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Minnesota Discovery Practice. By Roger S. Haydock with David F. Herr

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BOOK REVIEWS

MINNESOTA DISCOVERY PRACTICE. By Roger S. Haydock† with David F. Herr.†† St. Paul, Minnesota: North Central Publishing Company. 1978. Pp. 186. $17.50 (paperbound).

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Beneath the panoply of discovery devices is the core concept of modern discovery practice: cooperation. After adopting this concept of cooperation in *Minnesota Discovery Practice*,[1] Professor Haydock and Mr. Herr packed 186 pages with discovery techniques, tactics, and strategies that even experienced attorneys will find innovative and helpful. The book, however, is not just a how-to-do-it manual. It contains a scholarly analysis and explanation of the discovery rules,[2] with indications of troublesome problem areas in interpretation and application, and with citations to federal and state cases to provide helpful research material when these problems are confronted.[3] Sprinklings of humor in several forms distinguish this book from the often dull seriousness of most legal writing.[4]

Chapter 1 is introduced by an apt quotation from the *Bible*: "Ask and you shall receive. Seek and you shall find."[5] After the

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1. *See* R. HAYDOCK & D. HERR, MINNESOTA DISCOVERY PRACTICE 2 (1978).

2. MINN. R. CIV. P. 26-37.

3. Because the Minnesota and federal discovery rules are quite similar, the authors included both Minnesota and federal cases. R. HAYDOCK & D. HERR, *supra* note 1, at 4. *Compare* FED. R. CIV. P. 26-37 *with* MINN. R. CIV. P. 26-37.

4. For example, the authors indicate that the LSAT score of the opposing attorney is not discoverable. *See* R. HAYDOCK & D. HERR, *supra* note 1, at 8.

5. *Id.* at 7.

authors endorse the general philosophy of asking "for everything that you want to know about and that you have time to learn about,"[6] limitations on the scope of discovery are explored.[7] In their portrayal of the scope of discovery, the authors cover such topics as relevancy, privilege, work product, trial preparation materials, witness statements, and the opinions and conclusions of experts.

Because the discovery rules can pose problems in application and interpretation, the authors provide guidance for some of the more troublesome language. For example, the uncertainty of the discoverability of statements made by an employee to his employer, or to the employer's agent or attorney, is explored.[8] Similarly, examples, with citation of authority, explain the undue hardship and substantial need requirement for discovery of such trial preparation materials as surveillance films of a party, reports prepared shortly after an event, and information exclusively in the possession of the adverse party.[9] The authors also face the problem of the necessity of supplementing discovery responses when additional information is subsequently obtained that does not change but merely adds to the previous response, taking the position that this additional information must be disclosed.[10]

A distinctive feature of Chapter 1 is a chart illustrating the discoverability of the identity, facts, and opinions of five categories of experts: (1) trial witnesses; (2) retained or specially employed experts; (3) employees; (4) actors in or viewers of the event that is the subject matter of the suit; and (5) informally consulted experts.[11] For each of these categories of experts, the chart discloses whether the payment of expert fees or party expenses is a necessary condition for discovery.

Chapters 2 through 6 explain and interpret certain discovery rules and suggest strategies and techniques for employing each

6. *Id.* at 9.

7. Attention also is directed to the proposals for reform of the federal discovery rules that will restrict the scope of discovery to prevent abuse. *See id.* at 10. *See generally* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 80 F.R.D. 323 (1979).

8. *See* R. HAYDOCK & D. HERR, *supra* note 1, at 17.

9. *See id.* at 14.

10. *See id.* at 23-25.

11. *See id.* at 21.

device in preparation for trial. Chapter 2 on depositions, the longest in the book, will enable the young lawyer, facing his first deposition, to prepare for and conduct the examination, and to prepare, represent, and protect a client being deposed by an adversary. Included in this chapter are discussions of introductory statements,[12] questioning techniques,[13] pitfalls in the examination of the witness,[14] the method of handling exhibits,[15] reacting to objections and controlling interference,[16] and the concluding stipulations and formalities.[17] Supplementing the suggestions for preparing and representing the deponent, Appendix B is a client deposition guide containing detailed instructions and explanations to the client in question and answer form. The chapter on depositions concludes with a discussion of the use that may be made of depositions at trial.[18]

In Chapter 3 on interrogatories, the authors suggest several clarifying instructions and definitions that may be included as a preface or introduction to the questions.[19] Before supplying examples of information satisfactorily discoverable through interrogatories,[20] the authors humorously confront the seemingly simple problem of ascertaining when the limit of fifty interrogatories has been reached.[21] Chapter 3 also explores the problem of discovering factual opinions and contentions as well as conclusions of mixed law and fact. As an example, the authors note the propriety of asking whether the defendant contends that anyone observed the plaintiff commit a criminal act.[22]

