Discovery in Washington

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Two decades have passed since the Washington Supreme Court, in 1951, adopted practically verbatim the federal rules governing the discovery process. The federal rules themselves had been promulgated earlier by the United States Supreme Court in 1938. While pretrial depositions, interrogatories to parties, inspection of books and documents, and physical examination of parties were provided for in Washington prior to 1951, such devices were much less comprehensive than those under the federal rules as to persons, materials and subjects within the scope of proper inquiry.\(^1\)

By the time the present rules were adopted, it had already been established that the promulgation of such rules was properly within the sphere of the Washington Supreme Court's power. In 1928 in *State ex rel. Foster-Wyman Lumber Company v. Superior Court*,\(^2\) a rule of court relating to the taking of depositions was sought to be invalidated. It was held that such rules related to procedural rather than substantive matters and thus were permissible under a statute authorizing the court to make rules relating to pleading, practice and procedure,\(^3\) and that such authorization was not an unconstitutional delega-
tion of legislative power. The case has served as the touchstone for determining the constitutionality of rules of court in Washington and, particularly for present purposes, of discovery rules.

The reasons for the promulgation of modern discovery rules are numerous.\(^4\) Perhaps the chief purpose of modern discovery devices is the elimination of the problems resulting from each party proceeding his own way in the preparation and investigation of his case without the opportunity of knowing and evaluating the position of the other party. Without discovery the outcome of litigation turned too often on the tactical skills and techniques of attorneys rather than the reality of the situation. Through discovery of the other party's facts, witnesses, documents, and physical and mental condition, surprise and entrapment at the trial would be lessened. Trials would be decided upon the facts rather than by the skills of counsel. By more clearly defining the real issues and eliminating false issues, trials would be shortened. The number of witnesses and documents would be reduced. The hope was that in many instances the entire trial would be avoided by virtue of the greater likelihood of pretrial settlements when the realities were known by all the parties. Earlier disposition of issues, or of the entire case by summary judgment or settlements, would reduce not only the burden on the state but the cost to parties as well. While recent studies suggest that discovery does not always produce all of these desired results (for example, discovery does not appear to produce more frequent settlements or save substantial court time in shortening or avoiding trials), on balance it is working and has the support of the bar and commentators.\(^5\)

The purpose of this article is to review the developments in Washington under the discovery rules and to point up particularly some of the more common problem areas. This is appropriate not only because of the passage of time and accumulation of experience under the rules, but also because of the recent adoption of new federal discovery rules on July 1, 1970. The new federal rules are intended to remedy defects and clarify ambiguities existing under the 1938 federal dis-

\(^4\) A good listing of the advantages, and disadvantages, of discovery depositions is stated in H. Hickam & T. Scanlon, Preparation for Trial 92-110 (1963).

\(^5\) For an excellent discussion of the actual workings of discovery under the original federal rules and the bar's appraisal thereof see W. Glaser, Pretrial Discovery and the Adversary System (1968). The results of the study reported in this book provided much of the material used for the redrafting of the federal rules. See also Rosenberg, Changes Ahead in Federal Pretrial Discovery, 45 F.R.D. 481 (1968).
covery rules, the ones now basically controlling in Washington. One may anticipate growing discussion and eventual promulgation of part or all of the new federal rules in Washington in accord with Washington's general tendency to adopt the federal rules. This article will discuss some of the more important provisions of the new federal rules and the way in which their adoption and implementation would affect present Washington discovery practice and procedure.

The discussion in this article relates to discovery in civil cases. It was decided soon after the promulgation of the present discovery rules that they applied only to civil procedure. Discovery in criminal cases, rather than being governed by any particular set of rules, is a matter deemed to rest peculiarly in the discretion of the trial court. While the trend seems to be in the direction of more liberal allowances of pretrial discovery in criminal cases, such discovery has not yet reached the limits provided under modern civil discovery rules.

I. SCOPE OF DISCOVERY

The pertinent general provision as to scope of discovery under Washington practice is as follows:

Unless otherwise ordered by the court . . . , the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party . . . .

Prior to the adoption of this provision, discovery was limited to facts which were material to a party's own side of the controversy; one could not inquire into the other party's case. The limiting effect of this approach was demonstrated by Hill v. Hill, in which the plaintiff alleged a personal assault by the defendant. The defendant, through interrogatories, sought to require the plaintiff to state what

injuries were received, how long her recovery took, whether the assault occurred in her home, and the names of any persons who saw the assault.

Discovery of such information by the defendant was denied since it related to the plaintiff’s case. Under the present Washington rules such information could clearly be obtained as it relates “to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.”

Although the scope of appropriate subject matter for discovery was considerably extended by the rules, there are, of course, still limitations. One is that the matter not be privileged. An early example is Cully v. Northern Pacific Railway in which, in an action against a railroad company for personal injuries to an employee, interrogatories seeking to compel the defendant to produce an accident report and certain confidential correspondence were held improper since such communications were privileged.

The most litigated question in recent times relates to the physician-patient privilege. As will be discussed later, it is possible for a defendant to obtain a physical examination of a plaintiff under Civil Rule 35. But suppose that the defendant wishes instead to take a deposition of plaintiff’s doctor. In Bond v. Independent Order of Foresters, the court held that the bringing of a personal-injury action does not, by itself, constitute a waiver by the plaintiff of the physician-patient privilege afforded by statute. The Bond court also held

12. The court reasoned as follows: “...since they were propounded by the defense, they must call for matters material to the defense. Those here propounded had no tendency in that direction. They rather required the plaintiff to state with particularity what evidence she intended to give in support of her complaint.” Id. at 561, 219 P. at 18.

Other examples of this approach are State ex rel. Bronson v. Superior Court, 194 Wash. 339, 77 P.2d 997 (1938); Schmit v. Campbell, 140 Wash. 376, 249 P. 487 (1926); Brooke v. Boyd, 80 Wash. 213, 141 P. 357 (1914). See also Gose, The Scope of Interrogatories in Washington, 1 Wash. L. Rev. 119 (1926). Therein it is stated: “As under the ancient practice a mere fishing bill was not allowed, so under the statutes the scope of interrogatories is limited to facts material to the interrogating party’s own title or cause of action.” Id. at 120. The author also states that “these statutes give both parties to an action the right to propound interrogatories to discover evidence in support of their own case...” Id. at 122-23.

that the plaintiff's testimony in a pretrial deposition, as to the nature and extent of his injuries, did not constitute a waiver of the privilege where the testimony was in response to defendant's pretrial subpoena since plaintiff was being examined as an adverse witness in compliance with the subpoena and rules of court governing discovery.

