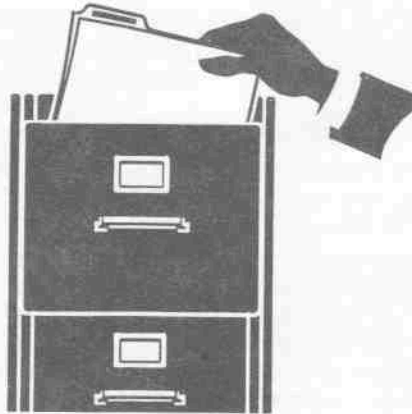


Federal Discovery in Products Liability Cases

by Elliott C. Winograd*



Introduction

Products liability is a body of law that governs the apportionment of damages where a product has malfunctioned due to a defect. The plaintiff must show the existence of a product defect and a causal connection between the defect and plaintiff's loss. Although products liability law sounds in tort, it has roots in the law of contract and warranty and these latter principles of law are still applicable.¹

The key element in products liability is the definition of "defect." Defects in products take one of three forms:

(1) Physical Defect — This is mainly the result of a "manufacturing flaw." A manufacturing flaw is a defect which results from the manufacturer's or designer's plans not being carried out correctly. For example, an automobile axle with a crack in it or improperly assembled components are physically-flawed products. Usually, the elements of proof of manufacturing flaw cases are: the existence of the defect, which existed at the time the product left the defendant's hands; a causal connection between the defect and the accident or injury; and damages on the part of the plaintiff.²

(2) Duty to Warn — It is not necessary for a product to be "defective" in order that a warning be required regarding its use; it is sufficient that the warning is needed in order to avoid a danger. The general rule is that a warning is required as to latent dangers regarding either use or misuse of the product, of which the seller either knew or should have known and of which the consumer did not already know as a result of independently gained knowledge. This category also extends to improper directions on the use of the product or total lack of directions on use of the product. Improper directions also include inadequate direction.³

(3) Design Defects — As a general rule, a design defect may be defined as a condition in the product which results in an unreasonable danger, not contemplated by a

reasonable consumer, even though the product may have been made exactly pursuant to the plan. It is also an error committed during the product's initial design stage, commonly called "drawing board" stage.⁴

Overview

Let us move into an overview of the discovery stage. Disingenuously, the plaintiff's attorney will always agree with the Archbishop of York, who remarked, "[m]y ignorance of science is such that if anyone mentioned 'copper nitrate,' I would think he was talking about a policeman's overtime." You should by now have retained an expert who is qualified to help you prepare for the discovery stage. You will need this expert to give you necessary information and suggestions in his particular area of expertise and specialization of the product and industry that is the subject matter of the litigation.

Keep in mind that the manufacturer of the product already has his expert in place. As a matter of fact, due to the previous number of lawsuits concerning that particular product, the manufacturer's experts are professionally "tried and true." Therefore, before retaining your expert, obtain his curriculum vitae and verify his credentials and qualifications by asking other attorneys and/or researching him through services such as the "Jury Verdict Reporter" and/or the American Trial Lawyers Association Networking System.

Plaintiff's counsel will want to bring this lawsuit in federal court because of its wide sweeping and liberal scope of discovery through the Federal Code of Civil Procedure (hereinafter "FRCP") as compared to New York State's Civil Practice Law and Rules (hereinafter "CPLR"), which can at times prove to be arcane. On the other hand, hopefully, defendant's counsel will do everything in his power to defeat diversity and have the case transferred to the state court.

This article will deal with nine aspects of discovery: the discovery of subsequent modifications; other accidents; product recall information; product standards and

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course of the doctor's business and that it is in the regular course of the doctor's business to keep the records. The objection at this point would be directed to the legibility of the records and whether the notes contain any symbols or signs that do not have a "universally recognized meaning."⁷

Other issues that must be addressed include whether reports received from other doctors contained in the office records are also admissible. In many doctors' offices, records are reports of consulting physicians, lab results, and other information from sources other than the treating physician. They are certainly kept in the regular course of business but they are not made by the doctor whose records are sought to be introduced. It has been held that physicians' reports prepared for litigation are not admissible.⁸ Based upon the fact that a consulting physician's report (or reports from other sources) contained in a physician's office record are not made in the regular course of the treating physician's business, there is no foundation for their introduction as business records pursuant to CPLR 4518(a).⁹

In summary, the office records of a treating physician are admissible in evidence pursuant to CPLR 4518(a) whether the physician is called as a witness or not.

Footnotes

1. See Richardson on Evidence §298-305, Prince 10th Edition.
2. 130 A.D.2d 221, 519 N.Y.S.2d 126 (2nd Dept. 1987).
3. 130 A.D.2d at pp. 231, 232.
4. 59 Misc. 2d 224, 298 N.Y.S.2d 360 (Sup. Ct., Oneida Co. 1968) (doctor deceased); *Duffy v. Edison Inc.*, 240 A.D. 1002, 268 N.Y.S. 959 (2nd Dept. 1933) (doctor deceased); *Hessek v. Roman Catholic Church of Our Lady of Lourdes*, 80 Misc. 2d 410, 363 N.Y.S.2d 297 (Civ. Ct., Queens Co. 1975) (doctor demanded "outrageous" fee to testify).
5. 141 A.D.2d 705, 529 N.Y.S.2d 824.
6. 285 N.Y. 389 (1941).
7. See *Wilson, supra*.
8. *Sabatino v. Turf House*, 76 A.D.2d 945, 428 N.Y.S.2d 752 (3rd Dept. 1980).

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statutory requirements; trade secrets; trial expert opinions; the nontestifying expert; work product; and requests calling for contentions. The purpose of this article is to provide the practitioner with a ready reference to case, statutory and procedural rule authority of federal law in specific areas of pre-trial and evidentiary concern, and to attempt to provide legal arguments both in support of and against the various types of discovery evidence. This article is simply meant to be a guideline and is not all-inclusive.

Discovery of Subsequent Modifications

What does the fact that there were subsequent modifications to a product have to do with a case? The federal courts (and New York State law) follow the common law exclusionary rule that precludes the admission of evidence of subsequent modifications at trial for purposes of proving negligence or culpable conduct. Such modifications are admissible only to prove ownership, control or feasibility of precautionary measures.

Keeping in mind that the plaintiff's goal is to obtain as much information as possible to formulate his theory of liability, he hopes that subsequent modifications by the manufacturer will assist in proving that an alternate design was safer, according to a risk benefit analysis, in which risk, cost and other relevant factors are balanced. Therefore, plaintiff's objective is to prove that the alternate design was feasible, given the state-of-the-art **at the time the product was designed.**

Subsequent design modification discovery is governed by FRCP 26(b)(1). However, under Federal Rule of Evidence 407 (hereinafter "FRE"), evidence of subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.⁵ **Evidence otherwise inadmissible is still discoverable if relevant,** and the plaintiff can expect to obtain discovery so long as the request is reasonably calculated to lead to admissible evidence.⁶ The practitioner should keep in mind that relevant evidence in the context of discovery has a different meaning from relevant evidence as defined by FRE 401.

