9/17/74

Memorandum 74-54

Subject: New Topics

This memorandum presents various suggestions for new topics. The staff believes that the Commission's present calendar of topics includes an excess of studies that will require substantial resources for a number of years but does not contain any studies that could be disposed of with a modest expenditure of Commission and staff time. We believe that some relatively easy studies should be added to our calendar, and the recommendations made below reflect this belief.

A brief discussion of each suggested topic follows. Although most of the topics are suggested by persons who have written to the Commission, a few are staff suggestions. You will note that the staff recommends that the Commission request authority to study the following new topics: (1) Limitation of Possibilities of Reverter and Powers of Termination, (2) Transfer of Out-of-State Trusts to California, (3) Elimination of Verification of Pleadings, (4) Discovery Procedures. In addition, the Commission might want to make a study concerning offers to compromise under Code of Civil Procedure Section 998. Also, the staff recommends a priority study of whether the claim presentation requirement should be eliminated in inverse condemnation cases.

Clarification of Law Relating to Offers to Compromise

Mr. Merzon (Exhibit I, item 3) suggests to the Commission that Code of Civil Procedure Section 998 (offers to compromise) be clarified to indicate whether an offer under Section 998 carries with it court costs incurred to the date of the offer. In other words, if the defendant offers to settle for $600 and the costs of the plaintiff at the time of the offer are $99.45, how high can the judgment be and still permit the defendant to obtain the benefit of Section 998?

Section 998 reads:

998. (a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section.

(b) Not less than 10 days prior to commencement of the trial as defined in subdivision 1 of Section 581, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken in accordance with the terms and conditions stated at that time. If such offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly. If such offer is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial.

(c) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment, the plaintiff shall not recover his costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court, in its discretion, may require the plaintiff to pay the defendant's costs from the date of filing of the complaint and a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in the preparation of the case for trial by the defendant.

(d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment, the court in its discretion may require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in the preparation of the case for trial by the plaintiff, in addition to plaintiff's costs.

(e) Police officers shall be deemed to be expert witnesses for the purposes of this section; plaintiff includes a cross-complainant and defendant includes a cross-defendant. Any judgment entered pursuant to this section shall be deemed to be a compromise settlement.

(f) The provisions of this chapter shall not apply to an offer which is made by a plaintiff in an eminent domain action.

Although Section 998 was enacted in its present form in 1971, a case decided under similar language in 1963--Bennett v. Brown, 212 Cal. App.2d 685, 28 Cal. Rptr. 485 (1963)--would seem to answer the correspondent's question. In this case, it was held that the costs to the date of the defendant's offer are to be added to the amount of the judgment in determining whether the plaintiff obtained a more favorable judgment. Thus, where the defendant offered to settle for $600, plaintiff did not obtain a more favorable judgment where the judgment was $500 and the costs to

the date of the offer were $99.45. If the costs to the date of the offer had been $101, the plaintiff would have obtained a more favorable judgment.

Although Section 998 does not specifically deal with the question whether costs are included in determining whether the person rejecting the offer obtained a more favorable judgment, it would appear that the Bennett case would be applicable under Section 998 even though it was not decided under that section. However, at least one lawyer feels that the question is one that should be answered in the statute. If it is felt that a more specific reference to prejudgment costs would clarify the terms of Section 998, it would seem that a relatively simple study and recommendation could be made by the Commission.

Prejudgment Interest

Mr. Merzon (Exhibit I, item 3) states:

> Also, there appears to be great justification for encouraging settlements by requiring the defendant (the insurance carrier) to pay a realistic interest rate from the date of injury, or possibly, from the date of an offer by the plaintiff.

There is much merit to his suggestion. The Commission already is authorized to study the question of prejudgment interest, but we necessarily have had to give priority to other topics. The State Bar is studying the matter of raising the legal rate of interest to 10 percent. We do not lack authority to study this question. What we lack is the time and resources.

Limitation of Possibilities of Reverter and Powers of Termination

The staff suggests the Commission make a study whether some limitation should be placed on the operation of deed restrictions which create either an automatic reversion on the occurrence of a condition or limitation (possibility of reverter) or a right of reentry upon a condition subsequent (power of termination). Both of these restrictions of the fee simple have

long been recognized in American law (Simes, Handbook of the Law of Future Interests §§ 13-14 (2d ed. 1966)) and have clearly been permitted in California courts (B. Witkin, Summary of California Law, Real Property §§ 241-244 (8th ed. 1973)).

The possibility of reverter is a future interest in which the reversionary interest is retained by the grantor and automatically reverts if the specified condition occurs. People v. City of Fresno, 210 Cal. App.2d 500, 26 Cal. Rptr. 853 (1962); Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962 (1935). The power of termination is distinguishable in that, upon the happening of the condition or limitation named in the creating instrument, the fee simple does not automatically terminate. The grantor or his successor must elect to forfeit the estate conveyed. Strong v. Shatto, 45 Cal. App. 29, 187 P. 159 (1919).

It has been held that the time limit imposed by the rule against perpetuities does not apply to possibilities of reverter and powers of termination even though the rule would be applicable if the grantor had provided that, upon the happening of the condition, the title would pass to someone other than the grantor or his heirs. Simes, Future Interests 379 (1951). Thus, when the fee is limited by a possibility of reverter or a right of termination, there is a permanent restriction on the property. The problem presented is whether the existence of such a limitation of the fee unduly burdens the property rendering it unmarketable or difficult to finance. See Simes, Rights of Entry and Possibilities of Reverter, 13 Hastings L.J. 1319 (Exhibit II); Simes & Taylor, Improvement of Conveyancing by Legislation, Title 19 (1960).

For a number of years, there has been a growing movement to provide some method of controlling the duration of these permanent limitations. Model

legislation proposing a time limit was drafted by the American Bar Association Committee of Real Property in 1957. See Simes & Taylor, supra, pp. 213-217. Such legislation has already been adopted in six states. Further, the Committee on Real Property of the Oregon Bar Association has recently endorsed legislation which would limit creation in the future of a possibility of reverter or right of entry for a period greater than 30 years and provide for recordation in order to perpetuate any such interest which existed prior to the effective date of the legislation. See Exhibit III.

California courts have strictly construed language in a deed which purports to create a possibility of reverter or right of entry, holding against such a limitation if the language was susceptible to another reasonable construction. Hawley v. Kafitz, 148 Cal. 393, 394, 83 P. 248, 249 (1905). In so doing, the courts have relied upon Civil Code Section 1442 which provides "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." However, there are numerous cases which have recognized the validity of these limitations. Parry v. Berkeley Hall School Foundation, 10 Cal.2d 422, 74 P.2d 738 (1937); Quatman v. McCray, 128 Cal. 285, 60 P. 855 (1900); Biecar v. Czechoslovak-Patronat, 145 Cal. App.2d 133, 302 P.2d 104 (1956).

The decision on whether it is appropriate for the Commission to study the need for legislation to provide some relief from the burdens of a right of entry or possibility of reverter which has become obsolete or unduly restrictive so as to be a serious burden on the title depends on whether the California courts have been willing to provide adequate equitable relief and on whether relief which requires a court action is indeed adequate.

