

# The Origins of the Oral Deposition in the *Federal Rules*: Who's in Charge?

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## I. INTRODUCTION

This article traces the origins of the oral deposition<sup>1</sup> in the *Federal Rules of Civil Procedure* (“Federal Rules”) with an emphasis on the role of the officer in charge of the deposition. In Parts II and III, I document the origins of the deposition, drawing on published sources. In Parts IV and V, I draw upon unpublished sources regarding the 1930s Advisory Committee’s decision not to provide for a judicial officer who would have the authority to rule on the admissibility of evidence during the deposition. That decision was an important, yet overlooked, element in the shaping of modern American civil procedure, including the displacement of civil trial by pretrial discovery.

A striking attribute of the modern American deposition is that opposing counsel conduct the questioning in the absence of a judicial officer.<sup>2</sup> The Advisory Committee that drafted the 1938 Federal Rules considered a proposal to provide deponents, both party and non-party witnesses, with the option of requesting a master to rule on the admissibility of evidence at the pretrial examination. According to archival sources, members of the Advisory Committee concluded that the systemic disadvantages of that proposal outweighed the advantages.<sup>3</sup>

I describe the historical origins of three salient features of the deposition: the near-absence of the rules of evidence; the presence of an “officer in charge”<sup>4</sup> who has no power to rule on the admissibility of evidence; and the breadth of the permitted scope of inquiry.<sup>5</sup> I discuss

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<sup>1</sup> See FED. R. CIV. P. 30 (governing the taking of oral depositions). Although oral examination for discovery exists in non-American jurisdictions, including Canada, “[t]he oral deposition is an American innovation that remains uniquely characteristic of American civil procedure.” JOHN H. LANGBEIN, RENÉE LETTOW LERNER, BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 395 (2009).

<sup>2</sup> See David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745, 752 (1986) (describing the international controversy that results when American lawyers take depositions in Germany).

<sup>3</sup> See, *infra*, Part V.C.

<sup>4</sup> See FED. R. CIV. P. 30(c) (1938) (amended 1972) (“The officer before whom the deposition is to be taken . . .”).

<sup>5</sup> *The expansive scope of pretrial discovery has displaced many trials by clarifying factual issues before trial.* See John H. Langbein, *The Disappearance of Civil Trial in*

why the term “officer” is misleading: the examination is conducted entirely by adverse parties in the absence of a judge or a judge-like figure.<sup>6</sup> The officer in charge is simply a stenographer or notary public who swears in the deponent and records the testimony; he or she exercises no adjudicatory function.<sup>7</sup>

The modern American deposition serves two primary functions. The deposition permits a party to preserve potential testimony for introduction at trial: a *preservation of potential testimony* function. The deposition is also a tool for investigating potential evidence before trial: an *investigation of potential evidence* function. Counsel orally questions an adverse witness, and the officer in charge of the deposition records the testimony verbatim. Unless the deponent will be unavailable at trial, the purpose of this deposition is to provide discovery to the party and not to supply trial testimony. At equity, “deposition” signified testimony taken by a court-appointed officer, based on party-propounded written interrogatories.<sup>8</sup> “[T]his *ex parte* procedure was the primary vehicle for bringing witness testimony before the court.”<sup>9</sup>

In Part II, I describe the discovery devices available in the federal courts just prior to the coming into force of the Federal Rules of Civil Procedure. In Part III, I discuss the role of the officer in charge of pretrial oral examinations in England and in the United States, and the

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the United States, 122 *YALE L.J.* 522 (2012). Also, the high cost of discovery practice has promoted settlements. See generally ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* (2009); ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* (2001). See also Stephen N. Subrin, Discovery in Global Perspective: Are We Nuts?, 52 *DEPAUL L. REV.* 299, 301–02 (2002) (noting the breadth of permitted discovery and the infrequency of trial in the American system). The nearly unlimited right of discovery under the Federal Rules has also been blamed for impeding access to the legal system. See Jack B. Weinstein, After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?, 137 *U. PA. L. REV.* 1901, 1906 (1989).

<sup>6</sup> There does exist a role for the judge: overseeing pretrial conferences under Federal Rule 16; limiting the scope of the examination by granting protective orders pursuant to Rule 30(d); issuing sanctions under Rule 37; and generally settling discovery disputes between parties.

<sup>7</sup> For the sake of consistency, I use the term “officer” to describe the person who swears in the examinant and records his testimony.

<sup>8</sup> See WILLIAM HEATH BENNET, A DISSERTATION ON THE NATURE OF THE VARIOUS PROCEEDINGS IN THE MASTERS’ OFFICE IN THE COURT OF CHANCERY 12 (1834) (“[W]here the master decides . . . that witnesses are proper to be examined, the interrogatories for their examination are prepared and signed by counsel.”) (emphasis removed).

<sup>9</sup> Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 *CORNELL L. REV.* 1181, 1206 (2005). As a result of this historical distinction, I will employ “oral examination for discovery” to refer to a pretrial deposition that is for the purpose of discovery rather than for gathering proof.

origins of permitting parties to conduct the examination. Part IV discusses the Advisory Committee that drafted the 1938 *Rules* and describes the expansion of discovery under those rules. In Part V, I examine the Committee's deliberations regarding the role of the officer in charge of the oral deposition, and in particular whether that person should have the power to rule on the admissibility of evidence. In Part VI, I conclude by setting forth the origins of the oral deposition in the Federal Rules and suggesting that the creation of liberal discovery contributed to the decline of civil trial. I include, at Appendix A, the draft rules (both published and unpublished) regarding the option, at a party's request, of having a master with the power to rule on the admissibility of evidence appointed to be in charge of the deposition. At Appendix B I sketch out the early origins of oral, as opposed to written, party-administered pretrial examination for discovery in Ontario – a jurisdiction that permitted such a procedure several years before New York's Field Code authorized pretrial discovery of adversary parties.

## II. DISCOVERY IN THE FEDERAL COURTS JUST PRIOR TO THE FEDERAL RULES OF 1938

### A. Introduction

Before 1938, when the Federal Rules of Civil Procedure (the "Rules") came into force, pretrial discovery was limited in cases at both law and equity in the federal courts.<sup>10</sup> In actions at law, there was no right to pretrial oral examination of parties or witnesses for discovery purposes, even if the law of the state in which the court sat did permit such procedures.<sup>11</sup> The Supreme Court had held that only federal, rather

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<sup>10</sup> See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 698–701 (1998) (describing pretrial discovery in the federal courts before the Rules were implemented).

<sup>11</sup> 6 JAMES WM. MOORE AT AL., MOORE'S FEDERAL PRACTICE § 26 App. 100 (Daniel R. Coquillette et al. eds., 3d ed. 2011) (citing *Ex Parte Fiske*, 113 U.S. 713, 719–20 (1885) (limiting the effect of both the Conformity Act and the Rules of Decision Act by holding that federal law prescribed the only procedure for obtaining evidence for trial at law in the federal courts)). See also *Gimenes v. New York & Porto Rico S. S. Co.*, 37 F.2d 168, 169 (S.D.N.Y. 1929) ("It is regrettable that in the period between the commencement of an action on the law side of this court – or the removal of a law action from the state court to this court – and the trial of the case, this court is unable to do much to facilitate the preparation of either party for trial."). 28 U.S.C. § 634 (1928) (amended 1988) provided that "in causes pending at law and in equity in the district courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the manner prescribed by the laws of the State in which the courts are held," but the Supreme Court held that this statute merely regulated the mode of taking depositions and did not

than state, statutes could authorize oral examination for discovery in actions at law, and that federal statutes did not permit oral examination for discovery.<sup>12</sup>

Edson R. Sunderland, the University of Michigan Law School professor who drafted the Rules regarding discovery,<sup>13</sup> stated in 1938 that, prior to the Rules, there were “just four sources [of] authority for any proceeding involving discovery before trial in the federal courts”: two federal statutes and two equity rules.<sup>14</sup> The discovery devices that the two statutes<sup>15</sup> authorized, however, served the preservation of potential testimony function and not the investigation of potential evidence function. Of the two rules of equity,<sup>16</sup> one was “the only provision in the entire federal system intended for discovery,” according to Sunderland.<sup>17</sup>

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enlarge the grounds for taking so as to allow examinations before trial for purposes of discovery in accordance with state practice. *Hanks Dental Ass’n v. Int’l Tooth Crown Co.*, 194 U.S. 303, 308 (1904).

<sup>12</sup> 28 U.S.C. § 635 (1928) (amended 1990) (“[T]he mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court except as hereinafter provided.”); *Hanks Dental Ass’n*, 194 U.S. at 309 (citing *National Cash Register Co. v. Leland*, 94 F. 502 (1st Cir. 1899) (holding that 28 U.S.C. § 635 prohibits both serving interrogatories upon an adverse party as well as oral examination of parties and witnesses in advance of the trial, except when permitted by federal statutes), *cert. denied*, 175 U.S. 724 (1899)). Some federal courts sitting in states that permitted more liberal discovery than did the federal statutes nevertheless occasionally followed the state procedure in circumstances that were arguably not contemplated by the federal statutes. See generally *Anderson v. Mackay*, 46 F. 105 (S.D.N.Y. 1891) (permitting a party to obtain an order for the examination of an adversary to enable the party to frame pleadings when such an order was provided for by state statute); *Donnelly v. Anderson Brown & Co.*, 275 F. 438 (S.D.N.Y. 1921) (permitting, pursuant to state practice, an examination to frame a pleading because such an examination differed from the preservation of testimony for proof at trial and because the federal statute did not provide for that contingency, state practice should prevail); *Heister v. Lehigh & N.E.R. Co.*, 50 F.2d 928 (S.D.N.Y. 1931) (permitting an examination to aid in the framing of a bill of particulars on grounds similar to *Donnelly*).

<sup>13</sup> Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 10 (1959) (“Thus with the Chairman’s approval I was able to commission Edson to prepare the draft of that part of the rules known originally as “V. DEPOSITIONS, DISCOVERY AND SUMMARY JUDGMENTS.””).

<sup>14</sup> Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 19 (1938). Sunderland delivered this address to the West Virginia Bar Association on August 20, 1938. *Id.* at 5.

<sup>15</sup> 28 U.S.C. §§ 639(1928) (amended 1968), 644 (1928) (amended 1997).

<sup>16</sup> FED. EQ. R. 47, 58.

<sup>17</sup> Sunderland, *supra* note 14, at 20.

*B. Federal Statutes Permitting Depositions to Preserve Testimony*

The two federal statutes authorized and governed the use of the deposition *de bene esse*<sup>18</sup> and the deposition pursuant to a *dedimus potestatem*.<sup>19</sup> The *de bene esse* provision permitted the taking of a deposition before trial when the witness might not be available to testify at trial. The deposition *de bene esse*, which did not require an application to the court, could be taken only if the witness:

- 1) was ancient or infirm, 2) lived more than 100 miles from the place of trial, 3) was bound on a voyage to sea, 4) was about to leave the United States, or 5) was out of the district where the case was to be tried and more than 100 miles from the place of trial, before the time of trial.<sup>20</sup>

The *dedimus potestatem* provision supplemented the *de bene esse* statute, by permitting the taking of a deposition when such a deposition was necessary in order “to prevent a failure or delay of justice.”<sup>21</sup> Any federal court could grant a *dedimus* to take a deposition, but the moving party had to make a showing:

- 1) that the issue had been joined in a pending action, 2) that a *dedimus* was necessary to prevent a failure or delay of justice, 3) that the witness was beyond the reach of the court’s process, 4) that the testimony could not be taken *de bene esse* pursuant to notice, and 5) that the application was made in good faith and not merely for discovery purposes.<sup>22</sup>

Both of these statutes applied to actions at law or at equity, but the depositions that these two statutes authorized were only available under limited circumstances. Unlike the post-1938 deposition, which merged the preservation of potential testimony function and the investigation of

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<sup>18</sup> 28 U.S.C. § 639 (1928) (amended 1968).

<sup>19</sup> 28 U.S.C. § 644 (1928) (amended 1997). A *dedimus* historically had been a “writ or commission out of chancery empowering one to do a specific act, such as administering an oath to a defendant and recording the defendant’s answers to questions.” Subrin, *supra* note 10, at 698.

<sup>20</sup> 6 MOORE, *supra* note 11 (citations omitted).

<sup>21</sup> Sunderland, *supra* note 14, at 19.

<sup>22</sup> 6 MOORE, *supra* note 11 (citations omitted). The requirement, under § 644, that the deposition must be held according to “common usage” constituted a further restriction on the usefulness of the statute for discovery purposes. The Supreme Court held in 1885 that a party seeking disclosure in advance of trial was restricted to the procedure prescribed by federal law for obtaining evidence for trial at law in the federal courts. *See supra*, note 11.

potential evidence function, the *de bene esse* deposition served only the preservation of potential testimony function.

