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THE NEW MARYLAND DEPOSITION AND DISCOVERY PROCEDURE

By James A. Pike* and John W. Willis†

When its new Rules of Practice and Procedure went into effect on September 1, 1941, Maryland joined the select list of states enjoying the benefits of the most liberal and flexible discovery system in operation anywhere. Like the Federal Rules of Civil Procedure, which entered their fourth year of service on September 16, the Maryland rules have incorporated the various devices for discovery which have proved most useful and effective in actual operation in the jurisdictions of this country and England. By adhering fairly closely to the wording of the Federal Rules wherever possible, the draftsmen of the Maryland provisions have preserved for practitioners in the state the benefits of the interpretations already placed on the Federal Rules by the cases construing them. At the same time they have taken the opportunity to avoid some of the defects which have been revealed in the practical operation of the Rules.

The Federal discovery rules themselves have elsewhere been treated by the present writers. What we have already said will not be repeated here except insofar as it is relevant to the present discussion. In addition, the historical background of the new Maryland procedure and the general considerations in favor of the adoption of a liberalized discovery practice have already been given an excellent discussion by Mr. Robert R. Bowie, Reporter to the Advisory Committee which drafted the rules, in the

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A comparative table showing the correlation between the Maryland Rules and the Federal Rules will be found at the end of this article.

Notes to the Rules.³ It will be the purpose of this article to discuss some of the more practical questions arising in the day-to-day use of the new procedure. The real meat of any discussion of discovery procedure is of course the scope of discovery—what information can be obtained. In order to put this question in its proper perspective, however, it will be necessary first to discuss the general objectives of the new procedure and its actual working.

I. GENERAL PURPOSES OF THE NEW PROCEDURE

Essentially, the object of any discovery procedure⁴ is to enable each party to get at the facts before trial. This serves at least three important purposes. First, it aids in the disposition of groundless claims and meritless defenses, and promotes settlements. When the parties are required to "lay their cards on the table" they are much more likely to be able to get together on settlement than if their evidence is kept up their sleeves. Secondly, it makes possible a more intelligent and efficient preparation for trial through the elimination of surprise and guesswork. Finally, it expedites the disposition of cases which are brought to trial by clarifying the issues, eliminating non-controversial matters and simplifying proof.⁵

In the Federal courts the new discovery procedure works hand in hand with several other devices. In the first place, pleadings have been greatly simplified, objections thereto minimized, and the burden of issue-formulation and fact-revelation thrown onto discovery.⁶ Also, the pre-trial conference assists in the formulation of issues

³ General Rules of Practice and Procedure Adopted by the Court of Appeals of Maryland, with Explanatory Notes, printed and distributed by Maryland State Bar Association, Bar Association of Baltimore City and Junior Bar Association of Baltimore City, 1941. References hereafter to the Notes to the Rules will be to this pamphlet.

⁴ As used in this article the term "discovery" includes discovery by deposition, as well as by the other methods traditionally classified under that title.

⁵ See generally Pike and Willis, supra, n. 1; Notes to Maryland Rules, 37.

and in promoting settlements. Finally, the summary judgment is closely tied in with discovery, since judgment may be rendered on the basis of admissions made by the opposing party in depositions or answers to interrogatories or requests to admit. None of these procedural reforms has yet been adopted in Maryland. It is to be hoped that, if the new discovery rules prove a success, they will be implemented in the future by the pre-trial conference and the summary judgment, and the burden taken off pleading which can better be borne by discovery.

II. THE MECHANICS OF DISCOVERY

Several methods of discovery are provided in the new Rules. None of them, with the exception of the request for admission of facts or documents, is a novelty to Maryland lawyers, but all have been greatly expanded in scope and effectiveness. Probably the most important is the deposition (Deposition Rules 1-12; Discovery Rules 1, 3). As an alternative or supplement to the deposition the old method of serving interrogatories on the adverse party is preserved (Discovery Rules 2, 3). The order for production of documents and other property has been expanded (Discovery Rule 4). Discovery Rule 5 codifies existing Maryland practice relevant to mental and physical examination of parties. Finally, there is provided that very handy device, the request for admissions (Discovery Rule 6).

The different provisions for discovery are designed to be used as supplements to each other, rather than as exclusive methods. So a party may by deposition or interrogatory ascertain the existence of relevant documents and then serve a request for their production; or he may supplement depositions or interrogatories with a request

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to admit. Of course, to prevent oppression, the court can call a halt to going over the same ground by different methods, such as by serving interrogatories after the taking of a deposition of the same person, or covering the same ground on the taking of a deposition as was covered by interrogatories previously served. But this discretion should certainly be exercised with caution and only to prevent useless duplication.

1. Depositions.

In its original conception the deposition was not regarded as a method of discovery, but as a means of preserving testimony against the possible death or disability of the witness. Accordingly, restrictions were placed upon the taking of depositions designed to limit their availability to cases where some showing was made that the deponent would probably be unavailable at the trial through absence from the jurisdiction or illness or death. Eventually, however, it was realized that the deposition was also a practical method of discovery before trial, possessing many advantages over the old bill of discovery or interrogatories. In many states therefore the restrictions on the taking of depositions have been relaxed and retained only as limitations on use.