It presently appears to be clear that, in the case of a right of entry, the court will apply the doctrine of "changed circumstances" adopted in

equitable servitude cases and overturn obsolete conditions subsequent. Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782 (1931). However, there is no California decision indicating that the "changed circumstances" principle will be applied in a case involving a possibility of reverter. Further, it should be noted that, even if a court were to apply the changed circumstances rule to the possibility of reverter, there would still be the requirement of an individual quiet title action (or some other judicial proceeding) in each case involving a full litigation of the relied upon changed circumstances. Perhaps a good solution would be a time limit after which a possibility of reverter or right of entry will be void with a right to have such a restriction terminated earlier by a court application of the doctrine of changed circumstances.

It is recommended that the Commission undertake the study of the desirability of limiting the duration of the possibility of reverter and the right of termination in California in order to eliminate restrictions which have outlived their usefulness and serve only as a clog on the alienability of real property.

Transfer of Out-of-State Trust to California

G. Gervaise Davis III (Exhibit IV) notes that, although Probate Code Sections 1132 and 1139 et seq. specifically provide for transfer of California trusts to other jurisdictions, no California statute deals with the transfer of an out-of-state trust to California. As indicated in Exhibit IV, this lack of statutory authority has proved burdensome. It is suggested that a brief study of the question be made so that legislation can be recommended to fill this void.

Community Joint Tenancy

It has become increasingly common for married couples to hold real property in joint tenancy while intending to retain the community nature of the ownership. This situation raises substantial questions when one of the joint tenants dies and the surviving spouse is left to deal with the property. It may be desirable to treat the property as joint tenancy for probate purposes so as to avoid the inclusion of the property in the estate for probate purposes and, at the same time, advantageous to maintain the community nature of the property for estate, inheritance, and income tax purposes. Mr. Merzon (Exhibit I) suggests this subject for commission study.

As recently pointed out in an article by Robert A. Mills--Community Joint Tenancy, A Paradoxical Problem in Estate Administration, 49 Cal. S.B.J. 39 (1974)(Exhibit V)--there are substantial differences in the standards applied for determining the nature of the property for tax and probate purposes. The surviving spouse may also be left the anomolous position of having the property treated differently for federal and state tax purposes. Further, the actions of either spouse in attempting to deal with the property by will and the method the survivor uses to deal with the property after death of one of the spouses may well have unexpected tax consequences. See Bordenave v. United States, 150 F. Supp. 820 (N.D. Cal. 1957).

It has been suggested that legislation be adopted which recognizes the true nature of the hybrid "community joint tenancy" form so as to create concrete rules as to its creation, taxability, and continuation. A limited form of recognition of this new form of property with regard to the rights of third parties was suggested in Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961).

The best solution to the problems presented by this anomolous property form would be to adopt changes of the rules applicable to joint tenancy property as part of a comprehensive revision of the probate procedures. Such a comprehensive revision would be a substantial undertaking. The State Bar has undertaken a study of probate reform, but it is not known when this project will be completed. This problem may be one that merits immediate study by the Law Revision Commission.

Videotape in California Trials

Mr. Merzon (Exhibit I) suggests that the Commission study the use of videotapes both as a discovery tool and at trial. These questions are currently being studied by the Judicial Council, and the Advisory Committee on Judicial Case Flow of the Governor's Conference on Criminal Justice has undertaken a study of the use of videotaped trials in criminal cases. It would seem unnecessary for the Commission to duplicate their efforts at this time. The Commission has previously decided not to study this topic and has suggested to the Judicial Council that that body study the matter.

Inverse Condemnation Requirement of Prior Claim

The State Bar has approved a resolution recommending an amendment to the Government Code to provide for the addition of Section 904 allowing an inverse condemnation suit against a government entity without the necessity of filing a claim with the entity. The staff recommends that the Commission give priority to drafting a recommendation to the 1975 Legislature to achieve the same result.

Homestead Law

Mr. Merzon (Exhibit I) suggests a study be made regarding priorities in recordation of a homestead declaration and a judgment lien. Specific

reference is made to the problems raised by Belieu v. Power, 54 Cal. App. 244, 201 P. 620 (1921). The Commission is already studying the question of creditors' rights, and this question would seem to fall within that study.

Probate

Mr. Merzon (Exhibit I) suggests that the Commission undertake a study of the whole area of probate law, pointing particularly to the questions of inheritance taxation of contingent remainders and the problems of statutory commissions. A committee of the State Bar is presently in the process of studying probate law, and it seems unnecessary for the Commission to duplicate the work of the State Bar committee. Further, it is felt that the area of tax policy is not an appropriate one for Commission consideration. Finally, any study of inheritance taxation would require comprehensive study which is not feasible at this time.

Jury System

Judge Yale has orally suggested that the Commission consider the entire jury system. He believes radical changes are needed in the procedures for selection, compensation, and use of juries. There has been considerable concern from other sources regarding juries (see proposals of Los Angeles County Judicial Procedures Commission--Exhibit VI).

A comprehensive study of the jury system would be most worthwhile. It should be pointed out, however, that there are other groups which have undertaken studies in this area. For example, the Advisory Committee on Judicial Process Case Flow of the Governor's Conference on Criminal Justice has been assigned the question of jury selection. Perhaps the Commission could obtain funding for a comprehensive study of these questions from some independent source. However, in the past, we have not found it profitable to duplicate

the efforts of other groups. If the Commission is interested in the topic--one that would require a substantial expenditure of time and resources--the staff will investigate further into the activities of other groups in the field.

Verification

The staff recommends that the Commission request permission to study the question of whether the requirement of verification of pleadings should be eliminated.

Federal Rule 11 provides for the signing of pleadings by an attorney if the party is represented by an attorney. Further, the rule eliminates the requirement of verification of pleadings. See Fed. Rules Civ. Proc. 11 (Exhibit VII--gold). The Commission has already recommended that the substance of Rule 11 be substituted in eminent domain cases for the requirements of subscription by the party and verification. See Tentative Recommendation Relating to Condemnation Law and Procedure: The Eminent Domain Law, 12 Cal. L. Revision Comm'n Reports § 1250.330 at 165 (1974).

Present California law requires subscription of the pleadings by either the party or his attorney. Code Civ. Proc. § 446. Under this section, verification is not necessary except in cases specifically required by statute. 2 B. Witkin, California Procedure § 347 (2d ed. 1971); California Civil Procedure Before Trial 328-330 (Cal. Cont. Ed. Bar 1957). However, control of the question of verification, except in specifically enumerated cases, is left to the discretion of the plaintiff. If the plaintiff chooses to verify, the defendant is forced to do so. If the complaint is verified, the answer must be verified and must be specific and not general.

This option places the plaintiff in some difficult situations. First, if the plaintiff does not verify the complaint, it may be considered by some

to be an indication of less than full commitment to the cause of action. Additionally, if the plaintiff lives within the county in which his attorney has his offices, he must sign a verification himself rather than have the attorney sign for him. A plaintiff must sign a technical pleading under penalty of perjury and be subject to cross-examination based on the phrasing of the pleadings when the plaintiff may find it difficult to understand the technical language of the pleadings.

