The applicable rule was amended, effective April 1962, to read, "No discovery or inspection shall be permitted which ... (f) would require a deponent, whether or not a party, to give an opinion as an expert witness, over his objection."[86] In an explanatory note to this rule change, the Committee acknowledged that subdivision (f) does not attempt to define the difference between "facts" and "opinion as an expert witness."[87] This distinction, it said, must be decided in each case. The amendment is also applicable in condemnation cases.[88] Thus, in Pennsylvania, the opinions of an appraiser are protected from discovery before trial by an explicit statement in the rules permitting objection by the appraiser.

The Federal District courts have not permitted discovery of opinionative matter, whereas the State courts have been much more liberal in sanctioning such discovery. The recent holding in a New York District Court anti-trust case may indicate a more liberal Federal approach, however. The court said:

> Rather than impose an inflexible rule which would require laborious search for the intricate and elusive (and perhaps illusory) dividing markers separating fact, opinion, contention, and conclusion, it seems preferable to allow those interrogatories which might possibly call for opinion, conclusion or contention, if, on the balance of convenience, answers to them would serve any substantial purpose, either in leading to evidence or in narrowing issues.[89]

This type of case can be distinguished from land acquisition cases by the complex factual situations involved in the anti-trust cases.

Names of Expert Witnesses

In addition to the fact-opinion division, problems arise in connection with the discovery of appraisal reports and their preparation, names of the expert witnesses, the employer of the expert witnesses, the methods of appraisal, the qualifications of the appraiser, and a breakdown of values.

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[84] State ex rel. Willey v. Whitman, 91 Ariz. 120, 370 P.2d 273 (1962).

[85] Straub v. Silver, 22 D.&C.2d 36 (1961), permitted unlimited examination of the opposing party's expert witness on the ground that the unamended rule permitted examination of "any matter, not privileged." Wright v. P.T.C., 24 D.&C.2d 334 (1961), arrived at the opposite decision.

[86] Pa. R. Ct. 4011(f) (eff. April 1962).

[87] Amram & Schulman, "The April 1962, Amendments to the Pennsylvania Rules of Civil Procedure," 33 Pa. B.A.Q. (1962).

[88] Ibid.

[89] United States v. Renault, Inc., 27 F.R.D. 23 (S.D.N.Y. 1960).

With regard to the names and addresses of expert witnesses, the Federal courts have consistently held in condemnation cases that they were not a proper subject of discovery.[90] Nor may the agency or party for whom the appraisers made such reports be discovered.[91] Discovery of the methods of appraisal used by the appraiser has been denied in two Federal court decisions,[92] whereas a very recent decision in Louisiana held that the State's witnesses would be required to answer all questions of fact asked in regard to their appraisal of the property and the method and manner used in making the appraisal.[93] It has been held that the qualifications of the appraisers are not discoverable.[94] Discovery of the specific values which the appraisers have placed on certain properties has likewise been denied in several cases.[95]

DISCOVERY OF GOVERNMENTAL INFORMATION IN LAND ACQUISITION

A unique situation is involved in the discovery of information against the government. This is the case in land acquisition, where appraiser's reports, opinions, photographs and statements are involved, as provided under Federal Rules 26(b), 33, 34, and 45. Of course, it is not one-sided because the rules apply also to the private party or condemnee. Yet, the fact that one of the parties is a governmental unit may sometimes cause greater concern than where only private parties are involved. In general, there would appear to be a policy against the unnecessary disclosure of files of the executive branches of the Government. However, this consideration must be evaluated in relation to the public interest in disclosure of files containing documents of evidentiary value to effect a just result.[96]

Disclosure of government information has, therefore, been permitted or denied on such considerations as whether the information is necessary solely for the purpose of determining "just compensation"; considered privileged; is fact or opinion; was obtained in the ordinary course of business; is the result of satisfying the requirements of Federal Rules 26, 33 and 34; is otherwise available; and was obtained directly for the pending litigation. Among the kinds of information that have significance for discovery in right-of-way cases are documents, reports and statements, and expert materials.

Documents, Reports and Statements

A succinct summary of the law under this subject can be found in the following analysis by Tolman:

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[90] Hickey v. United States, 18 F.R.D. 88 (E.D. Pa. 1952); United States ex rel. TVA v. Bennett, 14 F.R.D. 166 (E.D. Tenn. 1953); United States v. 7,534.04 Acres of Land, 18 F.R.D. 146 (N.D. Ga. 1954); United States v. 6.82 Acres of Land, 18 F.R.D. 195 (D.N.M. 1955); United States v. 19.897 Acres of Land, 27 F.R.D. 420 (E.D.N.Y. 1961); United States v. 900.57 Acres of Land, 30 F.R.D. 512 (W.D. Ark. 1962).

[91] Hickey v. United States, 18 F.R.D. 88 (E.D. Pa. 1952); United States v. 19.897 Acres of Land, 27 F.R.D. 420 (E.D.N.Y. 1961).

[92] United States v. 7,534.04 Acres of Land, 18 F.R.D. 146 (N.D. Ga. 1954); United States v. 6.82 Acres of Land, 18 F.R.D. 195 (D.N.M. 1955).

[93] State v. Riverside Realty Co., 152 So. 2d 345 (Ct. App. La. 1963).

[94] United States v. 19.897 Acres of Land, 27 F.R.D. 420 (E.D.N.Y. 1961).

[95] United States v. 7,534.04 Acres of Land, 18 F.R.D. 146 (N.D. Ga. 1954); United States v. 6.82 Acres of Land, 18 F.R.D. 195 (D.N.M. 1955); United States v. 19.897 Acres of Land, 27 F.R.D. 420 (E.D.N.Y. 1961).

[96] Reynolds v. United States, 192 F.2d 987,955 (1951), reversed on other grounds, 345 U.S. 1, 73 Sup. Ct. 528 (1953); United States v. Certain Parcels of Land Etc., 15 F.R.D. 224 (S.D. Cal. 1954).

> [T]here are now three methods of obtaining documents from the adverse party before trial: by initial court order under rule 34; by interrogatories under rule 33 followed by court order to produce under rule 34; and by subpoena duces tecum at an oral deposition examination under rule 45, which, since 1946, does not specifically require initial court order and which commentators believe, and most courts hold, still should be construed to require it as to parties in order to provide consistency with rule 34. All of these procedures are subject to protective control of the court on motion, under rule 30(b), of the party to whom the request for the document is directed.[97]

In permitting or denying discovery of government documents and reports in condemnation cases, courts have looked to the purpose for which the report was made: whether it was obtained in preparation for trial or in the ordinary course of business, whether good cause was shown in satisfaction of Rule 34, if the material sought is to be considered privileged, whether the information is essential to the litigation and otherwise unavailable, and whether or not the material sought requires discovery of fact or opinion.

Where the issue was solely one of establishing a fair market value of the land at the time acquired by the condemnor, the burden to establish a fair value was on the defendant landowner and the landowner was not entitled to the opinions or reports of the government's expert appraisers in advance of trial.[98]

A New York District Court condemnation proceeding in 1952[99] permitted discovery of appraisal reports under certain limited conditions. The court stated:

> It is shown that the appraisal reports in question were obtained by the Government for the express purpose of determining the compensation which would have to be paid for purchase of the property in question; that these reports are in possession and control of the government; and that neither the reports or the authors thereof are otherwise available to the moving party. There is nothing to indicate that these reports can be regarded as privileged matter.[100]

Ohio, in a 1959 proceeding to condemn land for a ballistic missile launching site, permitted discovery by interrogatories to ascertain the existence of documents supplied to appraisers to determine the manner and criterion for valuation, not that the valuation found by the government's appraisers should itself be the subject of discovery. The court was apparently following the "purpose test" as set out in United States v. 50.34 Acres of Land.[101] In referring to that case this court said:

> ... while not wishing to express an opinion at this time on the extent to which the court in that case went—requiring disclosure of the final expert opinion—I think the principle is sound.[102]

Discovery of certain statements and reports in a noncondemnation case in 1959 was permitted based on the following reasoning:

> Statements or reports made in the ordinary course of business and not in preparation for trial do not embody the lawyers opinions, tactics, or conclusions, and accordingly they do not enjoy the privilege afforded the attorney's work.[103]

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[97] Tolman, "Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer," 58 Colum. L. Rev. 498, 503 (1958).

[98] United States v. 900.57 Acres of Land, More or Less, 30 F.R.D. 512 (W.D. Ark. 1962).

[99] United States v. 50.34 Acres of Land, More or Less, 13 F.R.D. 19 (E.D.N.Y. 1952).

[100] Id. at 21.

[101] 13 F.R.D. 19 (E.D.N.Y. 1952).

[102] United States v. 62.50 Acres of Land, Etc., 23 F.R.D. 287 (N.D. Ohio 1959).

[103] United States v. Swift & Co., 24 F.R.D. 282 (N.D. Ill. 1959).