The previous Maryland law on this subject was not at all clear. The code provisions were ambiguous, but they had apparently not been construed in any reported decision, although one trial court judge had held that the limitations on use were also limitations on taking. What-

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10 Nekrasoff v. U. S. Rubber Co., 27 F. Supp. 953 (S. D. N. Y., 1939) (depositions); Modern Food Process Co., Inc., v. Chester Packing & Provision Co., Inc., 30 F. Supp. 520 (E. D. Pa., 1939) ("In framing its requests the plaintiff apparently dissected the defendant's answers to its interrogatories and drew a specific request directed to each separate fact contained in them, adding several new requests...”).

11 McNally v. Simons, 1 F. R. D. 254 (S. D. N. Y., 1940), per Hulbert, D. J.

12 Howard v. States Marine Corp., 1 F. R. D. 499 (S. D. N. Y., 1940), per Hulbert, D. J.


14 Md. Code (1939) Art. 35, Secs. 21, 22, 23, 26, 29, 34; Art. 16, Sec. 282 (Equity Rule 35).

ever the old law, however, there is no ambiguity in the new Rules. The deposition of any witness may be taken, whether a party or not, without any showing of probable unavailability; but restrictions are placed on the use of the deposition at the trial.  

In their provisions for taking of depositions, without leave of court, "at any time after jurisdiction has been obtained over any defendant or over property which is the subject of the proceeding", the Maryland Rules are more liberal than the Federal Rules. The first draft of Federal Rule 26 contained a similar provision; but the rule as adopted requires leave of court for the taking of depositions before an answer is filed. The reason for the limitation apparently was a fear that to permit unrestricted taking of depositions before joinder of issue would permit too wide a range of inquiry and possible oppression. The permissible scope of examination under the rules is so broad, however, that it may be doubted whether a requirement that issue be joined would materially limit it. At any rate the Maryland rules make no such requirement. As a matter of practice, however, most lawyers will probably wait until issue is joined before resorting to the taking of depositions, unless the information sought is needed for the drafting of an answer.

Whether the deposition must be transcribed is a question which has given rise to some discussion in the Federal practice. If the deposition is taken merely for discovery the party may obtain all the information he wishes by the oral examination and may not wish to go to the added expense of obtaining a transcript. Furthermore, he may not be able to pay the cost of transcribing. The Federal Rules are not clear on the point, but one court has held that a plaintiff who has taken defendant's deposi-

16 Deposition Rules 1, 11.
17 Preliminary Draft (May, 1936) Rule 31(a).
18 Rule 26(a).
19 Colorado similarly rejected the limitation in adopting the Federal rule. Colo. R. C. P. (1941) Rule 26(a). See note to Rule 26(a) (Second Draft, 1940): "This [requirement of leave] was thought bad practice and unnecessary hardship on lawyers in counties other than that in which the action is pending."
tion may not be compelled by defendant to have the deposition transcribed and filed unless defendant advances the costs.20 The Maryland rules have wisely obviated any difficulty on this score by providing that the deposition shall be transcribed unless the parties agree otherwise or the court "upon motion and for good cause shown, orders otherwise to save expense, or to prevent hardship or injustice".21

The actual procedure for taking of depositions is simple enough. Where the deposition is to be taken on oral examination, the taker serves a notice on "every other party", at least five days prior to the date of examination (Deposition Rule 5). The notice must state the time and place of the examination, the name or title of the officer before whom it is to be taken,22 and the name and address of the deponent "or, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs".23 The notice should not particularize the subject matter of the examination.24 No subpoena is required to enforce attendance of a party,25

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21 Deposition Rule 8(c).
22 The Federal Rule (30[a]) does not make this requirement.
23 Deposition Rule 3 specifies the persons before whom a deposition may be taken.
as distinguished from a witness. Other parties may examine or cross-examine the deponent as at the trial, or may submit written interrogatories. If the deposition is to be taken entirely on written interrogatories, the interrogatories are served on every other party with a notice stating the name and address of the deponent and the name or title and address of the officer. Cross, redirect and recross interrogatories may be served. The officer propounds the questions to the witness. Under either system the deposition is transcribed, subject to the qualification mentioned above, read to or by the witness, and signed by him, unless signature is waived or the witness is "ill or cannot be found or refuses to sign". The officer certifies the deposition and files it and the party taking it gives notice of filing to all other parties. Elaborate provisions are made for waiver of objections unless made at the earliest opportunity.

Some Federal courts have held that an examination should not be conducted in the office of the attorney for the examining party. The reason for this holding, however, is not apparent, and it would seem to work a hardship on attorneys in smaller cases. These decisions should not be followed in the state practice.

Where both parties serve notices to take the deposition of the other the first to serve his notice will ordinarily be granted the opportunity to conduct his examination first, even though his opponent specifies an earlier date. Of course, on some special showing the court could grant one or the other party priority regardless of the sequence of service.

2. Interrogatories to parties.

In their provisions for interrogatories to parties the Maryland Rules are probably an improvement over the

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28 See Deposition Rule 7 as to subpoenas generally.
Federal Rules. Federal Rule 33 is unnecessarily silent on a number of points, which are being cleared up only by a slow process of interpretation by the courts. The Maryland Rule (Discovery Rule 2) is a good deal more explicit.