The trend is toward elimination of the requirement of verification which has been termed "the all too barren formality of an oath to pleading." 2 Wright & Miller, Federal Practice and Procedure § 1335 (1969). See, e.g., Proposal of Oregon State Bar Association Committee:

> 3. *Elimination of Requirement of Verification of Pleadings* (Exhibit C).
>
> Present Oregon law requires that all pleadings, except a demurrer, shall be verified by a party, his agent or attorney, to the effect that he believes it to be true. The proposed amendment would eliminate the requirement that pleadings be verified and simply require that the pleadings be subscribed by a party or a resident attorney of the state.
>
> This change in the law is sought for the reason that the verification is neither meaningful nor useful. The use of verified pleadings to impeach a party is rarely effective, and the mechanics of obtaining the verification are often inconvenient and time consuming for client and lawyer alike, thereby increasing the expense of legal services.

Class Actions

At the September 1973 meeting, the Commission considered the suggestion for a comprehensive study of class actions in California courts (see Exhibit VIII) and determined not to study the question at that time. However, the Commission requested that class actions again be presented for consideration when proposed topics for this year were considered. The staff recommends that, since we have a considerable agenda of large topics presently under consideration, it would not be desirable to undertake a study of this rapidly developing field of law.

Domestic Relations

Exhibit I notes two practices in the area of domestic relations law which need clarification:

(1) Entry of a final decree of divorce over the objection of an attorney who has not been paid.

(2) Denial by the trial court of visitation and/or custody modification or enforcement in a case in which the moving pary is delinquent in support payments.

The staff recommends that, since there are a number of large topics presently under study and since consideration of the proposed matters would necessarily require broader study of enforcement in domestic cases, the Commission not request authorization to study these matters at this time.

Changes in Discovery Procedures in Conformity With Changes in Federal Rules

In 1957, California adopted the discovery provisions of the Federal Rules of Civil Procedure with but few alterations. Effective July 1, 1970, the federal discovery rules were amended to clarify and add a number of provisions. The staff recommends that the Commission request that it be authorized to study discovery procedures so that these changes--especially the primary ones listed below--may be considered by the Commission for possible adoption into California law:

1. Requirement of showing of good cause for production of documents. Originally, Federal Rule 34 (Exhibit IX) required a party to obtain a court order upon a showing of good cause to discover documents or other items of evidence in the hands of an opposing party. In 1970, Federal Rule 34 was altered to permit discovery of such items on a simple request to the party. In the vast majority of cases, the showing proved a waste of time and money since discovery was routinely granted. Further, studies of the federal cases indicated that, in the large majority of cases in which litigants sought discovery of documents, court orders were not actually sought. The parties dealt with the requests extrajudicially. See Exhibit IX (Notes on Amendment to Federal Rule 34). Under the present federal rule, the burden is shifted to the objecting party to go to court for protection in those relatively few instances in which discovery is improper.

Under Code of Civil Procedure Section 2031(a), California retains the requirement of a showing of good cause to obtain the production of documents. The requirement has been eliminated in a number of states (e.g., New York). It is recognized that, in California, to avoid the requirement of a showing of good cause, most attorneys agree on discovery without the necessity of a court order. However, in those cases in which a court hearing is held,

there is unnecessary expense and waste of valuable court time. Adoption of the federal rule would eliminate situations where slavish adherence to the rules are a burden on the system and add to the cost of litigation.

2. Protection of expert opinion under work product rule. In 1970, Federal Rule 26(b)(Exhibit X) was amended to add a specific work product rule covering expert information. This section permits discovery of the opinions of a party's expert only after it is determined that the expert will be a witness at trial. Further, a party may discover facts known or opionions held by an expert retained by another party in anticipation of litigation or preparation for trial who is not expected to be called as a witness only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain the facts or opinion on the same subject by other means. The risk that a party will seek to benefit unduly by deposing the other party's expert is minimized by the requirement that the discovery is limited to trial witnesses and may only be obtained at a time when the parties know who their experts are to be. A party must as a practical matter prepare his own case in advance of that time since he cannot hope to build his case out of his opponent's witness.

After a number of cases in which the California courts rejected the work product theory of privilege--see Greyhound Corp. v. Superior Court, 56 Cal.2d 355, 15 Cal. Rptr. 90 (1961); Suezaki v. Superior Court, 58 Cal.2d 166, 23 Cal. Rptr. 368 (1962)--the State Bar sponsored statutory changes which were adopted in 1963 and constituted a statutory work product rule for California. Code Civ. Proc. § 2016(b), (g). However, this section contained no specific reference to the problem of expert opinion. Two California cases have recognized the need for protection in appropriate situations of the opinions of experts employed by the parties in preparation for trial. Oceanside

Union School District v. Superior Court, 58 Cal.2d 180, 23 Cal. Rptr. 375 (1962); San Diego Professional Ass'n v. Superior Court, 58 Cal.2d 194, 23 Cal. Rptr. 384 (1962). Although these cases suggest a California rule which would generally conform to Federal Rule 26(b)(4), a rule clarifying the details of the privilege under California Law would be useful.

3. Deposition of a corporation or association. Federal Rule 30(b)(6) (Exhibit XI) was added in 1970 to permit a deposition of a corporation or association. Previously, as in California, an interrogatory could be sent to a corporation to be answered with "corporate knowledge," but there was no way to obtain these advantages by deposition. One could take the deposition of a specific corporate employee but, frequently, the employee chosen did not know the information required, and the deposition proved a waste of time. The new rule requires the party in his subpoena to describe with reasonable particularity the matters on which examination is requested. The organization named is then required to designate a person or persons who have the pertinent knowledge who then testify at the deposition as to matters known or reasonably available to the organization. The addition of this type of procedure would seem quite useful in California.

4. Supplementation of discovery responses. Federal Rule 26(e) was added in 1970 to require a party who has responded to a request for discovery to supplement his response to include information thereafter acquired under certain limited circumstances. Exhibit X. These exceptions basically have to do with identity of a possible witness learned after the prior discovery or the name of an expert witness to be used at trial and the subject matter and substance of the expert's testimony. Similarly, the party is required to amend prior responses if he learns that the prior response was incorrect or, though the response was correct when made, is no longer correct and circumstances are such that a failure to amend the response is in substance a knowing concealment.

The alternative to requirement of supplementation is a new set of interrogatories served as close to trial as possible. Because courts often require discovery to be completed a certain number of days before trial, newly discovered information may in fact be hidden. Serious consideration should be given to adoption of a California rule similar to Rule 26(e).

Appellate Review

Mr. Merzon (Exhibit I, item 2) suggests that the Commission undertake a study of the field of appellate review. This would be a major undertaking, and there has not been a showing that there is a need for such revision at this time.

Respectfully submitted,

Jo Anne Friedenthal
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Memorandum 74-54 EXHIBIT I

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March 21, 1974

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Dear Mr. Sandstrom:

Your thoughtful and very explanatory March 7, 1974, reply to my earlier correspondence is very much appreciated. One is certainly encouraged to comment upon pending Commission topics when one's comments are so promptly acknowledged and the Commission goes out of its way to make it clear that the comments are sincerely appreciated.

I do want to take a moment to reply to your inquiry regarding my thoughts for areas of appropriate Commission study. My first reaction was to carve out a great deal of time so that a well thought out and detailed suggestion list could be submitted. However, I have just not been able to devote the time necessary to comprehensively make suggestions to the Commission and I felt rather than putting the matter off for what may be an indefinite period, I would instead make some "off-the-top-of-the-head" suggestions.