Another point of discovery that should be considered is the "Similarity Doctrine," whereby the courts have held that the existence and nature of other complaints relating to the use of the defendant's product is a proper subject for pre-trial discovery to prove that the defendant had notice of the dangerous propensities of the product and to prove that the plaintiff had unusual susceptibility to the product.⁷ Some courts have allowed the admission of evidence at trial of information relating to other accidents of the same or similar product to prove the dangerous or hazardous nature of the product.⁸

The procedure for discovery of subsequent modifications is through interrogatories under FRCP 33. Some points of defendant's objections to this type of discovery may be covered under attorney-client privilege (see *Upjohn v. U.S.*, 449 U.S. 383 (1981)); work product doctrine (FRCP 26(b)(3)); Trade Secrets under FRCP 26(c)(7); and discovery is burdensome and expensive under FRCP 26(c).

Discovery of Other Accidents

Let us start out with the proposition that information relating to other accidents involving the same or substantially similar product is generally discoverable. One should keep in mind this doctrine applies notwithstanding the theory of recovery: negligence or strict liability. This discovery tool is of special significance when a punitive award is sought as governed by FRCP 26(b)(1).

In determining whether or not the same or substantially similar products are sought to be discovered, see *Culligan v. Yamaha*, 110 F.R.D. 122 (S.D.N.Y. 1986); in determining similarity of circumstances of accident, see *Karns v. Emerson*, 817 F.2d 1452 (10th Cir. 1987); *Farnum v. Bristol Co.*, 107 N.H. 165, 219 A.2d 277 (1966).

Discovery of Product Recall Information

There are two basic types of recall: voluntary and involuntary. Most manufacturers utilize quality control programs which are designed to ensure that products which they produce or manufacture are reasonably safe for the consuming public. Such control is not only a function of their concern for consumer well-being, but a method by which they can maintain their products' reputation, stay competitive and attempt to minimize potential product legal liability.

Many manufacturers are subject to governmental regulation and control through various governmental administrative agencies. These quasi-legislative, quasi-executive, and quasi-judicial entities are vested with the authority to require a manufacturer to recall its products when that particular agency perceives some threat or risk to the health, safety or welfare of the public. The most prominent federal agencies for the area of products liability include: the Food and Drug Administration (FDA), the Consumer Product Safety Commission (CPSC), the Federal Trade Commission (FTC) and the National Highway Traffic Safety Administration (NHTSA).⁹

The attorney should keep in mind that many corporations have recall departments that periodically review internal documents which may have a bearing on possible recalls. Such documents usually include: customer complaints, orders for repair parts, product testing, inspection results, quality control reviews, reports of dealers and reports of sales and service personnel. All of these are papers that an injured plaintiff, or the defending manufacturer, may wish to discover or introduce in litigation.

The defense may argue that the receipt of a recall notice by a product user removes the allegedly defective condition of the product and it is no longer "unreasonably dangerous." Moreover, since a manufacturer cannot be held strictly liable if, at the time of the accident, a product is **not** in substantially the same condition it was when sold, then it would not make sense to allow a claimant to recover when the manufacturer has acted to notify consumers of the alleged defect and there is good evidence the notice was unreasonably ignored. If the repair is not done because of the injured party's failure to respond to the recall, then the product is clearly not in the condition that the manufacturer **intended** it to be in at the time of the accident.

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Further arguments that the manufacturer may advance are that the injured party's lack of reasonable response to the recall amounts to an **intervening cause** of his or her injuries; if the plaintiff is proceeding under a failure to warn theory of recovery, the defense can point to the recall notice as evidence that the defendant did warn the plaintiff, or that it attempted to warn the plaintiff, of the alleged defect.

Some courts have held that the recall letter may not be used to establish that a defect actually existed in a particular product or that such defect was the proximate cause of the plaintiff's injury.¹⁰ If the plaintiff destroyed or lost the product in question, however, the doctrine of "spoliation of evidence" can, in some jurisdictions, give rise to an inference against plaintiff's position.

Evidence of recalls is frequently inadmissible when the duty to recall has been imposed by a regulatory agency, which dictates the form and content of the recall notice and letter.¹¹ As a matter of evidence, it would not fit within the business records exception to the hearsay rule.¹² However, defense counsel should keep in mind that the decisions are fairly uniform in allowing such information to be discovered during the discovery process and, under the Freedom of Information Act,¹³ the plaintiff may be able to obtain a significant amount of information directly from the agency that is regulating the manufacturer's products. This may be very prejudicial to a manufacturer, since the agency will typically have in its records much more information about the product than would otherwise be discoverable from the manufacturer in the course of normal discovery (for instance, the agency may be able to compel disclosure of trade secrets).

The defense may attempt to limit the discovery's broad scope by urging upon the court the plaintiff's theory of recovery.¹⁴ A more conservative judicial attitude towards discovery of recall information was clearly laid out in *Uitts v. General Motors Corp.*¹⁵

Discovery of Products Standards and Government Regulations

Manufacturers of consumer and industrial products are subject to a wide range of regulation with regard to the safety of their products. This regulation usually comes from governmental enactments such as the Consumer Products Safety Act, the National Electrical Safety Code and the Federal Motor Vehicle Safety Standards. Other regulations are from private industry, such as the American Standard Safety Code for Power Presses and the American National Standards Institute (ANSI).

There is virtually no case law on pre-trial discovery of product standards and government regulations.

Product standards and governmental regulations are usually admissible at a products action trial as relevant to the issue of liability.¹⁶ Safety codes are viewed as objective standards that represent a consensus of opinion of a public regulatory body or an industry. They thus contain the elements of trustworthiness which justify their admissibility as an exception to the hearsay rule.

The plaintiff's attorney will typically argue that the

manufacturer did not comply with the applicable regulation and, thus, was negligent. To refute the plaintiff's contention, defense counsel will point to his client's compliance with the regulation as evidence that the manufacturer was not negligent and that its product was not defective. The plaintiff will counter in a strict liability action that even though the manufacturer complied with the applicable standard, the product was unreasonably dangerous for normal use. These arguments have been accepted in appropriate cases by the courts.¹⁷

Plaintiff will commence discovery by means of interrogatories in an attempt to discover what industry or governmental standards or statutes were actually followed.¹⁸ However, defendant has the right, under FRCP 12(b)(6), to challenge the sufficiency of the allegations of the complaint before subjecting itself to discovery,¹⁹ if defendant believes that plaintiff is trying to build a case based on a theory being developed during discovery. A district court has broad discretion to dismiss a claim that has no merit. If defendant's Rule 12(b)(6) motion is denied, he can alternatively move to limit discovery "for good cause," under FRCP 26(c)(4). In addition, if defendant's counsel believes that the plaintiff is on a fishing expedition (overreaching), he may move for a protective order.²⁰

New York courts are also familiar with overbroad requests and fishing expeditions. In *Torpey v. Alpine Brook Triangle Corp.*,²¹ plaintiff demanded from defendant all documents pertaining to various points, without specification. The court denied plaintiff's overbroad request, stating that "the right to discover and inspect such documents as may be properly required in this case pursuant to CPLR 3101 and CPLR 3120, cannot be intelligently adjudicated without sufficient identification of pertinent documents in the possession and control of the adverse party."²²