Interrogatories to parties are of course not new in Maryland practice, having been brought down from the old equity procedure and also made available in law actions. The narrow scope of examination hitherto available, however, has discouraged their use. With the liberalization of the scope of inquiry, interrogatories should be a useful tool in preparation for trial. They are of course inexpensive, and, where the facts are simple, furnish a fairly effective method of obtaining admissions from the adverse party. In more complicated factual situations, or where the facts are highly controversial, the interrogatory is not as suitable a method as the deposition. Evasive replies are much easier where the questions are presented in advance with opportunity to give careful consideration to the framing of answers than on oral examination where answers must be given spontaneously. Again, use of the interrogatory method in complicated and controversial situations increases the burden on the courts through multiplying objections to interrogatories or motions for more definite answers. The Federal Courts, taking their lead from an opinion of District Judge Chesnut of the District of Maryland, have accordingly held in a number of cases that interrogatories should be relatively few and concerned with important aspects of the case, and have ordered the parties to resort rather to the taking of depositions where the interrogatories were too numerous and complicated.

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3. Notes to Maryland Rules, 52-3. For discussion of the scope of examination under the new rules, see infra, circa notes 70 et seq.
4. See Notes to Maryland Rules, 53; Sunderland, Scope and Method of Discovery before Trial (1933) 42 Yale L. J. 863, 875-6.
This restriction has been codified in the Maryland rule, which provides that no party may, without leave of court, serve on the same party more than thirty interrogatories "including interrogatories subsidiary or incidental to, or dependent upon other interrogatories, however grouped, combined or arranged". Leave of court presumably will be granted only on a showing that to require the taking of depositions would work a hardship on the examining party. Similar to the Federal rule is the provision that not more than one set of interrogatories may be served on the same party without leave of court.66

Under Federal Rule 33 the party served with interrogatories should either answer or object to the court, and if he simply fails to answer the propounding party must go to court under Rule 37 for an order compelling the party to answer or for an order striking the party's pleadings or dismissing the action or entering a default judgment. One Federal court has accordingly held that a motion to compel answer to interrogatories is improper;67 another, however, has entertained such a motion without comment.68 The Federal rules say nothing as to the proper procedure where the party answers but the answer is objected to as incomplete or evasive. It would seem a distortion of meaning to regard such an answer as a refusal to answer. Some courts have held that motion for a more adequate answer is in order in such a case, and this is expressly provided for in the local rules of a number of district courts.69

The Maryland rule has avoided any question as to the proper procedure in such cases by providing that the party

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66 See supra, notes 11, 12.
69 Gaumond v. Spector Motor Service, Inc., 3 Fed. Rules Serv. 33.421, Case 1 (D. Mass., 1940); Steingut v. National City Bank, 4 Fed. Rules Serv. 33.421, Case 1 (S. D. N. Y., 1940); American Lecithin Co. v. W. A. Cleary Corp., 1 F. R. D. 608 (D. N. J., 1941); E. D. N. Y. Civil Rule 14; S. D. N. Y. Civil Rule 14; N. D. N. Y. Civil Rule 13; N. C. Rule 12 (all districts). In Crosley Radio Corp. v. Hleb, 5 Fed. Rules Serv. 33.422, Case 1 (S. D. Iowa, July 22, 1941), it was held that the giving of false or evasive answers might be punished as a contempt and the party required to reimburse his opponent for additional expenses occasioned thereby.
submitting the interrogatories may file exceptions to the sufficiency of any answer or refusal to answer, and that the court may order an answer or further answer and may penalize an inadequate answer or refusal to answer by requiring the recalcitrant party to pay the expenses of obtaining the order, including attorney's fees.\footnote{Discovery Rule 2(c).} No provision is made for objection by the party served; the burden is put on the interrogating party to bring the matter before the court. The Maryland system seems a more reasonable one, since if the interrogated party refuses to answer his opponent may well decide to throw over the interrogatories altogether and resort to the taking of depositions, and the court is spared the labor of passing on the question.

Another matter in which the Maryland rule represents an improvement over the Federal model is the use of answers to interrogatories as evidence. The Federal rule is silent on the question, although it would seem obvious that the answers would be admissible for the interrogating party as admissions of the adverse party, but that the latter might not introduce his own answers since they would be merely self-serving statements.\footnote{See Commentary, Use of Answers to Interrogatories under Rule 33 as Evidence, 2 Fed. Rules Serv. 33.46; Bailey v. New England Mutual Life Ins. Co., 1 F. R. D. 494 (S. D. Cal., 1940).} The Maryland rule makes this clear by providing that answers, "so far as admissible under the rules of evidence, may be used as evidence against" the answering party by the party submitting the interrogatories. A salutary addition is the requirement, also taken from the Federal Rule on depositions,\footnote{Rule 26(d). See United States v. Aluminum Co. of America, 1 Fed. Rules Serv. 26d.52, Case 1 (S. D. N. Y., 1939).} that "If only a part of the party's answers is offered in evidence, he may require the introduction of all the answers which are relevant to the part introduced".

3. Discovery of documents and property.

Except for a broadening of the scope of discovery—a subject hereafter to be discussed—the new Discovery Rule 4 has made no substantial change in the Maryland law as
to discovery of documents and other tangible things. The rule is limited to documents, etc., in the possession or under the control of a party to the action, and the remedy is available at any time in the proceeding.

4. Mental and physical examination.

Discovery Rule 5, while patterned in part on Federal Rule 35, merely codifies existing non-statutory practice in Maryland. No question of its validity is therefore likely to be raised. It may be pointed out that the rule permits the court to order an examination "whenever the mental or physical condition of a party is material to any matter involved in any proceeding". In this it goes farther than some state statutes allowing the remedy only in personal-injury cases. While it is probable that the rule will find its greatest use in such cases, there would seem to be no reason so to limit it, and neither the Federal nor the Maryland rules does so.