The consensus is, however, that material gathered in preparation for trial either by the attorney or by someone retained by the attorney is generally considered a part of the attorney's work and is not discoverable under the rationale of the Hickman and Alltmont cases.

The courts have been consistent in their requirement that the party seeking discovery satisfy the good cause requirement of Rule 34. Discovery has been denied repeatedly by the courts when good cause was not shown.[104] Production of documents from a party under Rule 45 was denied when the moving party failed to satisfy the good cause requirement of Rule 34. There the court pointed out that the rules were to be construed in pari materia.[105] This requirement, however, is not to be construed as a "fishing expedition," because the newer theory is that it is more desirable to allow discovery of some immaterial facts than to deny discovery which may bring to light facts material to the issue.[106]

The question of privilege as it arises in land acquisition cases is usually related to the question of whether or not the documents sought are part of the attorney's work product. If such is the case, they are considered privileged and not subject to discovery. If material sought to be discovered is in direct preparation for trial, essential to the litigation or the determination of the truth, and otherwise unobtainable, the courts may permit discovery.[107] Where the production of transmittal letters was not apparently essential to the proper presentation of a taxpayer's suit, the court denied discovery, but cited Moore, on Federal Practice, as stating that:

> It is a recognized general principle that in actions involving the administration of Federal law to which the Government is a party, production of government documents should be permitted unless "the Court is satisfied that it would be against public policy to do so." Moore, Federal Practice, 2d Ed., §26.25(b), p. 1176.[108]

The position of the courts has been clear, however, that discovery will be denied if unusual circumstances cannot be shown or if the material is otherwise available.[109]

In summary, whether the documents or papers sought are fact or opinion relates directly to the problem of discoverability of expert testimony, and discovery of opinion material will be permitted only in special circumstances.[110] The determination of special circumstances rests on the judicial discretion of the courts.

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[104] Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp., 23 F.R.D. 257 (D. Neb. 1959); Michel v. Meier, 8 F.R.D. 464 (W.D. Pa. 1948), "In allowing plaintiff's motion under Rule 34, the court lays down the following showing plaintiff must make: (a) that there is 'good cause' for the production and inspection of the desired material, (b) material requested must be 'designated' with reasonable definiteness and particularity, (c) that the material must not be privileged, (d) material must constitute or contain evidence relating to matters within the scope of the examination permitted by Rule 26(b), i.e., it must be 'relevant to the subject matter involved in the pending action,' (e) the material must be within the possession, custody or control of the party upon whom demand is made"; Snyder v. United States, 20 F.R.D. 7 (E.D.N.Y. 1956); United States v. 6.82 Acres of Land, 18 F.R.D. 195 (D.N.M. 1955); United States v. Certain Acres of Land, 18 F.R.D. 98 (M.D. Ga. 1955); United States v. 19.897 Acres of Land, Etc., 27 F.R.D. 420 (E.D.N.Y. 1961).

[105] United States v. 6.82 Acres of Land, 18 F.R.D. 195 (D.N.M. 1955).

[106] Reed v. Swift & Co., 11 F.R.D. 273 (W.D. Mo. 1951). Allen, "The New Rules of Arizona," 16 F.R.D. 189 (1955).

[107] Sachs v. Aluminum Co. of America, 167 F.2d 571 (6 Cir. 1948); United States v. Certain Parcels of Land, Etc., 15 F.R.D. 224 (D.S.D. Cal. 1954).

[108] E.W. Bliss Co. v. United States, 203 F. Supp. 175 (N.D. Ohio 1961).

[109] United States v. Deere & Co., 9 F.R.D. 523 (D. Minn. 1949); United States v. 7,534.04 Acres of Land, Etc., 18 F.R.D. 146 (N.D. Ga. 1954); United States v. 6.82 Acres of Land, More or Less, 18 F.R.D. 195 (D.N.M. 1955).

[110] United States v. Certain Parcels of Land, Etc., 15 F.R.D. 224 (S.D. Cal. 1954); United States v. Certain Parcels of Land, 25 F.R.D. 192 (S.D. Cal. 1959); United States v. 4.724 Acres of Land, More or Less, 31 F.R.D. 290 (E.D. La. 1962). 4 Moore, Fed. Prac. §26.24 at 1152, and specifically footnote 6 for case citations, and Supp. 1961, p. 81 (2d ed. 1953).

Expert Testimony

In judicial proceedings conducted under the Federal Rules, the discovery of expert testimony arises from the provisions of Rules 30, 31, and 33 as read in conjunction with Rule 26(a) and (b). Depositions may be filed to take the testimony of any person or party on oral examination or written interrogatories for discovery, for use as evidence, or for both purposes.[111] All rules previously cited, with the exception of Rule 33, provide for a party to take the deposition of any person. Rule 33, however, restricts written interrogatories to "any adverse party" (Appendix A). Although this provision limits the taking of depositions in a litigation, the process is less expensive and quicker than the provisions made by Rules 30 and 31, and it has been more frequently used in cases involving land acquisition.

A 1962 Louisiana U. S. District Court decision[112] indicates that experts generally are immune from discovery;[113] although there are a substantial number of district court cases that hold that an expert's deposition may be taken and a copy of his report is subject to discovery.[114] Where the taking of oral depositions of officers or agents of the United States, who had knowledge of the value of the property involved, was questioned, the court held that the owners were entitled to take the oral depositions with respect to facts but not with respect to opinions, and that a liberal approach was required to be adopted in determining what is fact and what is opinion.[115] The court carefully distinguished its holding from that of United States v. 50.34 Acres of Land, in which the same court, 10 yr earlier, had permitted discovery of appraisal reports containing opinions, but with certain limitations based primarily on a showing of necessity.

The District Court of Rhode Island has held that a plaintiff was entitled to liberal discovery in attempting to ascertain facts surrounding methods employed by the defendant in production of its blood plasma, and the fact that the deponents possessed expert knowledge did not immunize them from examination.[116] The court distinguished this case from the older case of Lewis v. United Airlines Transport Corp.,[117] in that the plaintiff in this case was not taking the deposition of experts engaged by the defendant to make a study of the controversy, as was the situation in the Lewis case where an engineering expert was employed by the defendant's attorney to assist in preparation for trial. There it was held that the expert was not required to disclose communications

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[111] Fed. R. Civ. P. 26(a), 30, 31, 33.

[112] Maginnis v. Westinghouse Electric Corp., 207 F. Supp. 739 (E.D. La. 1962).

[113] Lewis v. United Airlines Transp., 32 F. Supp. 21 (W.D. Pa. 1940), engineering consultants' report on barrel of aircraft cylinder; Boynton v. R.J. Reynolds Tobacco Co., 36 F. Supp. 593 (Mass. 1941), physician; United States v. 88 Cases, Etc., 5 F.R.D. 503 (D.N.J. 1946), chemists' analysis of orange beverage; United States v. 720 Bottles, Etc., 3 F.R.D. 466 (E.D.N.Y. 1946), chemists' analysis of vanilla extract; Moran v. Pittsburgh-Des Moines Steele Co., 6 F.R.D. 594 (W.D. Pa. 1947), civil engineer's design on cylindrical liquified gas tank, no expert involved, but in dicta held that experts may not be deposed; Cold Metal Process Co. v. Aluminum Co., 7 F.R.D. 684 (Mass. 1947), metallurgist; Roberson v. Graham Corp., 14 F.R.D. 83 (Mass. 1952), experts on antiques; United States v. Certain Acres of Land, Etc., 18 F.R.D. 98 (M.D. Ga. 1955), expert land appraisers; Colonial Airlines, Inc. v. Jonas, 13 F.R.D. 199 (S.D.N.Y. 1952), public accounts; United States v. 7,534.04 Acres of Land, Etc., 18 F.R.D. 146 (N.D. Ga. 1954), expert land appraisers.

[114] Bergstrom Paper Co. v. Continental Bus Co., 7 F.R.D. 548 (E.D. Wis. 1947), engineer's report on situs of explosion; Cold Metal Process Co. v. Aluminum Co., 7 F.R.D. 425 (N.D. Ohio 1947), metallurgist report; Sachs v. Aluminum Co., 167 F.2d 570 (6 Cir. 1948), metallurgist; Broadway & Ninety-sixth St. Realty Co. v. Lowe's, Inc., 21 F.R.D. 347 (S.D.N.Y. 1958), expert in field of motion picture exhibition; United States v. 50.34 Acres of Land, Etc., 13 F.R.D. 19 (E.D.N.Y. 1952), expert land appraisers; United States v. Certain Parcels of Land, 15 F.R.D. 224 (S.D. Cal. 1953), expert land appraisers; Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954), heating experts report; Russo v. Merck & Co., 21 F.R.D. 237 (D.R.I. 1957), experts on production of blood plasma; Colden v. R. J. Schofield Motors, 14 F.R.D. 521 (N.D. Ohio 1952), automotive expert's report.

[115] United States v. 284,392 Sq Ft of Floor Space, Etc., 203 F. Supp. 75 (E.D.N.Y. 1962).