A plaintiff seeking discovery under FRCP 34 must describe items or categories to be inspected "with reasonable particularity." In *Flickinger v. Aetna Casualty & Surety Co.*,²³ the court held that the requests for production "encompass fishing expeditions of the most blatant character and are objectionable as being unnecessarily oppressive and burdensome." The *Flickinger* court went on to point out that, "[t]he purpose of Rule 34 is not to discover what exists but to force the production of items that do exist."²⁴ In addition, defense counsel may utilize the defense of inconvenience and expense.²⁵

FRCP Rules 27 and 32 govern depositions. Rule 27 sets forth the procedure for the perpetuation of testimony by the taking of depositions before an action or pending appeal. It also allows a court to entertain an action to perpetuate testimony. The scope of discovery under Rule 27 is much narrower than that available under the general discovery provisions of Rule 26, and is limited to preserving and registering testimony which would otherwise be lost before the matter to which it relates could be filed.²⁶

Discovery of Trade Secrets

The internal operations of most manufacturers include information transmitted about the product from one employee to another. This information is generated starting from research and inception of the idea, all the way to

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the completion of the manufactured product. Plaintiffs, through FRCP 26(b), have a right to discover this information, if it is relevant and reasonably calculated to lead to admissible evidence.²⁷ Defendants have the right, under this same rule, not to be unduly burdened or oppressed by plaintiffs' discovery.

Plaintiffs may seek data about current or past design features or manufacturing processes. But the manufacturer often has a strong competitive interest in resisting or limiting such discovery for reasons wholly unrelated to the plaintiff's particular cause of action. Accordingly, defendants will often try to limit or even prevent discovery of such information because it is a "trade secret" or "confidential business communication" which should be afforded a privilege.²⁸ The Federal Rules recognize the existence and legitimacy of this interest; Rule 26(c)(7) refers to any data which, if disclosed, may or would create an advantage to the disclosing party's competitor.²⁹ The manufacturer can prevent disclosure of trade secrets by moving for a protective order under Rule 26(c)(7).³⁰ Thus, the standard for issuing orders to protect trade secrets, and the standard for determining what actually is a trade secret, have become inextricably intertwined. In the protective order context, the criteria for determining what is a trade secret include:³¹

- (1) the extent to which the information is known outside the business;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken by him to guard the secrecy of the information;
- (4) the value of the information to him or his competitors;
- (5) the amount of effort or money expended by him in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.³²

Keep in mind that the defendant must also face the fact that the rule strongly favors the allowing of discovery.³³

The courts have been consistent in requiring that to be entitled to a protective order, the party seeking the order must show a particular and demonstrable injury that will result from disclosure. However, they differ as to what type of harm is necessary, and how likely the harm must be.³⁴

The defendant seeking a protective order must establish three prerequisites. First, the matter sought to be protected must be a trade secret or other type of confidential communication. Second, the defendant must show that disclosure of the information would cause serious harm.³⁵ Third, it must show that "good cause" for issuing the order exists, applying the balancing test discussed above. Once the defendant has met these requirements, then the burden shifts to the discovering party to establish that the material is relevant, and that there is a specific need for it in preparing for trial.

Even if the defendant satisfies the requirements, it should not expect a protective order that totally prevents discovery of trade secrets or other confidential business information.³⁶

Plaintiffs' attorneys and others have attempted to argue that they have a First Amendment right of free speech to disseminate material obtained in discovery, asserting that it becomes a public record. However, this argument was rejected when the Supreme Court held in *Seattle Times Co. v. Rhinehart*,³⁷ that it is the party seeking to prevent dissemination of materials which has the constitutionally protected interest involved.

After deciding which materials to protect and how to limit the protective order, the court must set forth the procedural manner in which the order is to be implemented; this is a particularly important step in complex, document-oriented products liability litigation. Two general, alternate approaches have emerged, as described by the *Cipollone* court.³⁸ The first requires that before documents can even be marked "confidential," the defendant seeking to prevent discovery indicate on a document-by-document basis those which are to be protected and not disseminated.³⁹ The second approach would allow entry of a "blanket," or "umbrella," protective order under which the defendant would mark those documents it believed in good faith were confidential; the plaintiff would then indicate those documents which it wanted to disseminate, and the court would determine whether the documents were within the terms of the protective order. Under this umbrella approach, the order protects all documents the producing party has in good faith marked confidential. After delivery, the opposing party would indicate those documents it believed were not confidential, and the burden would shift to the movant to justify the order with respect to those documents.⁴⁰



Discovery of Trial Expert Opinions

The expert witness is given special status with regard to pre-trial discovery under the Federal Rules of Civil Procedure. Certain forms of discovery are available upon proof of special need, however, full discovery is not avail-

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able under any circumstances.

This discussion will focus primarily on the provisions of Rule 26(b)(4) of the Federal Rules of Civil Procedure.

The expert witness frequently gains access to attorney-client communications, attorney work product or other privileged materials. If an independent examination or independent tests are performed by the expert, he can become a fact witness. Questions then arise concerning the interplay between the qualified privilege limiting discovery of expert opinions and the general rules of discovery and evidence.

FRCP 26(b)(4) applies to discovery concerning any person who is an expert. The rule places a limitation upon the discoverability of certain described information. The limitation applies to "facts known and opinions held by experts" as long as the facts or opinions were "acquired or developed in anticipation of litigation or for trial."

You should be familiar with the Advisory Committee's explanatory statement and notes concerning the 1970 amendment which created the rule.⁴¹ The stated purpose behind adoption of a special rule for discovery of expert opinions was to avoid the possibility of one party (presumably the plaintiff) obtaining the benefits of expensive trial preparation by his opponent, free of charge, while still permitting reasonable opportunity to prepare for trial.

Absent leave of court, the provisions of Rule 26(b)(4)(A) prohibit the use of any technique other than service of interrogatories, pursuant to FRCP 33, as a tool for discovering information about trial experts. The Rule does not require the revelation of all facts which will form the basis for the expert's opinion.

Most professional expert witnesses maintain files for each case on which they work. Opposing counsel would, of course, like to examine this file. A request for production of documents pursuant to FRCP 34 is not permitted by FRCP 26(b)(4)(A) without leave of court. To obtain access to documents held by expert witnesses, counsel must therefore either be prepared to prove special need or to show that the particular documents sought fall outside the protection of Rule 26(b)(4)(A).

A number of courts have distinguished between two types of documents: those which the expert obtained or which were created after he was retained to testify, and other documents in the expert's possession. Information already known to the expert and documents already in his possession, while usable in the course of testifying in the present matter, are either maintained in the ordinary course of business or were generated in the course of activities other than preparation for trial and, thus, are discoverable. Access to documents pertaining to prior litigation in which the expert participated has been allowed under this rationale.⁴² A distinction also has been drawn between documents furnished to an expert and documents provided by the expert to the client.⁴³

Where the documents sought are not simply business records of the expert, but pertain to prior litigation, a two-layer privilege analysis is necessary. Rule 26(b)(4)(A) expressly limits discovery to matters which are not privileged under Rule 26(b)(1). The question then becomes whether expert files from prior litigation are "privileged."