### C. Rules of Equity Permitting Depositions and Discovery

#### 1. Depositions at Equity

Federal Equity Rules 47 and 58 governed discovery in cases at equity. Federal Equity Rule 47, enacted in 1912, provided for taking the deposition of a witness.<sup>23</sup> The 1912 Federal Equity Rules required oral testimony in open court,<sup>24</sup> replacing the traditional equitable procedure of using documents and written testimony.<sup>25</sup> Rule 47 thus permitted a departure from the general requirement of oral testimony, but the deposition that the Rule permitted was a means of gathering evidence for trial.<sup>26</sup>

#### 2. Three Equitable Discovery Devices

##### i. Documentary Discovery

Federal Equity Rule 58 codified the traditional bill of discovery available in equity.<sup>27</sup> Under Rule 58, a party could move for a judicial

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<sup>23</sup> GEORGE FREDERICK RUSH, *THE ESSENTIALS OF EQUITY PLEADING AND PRACTICE* 221 (1913) (citing FED. EQ. R. 47 (1912) (“The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses.”)).

<sup>24</sup> RUSH, *supra* note 23, at 220–21 (citing FED. R. EQ. 46 (“In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules.”)). Blackstone had approved of the common law’s requirement of oral testimony over equity’s written approach: “This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk . . . .” 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 373 (University of Chicago Press 1979) (1765). For subsequent commentary, see CHARLES BARTON, *AN HISTORICAL TREATISE OF A SUIT IN EQUITY, IN WHICH IS ATTEMPTED A SCIENTIFIC DEDUCTION OF THE PROCEEDINGS USED ON THE EQUITY SIDES OF THE COURTS OF CHANCERY AND EXCHEQUER, FROM THE COMMENCEMENT OF THE SUIT TO THE DECREE AND APPEAL* 156–58 n.1 (London, W. Clark & Son, 1796) (stating that oral testimony is superior because “the very manner of the witness giving evidence is not unfrequently [sic] a sufficient indication of the truth or falsity of his testimony, an advantage entirely lost in the Courts of Equity”).

<sup>25</sup> For an assessment of the 1912 Federal Equity Rules, see Robert H. Talley, *The New and Old Federal Equity Rules Compared*, 18 VA. L. REV. 663 (1913).

<sup>26</sup> “The purpose here [Federal Equity Rule 47] was not discovery but obtaining proof.” Sunderland, *supra* note 14, at 20.

<sup>27</sup> See discussion, *infra* Part II.D.

order that would allow the party “to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary.”<sup>28</sup> Consistent with the principle that discovery was meant to help a litigant prove his case, but not to explore his adversary’s evidence,<sup>29</sup> documentary discovery under Rule 58 was limited to discovering facts concerning the requesting party’s own case, but not the adversary’s case.<sup>30</sup>

*ii. Requests for Admission*

Federal Equity Rule 58 allowed a party to request from the adversary, before trial, a written admission of “the execution or genuineness of any document, letter or other writing.”<sup>31</sup> This provision was of limited value. Stephen Subrin has observed that “one would have to know in advance about the writing to seek the admission, and . . . there was only limited discovery as to this.”<sup>32</sup>

*iii. Written Interrogatories*

A written interrogatory was a party-propounded set of questions that was administered to the adversary before trial. Rule 58 authorized a party to require a written interrogatory of an adversary for the discovery of “facts and documents material to the support or defense of the cause.”<sup>33</sup>

The written interrogatory available under Rule 58 was, according to Sunderland, “very inadequate” as a method of discovery.<sup>34</sup> As with the documentary discovery provision, a party could only use written interrogatories to determine facts related to the propounding party’s case,

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<sup>28</sup> RUSH, *supra* note 23, at 225 (quoting FED. EQ. R. 58).

<sup>29</sup> See Martin Conboy, *Depositions, Discovery and Summary Judgments: As Dealt with in Title V of the Proposed Rules of Civil Procedure for the Federal Courts*, 22 A.B.A. J. 881, 882 (1936) (noting “the traditional idea that in Chancery the right of a party to a discovery did not extend to all facts material to the issue, but was limited to such material facts as were necessary to establish his cause of action or defense”).

<sup>30</sup> Sunderland thus noted that such discovery was “good for attack but not for defense.” Sunderland, *supra* note 14, at 21. Another restriction on the use of documentary discovery was that, under Rule 58, “the party seeking an inspection of documents was required to obtain an admission from the adverse party that the documents were in his possession, custody, or control before the court would make an order for their production.” 7 MOORE, *supra* note 11, § 34 App. 100.

<sup>31</sup> RUSH, *supra* note 23, at 225.

<sup>32</sup> Subrin, *supra* note 10, at 700.

<sup>33</sup> RUSH, *supra* note 23, at 224.

<sup>34</sup> Sunderland, *supra* note 14, at 20 (noting in addition that written interrogatories “are almost useless in many cases and are effective in none but the most simple matters”).

and only from an adverse party, not witnesses. Written interrogatories were of limited value because the questioner could not adjust his questions to follow up on the answers he received. Judge Learned Hand criticized the efficiency of written interrogatories in 1917: “A much more convenient way [to permit discovery] would be to . . . allow . . . an oral examination.”<sup>35</sup>

There was an important difference between written interrogatory practice under the Equity Rules and oral deposition practice under the later Federal Rules: at equity, an examiner who was independent and neutral with respect to the parties administered the interrogatory and recorded the testimony;<sup>36</sup> at the oral deposition, counsel for the party seeking discovery was authorized to ask the adversary questions.<sup>37</sup>

#### *D. Equitable Bill of Discovery at Common Law*

While the Federal Equity Rules applied to trials at equity but not at law, a litigant in federal court was permitted to bring a bill of discovery at equity to obtain discovery in an action at law.<sup>38</sup> The federal courts were reluctant to grant these requests because such discovery was available only when an “adequate remedy at law” to compel documentary discovery was lacking.<sup>39</sup> Although an 1861 federal statute

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<sup>35</sup> *Pressed Steel Car Co. v. Union Pac. R. R. Co.*, 241 Fed. 964, 967 (S.D.N.Y. 1917). After recognizing that he “cannot compel” an oral examination of an adversary before trial, Judge Hand speculated that “the same result [an effective method of discovery] may probably be obtained, though it must be confessed with the maximum of expense in time and labor, by allowing interrogatories to be renewed as often as justice requires.” *Id.*

<sup>36</sup> Kessler, *supra* note 9, at 1216–17; 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 364 (16th ed. 1899) (“[A]ccording to the course of chancery, the testimony of the witness is taken upon interrogatories in writing, deliberately propounded to him by the examiner . . .”).

<sup>37</sup> For an account of the origins of the practice of allowing a party, rather than a court-appointed examiner, to conduct the examination, see discussion, *infra*, Part III.

<sup>38</sup> In 1917 Judge Learned Hand described the proper procedure for a bill of discovery in aid of an action at law after Federal Equity Rule 58 came into force in 1912:

[T]he proper practice in a bill of discovery is now as follows: The plaintiff will plead those facts which entitle him to a discovery from the defendant, and will annex such interrogatories as he wishes the defendant to answer. If the defendant does not dispute the plaintiff’s right to some discovery, but objects to some or all of the actual interrogatories annexed to the bill, he will make those objections under Rule 58, and bring them on for hearing before the judge. He is not subject to the rule that, by answering one, he must answer all. If, on the other hand, he disputes the plaintiff’s right to any discovery, he will plead in an answer such facts as he deems apposite, and obtain from the court, under Rule 58, an enlargement of his time to answer the interrogatories until the plaintiff’s right to discovery is established.

*Pressed Steel Car Co.*, 241 Fed. at 966–67.

<sup>39</sup> *United States v. Bitter Root Dev. Co.*, 200 U.S. 451, 472 (1906).

incorporating Section 15 of the Judiciary Act of 1789 permitted courts of law to compel the discovery of documents, the Supreme Court held in 1911 that the authorization to compel discovery of documents applied only at trial and that, under the statute, pretrial documentary discovery was not available.<sup>40</sup>

### III. THE ROLE OF THE OFFICER IN CHARGE OF THE DEPOSITION AT EQUITY

Under the 1938 Federal Rules, the officer in charge of conducting a deposition was responsible for taking down testimony, but lacked authority to do much else.<sup>41</sup> In the respect that this officer functions as a recorder of evidence, the person who presides over the modern American oral deposition resembles the lay examiner appointed by the English Court of Chancery to discharge an evidence-gathering function. The English examiner orally administered a written, party-prepared interrogatory upon an adverse party without the presence of counsel, recorded a written summary of the examinant's oral answers and transmitted that record to the court.<sup>42</sup> In modern American practice under the 1938 Rules, in contrast, counsel for the examining party asks questions orally of the examinant, but the questioner does not record the answers for the court.<sup>43</sup>

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<sup>40</sup> *Carpenter v. Winn*, 221 U.S. 533, 537–38 (1911) (citing U.S. REV. STAT. § 724, U.S. Comp. Stat. 1901, p. 583) (“In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default.”) (*codified at* 28 U.S.C. § 636 (1934)); *see also* 28 U.S.C. § 1350 (corresponds to the Judiciary Act of 1789, ch. 20, § 15, 1 Stat. 73) (“That all the said courts of the United States, shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.”). The Court recognized that the purpose of the statute was to provide a “substitute for a bill of discovery in aid of a legal action,” but nevertheless concluded that § 15 of the Judiciary Act only applied at trial. *Carpenter*, 221 U.S. at 537, 545.

<sup>41</sup> *See* FED. R. CIV. P. 30(c) (1938) (“The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise.”).

<sup>42</sup> *See, infra*, Part III.A.

<sup>43</sup> Fed. R. Civ. P. 30(c)(1).

In order to understand the choices that the drafters of the Rules made regarding regulating who would question witnesses and under what conditions, it is helpful to review the pre-1938 English and American practices with respect to the role of the officer in charge of the examination, including the origin of permitting a party (or the party's counsel) to conduct the examination.

*A. The English Examiner at Equity*

The English Court of Chancery appointed examiners to gather evidence for the court.<sup>44</sup> By the sixteenth century, the court was employing lay examiners to gather evidence by administering party-propounded interrogatories.<sup>45</sup> Beginning in the later sixteenth century, lay examiners only took examinations in London and the immediate vicinity, and by the middle of the seventeenth century, examination by commission was the “norm outside of London.”<sup>46</sup> By the seventeenth century, the practice was for the parties to nominate four commissioners each, from whom the court would select two of each.<sup>47</sup> Although examination on commission “was still to be considered as examination by persons authorised by and under the control of the court,” during the seventeenth century “there was in Chancery . . . something of a shift away from a view of commissioners as judicial officers, to one of them as perhaps somewhat suspect party nominees.”<sup>48</sup>

Although a party or counsel drafted the interrogatory, the party did not conduct the examination. Rather, the examination was conducted outside the presence of parties and counsel.<sup>49</sup> At the examination, the

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<sup>44</sup> JOHN G. HENDERSON, CHANCERY PRACTICE WITH ESPECIAL REFERENCE TO THE OFFICE AND DUTIES OF MASTERS IN CHANCERY, REGISTERS, AUDITORS, COMMISSIONERS IN CHANCERY, COURT COMMISSIONERS, MASTER COMMISSIONERS, REFEREES, ETC. 163 (1904). The court appointed examiners in part to relieve the court's heavy workload. *Id.* Early Chancery lawyers would have conceived of discovery as documents and testimony that were produced to the court, rather than to an adverse party. See Ian Eagles, *Disclosure of Material Obtained on Discovery*, 47 MOD. L. REV. 284, 286 (1984).

<sup>45</sup> JOHN P. DAWSON, A HISTORY OF LAY JUDGES 151 (1960); see MICHAEL R. T. MACNAIR, THE LAW OF PROOF IN EARLY MODERN EQUITY 173 (1999) (stating that equity followed the “principle that the examination of witnesses was to be by officers of the court and not by the parties or their agents.”).

<sup>46</sup> MACNAIR, *supra* note 45, at 173; see also DAWSON, *supra* note 45, at 151–59 (describing Chancery examinations both in London and in the country).

<sup>47</sup> MACNAIR, *supra* note 45, at 174. Dawson states that in the sixteenth century the Court of Chancery would “appoint a commission of four lay persons, two named by each of the parties.” DAWSON, *supra* note 45, at 151–52.

<sup>48</sup> *Id.* at 175–74.