In *Phipps v. Sasser*, the court again concluded that there was no automatic waiver of the privilege by the commencement of a personal-injury action or some other particular step in the litigation so that the defendant could then depose the plaintiff's doctor. Rather, a determination must be made on a case-by-case basis as to whether the plaintiff intends to waive his privilege, and when it appears that he ultimately will do so in a particular case the waiver may be accelerated so that the defendant may take the deposition of the plaintiff's physicians to prepare to meet their testimony. The court stated that while the inclusion of a physician on a list of the plaintiff's witnesses might evidence an intention to waive the privilege and justify acceleration of the waiver, under the particular circumstances the plaintiff did not waive the privilege by voluntarily making available certain privileged information in the form of medical reports and hospital records with the expectation of securing a speedy settlement of the litigation.

A second limitation is that the matter to be examined must be relevant to the subject matter involved in the pending action. The Advisory Committee's Note to new federal rule 26(b)(1), which continues to use relevancy to the subject matter as the guideline, states that since decisions for discovery purposes are made well in advance of trial a flexible treatment of relevance is required. Participation in discovery, whether voluntarily or under court order, is said not to be a concession or determination of relevance for purposes of trial. This is suggested by the provision in Washington Civil Rule 26(b) that, "It is not ground for objection that the testimony will be inadmissible at the

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See also M. Rosenberg, J. Weinstein & H. Smit, Elements of Civil Procedure, Cases and Materials 650-52 (2d ed., 1970). This contains a "Note on Relevance" which briefly mentions the more common relevancy problems.
trial if the testimony appears reasonably calculated to lead to the dis-
covery of admissible evidence."

A recurring problem, which has sharply split the courts, is whether
the defendant's liability insurance coverage is subject to discovery
when the insurance coverage is not itself admissible and does not bear
directly on any other issue in the case. There is no Washington appel-
late opinion resolving the matter and consequently the trial courts
have been free to go their own way. A new Federal Rule of Civil Pro-
cedure provides specifically for discovery of insurance coverage:

A party may obtain discovery of the existence and contents of any in-
surance agreement under which any person carrying on an insurance
business may be liable to satisfy part or all of a judgment which may
be entered in the action or to indemnify or reimburse for payments
made to satisfy the judgment. Information concerning the insurance
agreement is not by reason of disclosure admissible in evidence at
trial.

Rather than continuing the present practice of allowing each trial
judge to make his own determination, with resultant diversity
throughout the state, it would be preferable for the Washington court
to provide specifically one way or the other as to discovery of insur-
ance coverage.

In the federal courts some very difficult problems have involved
attempted discovery of materials obtained or prepared by the adverse
party, his attorney, or other representative in anticipation of litigation
or in preparation for trial. Original federal rule 34 made no explicit
provision for dealing with such materials. As a result, the federal
courts struggled with the requirement of the rule that documents,
papers and the like could be obtained only on a showing of "good
cause," and with the work-product doctrine of Hickman v. Taylor
whereby some showing of necessity or justification was required.

A new federal rule deals explicitly with trial preparation materials
and seeks to clarify much of the confusion that has previously existed.

19. See 40 Wash. L. Rev. 347 (1965), which suggests that the weight of authority
has held that insurance contracts are not relevant to the subject matter of the pending
action.
Federal rule 23(b)(3) provides for discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The rule also provides that a party may obtain a statement concerning the action or its subject matter previously made by that party. Any other person who has made such a statement may likewise obtain his own statement.

Washington has long had a specific provision in point. As originally adopted in January, 1951, it provides:24

The court need not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor or agent in anticipation of litigation or in preparation for trial. The court shall not order the production or inspection of any writing that reflects an attorney's mental impressions, conclusions or legal theories, or, except as provided in Rule 35, the written conclusions of an expert.

The Washington rule also protects the written conclusions of experts. It has been held that the rule applies to deny counsel the right to examine written reports of an expert at the trial itself. In State v. Corvallis Sand & Gravel Co.,25 counsel wished to examine a written report of the opponent's expert witness during cross-examination for possible impeachment purposes in the event that the report was inconsistent with the testimony. The court stated that the rule placed such reports out of reach of opposing counsel unless something occurred during the trial to warrant their production. Since nothing relating to the re-

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The new federal rule, 26(b)(4), provides in considerable detail for the discovery of facts known and opinions held by experts which were acquired or developed in anticipation of litigation or for trial. A party may, through interrogatories, require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Upon motion, the court may order further discovery by other means subject to such restrictions as to scope and as to payment of fees and expenses as the court deems appropriate.\footnote{26} If the expert has been retained or specially employed by another party in anticipation of litigation or preparation for trial but is not expected to be called as a witness at trial, discovery is permitted only as provided in federal rule 35(b), which will be discussed later, or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.\footnote{27}

Some have objected to such broad allowance of discovery of expert knowledge or opinion on the ground that one party will benefit unfairly at the expense of another's experts. To remedy this, it is provided that unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery.\footnote{28} Further, provision is made for the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

II. WHETHER TO MAKE DISCOVERY

Before considering each of the discovery tools individually, there is the general question of whether any discovery should be undertaken.

\footnote{26}{\textit{Fed. R. Civ. P.} 26(b)(4)(A).}  
\footnote{27}{\textit{Fed. R. Civ. P.} 26(b)(4)(B).}  
This is basically a tactical determination involving the balancing of the many advantages of learning about the opponent's case with the possible disadvantages of enabling the opponent to learn a little about one's own case by the nature of the discovery, alerting the opponent to the possibility of using his own discovery, and incurring certain costs of discovery.

One disadvantage has been removed by the recent case of *McGugart v. Brumback*.

The question presented was whether the submission of written interrogatories to the plaintiff concerning his alleged transactions with the decedent was a waiver of defendant estate's right under the deadman's statute to bar testimony by plaintiff at the trial. In a long series of cases the court had held that when a personal representative of a deceased person caused the pretrial deposition of the adverse party to be taken and the deposition reached alleged transactions with the decedent, such inquiry constituted a waiver of the bar of the deadman's statute with respect to such transactions.

In *McGugart* the court said there was no relevant basis for distinguishing between written interrogatories and depositions in the problem presented. In a 5-4 decision the court proceeded to overrule its prior holdings, relying upon the liberalization of pretrial discovery procedures that had occurred over the years. The court concluded that the finding of waiver of the deadman's statute discouraged personal representatives from using the discovery process, a result contrary to the purpose of modern, liberal discovery.

The *McGugart* court relied heavily upon Civil Rule 26(f), which removed another potential disadvantage to taking depositions. This rule specifies that a party is not deemed to make a person his own witness by taking his deposition. Therefore, that party neither vouches for the testimony of the deponent nor is prohibited from impeaching his testimony at the trial. A contrary position would inhibit the very purpose of depositions—discovery. Instead, it is the introduction in evidence of a deposition, other than for the purpose of contradicting or impeaching the witness, that makes the deponent one's witness.