Certainly in those instances where the expert acted as a consultant who was not designated to testify in the prior litigation, his files are subject to a claim of privilege in the prior case under Federal Rule 26(b)(4)(B) or the work product doctrine. The general rule in federal courts is that the work product privilege of Rule 26 carries over into subsequent litigation, and therefore constitutes a form of evidentiary privilege.⁴⁴ Any similar privilege attaching to expert opinions in the prior litigation should also carry over on the same rationale, and remain privileged from discovery in subsequent litigation. Under this analysis, in the absence of waiver, access to expert files from other cases should be available only in the course of the lawsuit for which they were originally prepared.

Because Rule 26(b)(4)(A) mandates disclosure of expert opinions, facts and foundation only insofar as that information is not privileged, it is tempting to try to cloak expert opinions and files in some sort of evidentiary privilege. Do not expect your expert to use attorney-client communications in forming his opinions unless you are prepared to reveal those communications.

Counsel desiring to obtain access to articles and standards should contend that this material must be identified, at a minimum, as part of an adequate interrogatory answer summarizing the basis for the expert's opinion. Counsel may then be required to search for copies of the documents rather than obtaining them directly from the opposing expert.⁴⁵ There is some authority that a request for production under FRCP 34 may not require production of documents in the possession of non-parties who are under no legal obligation to provide the requested items to a party.⁴⁶ This interpretation of Rule 34 has not yet been applied to a request for experts' papers under Rule 26(b)(4).

FRCP 26(b)(4) does not describe the burden which must be met by a litigant who seeks the required court order to permit deposition of an opponent's expert. Rule 26(b)(4)(B), which refers only to expert consultants who will not testify at trial, requires a showing that the information is unobtainable by any other means before any discovery may be had of the opinions of consultants. The Advisory Committee's note to the 1970 amendment to Rule 26(b)(4) implies that the burden to be met in seeking to depose an expert who will testify should be considerably less than the burden of obtaining discovery of consultant opinions. It describes the rule as substantially the procedure adopted by decision of the court in *Knighon v. Villian & Fassio*.⁴⁷

The first and primary goal to be achieved in deposing an opposing expert is to obtain the details of his analysis. This may be as simple as supplementing the Rule 26(b)(4) interrogatory answers with more detailed questions. Fundamental principles of evidence require an expert to have some sort of factual foundation for the opinions he gives, and some sort of rational description of how he reaches conclusions based on those facts.⁴⁸ A central purpose of the deposition of an expert (or any other witness) is to make him commit himself to specific conclusions. He should be required to state the assumed facts which support his analysis and to describe which facts are critical to his analysis. The expert may be willing to admit the importance of any particular fact.

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Occasionally, the desire of plaintiff's expert to avoid impeachment can actually be the best source of impeachment. Defense counsel should be prepared for attempts to change expert testimony on the eve of trial, and be prepared to submit briefs to the court either to suppress the changed opinions, disqualify the witness or reopen discovery to counter such unfair tactics.

New York continues to follow the pre-1970 federal rule of treating expert opinions as a form of attorney work product.⁴⁹

FRCP 26(b)(1) prohibits discovery of any matter which is privileged under the applicable rules of evidence. Rule 501 of the Federal Rules of Evidence refers the federal courts to state law in determining questions of privilege when the substantive rule of law is provided by the states, *i.e.*, diversity jurisdiction cases.⁵⁰

Discovery of the Nontestifying Expert

Discovery of nontestifying experts is governed by Rule 26(b)(4)(B), which presents two primary issues: (1) When has a party shown such "exceptional circumstances" as to warrant full discovery of an adversary's nontestifying expert; and (2) What type of showing is necessary for discovery of the nontestifying expert's identity only.

The purpose of this discovery rule is to promote better trial preparation and to prevent opposing counsel from gaining an unfair advantage.⁵¹

Exceptional circumstances arise most often when the subject matter of the expert's opinion is no longer available to the adverse party. *Wakabayashi v. Hertz Corp.*⁵² illustrates this type of situation well. *Bio Sandy Wholesale, Inc. v. Conley*⁵³ illustrates the type of facts which are necessary to show that exceptional circumstances are present. *State ex rel. Shelby Mutual Insurance Co. v. Circuit Court*,⁵⁴ a products liability action, also addresses the issue of exceptional circumstances. An interesting decision holding that exceptional circumstances were not shown is *Newsome v. Lowe*.⁵⁵

There are two opposing schools of thought concerning the necessity to discover the **identity** of an opponent's nontestifying expert under the same showing of exceptional circumstances.

The Advisory Committee's Note indicates that such information may be had upon the "proper showing." This "proper showing" clause has been the focus of most of the litigation on this issue. The leading case supporting the view that exceptional circumstances must also be shown to discover a nontestifying expert's identity is *Ager v. Jane C. Stormont Hospital & Training School for Nurses*.⁵⁶

Those courts that have held that a nontestifying expert's identity can be discovered absent a showing of exceptional circumstances have relied on the authority of Rule 26(b)(1), which requires only a showing of relevancy. Illustrative of this position is *Baki v. B.F. Diamond Construction Co.*⁵⁷

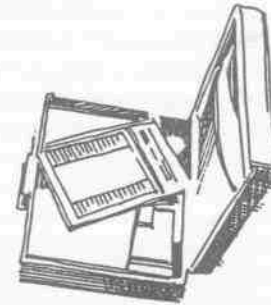
State and federal courts that have addressed the issue are split, with a majority allowing discovery of a par-

ty's nontestifying expert's identity even absent a showing of exceptional circumstances.⁵⁸ There are, however, many jurisdictions that require such a showing.⁵⁹

Another issue presented in discovery of a nontestifying expert is to what extent may one inquire as to knowledge the expert had prior to his being retained or specially employed. The few courts that have addressed this issue agree that discovery into this area is permitted by the rules.⁶⁰

As a general rule, employees of a party may not invoke the protection afforded to nontestifying experts by Rule 26(b)(4)(B).⁶¹ There is, however, some case law which has held that under certain circumstances an employee may be considered an expert who is retained or specially employed in anticipation of litigation.⁶²

While formally-consulted experts are subject to discovery, those that are informally consulted are immune. *Ager v. Jane C. Stormont Hospital & Training School for Nurses*⁶³ provides some guidance as to what factors determine whether an expert has been formally or informally consulted.



Discovery of Work Product

Discovery of trial preparation materials and work product is governed by FRCP 26(b)(3). In order to come within the qualified work product protection, the material must be:

- (1) documents and tangible things;
- (2) prepared in anticipation of litigation or for trial; and
- (3) by or for another party or by or for that other party's representative.

It should be noted that the work product privilege is not absolute, and trial preparation materials can be discovered upon the requisite showing of need. The work product doctrine was most clearly set forth in the United States Supreme Court's decision in *Hickman v. Taylor*.⁶⁴

The majority rule regarding discovery of claim files and investigative files is that these documents are **not** protected under the Rule 26(b)(3) work product doctrine **unless** they are prepared in anticipation of some specific claim, requested by or prepared for an attorney, or otherwise reflect the employment of an attorney's legal expertise. *Thomas Organ Co. v. Jadranska Slobodna Plovidba*⁶⁵ is the leading case under the majority position.