1. In the area of probate, several areas could undergo revision. Indeed, the whole subject itself, as some have suggested, needs to be revamped. For example, California Inheritance taxation of contingent remainders has always posed a serious tax threat to any testator who wishes to give some type of flexibility to his estate. California law requires that the highest contingency be assumed and that the tax be correspondingly figured. However, as a recent appellate case has discussed, this is not necessarily the practice followed by the Controller's office in all instances. Some type of uniform procedure should be adopted and one which recognizes the practicality of the eventual remainderman would be preferable.

Another area that stands review is the area of statutory commissions, particularly for attorney services. There doesn't seem to be much utility behind a statute which permits an attorney to charge on a percentage basis regardless of the fact that he may have devoted a minimal amount of time to the handling of an estate. There is no lamer explanation an attorney can give to a client in order to explain the fees than the explanation that he is required to so charge by statute.

2. The field of appellate review could stand revision. I am aware that many efforts are under foot to restrict the workload of the appellate courts, however, it seems to me that the Commission is among the least biased and among the most able to make suggestions and revisions in this area.

3. CCP 998, "Offers for Settlement," and the area of settlement in general needs revision. For example, does a 998 offer carry with it reimbursement of court costs incurred to the date of the offer or not? What is the effect of the offer, since the judgment would ordinarily carry with it the right to recover court costs? Also, there appears to be great justification in encouraging settlements by requiring that the defendant (the insurance carrier) pay a realistic interest rate from the date of injury, or possibly, from the date of an offer by the plaintiff.

4. In the area of domestic relations, the law could be clarified to either require or prevent the practice adopted by some courts, but not by others, which prevents the entry of a Final over the objections of an attorney who hasn't been paid attorney fees. The practice is not uniform and there is every reason that it should be. Also, statutory clarification should be given to the power of trial courts to deny visitation and/or custody modification or enforcement where the moving party is delinquent in support payments. Again, the practice is not uniform and it most certainly should be. Another area of law which infiltrates the domestic area is the so-called "Community Joint Tenancy."

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In this regard, an article in the most recent Bar Journal identifies the problem and points out how pervasive it is.

5. Video tapes are emerging as a useful courtroom and discovery tool. Statutory recognition and procedural regulation of its use is needed.

6. In the area of homestead law, I have recently come across an uncertainty which is not as esoteric as it might seem at first glance. It involves priority where the sequence of events is as follows: Recordation of Abstract of Judgment, recordation of Title, somewhat concurrent recordation of Homestead Declaration. Case law seems to give the Declaration priority over the judgment lien, but the parameters of the protection are not at all clear. See Belieu vs. Power, 54 Cal. App. 244. This kind of problem touches virtually any judgment debtor who wishes to acquire a home.

I hope my thoughts, as random as they are, may be of some help. I am happy to contribute in whatever manner I may to the working of the Commission and hope that if the need arises, the Commission will feel free to call upon me in the future.

Again, thank you for your very cordial and informative correspondence.

Sincerely,

JAMES B. MERZON

JBM:ljt

REPORT OF COMMITTEE ON REAL PROPERTY OF OREGON STATE BAR (1974)

REAL PROPERTY

The Committee recommends:

2. ***That the Oregon State Bar approve a bill placing a limitation on the right of reverter and curing title problems of old, outdated and antiquated rights of reverter.*** (Exhibit B.)

DISCUSSION OF RECOMMENDATIONS

2. *Limiting Possibilities of Reverter and Powers of Termination*

A grantor may transfer real property and provide that if a specific condition occurs the title will automatically revert to the grantor or his heirs. For example, A may convey land "to B so long as the property is used for school purposes." This estate is called a "determinable fee" and the retained interest of A and his heirs is called a "possibility of reverter." See Simes, Future Interests 41-44 (1951). Similarly, a grantor may provide that if a specific condition occurs the grantor or his heirs may elect to forfeit the estate created. For example, A may convey land "to B provided always the property is used for school purposes." The estate so created is called a "condition subsequent" and the retained interest of the grantor and his heirs is called a "power of termination" or a "right of entry for condition broken." See Simes Future Interests 44-47 (1951).

Under present law, there is no time limit within which the condition must occur. The time limit of the Rule against Perpetuities does not apply to possibilities of reverter or powers of termination, despite the fact that the rule would have imposed a time limit had the grantor provided that upon happening of the condition, the title would pass to someone other than the grantor or his heirs. See Simes, Future Interests 379 (1951). Moreover, unlike equitable servitudes created by restrictive covenants, the courts have no power to apply equitable principles in order to free property from possibilities of reverter or powers of termination after the condition becomes obsolete.

The lack of time limitations on possibilities of reverter and powers of termination have impaired the marketability of real estate. The mere existence of such interests makes the property so burdened unmortgageable for financing purposes and may impair the ability to sell the property. Moreover, the original grantor may long be dead, his heirs scattered near and far or undeterminable, and the condition no longer relevant; yet the courts are powerless to clear the title. In current times, restrictive covenants tend to be used in lieu of current possibilities of reverter and powers of termination. Nevertheless, many such interests created in earlier times remain on the records burdening property.

For these reasons it has long been recognized that the law should restrict the duration of these limitations in some manner. In 1957 the American Bar Association Committee on Real Property, Probate and Trust Law approved the report of its Committee on Improvement of Conveyancing and Recording Practices suggesting such a limitation. This resulted in model legislation which is set forth in Simes and Taylor, Improvement of Conveyancing by Legislation, Title 19 (1960).

The legislation proposed by our Committee is a slightly modified version of the model legislation contained in Professor Simes' book. The purpose of this legislation is to limit the duration of any possibility of reverter or power of termination to a designated number of years. This is done in two ways. First, prospectively, any special limitation or condition subsequent which restricts a fee simple estate in land created after the effective date of the proposed act is extinguished or ceases to be valid if the condition does not occur within 30 years after its creation. Second, because there is some question whether presently existing possibilities of reverter and powers of termination may constitutionally be extinguished, the bill does not extinguish such limitations existing on the effective date of the act, but requires the recording of a notice to keep the limitations alive. The notice must be recorded not less than 28 years nor more than 30 years after the limitation was created, except that if the limitation was created more than 28 years before the effective date of the Act, the notice may be recorded any time within two years after the effective date of the Act. Thereafter, renewal notices must be filed every 28 to 30 years in order to preserve the limitation. The bill provides that the notice may be filed by any one of the persons then holding the possibility of reverter or power of termination, and permits a conservator to file the notice on behalf of any minor or incapacitated person who is an owner or part owner of the interest.

The proposed legislation applies only to possibilities of reverter and powers of termination which restrict fee simple title and does not apply to possibilities of reverter and powers of termination restricting leases or life estates. The proposed legislation also does not affect equitable servitudes -- that is, conditions and restrictions enforceable in equity but which do not divest title. Accordingly, any grantor who wishes to limit the use of real property for a period longer than 30 years, could do so by an equitable servitude.

EXHIBIT B
A BILL FOR
AN ACT

Relating to real property.