5. Admission of facts and of genuineness of documents.

One of the handiest of the new discovery devices is the request for admissions, brought into Maryland practice in Discovery Rule 6. The rule follows fairly closely the language of Federal Rule 36, which in turn is based on the English Rule and on rules or statutes of Massachusetts, Illinois, New York and certain other states.

The request for admissions is just what its name implies—not so much a method of discovering facts but of getting the adverse party to admit the truth of particular, relevant fact-items or of the genuineness of documents, in order to save time and expense at the trial. A proper form for the request is as follows:

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43 See Md. Code (1939) Art. 16, Sec. 27; Art. 75, Secs. 104, 106.
44 See Notes to Maryland Rules, 54-5.
Plaintiff A. B. requests defendant C. D. within 10 days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.
   (Here list the documents and describe each document.)

2. That each of the following statements is true.
   (Here list the statements.)

Signed: .............................................................

Attorney for plaintiff.

Copies of the documents, if any, must be delivered with the request unless copies have already been furnished. If the facts are stated in documents the request should specify the particular relevant facts concerning which an admission is sought. If the party served fails within the period designated in the request to serve a sworn statement either denying specifically or "setting forth in detail the reasons why he cannot truthfully either admit or deny" the matters, they are deemed admitted, for the purposes of the pending proceeding only. If the party "refuses the admission" and his opponent thereafter proves the facts the court may require the recalcitrant party to pay the reasonable expenses of making such proof unless there were good reasons for the refusal or the admissions were of "no substantial importance".

The Maryland rule has remedied one of the defects of the Federal rule. Under the latter rule there has been considerable confusion as to whether a party served with a request may attack it by any preliminary motion or whether, if he does not want to answer it, he must simply refuse to admit and take his chance of being assessed for

48 The rule requires that the notice designate a period, not less than ten days.
50 This is the language of Discovery Rule 6. Federal Rule 37(c), otherwise similar, applies only where there is a "sworn denial".
costs later on. One or two courts have entertained motions to strike or limit a request to admit, but the majority have held that no such motion may be made. Again, one court has assumed the propriety of a preliminary motion with matters contained in a request be "deemed admitted" through failure to respond to the request, but another court has held improper a motion to strike an answer or to compel a more definite answer.

The Maryland rule has obviated these difficulties by providing that "Objections to a request to admit or to a refusal to admit shall be heard only on the application to assess expenses . . . ." The limitation is a wise one. The rule is intended to operate extrajudicially, as a method of expediting litigation; but if every request to admit were to be subject to a motion to strike or limit, and every refusal to admit to a motion to compel answer, the wheels of litigation would be clogged. The proper manner to raise any objection to a request to admit is by refusal to admit. Federal courts have held that even though the rule requires a party to admit or deny or state "the reasons why he cannot truthfully either admit or deny", a party may refuse to admit on the ground that the matters requested to be admitted are irrelevant or privileged. Although this construction seems to do some violence to the language just quoted, it seems the only proper one under

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65. Discovery Rule 6(d) (last sentence).
the Maryland rule, since otherwise the party would have no way to raise the objection—unless by failing entirely to answer, which would seem unnecessarily risky.

The Maryland rule incorporates a clause found in the English rule and in some state statutes, although not in the Federal rule, to the effect that the court may to prevent injustice allow a party to withdraw an admission or relieve a party from an implied admission.

The request to admit is to some extent an alternative to interrogatories to parties, but it is more expedient and efficient than the latter remedy, inasmuch as it is not subject to attack before trial. In view of the limitation of the number of interrogatories under the Maryland rule, the request to admit should find even more use than it has in Federal practice.


The Maryland rules, like the Federal rules, provide a diversified arsenal of sanctions for enforcement of the various discovery rules. If a party refuses to be sworn on the taking of a deposition, or refuses to answer after being ordered to by the court, or refuses to obey an order to produce documents or other things or to submit to a physical or mental examination, the court may enter an order dispensing with proof of the particular facts, or precluding the party from introducing proof on particular matters, or striking the pleadings, or staying proceedings, or dismissing the proceeding or rendering a default judgment; or the party may be held in contempt, except for disobedience of an order to submit to mental or physical examination. Failure to answer interrogatories is ground for dismissal or default or striking of pleadings. The sanctions for the enforcement of the rule on admission of facts have just been discussed.

59 See text supra, infra n. 34.
60 Deposition Rules 8(d), 12; Discovery Rule 7.
61 Discovery Rule 2(d).
Federal courts at first were hesitant about invoking the drastic penalties provided by the rules. The procedure was new and in most cases the party's failure to comply was due to unfamiliarity with the rules. Recently, however, the courts have enforced the sanctions with more strictness. In one case the intention of defendant, a vital issue, could be shown only by certain records in defendant's possession. When defendant failed to comply with an order for their production, the court held that plaintiff was entitled to judgment or to a finding that defendant's intention was as plaintiff alleged. In another case, where plaintiff refused to answer interrogatories on a particular issue, the court precluded her from introducing proof on that issue even though her right to recovery depended on it. In *Roerich v. Esquire Coronet, Inc.*, plaintiff, a resident of India, twice obtained stipulations for an extension of time within which he might be produced for examination before trial, but then indicated that he did not intend to come to the United States at any time in the near future. The action was dismissed for want of prosecution.