For the benefit of the responding party, proper and improper objections to interrogatories are listed, together with responses that federal courts have held to be inadequate answers to proper questions.[23] As the authors point out, although proof at trial is not

12. *See id.* at 59-60.
13. *See id.* at 56-59.
14. *See id.* at 50-54.
15. *See id.* at 60-62.
16. *See id.* at 63-66.
17. *See id.* at 66-67.
18. *See id.* at 83-85.
19. *See id.* at 96-98.
20. *See id.* at 98-101.
21. *See id.* at 91-93. Counting to 50 can become a problem if multiple-phrased questions that seek a single response, alternative responses, or multiple responses, are used. *Id.* at 93.
22. *See id.* at 102.
23. *See id.* at 109-12.

usually limited by the answers to interrogatories, any additional information or change of position should be timely disclosed to the adverse party.[24] Chapter 3 concludes with a discussion of the uses that may be made of interrogatories at trial.[25]

In discussing the Rule 34 request for the production of documents or things,[26] the authors illustrate the circumstances in which documents or things not actually possessed by a party, or even owned by him, are nevertheless within his control, custody, or constructive possession, and subject to production.[27] Then, as an aid in determining whether a requested document is described with reasonable particularity, the authors suggest a two-pronged test and provide a suggested form of definitions to serve as an introduction or preface to the request for production to avoid the objection that the documents requested are not properly described.[28] Two drafting techniques that may also help to avoid this objection are specifically outlined.[29] Also in Chapter 4 are suggested responses and proper objections[30] to a request for production, all with such supporting authority as Rosemary Woods and Pat Boone.[31] The authors then discuss the methods available for obtaining production of documents and things from nonparties who are not included in Rule 34.[32]

In Chapter 5 on medical examinations, the authors suggest that the guidelines set forth in *Haynes v. Anderson*[33] may be followed to establish the showing of good cause that is required to obtain a court order for a medical examination of an adverse party.[34] The authors conclude that the examinee may depose the examining doctor only upon a showing of good cause,[35] a showing that is specifically required when a party seeks to depose the physician

24. *Id.* at 115-16.
25. *See id.* at 117.
26. *See* MINN. R. CIV. P. 34.
27. *See* R. HAYDOCK & D. HERR, *supra* note 1, at 121-22.
28. *See id.* at 123-25.
29. *See id.* at 125-26.
30. *See id.* at 127-29. The authors include such common objections as trial preparation materials or undue burden or expense, and a few more original objections: for example, "The document contains words with less than eight syllables, no Latin clauses, and simple sentences, and thus will be undecipherable to an attorney." *Id.* at 129.
31. *See id.* at 129 nn.30 & 33.
32. *See id.* at 132-33. *See generally* MINN. R. CIV. P. 34 ("any party may serve on *any other party*" (emphasis added)).
33. 304 Minn. 185, 232 N.W.2d 196 (1975).
34. *See* R. HAYDOCK & D. HERR, *supra* note 1, at 136-37.
35. *See id.* at 141.

of a party who has waived his medical privilege under Rule 35.03 by voluntarily putting his physical condition in issue.[36] In the authors' opinion, the intent of the Minnesota rules is to discourage the depositions of medical experts; thus, the requirement of good cause may be satisfied only in unusual circumstances.[37] In the preparation of the motion for the examination, as the authors suggest, supporting affidavits should be used to show good cause, and a proposed order should be served and filed with the motion and notice.[38]

Written in question and answer form, Chapter 6 contains examples of proper requests for admission of factual or legal statements, opinions, and conclusions.[39] This chapter also provides the responding party with suggestions for proper responses and objections, and explains the effect of a response or a failure to respond.[40]

Chapter 7 on imposition of sanctions outlines the motion practice[41] or procedure for obtaining a court order compelling discovery—a prerequisite in most instances to the imposition of sanctions—and for an order imposing sanctions when the first order is disobeyed.[42] The authors suggest that these two steps may be avoided if the court, in the order compelling discovery, were to designate the sanctions that would be imposed for disobedience. Subsequent disobedience could then be established by affidavits and followed by the automatic imposition of the designated sanctions.[43]

Throughout this book, the authors succeed in presenting Minnesota discovery rules, tactics, and strategies in a palatable, thoroughly readable form. The book appropriately ends with Appendix C, a humorous pictorial summary of discovery, consisting of cartoon illustrations of each chapter.

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36. *See id.* at 141-42.
37. *Id. Compare* FED. R. CIV. P. 35(b)(3) (specifically permitting depositions of medical experts) *with* MINN. R. CIV. P. 35.04 (requiring court order upon showing of good cause).
38. R. HAYDOCK & D. HERR, *supra* note 1, at 137-38.
39. *See id.* at 144-45.
40. *See id.* at 148-55.
41. *See id.* at 163-66.
42. *See id.* at 158-62.
43. *See id.* at 162.