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Accident reports are often regarded as not being work product.⁶⁶

Insurance companies are often denied broad protection from discovery as shown in a typical opinion expressed by a federal court in Georgia.⁶⁷ Even if investigative reports are prepared in anticipation of litigation, they may nevertheless be discoverable, in accordance with Rule 26(b)(3), if plaintiffs can show that they have "substantial need" for the documents and they would incur "undue hardship" in obtaining substantially equivalent documents from another source.⁶⁸

The opinion in *Almaguer v. Chicago, Rock Island & Pacific Railroad Co.*⁶⁹ is supported by the Advisory Committee Comments to the 1970 Amendments to FRCP 26(b)(3), which describe the various policies supporting the work product rule as follows:

- (1) protection of the litigant's informal evaluation of his case;
- (2) encouragement of independent preparation for trial; and
- (3) prevention of one side obtaining automatic access to the detailed preparatory work of the other side.

The *Almaguer* approach was applied in *American Optical Corp. v. Medtronic, Inc.*,⁷⁰ in which an issue arose as to whether, and under what circumstances, the work product doctrine would protect documents, prepared in anticipation of previous litigation, from discovery in subsequent lawsuits.

Many courts have held that the work product protection does not carry over to subsequent litigation and that documents, prepared in anticipation of previous litigation and shielded from discovery in that previous litigation, are discoverable in a subsequent lawsuit. Typical is the decision in *Honeywell, Inc. v. Piper Aircraft Corp.*⁷¹

The judicial attitude favoring extension of work product protection to subsequent litigation can be found in *United States v. Leggett & Platt, Inc.*⁷²

Finally, the Supreme Court has noted, without deciding the issue, that the literal language of Rule 26(b)(3) "protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation."⁷³ Thus, while the Court did not conclusively state that this interpretation of Rule 26(b)(3) was correct, its remarks on the issue suggest that the work product protection continues over time.⁷⁴

Statements obtained by an investigator for a party's insurer, in anticipation of litigation, may be protected by the work product rule. See *Fireman's Fund Insurance Co. v. McAlpine*.⁷⁵

The Fourth Circuit held, in *McDougall v. Dunn*,⁷⁶ that it is "not at all convinced" that statements taken by a claims adjuster for an insurance company several years before any claim was made or suit begun "met the definition of materials embraced within Section (b)(3) of Rule 26."

Once a party establishes that certain documents were prepared in anticipation of litigation (and thus pro-

ected under the work product doctrine), the party seeking discovery has the burden of overcoming the protection.⁷⁷ The party seeking discovery of trial preparation materials must satisfy two tests set forth by FRCP 26(b)(3) in order to overcome the work product protection.⁷⁸

Once the party seeking discovery of work product meets the "substantial need" test, Rule 26(b)(3) requires that he then establish that he cannot obtain the substantial equivalent of the material sought by any other means without undue hardship.⁷⁹

The attorney-client privilege protects communications necessary for legal advice that are made in confidence between the lawyer and his client. The privilege is absolute; once established need cannot overcome it.⁸⁰

FRCP 26(b)(3) provides, in part: "[a] party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party."

A person who is "not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person," according to Rule 26(b)(3).⁸¹

Discovery Requests Calling for Contentions

There are three primary tools which enable a party to discover an opponent's contentions: interrogatories, requests for admissions and depositions.

Under present law, a plaintiff may expect to discover opinions and contentions of the defendant which relate either to fact or to the application of law to fact,⁸² but is precluded from asking about issues of "pure" law, *i.e.*, "legal issues unrelated to the facts of the case."⁸³ "Pure" legal conclusions are considered the attorney's opinion work product and are rarely discoverable, even upon a showing of special need, in accordance with Rule 26(b)(3).⁸⁴

Depositions are usually considered the best existing method of discovery because of their confrontory, direct and spontaneous nature.⁸⁵ Moreover, depositions may be taken of both parties and witnesses (Rule 30(a)), thereby avoiding the "party-only" limitation placed on interrogatories (Rule 33) and requests for admission (Rule 36).

One of the defendant's initial steps should be to immediately pin down the plaintiff on matters relating to the claimed injury and use of the product.⁸⁶ This can be achieved by early service of contention interrogatories.

Where permitted, discovery by the defendant should precede that of the plaintiff. Because of the overview they provide, contention interrogatories should be one of the first discovery devices employed. Generally, they should be filed, if procedurally permitted, with the answer.⁸⁷

FRCP 33(b) expressly provides for discovery of contentions. In addition to the general procedure set forth in Rule 33, parties should also consult the local rules of the federal court in which litigation is pending. In recent years, many federal district courts have adopted rules limiting the scope⁸⁸ and number of interrogatories which a party may serve.⁸⁹

The scope of contention interrogatories in the federal

(Continued on Page 18)

courts is governed by Rule 26(b). A common challenge to contention interrogatories is that the attorney's work product is being sought. Rule 33(b) states that calling for the opinions and contentions of an opponent is not objectionable if it relates to fact or the application of law to fact. The "pure legal conclusions" of the opponent, however, are protected work product.

In the federal courts, Rule 36 controls requests for admissions, which have two essential objectives: first, to facilitate proof of issues; and second, to narrow issues. Of course, admissions of law unrelated to the facts of the case are not proper.⁹⁰

For the defendant, requests for admissions are of most benefit when used to obtain a summary judgment.⁹¹ Spurious claims can be uncovered and swept aside by admissions directed to ultimate issues of fact.⁹²

The defendant should serve requests for admissions in order to clarify the critical issues and facts in the case and, pursuant to a motion under Rule 26(b)(4)(A)(ii), to narrow the theories of plaintiff's expert witnesses. Both types of requests cut costs and expedite litigation.

A party may object to a discovery request calling for an opinion, a conclusion about an issue of law, an ultimate issue of fact or the application of law to fact, on the ground that these matters are properly the responsibility of the jury or court. Such an objection may be overcome by reference to Federal Rules 33(b), 36(a), and arguably 30, which explicitly permit injuries of this nature.⁹³