Be It Enacted by the People of the State of Oregon:

Section 1. (1) A special limitation or a condition subsequent, which restricts a fee simple estate in land, and the possibility of reverter or right of entry for condition broken thereby created, shall, if the specified contingency does not occur within thirty years after the possibility of reverter or right of entry was created, be extinguished and cease to be valid.

(2) This section shall apply only to inter vivos instruments taking effect after January 1, 1976, to wills where the testator dies after such date, and to appointments made after such date, including appointments by inter vivos instruments or wills under powers created before such date.

Section 2. The following shall apply to all possibilities of reverter and rights of entry limited on fees simple existing on January 1, 1976:

(1) A special limitation or a condition subsequent, which restricts

a fee simple estate in land, and the possibility of reverter or right of entry for condition broken thereby created, shall be extinguished and cease to be valid, unless within the time specified in this section, a notice of intention to preserve such possibility of reverter or right of entry is recorded as provided in this Act. Such extinguishment shall occur at the end of the period in which the notice or renewal notice may be recorded.

(2) Any person having such possibility of reverter or right of entry may record in the deed records of the county in which the land is situated a notice of intention to preserve such interest. Such notice may be filed for record by any person who is the owner or part owner of such interest, in which case the notice shall be effective as to the person filing the notice and any other person who is a part owner thereof. If any owner or part owner is a minor or incapacitated person, as defined in ORS 126.003, the notice may be filed by a conservator appointed pursuant to a protective proceeding under ORS 126.157.

(3) To be effective and to be entitled to record, such notice shall contain an accurate and full description of all land affected by such notice; but if such claim is founded upon a recorded instrument, then the description may be by reference to the recorded instrument. Such notice shall also contain the terms of the special limitation or condition subsequent from which the possibility of reverter or right of entry arises. The notice shall be executed, acknowledged, proved and recorded in each county in which the land is situated in the same manner as a conveyance of real property. In indexing such notices the county clerk shall enter such notices under the grantee indexes of deeds under the names of the persons on whose behalf such notices are executed.

(4) An initial notice may be recorded not less than twenty-eight years, nor more than thirty years, after the possibility of reverter or right of entry was created; provided, however, if such possibility of reverter or right of entry was created prior to January 1, 1948, the notice may be recorded within two years after January 1, 1976. A renewal notice may be recorded after the expiration of twenty-eight years and before the expiration of thirty years from the date of recording of the initial notice, and shall be effective for a period of thirty years from the recording of such renewal notice. In like manner, further renewal notices may be recorded after the expiration of twenty-eight years and before the expiration of thirty years from the date of recording of the last renewal notice.

Respectfully submitted,

Committee on Real Property

Raymond R. Bagley, Jr., John T. Chinnock, Howard M. Feuerstein, Ron R. Fundingsland, C.H. McGirr, J. Christopher Minor, G.F. Rakestraw, Raymond R. Reif, George C. Reinmiller, Dan VanThiel, Orrin R. Ormsbee, Secretary, James A. Larpenteur, Jr., Chairman

Memo 73-54 EXHIBIT IV

LAW OFFICES
WALKER, SCHROEDER, DAVIS & BREHMER

GEORGE R. WALKER
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May 28, 1974

Mr. John DeMoully
Executive Secretary
Law Revision Commission
Stanford, CA 94305

Re: Moving Trusts into California

Dear John:

I have just gone through the frustrating experience of obtaining authority from the Superior Court of the State of California in Monterey to transfer a New York testamentary trust here with the permission of the New York Court. The New York Court had insisted that I get some concurrence in the form of an order from Californi before they would issue their order. For that purpose I prepared and filed the enclosed petition, points and authorities and finally obtained the enclosed order, which was what I needed for New York but not terribly artful. I enclose also a discussion from Condee on probate which discusses the problem.

As you are probably aware Probate Code §1132 was amended several years ago to permit the transfer of California trusts to other states, but no such statue exists for the reverse. I believe the Law Revision Commission would be doing a service to the Bar and the public by proposing a brief statute authorizing this, even if it simply incorporated the provisions of the new existing statute by a reference, or by some other manner. There certainly is no clear authority for the action and it occurs more and more as our citizens travel from state to state.

Very truly yours,

G. Gervasie Davis III

3:kp

§ 1850. Transfer of a Trust from Another State

Is it possible to transfer the trust estate from another state to the probate court in California? It might be a good thing for some legislative action in regard to this matter as there are many trusts in Eastern probate and in Surrogates' Courts in which all of the parties, both trustees and beneficiaries, have removed to California and in many cases the Surrogates are willing to transfer the cases if supervision can be taken over in California. Our Supreme Court has stated in Wells Fargo Bank case, in holding that an inter vivos trust could not be brought into the probate court as part of a testamentary trust, that the jurisdiction of the probate court is limited to trusts created by wills. This of course does not answer the question because the trusts which are removed to California are created under will.[50]

There are two cases in the Superior Court of Los Angeles County wherein trusts from other jurisdictions have been brought to California and administered. The first was brought under the petition of certain beneficiaries and a corporate trustee by way of petition for the appointment of a succeeding trustee. The petition set out all the facts of the administration of the estate in the foreign jurisdiction, set out copies of the will, of the decree of distribution, and all other matters in connection with that estate, and in the prayer asked that the local corporate trustee be appointed trustee under said last will. This was done

54. West's Ann.Cal.Probate Code, §§ 1132, 1133, 1134, 1135, 1136.

55. West's Ann.Cal.Probate Code, § 1134, Statutes 1957, chap. 440.

56. Wells Fargo Bank v. Superior Court (1948) 32 C.2d 1, 193 P.2d 721.

and in 1921 the judge sitting in probate made an order appointing a successor trustee to carry out the terms of the trust as were set out in the will attached to the petition. Thereafter annual accounts were filed in this matter for a number of years until the trust eventually terminated by its terms and a final account and an order for distribution was made.[57]

More recently a petition was filed asking for the appointment of a trustee under a will for an estate which had been administered in Michigan. As in the Van Frank petition, all of the facts concerning the Michigan estate were set forth, including copies of the will and orders of distribution. This was filed as a probate matter but the keeping of the file in segregated groups is probably only a housekeeping function of the County Clerk and if the petition states any cause of action within the jurisdiction of the Superior Court it may be considered by the court irrespective of the type of file in which the petition is kept. This matter was referred by the presiding judge to the probate department, ordering that it be heard as a petition in equity. An order was thereupon made appointing the trustee and retaining continuing jurisdiction over the proceedings for administration in the State of California for the trust, as established by the will. Presumably this trust will be processed in the probate department because it is the type of account and trust proceeding which is usually handled there, but it has not been accepted as was the older case, as a clear probate matter.[58]

There may be some doubt, however, if the court has any effective jurisdiction over a trust of this character attempted to be transferred from the probate or surrogate's court of another state. A demurrer was sustained without leave to amend on a petition to approve an accounting of a private trust. It was held that the probate code confers jurisdiction in these matters only to trusts created by estates distributed in that court, and there is no special proceeding provided for the approval of a private trust where no dispute or controversy exists.[59] There is another case which throws doubt on the possibility of bringing a trust into this state under present laws. This case held that although the superior court had appointed a trustee it could not later settle his accounts unless there was a controversy and a new equity action was started.[60]