<sup>49</sup> ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 270 (1952).

examiner or the commissioner propounded to the examinant questions that had been prepared by the party seeking the evidence. The examiner or commissioner then summarized the testimony in a report submitted to the court.<sup>50</sup>

## B. *Examinations in the Federal Courts of Equity*

### 1. General Method of Obtaining Proof

After the American Revolution, the equity side of the federal courts continued the English practice of using court-appointed officers to administer party-propounded written interrogatories to witnesses. Although the Judiciary Act of 1789 prescribed that “[t]hat the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity . . . as of actions at common law,”<sup>51</sup> the 1822 Federal Equity Rules provided for the traditional Chancery method of obtaining testimony.<sup>52</sup> The 1912 amendments mandated that all testimony was to be taken orally, in open court.<sup>53</sup>

### 2. Person Conducting the Examination

The 1842 Federal Equity Rules permitted a party (or the party’s counsel), as opposed to a court-appointed officer, to conduct the questioning during an examination.<sup>54</sup> This practice departed from the traditional mode of examination at equity by permitting the court-appointed officer to conduct an oral examination rather than administer written interrogatories. Consequently, the person asking the questions could react to the witness’s answers and pose follow-up questions, and not be constrained by the written interrogatory. Additionally, the parties

<sup>50</sup> See Kessler, *supra* note 9, at 1207.

<sup>51</sup> Judiciary Act of 1789, *supra* note 40, § 30, 1 Stat. 73, 88 (1789).

<sup>52</sup> JAMES LOVE HOPKINS, *THE NEW FEDERAL EQUITY RULES* 40–41 (8th ed. 1933) (citing FED. R. EQ. 25 (1822) (“Testimony may be taken according to the acts of Congress, or under a commission.”) (replaced by FED. R. EQ. 81 (1912) (“Witnesses who live within the district may, upon due notice of the opposite party, be summoned to appear before the commissioners appointed to take testimony, or before a master or examiner appointed in any cause . . . .”) (amended 1912))).

<sup>53</sup> See *supra* note 24.

<sup>54</sup> See HOPKINS, *supra* note 52, at 56 (citing FED. R. EQ. 67 (1842) (“If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.”) (amended 1912)). The default mode of gathering evidence – a court-appointed officer administering a party-propounded written interrogatory to the witness – was still available. See *id.* (“After the cause is at issue, commissions to take testimony may be taken out . . . .”).

and their counsel, who had been forbidden from attending the pretrial examination,<sup>55</sup> began to ask questions at the examination.

Amalia Kessler has suggested that the oral examination may have had its roots in early nineteenth-century New York equity practice.<sup>56</sup> In *Remsen v. Remsen*,<sup>57</sup> Chancellor Kent stated that masters had been conducting oral examinations rather than administering written interrogatories.<sup>58</sup> Kent indicated that the practice developed because an oral examination was more convenient and flexible than the use of written interrogatories.<sup>59</sup> He described the inconveniences and rigidity of the written interrogatory: “[In] long and complicated accounts . . . it seems almost impossible to reduce the requisite inquiries to writing, in the first instance, and to know what questions to put, except as they arise in the progress of the inquiry.”<sup>60</sup> Several state courts cited *Remsen* for the proposition that masters were authorized to conduct oral examinations.<sup>61</sup>

Kent also relaxed the restriction on the presence of parties at the examination. Parties and their counsel were permitted to attend oral examinations, although the court reserved the right to exclude them.<sup>62</sup> Kessler speculates that Kent allowed the presence of the parties in order to “maintain the role that litigants (or their counsel) traditionally had in framing written interrogatories.”<sup>63</sup> One treatise writer described *Remsen* as establishing a process in which the master and the litigants collaborated.<sup>64</sup>

Two kinds of officers could, under the 1842 Federal Equity Rules, be in charge of depositions: masters and commissioners. Rule 77 provided that a master “shall have full authority . . . to examine on oath,

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<sup>55</sup> See MILLAR, *supra* note 49, at 270.

<sup>56</sup> See Kessler, *supra* note 9, at 1225–26.

<sup>57</sup> 2 Johns. Ch. 495 (N.Y. Ch. 1817).

<sup>58</sup> *Id.* at 497–98. In *Remsen*, Kent wrote that even though “the exhibition of interrogatories, duly settled, be the usual mode of examination, appearing in the books, I do not apprehend that it is indispensable.” *Id.* at 499. “The practice with us,” Kent continued, “has been more relaxed, and oral examinations have frequently, if not generally, prevailed.” *Id.*

<sup>59</sup> See *id.* (noting that the practice of masters conducting oral examinations was “a question merely of convenience”).

<sup>60</sup> *Id.* at 500.

<sup>61</sup> Kessler, *supra* note 9, at 1226 n. 245.

<sup>62</sup> *Remsen*, *supra* note 57, at 502. (“The testimony may be taken in the presence of the parties, or their counsel” unless “a special order of the Court” required that “it is to be taken secretly.”)

<sup>63</sup> Kessler, *supra* note 9, at 1229.

<sup>64</sup> See HENDERSON, *supra* note 44, at 250 (stating that the parties and the master together determine which method of examination would be “most expedient”).

*viva voce*, all witnesses produced by the parties before him.”<sup>65</sup> Although this rule authorized the master to conduct the examination, courts interpreted the rule to permit parties to conduct the questioning.<sup>66</sup> A commissioner was the American analogue to the English lay examiner because the commissioner administered written interrogatories and summarized testimony. Under Rule 67, a party could conduct the examination in lieu of the commissioner.<sup>67</sup> The 1842 Federal Equity Rules authorized parties to conduct oral examinations before either a master or a commissioner.<sup>68</sup>

In 1861 the Supreme Court made it easier for a party to conduct an oral examination. The 1842 version of Federal Equity Rule 67 had required that both parties agree to an examination upon oral interrogatories.<sup>69</sup> The Court amended that rule to provide that only one party had to request an oral examination in order to obtain it.<sup>70</sup> The older method of employing written interrogatories remained available to litigants, but only if there was a “special reason” for using that method.<sup>71</sup> By 1861, therefore, federal courts of equity permitted parties to conduct oral examinations while a court-appointed examiner summarized the testimony.<sup>72</sup>

The 1912 amendments to the Equity Rules established the rule that oral testimony in open court would be the typical method for gathering evidence.<sup>73</sup> Rule 47 directed that depositions could be taken only “for good and exceptional cause.”<sup>74</sup> As Wayne Brazil has shown, although a

<sup>65</sup> HOPKINS, *supra* note 52, at 58–59 (citing FED. R. EQ. 77 (1842) (amended 1912)).

<sup>66</sup> *See, e.g.*, Foote v. Silsby, 9 F. Cas. 391 (C.C.N.D.N.Y. 1856) (No. 4,920) (“Under the 77th rule prescribed by the [S]upreme [C]ourt for the observance of the circuit courts in equity cases, the plaintiff had a right, without special order, to call and examine the defendants . . .”), *aff’d in part and rev’d in part*, Silsby v. Foote, 61 U.S. 378 (1858).

<sup>67</sup> *See supra* note 54.

<sup>68</sup> Fed. R. Eq. 67, 77 (1842). The English Court of Chancery was similarly reformed to permit obtaining evidence by oral examination. *See Kessler, supra*, note 9, at 1236.

<sup>69</sup> Fed. R. Eq. 67 (1842) (“If the parties shall so agree . . .”).

<sup>70</sup> 66 U.S. (1 Black) 6 (1861) (“Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court . . .”).

<sup>71</sup> *See id.* at 7 (“Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court . . . for special reasons, satisfactory to the court . . .”).

<sup>72</sup> *Id.* (“The depositions taken upon such oral examination shall be taken down in writing by the examiner, in the form of narrative, unless he determines the examination shall be by question and answer in special instances.”).

<sup>73</sup> *See RUSH, supra* note 24 (citing FED. R. EQ. 46).

<sup>74</sup> *See RUSH, supra* note 23 (citing FED. R. EQ. 47 (1912)). Depositions continued to be taken under this rule. *See Reflectolyte Co. v. Edwin F. Guth Co.*, 31 F.2d 777, 778

master was authorized to preside over the taking of a deposition under Rule 47, the federal courts “confined use of special masters almost exclusively to conventional references of complex matters at the trial stage.”<sup>75</sup> The basic structure of a deposition, in which parties (or their counsel) ask questions while a court-appointed functionary records the witness’s testimony, thus persisted past the final revision of the Federal Equity Rules before the Federal Rules united the procedures at law and equity.

The Federal Equity Rules pertained to obtaining proof by oral examination (the preservation of potential testimony function), rather than to obtaining discovery by oral examination (the investigation of potential evidence function). Under the nineteenth-century rules, the word “deposition” referred to the examiner’s report.<sup>76</sup> When the drafters of the 1938 Federal Rules united, in one examination procedure, the preservation of potential testimony function and the investigation of potential evidence function,<sup>77</sup> a precedent existed for a party-directed oral examination in which an officer of the court recorded testimony.<sup>78</sup> Although the Advisory Committee was not constrained by existing practice – the Committee members could have created a radically innovative procedure – two aspects of existing equity procedure influenced the debate over whether the 1938 Rules should provide for a master to rule upon the admissibility of evidence at depositions:<sup>79</sup> the practice of permitting parties to conduct the examination, and the presence of a court-appointed functionary without any powers and

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(E.D. Mo. 1927); *see also* Wallace R. Lane, *Working Under Federal Equity Rules*, 29 HARV. L. REV. 55, 70-71 (1915).

<sup>75</sup> Wayne D. Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 8 AM. B. FOUND. RESEARCH J. 143, 155 (1983). Brazil also found that masters were not involved in the documentary discovery procedures provided for in Rule 58. *See supra* text accompanying note 28. The rule provided that the judge was supposed to settle disputes about interrogatories and document requests, and Brazil found “only one reported case from the period between 1912 and 1938 that even mentions using a master in connection with a document production.” Brazil, *supra*, at 159 (citing *Pressed Steel Car Co.*, 240 F. at 137).

<sup>76</sup> *See* 66 U.S. (1 Black) 6 (1861) (stating that after the examination is concluded “the original *depositions*, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court . . .”) (emphasis added).

<sup>77</sup> FED. R. CIV. P. 26(a)(1938) (“testimony . . . may be taken . . . by deposition upon oral examination . . . for the purpose of discovery or for use as evidence in the action or for both purposes.”).

<sup>78</sup> *See, supra*, Part III.B.

<sup>79</sup> *See* Part V, *infra*.

responsibilities other than swearing in witness and taking down testimony.<sup>80</sup>

### C. *Persons Subject to Examination for Discovery*

A party could seek discovery only from another party, because only persons with an interest in the action could be examined. According to a leading nineteenth-century English treatise, “[f]rom the earliest times it has been a general rule . . . that no person without an interest could be made a defendant to a bill for the purpose of discovery.”<sup>81</sup> George Ragland, whose 1932 book *Discovery Before Trial* was the only significant American treatise about pretrial discovery known at the time, wrote that “[d]iscovery could be had only from parties under the [American] chancery practice.”<sup>82</sup> A non-party witness was therefore not subject to oral examination for discovery. A non-party witness was, however, subject to oral examination for the purposes of gathering testimony, which was the manner in which the courts of equity gathered evidence.

At common law a party to a suit was disqualified from testifying at trial because the party had an interest in the litigation and might have therefore been tempted to perjure himself.<sup>83</sup> Obtaining discovery of an

<sup>80</sup> For an argument that the *Federal Rules* represent the triumph of equitable procedure over common law procedure, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

<sup>81</sup> EDWARD BRAY, *THE PRINCIPLES AND PRACTICE OF DISCOVERY* 40 (1885). “Interest” meant “such an interest as that a decree could be made against him or as that he might be affected by the decree.” *Id.* at 40–41.

<sup>82</sup> GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* 46 (1932). The Advisory Committee relied on Ragland’s book during its deliberations regarding discovery rules. See Part IV.D, *infra*.

<sup>83</sup> For thorough coverage of the decline of the disqualification, see George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 659–61 (1997) (describing the downfall of witness competency rules in civil cases). Fisher has argued that the disqualification of civil parties for interest dates to before the sixteenth century:

Exactly when the rules evolved is unclear. Wigmore traced the rule barring civil parties to the sixteenth century and that barring all other interested persons to the mid-seventeenth century. But it seems that these dates merely mark the earliest references Wigmore could find; the rules may well have been older. Barbara Shapiro notes that the rules bear a close, if simplified, resemblance to the testimonial disqualifications that prevailed in the Roman-canon law of the Continent.

*Id.* at 625 (citations omitted). Michael Macnair has suggested that Wigmore dates the disqualification of parties too early and the disqualification of interested persons too late. See MACNAIR, *supra* note 45, at 204–211. See also James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom*, 12 L. & HIST. REV. 95, 107–17 (1994).

adverse party in an action at law would, therefore, have been the only opportunity for the party requesting discovery to learn what the adversary knew. New York's Field Code of 1848 provided for pretrial oral examinations of adverse parties as a substitute for testimony at trial.<sup>84</sup> Because the drafters of the Field Code presumed that the pleadings would properly frame the issues in the case, the Code did not include any provisions for interrogatories.<sup>85</sup>

*D. Applicability of Rules of Evidence at an Examination*

The rules of evidence govern the admissibility of testimony and prevent the fact-finder from considering inadmissible testimony. At the pretrial oral examination, the judge was absent, and neither a master nor an examiner could rule on evidence.<sup>86</sup> According to one treatise writer, "the rules governing the admissibility or rejection of evidence before a master or a referee are precisely the same as in a trial before the court."<sup>87</sup> If an adverse party objects to the "competency or admissibility" of evidence "at the hearing before the master," the master "should receive the evidence, subject to the objection [by the adverse party], and the court would be able then to pass upon the matter on review."<sup>88</sup> It was well-established that examiners were incompetent to rule on the admissibility of evidence. Under the 1912 amendments to Federal Equity Rules 49 and 51, the examiner before whom a deposition was

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<sup>84</sup> 1848 N.Y. Laws, c. 379 (71st Sess., April 12, 1848) [hereinafter "1848 Field Code"] § 345. The examination would be taken "subject to the same rules of examination, as any other witness." *Id.* § 344.