7. Remedies.

The rules, of course, are intended to do justice to both sides, and just as the discoveror may invoke sanctions to enforce discovery, so the discoveree may apply to the court for relief against oppressive application of the rules. Deposition Rule 6(a), patterned after Federal Rule 30(b), gives the court a wide discretion to limit or modify the scope and manner of taking depositions. The court may forbid the taking of the deposition, or order it to be taken in a different place or before a different officer, or privately, or order that it be taken only on written interrogatories or only on oral examination, or require the deposition to be

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64 Fisher v. Underwriters at Lloyd's London, 115 F. (2d) 641 (C. C. A. 7th, 1940). This would seem proper only if the court had ordered the party to answer. See Federal Rule 37(d) (2) (I).
sealed, or order the parties to exchange information in sealed envelopes, or limit the scope of the examination. The rule applies only to depositions, but the other discovery methods (except the request to admit) are in the control of the court anyway, and the court presumably has just as wide a range of discretion.

The Federal cases furnish a number of interesting examples of the type of protective orders which may be made. One court has held that a defendant wintering in the Bahama Islands might be required to pay costs of plaintiff's attorney in going there to take her depositions, if she did not choose to return to New York in time for the examination. In another case depositions were to be taken in Italy and the court ordered that if the adverse party could not afford to be represented at the taking, he could submit written interrogatories after inspecting the transcript of the testimony. In a converse situation a party was given leave to conduct oral cross-examination of witnesses in China whose depositions were to be taken on written interrogatories.

III. Scope of Examination

Under the old practice discovery was hedged about with restrictions and limitations. A party might not inquire into his opponent's case; he could not inquire into matters within his own knowledge; he could not inquire as to the names of witnesses. In addition there were restrictions designed to apply to discovery before trial the rules of evidence applicable to testimony in open court.

To some extent these limitations were more or less accidental. Most of them, however, fitted in with what Dean Wigmore has termed the "sporting theory" of justice—the

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66 As to limitation of the scope of examination, see infra, circa n. 70 et seq.
70 See generally Pike and Willis, The New Federal Deposition-Discovery Procedure (1938) 38 Col. L. Rev. 1436 et seq.; Notes to Maryland Rules, 40-41, 45-8; RAGLAND, DISCOVERY BEFORE TRIAL (1932) passim.
idea that each party was entitled to keep as secret as possible the evidence supporting his claim or defense. This idea, while it may have made litigation more adventurous, certainly did little to expedite it or to insure the doing of justice. And the law has gradually worked away from the old limitations until in certain of the states and the new Federal rules they have been almost entirely cast aside. The Maryland rules have adopted this more liberal attitude.

1. Inquiry into other party’s case.

Most drastic of the old limitations was the prohibition against inquiry into the other party’s case—i.e., matters on which the latter party had the burden of proof. Thus while a plaintiff might interrogate the defendant as to facts relating to plaintiff’s case in chief, he could not inquire into matters of defense; and likewise the defendant could not examine the plaintiff as to the details of plaintiff’s case. In jurisdictions employing the combined deposition-discovery procedure this restriction has generally disappeared—because the scope of examination permitted in depositions taken for discovery was as wide as in the case of depositions taken primarily for the purpose of obtaining evidence for the trial. The new Maryland rules, however, deliberately make it clear that the old restriction is abandoned. In language similar to that of Federal Rule 26(b), Discovery Rule 3 (applicable both to depositions and to interrogatories) provides that the party or witness may be examined regarding any relevant and non-privileged matter “whether relating to the claim or defense of the party examining or submitting interrogatories or to the claim or defense of any other party”. And Discovery Rule 4 permits discovery of documents and other property “which may constitute or contain evidence material to any matter involved in the proceeding”.

It has of course often been objected that to allow a party to “pry into” his opponent’s case before trial will

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71 See n. 70, supra.
lead to perjury and the subornation of perjury. This argument, however, has been pretty well exploded by such authorities as Professor Sunderland73 and Mr. Ragland.74 On the basis of the state experience it is pointed out that, rather than encouraging perjury, a liberal discovery procedure actually discourages it by permitting each party to tie his opponent down to a definite position early in the game. The *mutuality* of the remedy is its protection, for, while a party may be forced to reveal his case to his opponent, at the same time he can compel his opponent to state his position; the court can even require the parties simultaneously to exchange information in sealed envelopes.75 In any event, no complaint of "perjury" seems to have been made since the adoption of the Federal rules, and they have been given daily application in every type of case.

The Federal courts, applying the provisions of the Federal rules, were quick to realize that the old shackles had been struck off. In one of the first cases under the new procedure, Judge Moscowitz said that "it will not avail a party to raise the familiar cry of 'fishing expedition'".76 And other decisions have likewise sustained such inquiry into the other party's case.77 In a particularly interesting holding, Judge Nields of the District of Delaware has permitted a defendant, in an action by the government, to inquire by interrogatories into the evidence upon which the gov-

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74 *Ragland, Discovery before Trial* (1932) 124-5.


ernment relied to show knowledge on the part of defendant's officers.\textsuperscript{78}