57. Estate of Philip Riley Van Frank, L.A.Sup.Ct. No. 51165.

58. Estate of Costello, L.A.Sup.Ct. No. 347947.

59. Gillette v. Gillette (1932) 122 C.A. 640, 10 P.2d 760.

60. Oil Well Supply Co. v. Superior Court (1935) 9 C.A.2d 624, 51 P.2d 908.

It is doubtful if the 1959 amendments permitting additions to testamentary trusts from other sources will be any help in transferring trusts from other states to the probate courts in California unless there is an estate here, ancillary or otherwise.[61]

If the estate in California does not provide for a trust it might be possible to petition in the estate to appoint a trustee on the grounds a trust fund is expected from another source.[62]

61. West's Ann.Cal. Probate Code, §§ 1120–1120.1, Statutes 1959, chap. 804, §§ 1, 2.

62. West's Ann.Cal. Probate Code, § 1125.

Memorandum 74-54

EXHIBIT VI

Reform of Jury System Urged by County Agency

By Bob de Cartaret

The Los Angeles County Judicial Procedures Commission wants state legislation to make juries more representative of the community.

"In recent times, there has been much criticism of juries because there is insufficient participation by wage earners, students and minority groups, in view of the financial hardships involved in jury service," stated Herman T. Smith, acting chairman of the judicial procedures commission, in a report to the county Board of Supervisors.

The commission asked the Board of Supervisors, which presently has the report under consideration, to recommend that the state legislature broaden the base of the jury system.

One area recommended was to increase a juror's compensation from $5 a day to $25, with the cost in civil trials to be paid half by the litigants and half by the counties and the state.

Incentives, such as tax credits, should be provided to employers who make up any income loss to employees on jury duty, the report continued.

While retaining exemptions based on hardship, the commission recommended that exemptions for jury duty be eliminated to the greatest extent possible.

The commission also asked that the base for selection of jurors be expanded by using the list of licensed drivers in addition to the presently used voter's list.

The final recommendation by the commission was aimed at providing fairness to both parties under jury trial conditions.

It is as follows:

"If a party requests a jury and posts jury fees, and wishes to waive jury, he must give notice of waiver to the opposing party no later than 30 days prior to trial."

In the event, the report stated, the notice is not given, the party requesting the jury is responsible for jury costs unless, of course, the verdict is in his favor.

Smith said the reason for this rule is to prevent a party from dropping the jury on the day of trial, preventing the opposing party from his right to jury because he could not come up with the required funds.

Although "there will be increased cost resulting from the proposals ... we feel that it is important to maintain the integrity of our jury system," Smith said in the report to the supervisors.

In an interview with Frank Zolin, executive officer of the Los Angeles Superior Court, Zolin said he favors the principle of the commission's proposals.

Zolin said that the court for many years has been on record for an increase in jury fees.

However, he said, a costs-benefits study should be made on the proposal to include the driver's license list with the voter's list in seeking jurors.

Zolin cautioned that duplication would be high because many persons use their common name on the voter's list and their formal name on the driver's list.

Here the cost of preventing duplication would be great, he said.

Zolin also suggested that a study should be made to determine whether attorneys can decide 30 days prior to trial if they want a jury.

Zolin said he supports the plan to prevent the dropping of juries on the day of the trial, but is not sure that 30 days is adequate.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 11.

SIGNING OF PLEADINGS

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Memorandum 74-54

EXHIBIT VIII

UNIVERSITY OF CALIFORNIA, DAVIS

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SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW

DAVIS, CALIFORNIA 95616

May 31, 1973

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Pursuant to our telephone conversation of yesterday, I am writing to suggest that the Commission undertake a comprehensive study of class actions in California courts, and to offer my services as a consultant for such a study.

The increasing use of the class suit in an increasing variety of contexts makes desirable a systematic and disinterested examination of the procedural and administrative problems associated with this type of suit. The California Supreme Court has given considerable encouragement to class actions, but has expressly left unresolved problems of implementation of the class suit. (Vasquez v. Superior Court [1971] 4 Cal.3d 800, at 820). The Consumer Legal Remedies Act (CC §§ 1750-1784) provides some guidance for the management of class suits in the substantive realm with which that statute is concerned. In Los Angeles, there is now in use a Manual for Conduct of Pretrial Hearings on Class Action Issues, a document that might afford a firm foundation for a sound administration of class action issues, but which expressly disavows taking positions on "issues of law concerning class actions which are in dispute." (Foreward, p. i). Rule 23 of the Federal Rules of Civil Procedure, from which our state courts may and do seek guidance, is subject to considerable controversy among federal judges with respect to such crucial questions as the viability of the class suit in a particular case, the requirements of notice, and the nature of the allowable recovery. (See Eisen v. Carlisle & Jacquelin, Second Circuit Court of Appeals, May 1, 1973, 41 L.W. 2586). I believe the courts and the Legislature have had sufficient experience with class actions in their modern usages, that the time is now appropriate for a thorough examination of the problems involved.

Thank you for your consideration.

Very truly yours,

Dov M. Grunschlag

Dov M. Grunschlag
Professor of Law

Memorandum 74-54

EXHIBIT IX

Rule 34.

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) **Procedure.** The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

As amended Dec. 27, 1946, eff. March 19, 1948; March 30, 1970, eff. July 1, 1970.

Notes on Amendments to Federal Rule 34 and Comparative State Provisions

(a) *Amendments in 1970 to Rule 34*

The Advisory Committee commented on the 1970 amendments to Rule 34 as follows:

Rule 34 is revised to accomplish the following major changes in the existing rule: (1) to eliminate the requirement of good cause; (2) to have the rule operate extrajudicially; (3) to include testing and sampling as well as inspecting or photographing tangible things; and (4) to make clear that the rule does not preclude an independent action for analogous discovery against persons not parties.

Subdivision (a). * * * The good cause requirement was originally inserted in Rule 34 as a general protective provision in the absence of experience with the specific problems that would arise thereunder. As the note to Rule 26(b)(3) on trial preparation materials makes clear, good cause has been applied differently to varying classes of documents, though not without confusion. It has often been said in court opinions that good cause requires a consideration of need for the materials and of alternative means of obtaining them, *i. e.*, something more than relevance and lack of privilege. But the overwhelming proportion of the cases in which the formula of good cause has been applied to require a special showing are those involving trial preparation. In practice, the courts have not treated documents as having a special immunity to discovery simply because of their being documents. Protection may be afforded to claims of privacy or secrecy or of undue burden or expense under what is now Rule 26(c) (previously Rule 30(b)). To be sure, an appraisal of "undue" burden inevitably entails consideration of the needs of the party seeking discovery. With special provisions added to govern trial preparation materials and experts, there is no longer any occasion to retain the requirement of good cause.