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32. The introduction of the deposition of the adverse party does not make him one's witness. WASH. CIV. R. SUPER. CT. 26(f).
Thus the time for determining whether a deponent is one's witness is when, and if, his deposition is introduced. On the other hand, the critical time for determining the competency of a deponent is at the taking of a deposition rather than at its introduction into evidence. Thus, if a deponent is competent at the time of his deposition, the deposition is admissible insofar as that matter is concerned, even though the deponent is no longer competent at the time of trial. Presumably the same principle applies as to answers to written interrogatories.

III. DISCOVERY DEVICES

A. Depositions

1. To Whom Directed

The most common, and ordinarily most useful, discovery device is the oral deposition. A party may take the deposition of any person for the purpose of discovery or for use as evidence in the action or for both purposes. The deponent may be a hostile or friendly witness, the adverse party, or one's self.

The many advantages to be derived from depositions of hostile witnesses or the adverse party, such as discovery of his position and the facts known by him and as a record of his position for possible later impeachment, will often call for the taking of such depositions. Ordinarily, however, one would not wish to take the deposition of a friendly witness or of one's own party. It is not necessary to discover what is known nor would one ordinarily wish to put such a person's testimony on the record. But if the person were ill or about to leave the community, then the deposition might be desirable to perpetuate the testimony for trial.

34. WASH. CIV. R. SUPER. CT. 26(a). New federal rule 30(a) continues the same broad application.
35. As an example of the possibility of taking the deposition of a child, see Garratt v. Dailey, 46 Wn.2d 197, 279 P.2d 1091 (1955). In Garratt, the suggestion was made that, if necessary to protect a child from misleading and confusing questioning, the deposition might be taken under the supervision of the court. In the particular instance, however, the trial court's refusal to allow the deposition was not found to be prejudicial.
The attendance of persons for the purpose of taking their depositions may be compelled by the use of a subpoena.\textsuperscript{37} Ordinarily the subpoena will be issued by the attorney though it may be issued by the officer before whom the testimony is to be taken.\textsuperscript{38} Geographic limits are prescribed, in that a resident of the county in which a deposition is to be taken may be required to attend only in that county or in the county where he is employed or transacts his business, or at such other convenient place as is fixed by court order. A non-resident of the county may be required to attend only in the county wherein he is served with a subpoena, or within forty miles from the place of service or at such other convenient place as is fixed by court order.\textsuperscript{39} It is not necessary that a subpoena be used if one is certain that the deponent will appear for the deposition. However, it is wise to use it as a protective measure, particularly with a hostile witness, because if the witness does not attend and he was not subpoenaed the court may order the payment of the reasonable expenses incurred by the other party and his attorney in attending, including reasonable attorney’s fees.\textsuperscript{40}

In addition to subpoenaing the witness, reasonable notice in writing of not less than three days must be given to every other party to the action in order to allow the other parties to be represented at the taking of the deposition.\textsuperscript{41} The notice must state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs.

A question arises whether, if the deposition of the adverse party is to be taken, it is necessary to serve him with both a subpoena and a notice. Prior to the adoption of the present discovery rules, it was necessary that both be served.\textsuperscript{42} With the adoption of the equivalent of the federal rules in 1951, there was some uncertainty whether a subpoena was still necessary.\textsuperscript{43} The uncertainty was removed in 1961

\textsuperscript{37} \textit{Wash. Civ. R. Super. Ct.} 26(a).
\textsuperscript{38} \textit{Wash. Civ. R. Super. Ct.} 45(a)(3).
\textsuperscript{39} \textit{Wash. Civ. R. Super. Ct.} 45(d)(2).
\textsuperscript{40} \textit{Wash. Civ. R. Super. Ct.} 30(g)(2). If it is a hardship for a witness to appear at a particular time or place, he may move for a court order for his protection. See \textit{Wash. Civ. R. Super. Ct.} 30(b).
\textsuperscript{41} \textit{Wash. Civ. R. Super. Ct.} 30(a). New federal rule 30(b)(1) requires reasonable notice, but does not contain the three-day provision.
\textsuperscript{42} \textit{State ex rel. Onishi v. Superior Court}, 30 Wn.2d 348, 191 P.2d 703 (1948).
\textsuperscript{43} Under the equivalent federal rule, notice, without a subpoena, is sufficient to
with the adoption of what is now Civil Rule 43(f)(1), which provides in part: "Attendance of such deponent or witness [meaning party] may be compelled solely by notice (in lieu of a subpoena) given in the manner prescribed in Rule 30(a) to opposing counsel of record."

Another area of uncertainty was clarified by a rule adopted in 1961, that is, the problem of one party obtaining discovery from an adversary located outside the state. One might send written interrogatories in accordance with Civil Rule 33 or perhaps go to the other place and there take the deposition. But a better approach from the standpoint of what might be learned and of the cost involved might be to force the adversary to come to the examiner. Can this be done? In a series of cases prior to 1960 posing the problem to the Washington court, the conclusion seemed to be that neither party could be forced to come into the state to have his deposition taken, just as with a witness. This was changed by the adoption in 1961 of what is now Civil Rule 43(f)(3), which provides:

If a party or a managing agent refuses to attend and testify before the officer designated to take his deposition or at the trial after notice served as prescribed in Rule 30(a), the complaint, answer, or reply of the party may be stricken and judgment taken against the party, and the contumacious party or managing agent may also be proceeded against as in other cases of contempt.

This makes it clear that there is now power to order an adverse party to compel the attendance of the adverse party. Collins v. Wayland, 139 F.2d 677 (9th Cir. 1944); Peitzmann v. Illmo, 141 F.2d 956 (8th Cir. 1944).

44. See Wash. Civ. R. Super. Ct. 45(d)(3), which provides, 'When the place of examination is in another state, territory, or country, the party desiring to take the deposition may secure the issuance of a subpoena or equivalent process in accordance with the laws of such state, territory or country to require the deponent to attend the examination.' As to persons before whom depositions may be taken elsewhere in the United States and in foreign countries see Wash. Civ. R. Super. Ct. 28(a) and (b).


46. Wash. Civ. R. Super. Ct. 43(f)(3) continues: This rule shall not be construed: (A) to compel any person to answer any question where such answer might tend to incriminate him; (B) nor to prevent a party from using a subpoena to compel the attendance of any party or managing agent to give testimony by deposition or at the trial; nor (C) to limit the applicability of any other sanctions or penalties provided in Rule 37 or otherwise for failure to attend and give testimony.
be present for a deposition. While the rule applies to both parties, it may be expected that the court will be more willing to enter an order against an out-of-state plaintiff than an out-of-state defendant.

An amendment to the federal rules adds a provision which may be useful in those instances in which one wishes to obtain information from a corporation or association.\(^47\) A party may name as the deponent a public or private corporation, a partnership, association, or governmental agency, and designate the matters on which examination is requested. The organization shall then designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This should prove beneficial to both parties and to a non-party deponent, since the examining party need not incur the expense and loss of time of deposing several corporate officials, each of whom disclaims knowledge of matters clearly known to the organization, and the other party or non-party deponent will avoid the situation of many of its officers and agents being tied up with depositions. The adoption of such a provision in Washington would be desirable.