[116] Russo v. Merck & Co., 21 F.R.D. 237 (D.R.I. 1957).

[117] 32 R. Supp. (W.D. Pa. 1940).

with his client nor answer questions calling for his expert opinion. In addition, a recent State case[118] discounts the validity of the Lewis case and all condemnation cases before Aug. 1, 1951, when the Federal Rules were made applicable to condemnation proceedings.[119] Other Federal cases that have denied discovery of expert testimony, in both condemnation and noncondemnation proceedings, have based their holdings on some distinction between fact and opinion material, the work product privilege, the necessity of production and whether or not the material is otherwise available.[120]

Answers calling for expressions of opinion that might later be used against a United States agency were not permitted, nor were the names of witnesses and persons that were part of the work product of the agency's attorney and were otherwise available. Despite the burden which a landowner has to establish the market value at the time the condemnor took the land, discovery of the expert's opinions or reports was denied. This appears to be the majority view of the Federal courts with regard to condemnation cases; namely, that the movant must be able to show some special circumstances that, in the interest of justice, require discovery and lift the material out of the privileged categories.[121]

The State courts generally adhere to the requirement of a showing of special circumstances to justify discovery but have been more liberal in permitting discovery than have the Federal courts, and they have adopted additional tests which place a great deal of discretionary power in the courts.

PROCEDURAL INNOVATIONS

Effective Sept. 1, 1963, New York adopted new procedural rules[122] that differ from the proposals of the Federal Rules Advisory Committee, as described later, and from the previous rules in many respects. The new rules in New York, however, do not expand the scope or methods of discovery or provide for pretrial conferences in New York. However, in a 1954 condemnation proceeding by a gas company, the court held that pretrial examinations in condemnation proceedings were consistent with the existing Practice Act, on the grounds that a condemnation proceeding is a special proceeding within the meaning of Article 29 of the Civil Practice Act, and, therefore, pretrial examination of the adverse party should be permitted.[123]

Generally speaking, New York courts have permitted discovery of pertinent information in condemnation proceedings where the issue was one of determining fair market value or just compensation.[124] In a condemnation proceeding where the claimant sought to examine the State's land and claim adjusters on their appraisal of property,[125] however, the court denied discovery, holding the materials sought were confidential and of an investigatory nature and an essential part of the work product prepared in anticipation of litigation. Although the new rules establish that the work product and the anticipation of litigation tests deny discovery, the determination as to whether specified materials fall within these categories remains in the discretion of the court.

California has had its own system of code pleading and practice for over a century. The influence of the Federal Rules on the California code has been reciprocal. In 1957 California added a new section to its code on depositions and discovery[126] influenced

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[118] State ex rel. Willey v. Whitman, 71 Ariz. 120, 370 P.2d (Sup. Ct. 1962).

[119] Fed. R. Civ. P. 71A(a).

[120] Hickey v. United States, 18 F.R.D. 88 (E.D. Pa. 1952); United ex rel. TVA v. Bennett, 14 F.R.D. 166 (E.D. Tenn. 1953); United States v. 6.82 Acres of Land, More or Less, 18 F.R.D. 195 (D.N.M. 1955); United States v. 900.57 Acres of Land, More or Less, 30 F.R.D. 512 (W.D. Ark. 1962).

[121] United States v. 900.57 Acres of Land, More or Less, 30 F.R.D. 512 (W.D. Ark. 1962).

[122] N.Y. Civ. Prac. L. & R., 185 Sess., ch. 308 (1962).

[123] Algonquin Gas Transmission Co. v. Schwartz, 132 N.Y.S.2d 639, 206 Misc. 437 (Sup. Ct. Rochland County 1954).

[124] In re Union Turnpike, 268 N.Y. 681, 198 N.E. 556 (Ct. App. N.Y. 1935); In re Cross-Bronx Expressway, 82 N.Y.S.2d 55, 195 Misc. 842 (Sup. Ct. Bronx County 1948); Hewitt v. State, 216 N.Y.S.2d 615, 27 Misc. 2d 930 (Ct. Cl. 1960); Power Authority v. Kochan, 216 N.Y.S.2d 8 (Sup. Ct. 1961).

[125] Valley Stream Lawns, Inc. v. State, 164 N.Y.S.2d 482, 6 Misc. 2d 607 (Ct. Cl. 1957).

[126] Cal. Code Div. P., Art. 3. Deposition and Discovery, added by Stat. 1957, C. 1904, p. 3322, §3·(operative Jan. 1, 1958).

by the Federal Rules. The condemnation cases litigated since then have reflected a continuing liberalization in permitting discovery. In 1959, the District Court of Appeals[127] held that an interrogatory seeking facts relevant to the issues and resting within the knowledge of the State, such as what acreage the State had already acquired in the same general area for similar purposes, would be permitted. Interrogatories calling for the names and addresses of the condemnor's appraisers and the contents of the appraiser's reports fell within the attorney-client privilege, an absolute bar, and were denied. This decision was broadened in 1962 by distinguishing between the appraiser's reports and contents and the appraiser's opinions and conclusions regarding the value of certain lands and severance damages. The court held that the attorney-client privilege did not preclude questioning of the appraiser as to his opinions and conclusions regarding the value of the lands and interest therein condemned, severance damages, special benefits and the reasons for said opinions, nor testing the worth of the opinions by such inquiry on cross-examination as would be relevant to the subject matter. In July 1962, the Supreme Court of California went a step further in Oceanside Union School Dist. v. Superior Court,[129] in holding that even the appraiser's reports were not within the attorney-client privilege and that their divulgence could be directed. The court based its reasoning on the "dominant purpose" test[130] and whether or not the material sought "emanated from the client." Thus the attorney-client privilege became qualified and was no longer absolutely protected in California.

An interesting problem arose in Florida. New rules were adopted there in 1954, based primarily on the Federal Rules. In this context, Florida endorsed the work product immunity of Hickman v. Taylor in State Road Dept. v. Cline,[131] which denied the taking of depositions of three of the condemnor's appraisers on the ground that the information sought was the work product of the condemnor and not subject to discovery. In 1961, however, the State Supreme Court reversed the 1960 District Court,[132] in Shell v. State Road Dept.,[133] and permitted the condemnees to inspect the appraiser's work sheets of the State Road Department. This case has particular significance because appraisal work sheets were involved. The court was very careful in distinguishing this condemnation case from an ordinary case. In the ordinary situation, it said, this would constitute a part of the work product. This holding did not seem to be consistent with the work product approach and should have called for the same application as in private litigation, but the court found a way around that rule by reference to the governmental nature of one of the parties. Unlike litigation between private parties, condemnation by any governmental authority, the court felt, would place the condemnee at a disadvantage in every instance, because the government has unlimited resources to which the condemnee, as a taxpayer, contributes.[134]

Louisiana, traditionally a code State, adopted a new code, effective Jan. 1, 1961, which exhibited an effort to consolidate and retain the basic Louisiana procedure of the older codes (1870) and to draw intelligently on the Federal Rules. The Buckman case[135] involving highway condemnation was litigated before the effective date of the new rules. It held that it was error to require the State to produce certain written contracts and instructions concerning their appraisers in the absence of any showing of undue hardship or injustice in the denial of production. Yet under the new rules, the court has permitted discovery by requiring plaintiff's experts to answer interrogatories regarding facts on which the appraisal of property was based and to have written memoranda avail-

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[127] Rust v. Roberts, 341 P.2d 46 (Dist. Ct. App. Cal. 1954).
[128] Mowry v. Superior Ct., 20 Cal. Rep. 698 (Dist. Ct. App. 1962).
[129] 23 Cal. Rep. 375, 373 P.2d 439 (Sup. Ct. 1962).
[130] The dominant purpose test was first laid down in Holm v. Superior Ct., 42 Cal. 2d 500, 267 P.2d 1025, 268 P.2d 722 (1954).
[131] 122 So. 2d 827 (Dist. Ct. App. Fla. 1960).
[132] State Rd. Dep't v. Shell, 122 So. 2d 215 (Dist. Ct. App. Fla. 1960).
[133] 135 So. 2d 857 (1961).
[134] Shell v. State Rd. Dep't, 135 So. 2d 857 (Fla. 1961).
[135] State Dep't of Hwy. v. Buckman, 239 La. 872, 120 So. 2d 461 (Sup. Ct. Pa. 1960).

able to help answer questions.[136] This case was distinguished from the 1960 case in that this order did not require production or inspection of memoranda or written contracts, but rather questions as to facts on which the appraisals were based. In 1963, the Court of Appeals carried the distinction between fact questions, opinions and the written report or document a step further in State v. Riverside Realty Co.[137] in holding that witnesses for the State would be required to answer all questions of fact asked in regard to their appraisal of the property and the method and manner used in making their appraisal, and that they would not be excused from answering such questions on the basis that they had to refer to written memoranda.