The revision of Rule 34 to have it operate extrajudicially, rather than by court order, is to a large extent a reflection of existing law office practice. The Columbia Survey shows that of the litigants seeking inspection of documents or things, only about 25 percent filed motions for court orders. This minor fraction nevertheless accounted for a significant number of motions. About half of these motions were uncontested and in almost all instances the party seeking production ultimately prevailed. Although an extrajudicial procedure will not drastically alter existing practice under Rule 34—it will conform to it in most cases—it has the potential of saving court time in a substantial though proportionately small number of cases tried annually. * * *

Subdivision (c). Rule 34 as revised continues to apply only to parties. Comments from the bar make clear that in the preparation of cases for trial it is occasionally necessary to enter land or inspect large tangible things in the possession of a person not a party, and that some courts have dismissed independent actions in the nature of bills in equity for such discovery on the ground that Rule 34 is preemptive. While an ideal solution to this problem is to provide for discovery against persons not parties in Rule 34, both the jurisdictional and procedural problems are very complex. For the present, this subdivision makes clear that Rule 34 does not preclude independent actions for discovery against persons not parties.

EXHIBIT X

DEPOSITIONS AND DISCOVERY **Rule 30**

Rule 30.

DEPOSITIONS UPON ORAL EXAMINATION

(a) When Depositions May be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b) (2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of Examination: General Requirements; Special Notice; Non-Stenographic Recording; Production of Documents and Things; Deposition of Organization.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subdivision (b) (2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in

which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b) (6) does not preclude taking a deposition by any other procedure authorized in these rules.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 43(b). The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b) (4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a 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 Rule 26(c). 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. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d) (4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing. (1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

As amended Jan. 21, 1963, eff. July 1, 1963; March 30, 1970, eff. July 1, 1970; March 1, 1971, eff. July 1, 1971.

Notes on Amendments to Federal Rule 30 and Comparative State Provisions

(a) *Amendments in 1970 to Rule 30 and Reorganization of the Discovery Rules*

See the Notes on Amendments to Federal Rule 26 for a discussion of the 1970 reorganization of the discovery provisions, which has had an important effect on Rule 30. Rule 26 now deals solely with the general scope of discovery whereas Rule 30 governs all details of oral depositions.

In addition to the reorganization, the 1970 amendments to Rule 30 included a number of important alterations in the deposition practice.

The Advisory Committee commented on these alterations as follows:

Subdivision (a). * * * [Prior to the amendments a party was required to obtain leave of court if notice was served within 20 days after commencement of the action.]

The purpose of requiring the plaintiff to obtain leave of court is * * * to protect "a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit." Note to 1948 amendment of Rule 26(a), quoted in 3A Barron & Holtzoff, *Federal Practice and Procedure* 455–456 (Wright ed. 1958). In order to assure defendant of this opportunity, the period is lengthened to 30 days. This protection, however, is relevant to the time of taking the deposition, not to the time that notice is served. Similarly, the protective period should run from the service of process rather than the filing of the complaint with the court. * * *

Plaintiff is excused from obtaining leave even during the initial 30-day period if he gives the special notice provided in subdivision (b)(2). The required notice must state that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or out of the United States, or on a voyage to sea, and will be unavailable for examination unless deposed within the 30-day period. These events occur most often in maritime litigation, when seamen are transferred from one port to another or are about to go to sea. Yet, there are analogous situations in nonmaritime litigation, and although the maritime problems are more common, a rule limited to claims in the admiralty and maritime jurisdiction is not justified. * * *

Subdivision (b)(5). A provision is added to enable a party, through service of notice, to require another party to produce documents or things at the taking of his deposition. This may now be done as to a nonparty deponent through use of a subpoena duces tecum as authorized by Rule 45, but some courts have held that documents may be secured from a party only under Rule 34. See 2A Barron & Holtzoff, *Federal Practice and Procedure* § 844.1 n. 83.2, § 792 n. 16 (Wright ed. 1961). With the elimination of "good cause" from Rule 34, the reason for this restrictive doctrine has disappeared. * * * If the discovering party insists on examining many and complex documents at the taking of the deposition, thereby causing undue

burdens on others, the latter may, under Rules 26(c) or 30(d), apply for a court order that the examining party proceed via Rule 34 alone.

Subdivision (b) (6). A new provision is added, whereby a party may name a corporation, partnership, association, or governmental agency as the deponent and designate the matters on which he requests examination, and the organization shall then name one or more of its officers, directors, or managing agents, or other persons consenting to appear and testify on its behalf with respect to matters known or reasonably available to the organization. *Cf.* Alberta Sup.Ct.R. 255. The organization may designate persons other than officers, directors, and managing agents, but only with their consent. Thus, an employee or agent who has an independent or conflicting interest in the litigation—for example, in a personal injury case—can refuse to testify on behalf of the organization. * * *

The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. It will reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a "managing agent." See Note, *Discovery Against Corporations Under the Federal Rules*, 47 Iowa L.Rev. 1006–1016 (1962). It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. *Cf. Haney* v. *Woodward & Lothrop, Inc.*, 330 F.2d 940, 944 (4th Cir. 1964). The provision should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge. Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. *E. g., United States* v. *Cahagan Dredging Corp.*, 24 F.R.D. 328, 329 (S.D.N.Y.1958). This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge. * * *

Memorandum 74-54

EXHIBIT XI

V. DEPOSITIONS AND DISCOVERY

Rule 26.

GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery 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 party seeking discovery 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 any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance Agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b) (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b) (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant,

surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b) (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b) (4) (C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circum-

stances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b) (4) (A) (ii) and (b) (4) (B) of this rule; and (ii) with respect to discovery obtained under subdivision (b) (4) (A) (ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b) (4) (B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the

interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) **Supplementation of Responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; March 30, 1970, eff. July 1, 1970.

Notes on Amendments to Federal Rule 26 and Comparative State Provisions

(a) Amendments In 1970 to Federal Rule 26 and Reorganization of the Discovery Rules

1. **Nature and Extent of the 1970 Reorganization**

In 1070 the federal discovery provisions, and in particular Rules 26 and 30, were the subject of a general reorganization and substantive revision. The basic renumbering was as follows:

Prior Rule No.	New Rule No.
26(a)	30(a), 31(a)
26(c)	30(c)
26(d)	32(a)
26(e)	32(b)
26(f)	32(c)
30(a)	30(b)
30(b)	26(c)
32	32(d)

Rule 26 is now a general rule clearly governing the scope of all the various discovery devices. In section (b) it contains a number of important provisions defining and, in some situations, altering the scope of permissible discovery.

2. **Advisory Committee Comments on Substantive Alterations in Rule 26**

The Advisory Committee commented on changes in Rule 26 as follows:

Subdivision (b)(2)—Insurance policies. Both the cases and commentators are sharply in conflict on the question whether defendant's liability insurance coverage is subject to discovery in the usual situation where the insurance coverage is not itself admissible and does not bear on another issue in the case. * * *

The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. See cases collected in 2A Barron & Holtzoff, *Federal Practice and Procedure* § 647.1, nn. 45.5, 45.6 (Wright ed. 1961). It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated. The question is essentially procedural in that it bears upon preparation for trial and settlement before trial, and courts confronting the question, however they have decided it, have generally treated it as procedural and governed by the rules.

The amendment resolves this issue in favor of disclosure. Most of the decisions denying discovery, some explicitly, reason from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence; they avoid considerations of policy, regarding them as foreclosed. See *Bisserier v. Manning, supra.* Some note also that facts about a defendant's financial status are not discoverable as such, prior to judgment with execution unsatisfied, and fear that, if courts hold insurance coverage discoverable, they must extend the principle to other aspects of the defendant's financial status. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In *Clauss v. Dunker*, 264 F.Supp. 246 (S.D.N.Y.1967), the court held that the rules forbid disclosure but called for an amendment to permit it.