2. Time of Deposition

Generally, after an action has been commenced, a deposition may be taken without leave of court. The one exception is that leave must be obtained if notice of taking is served by the plaintiff within 20 days after commencement of the action.\(^48\) The purpose of requiring leave in such circumstances is to protect the defendant by enabling him to have time to retain counsel and inform himself of the nature of the suit. Presumably, in seeking leave of court the plaintiff must state grounds therefor. Examples might be a witness who will not be available or subject to subpoena after the elapse of the twenty days, or a motion by defendant which requires a deposition by plaintiff in order to meet the merits of the motion.

The most common time for the taking of depositions is, of course, after the action has been commenced. However, there is the possibility

\(^{47}\) Fed. R. Civ. P. 30(b)(6).
of taking a deposition before the commencement of an action for the purpose of perpetuating testimony. This is accomplished by filing a verified petition in the superior court in the county of the residence of the expected adverse party, setting forth such matters as the subject matter of the expected action, the names of the persons to be examined, and the reasons for desiring to perpetuate the testimony. Service of the petition is to be made on the expected adverse party, and a court order must be obtained before a deposition can be taken.\textsuperscript{49} This procedure might be invoked, for example, to take the deposition of a person critically injured in an automobile accident with the purpose in mind of using the deposition in the event of a subsequent wrongful death suit.

The 1970 amendments to the federal rules made no change in the procedure relating to depositions before commencement of an action to perpetuate testimony. Changes were made, however, in the rule relating to depositions after the commencement of an action. New federal rule 30(a) provides:

Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule.

This differs from the old federal rule and the present Washington rule in several ways. First, whether leave is required is determined by reference to the time the deposition is to be taken rather than the date of serving notice of taking. This is a desirable change since the purpose in protecting the defendant is relevant to the time of taking the deposition, not to the time that notice is served. Second, the time period is extended from 20 to 30 days and runs from the service of summons and complaint rather than the commencement of the action.\textsuperscript{50} Third, leave is not required if the defendant has sought discovery. Finally, leave is not required if the plaintiff's notice states that the person to be examined is about to go out of the district where the ac-

\textsuperscript{49} \textit{WASH. CIV. R. SUPER. CT.} 27(a).

\textsuperscript{50} \textit{As to the meaning of "commencement of the action" under old \textit{FED. R. CIV. P.} 26(a), see Application of the Royal Bank of Canada, 33 F.R.D. 296 (1963).}
tion is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period.\textsuperscript{51}

It should be noted that a defendant never has to obtain leave of court to take a deposition. A plaintiff need not obtain leave after the 20-day period in Washington and the 30-day period in the federal courts. In the ordinary case then, both parties are free to choose the time for taking depositions and the decision becomes a tactical, practical one, rather than one prescribed by court rule.

If one anticipates an early trial date, depositions should be taken early to assure proper preparation. If, as is more likely, the trial calendar is full, the problem is one of whether to take depositions shortly after the pleadings or to wait until a time nearer the trial date. The purpose of the deposition is of obvious consequence. If it is to perpetuate testimony, as in the case of a seriously ill witness, one must act quickly. If the purpose is for discovery, there is greater doubt. By waiting, one may in the meantime acquire information which will be useful in conducting a more penetrating examination in the deposition, and the examination will be able to cover a longer period of time. This might be important, for example, for a defendant examining a plaintiff in a personal injury action in order to determine the extent of the latter's recovery from the incident. On the other hand, an early deposition gets the deponent committed on the facts before he has had an extended opportunity to consider the opponent's theory of the case, and it provides an opportunity for investigating the deponent's statements with the view of obtaining contradicting or impeaching testimony.

In the event that one party wishes to obtain whatever advantage there may be in taking a deposition first, it may be important to act quickly in giving notice of taking. While there appear to be no Washington cases in point, the general position adopted by most federal courts under the old federal rules was that the party who first served notice of a deposition was entitled to priority as to that deposition.\textsuperscript{52} To avoid the race for priority which sometimes occurred, a 1970

\textsuperscript{51} See \textsc{Advisory Committee's Notes, supra} note 18, Rule 30, further discussing the purposes of the changes.

\textsuperscript{52} \textsc{J. Coudn, J. Friedenthal & A. Miller, Civil Procedure Cases and Materials} 521-22 (1968).
amendment to the federal rules provides, "Unless the court upon mo-
tion, for the convenience of parties and witnesses and in the interests of
justice, orders otherwise, methods of discovery may be used in any
sequence and the fact that a party is conducting discovery, whether by
deposition or otherwise, shall not operate to delay any other party's
discovery." There is no comparable rule in Washington at present to
prevent the race.

3. Mechanics of Taking Depositions

The steps to be followed in the taking of a deposition are clearly
stated in Civil Rules 26, 28, 30 and 32, and only a few points need be
stressed. The general interpretation has been that substantial compli-
ance with the rules is sufficient. Thus, the fact that an officer taking a
deposition did not enclose it in a sealed envelope as required by a rule
was not such an irregularity, in the absence of any evidence of tamp-
ering or altering, as to warrant the suppression of the deposition.54
Furthermore, if the parties so stipulate in writing, depositions may be
taken before any person, at any time or place, upon any notice, and in
any manner, and when so taken may be used like other depositions.55

One change made in the new federal rules relates to the method of
recording the testimony of the deponent. The Washington rule pro-
vides that the testimony shall be taken stenographically.56 The federal
rule now provides that the court may upon motion order that the testi-
mony be recorded by other than stenographic means—for example,
by mechanical, electronic, or photographic means—in which event
the order shall designate the manner of recording and preserving the
deposition.57 This has the desirable effect of facilitating less expensive
procedures. If a party wishes, he may nevertheless arrange to have a
stenographic transcription made at his own expense.

A problem for counsel to decide is what matters must be objected
to at the time of the taking of the deposition to avoid waiver and what

53. FED. R. CIV. P. 26(d).
54. Kirkpatrick v. Dept. of Labor and Industries, 48 Wn.2d 51, 290 P.2d 979
(1955). For cases applying a similar test of substantial rather than strict compliance
under earlier statutes see Bank of America Nat'l Trust & Savings Ass'n v. Stotsky, 149
Wash. 246, 77 P.2d 990 (1938); Finn v. Bremerton, 118 Wash. 381, 203 P. 971
(1922); Armstrong v. Yakima Hotel Co., 75 Wash. 477, 135 P. 233 (1913).
55. WASH. CIV. R. SUPER. CT. 29.
56. WASH. CIV. R. SUPER. CT. 30(c).
57. FED. R. CIV. P. 30(b)(4).
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may be raised for the first time at the trial if the deposition is offered in evidence. Civil Rule 32 is clear as to the necessity of prompt objection to errors in the notice for taking a deposition, to disqualification of the officer before whom the deposition is to be taken, and to errors as to completion and return of the deposition. As to errors in the taking of the deposition, the test is whether the ground of the objection is one which might have been removed if presented at the time.

Thus, objections to the competency, relevancy or materiality of testimony ordinarily need not be raised since the officer has no authority to determine those matters. On the other hand, errors in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties are waived if objection is not made at the time. Thus, an objection to an answer in an oral deposition because of unresponsiveness or to the use of secondary evidence must be made at the taking of the deposition.

After the deposition is taken and the testimony is transcribed, the deposition is submitted to the deponent. Prior to his signing, any changes in form or substance which the witness desires to make are entered upon the deposition by the officer with a statement of the reasons given by the deponent for making them. It is important to note, however, that both the original and the changed testimony appear in the deposition, and both are admissible in court under the ordinary rules of evidence.

Brief mention should be made of the possibility of taking depositions upon written questions rather than by oral examination. Instead of appearing personally to ask questions of the deponent, written questions may be given to the officer who then takes the testimony of the deponent in response to the questions. Due to the advantages of

58. See Rawsthorn v. Rawsthorn, 198 Wash. 471, 88 P.2d 847 (1939); In re Pompal's Estate, 150 Wash. 242, 272 P. 980 (1928).
60. See Rosenkranz v. Yakima Valley Bank & Trust Co., 149 Wash. 409, 271 P. 85 (1928).
65. The procedure is set forth in Wash. Civ. R. Super. Ct. 31. To avoid confusion with written interrogatories to parties under federal rule 33, new federal rule 31 is entitled, "Depositions Upon Written Questions". A principal change in new federal rule 31 is to extend the time for service of cross, redirect and recross questions to more realistic lengths.
the oral examination in that the examiner can adapt his questioning to
the answers and thereby make a more searching and thorough in-
quiry, depositions upon written questions for discovery are seldom
used. However, if the facts sought are few, simple and of a formal
nature, or if the deposition is to be taken at a distance for which the
expense of an oral examination is not justified, this device may be
useful.66

4. Use of Depositions

Civil Rule 26(d) states the uses that may be made of depositions at
the trial or upon the hearing of a motion. Probably the most common
use is for the purpose of contradicting or impeaching the testimony of
the deponent as a witness under subsection 26(d)(1).67

In addition, subsection (2) of rule 26(d) provides that the deposi-
tion of a party may be used by an adverse party for any purpose. This
includes impeachment and the introduction of substantive evidence. It
is not mandatory, however, for the trial court to admit a party's depo-
sition whenever it is offered in evidence by his opponent.68 Thus, if
the party is present and testifies, the court might refuse to allow the
reading of his deposition by his opponent when it does not contradict
or materially differ from his testimony.69 On the other hand, a trial
court might, without its constituting reversible error, admit a deposi-
tion of an opponent for substantive purposes even though the oppo-

dent is present. Basically, the use of the opponent's deposition seems
to rest in the discretion of the trial court.70

Finally, subsection (3) provides for the use of a deposition of a wit-
ness, whether or not a party, for any purpose in certain defined in-
stances, such as death of the witness, residence out of the county and
more than 20 miles from the place of trial, and inability of the witness
to attend because of age, sickness, infirmity or imprisonment. Unlike

67. An excellent illustration of the effect of such usage is Hurst v. Washington
Canners Co-op, 50 Wn.2d 729, 314 P.2d 651 (1957).
69. See Lashbrook v. Spokane-Wallace Stages, Inc., 168 Wash. 24, 10 P.2d 241
(1932).
70. See Young v. Liddington, 50 Wn.2d 78, 309 P.2d 761 (1957); Vannoy v.
subsection (2), subsection (3) is predicated upon the unavailability of the particular deponent-witness.71

A problem arises under the provision of subsection (3) allowing for the use of a deposition of a witness in the event "that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition." The problem is whether "absence" in the "unless" clause means absence from the county and more than twenty miles from the place of trial, or absence from the trial. For example, suppose counsel offers the deposition of his party, or a managing agent of his party, or a friendly witness, any one of whom resides out of the county and more than 20 miles from the place of trial, but whose presence at the trial could be obtained if the party wished. Has absence of the witness been procured in violation of the rule so as to preclude admissibility? The Washington court has held not, in accord with federal authority.72 The "unless" clause has reference to procuring absence from the county, not the trial.

In addition to meeting the above stated requirements, the part of the deposition sought to be used at the trial must be admissible under the rules of evidence.73 While a party does not make a person his own witness by taking his deposition, the introduction in evidence of any part of a deposition for any purpose other than that of contradicting or impeaching the deponent makes the deponent his witness, unless the deponent is the adverse party.74 Finally, if only part of a deposition is offered in evidence by a party, an adverse party may require

73. Wash. Civ. R. Super. Ct. 26(e) and 26(d) (first paragraph). Thus, while at the taking of a deposition it is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence, the rules of evidence do apply at the trial itself.
him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.\footnote{WASH. CIV. R. SUPER. CT. 26(d)(4). For an application of the rule see Symes v. Teagle, 67 Wn.2d 867, 410 P.2d 594 (1966). For a case under earlier statutes see Harris v. Saunders, 108 Wash. 195, 182 P. 949 (1919).}

5. Costs

The expense of taking depositions may be considerable and, consequently, the question of who bears that expense is important. When the present discovery rules were adopted in 1951, it was provided that "No cost or expense of taking a deposition of a witness, nor of the transcription or certification of testimony shall be taxed as costs or disbursements."\footnote{The provision was WASH. PLEAD., PRAC., PROC., 26(g).} That provision was abrogated, effective in 1953. To be considered is a statutory provision which states in part, "[t]he prevailing party . . . shall also be allowed for all necessary disbursements, including . . . the necessary expenses of taking depositions. . . ."\footnote{WASH. REV. CODE § 4.84.090 (1961).}

In \textit{Platts v. Arney}\footnote{Arnesen v. Rowe, 46 Wn.2d 718, 284 P.2d 329 (1955); Kenworthy v. Kleinberg, 182 Wash. 425, 47 P.2d 825 (1935); Victor Products Corp. v. Edwards, 172 Wash. 1, 18 P.2d 1045 (1933).} the defendant took the depositions of two witnesses, not parties to the action. The witnesses were present and testified at the trial. One of the depositions was used in cross-examination, but neither was used for the purpose of introducing testimony. The court noted that at the time the above statute was adopted a pretrial discovery deposition was not authorized. Consequently, it was held that the statute did not authorize taxing, as costs, expenses incurred by a party taking a deposition of a witness for discovery purposes. The same principle applies to a pretrial discovery deposition of the opposing party.\footnote{Duplanty v. Matson Navigation Co., 53 Wn.2d 434, 333 P.2d 1092 (1959).}

On the other hand, costs may be allowed under the statute for depositions taken not for discovery purposes, but for use at the trial. Thus, it is proper to allow costs to the prevailing party for traveling expense incurred by his counsel in taking out-of-state depositions.\footnote{Most Worshipful Prince Hall Grand Lodge of Washington and Its Jurisdiction.} Further, if a deposition is actually introduced into evidence at the trial, the court will not presume that it was not taken for that purpose.\footnote{428}
B. Interrogatories to Parties

Another method of discovery is that one party may serve written interrogatories upon any adverse party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories are to be answered within 15 days or objected to within 10 days with a notice of hearing.

New federal rule 33 makes a number of changes. The time limit for answering or objecting has been extended to 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon him. With the increased time for answering, the plaintiff is no longer required to obtain leave of court before submitting interrogatories, thereby allowing him to do so together with the summons and complaint. Another change is that interrogatories are no longer restricted to "adverse" parties, but may be served on any other party.

Under the Washington rule the objecting party has the burden of noting the matter for hearing. Under the amended federal rule the burden is on the interrogating party to move under rule 37(a) for a court order compelling answers, at which time the court will rule on the objections. This change in the burden of going forward does not, however, alter the obligation of an objecting party to justify his objections.

The Washington rule provides that interrogatories may relate to any matters which can be inquired into under rule 26(b), thereby raising the issues of relevancy and privilege previously discussed. The trial court has considerable discretion in determining what may be inquired into through interrogatories. An important change in the new federal rule is that it is made clear that an interrogatory is not necessarily objectionable merely because an answer involves an opinion or contention that relates to fact or the application of law to


See Weber v. Biddle, 72 Wn.2d 22, 431 P.2d 705 (1967), which affirmed a trial court order sustaining objections to interrogatories asking for all information upon which a motion to vacate a judgment was based. 3A L. ORLAND, WASHINGTON PRACTICE 25 (2d ed., Supp. 1970). Orland suggests the case may be "unduly restrictive."
fact. This is a matter upon which the federal courts had split and which is not clearly answered in Washington at present.

To the extent that parties can inquire into contentions, the answering party must be careful, as he may find his proof limited at the trial by his answers. In a wife's action against a manufacturer and seller of a tractor for the wrongful death of her husband who was killed while operating the tractor, the defendant sent interrogatories requesting the plaintiff to delineate in detail each physical and mechanical characteristic which caused her husband to be injured. The plaintiff's answers did not mention the failure to place a curved bar on the hood of the tractor. The court of appeals held the trial court's refusal to admit evidence on behalf of the plaintiff on the matter was not an abuse of discretion. The guiding considerations were said to be whether there is prejudice to the party who propounded the interrogatories and whether the answering party has a satisfactory explanation of the failure to answer correctly.

Another problem which may present itself to the answering party is whether he has a duty to supplement or amend his answers upon the basis of information received later. In another recent court of appeals case the defendant sent interrogatories to the plaintiff requesting the names of witnesses. The plaintiff answered, listing 23 witnesses. Later the plaintiff contacted an expert witness, but did not provide his name to the defendant. The trial court's refusal to allow the witness to testify was held to be error upon the ground that interrogatories under Civil Rule 33 are not continuing unless specifically stated to be so.

Under the new federal rules, however, there would clearly be a duty to provide the name of the expert witness. New rule 26(e) clarifies the extent of the continuing duty of the responding party not only as to interrogatories but also as to questions in depositions and as to requests for inspection and admission. It is provided 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 with information thereafter acquired, with three exceptions. A party is under a duty to supplement his response with respect to any question addressed to the identity and location of persons having knowledge of discoverable matters and the identity of each person expected to be

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called as an expert witness at trial and the subject matter on which he is expected to testify. Second, a party who knows or later learns that his response is incorrect is under a duty to correct the response. Third, a duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through requests for supplementation of prior responses.

One other addition to federal rule 33, a subdivision entitled "option to produce business records," is noteworthy. Interrogatories sometimes require a burdensome and expensive search of business records in order to provide an answer. The new subdivision provides the responding party with the option of specifying the records from which the answer may be derived and allowing the other party reasonable opportunity to examine and make copies of the records. The option is limited to those instances in which "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served."\(^6\)

C. Production of Documents and Things

Upon motion of any party showing good cause and upon notice to all other parties, the court may order a party to produce and permit the inspection of any designated documents, papers, objects or tangible things, not privileged, which contain evidence within the scope of examination as provided in rule 26(b) and which are in the party's possession, custody or control.\(^7\) Likewise, the court may order any party to permit entry upon designated land for the purpose of inspecting it.

The federal procedure for obtaining discovery of documents has been considerably changed by new federal rule 34. Instead of a motion, the party seeking discovery serves a request upon the other party. The request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The party upon whom the request is served must serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon him. The re-

\(^6\) Fed. R. Civ. P. 33(c).
\(^7\) Wash. Civ. R. Super. Ct. 34.
response must state either that inspection is permitted or that there is an objection and the reason therefor. The party making the request may move for a court order under rule 37(a) following any objection or other failure to respond or to permit inspection. Thus, whereas under the Washington rule a court order is required, under the new federal rule inspection of documents, as with depositions and interrogatories, operates extrajudicially unless there is an objection.

The new federal rule also removes the requirement that the party seeking discovery show "good cause." As will be recalled, trial preparation materials are treated separately in federal rule 26(b)(3), with the required special showing previously discussed. With such matters removed from rule 34, no reason was seen to continue the requirement of "good cause" as to ordinary documents and things. Rather they are subject to the same conditions for examination as depositions and written interrogatories, that is, relevant and non-privileged.88

In Washington, the "good cause" requirement remains. In the leading case of Gooldy v. Golden Grain Trucking Co.,89 the trial court refused to require the defendant to produce a statement given by the defendant to his insurance carrier shortly after the date of the accident in question. The ground for production stated by the plaintiff in his motion under rule 34 was that at the time of the defendant's deposition he indicated he had had only one drink whereas the information furnished the carrier indicated that he was in a substantially intoxicated condition. The Washington Supreme Court affirmed upon the basis that there was no showing of good cause, since plaintiff made no showing of lack of cooperation, evasiveness, hostility, or inconsistency in defendant's deposition to indicate that the contents of the statement to the carrier were inconsistent with his deposition. The "good cause" requirement was deemed to make the production of documents more restrictive than other types of discovery.

Another new provision is federal rule 30(b)(5), which provides that a notice to a party deponent of the taking of his deposition may be accompanied by a request to produce documents and things in compliance with rule 34. In Washington a subpoena may be used to compel a person to produce documents at the taking of his deposition.90

88. See Advisory Committee's Notes, supra note 18, Rule 34.
89. 69 Wn.2d 610, 419 P.2d 582 (1966).
Presumably, the subpoena may issue against a party as well as a nonparty. Finally, it should be noted that as to a nonparty, a subpoena must be used in both state and federal courts to obtain the production of documents regardless of whether the documents are desired at the taking of a deposition or otherwise, since rule 34 applies only as to parties.