Virginia approached the problem somewhat differently and used an agency principle to permit discovery of the opinion of the condemnor's appraiser.[138] Discovery was permitted in this case because the appraiser was not the exclusive agent of the condemnor, and it was pointed out that some distinction is made between fact and opinion evidence.

Wisconsin has also permitted discovery of the expert's relevant opinions and observations on the value of property on the theory that such information was neither a part of the work product of the attorney general nor within the attorney-client privilege, but that a direct communication between the expert and his client or staff in connection with the condemnation of the property could be privileged.[139]

Other States, such as Idaho, Illinois, Missouri, and Pennsylvania, have denied discovery following the reasoning of the Federal courts[140] and by emphasizing modified versions of Federal tests.[141]

Proposed 1946 Amendment to Federal Rules and State Adoption

In 1944, the Advisory Council to the Supreme Court began deliberations on possible amendments to the Federal Rules of Civil Procedure. Just before the Council was to make its recommendations, the Supreme Court of the United States granted a writ of certiorari in the Hickman case. In that opinion, the Court adopted some of the Advisory Committee's proposals but rejected the proposal to amend Rule 26(b) to include the discovery of data prepared for trial and the conclusions of an attorney or expert (Appendix D). Instead, the decision in Hickman was handed down to accomplish a similar result. A number of States, however, have adopted the amendment in one form or another, affixing it either to their comparable Rule 26(b),[142] 30(b),[143] 34,[144] or in one instance have made it a separate rule in itself[145] (Appendix D).

As proposed to the Supreme Court, the amendment has been adopted in substantially the same form by eight States.[146] The effect has been to clothe any writing prepared in anticipation of litigation or in preparation for trial with a qualified privilege from discovery. In other words, the States extend the rationale in Hickman v. Taylor and grant a qualified immunization from discovery. Only on a showing of undue hardship or injustice, attributable to the denial of discovery of such material, will discovery be permitted. A second effect of this rule is to grant an absolute immunity from discovery to any writing that reflects either an attorney's or an expert's conclusions. Under no circumstances is any written matter containing such an opinion subject to discovery.

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[136] State Dep't of Hwy. v. Spruell, 243 La. 202, 142 So. 2d 396 (Sup. Ct. La. 1962)

[137] 152 So. 2d 345 (Ct. App. La. 1963).

[138] 197 Va. 653, 90 S.E.2d 788 (Sup. Ct. App. Va. 1956).

[139] State ex rel. Reynolds v. Circuit Ct., 15 Wis. 2d 311, 112 N.W.2d 886 (1961).

[140] City of Chicago v. Harrison-Halsted Building Corp., 11, Ill. 2d 431, 143 N.E.2d 40 (1957); State v. Bair, 83 Idaho 478, 365 Pa. 2d 216 (1961). State ex rel. State Hwy. Comm'n v. Jensen, 362 S.W.2d 568 (Mo. Sup. Ct. 1962).

[141] "Anticipation of litigation" instead of "in preparation for trial," Musulin v. Redevelopment Authority, 25 Pa. County R. 267 (1961); Construction of Vine St. Extension, 18 D.&C.2d 115 (Pa. 1959).

[142] Idaho, Maryland, Minnesota, Missouri, New Jersey, Washington.

[143] Illinois, Iowa, Louisiana, Nevada, Utah, [Michigan-1963?].

[144] Pennsylvania, Texas, West Virginia.

[145] Kentucky.

[146] Idaho, Iowa, Kentucky, Louisiana, Nevada, New Jersey, Utah and West Virginia.

In the jurisdictions that have adopted the rule, opinion is by statute eliminated from the proper scope of examination, although there is no clear differentiation between fact and opinion. But inasmuch as an appraisal report, if prepared in anticipation of litigation, is qualifiedly protected, even the factual material is not per se subject to discovery. The result is a substantial degree of immunity from discovery for both the appraiser and the appraisal report.

In the case in Idaho, condemnees tried to get the appraisal reports and were unsuccessful because the appraisers were experts within the rule making conclusions of experts exempt from pretrial discovery.[147] Similarly, Iowa observed that, under it, a writing containing the conclusion of an expert need not be produced for an adversary.[148] Some State law is not so distinct. For instance, Louisiana has both permitted and denied discovery of appraisal reports by statutory interpretation of their comparable provision.[149] New Jersey, in a personal injury action, expressly immunized from production or inspection "the conclusions of an expert."[150]

Several other States extend even greater protection to the expert and his work. Minnesota and Missouri, for example, have enacted the amendment with the exception of the qualification placed on the discovery of any writing prepared in anticipation of litigation.[151] Consequently, the work product of an attorney is given an absolute immunity from discovery the same as the conclusion of an attorney or expert. In Missouri, however, letters, memoranda, or notes prepared by appraisers for the highway department were exempt from discovery as a work product prepared in anticipation of litigation.[152]

Illinois has likewise granted absolute immunity to reports or documents made in preparation for trial, although its new rule does not follow the proposed Federal amendment or the "essentiality" test of Hickman v. Taylor.[153] The Pennsylvania Rules of Court also grant absolute immunity to both the reports prepared in anticipation of litigation,[154] and to the opinions of expert witnesses.[155]

In Texas, absolute immunity has been granted to the communications involving the parties to the suit when "made in connection with the prosecution, investigation or defense" of a claim or the circumstances out of which the claim arose.[156] No mention is made in the statute, however, of protection for the opinions and conclusions of either an attorney or an expert.

The language of the Washington rule is unclear as to the type of protection given to the writing prepared in anticipation of litigation.[157] Absolute immunity from discovery is accorded the conclusions of an attorney or an expert; but as for the work product, instead of conditioning discovery on the showing of an injustice or undue hardship, the rule merely says, "The court need not order the production or inspection of any writing obtained or prepared. . . ."

One other State, Maryland, has enacted a rule with provisions quite similar to those of the proposed Federal rule. The result in Maryland, however, has been exactly opposite to that in the other 14 States. Instead of protecting the deponent from discovery, the Maryland Rules offer him little or no opportunity to avoid disclosing all that he knows concerning the pending action.[158] An appraisers report is not protected even though it

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[147] State v. Bair, 83 Idaho 478, 365 P.2d 216 (1961).
[148] Bryan v. Iowa State Hwy. Comm'n, 251 Iowa 1043, 104 N.W.2d 562 (1960).
[149] State Dep't of Hwy. v. Spruell, 243 La. 202, 142 So. 2d 396 (1962), discovery permitted on technical interpretation that material was not ordered to be "produced." State Dep't of Hwy. v. Buckman, 239 La. 872, 120 So. 2d 461 (1960).
[150] Cermak v. Hertz Corp., 53 N.J. Super. 455, 147 A.2d 800 (1958).
[151] Minn. R. Civ. P. 26.02; Mo. Sup. Ct. R. 57.01(b).
[152] State ex rel. State Hwy. Comm'n v. Jensen, 362 S.W.2d 568 (Mo. 1962).
[153] Ill. Sup. Ct. R. 19-5; Ill. Ann. Stat. §101.19-5 (Supp. 1962).
[154] Pa. R. Ct. 4011(d); Musulin v. Redevelopment Authority, 25 D.&C.2d 267 (Pa. 1961).
[155] Pa. R. Ct. 4011(f).
[156] Tex. R. Civ. P. 167.
[157] Wash. R. Ct. 26(b).
[158] Md. R. P. 410. See Appendix D for text.

may have been obtained in anticipation of litigation. Only the mental impressions, conclusions, opinions, or legal theories of an attorney, as contained in a written report, are protected. If no report has been written by the expert, he may then be examined by either oral or written deposition as to both his findings of fact and his opinions based thereon. To further emphasize the liberality of the discovery procedures, Rule 406(b) states:

> The policy of these Rules is to require full disclosure as specified in Rule 410 (Scope of Examination) and the powers conferred by section (a) of this Rule [providing for Orders to Protect Party and Deponent] shall be used only to prevent genuine oppression or abuse.

New York has enacted a modified version of the amendment, effective Sept. 1, 1963. Under the new Civil Practice Law and Rules, the work product of an attorney is not obtainable at all.[159] With regard to the material prepared for litigation, the rule reads as follows:

> The following shall not be obtainable unless the court finds that the material can no longer be duplicated because of a change in conditions and that withholding it will result in injustice or undue hardship: (1) any opinion of an expert prepared for litigation; and (2) any writing or anything created by or for a party or his agent in preparation for litigation.[160]

The writing and opinion of an appraiser will be only qualifiedly protected from discovery, whereas the work product of an attorney will enjoy an absolute protection. Consequently, New York has established still another method of dealing with this problem, one which gives the appraiser less immunity from discovery than in most of the other States.

Thus, the proposed 1946 Amendment has varied greatly among the States, ranging from no protection at all for the reports and opinions of an appraiser, as in Maryland, to absolute immunity from discovery of both, as in Minnesota and Missouri. This follows the usual development of the law, whereby similar rules may result in different interpretations because of the historical development of the particular State and its legal needs.