<sup>85</sup> Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 L. & HIST. REV. 311, 332 (1988).

<sup>86</sup> Wisconsin and Missouri had provisions in their procedural codes that permitted, under limited circumstance, the officer in charge of the deposition to rule on the admissibility of evidence. See MO. REV. STAT. (1919) § 5446; WIS. STAT. (1927) c. 252, § 1415; RAGLAND, *supra* note 81, at 106 (Wisconsin), 107–08 (Missouri).

<sup>87</sup> HENDERSON, *supra* note 44, at 296. "So, also, hearsay evidence is no more admissible upon a hearing before the master than upon a trial in court." *Id.* In *De la Riva v. Berreyessa*, Chief Justice Murray of the Supreme Court of California held that testimony that would be inadmissible at trial was also inadmissible at a pretrial examination: "It appears . . . that testimony, though objected to, was admitted to establish a demand for the price of wheat which was barred by the statute of limitations. The record discloses much hearsay and irrelevant testimony, which should have been excluded." 2 Cal. 195, 197 (Cal. 1852).

<sup>88</sup> HENDERSON, *supra* note 44, at 325 (quoting *Kansas Loan & Trust Co. v. Electric Ry., Light & Power Co. of Sedalia, MO*, 108 F. 702 (C.C.W.D. Mo. 1901)). The court's reference to an "objection" by "the adverse party" is a reminder that by 1901 counsel was present at oral examinations.

taken had no authority to exclude evidence or to rule that a deponent need not answer a question.<sup>89</sup>

#### IV. EXPANSION OF DISCOVERY UNDER THE *FEDERAL RULES OF CIVIL PROCEDURE*

##### A. *The Enabling Act and The Advisory Committee*

On June 19, 1934 Congress passed the Enabling Act, which authorized the Supreme Court to establish new rules of procedure for the district courts.<sup>90</sup> The legislation empowered the Court “at any time [to] unite the general rules prescribed by it for cases in equity with those actions at law.”<sup>91</sup> The Act also directed that the new rules “shall neither abridge, enlarge, nor modify the substantive rights of any litigant.”<sup>92</sup>

On June 3, 1935, the Supreme Court appointed an Advisory Committee “to prepare and submit to the Court a draft of a unified system of rules . . . .”<sup>93</sup> Former U.S. Attorney General William D. Mitchell was named to chair the Committee.<sup>94</sup> The Reporter to the Advisory Committee was Charles Clark, the Dean of Yale Law School at the time.<sup>95</sup> Edson Sunderland, a member of the Committee and a professor at the University of Michigan Law School, was the primary drafter of the discovery rules.<sup>96</sup>

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<sup>89</sup> ARMISTEAD M. DOBIE, *HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE* 721 (1928).

<sup>90</sup> “Be it enacted that the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.” ACT OF JUNE 19, 1934, c. 651, §1, 48 Stat. 1064, 28 U.S.C. § 723b (subsequently 28 U.S.C. § 2072).

<sup>91</sup> *Id.* § 2. In 1922, Chief Justice Taft had recommended that the federal system adopt a procedure that merged law and equity. William Howard Taft, *Possible and Needed Reforms in the Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 47 A.B.A. REP. 250 (1922).

<sup>92</sup> ACT OF JUNE 19, 1934, at § 2. For a discussion of how the new Federal Rules were interpreted to erode the right to jury trial, see Subrin, *supra* note 79, at 929–31.

<sup>93</sup> Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1934).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Clark, *supra* note 13, at 10 (“Thus with the Chairman’s approval I was able to commission Edson to prepare the draft of that part of the rules known originally as “V. DEPOSITIONS, DISCOVERY AND SUMMARY JUDGMENTS.””). Sunderland was a Sterling Foundation Research Associate at Yale Law School from 1931 until 1933. *Id.* at 7. The other members of the Committee included: former U.S. Attorney General George Wickersham (who died in 1936 and was replaced by George Pepper); Scott Loftin, the

*B. A Note Regarding Sources*

The official documentary records of the Advisory Committee's deliberations are located at the Federal Records Center in Suitland, Maryland.<sup>97</sup> In 1938 Chief Justice Hughes placed that collection of archival material under seal; the collection remained, as of 1983, inaccessible to the general public, but the materials appear to have been opened up by 1993.<sup>98</sup> Although it is not clear why the Supreme Court had the records sealed, the Advisory Committee was self-conscious of the private nature of its deliberations.<sup>99</sup>

A second, substantial set of Committee records exists at Sterling Memorial Library, Yale University.<sup>100</sup> Charles Clark, the reporter to the

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President of the American Bar Association; Wilbur Cherry, Professor of Law at the University of Minnesota; Armistead M. Dobie, Dean of the University of Virginia Law School; Robert Dodge, a Boston lawyer; George Donworth, a former federal judge in Seattle; Joseph Gamble, a Des Moines lawyer; Monte Lemann, a New Orleans lawyer who taught at the Tulane University Law School; Edmund Morgan, Professor of Law at Harvard Law School; Warren Olney, Jr., a San Francisco lawyer and founding member of the Sierra Club; and Edgar Tolman, a Chicago lawyer and editor-in-chief of the *American Bar Association Journal*.

<sup>97</sup> See The Washington National Records Center at Suitland Maryland, NATIONAL ARCHIVES, <http://www.archives.gov/dc-metro/suitland/> (last visited Oct. 5, 2013).

<sup>98</sup> See Brazil, *supra* note 75, at 160 n.113 (indicating that as of 1983 the collection remained inaccessible to the general public and that "to date [1983], no scholar has been permitted to quote any portion of these records"). Peter Charles Hoffer reported in 1993 that he was able to obtain a duplication of the full transcription of the Committee's deliberations from 1935 to 1937, which Edgar Tolman, the secretary of the Committee, had deposited with the Supreme Court and which were archived at Suitland. Peter Charles Hoffer, *Text, Translation, Context, Conversation, Preliminary Notes for Decoding the Deliberations of the Advisory Committee that Wrote the Federal Rules of Civil Procedure*, 37 AM. J. LEGAL HIST. 409, 413-414 n.22 (1993). Hoffer was also able to obtain copies of "all the drafts of the rules prepared by Clark and his staff, and the comments of members of the bench and bar in the various judicial circuits to those drafts . . ." *Id.*

<sup>99</sup> Subrin, *supra* note 10, at 718 n. 159 (quoting Summary of Proceedings of the First Meeting of the Advisory Committee on Rules, Held in the Federal Building at Chicago, June 20, 1935, in Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-1988, at CI-103-42-46 (Congressional Information Service) ("It was thereupon unanimously resolved, that as the committee is acting in an advisory capacity only, no publicity be given to any action or decision taken by it, except to the extent authorized by the Supreme Court.")). At least one court has made use of documents in the Clark Papers to inform its interpretation of the *Federal Rules*. See Whalen v. Ford Motor Credit Corp., 684 F.2d 272 (4th Cir. 1982) (en banc).

<sup>100</sup> The documents are housed in the Manuscripts and Archives Division of Sterling Memorial Library (Manuscript Group Number 1344). An archivist-prepared finding aid to the records, which consist of 38 boxes, was completed in March 1982 and may be found at: <http://drs.library.yale.edu:8083/HLTransformer/HLTransServlet?stylename=yul.ead2002.xml&pid=mssa.ms.1344&query=charles%20e.%20clark&clear-stylesheet>

Advisory Committee while he was the dean of Yale Law School, preserved 38 boxes of material.<sup>101</sup> The Clark Papers include reports, memoranda, abstracts, transcripts and minutes of the Advisory Committee's meetings, preliminary drafts of the rules, and correspondence that the Committee received from lawyers and judges, including suggestions regarding proposed rules.<sup>102</sup> The archive contains verbatim transcripts of the Committee's proceedings that occurred between November 1935 and February 1937<sup>103</sup> and correspondence dating from the period September 1934 to September 1939.<sup>104</sup>

The Clark Papers contain the two published preliminary drafts of the proposed rules that the Advisory Committee circulated in order to elicit comments and suggestions from lawyers and judges: a May 1936 "Preliminary Draft"<sup>105</sup> and an April, 1937 draft titled "Proposed Rules."<sup>106</sup> The Proposed Rules reflected changes that the Committee made after reviewing the suggestions from the legal profession.<sup>107</sup>

Before publishing the "Preliminary Draft," the Committee debated several unpublished earlier drafts. I discuss these versions, which are included in the Clark Papers, in this article. The draft rules pertaining to the powers of the officer in charge of the deposition are collected at Appendix A, below.

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<sup>101</sup> Hereinafter CLARK PAPERS. The archivists at Yale have divided the 38 boxes into three chronological sections: 1935–1939; 1943–1950; 1952–1956. I have only consulted the first section, boxes 94 to 113.

<sup>102</sup> In addition to the official documents at the Federal Records Center and the Clark Papers, less complete collections of records from the Committee's work exist. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1132–33 n.529 (1982) (describing sets of documents at Chicago, Michigan, Virginia, and other locations).

<sup>103</sup> CLARK PAPERS, *supra* note 100, boxes 94–96.

<sup>104</sup> *Id.* at boxes 106–13. "Preparatory papers," including preliminary drafts of the rules, make up the bulk of the remainder of the portion of the archive relevant to the period 1935–1938. *Id.* at boxes 97–105.

<sup>105</sup> ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA (May 1936) [hereinafter PRELIMINARY DRAFT].

<sup>106</sup> REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PROPOSED RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (April 1937) [hereinafter PROPOSED RULES].

<sup>107</sup> See FINAL REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE (Nov. 1937) (reflecting primarily stylistic changes to its April 1937 PROPOSED RULES, *supra* note ).

C. *Expansion of Availability of and Scope of Oral Examination for Discovery*

1. Edson Sunderland: A Proponent of Liberal Discovery

Edson Sunderland, the principal framer of the Federal Rules pertaining to discovery,<sup>108</sup> was a strong proponent of expansive discovery as a means to eliminate surprise at trial. He wrote in 1933 that “effective preliminary discovery” would increase the efficiency of trial.<sup>109</sup> Under a liberal discovery system in which all parties were aware of the facts, it would be possible to dispense with “that elaborate maneuvering for advantage, that vigilant and tireless eagerness to insist on every objection, which not only prolongs and complicates the trial but makes the outcome turn more upon the skill of counsel than upon the merits of the case.”<sup>110</sup>

Sunderland also advocated more liberal discovery than was available before the Federal Rules because he believed that pleadings were an inadequate method of framing issues for trial.<sup>111</sup> The function of pleadings consisted of framing the issues in the case and disclosure of the parties’ view of the evidence. The pleadings thus could be an opportunity for a party to conceal information.<sup>112</sup> The virtues of liberal discovery included the disclosure of actual evidence and the ability of the parties to directly assess its merits. More thorough investigation of the evidence would promote settlement and reduce the need for trial. Sunderland had been impressed by the efficiency of the English “summons for direction,” a type of pretrial conference with a standing master.<sup>113</sup>

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<sup>108</sup> On the twentieth anniversary of the *Federal Rules*, Clark wrote: the “original conception [of Rule 16], as well as the several rules for discovery and summary judgment, was and now remains a tribute to Edson’s genius.” Clark, *supra* note 13, at 10.

<sup>109</sup> See Edson R. Sunderland, *Improving the Administration of Civil Justice*, 167 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 60, 74 (1933) (“[A] trial which follows an effective preliminary discovery gains much in efficiency.”).

<sup>110</sup> *Id.* at 74. “With the facts on each side understood by both parties when the trial opens, leading questions lose their objectionable character, the witnesses can be brought at once to the main points in controversy with no waste of time over formal matters, the necessity for cross-examination is greatly reduced, and the actual introduction of proof may often be dispensed with altogether.” *Id.* at 74–75 (emphasis added).

<sup>111</sup> See Edson R. Sunderland, *Scope and Method of Discovery Before Trial: Inadequacy of the Pleadings as a Basis for Trial*, 42 YALE L.J. 863 (1933).

<sup>112</sup> The Federal Rules debased pleading. See FED. R. CIV. P. 8 (1938) (amended 2010).