D. Physical and Mental Examinations

Long before the adoption of present Civil Rule 35 in Washington it had been possible under limited circumstances to obtain a physical examination of a party either as a result of the inherent powers of the courts or under statutory authorization. Nevertheless, the rule substantially enlarged the scope of the authority of the trial court to order a physical examination. Under rule 35 the court may order a party to submit to a physical or mental examination in any action in which the condition of the party is in controversy. There must be a motion with a showing of good cause and with notice to the party to be examined and to all other parties. The issuance of the order rests in the discretion of the trial court.

Upon request, the party examined under the Washington rule is entitled to a copy of a detailed written report of the examining physician setting out his findings and conclusions. If such request and


Strictly considered documents cannot be demanded in connection with Rule 33 interrogatories. Such is the prevailing federal practice. However, in Washington, documents can be demanded by deposition subpoena, on oral or written depositions. Under such circumstances, the production of documents can be forced without an application to the court and, as a practical matter, the existence of such an alternative device may impel a party to produce documents in response to a demand accompanying Rule 33 interrogatories.


93. See Lane v. Spokane Falls & Northern Ry. Co., 21 Wash. 119, 57 P. 367 (1899).

94. Wash. Rev. Code § 5.32.010, adopted in 1915 and repealed in 1957 after the adoption of the present discovery rules.


96. Beagle v. Beagle, 57 Wn.2d 753, 359 P.2d 808 (1961). Beagle held that in an action to modify a divorce decree and obtain custody of minor children, the trial court did not abuse its discretion in denying a motion to compel the mother to submit to a mental examination.

97. Under the amended federal rule 35, he is also entitled to the results of all tests made and diagnoses, "together with like reports of all earlier examinations of the same condition."
delivery are made, two consequences occur. First, the other party is entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report, the court may order delivery on such conditions as are just, and if a physician fails to make such a report the court may exclude his testimony at the trial.98 Second, the party examined waives any privilege he may have regarding the testimony of every other person who has examined him or may thereafter examine him in respect of the same condition.

Amendments to federal rule 35 extend the provisions to include not only parties but also persons in the custody or under the legal control of a party.99 Furthermore, an amendment expressly includes the determination of blood group within the kinds of examinations that can be ordered under the rule.

E. Admission of Facts

After commencement of an action a party may serve upon any other party a written request for the admission of the genuineness of any relevant documents or of the truth of any relevant matters of fact.100 If the plaintiff desires to serve a request within 10 days after commencement of the action, leave of court must be obtained. The matters are deemed admitted unless the party responds within 10 days either by a sworn statement denying the matters or by stating the reasons why they cannot truthfully be admitted or denied, or by written objections and a notice of hearing on the objections.

As elsewhere in the new federal rules, the time for responding has been extended.101 The party has 30 days except that a defendant need

98. The determination of whether the testimony of the doctor should be excluded rests in the discretion of the trial court. See Davis v. Sill, 55 Wn.2d 477, 348 P.2d 215 (1960), in which plaintiff's doctor was allowed to testify although he had not supplied a copy of his report to the defendant, where the court found there was no intention on the part of the plaintiff to violate the rule and the testimony of the doctor was not a surprise to the defendant as to any new issues in the case.


not respond until 45 days after service of the summons and complaint upon him. Also, the plaintiff may now serve requests for admissions with the summons and complaint and need not obtain leave of court. Another procedural change is that the federal rule places the burden of moving for a hearing on an objection on the party requesting an order. Under the Washington rule the burden is on the objecting party. The federal rule does not, however, change the burden of persuasion on the objections themselves.

Admissions serve at least two very useful purposes: narrowing the issues, and facilitating proof with respect to the issues that remain. The Washington rule limits these possibilities to "matters of fact." 102 The federal rule is broader and includes matters "that relate to statements or opinions of fact or of the application of law to fact." 103

The federal rule also serves to clarify some matters about which the federal courts were divided and which appear to remain unanswered in Washington. A party who believes that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request. Further, a party may not give lack of information or knowledge as reason for failure to admit or deny unless he states that he has made reasonable inquiry. 104 Finally, the federal rule clarifies some doubt as to the effect of an admission by providing that the matter admitted is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the pre-

102. See Weyerhaeuser Sales Co. v. Holden, 32 Wn.2d 714, 203 P.2d 685 (1949), wherein a request for admission was held not to comply with the rule where it requested that each allegation in certain paragraphs of the reply be admitted as true, such allegations consisting of a mixture of facts, conclusions and argumentative statements.

A special point to note is that while the failure to answer a request to admit having made a certain statement constitutes an admission that the statement was made, it is not an admission that the statement is true. If the party has otherwise denied the truth of the statement, summary judgment cannot be entered. Salvino v. Aetna Life Ins. Co., 64 Wn.2d 795, 394 P.2d 366 (1964); Phillips v. Richmond, 59 Wn.2d 571, 369 P.2d 299 (1962).

103. This is similar to the provision in new federal rule 33 that an interrogatory is not necessarily objectionable because an answer involves "an opinion or contention that relates to fact or the application of law to fact."

104. Cf. City of Mercer Island v. Kaltenbach, 60 Wn.2d 105, 371 P.2d 1009 (1962). Kaltenbach stands for the proposition that a general denial based upon lack of knowledge and information sufficient to form a belief is insufficient to raise an issue as to the existence of matters of public record. Where such a denial was made in response to a request for admission of the genuineness of certain documents of record, the genuineness of the documents was deemed admitted.
sentation of the merits of the action will be served and the party who obtained the admission fails to satisfy the court that he will be prejudiced.\footnote{105}{The federal rule removes the requirement that answers to requests for admissions be by a sworn statement of the party. Rather, they may simply be signed by either the party or his attorney.} 

IV. SANCTIONS

Civil Rule 37 sets forth the sanctions available in the event of a failure to comply with the rules of discovery. If a party or other defendant refuses to answer a question upon oral examination, refuses to answer an interrogatory under rule 31, or refuses to answer an interrogatory under rule 33, the court may on motion order an answer and provide for the payment of reasonable expenses. If a party or other witness fails to comply with such order he may be considered in contempt of court. Further, if a party refuses to obey such order, or an order under rule 34 to produce a document, or an order under rule 35 to submit to a physical examination, the court may (among other things) enter an order that designated facts shall be taken as established, or an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or an order striking pleadings or dismissing the action or rendering a judgment by default. If a party denies a request for admission of the truth of certain facts which are thereafter proved to be true, he may be required to pay the other party his reasonable expenses in making such proof. Finally, if a party wilfully fails to appear for the taking of his deposition or fails to serve answers to interrogatories under rule 33, the court may strike his pleadings, or dismiss the action, or enter a judgment of default against such party.