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy. * * *

The provision applies only to persons "carrying on an insurance business" and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. * * *

In no instance does disclosure make the facts concerning insurance coverage admissible in evidence.

Subdivision (b)(3)—Trial Preparation: Materials. Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial. The existing rules make no explicit provision for such materials. Yet, two verbally distinct doctrines have developed, each conferring a qualified immunity on these materials—the "good cause" requirement in Rule 34 (now generally held applicable to discovery of documents via deposition under Rule 45 and interrogatories under Rule 33) and the work-product doctrine of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). Both demand a showing of justification before production can be had, the one of "good cause" and the other variously described in the *Hickman* case: "necessity or justification," "denial * * * would unduly prejudice the preparation of petitioner's case," or "cause hardship or injustice" 329 U.S. at 509–510. * * *

The major difficulties visible in the existing case law are (1) confusion and disagreement as to whether "good cause" is made out by a showing of relevance and lack of privilege, or requires an additional showing of necessity, (2) confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers, and (3) the resulting difficulty of relating the "good cause" required by Rule 34 and the "necessity or justification" of the work-product doctrine, so that their respective roles and the distinctions between them are understood. * * *

The rules are amended by eliminating the general requirement of "good cause" from Rule 34 but retaining a requirement of a special showing for trial preparation materials in this subdivision. The required showing is expressed, not in terms of "good cause" whose generality has tended to encourage confusion and controversy, but in terms of the elements of the special showing to be made: substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means.

These changes conform to the holdings of the cases, when viewed in light of their facts. Apart from trial preparation, the fact that the materials sought are documentary does not in and of itself require a special showing beyond relevance and absence of privilege. * * *

Elimination of a "good cause" requirement from Rule 34 and the establishment of a requirement of a special showing in this subdivision will eliminate the confusion caused by having two verbally distinct requirements of justification that the courts have been unable to distinguish clearly. Moreover, the language of the subdivision suggests the factors which the courts should consider in determining whether the requisite showing has been made. The importance of the materials sought to the party seeking them in preparation of his case and the difficulty he will have obtaining them by other means are factors noted in the *Hickman* case. The courts should also consider the likelihood that the party, even if he obtains the informa-

tion by independent means, will not have the substantial equivalent of the documents the production of which he seeks.

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision. *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963); *cf. United States v. New York Foreign Trade Zone Operators, Inc.*, 304 F.2d 792 (2d Cir. 1962). No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.

Treatment of Lawyers; Special Protection of Mental Impressions, Conclusions, Opinions, and Legal Theories Concerning the Litigation.—The courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. The *Hickman* case left this issue open since the statements in that case were taken by a lawyer. * * *

Subdivision (b) (3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure [of] the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted. * * *

Party's Right to Own Statement.—An exception to the requirement of this subdivision enables a party to secure production of his own statement without any special showing. The cases are divided. * * *

Courts which treat a party's statement as though it were that of any witness overlook the fact that the party's statement is, without more, admissible in evidence. Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. * * *

Witness' Right to Own Statement.—A second exception to the requirement of this subdivision permits a non-party witness to obtain a copy of his own statement without any special showing. Many,

though not all, of the considerations supporting a party's right to obtain his statement apply also to the non-party witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of his statement and are modifying their regular practice accordingly.

Subdivision (b)(4)—Trial Preparation: Experts. * * *

Subsection (b)(4)(A) deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of those cases present intricate and difficult issues as to which expert testimony is likely to be determinative. Prominent among them are food and drug, patent, and condemnation cases. * * *

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, *Some Practical Problems in Proof of Economic, Scientific, and Technical Facts*, 23 F.R.D. 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is "lengthy—and often fruitless—cross-examination during trial," and recommends pretrial exchange of such material. Calif.Law Rev.Comm'n, *Discovery in Eminent Domain Proceedings*, 707–710 (Jan.1963). Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated. * * *

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds the risk to a minimum. Discovery is limited to trial witnesses and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts. * * *

Subdivision (b)(4)(B) deals with an expert who has been retained or specially employed by the party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the case), but who is not expected to be called as a witness. Under its provisions, a party may discover facts known or opinions held by such an expert only on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. * * *

Subdivision (d)—Sequence and Priority. This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of

the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case.

A priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects.

First, this priority rule permits a party to establish a priority running to all depositions as to which he has given earlier notice. Since he can on a given day serve notice of taking many depositions he is in a position to delay his adversary's taking of depositions for an inordinate time. * * *

Second, since notice is the key to priority, if both parties wish to take depositions first a race results. *See Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y.1951) (description of tactics used by parties). But the existing rules on notice of deposition create a race with runners starting from different positions. The plaintiff may not give notice without leave of court until 20 days after commencement of the action, whereas the defendant may serve notice at any time after commencement. Thus, a careful and prompt defendant can almost always secure priority. This advantage of defendants is fortuitous, because the purpose of requiring plaintiff to wait 20 days is to afford defendant an opportunity to obtain counsel, not to confer priority.

Third, although courts have ordered a change in the normal sequence of discovery on a number of occasions, *e. g., Kaeppler v. James H. Matthews & Co.*, 200 F.Supp. 229 (E.D.Pa.1961); *Park & Tilford Distillers Corp. v. Distillers Co.*, 19 F.R.D. 169 (S.D.N.Y.1956), and have at all times avowed discretion to vary the usual priority, most commentators are agreed that courts in fact grant relief only for "the most obviously compelling reasons." * * *

It is contended by some that there is no need to alter the existing priority practice. In support, it is urged that there is no evidence that injustices in fact result from present practice and that, in any event, the courts can and do promulgate local rules, as in New York, to deal with local situations and issue orders to avoid possible injustice in particular cases.

Subdivision (d) is based on the contrary view that the rule of priority based on notice is unsatisfactory and unfair in its operation. Subdivision (d) follows an approach adapted from Civil Rule 4 of the District Court for the Southern District of New York. That rule provides that starting 40 days after commencement of the action, unless otherwise ordered by the court, the fact that one party is taking a deposition shall not prevent another party from doing so "concurrently." In practice, the depositions are not usually taken simultaneously; rather, the parties work out arrangements for alternation in the taking of depositions. One party may take a complete deposition and then the other, or, if the depositions are extensive, one party deposes for a set time, and then the other. See *Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y. 1951).

In principle, one party's initiation of discovery should not wait upon the other's completion, unless delay is dictated by special considerations. Clearly the principle is feasible with respect to all methods of discovery other than depositions. And the experience of the Southern District of New York shows that the principle can be applied to depositions as well. The courts have not had an increase in motion business on this matter. Once it is clear to lawyers that they bargain on an equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention. * * *

Subdivision (e)—Supplementation of Responses. The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a "continuing burden" on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is. See 4 *Moore's Federal Practice* ¶ 33.25[4] (2d ed. 1966).

Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. * * * On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. * * *

Subdivision (e) provides that a party is not under a continuing burden except as expressly provided. * * *

The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate.