The 1975 Amendments to the Minnesota Rules of Discovery

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THE 1975 AMENDMENTS TO THE MINNESOTA RULES OF DISCOVERY

By William B. Danforth†

The Minnesota rules of discovery were amended as of January 1, 1975. In this Article Professor Danforth discusses the amendments, placing special emphasis on the amendments to Rule 26, which now governs generally all discovery devices, and Rule 30, which governs oral depositions.

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I. Introduction

In 1970, the discovery provisions contained in the Federal Rules of Civil Procedure were amended.1 To a large extent, these changes were reflected five years later in the 1975 amendments to the Minnesota Rules of Civil Procedure for the District Courts.2

Because the changes in Minnesota became effective January 1, 1975,3 the language of the discovery rules is not new. Yet many new issues have been created by the 1975 amendments which have not been judicially resolved. There is little Minnesota case law on the 1975 amendments. Federal decisions, which often are relevant because of the similarity between the federal and Minnesota rules, are also scarce and oftentimes conflicting.

The purpose of this Article is twofold. First, it will set forth an overview of the changes in the discovery rules.4 Second, and more importantly, this Article will examine Rules 265 and 306 in detail. Rule 26 governs all discovery devices and Rule 30 governs oral depositions.

II. An Overview of the 1975 Amendments

The 1975 amendments to the discovery rules reflect organizational as well as substantive changes. The rules were rearranged to create one rule which would govern discovery devices in general.7 Thus old Rule 26, which dealt exclusively with depositions, was converted into a rule of general applicability which prescribes

4. See notes 7-117 infra and accompanying text.
5. See notes 118-96 infra and accompanying text.
6. See notes 197-266 infra and accompanying text.
the methods,\(^8\) scope,\(^9\) limitations,\(^10\) timing,\(^11\) and supplemental responses\(^12\) of discovery. Many of the old Rule 26 provisions for depositions were then transferred to Rules 30, 31, and 32.\(^13\)

The 1975 amendments also reflect substantive changes in the rules governing discovery. Because many of the major changes appear in Rules 26 and 30, they will be discussed in detail.\(^14\) Preceding this discussion, however, is an overview of the substantive changes in the other discovery rules.

A. **Rule 29: Stipulations Regarding Discovery Procedure**

Old Rule 29 permitted the parties to change by stipulation only the procedures for taking depositions.\(^15\) Rule 29 now permits stipulations modifying the procedures for any discovery device.\(^16\) The stipulation does not require court approval. It is not subject to disapproval by the court, except to the extent a protective order may be obtained. Presumably the parties cannot stipulate to the scope of discovery or the sanctions for failure to make discovery because Rule 29 speaks only in terms of stipulating to "procedure."\(^17\)

B. **Rule 31: Depositions of Witnesses on Written Questions**

Rule 31 deals with depositions of a party\(^18\) or witness upon

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13. This resulted in the following arrangement: (1) Dist. Ct. R. 26.01, 278 Minn. at app. 32 (1968) (when depositions may be taken) was transferred to new Rule 30.01; (2) Dist. Ct. R. 26.03, 278 Minn. at app. 33 (1968) (examination and cross-examination in depositions) was transferred to new Rule 30.03; (3) Dist. Ct. R. 26.04, 278 Minn. at app. 33-34 (1968) (use of depositions) was transferred to new Rule 32.01; (4) Dist. Ct. R. 26.05, 278 Minn. at app. 34 (1968) (objections to the admissibility of depositions) was transferred to new Rule 32.02; and (5) Dist. Ct. R. 26.06, 278 Minn. at app. 34-35 (1968) (effect of taking or using depositions) was transferred to new Rule 32.03.
14. See notes 118-266 infra and accompanying text.
17. See id.
18. Because the title of Rule 31 refers only to witnesses, some controversy has arisen concerning whether a party to the lawsuit is to be included in the provisions of the rule. Federal case law has generally determined, however, that the plain language of Rule 31 does apply to any person, including a party. See, e.g., Smith v. Morrison-Knudsen Co., 22 F.R.D. 108 (S.D.N.Y. 1958).
written questions. Most provisions have not been changed.19 There are, however, five minor changes in Rule 31. First, the language of the rule has been changed from depositions upon written "interrogatories" to depositions upon written "questions."20 This change eliminates confusion between Rule 33 interrogatories and Rule 31 depositions.21 Second, the time for service of cross questions is extended from ten to thirty days, for redirect questions from five to ten days, and for recross questions from three to ten days.22 For cause shown, the court may enlarge or shorten the time periods.23 A third minor change is that the notice of deposition upon written questions may designate the witness by general description, class, or group if his name is not known.24 This provision was adopted from similar Rule 30 provisions governing notice of oral depositions.25

The fourth and fifth changes in Rule 31 are somewhat more significant. Rule 31 has adopted the Rule 30 provision relating to the deposition of a corporation or other organization.26 The deposition upon written questions may designate the organization itself as a deponent, thereby imposing a duty upon the organization to designate an officer, agent, or other person to respond on its behalf.27 Fifth, the new Rule 31 eliminates the limitations on

23. MINN. R. CIV. P. 31.01 (1977). A major disadvantage of the time schedule is that all questioning is usually complete before any answers are received. This disadvantage has been circumvented to some extent by court orders delaying the time for serving cross questions. See, e.g., Spotts v. O'Neil, 30 F. Supp. 669, 669-70 (S.D.N.Y. 1939). See also Baron v. Leo Feist, Inc., 7 F.R.D. 71 (S.D.N.Y. 1946) (order allowing recross after filing of answers to direct questions). In addition, the courts have not ruled against the practice of giving the deponent advance copies of the questions. See Hamdi & Ibrahim Mango Co. v. Fire Assoc., 20 F.R.D. 181, 182-84 (S.D.N.Y. 1957).
At least one federal court has held that the direct or redirect questions can be oral rather than written. See Winograd Bros. v. Chase Bank, 31 F. Supp. 91 (S.D.N.Y. 1939). But cf. United States v. National City Bank, 1 F.R.D. 367 (S.D.N.Y. 1940) (questions for cross-examination must be written).
26. See notes 223-27 infra and accompanying text.
27. This requirement and the similar requirement in Rule 30.02(6) were added to eliminate the previous difficulties in determining whether an employee or agent of the corpora-
timing of depositions which were imposed under old Rule 26. Under old Rule 26, all depositions, whether oral or written, required leave of court if taken within twenty days after the commencement of the action. Rule 31 now merely provides that depositions upon written questions may be taken "after commencement of the action." Thus, unlike oral depositions, a deposition upon written questions may be taken at any time after service of the summons.

C. Rule 32: Use of Depositions in Court Proceedings

Rule 32 makes only minor clarifying changes in the former rule which prescribes the conditions under which oral or written depositions may be used at trial or upon the hearing of a motion or an interlocutory proceeding. Most of the old rule was retained.

One change, however, is a new provision allowing adverse use of the deposition of a person designated by a corporation or other organization to testify on its behalf at the taking of the deposition. This addition accommodates the new procedure for designating a "managing agent" who may be deposed. MINN. R. CIV. P. 30.02(6), Advisory Comm. Note—1975. Under the old rule, oftentimes many officers had to be deposed because each would deny knowledge of the information. See Kroll & Maciszewski, Pre-Trial Discovery: Change in the Federal Rules, 7 HAWAII B.J. 48, 52 (1970), reprinted in W. TREADWELL, NEW FEDERAL CIVIL DISCOVERY RULES SOURCEBOOK 205, 209 (1972).


29. See Dist. Ct. R. 26.01, 278 Minn. at app. 32 (1968). The reason for granting this tactical advantage to the defendant was to prevent the plaintiff from proceeding with a deposition or other discovery before the defendant had the opportunity to obtain counsel. See FED. R. Civ. P. 30(a), Notes of Advisory Comm.—1970 Amendment, reprinted in 28 U.S.C.A. 243 (West 1972).


31. Compare MINN. R. CIV. P. 31.01 (1977) with id. 30.01. The difference exists because Rule 31 written questions are submitted to the opposing counsel who then submits cross questions. This procedure minimizes the element of surprise which might be present in Rule 30 oral questioning.

32. MINN. R. CIV. P. 32.01(1) (1977) retains the provisions for using a deposition to impeach a deponent who is a witness at trial, although the limitation to "material matters only," under Dist. Ct. R. 26.04, 278 Minn. at app. 33 (1968), was eliminated. In addition, Rule 32.01(2) still permits an adverse party to use, for any purpose, the deposition of another party or of a person who at the time of taking the deposition was a representative of a corporate party. Furthermore, no change was made in Rule 32.01(3) which provides that a witness' deposition may be used for any purpose when the witness is unavailable to testify at trial or in the event of exceptional circumstances. Finally, no substantial change was made in the Rule 32.03 provision that a party makes a deponent his own witness when he introduces the deposition into evidence, unless it is offered for impeachment, or as the deposition of an adverse party or his representative.

33. See MINN. R. CIV. P. 32.01(2) (1977).
ing a person to answer a deposition on behalf of a corporation or organization.\textsuperscript{34}

New Rule 32 also changes the former rule which provided that a party introducing only a portion of a deposition into evidence may be required by an adverse party to introduce additional parts "relevant" to the portion introduced.\textsuperscript{35} The rule now provides that the adverse party may compel the introduction of additional parts which "in fairness" ought to be considered with the portion introduced.\textsuperscript{36} The provision that any party may introduce any other portion of the deposition is retained.\textsuperscript{37}

Only minor change was made in the rule governing objections to the admissibility of depositions.\textsuperscript{38} Unless waived,\textsuperscript{39} objections at trial to the admissibility of the deposition may be made upon the same grounds as if the deposition witness were present at the trial and testifying to the matters contained in his deposition. This eliminates any hearsay objection based on the deponent's absence from court.\textsuperscript{40} The only change in waiver of objections is reflected in the time period within which objections to the form of written questions may be made.\textsuperscript{41} Objections can now be made

\textsuperscript{34} See notes 223-27 infra and accompanying text.


\textsuperscript{36} See MINN. R. CIV. P. 32.01(4) (1977). The rule provides that additional parts may be compelled by an adverse party when the partial deposition is offered "in evidence." This suggests that the provision does not apply if the deposition is offered for purposes of impeachment only.

\textsuperscript{37} Id.

\textsuperscript{38} Compare Dist. Ct. R. 26.05, 278 Minn. at app. 34 (1968) with MINN. R. CIV. P. 32.02 (1977).

\textsuperscript{39} The following objections are waived if not made at the taking of the deposition: (1) objections relating to the competency, relevancy, or materiality of testimony or the competency of a witness, provided the grounds for the objection might have been removed had it been made at that time; (2) objections relating to errors and irregularities in the manner of taking the oral examination, in the form of the questions or answers, in the conduct of the parties, or any other errors that would have been removed had timely objection been made; and (3) objections relating to the form of written questions unless made within the time allowed for serving the succeeding cross or other questions and within five days from the service of the last questions permitted by the rules. MINN. R. CIV. P. 32.04(3) (1977).

\textsuperscript{40} Under Dist. Ct. R. 26.04, 278 Minn. at app. 33-34 (1968), a deposition could be used at trial only so far as it fell "under the rules of evidence." Because the former rule did not express the qualification that the deponent need not be at trial, possible hearsay objections under the rules of evidence could have been fatal to the introduction of a deposition. See generally 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE \S\S 641-657 (Wright ed. 1961). The new rule eliminates this hearsay objection by requiring the evidentiary determination to be made "as though the witness were then present and testifying." MINN. R. CIV. P. 32.01 (1977).

\textsuperscript{41} Compare Dist. Ct. R. 32.03, 278 Minn. at app. 43 (1968) with MINN. R. CIV. P. 32.04 (1977).
within five days from the service of the last questions permitted by the rules, rather than three days.\footnote{42}

D. Rule 33: Interrogatories to Parties

Rule 33, governing the procedure for written interrogatories to a party,\footnote{43} makes substantial changes in old Rule 33.\footnote{44} The first change relates to the timing of the questions, answers, and objections to interrogatories. A second change relates to additional requirements and prerogatives in the interrogatory answer. A third change relates to the scope of the interrogatory.

Unlike old Rule 33, which required leave of court to serve the interrogatory by plaintiff within ten days after commencement of the action,\footnote{45} new Rule 33 allows the plaintiff as well as any other party to serve interrogatories on any party with or at any time after service of process without leave of court.\footnote{46} Rule 33 also extends the time for service of written answers or objections.\footnote{47} The old rule required service of answers and objections within fifteen days after the service of the interrogatory, unless the court enlarged or shortened the time.\footnote{48} The new rule allows thirty days from service of interrogatories, except defendants are allowed

\begin{enumerate}
\item \footnote{42} Compare Dist. Ct. R. 32.03(2), 278 Minn. at app. 43 (1968) \textit{with} Minn. R. Civ. P. 32.04(3)(c) (1977).
\item \footnote{43} For a discussion of the advisability of altering Rule 33 to permit service of interrogatories on nonparty witnesses, see \textit{Developments in the Law—Discovery}, 74 Harv. L. Rev. 940, 1020-22 (1961).
\item \footnote{44} The primary purpose of the changes is to reduce the need for intervention of the court. \textit{See} Minn. R. Civ. P., Advisory Comm. Note—1975, Introduction. This purpose is furthered by the amendments which reduce court intervention with regard to interrogatories because interrogatories traditionally cause a greater percentage of objections and motions than any other discovery device.
\item \footnote{45} Dist. Ct. R. 33(1), 278 Minn. at app. 44 (1968).
\item \footnote{46} Minn. R. Civ. P. 33.01(1) (1977). Because the time for response to the interrogatory has been lengthened, see notes 47-50 \textit{infra} and accompanying text, requiring leave of court is no longer necessary to assure that defendant has adequate time to obtain counsel. \textit{See} Minn. R. Civ. P. 33.01(1), Advisory Comm. Note—1975.
\item \footnote{47} Compare Dist. Ct. R. 33(2), 278 Minn. at app. 44 (1968) \textit{with} Minn. R. Civ. P. 33.01(2) (1977).
\item \footnote{48} See Dist. Ct. R. 33(2), 278 Minn. at app. 44 (1968). These former time limitations were so short that they tended to encourage objections and court motions. In addition, if the party failed to object within the 15-day period he risked a waiver of his objections. \textit{See}, e.g., United States v. 58.16 Acres of Land, 66 F.R.D. 570 (E.D. Ill. 1975) (failure to object in time is a waiver of all objections, including privilege); Cleminshaw v. Beech Aircraft Corp., 21 F.R.D. 300 (D. Del. 1957). In practice, parties seldom sought the permitted extension of time, but instead simply objected because Rule 33 imposes no sanction for unjustified objections.
\end{enumerate}
forty-five days from service of process. 49 The new rule retains the provision that the court may enlarge or shorten the time. 50

Interrogatory answers are now subject to additional requirements and prerogatives. Rule 33 continues the requirement that answers shall be signed under oath. 51 It adds, however, a provision requiring that each interrogatory 52 be restated in the answer to that interrogatory. 53 The purpose of this additional requirement is to facilitate more convenient use of the interrogatories at trials and hearings by eliminating the necessity of referring back to the questions. 54 Rule 33 also adds a provision which allows a party to answer an interrogatory by merely indicating from which of his business records the answer may be obtained. 55 Several conditions must be satisfied before this method of answering is allowed. First, and most obvious, the answer must be ascertainable from the business records of the party upon whom the interrogatory is served. Second, the burden of deriving or ascertaining the answer must be substantially the same for the party serving the interrogatory as for the party served. Finally, the party serving the interrogatory must be afforded a reasonable opportunity to examine and make copies of the pertinent business records. 56

The third aspect of Rule 33 which was changed is the scope of the interrogatory. The scope of discovery for written interrogato-

49. See MINN. R. CIV. P. 33.01(2) (1977).
52. Interrogatories are limited to 50 per party, with each subdivision of separate questions counted as one interrogatory. MINN. R. CIV. P. 33.01(1) (1977).
55. Compare Dist. Ct. R. 33, 278 Minn. at app. 44-45 (1968) with MINN. R. CIV. P. 33.03 (1977). The purpose of the new rule is to relieve the burden and expense of answering an interrogatory dealing with business records. See 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2178 (1970). This amendment should prove to be useful in antitrust, products liability, and other complex cases involving voluminous papers and documents.
56. See MINN. R. CIV. P. 33.03 (1977). A responding party cannot merely indicate a mass of records into which research can be made. That type of answer could invoke a challenge by motion under Rule 37.01 to compel an answer. The respondent should concretely indicate the documents from which the information can be obtained, rather than just indicating a collection of documents. See In re Master Key Antitrust Litigation, 53 F.R.D. 87, 90 (D. Conn. 1971).
ries is governed generally by Rule 26,\textsuperscript{57} which also has a specific provision for the use of interrogatories to ascertain the names of expert trial witnesses\textsuperscript{58} along with the substance of their expected testimony and the basis for their opinions. New Rule 33 enlarges the scope of discovery to include inquiry as to opinions, conclusions, and contentions upon mixed questions of law and fact.\textsuperscript{59} This serves to narrow the issues, although answers to interrogatories generally do not limit proof at trial\textsuperscript{60} except in exceptional circumstances when a party has relied on the answers to his prejudice.\textsuperscript{61} The court may permit a delay in answering interrogatories concerning opinions or contentions pending further discovery or pretrial conference.\textsuperscript{62}

E. Rule 34: Production of Documents and Things and Entry upon Land for Inspection and Other Purposes

Rule 34 provides for the production of documents and tangible things and the entry upon land for the purposes of discovery. It is available only against a party.\textsuperscript{63} By the express terms of Rule

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  \item 57. See Minn. R. Civ. P. 26.02 (1977).
  \item 58. See id. 26.02(4).
  \item 59. Id. 33.02. Federal law prior to the 1970 federal amendments contains a long-standing dispute as to the discoverability of opinions and contentions of a party. For a summary of the conflicting authorities, see 4A Moore's Federal Practice ¶ 33.17 (2d ed. 1975) and 2A W. Barron & A. Holtzoff, Federal Practice and Procedure § 768 (Wright ed. 1961).
  \item It is now permissible within the amended rule to ask questions calling for an opposing party's specific position relating to the facts of the claim, even if the facts themselves are already known to the questioning party. See, e.g., United States v. Beatrice Foods Co., 52 F.R.D. 14, 19-20 (D. Minn. 1971). Even under the new rule, however, interrogatories may not include questions extending to issues of "pure law" unrelated to the facts of the particular case. See, e.g., Union Carbide Corp. v. Travellers Indem. Co., 61 F.R.D. 411 (W.D. Pa. 1973) (dictum) (discovery of an opinion based on hypothetical facts is improper); Sargent-Welch Scientific Co. v. Ventron Corp., 59 F.R.D. 500 (N.D. Ill. 1973) (dictum).
  \item 62. Minn. R. Civ. P. 33.02 (1977). This authorization to delay an answer is allowed because of the likelihood that questions of mixed law and fact will cause disputes which are better resolved after other discovery is completed or in the presence of a judge. This procedure is analogous to the provisions of Rule 26.02(4) which relate to experts expected to testify at trial. See Minn. R. Civ. P. 33.02, Advisory Comm. Note—1975.
  \item 63. Minn. R. Civ. P. 34.01 (1977). Rule 45.04(1), however, permits the serving of a subpoena duces tecum on a nonparty to produce materials at a deposition. See Continental Coatings Corp. v. Metco, Inc., 50 F.R.D. 382 (N.D. Ill. 1970). In addition, a party may obtain the production of documents and things from a nonparty by an independent suit
\end{itemize}
34, it applies only to those documents, tangible things, and land which are within the provisions of Rule 26 limiting the scope of discovery. Thus, for example, production of documents or tangible things containing work product is not contemplated by Rule 34. Two aspects of Rule 34 have been changed by the 1975 amendments—scope and procedure.

The scope of Rule 34 has been changed in two ways. First, the description of the documents that may be obtained from a party for inspection and copying has been extended to include data compilations from which the responding party may be required to provide usable information by means of his detection devices. For example, he may be required to supply a printout of computer data. The second change provides that tangible things and land may now be tested and sampled as well as inspected or copied.

New Rule 34 also introduces substantial procedural changes intended to facilitate the informal production of materials without court intervention. Discovery is initiated by a request instead of a motion to produce supported by a showing of good cause. Leave of court is not required to initiate Rule 34 procedure.


65. MINN. R. CIV. P. 34.01 (1977). Although this will put a burden on the responding party, the court may protect against undue burden or expense by restricting discovery or requiring reimbursement of expenses. Id. 26.03. Rule 26.03 also enables the court to protect the responding party's need for preservation and confidentiality of the records produced.

66. MINN. R. CIV. P. 34.01 (1977). Even prior to the 1975 amendment, the word "inspection" probably had a broader meaning than just the right to "look"; it included the right to sample and test. See, e.g., Martin v. Reynolds Metals Corp., 297 F.2d 49, 57 (9th Cir. 1961). It seems clear that a party is free to perform the tests in the manner he decides is best. See Sperberg v. Firestone Tire & Rubber Co., 61 F.R.D. 80, 83 (N.D. Ohio 1973).


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although court intervention might be required to satisfy Rule 26 and Rule 35 provisions limiting the discovery of trial preparation materials and expert witnesses.

New provisions set forth the degree of specificity required in requests and responses. The request must set forth the item to be inspected with reasonable particularity. Responses must state with respect to each item or category whether the party will object to or permit inspection. Reasons for any objections must also be stated.

Finally, new provisions similar to those in new Rule 33 set forth limitations on the timing of requests and responses. The plaintiff may serve the request with or after service of process. Any other party may serve the request after commencement of the action. Unless a protective order is obtained, a written response permitting discovery or containing objections to the request must be served within thirty days after service of the request except that a defendant may have forty-five days from service of process. Failure to respond may lead to Rule 37 sanctions.

F. Rule 36: Requests for Admission

Rule 36 provides that a party may request from any other party the admission of certain matters for the purposes of the pending action only. The 1975 amendments affected Rule 36 by changing

old Rule 34 the Minnesota court viewed “good cause” as requiring relevancy. See In re Estate of Sandstrom, 252 Minn. 46, 61-62, 89 N.W.2d 19, 28-29 (1958); Webster v. Schwartz, 249 Minn. 224, 227-28 & n.1, 81 N.W.2d 867, 870-71 & n.1 (1957).

71. MINN. R. CIV. P. 34.02 (1977). This change conforms the rule to the existing practice. Thus, although the change will not much affect the present practice, it will save court time.

72. See id. 26.02(3), 35.02, 35.04; notes 125-67 infra and accompanying text.

73. MINN. R. CIV. P. 34.02 (1977). The request is sufficiently specific if a reasonable person would know what documents or things were called for. See, e.g., Mallinckrodt Chem. Works v. Goldman, Sachs & Co., 58 F.R.D. 348 (S.D.N.Y. 1973).

74. MINN. R. CIV. P. 34.02 (1977).

75. See notes 45-50 supra and accompanying text.

76. See MINN. R. CIV. P. 34.02 (1977).

77. Id.

78. See id. 26.03.

79. Id. 34.02.

80. See id. 37.01(2), .02(2).

the provisions concerning the timing of requests and responses, the scope of the request, the ability to use lack of information or knowledge as a reason for failure to admit or deny, the objections to the request, and the binding effect of admissions.

The timing limitations on requests and responses are identical to new Rule 33 provisions for interrogatories. Requests may be served without leave of court on the defendant with or after service of process and on the plaintiff after commencement of the action. This changes the old rule which required leave of court if the plaintiff sought to serve the request within ten days after commencement of the action. Within thirty days from service of the request, a party must respond to each request by objecting with reasons, by answering with an admission or denial of the subject matter of the request, or by stating reasons why it cannot be denied or admitted. However, the defendant usually does not have to respond before the expiration of forty-five days after service of process.

Rule 36 continues the provision that the truth of each matter not so answered by denial or not objected to is admitted except when the answering party gives reasons in detail why he cannot truthfully admit or deny the subject matter of a particular re-

82. See notes 45-50 supra and accompanying text.
83. MINN. R. CIV. P. 36.01 (1977).
85. Courts were divided in the past as to whether parties may object to requests for admission on the grounds that it is a matter in dispute. See Fed. R. Civ. P. 36, Notes of Advisory Comm.—1970 Amendment, reprinted in 28 U.S.C.A. 49 (West Supp. 1977). The notes of the Federal Advisory Committee indicate that the proper response in such a case is an answer. Id. See also Ranger Ins. Co. v. Culberson, 49 F.R.D. 181 (N.D. Ga. 1969) (defendant must answer request for admission on a controverted fact even if it is crucial to liability); Khalili v. Pan Am. Petroleum Corp., 49 F.R.D. 22 (D. Alas. 1969) (disputed fact is a proper subject of a request for admission).
86. MINN. R. CIV. P. 36.01 (1977).
87. Id. The rule also provides, however, that the court may shorten the time and require the defendant to respond within the 45-day period.
quest. An additional requirement is imposed, however, if lack of information or knowledge is given as a reason for failure to admit or deny. In that instance, Rule 36 now requires that the responding party must have used efforts to get readily available knowledge and information and that his answer so state.

Rule 36 enlarges the scope of requests for admission. Under the old rule, a party could only request the admission of a factual matter. New Rule 36 now allows a party to request the admission of "opinions of fact" and "the application of law to fact," thus encompassing opinions and conclusions on matters involving mixed law and fact.

Rule 36 also provides that the requesting and not the answering party shall move for a hearing on objections to requests or on the sufficiency of answers. The court may award expenses in accordance with the provisions of Rule 37. The failure to answer a request when ordered by the court does not automatically result in an admission. It does, however, allow the court to deem the matter admitted, and the requesting party may also recover the costs and attorney's fees incurred in proving matters not admitted.

Finally, Rule 36 now makes it clear that an admission is conclu-

89. MINN. R. CIV. P. 36.01 (1977).

Of course there also remains the duty to supplement answers and admissions with subsequently acquired information. See Criterion Music Corp. v. Tucker, 45 F.R.D. 534 (S.D. Ga. 1968); notes 181-96 infra and accompanying text.

92. MINN. R. CIV. P. 36.01 (1977).
94. See MINN. R. CIV. P. 37.03 (1977).
95. Id. 36.01.
96. Id. 37.03.
sively binding for the purposes of the pending action, 97 unless the court permits it to be amended or withdrawn. 98

G. Rule 37: Failure to Make Discovery; Sanctions

Rule 37 prescribes the sanctions that may be imposed for failure to make discovery and the procedures required for their imposition. Most of the rule is applicable to all forms of discovery, but parts of it are applicable only to specific discovery devices. The portions of the rule applicable only to specific discovery devices have undergone minor change, and will not be discussed at length here.

A major substantive change in Rule 37 is that sanctions are now imposed for "failure" instead of "refusal" to make discovery. Thus, any requirement of willfulness is removed. 99 The element of willfulness is relevant only to the issue of what particular sanctions, if any, should be imposed for the failure to make discov-

97. Under the amended rule, an admission is comparable to a stipulation made at trial. The admitting party should not be allowed to contradict or change any admitted facts. See, e.g., Kuenne v. Loffler, 266 Md. 468, 295 A.2d 219 (1972). In contrast to an admission, the answer to an interrogatory is mere evidence which must be weighed and analyzed by the factfinder. See, e.g., Victory Carriers, Inc. v. Stockton Stevedoring Co., 388 F.2d 955, 959 (9th Cir. 1968). See also Freed v. Erie Lackawanna Ry., 445 F.2d 619, 621 (6th Cir. 1971), cert. denied, 404 U.S. 1017 (1972) (evidence which conflicts with interrogatory answer may be received). This amendment to the rule will go far towards increasing the use of requests for admissions because the party can now depend on their binding effect. See generally Finman, supra note 81, at 418-26; Comment, The Dilemma of Federal Rule 36, 56 Nw. U.L. Rev. 679, 682-83 (1961).

98. MINN. R. Civ. P. 36.02 (1977). Although it is important that the admissions be given binding effect, the provision for withdrawal or amendment is a safeguard against undue prejudice to a party or interference with trial on the merits. See Moosman v. Joseph P. Blitz, Inc., 358 F.2d 686, 688 (2d Cir. 1966) (effect of admission may be avoided by an untimely answer under "compelling circumstances").

99. This change was made to eliminate the confusion that existed formerly because the old rule used the terms "failure" and "refusal," both of which implied a requirement of willfulness in the responding party's noncompliance. See, e.g., Campbell v. Johnson, 101 F. Supp. 705, 707 (S.D.N.Y. 1951); Roth v. Paramount Pictures Distrib. Corp., 8 F.R.D. 31 (W.D. Pa. 1948). See generally Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 COLUM. L. REV. 480 (1958). In 1958, the United States Supreme Court held that a simple failure to comply with the request for discovery was to be construed as a "refusal" within the meaning of the rule. See Societe Internationale v. Rogers, 357 U.S. 197 (1958). The rule in Rogers was not immediately accepted by the lower courts, however. See Hinson v. Michigan Mut. Liab. Co., 275 F.2d 537 (5th Cir. 1960). The federal rules were amended in 1970 to correspond with the interpretation set forth in Rogers, and the federal courts have now complied with this interpretation. See, e.g., Roberson v. Christoferson, 65 F.R.D. 615 (D.N.D. 1975); Bollard v. Volkswagen of America, Inc., 56 F.R.D. 569 (W.D. Mo. 1971).
Furthermore, evasive or incomplete answers constitute a failure to answer.

A motion for an order compelling discovery and a failure to obey that order are conditions precedent to the imposition of sanctions under Rule 37. A court order may already be required or available under the rule dealing with the particular discovery device, and therefore a further court order under Rule 37 is redundant and unnecessary for imposition of sanctions. When a court order is not obtained or required under the rule governing the particular discovery device, a Rule 37 motion must be made to obtain a court order compelling discovery of the desired matters. Rule 37 motions encompass the situations where a party or other witness fails to answer a question at the taking of his deposition, a corporate party fails to designate a witness or to testify for the corporation or other organization at a deposition, a party fails to answer a written interrogatory, and a party in

100. MINN. R. Civ. P. 37.02, Advisory Comm. Note—1975. Drastic sanctions such as dismissal or default will usually not be imposed without the element of willfulness being evident in the answering party’s failure to respond. See, e.g., Fox v. Studebaker-Worthington, Inc., 516 F.2d 989 (8th Cir. 1975); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1210-15 (8th Cir.), cert. denied, 414 U.S. 1162 (1973).

In Fox v. Studebaker-Worthington, Inc., 516 F.2d 989 (8th Cir. 1975), the court held that discovery sanctions are within the sound discretion of the trial court and the imposition of sanctions will not be reversed without a showing of abuse of that discretion. The court found, however, that because the sanction of dismissal is so drastic, the trial court’s discretion is accordingly very narrow. Thus willfulness, fault, or bad faith are factors that must be present in the responding party’s noncompliance. 516 F.2d at 993 (citing Societe Internationale v. Rogers, 357 U.S. 197 (1958)).

101. MINN. R. Civ. P. 37.01(3) (1977). The courts appear to agree that they may remedy incomplete and inadequate answers by an order compelling an answer, but not by sanctions. Sanctions for failure to answer are improper for anything other than a total failure to answer. A motion to compel is the proper remedy for a failure to answer adequately. See, e.g., Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 995 (8th Cir. 1975); Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974); Anderson v. Home Style Stores, Inc., 58 F.R.D. 125, 129-30 (E.D. Pa. 1972).

102. MINN. R. Civ. P. 37.01(4) (1977); cf. GFI Computer Indus., Inc. v. Fry, 476 F.2d 1 (5th Cir. 1973) (default judgment reversed because of failure to move for an order to compel); Vac-Air, Inc. v. John Mohr & Sons, 471 F.2d 231, 234 (7th Cir. 1973) (same).

103. MINN. R. Civ. P. 37.01(4) (1977). The rules are not clear, however, on whether a party who obtains an order compelling discovery must come into court a second time to move for imposition of sanctions for failure to comply with the initial order. Although not specifically authorized by the rules, many trial judges specify in the order compelling discovery just what sanctions will be imposed for failure to comply with the order. This allows the court to impose sanctions without another formal hearing. The Minnesota Supreme Court has affirmed the use of an order which alternatively imposed sanctions for failure to comply with its terms. See O’Neil v. Corrick, ____ Minn. ___, 239 N.W.2d 230 (1976).

response to a request for production of materials for inspection fails to state that inspection will be permitted or fails to permit inspection.105

The motion for an order compelling discovery, when required, must be brought in the appropriate court. The old rules allowed the motion to be made in the court where the action was pending.106 This remains unchanged by new Rule 37 except for failure to answer questions at a deposition. If the deponent is a party, the motion to compel an answer to a deposition may be made either to the court in which the action is pending or to the court in the county where the deposition is being taken.107 If the deponent is not a party, the motion to compel answers to a deposition must be made to the court in the county where the deposition is being taken.108

Upon granting or denying a motion to compel discovery the court may award expenses and fees to the prevailing party unless the court finds the conduct of the losing party or person supporting or opposing the motion was "substantially justified."109 Expenses may be apportioned when the motion is granted in part and denied in part.110 The rule makes the award of expenses presumptively appropriate, changing the language of the old rule which made the award presumptively inappropriate.111 This change was made to encourage the award of expenses and fees.112

If a motion to compel discovery is denied in whole or in part, the court may enter a protective order against the moving


106. Dist. Ct. R. 37.01, 278 Minn. at app. 48 (1968).

107. MINN. R. Civ. P. 37.01(1) (1977). Although the party seeking discovery may choose which court to use, the court has the power to override his choice and remit the motion to the other forum if it is more appropriate. See Fed. R. Civ. P. 37, Notes of Advisory Comm.—1970 Amendment, reprinted in 28 U.S.C.A. 58 (West Supp. 1977).

In the past, courts resorted to a theory that the court where the action was pending had "inherent power" to compel the answer of a party deponent. See, e.g., Lincoln Labs., Inc. v. Savage Labs., Inc., 27 F.R.D. 476 (D. Del. 1961). The new rule provides the authority necessary to compel an answer and clarifies the respective roles of the courts involved.


109. Id. 37.01(4).

110. Id.

111. Dist. Ct. R. 37.03, 278 Minn. at app. 50 (1968).

party. If the motion is granted, various sanctions may be imposed for failure to comply with the resulting court order. The sanctions which may be imposed for failure to obey a court order differ depending upon which court made the order. Contempt is the only sanction that may be imposed by the court in the district where a deposition is taken for failure to be sworn or to obey an order compelling an answer. Because the old rules did not contemplate sanctions by courts other than the one in which the action was pending, this provision is new. The sanctions that may be imposed by the court in which the action is pending remain essentially unchanged. A provision is added, however, whereby the expenses and fees caused by a party’s failure to obey an order for discovery “shall” be awarded against that party or the attorney advising him unless the disobedience was substantially justified or other circumstances make the award unjust.

III. Rule 26: General Provisions Governing Discovery

Rule 26 is a rule of general applicability to all the discovery devices. These devices are Rule 30 depositions on oral examination, Rule 31 depositions on written questions, Rule 33 written interrogatories, Rule 34 production of documents or things, Rule 35 physical and mental examinations, and Rule 36 requests for admission. Rule 26 prescribes generally and specifically what is discoverable under the various discovery devices.

Generally, relevant nonprivileged matter is discoverable, subject, however, to Rule 35 restrictions on discovery of physical and mental examinations, Rule 26 restrictions on discovery of

113. MINN. R. CIV. P. 37.01(4) (1977); see id. 26.03.
114. Id. 37.02.
115. Id. 37.02(1).
116. Compare Dist. Ct. R. 37.02, 278 Minn. at app. 49 (1968) with MINN. R. CIV. P. 37.02(2) (1977). The sanctions which may be imposed include an order establishing designated facts for the purpose of the action, prohibiting certain defenses, striking pleadings, staying proceedings, dismissing the action in whole or in part, rendering a default judgment, or citing the party with contempt of court. The contempt citation is a remedial rather than punitive measure, however, and the party might be allowed to rid himself of the sanction by complying with the order. See United States v. International Business Mach. Corp., 60 F.R.D. 658, 667 (S.D.N.Y.), appeal dismissed, 493 F.2d 112 (2d Cir. 1973), cert. denied, 416 U.S. 976 (1974).
118. Id. 26.02(1).
119. Id. 26.02(2)-(4).
120. See id. 26.02(1).
trial preparation materials\textsuperscript{121} and facts and opinions known by experts,\textsuperscript{122} and Rule 26 protective orders.\textsuperscript{123} Only the Rule 26 limitations have been changed by the 1975 amendments.\textsuperscript{124} In addition, new provisions have been added to Rule 26 relating to the sequence, timing, and frequency of discovery devices and to the continuing duty to supplement discovery responses. These changes and additions are discussed below.

A. Restrictions on the Discovery of Trial Preparation Materials

The most significant change in the limitations on discovery are found in the new work product rules. The first change concerns the necessity of showing need as a condition to the discovery of trial preparation materials. Statements of witnesses prepared by or for a party or his representative in anticipation of trial are now discoverable without a showing of need.\textsuperscript{125} The term "statement" is defined to include recorded oral statements or transcriptions thereof and written statements signed or adopted by

\begin{itemize}
\item 121. See id. 26.02(3).
\item 122. See id. 26.02(4).
\item 123. See id. 26.03.
\item 124. The discoverability of liability insurance, however, is continued under the 1975 amendments. See id. 26.02(2).
\item 125. MINN. R. CIV. P. 26.02(3). At least two reasons justify the change. First, the discoverability of a party's own statement reduces the threat that it will unknowingly be used against him as an admission. See Developments in the Law—Discovery, 74 HARV. L. REV. 940, 1039 (1961). Second, it is arguable that a court would inevitably find a showing of "substantial need" for the statement and inability to obtain the equivalent "without undue hardship." The particular statement, if not remembered by the party making it, usually cannot be obtained by means other than from the adverse party. Thus, courts under the old rules often found "good cause." See, e.g., New York Cent. R.R. v. Carr, 251 F.2d 433, 435 (4th Cir. 1957).

Even before the 1975 amendments to the Minnesota rules of discovery, a party had a statutory right to obtain his own statement without a showing of good cause. MINN. STAT. § 602.01 (1976) states in part that "[n]o statement [from an injured person] can be used as evidence in any court unless the party so obtaining the statement shall give to such injured person a copy thereof within 30 days after the same was made." The effect of the statute is limited. First, it does not create a right in the injured party to acquire his statement, rather it creates an obligation on the other party to deliver the statement if it is sought to be used as evidence. Second, it applies only to a person suing to recover for his personal injuries. Hillesheim v. Stippel, 283 Minn. 59, 166 N.W.2d 325 (1969).
the person making them. This definition is adopted from the Jencks Act. Since the provisions relate to discovery of documents and tangible things in preparation of trial, the rule makes no provision for the discovery of unrecorded oral statements. This could mean that unrecorded oral statements are not discoverable, or it could mean that existing case law is continued, making these statements discoverable only upon a showing of good cause.

Documents and tangible things, other than statements of witnesses or parties, prepared by or for a party or his representative in anticipation of trial are discoverable only upon a special showing of substantial need for the materials in the preparation of the case and inability without undue hardship to obtain their substantial equivalent by other means. Mere relevancy is not a sufficient showing. If a Rule 34 objection is made to the production of such documents, the required showing must be made upon motion to the court for an order compelling discovery. Of course, no special showing is required for discovery of materials not prepared in anticipation of litigation such as routine business records or reports which are otherwise discoverable.

129. Although the Minnesota Advisory Committee said that it eliminated the word “consultant” from the language of the rule as a “representative” of a party, the text of the rule continues to include the word in a parenthetical. Compare MINN. R. CIV. P. 26.02(3), Advisory Comm. Note—1975 with MINN. R. CIV. P. 26.02(3) (1977). The advisory notes should be considered when interpreting the rule, therefore the word “consultant” should be construed narrowly in light of the broad possible application of the word.


131. MINN. R. CIV. P. 26.02(2) (1977); see Ossenfort v. Associated Milk Producers, Inc., —— Minn. ——, ——, 254 N.W.2d 672, 681-82 (1977). The new federal rules impose the requirement of “substantial need . . . and [inability] without undue hardship to obtain the substantial equivalent of the materials by other means,” Fed. R. Civ. P. 26(b)(3), because it was felt that the federal courts were requiring more than mere relevancy when discovery of trial preparation materials was sought. Id., Notes of Advisory Comm.—1970 Amendment, reprinted in 28 U.S.C.A. 157-60 (West 1972).

Although those portions of trial preparation documents containing opinions and contentions of the attorney are still not discoverable, disclosure of opinions, contentions and conclusions of fact or of mixed law and fact may be required in response to Rule 33 interrogatories and to Rule 36 requests for admission regardless of whether the opinions and contentions sought are contained in work product documents. Also, relevant facts known to a party are discoverable by deposition, interrogatories, and requests for admission even though the facts are contained in a document which is not discoverable for failure to make the required showing of need.

B. Restrictions on the Discovery of Experts

A second change in the work product rule is a new provision dealing specially with the discovery of facts known and opinions held by experts acquired or developed in anticipation of litigation or for trial. Discovery of information which the expert acquired in a manner other than in anticipation of litigation is not subject to the limitations of the new rule. Four types of experts emerge


In any event, the court might distill the attorney's opinions and contentions from other information in the document and allow discovery of the information, provided the requisite showing of "substantial need" and "undue hardship" is made. Xerox Corp. v. International Business Mach. Corp., 64 F.R.D. 367 (S.D.N.Y. 1974); cf. Snyker v. Snyker, 245 Minn. 405, 72 N.W.2d 357 (1955) (evidence in document within attorney-client privilege is protected; evidence in same document outside attorney-client privilege is discoverable).


from the rules of discovery. Rule 26 distinguishes between experts who are expected to be called as trial witnesses\textsuperscript{138} and experts who have been retained or specially employed in preparation for trial but who are not expected to be trial witnesses.\textsuperscript{139} The scope of discovery is greater with respect to the former.\textsuperscript{140} The remaining two types of experts are those informally consulted and those not consulted at all. Discovery of information which an informally consulted expert acquired or developed in anticipation of litigation is not permitted.\textsuperscript{141} Discovery of an expert not consulted at all must proceed as if he were a nonexpert witness.\textsuperscript{142} Under subdivision A of new Rule 26.02(4) the names of expert witnesses expected to be called at trial\textsuperscript{143} and the substance of their expected testimony may be discovered by Rule 33 interrogatories.\textsuperscript{144} Under old Rule 26, only an expert’s non-written conclusions could be discovered.\textsuperscript{145} In addition, subdivision A provides that a show-


\textsuperscript{139} See id. 26.02(4)(B).

140. This distinction is a result of balancing two competing interests. A party has an interest in protecting the information which he has obtained in preparation of trial from usurpation by his opponent. The opponent and the judicial system, on the other hand, have an interest in disclosure of the rationale underlying the conclusions of an adversary's expert to facilitate determination of the expert's credibility through better cross-examination. Since the latter interest applies only to experts who will be called as witnesses, a party should be afforded greater protection against discovery of information possessed by his expert if the expert is not expected to be a witness. See Minn. R. Civ. P. 26.02(4), Advisory Comm. Note—1975.

141. Minn. R. Civ. P. 26.02(4) (1977) states that discovery of expert information “may be obtained only as follows . . . .” The provisions which follow relate to expert witnesses, experts retained or specially employed, and the payment of fees and expenses for either type of expert. Since there is no provision for experts not retained or specially employed, discovery against such experts may not be obtained. See Nemetz v. Aye, 63 F.R.D. 66 (W.D. Pa. 1974); In re Brown Co. Sec. Litigation, 54 F.R.D. 384, 385 (E.D. La. 1972).

142. See Minn. R. Civ. P. 26.02(4), Advisory Comm. Note—1975. The Federal Advisory Committee, however, classifies as ordinary witnesses those experts not consulted in preparation for trial who were witnesses to the event that is the subject of the lawsuit. See Fed. R. Civ. P. 26(b)(4)(B), Notes of Advisory Comm.—1970 Amendment, reprinted in 28 U.S.C.A. 161 (West 1972). The Committee's use of the terms "witness to the event" implies that such experts cannot be discovered unless they were eyewitnesses. It seems clear, however, that such experts should be discoverable even though they are not eyewitnesses.

143. The amendment codified a rule which had been adopted previously by judicial decision. See Sanchez v. Waldrup, 271 Minn. 419, 136 N.W.2d 61 (1965).


145. Dist. Ct. R. 26.02, 278 Minn. at app. 33 (1968) provided: "The production or inspection of any writing . . . that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert, shall not be required." The provision was ambiguous because it was not clear whether "writing" modified only the clause referring to the attorney's work product or whether it also modified the clause referring to expert's conclusions. Leininger v. Swadner, 279 Minn.
ing of need is no longer required. Further discovery by other means may be obtained only by order of court with appropriate provisions for payment of the expert’s fees and reimbursement of the party who intends to use the expert at trial for past expenses incurred in consulting him. The rule does not specify what showing, if any, is required for additional discovery. The requirement for payment of the expert’s fees is mandatory, but reimbursement of a party’s expenses is discretionary with the court.

Under subdivision B of new Rule 26.02(4), discovery of facts or opinions by any method from experts retained or specially employed in preparation for trial, but not expected to be trial witnesses, is permitted only upon a showing of the impracticability of obtaining the information sought by other means. If the expert retained or specially employed is a medical expert, discovery is permitted only in accordance with Rule 35.

Payment of the expert’s fees and reimbursement of the other party’s expenses

251, 156 N.W.2d 254 (1968), resolved this ambiguity in favor of the latter construction. Thus, Dist. Ct. R. 26.02 was construed as prohibiting the discovery of an expert’s conclusions only if in a writing.

146. A showing of need was eliminated to ease the burden of discovering the expected testimony of the expert witness and thereby facilitate better preparation for rebuttal and cross-examination of the expert. See Fed. R. Civ. P. 26(b)(4), Notes of Advisory Comm.—1970 Amendment, reprinted in 28 U.S.C.A. 161 (West 1972). Similarly, the Minnesota Supreme Court had previously indicated that the purposes of impeachment or corroboration are factors which may justify discovery of an expert’s conclusion. See Leininger v. Swadner, 279 Minn. 251, 258-59, 156 N.W.2d 254, 260 (1968) (quoting Hickman v. Taylor, 329 U.S. 495, 511 (1947)). In light of the importance of expert testimony in many trials, the elimination of a required showing of need increases the prospect that such litigation will be decided on the basis of credible expert testimony.


148. See id. 26.02(4)(C).

149. Previous Minnesota case law had stated that limitations on discovery from an adversary’s expert applied only to the expert’s conclusions and not to the underlying facts which formed the basis of the expert’s conclusions. See LeMieux v. Bishop, 296 Minn. 372, 382, 209 N.W.2d 379, 385 (1973); Leininger v. Swadner, 279 Minn. 251, 259, 156 N.W.2d 254, 259 (1968). In those cases, however, the expert was called as a witness and therefore the holdings are not contrary to the new rule which places limitations on the discovery of facts, as well as conclusions, of an expert who is not expected to be called as a witness.

150. See Minn. R. Civ. P. 26.02(4)(B) (1977). It has been argued that the rule operates inequitably because it allows a party to “purchase” an expert and suppress his unfavorable findings simply by declining to offer his testimony at trial. See Note, Civil Procedure—Discovery of Expert Information, 47 N.C.L. Rev. 401, 406 (1969). It is doubtful that the rule would have such an effect. The unfavorable findings of the opponent’s “purchased” expert could not be suppressed because if the party seeking discovery cannot obtain the information elsewhere and by other means, the party seeking discovery will be able to make a showing of need and thereby be entitled to the information.

151. See Minn. R. Civ. P. 35.01 (1977).
in consulting the expert is mandatory if discovery is ordered under Rule 26.

Since subdivision A of new Rule 26.02(4) eliminates the required showing of need only as to substance of the expert witness's "expected" testimony, theories and opinions of an expert witness which will not be the subject of his testimony are not encompassed by subdivision A.\textsuperscript{152} Arguably, however, such information should be discoverable upon a required showing of exceptional circumstances. This result might be reached by two routes. First, the expert witness might be viewed as a nonwitness expert under subdivision B as to facts and opinions which will not be the subject of his testimony, based on an argument that the critical distinction underlying subdivision A and subdivision B of Rule 26.02(4) is not the identity of the expert, but rather whether the expert information is expected to be presented at trial. Under this approach, subdivision A would govern if information is expected to be presented at trial; and if it is not expected to be presented at trial, subdivision B would govern, thereby making the information discoverable only upon a showing of exceptional circumstances.

The first route probably stretches the language of the rule too far. A second alternative is based upon subdivision A itself. Subdivision A allows "further" discovery of expert witnesses beyond their expected testimony upon order of the court. Presumably this includes discovery of expert facts and opinions which are not expected testimony. The court order probably would require, however, a showing of some justification for the further discovery, undoubtedly similar to the showing of exceptional circumstances required by subdivision B.

One issue raised by the new provisions relating to discovery against a nonwitness expert is the construction which will be given to the required showing of "impracticability of obtaining the information by other means." It has been suggested that the required showing may be difficult to establish because the party seeking discovery does not even know the facts or opinions of the adversary's expert and therefore cannot establish that they are unavailable by other means.\textsuperscript{153} Certainly the drafters of the rule did not intend to impose an inherently contradictory requirement.

\textsuperscript{153} See United States v. Meyer, 398 F.2d 66, 76 (9th Cir. 1968).
of demonstrating inability to obtain, by other means, information which is already known by the party seeking discovery. Instead, it is reasonable to conclude that the party seeking discovery must show that he has a lack of information on a general matter at issue.\textsuperscript{154}

Another issue raised by the new provisions relating to discovery against a nonwitness expert is whether the names of experts specially retained in preparation of trial, but not expected to be called as witnesses, may be discovered without a showing of "exceptional circumstances." The rule makes no provision for the discovery of their names. One view is that the identity of an expert is discoverable only upon the requisite showing of the "exceptional circumstances" needed to discover their opinions or facts acquired in the preparation of the litigation.\textsuperscript{155} A second view is that a showing of exceptional circumstances is not required to discover the identity of an expert.

One court has taken the second view by relying on language in subdivision (b)(1) of federal Rule 26 which requires the disclosure of persons having knowledge of any discoverable matter.\textsuperscript{156} An argument could be made, however, that nonwitness experts do not have knowledge of "discoverable" matter unless a showing of exceptional circumstances is made, and therefore their identity need not be disclosed until such a showing is made.

Another court adopted the second view in \textit{Sea Colony, Inc. v. Continental Insurance Co.}\textsuperscript{157} The court in \textit{Sea Colony} reasoned that establishing the identity of the expert is the first step in discovering the existence of the expert's reports.\textsuperscript{158} Furthermore, the court reasoned, a showing of exceptional circumstances is not needed to discover the mere identity of the expert because the rule is stated in terms of "facts or opinions" of the expert, not his "identity."\textsuperscript{159}

If there is truth to the premise that the identity of the retained nonwitness expert is a helpful first step in showing the "exceptional circumstances" under which his facts or opinions may be discovered, then the analysis of \textit{Sea Colony} has merit.

\textsuperscript{157} 63 F.R.D. 113 (D. Del. 1974).
\textsuperscript{158} Id. at 114.
\textsuperscript{159} Id.
The validity of the premise, however, is questionable. The showing of "exceptional circumstances" required by the rule probably does not require a showing that the particular facts or opinions of an expert cannot be obtained by other means. Instead, it probably requires that the party cannot obtain, by other means, facts or opinions about a matter in issue. For example, the party should not have to show inability to obtain the specific statistical calculations of an adversary expert; he should only have to show that he cannot locate any other experts capable of performing the same calculations. The identity of the nonwitness expert is helpful in making the former showing, but not the latter. Identity of the nonwitness expert would therefore appear to be important only after the party shows his inability to obtain information on matters at issue by other means—a showing of "exceptional circumstances."

The court in Sea Colony may also have been misguided in stating that the rule only relates to "facts or opinions" of the expert and not his identity. Although Rule 26.02(4) sets forth requirements of the discovery of "facts and opinions" held by experts, subdivision A of that rule also requires the disclosure of an expert's identity if the expert is expected to be a witness. Thus, it cannot be said that Rule 26.02(4) deals only with the "facts or opinions" of experts. Furthermore, the mandatory disclosure of an expert's identity expressed only in subdivision A, relating to expert trial witnesses, negatively implies that the disclosure is not mandatory in subdivision B relating to specially retained experts not expected to be a witness.

There are two other reasons for not allowing discovery of the identity of such experts until "exceptional circumstances" have been shown. First, a requirement of exceptional circumstances is in apparent accord with the comments to the federal rule. Second, any duty to disclose the identity of the expert would probably involve an issue of whether he was a discoverable expert specially retained or employed as distinguished from a nondiscoverable expert informally consulted. The court could determine in

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160. See notes 153-54 supra and accompanying text.
161. FED. R. CIV. P. 26(b)(4)(B), Notes of Advisory Comm.—1970 Amendment, reprinted in 28 U.S.C.A. 161 (West 1972), states that "a party may on a proper showing require the other party to name experts retained or specially employed . . . ." Although it is not perfectly clear what is meant by "proper showing," 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2032, at 255 n.81 (1970), the expression probably refers to the showing of "exceptional circumstances" under Rule 26(b)(4)(B).
the same proceeding both this issue and the issue of whether "exceptional circumstances" have been shown.

All of these considerations seem to indicate that the better rule is to require a disclosure of the identity of a specially retained expert, not expected to be a witness, only upon a showing of "exceptional circumstances."

Discovery is allowed against a non-witness expert only if he is "retained or specially employed." Discovery is not allowed if he merely has been informally consulted. Determination of whether an expert has been retained or "specially employed" presents some difficulty. The Federal Advisory Committee implied that an expert employee of a party who is a regular general employee and who has been specially assigned to the case is one who is "specially employed."

One federal district court, however, has given a different interpretation to the term "specially employed." That court drew a distinction between the expert who is already an employee of a party and who has been assigned to work on the litigation, and the expert who has been put on the payroll for the specific purpose of assisting in trial preparation. The first type of employee is not "specially employed," and therefore is the subject of discovery to the same extent as an ordinary witness. Thus, house experts are to be treated as ordinary witnesses. The second type of employee is "specially employed" and thus subject to qualified discovery.

C. Protective Orders

The new rules continue the availability of protective orders to protect a party from oppression, undue burden, or expense in

166. Id. at 407-08.
167. Id. at 407.
connection with discovery. The 1975 amendments, however, contain three changes relating to protective orders. First, by placing the provisions for protective orders in Rule 26, they are now available for any of the discovery devices. Under the old rules, they were only available for oral depositions. The second change is an addition describing the courts from which the protective orders may be obtained. Protective orders may now be obtained from the court in which the suit is pending, or in the case of depositions, from either that court or the court in the district where the deposition is to be taken. Third, the protections afforded by the rule have been slightly enlarged. Rule 26 now specifically provides that trade secrets may be protected and that both the time and place of discovery may be designated by the court. A motion for a protective order should be made when a party objects to discovery and therefore fails to appear at his deposition, respond to Rule 33 interrogatories, or respond to Rule 34 requests for the production of documents. If a motion is not made, the grounds for objection may be waived. If a motion for

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The court may award expenses and fees against a party losing the motion for protection. Minn. R. Civ. P. 37.04 (1977).


171. The rule merely restates existing Minnesota case law. Under Dist. Ct. R. 30.02, 278 Minn. at app. 39 (1968), a protective order could be obtained to prevent disclosure of "secret processes, developments or research . . . ." In Baskerville v. Baskerville, 246 Minn. 496, 510, 75 N.W.2d 762, 771 (1956) (dictum), the Minnesota Supreme Court said that trade secrets would not be protected if they contain relevant evidence essential to a fair adjudication of an issue. In addition, a party seeking protection of a trade secret must be acting in good faith and not merely using a claim of trade secret to avoid legitimate discovery. Thermorama, Inc. v. Shiller, 271 Minn. 79, 86, 135 N.W.2d 43, 47-48 (1965).

The court has broad discretion in forming the type of protection to be given a trade secret. Therefore, the manner of protection varies with each case. Some of the more frequently employed methods of protection include inspecting the information in camera to determine confidentiality, e.g., Ronson Corp. v. Liquifin Aktiengesellschaft, 370 F. Supp. 597 (D.N.J.), aff'd, 497 F.2d 394 (3d Cir.), cert. denied, 419 U.S. 870 (1974), limiting the persons to whom the information must be disclosed, e.g., Scovill Mfg. Co. v. Sunbeam Corp., 61 F.R.D. 598, 602 (D. Del. 1973), and requiring disclosure of the ingredients of a product but not the ratios in which they are combined, e.g., Sandee Mfg. Co. v. Rohm & Haas Co., 24 F.R.D. 53, 58 (N.D. Ill. 1959).


173. Id. 37.04.

174. See id.
protection is lost, the court may award expenses and fees against the losing party\textsuperscript{175} as well as order discovery.\textsuperscript{176}

D. \textit{Sequence, Timing, and Frequency of Discovery}

Rule 26 now specifically provides for the sequence, timing, and frequency of discovery. Subject to order of court and the time limitations placed upon plaintiff for taking depositions, discovery procedures begun by one party will no longer take priority over those subsequently initiated by another party.\textsuperscript{177} Discovery devices may be used in any sequence.\textsuperscript{178} When a conflict arises, for example, in the taking of depositions, the attorneys in most instances will be able to resolve it informally without court intervention. Finally, no limitation is placed on the frequency of discovery procedures, except on the number of interrogatories that may be submitted under Rule 33\textsuperscript{179} and subject to the terms of a

\textsuperscript{175} See id. 37.01(4).

\textsuperscript{176} Failure to comply with the order will, of course, allow the imposition of Rule 37 sanctions. See id. 37.02(2).

\textsuperscript{177} Old Rule 26.01 had the effect of allowing the defendant to obtain priority in the taking of depositions because the defendant could serve notice of a deposition anytime after commencement of the action, whereas plaintiff could not serve notice of a deposition within the first 20 days after commencement of the action unless leave of court was obtained. In addition, some courts gave continuing priority to the first party to serve a notice of deposition. See, e.g., Story v. Quarterback Sports Fed’n, 46 F.R.D. 432, 433 (D. Minn. 1969); Schilling-Hillier S.A. Indus. E. Comercial v. Virginia-Carolina Chem. Corp., 19 F.R.D. 271, 274 (S.D.N.Y. 1956). Where special circumstances existed, however, this rule was not strictly applied. E.g., Caldwell-Clements, Inc. v. McGraw-Hill Publishing Co., 11 F.R.D. 156, 158 (S.D.N.Y. 1951) (parties ordered to alternate taking of depositions when duration of discovery is likely to be lengthy); Stover v. Universal Moulded Prod. Corp., 11 F.R.D. 90, 91-92 (E.D. Pa. 1950) (plaintiff given priority if defendant’s prior notice is invalid).

The priority rule was criticized because it could be misused and thereby cause injustice to the party lacking priority. Comment, \textit{Discovery Priority Rule Under the Federal Rules of Civil Procedure—Friend or Foe?}, 74 \textit{Dick. L. Rev.} 103, 111-14 (1969). One such case is First Nat’l Bank v. Cities Serv. Co., 391 U.S. 253, 261-63 (1968), in which the plaintiff was not permitted to have any kind of discovery until defendants finished taking depositions more than five years after the action had commenced.

New Rule 26.04 eliminated the priority rule. See \textit{Minn. R. Civ. P.} 26.04, Advisory Comm. Note—1975. In addition, new Rule 30.01 eliminated the ability of the defendant to serve the first notice of deposition. It requires court approval for the plaintiff’s taking of a deposition within 30 days after service of the summons and complaint but does not limit plaintiff’s service of mere notice. Therefore, priority will not exist under the new rules unless the court orders it for the convenience of the parties and witnesses or in the interests of justice, see \textit{Minn. R. Civ. P.} 26.04, Advisory Comm. Note—1975, or the parties stipulate to it, \textit{Minn. R. Civ. P.} 29 (1977).


\textsuperscript{179} \textit{Minn. R. Civ. P.} 33.01(1) (1977) continues to impose a limit of 50 interrogatories served upon another party.
protective order obtained to relieve a party from oppressive discovery.\textsuperscript{180}

\textbf{E. The Continuing Duty to Supplement Discovery Responses}

The old rules contained no requirement for supplemental responses to depositions, interrogatories, and requests for admission or inspection when new information was obtained. Minnesota case law, however, imposed a continuing duty to supplement interrogatory answers.\textsuperscript{181} Under new Rule 26, supplemental responses by a party are required only in specified instances.\textsuperscript{182} First, there is a continuing duty to disclose the identity of trial witnesses, including expert trial witnesses, and the substance of their testimony.\textsuperscript{183} Second, a response must be corrected if it was either incorrect when made, or has since become incorrect so that nondisclosure would amount to a knowing concealment of the true facts.\textsuperscript{184} Third, supplemental responses are required in compliance with an order of court, agreement of the parties, or new requests by a party for supplementation of responses.\textsuperscript{185}

Rule 37 sanctions are probably not available if a party fails to provide a required supplemental response because it is not one of the types of flagrant misconduct listed in Rule 37.04.\textsuperscript{186} Instead, the court is given wide discretion to determine any sanctions,\textsuperscript{187} such as exclusion of evidence or continuance.\textsuperscript{188} The Minnesota Supreme Court has indicated that sanctions will vary depending on whether or not the failure to supplement a response was willful.\textsuperscript{189}

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\textsuperscript{180} See id. 26.03.
\textsuperscript{182} See MINN. R. CIV. P. 26.05 (1977).
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2050, at 325 (1970).
\textsuperscript{189} In Gebhard v. Niedzwiecki, 265 Minn. 471, 478-79, 122 N.W.2d 110, 115 (1963), the court said:

\begin{quote}
The object of sanctions should be to prevent the party who fails to comply with the rule from profiting by his own violation. In cases where there is an honest mistake and the harm can be undone, it may frequently occur that a continuance or some other remedy would be adequate but, where the violation is willful and the party guilty of the violation seeks to take advantage of it at a time when
\end{quote}
An issue raised by these provisions is whether there is a duty to disclose subsequently acquired information which merely adds to a previous truthful answer. Prior to adoption of the new rules, Gebhard v. Niedzwiecki imposed a duty to disclose after-acquired information in two situations. First, it had to be disclosed when it rendered the original answers untruthful, unreliable, or inaccurate. Second, after-acquired information had to be disclosed if it was of a material nature. New Rule 26.05(2) codifies the first situation. The second situation is not contained in new Rule 26, except to the extent that it relates to the continuing duty of identifying either an expert witness who is expected to be called at trial or a person with discoverable information. Arguably, therefore, a party need not disclose material information which merely adds to a previous answer.

There is, however, a countervailing argument that Gebhard, rather than Rule 26.05, applies in situations where a party subsequently acquires material information which merely adds to a previous truthful answer. Rule 26.05 provides that "[a] party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows . . . ." If the initial response was not complete when made, Rule 26.05 should not be applicable. It is therefore critical to determine the meaning of the clause "complete when made." The clause could refer to completeness in the sense of being exhaustive of the party's knowledge at the time of the initial answer, or it could refer to completeness in the sense of being exhaustive of information actually in existence whether known by the party or not. If the clause has the former meaning, a party has given a complete answer unless he willfully or inadvertently concealed some of his knowledge when he gave the initial response. If the clause has the latter meaning, a party who does not provide material information in his initial response which was

the harm cannot be undone, suppression of the evidence may very well be the proper and only available remedy.


190. 265 Minn. 471, 122 N.W.2d 110 (1963).
191. Id. at 477, 122 N.W.2d at 114.
192. Id.
194. Id. 26.05 (emphasis added).
actually in existence at that time has given an "incomplete" answer. Thus, under the latter construction, Rule 26.05 is not applicable in the situation where a party fails to provide existing but unknown material information in his initial response, and Gebhard could remain good law without being repugnant to Rule 26.05.

Notwithstanding this argument, Gebhard should no longer be the law in Minnesota. First, the new rules of discovery were meant to be a clarification of discovery requirements and not an adjunct to prior case law.\(^{195}\) Second, the duty of making supplemental responses was meant to be reduced, not enlarged, by the new rules.\(^{196}\)

**IV. RULE 30: DEPOSITIONS UPON ORAL EXAMINATION**

Rule 30 contains the specific provisions governing depositions of a party or witness on oral examination.\(^{197}\) Although many of its provisions were taken from the old rules, several important changes have been made. These changes have been made in the rules governing the timing of depositions, notice of examination, examination, recording of depositions, and procedural matters after the deposition.

**A. Timing of Depositions**

An oral deposition may be taken any time after commencement of the action.\(^{198}\) The plaintiff, however, is required to obtain leave of court if the deposition is to be taken within thirty days from the service of process unless the defendant has initiated discov-

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195. The Minnesota Advisory Committee stated:

Gebhard v. Niedzwiecki, 265 Minn. 471, 122 N.W.2d 110 (1963), and case law in other jurisdictions, impose a continuing obligation to respond upon a party under Rule 33. The proposed new Rule 26.05 clarifies the practice and makes explicit the obligation to provide new information in the specified situations.

There is no duty to supplement the responses except as provided in the rule.


196. The Minnesota Advisory Committee stated:

The proposed changes are designed to encourage discovery with a minimum of court intervention. Among these are the following:

(3) The duty to supplement responses would be eliminated except in certain specified situations.


199. Id.
ery in any form or the defendant will be unavailable for examination within the state after the expiration of the thirty days and the plaintiff so states with supportive facts in the notice of the deposition. The old rule required leave of court if the deposition was to be taken within twenty days from commencement of the action rather than from service of process. Because the new rule addresses the taking of depositions and not the notification of depositions, the plaintiff may give notice within the thirty-day period of a deposition to be taken after the thirty-day period without leave of court. In addition, the required leave of court may be obtained ex parte, unless it is an order to change the time of taking the deposition. But even if leave of court is unnecessary because of the time at which the deposition is taken, court intervention may be desired or required because of other considerations. First, a deposition taken by plaintiff within thirty days after service of process may not be used against a party at

200. Id. 30.02(2). The 30-day limitation is applicable to the deposition of a nonparty as well as a party. It is true that the hardship of a deponent in preparing for a deposition is usually not so great in the case of a nonparty as it is for a defendant. Yet, application of the 30-day limitation to both parties and nonparties is sound because the limitation protects defendants by affording them sufficient time to prepare for cross-examination of a nonparty deponent. See 1 J. Hetland & O. Adamson, Minnesota Practice 689 (1970) (authors' comment to old Rule 26.01).

201. See Dist. Ct. R. 26.01, 278 Minn. at app. 32 (1968). An action is commenced when the summons is served or delivered to a proper officer for service. Minn. R. Civ. P. 3.01. If the summons is delivered to a proper officer for service, the running of the old 20-day limitation commenced at that time and could possibly expire by the time the defendant actually received the summons. In that situation, the defendant would then have the burden of obtaining a protective order. See, e.g., Westerman v. Grow, 198 F. Supp. 309 (S.D.N.Y. 1961); 1 J. Hetland & O. Adamson, Minnesota Practice 689 (1970) (authors' comment to old Rule 26.01). To avoid this hardship, the rule was amended to measure the period from the time process is served upon the defendant. If service is by publication, the 30-day period is measured from 21 days after the first publication because that is when "[t]he service of the summons shall be deemed complete." Minn. R. Civ. P. 4.04.


203. Because the purpose of the required leave of court is to protect "a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit," Fed. R. Civ. P. 26(a), Notes of Advisory Comm.—1946 Amendment, reprinted in 28 U.S.C.A. 153 (West 1972), the protection which is to be afforded the defendant should not be against mere notice of the taking of a deposition but rather should be against the taking of a deposition. Furthermore, restrictions on the timing of a plaintiff's notice of taking a deposition were eliminated to prevent the defendant from obtaining priority in the taking of depositions. See note 177 supra.


trial who can show that he was unable to obtain counsel to repre-

sent him at the deposition. Second, a court order or showing of
need may be required under Rule 26 to depose a nonmedical
expert witness or under Rule 35 to depose a medical expert.

The 1975 amendments left unanswered the question of whether
a third-party plaintiff must obtain leave of court for the taking
of a deposition within thirty days after service of the third-party
complaint. This question would probably be answered in the nega-
tive because of practical considerations and because such a limi-
tation would not exist if defendant did not institute a third-party
action.

The rule also leaves unanswered the question of whether the
deponent's contemplated return to the state sometime after the
thirty-day period should affect the plaintiff's ability to take the
deposition within the thirty-day period without leave of court.
This situation would exist if the deponent was about to leave the
state within the thirty-day period but would return, for example,

207. Expert adverse trial witnesses may be deposed only pursuant to order of court, with
restrictions on the scope of discovery and such provisions for award of expenses and fees
as the court deems appropriate. Id. 26.02(4)(A)(ii). Experts specially employed by a party
in preparation for trial but who will not be trial witnesses may not be deposed except upon
a showing that it is impractical to obtain the information sought from them by other
means. Id. 26.02(4)(B). See notes 149-51 supra and accompanying text.
208. Medical experts who have examined an adverse party under Rule 35 may be
deposed without order of court. MINN. R. CIV. P. 35.02(2) (1977). If the medical privilege
has been waived, either by requesting the report of an adverse medical examination or by
deposing the examiner, id. 35.01, or by putting in issue a party's physical condition, id.
35.03, depositions of treating or examining medical experts may otherwise be taken only
upon a showing of good cause, id. 35.04.
209. One commentator has argued the limitation should not be applicable because "it
would unduly complicate matters if all taking of depositions were to be suspended every
time a new party was brought into a suit." 4A MOORE'S FEDERAL PRACTICE ¶ 30.53[3], at
30-58.1 (2d ed. 1975). Perhaps a better reason is stated in 1 J. HEITLAND & O. ADAM-
SON, MINNESOTA PRACTICE 689-90 (1970) (authors' comment to old Rule 26). It states:

[S]ince the third party plaintiff as a defendant in the original action could
properly take the deposition of the potential third party defendant at any time
before commencing the third party action without regard to the 20 day prohibi-
tion, since the depositions of other parties pertaining to main action matters
may or may not involve third party defendant, and since plaintiff in the original
action may appropriately take depositions and generally is not a plaintiff for
purposes of relationship with a third party defendant, it would appear wise to
require a third party defendant to use [protective orders] in those situations
where protection is needed and additional time is required for preparation of
third party defendant as a party rather than to establish a blanket 20 day
prohibition each time a new claim is asserted against a new party.

Id. at 690.
six months later. If Rule 30 is followed literally, the plaintiff will be unable to take the deposition without obtaining leave of court because the deponent will be available for examination within the state after thirty days. Obviously, Rule 30 cannot be given such a narrow construction because it would effectively prevent the plaintiff from deposing a person who left the state shortly before expiration of the thirty-day period but who planned to return after trial.210 The best construction which could be given the Rule 30 language is probably that the plaintiff should be allowed to depose, without leave of court, a person who the plaintiff has reason to believe will leave the state prior to expiration of the thirty-day period and reason to believe will not return to the state before trial and in time for the plaintiff to ascertain relevant facts and information held by the deponent.211 In addition, the notice to the deponent should set forth facts in support of the beliefs and be certified by the plaintiff's attorney.212

If the plaintiff is incorrect as to his belief of the deponent's unavailability, the deponent could then merely seek to have the time lengthened by the court.213 Even if the defendant is not the deponent, the defendant should similarly be entitled to have the time lengthened because one of the purposes of the thirty-day limitation is to enable the defendant to prepare for cross-examination.214

B. Notice of Examination

Rule 30 continues the practice of initiating the taking of a deposition by service of a reasonable written notice containing the

210. See Gebhard v. Niedzwiecki, 265 Minn. 471, 476, 122 N.W.2d 110, 114 (1963) (construction of discovery rules which would prevent a party from preparing for a trial should be avoided).

211. An objective standard, which would require plaintiff to show the deponent is about to leave the state and not return in time for trial, cannot be implemented as a practical matter because an action is not usually placed on the trial calendar until well after the 30-day period. Thus, the showing which plaintiff must make should be based on his subjective beliefs as to the deponent's availability rather than objective facts. The subjective standard also furthers the purpose of discovery, which is to eliminate the element of surprise and allow each party to ascertain all relevant facts and information prior to trial. See Gebhard v. Niedzwiecki, 265 Minn. 471, 476-77, 122 N.W.2d 110, 114-15 (1963); Jeppesen v. Swanson, 243 Minn. 547, 560, 68 N.W.2d 649, 656-57 (1955).

212. MINN. R. CIV. P. 30.02(2) (1977).

213. See id. 30.02(3).

details required by the rule.\textsuperscript{215} If a party is to be examined, mere notice is sufficient to compel attendance.\textsuperscript{216} If the deponent is not a party, he must be subpoenaed.\textsuperscript{217} If the deposition is to be taken within thirty days after the service of process without order of court, the notice should contain the statement that the deponent will be unavailable in the state after the thirty-day period and should set forth facts to support the statement.\textsuperscript{218}

The notice should designate any materials required to be produced by a nonparty witness under a subpoena duces tecum.\textsuperscript{219} If the deponent is a party, the notice should include a request for production of specified documents or things in compliance with the requirements and procedures of Rule 34.\textsuperscript{220} Professors Wright and Miller have criticized the different procedural treatment of parties and nonparties in the production of documents at a deposition because a nonparty served with a subpoena duces tecum under Rule 45 must object within ten days after service whereas a party served with a request for the production of documents under Rule 34 has at least thirty days in which to respond.\textsuperscript{221} They conclude that the Rule 34 time period should be disregarded in a request for documents used in conjunction with a Rule 30 deposition.\textsuperscript{222}

This argument seems to overlook the fact that a duty to produce documents imposes the same hardship on a party whether required in conjunction with a deposition or required as an independent means of discovery. It must be assumed that the thirty-

\textsuperscript{215} See Minn. R. Civ. P. 30.02(1) (1977).
\textsuperscript{216} See id. 30.02(1). See also Juster v. Grossman, 229 Minn. 280, 283-87, 38 N.W.2d 832, 834-36 (1949) (court has no jurisdiction to restrain taking of a deposition when proper notice is served).
\textsuperscript{217} See Minn. R. Civ. P. 30.01 (1977). Rule 45 sets forth the provisions governing subpoenas.
\textsuperscript{218} Id. 30.02(2).
\textsuperscript{219} Id. 30.02(1).
\textsuperscript{220} Id. 30.02(5).
\textsuperscript{222} Charles Wright and Allen Miller state:

It makes no sense at all to build such a long delay into the procedure as against a party while allowing expeditious proceedings against a nonparty. The only way to avoid such an unappealing result is to say that the procedural provisions of Rule 34 other than the time periods there set out apply to a request under Rule 30(b)(5) . . . . This is what the law ought to be, and it seems to be what the Advisory Committee intended, but unfortunately it flies in the teeth of the language of the rule.