Perhaps the greatest amount of discussion under the Federal rules has arisen over the question whether a party may by discovery inquire into evidence which his opponent, or his opponent's insurer, has gathered in preparation for trial. The question generally comes up in personal injury cases. After the accident, the putative defendant or his insurer generally interviews witnesses and takes their statements, and if a corporation is involved there may be reports to superior officers. May plaintiff obtain inspection of these statements either by motion for production of documents or by taking the deposition of the party or the investigator?\textsuperscript{79}

A few early decisions indicated that such discovery would be allowed.\textsuperscript{80} In one of the cases, however, plaintiff was attempting to inspect her own statement which defendant's insurer had taken,\textsuperscript{81} and in another the statements were made by plaintiff, her daughter, her son-in-law, and her physician.\textsuperscript{82} One decision did permit a plaintiff to inquire into statements obtained by his opponent's insurer from other witnesses.\textsuperscript{83} Later cases, however, have pretty generally denied such discovery either under the deposition rules or under the rule as to production of documents,\textsuperscript{84} either on the ground that the matter is privileged,

\textsuperscript{78} United States v. American Solvents & Chemical Co. of Calif., 30 F. Supp. 107 (D. Del., 1939).
\textsuperscript{79} See generally Commentary, Discovery of Statements and Documents Obtained after Claim Has Accrued, 2 Fed. Rules Serv. 26b.211 (1940); Pike and Willis, Federal Discovery in Operation (1940) 7 U. Chi. L. Rev. 297, 301 et seq.
\textsuperscript{82} Price v. Levitt, 29 F. Supp. 164 (E. D. N. Y., 1939).
\textsuperscript{83} Kulich v. Murray, 28 F. Supp. 675 (S. D. N. Y., 1939).
or on the broad ground that to permit a party to make use of his opponent's preparation for trial "would penalize the diligent and place a premium on laziness". In addition, some cases have denied discovery on the ground that the statements would be hearsay and inadmissible in evidence.

It may be questioned whether such matters can properly be considered as privileged. Nor should the objection that the statements are hearsay be given weight. But the courts are apparently set against allowing such discovery, and the rulings can be justified on the ground that to permit it would be "oppressive". It seems likely that the Maryland courts will follow the rule laid down by the majority of the Federal decisions, particularly in the light of the precedent furnished by a decision on the point by Judge Chesnut.

Related to the problem just discussed is the question whether a party may examine by deposition an expert witness whom his adversary has engaged and whose only knowledge of the matters in issue comes from the fact of such employment. The question has come up in two cases, in both of which the examination was denied. In


the first case the witness was an engineer who had been engaged to examine and test an allegedly defective cylinder. The court held that any information which he had acquired was privileged. In the second case the expert was a physician who had been employed to give an expert opinion, and who had not treated the decedent. The court as a matter of discretion refused to allow examination.

2. Discovery of matters within party's knowledge.

In many jurisdictions—including the Federal courts before the new rules—the limitation has been followed that discovery is not proper as to matters within the knowledge of the discoveror or as to which he might obtain information elsewhere. There is, of course, no particular justification for such a rule. Knowing a fact is one thing; proving it is another. If it is clearly recognized that the obtaining of admissions is a legitimate object of discovery practice, the arbitrary character of the old rule becomes apparent.

The Federal rules are silent on this point, and the result has been confusion and conflict. The new Maryland rule, however, expressly provides for discovery "whether or not any of such matters is already known to or otherwise obtainable by the party examining or submitting interrogatories". While the rule in terms applies only to depositions and interrogatories, there is no reason to think that it will not be equally applicable to discovery of documents and to the request for admissions.

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94 The cases are collected in Pike and Willis, Federal Discovery in Operation (1940) 7 U. Chi. L. Rev. 297, 307-309.
95 Discovery Rule 3(4).
3. Discovery of matters inadmissible in evidence.

In the taking of depositions, particularly for the purpose of discovery, much inadmissible matter finds its way into the record. Usually no objection is made.98 Where there is objection, however, conflict has arisen as to whether or not discovery should be limited to matters admissible in evidence.

On purely a priori reasoning there should be no reason to apply to discovery the exclusionary rules of evidence. The rules against hearsay, opinion, etc., are based on the supposed lack of probative value of such evidence. But these considerations are obviously inapplicable when the information is sought, not necessarily for use as evidence, but as a "lead" to further evidence, as a method of eliminating issues at the trial, etc. If the deposition is offered at the trial objection can then be made to the admissibility of any particular answers, and in the meanwhile no harm has come to the parties through disclosure of the information.99

The Federal and Maryland rules seem to contemplate inquiry into matters not strictly admissible in evidence. Deposition Rule 1 (Federal Rule 26[a]) provides that depositions may be taken "for the purpose of discovery or for use as evidence in the proceeding or for both purposes". And Deposition Rule 3 (Federal Rule 26[b]) permits inquiry into "any matter, not privileged, which is relevant to the subject matter involved in the pending proceeding".

The decisions under the Federal rules are not in accord on this question. Some, taking the view just outlined, have held that discovery should not be limited by the rules of evidence.100 The best statement of this position was

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98 Ragland, Discovery Before Trial (1932) 150.
99 Pike and Willis, Federal Discovery in Operation (1940) 7 U. Chi. L. Rev. 297, 309-314; Note (1941) 50 Yale L. J. 708. For a contrary position see Note (1940) 29 Geo. L. J. 382.
made by Judge Hincks in *Lewis v. United Air Lines Transport Co.*,\(^1\) in which he said that “To the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible”. Other courts, however, have applied evidentiary limitations to discovery,\(^2\) generally without much consideration of the question. The one case taking this position which has treated the problem at any length relied upon a strained construction of “relevant” in Rule 26(b) (Discovery Rule 3) as meaning “material and competent under the rules of evidence”.\(^3\)

A decision by Judge Chesnut has indicated that hearsay statements may not be inquired into on the taking of a deposition;\(^4\) but the case involved discovery of an opponent’s trial-preparation,\(^5\) and the “hearsay” argument was only an alternative reason for forbidding the inquiry.