CONCLUSION

This paper has sought to indicate the tendency toward liberalizing the discovery procedures in the courts. Federal and State rules have influenced each other and, in general, more open procedures are used so that the adversary content of a trial is minimized by the exchange of information allowed under the various rules.

Distinctions have been made between the discovery of factual data and opinions, especially in the Federal courts. In the State courts, however, opinion information is being allowed discovery in an increasing number of cases. True, there are various qualifications as to how it may be discovered and under what circumstances. In many instances, discovery of opinionative material is dependent on the court's discretion, weighing the private necessities against the public interest for justice. This philosophical basis has seen the discovery of new kinds of materials. Recent legislation has sought to distinguish such matter in a number of States from the attorney's work product. In some States, fact as well as opinion material has been specifically excluded from discovery while others have included it as discoverable. The process of judicial construction has, however, sought to determine a fair balance between the interests involved.

One of these interests is, or course, the individual vs the sovereign. Whereas there have been a few cases which have stated that when a government unit is involved greater discovery against such a unit should be allowed, the courts have generally tended to treat litigants alike—as though they were private parties.

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[159] N.Y. Civ. Prac. L. & R. §3101(c).
[160] Id §3101(d).

In eminent domain proceedings, public authorities can draw certain implications from the Federal and State trends described in this paper based on case and statute law. There is an apparent trend toward discovery of appraisal work sheets, interrogatories concerning factual information regarding individual appraisals, and witnesses' names, including expert witnesses. Both public and private litigants no doubt produce preliminary papers of various sorts which are in an incomplete stage. The courts, to avoid unnecessary interference with ordinary deliberations on the part of the experts involved, need to draw a distinction between reliable factual materials to be relied on by the movant in a case and various preliminary data that have not yet assumed such a role. With regard to expert opinion, whereas it would appear to be sensible to have such opinion available to both sides prior to trial to facilitate adequate trial preparation, many States and Federal Courts have regarded this as an invasion of expertise and of the work efforts of the attorney.

Any efforts to reduce the adversary content of a trial and to arrive at a more factual approach to determination of issue would appear to be commendable. On the other hand, every effort should be made to eliminate a "fishing expedition" because of inadequate trial preparation on the part of the litigants, especially where the materials are readily available to both parties through the use of effort and imagination.

An important caveat is posed. Federal, State, and private litigants must make certain that expert materials developed in anticipation of trial are well prepared, well documented and well reasoned, that the factual materials are substantial and that, if the data are discoverable, they are technically sound. With such efforts there need be less concern for discovery even where opinionative matter may be obtained.

Wise application of the discovery rules to individual cases by the courts will provide the means whereby adequate information is made accessible to both parties and settlement of cases is expedited. Whereas it may appear on the surface that the courts are moving with great haste toward use of discovery procedures, expecially against experts, examination in depth of the case law seems to indicate that the courts offer considerable restraints against such indiscriminate use. Where such indiscriminate application has occurred, the legislatures have specified restraints. The development of discovery doctrines has a long history and has only recently affected the field of right-of-way litigation to any great extent. Just as other substantive fields of law have learned to adapt to these procedures, so will there develop a compatibility of discovery procedures with eminent domain law. The greatest defense against inordinate use of the discovery process is good preparation of documents, papers, and other materials by the litigants involved. This process would then result in fair compensation to the condemnee based on the adequacy of the information available to both parties.

Appendix A

FEDERAL RULES PERTINENT TO DISCOVERY PROCESS

(Federal Rules of Civil Procedure, 28 U.S.C. (1961), as amended)

Rule 16. Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for 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 witnessess;
5. 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; and

6. Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

Rule 26. Depositions Pending Action

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

Rule 30. Depositions Upon Oral Examination

(b) Orders for the Protection of Parties and Deponents. —After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

(d) Motion to Terminate or Limit Examination. —At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order 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.

Rule 31. Depositions of Witnesses Upon Written Interrogatories

(d) Orders for the Protection of Parties and Deponents. —After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent upon notice and good cause shown, may make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

Rule 33. Interrogatories to Parties

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

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

Rule 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Rule 45. Subpoena

(b) For Production of Documentary Evidence. —A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(d) Subpoena for Taking Depositions; Place of Examination. —(1) Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated

books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45.

Rule 71A. Condemnation of Property

(a) Applicability of Other Rules. —The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

Appendix B

EXPANDED VERSION OF FEDERAL PRE-TRIAL CONFERENCE PROVISION

2 Iowa Code 1962, R. Civ. P. §136, Pre-trial Conference

After issues are joined the court may in its discretion, and shall on written request of any attorney in the case, direct all attorneys in the action to appear before it for a conference to consider, so far as applicable to the particular case:

1. The necessity or desirability of amending pleadings by formal amendment or pre-trial order;
2. Agreeing to admissions of fact, documents or records not really controverted, to avoid unnecessary proof;
3. Limiting the number of expert witnesses;
4. Settling any facts of which the court is to be asked to take judicial notice;
5. Stating and simplifying the factual and legal issues to be litigated;
6. Specifying all damage claims in detail as of the date of the conference;
7. All proposed exhibits and mortality tables and proof thereof;
8. Consolidation, separation for trial, and determination of points of law;
9. Questions relating to voir dire examination of jurors and selection of alternate jurors, to serve if a juror becomes incapacitated;
10. Possibility of settlement;
11. Filing of advance briefs when required; and
12. Any other matter which may aid, expedite, or simplify the trial of any issue.

The pre-trial judge may direct the parties to the action to be present or immediately available at the time of conference (Report 1943, amendment 1961).

Appendix C

ADOPTION OF FEDERAL DISCOVERY RULES BY STATES[1]

State	Rules Citation									
	16	26(b)	30(b)	30(d)	31(d)	33	34	45(b)	45(d)	71A(a)
Alabama	N	F	F	N	N	I	N	I	N	N
Alaska	F	F	F	F	F	F	F	F	F	F
Arizona	F	F	F	F	F	F	F	F	F	N
Arkansas	F	F	F	F	S	F	F	S	S	N
California	FE	FA	FA	F	F	FC	F	S	S	S
Colorado	F	F	FA	F	F	F	F	F	F	N
Connecticut	I	I	S	N	S	S	I	I	N	N
Delaware	F	F	F	F	F	S	F	F	IF	IF
D. C.	S	F	F	F	F	F	F	F	N	N
Florida	S	F	F	F	S	S	F	F	F	N
Georgia	F	F	F	F	F	F	FA	I	F	N
Hawaii	F	F	F	F	F	F	F	F	F	N
Idaho	F	FA	F	F	F	FA	F	F	FE	N
Illinois	F	I	S	S	S	S	I	I	I	N
Indiana	S	S	I	I	I	I	I	I	N	N
Iowa	FE	S	FA	F	I	I	S	S	I	N
Kansas	F	I	N	N	N	N	I	N	I	N
Kentucky	F	F	FA	F	F	F	F	F	S	S
Louisiana	S	F	FA	F	F	S	F	S	S	N
Maine[2]	N	I	N	N	N	N	N	N	N	N
Maryland	FA	FA	FA	I	I	I	FA	S	F	IF
Massachusetts*	F	I	—	—	—	I	I	—	—	N
Michigan[3]	—	—	—	—	—	—	—	—	—	—
Minnesota	F	FA	FA	F	F	FA	F	F	F	N
Mississippi*	N	I	—	—	—	—	I	N	N	N
Missouri	F	FA	S	S	F	FA	S	I	I	—
Montana	F	F	F	F	F	F	F	F	S	N
Nebraska	N	S	F	F	F	FA	F	I	I	N
Nevada	F	F	F	F	F	F	F	F	F	N
New Hampshire*	—	—	—	—	—	—	—	—	—	—
New Jersey	FE	FA	F	F	F	FE	F	I	N	N
New Mexico	F	F	FA	F	F	F	F	F	F	N
New York	N	I	I	N	I	N	I	I	N	N
North Carolina	IF	I	I	N	I	N	I	I	N	N
North Dakota	F	F	F	F	F	FA	FA	F	F	N
Ohio*	N	I	—	—	—	—	I	I	N	N
Oklahoma*	—	—	—	—	—	—	I	—	—	N
Oregon*	N	—	IF	S	—	—	—	—	—	N
Pennsylvania	S	I	I	I	N	S	I	I	N	N
Rhode Island*	N	I	—	—	—	—	—	—	—	N
South Carolina	N	I	I	N	I	N	I	I	N	N
South Dakota	F	I	F	F	F	I	I	F	F	N
Tennessee	N	S	FA	I	I	N	N	N	N	N
Texas	S	I	N	N	N	I	FA	I	N	N
Utah	F	F	FA	F	F	F	F	F	F	N
Vermont	S	F	F	F	S	I	S	N	F	N
Virginia	S	I	—	—	—	—	I	I	N	N
Washington	S	FA	F	F	F	F	F	N	N	N
West Virginia	F	IF	F	S	F	F	FA	F	F	N
Wisconsin	F	IF	S	N	S	N	I	N	N	IF
Wyoming	F	F	F	F	F	F	FA	F	F	N

[1] * = States showing little Federal influence, F = same as Federal Rule, FC = Federal Rule changed, FE = Federal Rule expanded, FA = Federal Rule plus an additional paragraph, I = individual State rule, IF = individual State rule showing Federal influence, N = no comparable rule, and S = substantially the same as the Federal Rule.