A principal case illustrating the application of rule 37 is *Mitchell v. Watson.*\footnote{106}{58 Wn.2d 206, 361 P.2d 744 (1961).} In a libel action the defendant refused to answer interrogatories directed to the matter of who had supplied the defendant with certain information. The trial court adjudged the defendant to be in contempt of court, struck the defendant's answer and entered a judgment of default except as to damages. The trial was continued as to damages but the defendant was prohibited from participating, and the plaintiff was awarded attorney's fees of $200. The appellate court al-
allowed the award of attorney’s fees to stand, but set aside the judgment of default and reinstated the answer. The court stated that while it would be proper for the trial court to presume certain facts relating to the interrogatories to be true, it was improper to enter a judgment against the defendant as to all issues and to preclude the defendant from otherwise participating.

While there were constitutional implications in *Mitchell*, the result is nevertheless representative of the decisions interpreting the sanctions rule. While the matter is primarily within the discretion of the trial judge who is empowered with means of enforcing the discovery rules, the tendency is to be lenient with violations and to attempt to reach the trial on the merits.107 Thus, it has been held that the provision for striking a pleading of a party for failure to answer an interrogatory should be considered an extreme penalty to be invoked only in the case of a wilful failure to answer.108 Similarly, the court found no error in a trial court’s refusal to strike the defendant’s affirmative defenses and hold him liable as a matter of law even though the defendant failed to answer interrogatories until after the plaintiff had moved to strike the defenses.109 Nor was it an abuse of discretion for the trial court to refuse to strike a complaint because written interrogatories submitted by the defendant to the plaintiff were not answered until the day before trial, where it did not appear that the defendant was prejudiced by the delay.110

While the extreme penalty of dismissal of the action or a default judgment is seldom imposed, an appropriate occasion may arise. Thus, it was held not to be an abuse of discretion for the trial court to dismiss an action where the defendant had moved for judgment of dismissal for failure of the plaintiff to answer interrogatories and requests for admission of facts, the trial court had at first denied such motion on condition that the plaintiff pay to the defendant’s counsel the sum of $150 costs and attorney’s fees within 10 days, and

110. Kagele v. Frederick, 43 Wn.2d 410, 261 P.2d 699 (1953), noted in 29 WASH. L. REV. 143 (1954). The case was decided under a statute existing before the present discovery rules.

Other pre-rule cases are McDonald v. McDonald, 119 Wash. 396, 206 P. 23 (1922); Saar v. Weeks, 105 Wash. 628, 178 P. 819 (1919); Capps v. Frederick, 44 Wash. 38, 86 P. 1128 (1906); and Lawson v. Black Diamond Coal Mining Co., 44 Wash. 26, 86 P. 1120 (1906).
the plaintiff had failed to do so. And, of course, lesser sanctions will more readily be imposed. If a party denies knowledge of witnesses who are later produced, the surprised party may properly move that they not be permitted to testify or that a continuance be granted to permit an opportunity to obtain rebuttal evidence. Likewise, attorney's fees may be allowed to a party who is required to prove the truth of matters denied by the other party in response to a request for admissions when there is no good reason for the denial.

The guiding principle is justice in applying sanctions for failure to comply with the discovery rules. Though an unwillingness to impose the harsher sanctions may encourage or at least allow for a greater avoidance of the rules, the tendency of the courts, as stated, seems to be to avoid the extreme sanctions. A party in seeking enforcement might therefore be wise to move alternatively for lesser relief when seeking such matters as a dismissal or default in order to assure that his motion is not totally lost.

The federal rule is strengthened in several ways by the 1970 amendments. One amendment makes it clear that an evasive or incomplete answer in a deposition or in response to an interrogatory is to be treated as a failure to answer. On the matter of expenses (including attorney's fees) to be awarded to the prevailing party when a motion is made for an order compelling discovery, the Washington rule provides for an award only if the losing party is found to have acted without substantial justification. The amended federal rule requires an award unless the conduct of the losing party is found to have been substantially justified. The change in emphasis is intended to encourage judges to more readily grant an award of expenses. The Washington requirement that the failure to appear for a deposition or to answer an interrogatory be "wilful" before sanctions can be imposed has been removed for federal courts. On the other hand, the sanctions are to be such as are "just," thereby allowing for less than dismissal or default if the failure is other than wilful.

112. See Sather v. Lindahl, 43 Wn.2d 463, 261 P.2d 682 (1953) where the deceived party waited until the argument to the jury began and then moved for a mistrial. This was held to be too late.
113. Clausing v. Kassner, 60 Wn.2d 12, 371 P.2d 633 (1962). The requesting party must prove the truth of the matters for which admission was requested before he may obtain his expenses. Dellit v. Perry, 60 Wn.2d 287, 373 P.2d 792 (1962).
115. See Advisory Committee's Notes, supra note 18, Rule 37.
CONCLUSION

Most of the law concerning discovery which is not included in the rules is made at the trial court level rather than through appellate decisions. This results from the fact that discovery rulings are almost never appealable. Rather they are interlocutory in nature, thereby requiring a final judgment before an appeal can be taken.116

As has been recognized by the court, this means that, realistically, the opportunity for appellate review is often illusory.117 If discovery should have been allowed by the trial court but was denied, there is little an appellate court can do once the issues have been decided on the merits. By the time the appellate court hears the case, the denial will be treated as harmless error. On the other hand, if discovery is ordered when it should have been denied, the disclosure has occurred, and again, an appellate determination that this was error is of no practical value. Furthermore, even if error is assigned on appeal from a final judgment, it is likely, as evidenced throughout this article, that the appellate court will treat the matter as within the discretion of the trial judge.

The combination of nonappealability and review of only alleged abuses of discretion means that trial judges are generally free to go their own way on discovery issues. If guidance is to be provided, and uniformity is to be achieved, it must be primarily through the rules rather than appellate decisions. In several areas the recent amendments to the federal rules provide that guidance considerably better than do the present rules in Washington, and for that reason alone consideration should be given to their adoption.

116. See State ex rel. Smith v. Jones, 149 Wash. 614, 271 P. 1005 (1928); State ex rel. Seattle General Contract Co. v. Superior Court, 56 Wash. 649, 106 P. 150 (1910). One method whereby an appeal might be expedited is a refusal to comply with an order of discovery thereby resulting in a contempt order. Admittedly, this is a harsh method. See State ex rel. Mangaong v. Superior Court, 30 Wn.2d 692, 193 P.2d 318 (1948). This case held that while an order for the inspection of papers is not a final order from which an appeal can be taken, an order of contempt for refusal to comply with such order is appealable. See also State ex rel. Hayashi v. Ronald, 134 Wash. 152, 235 P. 21 (1925).