Id. (footnote omitted).
day response period was intended if a Rule 34 request is made independent of any other forms of discovery. The same time period should also be available if the party seeking discovery decides to use Rule 34 in conjunction with a deposition. To hold otherwise and follow the suggestion of Wright and Miller would allow a party requesting production of a document to circumvent the thirty-day response period by merely requesting the document in conjunction with a deposition that could, as a tactical matter, consist of merely one question.

A final change made in Rule 30 provisions governing notice of examination is found in a new procedure whereby a party or nonparty corporation or other organization may be named as a witness in the deposition notice and subpoena. The new procedure does not, however, prevent a party from designating specific individual officers or agents. If the corporation or organization is named in the deposition, it must then designate a director, officer, managing agent, or other person to testify on its behalf upon the matters set forth in the notice and subpoena. If a corporation or organization fails to designate a deponent, a motion for an order compelling such designation is available under Rule 37. Disobedience of the order may result in the imposition of sanctions.

Persons other than officers, directors, or managing agents may be so designated only with their consent. This permits an agent or employee who has a conflicting or independent interest in the lawsuit—such as a personal injury action—to refuse to testify. The person designated must testify as to matters known or reasonably available to the organization.

224. See id. 37.01(2).
225. See id. 37.02(2).
227. Minn. R. Civ. P. 30.02(6) (1977). Although the rules were not clear, it was generally understood that prior to the 1975 amendments the party seeking discovery had the duty to name the officer or agent who was to testify on behalf of the corporation. See 2 J. Hetland & O. Adamson, Minnesota Practice 5 (1970) (authors' comment to old Rule 30). There are no Minnesota decisions on the Minnesota rule, but under the old federal rules a party seeking discovery could not continue the examination with a different officer when the officer or agent named could not give the information, unless notice was given to the different officer. See Harry Von Tilzer Music Pub. Co. v. Leo Feist, Inc., 2 F.R.D. 96 (S.D.N.Y. 1941). This result is changed by the new rules because Rule 30.02(6) places the burden on the corporation to designate an officer, agent or other person who “shall testify as to matters known or reasonably available to the organization” (emphasis added). The
C. Examination and Objections

Rule 30 continues the provisions of the old rules that defendants shall be examined and cross-examined under Rule 43 governing examination and cross-examination at trial. The scope of examination at a deposition is governed generally by Rule 26 subject to such limitations as the court may impose when the deposition of an expert trial witness is taken or when a protective order to limit the examination is sought.

New Rule 30 continues the requirements that all objections made at the deposition shall be noted on the record, and evidence objected to shall be taken subject to the objection unless a motion is made to the court to limit the scope of the examination or to compel an answer from a witness who refuses to answer a question or questions. Failure to make an objection may
result in its being waived. This includes objections to the qualification of the officer before whom the deposition is taken.

Objections may be an insufficient deterrent in some instances to prevent improper questioning. Rule 30 continues the old provisions for a motion to limit examination by terminating the deposition or limiting the scope or manner of the examination by the court in which the action is pending or by the court in the district where the deposition is being taken. The moving party must show that the examination is being conducted in bad faith or in a manner which is unreasonably annoying, embarrassing, or oppressive. A new provision is added, however, whereby the court may impose expenses and fees against the moving or opposing party or his attorney, depending on the “substantial justification” for the motion or the opposition to it.

D. Recording of Depositions

Unless otherwise ordered by the court, testimony at a deposition is recorded stenographically. Upon the request of a party, the court may order that the testimony be recorded by mechanical, electronic, or photographic means with adequate safeguards. This order does not, however, prevent the other party from having the deposition stenographically transcribed at his own expense. A final change is that unlike the former rule, testimony will be transcribed only if one of the parties requests it.

Failure to obey an order of the court located in the county in which the deposition is taken may be considered a contempt. Failure to obey an order of the court in which the action is pending may result in the imposition of other sanctions. See id. 30.02(2).

See note 39 supra.

See MINN. R. Civ. P. 32.04(2) (1977). Although the rules contain no specific provision for hearing an objection to the qualifications of the officer, this objection can be heard before trial if the deponent refuses to answer, thereby requiring the party who asked the question to obtain an order compelling an answer under Rule 37. Otherwise, the objection will be heard at trial along with any other objections to the deposition.

Limitations on the scope or manner of the examination are set forth in the provisions for protective orders under MINN. R. Civ. P. 26.03 (1977).

The courts which have faced the issue of adequate safeguards needed for nonstenographic recording have been virtually unanimous in requiring that the initiating party implement the nonstenographic recording,245 that the recording device be of high quality and reproduce the deposition as accurately as a court reporter,246 an original be filed with the court,247 identification of the speaker be assured,248 and two independent recording devices be used.249

There are certain safeguards, however, which have been the subject of dispute. One disputed safeguard is whether the recording device must be operated by an independent third party. Some courts have required an independent operator as a matter of course250 whereas others have not.251

The differing requirements of an independent operator stem from various conclusions reached by the courts as they weigh the need for accuracy and trustworthiness against the need for economy. Therefore, perhaps the best solution to this issue is to balance these interests on a case-by-case basis and not have a predetermined requirement of an independent operator. Two courts have taken a similar position, requiring an independent operator only when there are no other alternatives to guarantee trustworthiness.252 Under the proposed case-by-case standard, the initiat-

ing party at least should be required to demonstrate a cost saving in not hiring an independent operator because all costs being equal, the court should favor the more accurate and trustworthy deposition recorded by an independent operator.

A related issue which has been the subject of dispute is whether the calling party should be required to show that use of a nonstenographic recording will result in a cost-saving over use of a stenographic recording. This issue stems in part from the Federal Advisory Committee's comment that "[i]n order to facilitate less expensive procedures, provision is made for the recording of testimony by other than stenographic means . . . ."253 One court has taken the position that if the initiating party cannot make a showing of the cost-saving, the request for a nonstenographic recording is inimical to the only stated objective of the rule.254 Another court has taken the opposite position, stating that the inability of a particular party to pay for stenographically recorded depositions is usually irrelevant because the express objective of facilitating less expensive procedures is merely a declaration of general policy.255 The latter position seems preferable, because the former position places the wrong emphasis on the Federal Advisory Committee comments. It is just as likely that the comments refer to the expected manner in which the rule would be used rather than to the required manner of its use. That is, a moving party will usually seek nonstenographic recording if it is less expensive than stenographic recording, and therefore the rule will "facilitate less expensive procedures." Certainly the court should recognize that nonstenographic recordings may be desirable for reasons other than saving expenses. If the rule were merely intended to be a cost-saving substitute for stenographically recorded depositions, the Federal Advisory Committee would not have also used "photographic" procedures as an example of permissible procedures.256

A final safeguard over which there has been dispute is the necessity of maintaining a detailed log and index when the oral

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deposition is recorded on tape. One court has required a detailed log and index to facilitate, during the taking of the deposition, reference back to previously answered questions. 257 Another court has stated that a detailed log and index is not required because the recording will be subsequently transcribed. 258 The conclusion of the former court seems more reasonable than that of the latter court. Whether the recording is to be transcribed subsequently is irrelevant to a determination of whether the convenience of quick reference back to a prior statement during the deposition justifies the imposition of a duty to maintain a log and index. The better rule is that maintenance of a log and index should be required as part of the initiating party’s burden of supplying the device for nonstenographic recordation. This duty could be discharged either by an independent operator, if required, or by an employee of the initiating party. If the initiating party fails to provide a sufficient log and index to meet the demands for its use during the deposition, the court could then impose additional safeguards. 259

E. Procedural Requirements after the Deposition

Most of the procedural requirements imposed after the taking of a deposition remain unchanged. Rule 30 continues the requirement that the officer certify and file the deposition. 260 The party taking the deposition is still required to give notice of the filing to all other parties. 261 Two significant changes, however, were made with respect to procedural requirements imposed after the taking of a deposition.

The first change relates to the signing of the deposition. As before, a stenographic transcription of a deposition shall be submitted to the witness for examination unless waived by the witness and the parties. 262 If the deposition is submitted to the witness, he shall sign it unless the need for his signature has been waived by the parties. In addition, the new rule provides that if

259. Cf. Montgomery Mills, Inc. v. Griffen-Burgess Corp., 62 F.R.D. 105 (D. Del. 1974) (additional safeguards to assure taping is subordinate to the conduct of the deposition and is as innocuous as the taking of written notes).
262. Id. 30.06.
the deposition is not signed within thirty days from its submission to the witness, the officer taking the deposition shall sign it.\textsuperscript{263} This additional requirement does not affect the use of the deposition.

A new provision has also been added to provide flexibility in the handling of exhibits produced for inspection at the taking of the deposition.\textsuperscript{264} Upon the request of a party, documents and other items produced for inspection at the deposition shall be annexed to the deposition.\textsuperscript{265} For the safekeeping of original documents, the person producing the materials may substitute copies of the originals with an opportunity for verification, or he may request return of the original for an opportunity to inspect and copy it. However, any party may move that the original document be annexed pending final disposition of the case.\textsuperscript{266}

\textbf{V. Conclusion}

This Article has discussed the various changes in the new discovery rules and some of the unresolved issues which have been created by the changes. Although some of the changes are significant, many will have little, if any, impact on the discovery practices which were used by Minnesota attorneys prior to the amendments. The most significant impact is on prior practices relating to discovery through depositions and the discovery of work product and experts.

Some of the unresolved issues raised by the changes are also significant, especially issues relating to the discovery of experts and work product. In addition, the question of what safeguards are needed in conjunction with depositions by electronic and photographic means will certainly become significant as such devices become more popular. But even though new issues have been created, the 1975 amendments to the discovery rules, as a whole, represent a simplification and clarification of permissible discovery techniques.

\begin{itemize}
\item 263. \textit{See id.}
\item 264. \textit{Compare Dist. Ct. R. 30.06, 278 Minn. at app. 41 (1968) with Minn. R. Civ. P. 30.06(1) (1977).}
\item 265. \textit{Minn. R. Civ. P. 30.06(1) (1977). "As a general rule and in the absence of agreement to the contrary or order of the court, exhibits produced without objection are to be annexed to and returned with the deposition . . . ." Fed. R. Civ. P. 30(f)(1), Notes of Advisory Comm.—1970 Amendment, \textit{reprinted in} 28 U.S.C.A. 246 (West 1972). "If the originals are to be annexed and retained with the deposition, a court order is appropriate for such purpose." Minn. R. Civ. P. 36.06(1), Advisory Comm. Note—1975.}
\item 266. \textit{Minn. R. Civ. P. 30.06(1) (1977).}
\end{itemize}