Most of the decisions on the point concern either hearsay or opinion evidence. Particularly in patent cases, the rule has developed that interrogatories directed to matters of opinion are improper.\(^6\) A few cases, however, have taken a more realistic view. As was said in *Schwartz v.*


\(^1\) 27 F. Supp. 946 (D. Conn., 1939).


See also note 106, infra.


\(^5\) See supra, n. 89.

Howard Hosiery Co.\textsuperscript{107} in overruling an objection that an interrogatory called for an opinion:

“One of the purposes of Rule 33 [Discovery Rule 2] is to obtain admissions and thus limit the subjects of controversy at the trial and avoid unnecessary testimony and waste of time in preparation . . . The plaintiff’s objection to answering this interrogatory seems to me to be the last word in technicality and entirely out of touch with the spirit of the new rules.”

This attitude seems the correct one. The question should not be: Does the interrogatory call for opinion?, but: Will an answer in any way expedite the course of the litigation? It is to be hoped that the Maryland courts will adopt this more reasonable interpretation. Fortunately they are not hampered, as were the Federal courts,\textsuperscript{108} by any body of precedent against inquiry into matters of opinion.

If matters of opinion can be gone into on interrogatories, of course they may also be made the subject of a request to admit. The rule itself refers to “relevant matters of fact”, but if an admission will facilitate trial it should matter little that it may technically amount to an expression of opinion.\textsuperscript{109}

Whether inadmissible matters may be inquired into on a motion for production of documents is another matter. The same considerations of policy would seem to apply here as in the case of depositions or interrogatories; and it has been contended that the rules should be construed alike.\textsuperscript{110} Yet the difference in language of the rules may require a different conclusion. The rule on depositions and interrogatories requires only a showing of “relevancy”; but documents must “constitute or contain evidence mate-


\textsuperscript{110} Note (1941) 50 Yale L. J. 708; Connecticut Importing Co. v. Continental Distilling Corp., 1 F. R. D. 190 (D. Conn., 1940).
rial to any matter involved in the proceeding”.

Historically, discovery of documents seems to have been limited to documents admissible in evidence; and a comparison of the different drafts of Federal Rule 34 indicates that the Advisory Committee considered a broader scope but decided against it. At any rate, the majority of the Federal courts have limited discovery of documents to those admissible in evidence, and it is probable that Maryland judges will follow their lead.

4. Relevancy.

Whether or not information sought by discovery must be admissible in evidence, certainly it must be relevant. Relevancy, of course, is a nebulous concept: at the trial it may mean one thing; before trial, another. It is not easy to tell, while a case is still in its preliminary stages, whether or not particular evidence will prove to be relevant at the trial. Accordingly the Federal courts have generally held that the idea of relevancy should be given a broad interpretation, and that inquiry will not be limited “unless the information sought upon the examination is clearly privileged or irrelevant”; all that need be shown is that it is reasonably probable that the evidence sought will be material or relevant.

One of the best-reasoned opinions on the question of relevancy under the Federal Rules is Fox v. House. The action was for an accounting, and plaintiff sought to obtain discovery as to the items of the account. Defendant ob-

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111 Federal Rule 34, Maryland Discovery Rule 4.
112 People ex rel. Lemon v. Supreme Court, 245 N. Y. 24, 156 N. E. 84 (1927).
113 See Commentary, Discovery of Documents Not Admissible in Evidence, 4 Fed. Rules Serv. 34.412 (1941).
jected that the right to the accounting had first to be determined. The court overruled the objection, saying that the rules were intended to facilitate preparation on all phases of the case, that piecemeal discovery would block a speedy determination of the litigation, and that plaintiff should be permitted to ascertain if an accounting would be worth the trouble of obtaining it. Some cases have taken a narrower view on the question of discovery as to damages, holding that damages may not be inquired into until liability is established. This view, however, is out of line with the theory of the new procedure. Disclosure will not hurt the party; it may expedite settlement. And it can hardly be contended that the matter is not “relevant”.

5. Names of witnesses.

In most jurisdictions the rule has prevailed that a party might not compel his adversary to disclose the names of his witnesses, for fear of tampering and subornation. More enlightened students of the problem, however, have realized that “witnesses do not belong to one party more than to another”, and that the dangers of perjury were probably not as serious as the disadvantages involved in denying the parties equal access to the sources of relevant information. The Federal rules accordingly permit inquiry as to “the identity and location of persons having knowledge of relevant facts,” a provision carried over into Maryland Discovery Rule 3.

The rule, of course, does not require a party to furnish his opponent with a list of his prospective witnesses, and a request to “state the names and addresses of your wit-


nesses" would probably not do. Some decisions, however, have allowed interrogatories asking for the names and addresses of "all persons having knowledge" of facts relevant to particular issues. The more particular the request, the better reception it will probably get from the court in case of objection. Thus, for example, a request for names and addresses of all eye-witnesses of an accident would probably be held proper.