<sup>113</sup> Edson R. Sunderland, *An Appraisal of English Procedure*, 9 J. AM. JUD. SOC. 164, 167 (1925). According to Sunderland:

Sunderland believed that reforming the pretrial phase of litigation in such a way that the procedures governing discovery before trial mimicked those in use at trial itself would result in the improved administration of justice. In 1933 he endorsed establishing such a pretrial discovery procedure.<sup>114</sup> During the Advisory Committee's deliberations, Sunderland consistently supported broad, rather than restricted, rights to discovery.<sup>115</sup> Writing in 1932, Sunderland alluded to the "widespread fear of liberalizing discovery," stating that "hostility to 'fishing expeditions' before trial is a traditional and powerful taboo" and that only "experience" would effectively neutralize such hostility.<sup>116</sup>

Clark shared Sunderland's enthusiasm for broad rights to discovery. The Advisory Committee held its first meeting on June 20, 1935 and as early as June 28 Clark indicated his preference for liberal discovery provisions. When he prepared his "tentative" outline of the subjects to be dealt with by the new rules, Clark included a section on "Discovery and Summary Proceedings." With respect to the topics "Discovery, Summary Judgment, and Defendant's Motion for Judgment Supported by Affidavits," Clark wrote a note on the outline that said: "Liberal provisions should be drafted on all these matters. Cf. RAGLAND, DISCOVERY (1931)."<sup>117</sup>

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There is nothing in the English court system which proceeds under such speed and pressure as a hearing before a master on a summons for directions. The solicitors are not allowed the luxury of a seat, but stand at a sort of high desk before the master, and are hardly given time to gather up their papers before the next group of solicitors has crowded forward to take their place. Each of the masters has a docket of sixteen or eighteen cases per hour, and he usually finishes the list on time. The summons for directions, by which the vast scheme of discovery is largely administered, is thus a tremendously efficient instrument.

*Id.*

<sup>114</sup> Sunderland, *supra* note 110, at 877 ("[I]t is also possible to preserve that correlation [between scope and method of discovery] by changing both, authorizing a discovery as broad in its scope as the trial itself, and providing the same method of examination which is employed in trial practice. This is the solution which has been found for the problem in a group of jurisdictions of which Wisconsin is the most conspicuous example. Discovery has by this means become a widely used system of pre-trial procedure which has profoundly affected the administration of justice.").

<sup>115</sup> See, e.g., Transcript of Advisory Committee Meeting at 740 (Feb. 22, 1936), in CLARK PAPERS, *supra* note 100, box 95 (Sunderland objecting to Pepper and Mitchell's tentative suggestion that the judge should be able to "define the things you can fish about").

<sup>116</sup> Edson R. Sunderland, *Foreword*, in RAGLAND, *supra* note 81, at iii.

<sup>117</sup> *Supreme Court of the United States Advisory Committee on Rules of Civil Procedure Topical Outline of Proposed Rules* (June 28, 1935) 1, 5 in CLARK PAPERS, *supra* note 100, at Box 108. It is not clear to whom Clark was addressing his note – it may have been a note to himself.

## 2. The Liberal Discovery Policy of the *Federal Rules*<sup>118</sup>

The Federal Rules authorized the use of “virtually every known discovery method.”<sup>119</sup> The Advisory Committee redefined the function of the oral deposition, by uniting both the preservation of potential testimony function and the investigation of potential evidence function into a single examination procedure.<sup>120</sup>

The Federal Rules expanded, with respect to the oral deposition, both the scope of what information was discoverable<sup>121</sup> and the range of persons subject to discovery (both parties and non-party witnesses).<sup>122</sup> Because the oral deposition under the Federal Rules combined the investigatory examination for discovery with the examination to gather and preserve testimony, the federal statute that restricted the circumstance under which a party could take a deposition *de bene esse* was repealed.<sup>123</sup> In addition, the previous “privilege against disclosure of one’s case” – the rule that a party could only obtain discovery of matters related to the discoveror’s case – no longer applied under the Federal Rules.<sup>124</sup> At the Advisory Committee’s meeting on February 22, 1936,

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<sup>118</sup> I focus in this section on the oral deposition.

<sup>119</sup> Subrin, *supra* note 10, at 300. These methods included “interrogatories, oral depositions, written depositions, document requests, physical and mental examinations, inspection of property, and requests for admissions.” *Id.* Another commentator has likened the range of discovery devices available to an arsenal of weapons: “A veritable arsenal of weapons for discovery is provided [by the 1938 *Rules*], from which a skilled lawyer may select those best suited for his purpose, just as an experienced golfer chooses the club which best fits his immediate needs.” Alexander Holtzoff, *Instruments of Discovery under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 205 (1942).

<sup>120</sup> FED. R. CIV. P. 26(a) (1938) (amended 2010) (“[T]he testimony of any person . . . may be taken at the instance of any party by deposition upon oral examination . . . for the purpose of discovery or for use as evidence in the action or for both purposes.”).

<sup>121</sup> See FED. R. CIV. P. 26(b) (1938) (amended 2010) (“[T]he deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or 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.”).

<sup>122</sup> See FED. R. CIV. P. 26(a) (1938) (amended 2010) (“[T]he testimony of *any person*, whether a party or not, may be taken . . .”) (emphasis added).

<sup>123</sup> The Enabling Act had stated: “[the rules] shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.” ACT OF JUNE 19, 1934, c. 651, §1, 48 Stat. 1064, 28 U.S.C. § 723b (subsequently 28 U.S.C. § 2072).

<sup>124</sup> James A. Pike, *The New Federal Deposition-Discovery Procedure and the Rules of Evidence*, 34 ILL. L. REV. 1, 5 (1939). Ragland had described that, in New York, the restriction the defendant’s discovery to matters related to his affirmative defenses led to the practice of putting “in fictitious defenses for the sole purpose of securing an

Mitchell explained the difference between the preservation of potential testimony function and the investigation of potential evidence function, concluding that “there ought not to be any limit to taking a deposition to discover, no matter where the witness is.”<sup>125</sup>

The Advisory Committee expanded discovery in two other ways. First, the drafters decided, consistent with equity practice,<sup>126</sup> to adopt the rule that testimony to which a party objected would be recorded notwithstanding the objection.<sup>127</sup> This rule permitted a party to inquire into facts that might be inadmissible evidence. Although the law of evidence still nominally applied at the oral deposition,<sup>128</sup> the officer in charge of the deposition had no power to rule on the admissibility of evidence. Second, the drafters employed a broad standard of relevance regarding the matters into which a party was permitted to inquire.<sup>129</sup> As a contemporary observer pointed out, “relevancy immediately presupposes a referent.”<sup>130</sup> Because such a referent may be obscure at the pretrial phase of the litigation, any matter that *may* be relevant would fall within the ambit of Rule 26(b). In 1946, this rule was amended to expand the standard of relevance: “[R]elevant information need not be

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examination of his adversary,” a practice of which New York lawyers were critical. RAGLAND, *supra* note 81, at 132.

<sup>125</sup> Advisory Committee Meeting Transcript (Feb. 1936), *supra* note 114, at 660–61.

<sup>126</sup> See *supra* Part III.E..

<sup>127</sup> Fed R. Civ. P. 30(c) (1938) (amended 2007) (“All objections made at the time of the examination . . . shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections.”). *Accord Kansas Loan & Trust Co.*, 108 F. 702 (directing that evidence at a hearing before a master be recorded despite an objection).

<sup>128</sup> Technically, the “assimilation of discovery into the deposition mold . . . [brought] about the application of one law of evidence for both *viva voce* and pre-trial testimony.” Pike, *supra* note 123, at 7.

<sup>129</sup> Fed R. Civ. P. 26(b), *supra* note 120 (subject to provisions intended to protect parties from abusive discovery, “the deponent may be examined regarding any matter not privileged, which is relevant to the subject matter involved in the pending action . . .”). See also *Leverett v. Cont’l Briar Pipe Co., Inc.*, 25 F. Supp 80, 81–82 (E.D.N.Y. 1938) (interpreting Rule 26 to permit the “broadest type of examination” in “the field of depositions and discovery”). The Committee had rejected two possible methods of limiting the scope of inquiry at the deposition: in 1935 Clark had initially proposed more rigorous pleading rules and tying the scope of discovery more closely to the allegations in the pleadings; also, Sunderland’s initial draft (also in 1935) of the oral deposition rule would have constrained discovery to “any matter, not privileged, which is relevant to the pending cause as shown in the pleadings filed therein.” See Subrin, *supra* 10, at 722–23.

<sup>130</sup> Pike, *supra* note 123, at 3. In federal equity practice the scope of what constituted relevant testimony was limited by the order of reference to the master. See HENDERSON, *supra* note 44, at 325 (“[T]he master cannot hear evidence bearing on questions already settled in the order of reference relevance.”) (citing *Remsen*, 2 Johns. Ch. At 495.)

admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>131</sup>

Sunderland and the Committee combined discovery devices and discovery policies that had been adopted by various jurisdictions.<sup>132</sup> No single state procedural system in existence at the time of the drafting of the Federal Rules included all of the discovery provisions that the Rules would contain. During the Advisory Committee’s campaign to gain public support for the preliminary draft of the Rules, Mitchell asserted that “[discovery] rules as liberal as those we have proposed have been in use in the English courts for many years” and that “similar systems are in effect in some States of the Union.”<sup>133</sup> In fact, the Federal Rules’ discovery provisions went farther than any other jurisdiction at the time, as Clark later admitted in 1959.<sup>134</sup>

#### D. *The Advisory Committee’s Sources*

Sunderland and other members of the Committee relied on *Discovery Before Trial*,<sup>135</sup> the book by Sunderland’s student, George Ragland, Jr.<sup>136</sup> In his book, Ragland provided a survey of discovery rules

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<sup>131</sup> FED. R. CIV. P. 26(b)(1) (1946) (amended 2010)

<sup>132</sup> Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1072 (1955). At the meeting of the Advisory Committee on April 17, 1935, Sunderland said of his first draft of the discovery procedure for the *Federal Rules*: “I think it is an advance over what any one of those states have. But I think it is not an advance over what can be found in these states taken together.” *Id.* With regard to source material, Holtzoff stated that he was “indebted to Mr. Leland L. Tolman, the Secretary of the Advisory Committee [of 1954] on the Federal Rules of Civil Procedure, for access to the stenographic minutes of the meetings of the Committee.” *Id.* at 1057. Because Holtzoff quoted liberally from the minutes of meetings held by the original Advisory Committee, Leland Tolman must have had access to records of the 1930s Committee.

<sup>133</sup> William D. Mitchell, *Attitude of Advisory Committee—Events Leading to Proposal for Uniform Rules—Problems on which Discussion is Invited [Address at the Open Session for Discussion of the Proposed Rules of Civil Procedure for the Federal Courts]*, 22 A.B.A. J. 780, 782 (1936).

<sup>134</sup> Clark, *supra* note 13, at 11. (“The system thus envisaged by Sunderland had no counterpart at the time he proposed it. It goes very much beyond English procedure, which does not provide for general depositions of parties or witnesses. And only sporadically was there to be found here and there a suggestion for some part of the proposed system, but nowhere the fusion of the whole to make a complete system such as we ultimately presented.”)

<sup>135</sup> See RAGLAND, *supra* note 81.

<sup>136</sup> See, e.g., *Preparatory Papers: Drafts, Reports and Correspondence used in the Preparation of the Rules of Civil Procedure for the District Courts of the United States*, in CLARK PAPERS, *supra* note 100, box 98 (citing Ragland’s book in a Note to Rule 30(c) (Officers Before Whom Depositions May be Taken) [see Appendix A, *infra*]). See also text accompanying note 116, *supra*. Sunderland wrote the foreword to Ragland’s book

and practices in all (at the time) forty-eight states, in the federal courts, in England, and in Ontario and Quebec.<sup>137</sup> In addition to gathering procedural rules and statutory and case law, Ragland undertook “field studies” in several North American cities to explore the experience “with each type of [discovery] device which is being used.”<sup>138</sup> Ragland was an enthusiastic supporter of expanded discovery, quoting with approval a lawyer who had told him: “The lawyer who does not use discovery procedure is in the position of a physician who treats a serious case without first using the X-ray.”<sup>139</sup>

### I. Persons Subject to Examination for Discovery

Consistent with the traditional rule at equity,<sup>140</sup> in all of the jurisdictions that Ragland studied, “adverse” parties were subject to examination for discovery.<sup>141</sup> Ragland reported that in Indiana, Kentucky, Missouri, Nebraska, New Hampshire, Ohio and Texas, a party was permitted to take a deposition upon oral interrogatories of non-party witnesses, but the procedure he described was intended to preserve witness testimony, rather than to investigate potential evidence.<sup>142</sup> Unlike the federal *de bene esse* statute, however, in those seven states a witness could be deposed regardless of whether he would be unavailable at trial. The discovery rules in Wisconsin did not permit examination of

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and Clark had published a positive review of it in 1933. Charles E. Clark, *Book Reviews*, 42 YALE L.J. 988 (1933) (reviewing GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* (1932)).