[2] Reflects the rules in effect before 1959 repealing statute; more recent material was unavailable.

[3] Michigan adopted new rules effective January 1, 1963. The new rules, not available for this study, conform substantially to the Federal practice, except that only evidence admissible at the trial may be taken in discovery proceedings.

Statutory References to Discovery Rules, by States

Ala. Code, recomp. 1958, tit. 7 (1960).
Alaska R. Ct. Proc. & Adm'n (1963).
16 Ariz. Rev. Stat. Ann., R. Civ. P. (1956).
3A Ark. Stat. Ann. 1947, tit. 28 (1962 replacement).
(Cal.) 23 Wests' Ann. Code Div. P. (Cum. P. P. 1962).
1 Colo. Rev. Stat., ch. 4 (1953).
Conn. Prac. Book of 1951 (Cum. Supp. 1960).

13 Del. Code Ann., Super. Ct. R. —Civ. (1953).
(D.C.) Munic. Ct. R. (1961).
30 Fla. Stat. Ann. (1954).
38 Ga. Code Ann. (1959) (Cum. P.P. 1961).
Hawaii R. Civ. P. (1954).
2 Idaho Code, R. Civ. P. (Cum. P. Supp. 1961).
110 Smith-Hurd Ill. Ann. Stat., Sup. Ct. R. (1956).
2 Burns Ind. Stat. Ann.; I.L.E. Depositions and Discovery §1 (Cum. P.P. 1962).
2 Iowa Code 1962, R. Civ. P.
Gen. Stat. Kan. Ann. §60 (1949).
Ky. Rev. Stat., R. Civ. P. (1953).
3, 4 La. Stat. Ann. (1961).
Me. Rev. Stat. 1959 (Cum. Supp. 1961).
Md. R. Civ. P. (unann. ed. 1963).
38 Mass. Gen. L. Ann. (1960).
(Mich.) Gen. Ct. R. of 1963.
27A Minn. Stat. Ann., R. Civ. P. Dist. Ct. (1958).
2 Miss. Code 1942 §1699 (1957).
4 Mo. Rev. Stat., Sup. Ct. R. (1957).
Mont. Laws, 37th Sess., ch. 13 (1961).
Neb. Sess. Laws 1951, §§25-1267.01-25.1269 (1952).
1 Nev. Rev. Stat., R. Civ. P. (1953).
5 N.H. Rev. Stat. Ann., §516 (1955).
N.J. Prac., part IV, ch. 4 (1953).
4 N.M. Stat. Ann. 1953, ch. 21 (1954).
N.Y. Laws, Civ. Prac. L. & R., ch. 308 (1962).
1A N.C. Gen. Stat., recomp. 1953.
5 N.D. Cent. Code Ann., R. Civ. P. (1957).
Ohio Rev. Code Ann., ch. 2317 (1962 Supp.).
Okla. Stat. Ann., tit. 12, ch. 10 (1960).
1 Ore. Rev. Stat., ch. 45 (ch. replaced 1961-1962).
Pa. R. Ct. (1962).
2 Gen. Laws R.I., tit. 9, ch. 18 (1962).
6 Code Laws S.C., ch. 7 (1962).
2 S.D. Code, tit. 36, ch. 36 (Supp. 1960).
5 Tenn. Code Ann., tit. 24 (Supp. 1962).
Tex. R. Civ. P. (1955).
9 Utah Code Ann., R. Civ. P. (1953).
3 Vt. Stat. Ann., tit. 12 (Supp. 1961).
2 Va. Code, tit. 8, R. Sup. Ct. App. (1950).
0 Rev. Code Wash., R. Pleading, Prac. & P. (1960).
3 W. Va. Code Ann., R. Civ. P. (1961).
30, 38 Wis. Stat. Ann. (1958).
2 Wyo. Stat. 1957, R. Civ. P. (1959).

Appendix D

STATUS OF STATE LAWS[1] AS TO PRIVILEGED MATTER[2]

State	Expert Report	Expert Conclusion	Work Product	State	Expert Report	Expert Conclusion	Work Product
Alabama	—	—	—	Montana	—	—	—
Alaska	—	—	—	Nebraska	—	—	—
Arizona	N	Q	Q	Nevada[3]	Q	A	A
Arkansas	—	—	—	New Hampshire	Q	—	Q
California	N	Q	Q	New Jersey[3]	Q	A	A
Colorado	—	—	—	New Mexico	—	—	—
Connecticut	—	—	A	New York[3]	Q	Q	A
Delaware	Q	—	Q	North Carolina	—	—	—
Florida	N	Q	Q	North Dakota	—	—	—
Georgia	—	—	A	Ohio	A	Q	A
Hawaii	—	—	—	Oklahoma	—	—	—
Idaho[3]	Q	A	A	Oregon	—	—	—
Illinois[3]	A	A	A	Pennsylvania[3]	A	A	A
Indiana	—	—	—	Rhode Island	—	—	—
Iowa[3]	Q	A	A	South Carolina	—	—	—
Kansas	—	—	—	South Dakota	—	—	—
Kentucky[3]	Q	A	A	Tennessee	—	—	—
Louisiana[3]	Q	Q	A	Texas[3]	A	—	A
Maine	—	—	—	Utah[3]	Q	A	A
Maryland[3]	N	N	Q	Vermont	—	—	—
Massachusetts	—	—	—	Virginia	—	Q	—
Michigan	—	—	Q	Washington[3]	—	A	A
Minnesota[3]	A	A	A	West Virginia[3]	Q	A	A
Mississippi	Q	—	—	Wisconsin	N	Q	Q
Missouri	A	A	Q	Wyoming	—	—	—

[1] See Summary Explanation following.
[2] A = absolute protection from discovery, N = no protection from discovery, and Q = qualified protection from discovery.
[3] States which have adopted the proposed 1946 Amendment to the Federal Rules regarding experts and attorney's work product.

Summary Explanation of Status of State Laws

Alabama. —No cases on point. Ala. Code, recomp. 1958, tit. 7, §§474-489. Provisions are based on the Federal provisions for discovery, but no provision is made for production of documents, requests for admissions, written interrogatories or the other discovery devices available under the Federal Rules. Rules similar to the Federal Rules were proposed in 1957 but rejected in the Senate.

Alaska. —No cases on point. Alaska R. Ct. Proc. & Adm'n 1963, Fed. R. Civ. P. made effective in Alaska on July 18, 1949; 63 Stat. 445, 48 U.S.C.A. §103a (1952).

Arizona. —Rules virtually identical to Federal Rules were adopted, effective Jan. 1, 1940. Latest revision effective Jan. 1, 1956. Dean v. Superior Court, 84 Ariz. 104, 324 P.2d 764 (1958), denying discovery of work product; State ex rel. Willey v. Whitman, 91 Ariz. 120, 370 P.2d 273 (1962), condemnation case permitting discovery of reports and conclusions.

Arkansas. —No cases on point. Procedure is regulated entirely by legislature. 3A Ark. Stat. Ann. 1947, tit. 28 (1962 replacement). In 1949, provisions similar to Fed. R. 16 were adopted, Ark. Stat. §27-2401 (Supp. 1947). In 1953 legislature adopted provisions similar to Fed. R. 26-37, Ark. Stat. §§28-347 to 28-361 (Supp. 1957). As to liberal construction of rules see, Arkansas State Hwy. Comm'n v. Stanley, 353 S.W.2d 173 (1962).

California. —Adopted code pleading in 1851. Judicial Council adopted rules similar to Federal pre-trial and discovery provisions in 1957 & 1958, Cal. Stat. 1957 §3, ch. 1904 p. 3322, operative Jan. 1, 1958. Oceanside Union School Dist. v. Superior Ct., 23 Cal. Rep. 375, 373 P.2d 439 (1962), condemnation case permitting discovery of expert reports; Greyhound Corp. v. Superior Court, 56 C.2d 355, 364 P.2d 266 (1961), permitting discovery of work product; for recent discussion of scope of discoverability of expert reports, conclusions and work product see, Brown v. Superior Ct., 30 Cal. Rep. 338 (Dist. Ct. App. 1963).

Colorado. —No cases on point. Procedural rules have been similar in text and interpretation to Federal provisions since April 6, 1941. 1 Col. Rev. Stat., ch. 4 (1953). Keely, "How Colorado Conformed State to Federal Civil Procedure," 16 F.R.D. 291 (1955).