One case has held that a deponent could not be required to divulge names of witnesses where he knew them only by hearsay. This, however, seems clearly wrong. The hearsay rule has nothing to do with the matter; the purpose of the inquiry is to locate persons with first-hand knowledge of the facts and it should make no difference how their identity came to be known to the interrogated party. Under the Maryland rule this is made especially clear by the reference to any such information, "however obtained".

Although names of witnesses may ordinarily be obtained, the court has power to forbid the inquiry if justice requires it. Thus in one case a plaintiff in an action on a fire insurance policy sought disclosure of the names of defendant's witnesses. The court refused to order the discovery after the district attorney had stated that he intended to prosecute plaintiff for arson and that disclosure of the evidence would enable plaintiff to frame an alibi.


In allowing such wide scope of discovery by deposition the draftsmen of the Federal rules of course realized that

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abuses might be possible. Rather than attempt to impose limitations on the rules themselves, however, they wisely left the matter to the discretion of the court in which the action is being tried. Thus Federal rules 30(b) and (d) and 31(d) permit the court, among other things,\textsuperscript{126} to forbid the taking of a deposition, or to preclude inquiry into certain matters, or to limit the scope of examination to particular matters, and particularly to provide that secret processes, developments, or research need not be disclosed. These powers have been granted to the Maryland courts by Deposition Rule 6(a).

It was recognized in one of the first decisions under the Federal rules that these provisions were not intended to be made the basis of an application to the court in every case.\textsuperscript{127} And subsequent decisions have shown a strong disinclination to limit the scope of examination in advance of the taking of a deposition. Some definite prejudice or unreasonable oppression must be shown.\textsuperscript{128} In particular, the courts will not attempt to pass on questions of relevancy or privilege in advance of the examination, but rather will tell the party or witness to wait until the questions are asked and then raise the objection if he cares to.\textsuperscript{129}

These decisions are of course entirely applicable under the Maryland rules. To make doubly sure that the protective provisions of the rules were not used to defeat the liberal provisions for scope of discovery the draftsmen included a caveat that “The policy of these rules is to require full disclosure as specified in Discovery Rule 3 and the powers conferred by section (a) of this rule shall be used only to prevent genuine oppression or abuse”.

\textsuperscript{126} See supra, circa notes 67-69.
It is apparent from what we have said above that there is practically nothing in the new Maryland Rules which has not been tried and found satisfactory in other jurisdictions. Such novel provisions as are included have for the most part been devised in an effort to avoid specific difficulties which have developed in the practical operation of comparable provisions of the Federal Rules or of state statutes. The most striking features of the new Rules—extension of discovery by deposition to all witnesses, whether parties or not, and liberalization of the scope of inquiry—have behind them a record of successful operation in many states as well as in the Federal courts.

Within the excellent framework which the new Rules supply, Maryland may well develop as effective a system of pre-trial discovery as has ever been known. The ultimate success of the new procedure, however, depends on the attitude of the bar and of the judiciary. The Rules are not self-executing; they must be applied by lawyers and judges, and a cooperative and liberal attitude on the part of the bar in utilizing the rules, and of the bench in enforcing them, will do much to insure a smooth transition from the old ways to the new.

The matter of expense, for instance, is one in which a cooperative attitude may mean all the difference between success and failure. For it cannot be denied that, while the oral deposition is the most effective method of discovery, it is also as a general matter the most expensive, and in small cases the interests at stake may not justify the cost. Much, however, can be done toward reduction of costs through the taking of depositions informally by agreement, as permitted by Deposition Rule 4, and by use of the attorneys' own stenographers to write up the evidence. In addition, under Deposition Rule 8 (c) which, as pointed out above, is original with the Maryland procedure, the court can accomplish the same thing for poorer litigants and should exercise its discretion under that section freely for that purpose. And of course the

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130 See RAGLAND, DISCOVERY (1932) 172.
131 Supra, n. 21.
same broad scope of examination is available for methods the costs of which are inconsequential—written depositions, written interrogatories, and the notice to admit.

It is also important that the system be kept simple and non-technical by reducing to a minimum dilatory and time-consuming motions. While the Maryland Rules have taken a step beyond the Federal Rules by allowing all depositions to be taken on notice without motion even before answer and by definitely eliminating motions directed against a request to admit, there still remain motions for discovery of documents or other things, motions for physical or mental examination, motions to compel answers on the taking of a deposition, motions for protective orders, motions to enlarge or shorten time, motions for leave to serve more than thirty interrogatories, exceptions to answers to interrogatories, motions to impose penalties—each of which will be a separate motion. But by adopting a clear and liberal policy from the very beginning, the courts can relieve themselves of the burden of passing on unnecessary motions and can likewise save the time of lawyers. They can do this by refusing to entertain unwarranted motions to prevent the taking of depositions and by dealing severely with refusals to answer and by imposing expenses on lawyers and parties in appropriate cases. If the courts in this manner make clear their policy to permit discovery in all normal circumstances, most of these questions will be handled by the lawyers themselves without application to the court. In more complicated cases the courts might find it wise to hold "pre-discovery" conferences, such as have been suggested for the Federal courts, for the purpose of narrowing the issues, securing stipulations, etc., in order to limit the extent of necessary trial-preparation and eliminate waste action.

132 See supra, n. 19.
133 See supra, n. 55.
## Comparative Table of Maryland and Federal Rules

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