Footnotes

1. See *Martin v. Julius*, 43 N.Y.2d 583, 403 N.Y.S.2d 185 (1978) and *Codling v. Paglia*, 32 N.Y.2d 330, 345 N.Y.S.2d 461 (1975); *Victorson v. Bock*, 37 N.Y.2d 395, 373 N.Y.S.2d 39 (1975).
2. *Codling v. Paglia*, 32 N.Y.2d 330, 345 N.Y.S.2d 461 (1975); *Micallef v. Miehle*, 39 N.Y.2d 376, 384 N.Y.S.2d 115 (1976); *Boim v. Triumph*, 33 N.Y.2d 151, 350 N.Y.S.2d 644 (1933); *Torrogrossa v. Towmotor*, 44 N.Y.2d 709, 405 N.Y.S.2d 448 (1978).
3. *Rainbow v. Albert*, 79 A.D.2d 287, 436 N.Y.S.2d 480 (4th Dept. 1981), *aff'd*, 56 N.Y.2d 550, 449 N.Y.S.2d 967 (1982); *Wolfgruber v. Upjohn*, 72 A.D.2d 59, 423 N.Y.S.2d 95 (4th Dept. 1975), *aff'd*, 52 N.Y.2d 768, 436 N.Y.S.2d 614 (1980); *Donigi v. American*, 57 A.D.2d 760, 394 N.Y.S.2d 422 (1st Dept. 1977), *aff'd*, 43 N.Y.2d 935, 403 N.Y.S.2d 894 (1978).
4. *Robinson v. Reed*, 49 N.Y.2d 471, 426 N.Y.S.2d 717 (1980); *Gardner v. Dixie*, 80 A.D.2d 577, 435 N.Y.S.2d 784 (2nd Dept. 1981).
5. See *Stevens v. Consolidated Mutual Ins.*, 352 F.2d 41 (1st Cir. 1965); *Strauss v. Douglas Aircraft*, 404 F.2d 1152 (2nd Cir. 1968).
6. See *Lindberger v. General Motors*, 56 F.R.D. 433 (W.D. Wisc. 1972).
7. See *Kelleher v. Omark Industries*, 20 Fed. R. Serv. 199 (D. Mass. 1975) and *TYTEL v. Richardson-Merrell, Inc.*, 37 F.R.D. 351 (S.D.N.Y. 1965).
8. See *Uitts v. General Motors Corp.*, 62 F.R.D. 560 (E.D. Pa. 1974); *Frey v. Chrysler Corp.*, 41 F.R.D. 174 (W.D. Pa. 1966).
9. See "Recalls: Legal and Corporate Responses to FDA, CPSC, NHTSA, and Product Liability Considerations," 39 *Bus. Law* 757, 762 (1984) (hereinafter "Recalls"); *United States v. General Motors Corp.*, 656 F. Supp. 1555 (D.D.C. 1987), *aff'd*, 841 F.2d 400 (D.C. Cir. 1988); 15 U.S.C. §§ 2051-2083; 15 U.S.C. §§ 2069-2074.
10. "Recalls," at 765.
11. *Id.*
12. See Fed. R. Evid. 801(c)(2), 803(6).
13. 5 U.S.C. § 552.
14. See *Parsons v. General Motors Corp.*, 31 Fed. R. Serv.2d 12186 (N.D. Ga. 1981); see also 85 F.R.D. 724 (N.D. Ga. 1980); *Swain v. General Motors Corp.*, 81 F.R.D. 698 (W.D. Pa. 1979); *In re Richard-*

- son-Merrell, Inc., 97 F.R.D. 481 (S.D. Ohio 1983).
15. 62 F.R.D. 560 (E.D. Pa. 1974).
16. For a general overview, see Annot., "Admissibility in Evidence, on Issue of Negligence, of Codes or Standards of Safety Issued or Sponsored by Governmental Body or by Voluntary Association," 58 A.L.R.3d 148 (1974).
17. See, generally Restatement (Second) of Torts § 288C; *Prosser & Keeton on Torts* § 36 (1984).
18. For a comprehensive listing of the sorts of interrogatories plaintiff may propound in the effort to discover all of the relevant governmental and industrial standards and regulations, see Danner, *Pattern Interrogatories: Products Liability*, §§ 4.25-4.27 (1972).
19. *Greene v. Emersons, Ltd.*, 86 F.R.D. 66, 73 (S.D.N.Y. 1980).
20. See *Schenker v. Pepperidge Farm, Inc.*, 7 Fed. R. Serv.2d 684 (S.D.N.Y. 1963); *Frey v. Chrysler Corp.*, 41 F.R.D. 174 (W.D. Pa. 1966).
21. *Torpey v. Alpine Brook Triangle Corp.*, 84 A.D.2d 739, 444 N.Y.S.2d 73 (1st Dept. 1981).
22. 444 N.Y.S.2d at 74. See *City of New York v. Friedberg & Associates*, 62 A.D.2d 407, 404 N.Y.S.2d 868 (1st Dept. 1978); see *Frey v. Chrysler Corp.*, *supra*, note 8. See also *Blotcher v. Upjohn Co.*, 54 A.D.2d 851, 388 N.Y.S.2d 289 (1st Dept. 1976), where the court held that the interrogatories sought irrelevant material and were unduly broad and oppressive.
23. 37 F.R.D. 533, 535 (W.D. Pa. 1965).
24. *Id.* quoting *Tobin v. WKRZ, Inc.*, 12 F.R.D. 200, 201 (W.D. Pa. 1952). See *Soetaert v. Kansas City Coca Cola Bottling Co.*, 16 F.R.D. 1 (W.D. Mo. 1954).
25. See *Stapleton v. Kawasaki Heavy Industries*, 69 F.R.D. 489 (N.D. Ga. 1975).
26. See *Ash v. Cort*, 512 F.2d 909 (3rd Cir. 1975).
27. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).
28. The standards adopted in the 1983 Amendment to Rule 26(b)(1) reflect concerns for the corporation's cost of discovery, duplicative discovery, the respective resources of the parties and the states involved. The Advisory Committee Notes reflect a concern that, while these factors had been applied prior to the 1983 Amendment, courts were still reluctant to limit the use of discovery.
29. *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 360 (1979); *Morrison Knudsen Co. v. Department of the Army*, 595 F. Supp. 352 (D.D.C. 1984), *aff'd*, 762 F.2d 138 (D.C. Cir. 1985).
30. *Weinstein's Evidence*, § 508[03]; Doerfer, "The Limits on Trade Secrets Law imposed by Federal Patent and Antitrust Supremacy," 80 *Harv. L. Rev.* 1432 (1967); Steadman, "Trade Secrets," 23 *Ohio St. L. J.* 4 (1962); *Parsons v. General Motors Corp.*, 85 F.R.D. 724 (N.D. Ga. 1980); 8 *Wright & Miller, Federal Practice & Procedure, Civil*, § 2043.
31. See *Waelde v. Merck, Sharo & Dohme*, 94 F.R.C. 27, 28 (E.D. Mich. 1981). These criteria are derived from Restatement (First) of Torts, § 757, comment (b) (1939).
32. Advisory Committee Notes, Rule 26(b), 1970 Amendments; *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985); *Moss v. Aetna Standard Engineering Co.*, 8 F.R.D. 323 (E.D.N.Y. 1948); e.g., *Pioneer Hi-Bred International, Inc. v. Holden's Foundation Seeds, Inc.*, 105 F.R.D. 76 (N.D. Ind. 1985). It is worth noting that this case, unlike *Moss*, involved discovery from a non-party; the court indicated that, as a result, the non-party did not have as high a burden to establish the protective order.
33. *Federal Open Market Committee v. Merrill*, 443 U.S. 340 at 362, citing 8 *Wright & Miller, Federal Practice & Procedure, Civil*, § 2043. See also *Cutler v. Lewiston Daily Sun*, 105 F.R.D. 137 (D. Maine 1985); *Farnsworth v. Procter & Gamble Co.*, *supra*, note 34.
34. See *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3rd Cir. 1986); *Centurion Industries, Inc. v. Warren Steurer & Associates*, 665 F.2d 323, 325 (10th Cir. 1981); *Citicorp v. Interbank Card Association*, 478 F. Supp. 756, 765 (S.D.N.Y. 1979); and *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 479 (S.D.N.Y. 1982); see, e.g., the higher standard of the court in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F. Supp. 866 (E.D. Pa. 1981).
35. Specific types and examples of potential harm must be shown; mere conclusory allegations that harm will result are not sufficient. *Zenith Radio Corp.*, *id.*; see also, *Centurion Industries, id.*
36. See *Centurion Industries, supra*, note 34; *Pioneer Hi-Bred International, supra*, note 32; *Federal Open Market Committee, supra*, note 31; *United States v. United Fruit Co.*, 410 F.2d 553 (5th Cir.