Connecticut. —Adopted code in 1879 Based on the Field Code. In 1957 the Conn. Sup. Ct. adopted rules providing for limited disclosure and pre-trial practice. Conn. Prac. Book of 1951 (Cum. Supp. 1960). Prizio v. Penachio, 19 Conn. Sup. 381, 115 A.2d 340 (Conn. Super. 1955), indicating a trend toward Federal interpretation but protecting written statements as work product.

Delaware. —Adopted rules similar to Federal provisions, eff. Jan. 1, 1948, 13 Del. Code Ann., Super. Ct. R.—Civ. (1953). Empire Box Corp. v. Illinois Cereal Mills, 90 A.2d 672 (Super. Ct. 1952), denying discovery and qualifying protection to expert reports and work product.

Florida. —Rules adopted March 15, 1954, based primarily on Federal Rules. 30 Fla. Stat. Ann. (1954). Shell v. State Rd. Dep't, 155 So. 2d 857 (Fla. 1961), condemnation case permitting discovery of appraiser's work sheets; Shawmut Van Lines, Inc. v. Small, 148 So. 2d 556 (Dist. Ct. App. Fla. 1963), noncondemnation case qualifying discovery of work product.

Georgia. —As of March 25, 1959, the code of Georgia stands amended following for the most part the Federal discovery provisions. 38 Ga. Code Ann. (1959). (Cum. P. P. 1961). Setzers Super Stores v. Higgins, 104 Ga. App. 116, 121 S.E.2d 305 (Ga. App. Ct. 1961), noncondemnation case denying discovery of work product.

Hawaii. —No cases on point. Rules were adopted, eff. June 14, 1954, substantially the same as Federal Rules. Hawaii R. Civ. P. 1954.

Idaho. —Rules which follow closely Federal Rules were adopted, eff. Nov. 1, 1958. 2 Idaho Code, R. Civ. P. (Cum. P. Supp. 1961). State v. Bair, 33 Idaho 478, 365 P.2d 216 (1961), condemnation case denying discovery of experts' conclusions.

Illinois. —A new Civil Practice Act, influenced by Federal Rules, was adopted, eff. Jan. 1, 1956, 110 Smith-Hurd Ill. Ann. Stat., Sup. Ct. R. (1956). City of Chicago v. Harrison-Halsted Bldg. Corp., 11 Ill. 2d 431, 143 N.E.2d 40 (Sup. Ct. 1957), condemnation case denying discovery of experts' statements. Kemeny v. Skorch, 159 N.E.2d 489, 490 (Ill. 1959), as to documents exempt from disclosure.

Indiana. —No cases on point. Indiana has rules provisions similar to Fed. R. 16 and 26(b), but has its own limited provisions for depositions and discovery. 2 Burns Ind. Stat. Ann. (1947); I.L.E., Depositions & Discovery §1 (Cum. P.P. 1962).

Iowa. —Rules adopted, eff. July 4, 1943, are less liberal than the corresponding Federal provisions. 2 Iowa Code 1962, R. Civ. P. Bryan v. Iowa State Hwy. Comm'n, 251 Iowa 1093, 104 N.W.2d 562 (1960), condemnation case in which discovery of experts' conclusions were denied; Hanke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920 (1958), a noncondemnation case qualifying discovery of attorney's work product.

Kansas. —No cases on point. Procedure to a great extent remains unchanged since 1859. Pre-trial procedure corresponding to Fed. R. 16 was adopted, eff. June 30, 1949. Gen. Stat. Kan. Ann. §60 (1949). Pyramid Life Ins. Co. v. Gleason Hospital, Inc., 188 Kan. 95, 360 P.2d 858 (1961), as to general interpretation of discovery statute.

Kentucky. —Rules similar to Federal Rules were adopted, eff. July 1, 1953, Ky. Rev. Stat., R. Civ. P. (1953). Bender v. Eaton, 343 S.W.2d 799 (Ky. 1961), a noncondemnation case denying discovery of work product.

Louisiana. —Code revision, eff. Jan. 1, 1961; 3, 4 La. Stat. Ann. (1961); State Dep't of Hwy. v. Buckman, 239 La. 872, 120 So. 2d 461 (1960), condemnation case denying discovery of certain contracts and instructions; State v. Riverside Realty Co., 152 So. 2d (Ct. App. La. 1963), condemnation case permitting discovery of expert factual questions without violating work product.

Maine. —No cases on point. Rules similar to Federal Rules were adopted, eff. Dec. 1, 1959. Me. Rev. Stat. 1959 (Cum. Supp. 1961).

Maryland. —No cases on point. A complete revision of the rules was promulgated in 1956 and rules revised, eff. Jan. 1, 1957. Md. R. Civ. P. (1961 ed.) and as amended through Sept. 1, 1963 (unann. ed. 1963). Baltimore Transit Co. v. Mezzanotti, 227 Md. 8, 174 A.2d 768 (Ct. App. 1961), as to liberal construction of the rules.

Massachusetts. —No cases on point. Procedure continues to follow a practice act first adopted in 1852. 38 Mass. Gen. L. Ann. (1960).

Michigan. —A complete procedural change designated the Revised Judicature Act of 1961, and rules substantially similar to Federal Rules adopted, eff. Jan. 1, 1963. Mich. Gen. Ct. R. of 1963. Hallett v. Michigan Consol. Gas Co., 298 Mich. 582, 299 N.W. 723 (1941), qualified protection of experts' reports; Wilson v. Borchard, 122 N.W.2d 57 (Mich. 1963), qualified protection of work product.

Minnesota. —Adopted rules virtually identical to Federal Rules, eff. Jan. 1, 1952. 27A Minn. Stat. Ann., R. Civ. P. Dist. Ct. (1958). In re Sandstrom's Estate, 89 N.W.2d (Minn. 1958), production of documents denied for failure to show good cause; Brown v. Saint Paul City Ry., 241 Minn. 15, 62 N.W.2d 688 (1954), discovery of work product denied.

Mississippi. —Limited discovery provisions, unlike Federal Rules. 2 Miss. Code 1942 §§1659, 1699 (1957). Garraway v. Retail Credit Co., 141 So. 2d 727 Miss. 1962, qualified protection of experts' reports.

Missouri. —Mo. Sup. Ct. adopted rules in 1959 similar to Federal Rules, eff. Oct. 1960. 4 Mo. Rev. Stat., Sup. Ct. R. (1959). State ex rel. State Hwy. Comm'n v. Jensen, 362 S.W.2d 568 (Sup. Ct. Mo. 1962), condemnation case protecting appraisers notes from discovery as work product; State ex rel. St. Louis County Transit Co. v. Walsh, 327 S.W.2d 713 (Ct. App. Mo. 1959), photographs not privileged per se—qualifies work product.

Montana. —No cases on point. Adopted Federal Rules almost verbatim, eff. Feb. 9, 1961. Mont. Laws, 37th Sess., ch. 13 (1961). As to extent of discovery under previous rules see, State ex rel. Pitcher v. District Ct., 114 Mont. 128, 133 P.2d 350 (1943).

Nebraska. —No cases on point. As of 1951 Nebraska has had discovery provisions similar to Federal Rules. Neb. Sess. Laws 1951, §§25-1267.01-25.1269 (1952).

Nevada. —No cases on point. Nev. Sup. Ct. adopted rules similar to Federal Rules, eff. Jan. 1, 1953. 1 Nev. Rev. Stat., R. Civ. P. (1953).

New Hampshire. —No provisions similar to Federal Rules. 5 N.H. Rev. Stat. Ann., §516 (1955). McDuffey v. Boston & Maine R.R., 102 N.H. 179, 152 A.2d 606 (Sup. Ct. 1959), permitting discovery of experts' reports; Smith v. American Employer's Ins. Co., 102 N.H. 530, 163 A.2d 564 (Sup. Ct. 1960), denying discovery of work product.

New Jersey. —Rules substantially similar to Federal Rules, eff. Sept. 15, 1948, and revised in 1953. N.J. Prac., part IV, ch. 4 (1953). Cermak v. Hertz Corp., 53 N.J. Super. 455, 147 A.2d 800 (1958), discovery of experts' conclusions denied; Kaplan v. Jones, 77 N.J. Super. 31, 185 A.2d 248 (Super. Ct. 1962), denying discovery of work product.

New Mexico. —No cases on point. As of 1949 New Mexico has had rules similar to Federal Rules. 4 N.M. Stat. Ann. 1953, ch. 21 (1954). Salitan v. Carrillo, 69 N.M. 476, 368 P.2d 149 (1961), as to scope of discovery.