<sup>137</sup> See RAGLAND, *supra* note 81, at 267–391 (1932) (statutory provisions on discovery in these jurisdictions).

<sup>138</sup> *Id.* at v. Ragland undertook his field studies in cities in Indiana, Kansas, Kentucky, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Ontario, Quebec, Texas and Wisconsin. Ragland’s studies included interviews with judges, lawyers, and – where available – officials in charge of discovery examinations. *Id.*

<sup>139</sup> RAGLAND, *supra* note 81, at 251. Subrin has related Ragland’s procedural philosophy, which also included eliminating the “sporting theory of justice,” to the themes of Roscoe Pound’s 1906 speech *The Causes of Popular Dissatisfaction with the Administration of Justice*. Subrin, *supra* note 10, at 709–10.

<sup>140</sup> See *supra* text accompanying note 80.

<sup>141</sup> RAGLAND, *supra* note 81, at 37. Thus, for example, a Wisconsin court found that a co-defendant could have been examined only if his interests are actually adverse. *O’Day v. Meyers*, 147 Wis. 549 (1911). In New Jersey and Louisiana, only the parties of record were subject to discovery. See *Apperson v. Mut. Ben. Life Ins. Co.*, 38 N.J.L. 272 (Sup. Ct. 1876); LA. REV. CODE OF PRAC. § 347 (1927).

<sup>142</sup> RAGLAND, *supra* note 81, at 50.

witnesses even though that state's rules permitted liberal examination of parties and representatives of corporate parties.<sup>143</sup>

## 2. Powers of the Presiding Officer at an Examination

Ragland had reported that under the practices of Missouri, Nebraska, New Hampshire, Ohio, and Wisconsin, the officer in charge of the examination had the power to compel answers, decide objections, and rule on the admissibility of testimony.<sup>144</sup> In Nebraska, New Hampshire, and Ohio, a notary presided over the examination and could hold an examinant in contempt for refusing to answer a question.<sup>145</sup> Ragland indicated that it was very rare for a notary actually to punish an examinant and that the mere threat of contempt often compelled the examinant to answer the question. Ragland suspected that a notary was reluctant to exercise his power to hold someone in contempt because the notary had no basis to know whether the particular question was proper, and may have been afraid of liability for wrongful committal.<sup>146</sup>

In Wisconsin, a "court commissioner" – akin to a standing master – was in charge of an examination for discovery.<sup>147</sup> In his field study, Ragland encountered three different understandings of how the commissioner was expected to respond to objections at an oral examination.<sup>148</sup> Milwaukee lawyers believed that a commissioner had the same powers as a judge in chambers; the commissioner had the authority to rule on objections and punish for contempt.<sup>149</sup> Madison lawyers believed that the commissioners only possessed the power to decide challenges to the relevance of a question. Ragland reported that

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<sup>143</sup> *Id.* at 47. The Ontario history is intriguing: although the courts were empowered to grant discovery of witnesses "when it appears necessary for the purposes of justice," in 1894 the Supreme Court of Ontario overruled itself and reinstated the prohibition on discovery of witnesses.

<sup>144</sup> *Id.* at 104-13.

<sup>145</sup> *Cf. Olmsted v. Edson*, 98 N.W. 415, 417 (Neb. 1904) (stating that, like a judicial officer, a notary "is not liable for a mere error of judgment while acting within his jurisdiction but he is not protected if he assumes to act beyond the scope of his authority."). The sanction for contempt included imprisonment. *Id.* at 416.

<sup>146</sup> *Id.* at 104-13.

<sup>147</sup> The court commissioner was an officer of the court appointed by the circuit judge. The commissioner held his office during the term of office of the appointing judge. *See* WIS. STAT. § 1415 c. 252 (1927).

<sup>148</sup> RAGLAND, *supra* note 81, at 104-06.

<sup>149</sup> In practice, the oral examinations for discovery in Milwaukee were supervised by reporters, whose primary task was to record testimony. The reporters thus resembled the lay examiner appointed by the Court of Chancery in England or the examiner under the Federal Equity Rules. In Milwaukee the parties would call in the commissioner when a dispute arose regarding the propriety of the questioning. *Id.* at 106.

in Madison commissioners had ruled that they had no power to decide objections regarding competency, privilege, or hearsay. In other parts of Wisconsin the perception among lawyers was that the court commissioner was not authorized to rule on objections and that the commissioner only noted objections in the record.<sup>150</sup>

In Missouri, the party served with a notice of deposition was allowed, under certain circumstances, to apply to the court for the appointment of a “special commissioner” to supervise the examination.<sup>151</sup> The option of applying to the court for the appointment of a special commissioner was only available in cities with a population of fifty thousand or more.<sup>152</sup> The special commissioner had “power and authority to hear and determine all objections to testimony and evidence, and to admit and exclude the same, in the same manner and to the same extent as the circuit court might in a trial of said cause before said circuit court.”<sup>153</sup> The special commissioner was “learned in law” and would “preside as an officer of the court at the taking of depositions,” ensuring “that the inquiry might be confined to the legitimate issues of the case and not range over other and impertinent fields.”<sup>154</sup> The option of requesting a special commissioner was thus a method of protecting an examinant from abusive discovery practices: a presiding officer applied the rules of evidence contemporaneously with the taking of deposition testimony.

Ragland found that in several other jurisdictions,<sup>155</sup> the officer in charge of the examination only played a ministerial role, such as swearing in the examinant and recording testimony.<sup>156</sup> To the extent that

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<sup>150</sup> Ragland proposed several explanations for the diversity of opinion in Wisconsin regarding the power of the court commissioners. One explanation was that the courts in Milwaukee were too busy to decide objections arising out of discovery and that therefore the judges there encouraged the commissioners to issue rulings. In Madison, Ragland indicated, the courts *were* able to entertain certifications of commissioners’ decision. *Id.*

<sup>151</sup> MO. REV. STAT. § 5446 (1919).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> State *ex rel.* Wilson v. Burney, 193 Mo. App. 326, 334 (1916).

<sup>155</sup> California, Indiana, Kentucky, New Jersey, North Carolina, Ontario, Quebec, and Texas. RAGLAND, *supra* note 81, at 97.

<sup>156</sup> Ragland described the officer’s powers thus:

[T]he officer in charge is a reporter with power only to swear the witness and preserve orderly conduct of the hearing; he has no power to compel answers or to decide objections to questions; if objections arise which cannot be decided among counsel, the examination is adjourned until a ruling can be obtained from the trial court.

*Id.* In every jurisdiction that Ragland studied, the officer in charge of the examination was responsible for swearing in the examinant. *Id.* at 81.

this type of officer functioned as a stenographer without the power to adjudicate discovery disputes, he played the same role as the examiner in both English and federal equity practice. In contrast, the master-like court commissioner in Wisconsin and the special commissioner in Missouri exercised authority of a quasi-judicial nature.

In jurisdictions in which the officer in charge had no power to rule on objections, the officer would note an objection of counsel in the record. Ragland recounted that, in case of an objection to a question, the lawyer who asked the question and the lawyer who objected to it would argue about the basis for the objection while the officer supervising the deposition played no role in the discussion.<sup>157</sup> Typically the two lawyers would reach an agreement, but the proponent of the question could adjourn the deposition proceedings and bring a motion before the court to compel an answer: “[u]sually they [the lawyers] reach an agreement: the proponent either agrees to withdraw or restate the question or the opponent agrees to allow an answer subject to objection.”<sup>158</sup>

Ragland favored “an assimilation of discovery procedure and deposition procedure . . . .”<sup>159</sup> He praised systems in which anyone authorized by statute to preside over depositions generally was also permitted to preside over depositions for discovery. Ragland had recognized the efficiency of adapting a pre-existing functionary – the person in charge of the procedure to preserve testimony – to play the same role in a proceeding that combined the preservation of potential testimony function with the investigation of potential evidence function. The fact that the federal courts did not employ personnel similar to the commissioners in Wisconsin and Missouri was one of the reasons why the Advisory Committee ultimately rejected a rule expressly modeled on the Missouri rule.<sup>160</sup>

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<sup>157</sup> The practice in Ontario differed. In Toronto, the person in charge of the deposition (the “examiner” even though counsel actually questioned the witness) “[would] enter[] into the discussion with the lawyers as to the propriety of the question and aids a decision.” *Id.* at 100. The examiner in Toronto “exercise[d] limited powers” including the power to order a witness to answer and the power to relieve the witness from answering. If an examinant refused to answer a question, the examiner could not compel an answer, but the court could compel an answer upon a motion by the proponent of the question. *Id.*

<sup>158</sup> *Id.* at 99.

<sup>159</sup> RAGLAND, *supra* note 81, at 97.

<sup>160</sup> See Draft Rule 32(b) and Note, *in* PRELIMINARY DRAFT, *supra* note 104, at 60–61 (alluding to the Missouri rule providing for a special commissioner). For the text of the rule and notes, see Appendix A.

V. SAFEGUARDS AGAINST ABUSES OF THE RIGHT TO ORAL  
EXAMINATION FOR DISCOVERY: THE PROPOSED MASTER-SUPERVISED  
DEPOSITION

*A. The Committee's Anticipation of Demand for Protection Against Overreaching Discovery*

In 1936 the Advisory Committee affirmed that the deposition-discovery provisions of the Federal Rules permitted an “unlimited right of discovery.”<sup>161</sup> Despite Sunderland and Clark’s strong support for expanding discovery, some of the members of the Advisory Committee anticipated a backlash against a liberal right to discovery unless the Committee provided better safeguards. At the Committee’s meeting on February 22, 1936, Mitchell, the chairman of the Committee, stated: “[W]e are going to have an outburst against this discovery business unless we can hedge it about with some appearance of safety against fishing expeditions.”<sup>162</sup> At the same meeting, Robert Dodge, the Boston lawyer, also expressed an awareness of widespread opposition to liberalizing discovery, suggesting that the Committee “cloak” the discovery provisions in such a way as to make them more acceptable to the public.<sup>163</sup> Dodge paraphrased a conversation he had had with two district court judges who were anxious about an unrestricted discovery system. The judges, according to Dodge, had told him: “[we] hope, for heaven’s sake, you are not going to open up this discovery before trial.”<sup>164</sup>

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<sup>161</sup> Note to Draft Rule 32(b) (1936), in PRELIMINARY DRAFT, *supra* note 104, at 61.

<sup>162</sup> Proceedings of Feb. 22, 1936 at 735, CLARK PAPERS, *supra* note 100, box 95. When Mitchell presented the new proposed *Rules* to the A.B.A., he emphasized, perhaps disingenuously, the Committee’s avowed interest in protecting against discovery abuses:

Rules on this subject [discovery] should be carefully drawn to guard against abuse. On the other hand, they should be sufficiently liberal to accomplish the intended purpose. We ask particularly for careful consideration of the proposed rules on this subject. Will the Committee’s proposals sufficiently guard against abuse? Should the right of examination before trial be limited to the parties, or extended to other witnesses? Any suggestions you may make based on practical experience will be gratefully received.

Mitchell, *supra* note 132, at 782.

<sup>163</sup> Dodge remarked: “[I]t must be understood that we have to cloak [the prospective discovery practice] in such a way as to make it popular in those parts of the country where they are totally unfamiliar with it.” Proceedings of Feb. 22, 1936 at 731, CLARK PAPERS, *supra* note 100, box 95.

<sup>164</sup> *Id.* at 730–31. Olney, too, urged that “it should be apparent on the face of the rules that there are safeguards, so that they [the rules] will appeal to the members of the profession who are not acquainted with this [discovery] practice.” *Id.* at 755.

The Committee members expressed concerns about the effect of expanded discovery on public support for the Rules, and about the potential abuse of discovery devices.<sup>165</sup>

*B. Proposal for a Master-Supervised Deposition*

*I. The Committee's Deliberations*

Concerned that discovery tools would be abused by lawyers, George Wickersham, the vice-chairman of the Advisory Committee until his death in 1936, announced in November 1935 that he would propose that the Rules require that depositions be taken “in the presence of some judge or officer having the power to rule on evidence.”<sup>166</sup> Mitchell also supported such a proposal; he believed that “having a master on demand” might “prevent objections from the bar as to fishing expeditions among parties.”<sup>167</sup>

The first preliminary draft of the Rules, proposed in October 1935, did not contain a provision for the appointment of a master to supervise a deposition.<sup>168</sup> In November, the Committee directed Sunderland to draft a rule that provided for the appointment of a master with the power to rule on admissibility.<sup>169</sup> Sunderland included the provision in what was at the time draft Rule 30(c).<sup>170</sup> Under the text Sunderland drafted, however, the option of having a master appointed would have been available only if the party requesting the appointment could “show . . . special and unusual circumstances sufficient to satisfy the court that the deposition cannot be satisfactorily taken” before the default officer who would take down testimony at the deposition.<sup>171</sup> In his Note to draft Rule 30(c)<sup>172</sup> Sunderland indicated that he was not enthusiastic about Wickersham’s proposal. Sunderland emphasized in his Note that, aside from the Wisconsin and Missouri practices that Ragland had

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<sup>165</sup> See *infra* Part V.B.2.

<sup>166</sup> *Proceedings of Advisory Committee on Uniform Rules of Civil Procedure for the District Court of the United States* at 252 (Nov. 4, 1935), in CLARK PAPERS, *supra* note 100, box 94.

<sup>167</sup> *Proceedings of Feb. 22, 1936* at 727, CLARK PAPERS, *supra* note 100, box 95.

<sup>168</sup> Preliminary Draft I (Oct. 15, 16, 25, 1935), CLARK PAPERS, *supra* note 100, box 97.

<sup>169</sup> *Proceedings of Feb. 22, 1936* at 750, CLARK PAPERS, *supra* note 100, box 95.

<sup>170</sup> See Draft Rule 30(c) (Jan. 13, 1936), in TENTATIVE DRAFT II, *infra*, Appendix A.

<sup>171</sup> *Id.*

<sup>172</sup> See Note to Draft Rule 30(c), TENTATIVE DRAFT II, *infra*, Appendix A.

documented,<sup>173</sup> there was no precedent for appointing an officer with the power to decide objections.

On February 22, 1936, the Committee deliberated about whether the Rules should permit an examinant to request that a master with the power to rule on the admissibility of evidence preside at the examination. Sunderland, Mitchell, and the Harvard Law professor Edmund Morgan<sup>174</sup> confirmed at the meeting that, absent the appointment of a master, the Rules contemplated that the officer in charge of the deposition played the same role as the “examiner” in federal equity practice. The officer’s primary responsibility was to record testimony.<sup>175</sup>

In order to placate both those on the Committee who favored unencumbered discovery and those members of the bar who might be apprehensive of fishing expeditions, Mitchell proposed that Rule 30(c) should only apply when the deponent was an adverse party.<sup>176</sup> Monte Lemann, the New Orleans lawyer on the Advisory Committee, objected that this restriction would not allay fears of the potential for abusive discovery.<sup>177</sup> Mitchell then proposed, and Lemann agreed, to “leave it discretionary with the court in other cases.”<sup>178</sup>

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<sup>173</sup> See *supra* Part IV.D.3.

<sup>174</sup> See *supra* note 92.

<sup>175</sup> In response to a worry about the effect of an adversary paying for the officer’s services, Sunderland stated: “as a matter of fact, very little harm will be done, anyway, because these examiners have no power.” Mitchell responded: “Yes; but they have to transcribe, certify, and return the deposition” and Morgan agreed: “They have the power of reducing the thing to writing, and methodizing, so-called, the deposition.” Proceedings of Feb. 22, 1936 at 726-27, CLARK PAPERS, *supra* note 100, box 95.

<sup>176</sup> Mitchell’s comment again underscored his motivation for providing safeguards to the discovery rules:

Might we say that it would be sufficient protection if we require a master to rule on questions only in those cases where the witness to be examined is an adverse party? I thought perhaps if he were just an ordinary witness he could protect himself fully by refusing to testify and standing on his rights. *I think, probably, so long as we are putting this in just to quiet apprehensions of lawyers*, that it would be sufficient if it were limited to a case where you started to examine an adverse party – and by “adverse party” I mean directors, officers, and agents of a corporation or association, and so forth –

*Id.* at 728 (emphasis added).

<sup>177</sup> *Id.* (“If you are really worried about that, as Mr. Wickersham was, I think, very much, I am not sure that your limitations would relieve that fear or allay it . . . [because] you may get a fishing expedition by going around to a bank, or a third person, not my employee, and asking a lot of questions that ought not to be asked.”) Like Mitchell, Lemann distinguished anxieties about the public reception of the proposed discovery practice from his own worries. See *id.* at 728–29 (“I am not subscribing particularly to that fear [of fishing expeditions], but I am making the point that if the fear is entertained,

Following the exchange between Mitchell and Lemann, Sunderland and Morgan made the case against the proposal to allow for a master to rule on the admissibility of evidence at the examination. Sunderland opined that the proposal was unworkable<sup>179</sup> and stressed that authorizing an officer in charge of a deposition to rule on the admissibility of testimony was both “contrary to the universal practice”<sup>180</sup> and would be regressive, restricting the scope of discovery.<sup>181</sup> Mitchell was skeptical that the novelty of a rule allowing for a master required the Committee to reject the proposal.<sup>182</sup>

Sunderland’s claim regarding the lack of precedent for Rule 30(c) was somewhat strained. Although he was correct that the Federal Equity Rules required the officer in charge of an examination to report all testimony notwithstanding objections,<sup>183</sup> those rules applied to depositions on oral or written interrogatories for the purpose of preserving potential testimony. If the officer in charge did not record objectionable testimony, then the court would have no means of deciding whether to suppress that testimony. The Advisory Committee was combining both the preservation of potential testimony and the investigation of potential evidence functions in the deposition procedure. The Committee made the affirmative decision to allow rules that governed the evidence-gathering function – the requirement of preserving objectionable testimony – also to govern the discovery function.

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and you want to avoid it or protect against it, . . . [Rule 30(b) would not] leave it sufficiently protected.”)

<sup>178</sup> *Id.* at 728.

<sup>179</sup> *Id.* at 729. (“As a matter of fact, I do not see how this thing will work anyway.”).

<sup>180</sup> Proceedings of Feb. 22, 1936 at 729, CLARK PAPERS, *supra* note 100, box 95. (“I do not find any authority for these examiners or masters ruling on testimony. The equity rule expressly provides that all evidence taken before an examiner or like officer, together with any objections, shall be saved and returned into court.”). Sunderland, however, did know about the Wisconsin and Missouri practices that Ragland described in *Discovery Before Trial*.

<sup>181</sup> *Id.* at 729–30. In response to Morgan’s comment “I think it would be very unfortunate to let a master rule on evidence,” Sunderland said: “if we put in a thing like this, we would be going backward” and “[i]t would be a serious regression on our part.” *Id.*

<sup>182</sup> See Proceedings of Feb. 22, 1936 at 731, CLARK PAPERS, *supra* note 100, box 95 (Mitchell exclaiming to Morgan: “It may not have been the practice normally to give a master the power to rule on evidence, unless he is going to make findings of fact, but there is no reason on God’s earth why we cannot have a rule [that does give the master the power to rule on evidence].”).

<sup>183</sup> See *supra* Part III.E..

In response to Sunderland's and Morgan's criticisms, Mitchell began to reconsider his support for Wickersham's initial proposal: "I am inclined to think that my suggestion, which was made to quiet the fears of General Wickersham and others, is probably not a sound one."<sup>184</sup> Mitchell's comment spurred more debate.<sup>185</sup>

Monte Lemann suggested that the Committee adopt the New York rule, in which an objection to a question asked during an examination could be referred immediately to the judge.<sup>186</sup> Sunderland rejected Lemann's suggestion on the grounds that "running to the judge" would be "a great nuisance to the courts" and would "not work at all in sparsely settled circuits."<sup>187</sup> Mitchell agreed, pointing out that the judges "might be trying cases, and they would have to stop. They could not do that."<sup>188</sup> Sunderland also referred to the Wisconsin practice, in which it was said that judges did not like being asked to rule on discovery disputes and instead made the examinant "answer, so [the lawyers] do not go to [the judges] much."<sup>189</sup>

Sunderland sought to break the impasse by suggesting a cosmetic rule: "Why can we not put in a provision for a master on application, just to look well, but not put anything about giving the master power to exclude evidence?"<sup>190</sup> Both Lemann and Mitchell thought that Sunderland's idea was unhelpful. Lemann said that because Sunderland's "high-class man" to supervise the deposition<sup>191</sup> would only be able to "sit there and look pleasant," "you might as well have a low-class man."<sup>192</sup>

George Wharton Pepper, a former Senator from Pennsylvania who joined the Committee after Wickersham died in 1936,<sup>193</sup> weighed in and

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<sup>184</sup> Proceedings of Feb. 22, 1936 at 730, CLARK PAPERS, *supra* note 100, box 95.

<sup>185</sup> *See id.* at 730–62.

<sup>186</sup> According to Lemann: "If the master says, 'I think this testimony ought not to go in,' the fellow who wants it to go in would say, 'Let us go right down to the judge now and let him rule on it.' I understand that is what they do in New York." *Id.* at 733–34.

<sup>187</sup> *Id.* at 734.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*; *see also* RAGLAND, *supra* note 81, at 104–06 (describing Wisconsin judges' aversion to adjudicating disputes arising out of depositions).

<sup>190</sup> Proceedings of Feb. 22, 1936 at 735, CLARK PAPERS, *supra* note 100, box 95. Sunderland believed that the question of the master's power to exclude evidence was "really the difficult part." *Id.*

<sup>191</sup> *See id.* (Sunderland suggesting that a "high-class man" could preside over the deposition).

<sup>192</sup> *Id.*

<sup>193</sup> Order, 297 U.S. 731 (1936).

condemned the broad right to conduct a deposition.<sup>194</sup> Pepper worried that a plaintiff might bring a pretextual suit in order to use the Rules to publicly embarrass the defendant.<sup>195</sup> When Mitchell facetiously wondered aloud whether Pepper's fears about public embarrassment stemmed from Pepper's time serving on Senatorial committees,<sup>196</sup> Pepper replied "exactly; and that is where I got a taste of the kind of lawlessness that ruins people's reputations without the opportunity ever to redress the harm that is done."<sup>197</sup> In addition to his vehement opposition to a nearly unlimited right to take a deposition,<sup>198</sup> Pepper also criticized the motivation behind the Committee's attempt to make the discovery rules acceptable to the public.<sup>199</sup> Pepper predicted that the Supreme Court would never approve of the expanded right to discovery that the Committee was then inclined to propose.<sup>200</sup>

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<sup>194</sup> See Proceedings of Feb. 22, 1936 at 735-37, CLARK PAPERS, *supra* note 100, box 95

<sup>195</sup> Pepper said:

[I]n the part of the country I come from, I know perfectly well that this sort of power given to a plaintiff is simply going to be used as a means of ruining the reputation of responsible people. You bring a suit against a man, without any ground whatever—the president of some important company, the president of a utilities company or a bank or something. You take his deposition, have the reporters present, and grill him in the most unfair way, intimating that he is a burglar or murderer, or this, that, and the other. He has no redress, and the next morning the papers have a whole lot of front-page stuff. The case never goes any further. That is all that was intended.

*Id.* at 735-36.

<sup>196</sup> "It is too much like some of these Senate committees you used to sit on. [Laughter]." *Id.* at 736.

<sup>197</sup> *Id.*

<sup>198</sup> Pepper also remarked:

[T]here is anything worse than the use of judicial proceedings for the creation of a forum from which, through the newspapers, to harangue the public. The defendant is perfectly helpless. There is no restraint upon the examination. This business of getting a high-class man to sit there and listen in [referring to the possibility of using masters to superintend depositions] increases the audience for the publication of the slander, but that is all it does.

*Id.*

<sup>199</sup> Proceedings of Feb. 22, 1936 at 736, CLARK PAPERS, *supra* note 100, box 95. ("I do not like the attitude of mind that suggests that the thing to do is to make a vicious practice sound well or look well.")

<sup>200</sup> *Id.* ("It seems to me that the whole thing [broad right to taking depositions] is vicious, and the only reason I am not worried more about it is that I am morally certain that it will never get by the Supreme Court, I do not care how you dress it up.")

Robert Dodge, the Boston lawyer, shifted the topic of discussion to the courts' control over the discovery process.<sup>201</sup> Mitchell, still concerned over the bar's attitude toward the tentative Rules,<sup>202</sup> suggested that a party should be required to get the court's permission before taking a deposition.<sup>203</sup> Morgan countered that the Committee should permit a party to take a deposition as the default rule, but "allow the party who has been served with the notice, for good cause shown, to prohibit the taking of the deposition by the adverse party."<sup>204</sup> Lemann replied that the judge would not have a basis for deciding whether a litigant would be asking "a lot of improper questions."<sup>205</sup> Mitchell, with the support of Pepper, then proposed another form of prior restraint on the taking of depositions, that the judge should be able to specify "the particular things you are going to be allowed to inquire about" by making "an order defining the things you can fish about."<sup>206</sup> Sunderland objected because in New York such orders had led to "an enormous amount of preliminary litigation, which becomes quite a nuisance."<sup>207</sup>

Warren Olney, the San Francisco lawyer, was of the view that the Committee should not design the rules around the less scrupulous members of the bar. Drawing on his experience in California, Olney asserted that the Committee was exaggerating the potential for abuse of the discovery rules.<sup>208</sup> Olney suggested that, instead of the option of

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<sup>201</sup> *Id.* at 736–37. ("In some ways the courts must have control over the proceedings, and the power to check abuses. I think that is more important than any question of references to a master."). Dodge went on to discuss the risks of strikesuits and "nuisance settlements." *Id.* at 737.