- 1969); Zenith Radio Corp., *supra*, note 36; Cutler v. Lewiston Daily Sun, *supra*, note 35.
- Some courts have noted that the need for limiting dissemination of trade secrets and other confidential business information only applies to dissemination to competitors and should not be used to prevent a plaintiff from sharing the information with other similarly situated litigants. "Shared discovery is an effective means to insure full and fair disclosure." Garcia v. Peeples, 734 S.W.2d 343, 347 (Tex. 1987), citing a federal court decision supporting "shared discovery." The danger inherent in such shared discovery, from a defendant's viewpoint, is that trial courts will lose the ability to control dissemination to other litigants in other jurisdictions, and the information ultimately will find its way into competitors' hands. *See, e.g.*, Pioneer Hi-Bred International, *supra*, note 32, 105 F.R.D. at 81; 4 Moore's Federal Practice, § 26.60(4), at 26-212. Centurion Industries, *supra*, note 34, 665 F.2d at 326. *See also* A.H. Robins Co. v. Fadely, 299 F.2d 557 (5th Cir. 1962); Paul v. Sinnott, 217 F. Supp. 84 (W.D. Pa. 1963). *See, e.g.*, Bleacher v. Bristol-Myers Co., 53 Del. 1, 163 A.2d 526 (1960); Garcia v. Peeples, *id.*
37. *Supra*, note 27.
 38. 785 F.2d 1108 (3rd Cir. 1986).
 39. *Id.* at 1122.
 40. *Id.*
 41. 48 F.R.D. 487-491, 497-508.
 42. *See* Barkwell v. Sturm Ruger Co., 79 F.R.D. 444 (D. Alaska 1978). A number of other decisions have allowed access to documents in the possession of an opponent's expert, with suitable restrictions to avoid access to documents which are otherwise privileged. *See, for example*, Quadri v. Sikorsky Aircraft Division, United Aircraft Corp., 74 F.R.D. 594 (D. Conn. 1977); *In re* IBM Peripheral EDP Devices Antitrust Litigation, 77 F.R.D. 39 (N.D. Cal. 1977); Baise v. Alewel's Inc., 99 F.R.D. 95 (W.D. Mo. 1983).
 43. United States v. International Business Machines Corp., 72 F.R.D. 78 (S.D.N.Y. 1976).
 44. *See* 4 Moore's Federal Practice, § 26.64[2], nn. 9-13, for a discussion of the various interpretations and trends.
 45. Baise v. Alewel's Inc., *supra* note 45.
 46. Cases decided prior to the 1970 amendment to Rule 34 distinguish between documents held by experts which a litigant was legally entitled to demand from the expert, versus those which the expert had discretion to withhold. *See, for example*, Greene v. Sears, Roebuck & Co., 40 F.R.D. 14 (N.D. Ohio 1966). This distinction does not appear in any of the post-1970 cases.
 47. 39 F.R.D. 11 (D. Md. 1965).
 48. *See also* Herbst v. International Telephone & Telegraph Corp., 65 F.R.D. 528 (D. Conn. 1975).
 49. New York prohibits discovery of expert opinions without proof that information known by the expert is unavailable by any other means. CPLR § 3101(d).
 50. *See, for example*, Inspiration Consolidated Copper Co. v. Lumbermens Mutual Casualty Co., 60 F.R.D. 205 (S.D.N.Y. 1973); Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc., 553 F. Supp. 45 (S.D.N.Y. 1982); Nelco Corp. v. Slater Electric Inc., 80 F.R.D. 411 (E.D.N.Y. 1978).
 51. 8 Wright & Miller, *Federal Practice & Procedure, Civil*, §§ 2029, 2032, 2034.
 52. 66 Haw. 265, 660 P.2d 1309 (1983).
 53. 639 S.W.2d 778 (Ky. 1982).
 54. 67 Wis. 2d 469, 228 N.W.2d 161 (1975).
 55. 699 S.W.2d 748 (Ky. App. 1985).
 56. 622 F.2d 496 (10th Cir. 1980).
 57. 71 F.R.D. 179 (D. Md. 1976).
 58. *See, e.g.*, Phillips v. District Court, 194 Colo. 455, 573 P.2d 553 (1978); Sea Colony, Inc. v. Continental Insurance Co., 63 F.R.D. 113 (D. Del. 1974); Weiner v. Bache Halsey Stuart, Inc., 76 F.R.D. 624 (S.D. Fla. 1977); *In re* Folding Carton Antitrust Litigation, 83 F.R.D. 256 (N.D. Ill. 1979); Arco Pipeline Co. v. S/S Trade Star, 81 F.R.D. 416 (E.D. Pa. 1978); Martin v. Easton Publishing Co., 85 F.R.D. 312 (E.D. Pa. 1980); Crenna v. Ford Motor Co., 12 Wash. App. 824, 532 P.2d 290 (1975).
 59. *See, e.g.*, Munns v. Volkswagenwerk, A.G., 539 P.2d 1180 (Alaska 1975); Thornton v. State Highway Department, 113 Ga. App. 351, 148 S.E.2d 66 (1966); Fernandes v. United Fruit Co., 50 F.R.D. 82 (D. Md. 1970); Guilloz v. Falmouth Hospital Association, Inc., 21 Fed. R. Serv.2d 1367 (D. Mass. 1976); Aetna Casualty & Surety Co. v. Williams, 476 N.Y.S.2d 451 (City Ct. 1984); State ex rel. Shelby Mutual Insurance Co. v. Circuit Court, 67 Wis. 2d 469, 228 N.W.2d 161 (1975).
 60. *See, e.g.*, Sullivan v. Sturm Ruger & Co., 80 F.R.D. 489 (D. Mont. 1978); Nelco Corp. v. Slater Electric Inc., 80 F.R.D. 397 (E.D.N.Y. 1978); Grinnell Corp. v. Hackett, 70 F.R.D. 326 (D.R.I. 1976).
 61. *See, e.g.*, Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397 (E.D. Va. 1975); Kelleher v. Omark Industries, Inc., 20 Fed. R. Serv.2d 1430 (D. Mass. 1975).
 62. *See* Seiffer v. Topsy's International, Inc., 69 F.R.D. 69 (D. Kan. 1975).
 63. 622 F.2d 496 (10th Cir. 1980).
 64. 329 U.S. 495 (1947). *See, e.g.*, the substantive and procedural guidelines set forth by Judge Harold Greene in *United States v. American Telephone & Telegraph Co.*, 86 F.R.D. 603 (D.D.C. 1979).
 65. 54 F.R.D. 367 (N.D. Ill. 1972).
 66. *See* Miles v. Bell Helicopter Co., 385 F. Supp. 1029, 1032 (N.D. Ga. 1974).
 67. Atlanta Coca-Cola Bottling Co. v. Transamerica Insurance Co., 61 F.R.D. 115, 118 (N.D. Ga. 1972).
 68. *See* APL Corp. v. Aetna Casualty & Surety Co., 91 F.R.D. 10 (D. Md. 1980); Young v. United States Parcel Service, 88 F.R.D. 269 (D.S.D. 1980). *But see*, Almaguer v. Chicago, Rock Island & Pacific Railroad Co., 55 F.R.D. 147 (D. Ned. 1972).
 69. *Id.*
 70. 56 F.R.D. 426, 430 (D. Mass 1972).
 71. 50 F.R.D. 117, 199 (M.D. Pa. 1970). *Also see*, Gulf Construction Co. v. St. Joe Paper Co., 24 F.R.D. 411, 415 (S.D. Tex. 1959); Tobacco & Allied Stocks, Inc. v. Transamerican Corp., 16 F.R.D. 534, 537 (D. Del. 1954).
 72. United States v. Leggett & Platt, Inc., 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).
 73. Federal Trade Comm. v. Grolier Inc., 462 U.S. 19 (1983).
 74. Federal Trade Commission v. Grolier Inc., *supra* note 73; *See also* Western Fuels Association, Inc. v. Burlington Northern Railroad Co., 102 F.R.D. 210 (D. Wyo. 1984).
 75. 120 R.I. 744, 391 A.2d 84 (1978). APL Corp. v. Aetna Casualty & Surety Co., 91 F.R.D. 10, 15 (D. Md. 1980). *See in re* LTV Securities Litigation, 89 F.R.D. 595 (N.D. Tex. 1981); United States v. Maryland Shipbuilding & Drydock Co., 51 F.R.D. 159 (D. Md. 1970). *See* Almaguer v. Chicago, Rock Island & Pacific Railroad Co., 55 F.R.D. 147 (D. Neb. 1972); Dingler v. Halcyon Lijn N.V., 50 F.R.D. 211 (E.D. Pa. 1970).
 76. 468 F.2d 468, 473 (4th Cir. 1972).
 77. Hickman v. Taylor, 329 U.S. 495 (1947), Feldman v. Pioneer Petroleum, Inc., 87 F.R.D. 86 (W.D. Okla. 1980); *In re* International Systems & Controls Corp. Securities Litigation, 693 F.2d 1235 (5th Cir. 1982).
 78. *See* Hickman v. Taylor, 329 U.S. at 511; Hickers v. Siegfried, 54 F.R.D. 24, 26 (W.D. Mo. 1971).
 79. Xerox Corp. v. IBM Corp., 64 F.R.D. 367 (S.D.N.Y. 1974).
 80. *See, e.g.*, 8 Wigmore, *Evidence*, § 2292 (McNaughton rev. 1961).
 81. 8 Wright & Miller, *Federal Practice & Procedure: Civil*, § 2028.
 82. Fed. R. Civ. P. 33(b), 36(a).
 83. *See* Advisory Committee Note, Fed. R. Civ. P. 33.
 84. *Id.*
 85. *See* Sunderland, "Scope and Method of Discovery Before Trial," 42 *Yale L.J.* 863, 874-77 (1983).
 86. Rheingold, "Drug Products Liability and Malpractice Cases," 17 *Am. Jur. Trials* 1, 130 (1970).
 87. Murphy & Marsh, "Defense and Management of a Products Liability — What, When and How To Do It," 28 *Fed. Ins. Couns. Q.* 227, 237 (1978).
 88. *See* Cohn, "Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules," 63 *Minn. L. Rev.* 253, 276, & n.141 (1979).
 89. *E.g.*, LR 230-1 (S.D. Cal.); LR 4.1(b)(1) (D. Del.); Gen. R. 303(a) (M.D. Fla.); Gen. R. 9(g) (N.D. Ill.); R. 14(c) (S.D. Ind.); R. 17(d) (D. Kan.).
 90. *See* Advisory Committee Note, Fed. R. Civ. P. 36.
 91. Bradford, "Request for Admissions by Defendant," 4 *Am. Jur. Trials* 215, 219 (1966).