New York. —In 1962 the N.Y. Civ. Prac. Laws & Rules were adopted, eff. Sept. 1, 1963. The rules do not expand the scope or methods of discovery nor make provision for pre-trial conferences. N.Y. Laws, Civ. Prac. L. & R., ch. 308 (1962). Murphy v. City Products Corp., 188 N.Y.S.2d 247, 17 Misc. 2d 1026 (Sup. Ct. Erie County 1959), denying discovery of experts' conclusions; Hewitt v. State, 216 N.Y.S.2d 615, 27 Misc. 2d 930 (Ct. Cl. N.Y. 1960), condemnation case permitting discovery of experts' conclusions; Pfaudler Permutit, Inc. v. Stanley Steel Service Corp., 212 N.Y.S.2d 106, 28 Misc. 2d 388 (Sup. Ct. Monroe County 1961), denying discovery of experts' conclusions; Salzo v. Vi-She Bottling Corp., 235 N.Y.S.2d 585, 37 Misc. 2d 357 (Supp. Ct. Queens County 1962), qualified admission of experts' reports; Cataldo v. Monroe County, 238 N.Y.S.2d 855, 38 Misc. 2d 768 (Supp. Ct. Monroe County 1963), qualified denial of insurance reports.

North Carolina. —No cases on point. Limited discovery and deposition procedures. 1A N.C. Gen. Stat., recomp. 1953.

North Dakota. —No cases on point. Rules similar to Federal Rules were adopted, eff. July 1, 1957. 5 N.D. Cent. Code Ann., R. Civ. P. (1957).

Ohio. —Procedure is under a legislative code first adopted in 1853. Ohio Rev. Code Ann., ch. 2317 (1962 Supp.). Neff v. Hall, 170 N.E.2d 77 (Ct. App. Ohio 1959), con-

demnation case denying discovery of experts' reports; Nomina v. Eggeman, 188 N.E.2d 440 (Ct. C. P. Ohio 1962), qualifying discovery of experts' conclusions' in re Bates, 167 Ohio St. 46, 146 N.E.2d 306 (Sup. Ct. 1957), denying discovery of work product.

Oklahoma. —No cases on point. Procedure is regulated by a code first adopted in 1870. Okla. Stat. Ann., tit. 12, ch. 10 (1960). Application of Umbach, 350 P.2d 299 (Okla. 1960), Federal income tax returns held privileged.

Oregon. —No cases on point. Code provisions regulate procedure and are much more limited than Federal Rules. 1 Ore. Rev. Stat., ch. 45 (ch. replaced 1961-1962). See 40 Ore. L. Rev. 94 (1960) as to work product.

Pennsylvania. —Discovery procedures are not as liberal as comparable Federal provisions. Pa. R. Ct. 1962. Musulin v. Redevelopment Authority, 25 D.&C.2d 267 (Pa. 1961), condemnation cases denying discovery of appraisals and valuations; Wright v. Philadelphia Transp. Co., 24 D.&C.2d 334 (Pa. 1961), denying discovery of experts' reports and conclusions.

Rhode Island. —No cases on point. Trend since 1956 to adopt procedure similar to Federal system, 10 R.I. B.J. 7 (Nov. 1961); 2 Gen. Laws R.I., tit. 9, ch. 18 (1956). De Courey v. American Emery Wheel Works, 153 A.2d 130 (R.I. 1959), as to court appointed experts.

South Carolina. —No cases on point. Procedure still substantially the same as under the Field Code first adopted in 1870. 6 Code Laws S.C., ch. 7 (1962). As to general provisions see, Peagler v. Atlantic Coast Line R.R., 101 S.E.2d 821 (S.C. 1958).

South Dakota. —No cases on point. Rules have been adopted similar to Federal discovery provisions. 2 S.D. Code, tit. 36, ch. 36 (1960 Supp.).

Tennessee. —No cases on point. Code provisions limited following some of the Federal provisions. 5 Tenn. Code Ann., tit. 24 (Supp. 1962).

Texas. —A detailed set of rules following Federal provisions, eff. Sept. 1, 1941. A series of amendments in 1957 substantially broadened the discovery procedure. Tex. R. Civ. P. (1955). Harrell v. Atlantic Refining Co., 339 S.W.2d 548 (Ct. Civ. App. Tex. 1960), discovery or work product denied.

Utah. —Rules were adopted in 1950 very similar to Federal Rules. 9 Utah Code Ann., R. Civ. P. (1953). Mower v. McCarthy, 122 Utah 1, 245 P.2d 224 (Sup. Ct. 1952), denying discovery of expert conclusions and work product.

Vermont. —No cases on point. Discovery procedure similar to Federal procedure was adopted by statute in 1957 and substantially amended in 1959. 3 Vt. Stat. Ann., tit. 12 (1961 Supp.).

Virginia. —Sup. Ct. adopted a set of rules, eff. Feb. 1, 1950, with limited discovery procedure. 2 Va. Code, tit. 8, R. Sup. Ct. App. (1950). Cooper v. Norfolk Redevelopment & Housing Authority, 197 Va. 653, 90 S.E.2d 788 Sup. Ct. App. (1956), a condemnation case permitting discovery of experts' conclusions on agency principles.

Washington. —No cases on point. Has adopted Federal Rules on discovery and pretrial conference. 0 Rev. Code Wash., R. Pleading, Prac. & P. (1960).

West Virginia. —No cases on point. The W. Va. Sup. Ct. adopted rules similar to Federal Rules, eff. July 1, 1960. 3 W. Va. Code Ann., R. Civ. P. (1961).

Wisconsin. —Discovery statutes were amended in 1961 to harmonize with liberal interpretation of Federal provisions. 30, 38 Wis. Stat. Ann. (1958). State ex rel. Reynolds v. Circuit Ct., 15 Wis. 2d 311, 112 N.W.2d 686 (1961), condemnation case permitting discovery of appraisers' reports and opinions; Walsh v. Northland Greyhound Lines, 224 Wis. 281, 12 N.W.2d 20 (1943), permitting discovery of experts' reports.

Wyoming. —No cases on point. Wyo. Sup. Ct. adopted new rules similar to Federal Rules in 1957. 2 Wyo. Stat. 1957, R. Civ. P. (1959). See, Lake De Smet Reservoir Co. v. Kaufman, 292 P.2d 482 (Wyo. 1956) as to liberal interpretation of courts discretion in permitting discovery of books, documents and papers.

Illustrative Statutory Provisions Regarding Expert Protection from Discovery

A. Absolute protection (A) for the expert's conclusions, and the attorney's work product

Smith-Hurd Ill. Ann. Stat. §101.19-5 (Sup. Ct. R. 19-5): §101.19-5 (1). All matters which are privileged against disclosure upon the trial are privileged against disclosure

through any discovery procedure. Disclosure of memoranda, reports, or documents made by or for a party in preparation for trial or any privileged communications between any party or his agent and the attorney for the party shall not be required through any discovery procedure.

Pa. R. Ct. 4011. Limitation of Scope of Discovery and Inspection. No discovery or inspection shall be permitted which:

1. Is sought in bad faith;
2. Causes unreasonable annoyance, embarrassment, expense, or apprehension to the deponent or any person or party;
3. Relates to matter which is privileged or would require the disclosure of any secret process, development, or research;
4. Would disclose the existence or location of reports, memoranda, statements, information, or other things made or secured by any person or party in anticipation of litigation or in preparation for trial or would obtain any such thing from a party or his insurer, or the attorney or agent of either of them, other than information as to the identity or whereabouts of witnesses;
5. Would require the making of an unreasonable investigation by the deponent or any party or witness, adopted Nov. 20, 1950, eff. June 1, 1951, amended April 12, 1954, eff. July 1, 1954; or
6. Would require a deponent, whether or not a party, to give an opinion as an expert witness, over his objection, amended March 1962, eff. April 1962.

B. No statutory protection (N) for expert's report or his conclusions and only qualified protection (Q) of attorney's work product. Md. R. P. 410

§410 (c). Writings obtainable: Except as otherwise provided in Rule 406 (similar to Federal Rule 30(b) providing for protective orders), a party may be written interrogatory or by deposition require that an opposing party produce or submit for inspection a written report of an expert, whom the opposing party proposes to call as a witness, whether or not such report was obtained by the opposing party in anticipation of trial or in preparation for litigation. If such expert has not made a written report to the opposing party, such expert may be examined upon written questions or by oral depositions as to his findings and opinions.

§410 (d). Writings not obtainable: Except as otherwise provided in Rule 406, a party or deponent shall not be required to produce or submit for inspection:

1. Object prepared for trial. A writing, statement, photograph or other object obtained or prepared in anticipation of litigation or in preparation for trial, except as provided in section C of this Rule, unless the court otherwise orders on the ground that a denial of production or inspection will result in an injustice or undue hardship.
2. Reflecting attorney's conclusions. A writing which reflects an attorney's mental impressions, conclusions, opinions or legal theories (In this case the attorney's work product appears to include only the results of the mental processes of the attorney).

C. Qualifying (Q) protection of expert's report upon condition that it was prepared in preparation for trial and protecting "any part."

Ky. Rev. Stat., R. 37.02. Limitations on the Production of Writings: The deponent shall not be required and the court shall not order a deponent or party to produce or submit for inspection 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 result in an injustice or undue hardship; nor shall the deponent be required or the court order a deponent or party to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or except as provided in Rule 35, the conclusions of an expert.