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92. *Asea, Inc. v. Southern Pacific Transportation Co.*, 669 F.2d 1242, 1248 (9th Cir. 1981) (dictum). *Massey v. Haupt*, 632 P.2d 824, 826 (Utah 1981). *Palzer v. Serv-U Meat Co.*, 419 P.2d 201, 207-08 (Alaska 1966); *Burke v. Superior Court*, 71 Cal.2d 276, 283, 78 Cal. Rptr. 481, 487 (1969).

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New Department Created at the NYSBA

Stephen P. Gallagher has been appointed to the newly-created position of Director of the Law Office Economics and Management Department for the New York State Bar Association.

As Director of the State Bar's Law Office Economics and Management Department, Steve will be the key resource person to assist lawyers in making the delivery of legal services more effective, competent and responsive to the needs of clients. The state bar's Committee on Law Office Economics and Management has identified the need for someone with Steve's expertise to help lawyers better manage their practices and thereby serve the public with greater efficiency.

One of the first projects of the new Department is the establishment of a resource center to provide educational programs, information and services in the rapidly evolving areas of law office administration, equipment and related concerns. Any member of the state bar will be able to call the Resource Center hotline (518) 487-2596 for assistance in researching practical issues that arise in practice. One of the major goals in setting up the Resource Center is to encourage Bar members to develop innovative methods that simplify and make less expensive the rendering of legal service. Questions might arise regarding the use of legal assistants, computer software for estates practice, risk management issues or other general law office management concerns.

Another goal of the Department is to establish a Lawyer Mentor Program that will help experienced lawyers assist newly admitted lawyers to face the practical issues that arise in the practice. More information should be available by the annual meeting in January; however, if

you would be interested in participating in this project, please contact Stephen P. Gallagher at the Bar Center, One Elk Street, Albany, NY 12207-1096, (518) 463-3200, ext. 5595.

The Law Office Economics and Management Committee of the State Bar Association feels that the establishment of the Resource Center and a Lawyer Mentor Program, as well as greater involvement with CLE programs, will greatly assist individual lawyers and the organized Bar in understanding the changes that are taking place in the profession and help to preserve the principles of professionalism which will endure despite the changing legal landscape.

The Department will expand on and coordinate with the activities of the Committee on Law Office Economics and Management (Carl S. Koerner of New York City, Chair) and similar committees of the various Sections. If anyone is interested in working with this committee, please contact Steve.

Steve has served as director of administration for Temple University School of Law, legal administrator in law offices in the metropolitan Philadelphia area, and legal operations officer for First Fidelity Bancorporation in Lawrenceville, New Jersey. He has authored several articles on law office economics and management for trade publications. He chairs the Peer Review Committee of the Law Practice Management Section of the American Bar Association, is an active member of the Association of Legal Administrators and also taught law office administration at the Paralegal Institute in Pennsylvania.