<sup>202</sup> *Id.* at 739 ("I think *the bar* would like it better if you were required to get your authority [to take a deposition] from the court in advance.") (emphasis added).

<sup>203</sup> *See id.* at 737.

<sup>204</sup> Proceedings of Feb. 22, 1936 at 737, CLARK PAPERS, *supra* note 100, box 95.

<sup>205</sup> *Id.* at 738.

<sup>206</sup> *Id.* at 740.

<sup>207</sup> *Id.* Pepper also perceived difficulties in circumscribing the scope of the examination. He approved of the proposal for the optional appointment of a master, but he stated: "I do not know by what yardstick the master will measure the relevancy of questions put, because, by the terms of the proposition, no issue has been framed, and it is as wide-open as the sky." *Id.* at 752–53; *See also* text accompanying notes 128–130, *supra*. Pepper doubted the feasibility of restricting the scope of the examination to those matters relevant to the pleadings because "the complaint may be full of matter which, upon motion, will be stricken out as scandalous and impertinent, but this deposition will take place before there is ever a chance to make such a motion as that." Proceedings of Feb. 22, 1936 at 753, CLARK PAPERS, *supra* note 100, box 95.

<sup>208</sup> *Id.* at 742. ("[In California] [t]here is the very freest right out there to take the deposition of an adverse party, and has been ever since I can remember. It is not abused in the way in which it has been described here that there is fear that it might be."). Furthermore, Olney remarked that even though there were "members of the bar" who had

requesting the appointment of a master, a party should have the right to apply to the court to terminate the deposition if the procedure was being used for an improper purpose, such as harassment.<sup>209</sup>

At the end of the debate over Sunderland's draft of tentative Rule 30(c), the Committee voted to instruct Sunderland to revise the rule in two respects. First, the option of having a master with the power to rule on the admissibility of evidence would be available only in the case of a deposition of an adverse party. Second, in the case of a deposition at which a master did not preside, a party that alleged abuse would be able to apply to the court to "correct the situation" and to have the right to take a deposition "checked or limited."<sup>210</sup>

In May 1936 the Advisory Committee distributed the Preliminary Draft of the Rules<sup>211</sup> "to the Bench and Bar for criticism and suggestions."<sup>212</sup> Sunderland's revised version of the proposal to provide for a master to supervise a deposition – Rule 30(c) in the Committee's *Tentative Draft II*<sup>213</sup> – appeared as Rule 32(b) in the publicly circulated Preliminary Draft.<sup>214</sup>

## 2. Private and Public Criticism of the Liberal Right to Discovery in the *Rules*

The Committee received correspondence from lawyers and associations of lawyers in response to the Preliminary Draft. The Clark Papers include two bound volumes of these suggestions, dating from the period between June and December 1936.<sup>215</sup>

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"no scruples in the world, and they live very largely, to be plain, by blackmail," lawyers in California "have not had this particular trouble." *Id.* at 744.

<sup>209</sup> Proceedings of Feb. 22, 1936 at 756, CLARK PAPERS, *supra* note 100, box 95. A version of Olney's suggestion would become FED. R. CIV. P. 30(d) (1938). *See* Appendix A, *infra*.

<sup>210</sup> Proceedings of Feb. 22, 1936 at 760-62, CLARK PAPERS, *supra* note 100, box 95.

<sup>211</sup> PRELIMINARY DRAFT, *supra* note 104, at iv.

<sup>212</sup> *Id.* at iv.

<sup>213</sup> *See infra* Appendix A.

<sup>214</sup> *See id.* at 60-61 (reprinted at Appendix A, *infra*).

<sup>215</sup> *See* 13 *Preparatory Papers*, CLARK PAPERS, *supra* note 100, box 101 ("Suggestions on the Preliminary Draft of Rules of Civil Procedure: Received from Local Committees, District Court Committees, Circuit and District Judges, Members of the Bar, and others. June-December 1936. A – G"); 14 *Preparatory Papers*, CLARK PAPERS, *supra* note 100, box 102 ("Suggestions on the Preliminary Draft of Rules of Civil Procedure: Received from Local Committees, District Court Committees, Circuit and District Judges, Members of the Bar, and others. June-December 1936. H – Z"). I cite the page numbers of the correspondence therein because the volumes themselves are not consecutively paginated.

The majority of the comments regarding the discovery rules were negative. Most writers focused on the then Rule 31, entitled “Depositions; Their Form; Purposes; Scope; Use and Effect; Costs”. The writers feared “fishing expeditions”<sup>216</sup> in which litigants would be able to annoy adversaries<sup>217</sup> and might be tempted to concoct false evidence.<sup>218</sup> One commentator speculated that adopting the Rules would increase the

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<sup>216</sup> See, e.g., Letter from E. J. Marshall of Marshall, Melhorn and Marlar, Toledo, Ohio (July 31, 1936) at 1 in 14 *Preparatory Papers*, *supra* note 214 (“Your Committee understands ‘discovery’ to include fishing expeditions.”). Marshall was vehement in his objections:

You [William D. Mitchell] and perhaps I might be decent and reasonable in the taking of depositions but keep in mind that you are setting up a procedure to be used by every crook and shyster who has a license to practice law and you dare not assume that they will be decent . . . .

I can see that one, such as my good friend Sunderland, who has spent his life in the cloister, reading and teaching the Canons of Ethics might honestly believe that the proposed procedure would not be abused if put into the hands of everyday working lawyers, but I have seen it in actual operation and know what will happen. I am not guessing. I am not reading the answer in the stars . . . .

I insist that the court must have the full, unfettered control and regulation of all proceedings from the beginning to the end and your draft of rules should so provide in words of one syllable that no one can misunderstand.

*Id.* at 2–3.

<sup>217</sup> See, e.g., Letter from the Committee of the Bar of the Southern District of Alabama (Aug. 14, 1936) at 6, in 13 *Preparatory Papers*, *supra* note 214 (the rule permitting unlimited discovery (Rule 31 in PRELIMINARY DRAFT, see Appendix A) “seems to us to be highly vexatious in this particular and in all likelihood would result in every case in a preliminary fishing expedition and then a trial”). The State Bar of California advocated for the elimination of Rule 31(c):

We do not believe that a party to an action should have the right to go on a fishing expedition and call in as witnesses in a deposition any person who he may think can shed any light on the subject and thereby discommode persons not interested in the particular litigation. . . . The fishing permitted is on entirely too great a body of water.

State Bar of California Committee Report (Aug. 10, 1936) at 1, 2, in 13 *Preparatory Papers*, *supra* note 214.

<sup>218</sup> See, e.g., Letter from John H. Cantrell of Spielman, Cantrell & McCloud, Oklahoma City (July 23, 1936) at 2, in 13 *Preparatory Papers*, *supra* note 214 (“To make it too easy to engage in ‘fishing expeditions’ creates the temptation upon the part of an over-zealous advocate to fabricate evidence to contravene and destroy the evidence of the opponent”).

likelihood of suits intended to prepare for larger lawsuits.<sup>219</sup> Even commentators who were avowed supporters of expanded discovery believed that the Advisory Committee's preliminary draft permitted overly expansive discovery.<sup>220</sup>

A group of insurance executives provided a comprehensive critique of the discovery rules.<sup>221</sup> They reasoned that by permitting depositions of both parties and non-parties, and by permitting depositions to be taken for the dual purposes of discovery and for use as evidence (or both), the proposed rules would result in "obvious fishing expedition expeditions" and promote "other evils."<sup>222</sup>

The Association did not believe that the protections offered by Rule 32(b) were adequate. The Association recommended, instead, that inquiry should be limited to any matter that was "material and necessary" to the pending action, rather than merely "relevant."<sup>223</sup> The Association further suggested that the appointment of a master, which was an option

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<sup>219</sup> Comments by New York Court of Appeals Judge Edward R. Finch at ABA Meeting in Boston (Aug. 28, 1936) at 1, in 13 *Preparatory Papers*, *supra* note 214 ("A person asserting a claim should not be given all the advantages here proposed unless at the same time the rights of defendants are adequately safeguarded."); *Id.* at 3 (noting that strikesuits to prepare for a larger law suit "will be greatly encouraged by the adoption of the preliminary draft"). Finch believed that the expanded discovery devices under the *Rules* would harm both plaintiffs and defendants. Unless the federal courts adopted a loser-pays system, defendants would be forced to pay for the settlement of "so-called speculative litigation" because it would be cheaper than resisting, and a poor plaintiff would be forced by a wealthy defendant "to accept an unfair settlement [for a meritorious claim]" because of the great expense of discovery. Edward R. Finch, *Some Fundamental and Practical Objections to the Preliminary Draft of the Rules of Civil Procedure for the District Courts of the United States*, 22 A.B.A. J. 809, 810-11 (1936).

<sup>220</sup> See, e.g., Letter from Charles A. Beardsley of Fitzgerald, Abbot & Beardsley, Oakland, CA (June 19, 1936) at 2, in 13 *Preparatory Papers*, *supra* note 214. ("Personally I am a firm believer in the liberalization of the rules of evidence, but it seems to me that these provisions [Rule 31] are entirely too liberal.")

<sup>221</sup> Letter from Association of Casualty and Surety Executives (received by the Advisory Committee on Oct. 8, 1936) at 1-3, in 13 *Preparatory Papers*, *supra* note 214.

<sup>222</sup> *Id.* at 1. The "evils" included: perpetuating "blackmail and extortion"; facilitating "strike suits for the purpose of unearthing evidence to form the basis of large lawsuits"; incentivizing plaintiff's lawyers "to 'find' witnesses to offset the testimony given by defendants' known witnesses"; allowing plaintiffs to obtain, without cost to themselves, records of companies that "may have been acquired by the defendant at great expense"; threatening to waste executives' time in order to "demand and possibly obtain much higher amounts in settlement than is now the case"; and the risk of champerty because "an unscrupulous attorney for a nominal plaintiff could use this device to obtain the names and addresses of possible serious cases and thus contact those persons, in which event the procedure would . . . stimulate litigation instead of reducing it." The Association claimed that the rules overly disfavored the defendant because the plaintiff might have no records and could claim not to know of any witnesses. *Id.* at 1-2.

<sup>223</sup> *Id.* at 2.

under Rule 32(b) only if the court granted a party's request for such an appointment, should be a mandatory feature of deposition practice.<sup>224</sup>

Still other commentators recommended revisions to Rule 32(b). One commentator objected to the Rule 32(b) master's power entirely to exclude evidence. Tenth Circuit Judge George T. McDermott wrote that the master should preserve the substance of inadmissible testimony, unless it was privileged.<sup>225</sup> The Federal Bar Association of New York, New Jersey, and Connecticut suggested that the Committee should call the person authorized to hold the examination under Rule 32(b) a "commissioner" because a "master reports findings and makes recommendations."<sup>226</sup> A lawyer from Ohio, E. J. Marshall, suggested that the court should have the power to issue protective orders or terminate a deposition taken in bad faith.<sup>227</sup> His arguments were similar to those that Olney had made at the Committee's February 1936 meeting.<sup>228</sup>

The compilation<sup>229</sup> of all the comments that the Committee received on the May 1936 Preliminary Draft included only one comment that advocated eliminating Rule 32(b) entirely.<sup>230</sup>

According to Edward Hammond, a member of the Committee's staff,<sup>231</sup> some lawyers worried about who would pay the master's fee whereas others expressed concerns about the master's authority to

<sup>224</sup> See *id.* at 3 (proposing that all examinations "should be made before a competent and responsible officer, or provision should be made for the determination of objections by a Judge or properly qualified Referee or Master.").

<sup>225</sup> See Letter from George T. McDermott (Sept. 9, 1936) at 3, in 14 *Preparatory Papers*, *supra* note 214 ("In hearings before masters, I think the substance of Equity Rule 46 should be preserved to the effect that where evidence is offered and excluded, the court shall preserve the substance thereof, except where the evidence is excluded on the ground of a privileged communication.").

<sup>226</sup> Federal Bar Ass'n of N.Y., N.J. & Conn. Committee Report (Aug. 25, 1936) at 14, in 13 *Preparatory Papers*, *supra* note 214.

<sup>227</sup> Letter from E. J. Marshall of Marshall, Melhorn and Marlar, Toledo, Ohio (July 31, 1936) at 1 in 14 *Preparatory Papers*, *supra* note 214 (urging that the Committee "provide very definitely that the court may make any sort of an order and give any directions that appear to be proper to regulate and control the taking of the depositions, and to see that they are fairly taken, or to order that the depositions be not taken.").

<sup>228</sup> See *supra* text accompanying note 208.

<sup>229</sup> See 16 *Preparatory Papers*, in CLARK PAPERS, *supra* note 100, box 103 ("Abstracts, Oct. 1935-Jan. 1937") (including comments and objections to the proposed Rules).

<sup>230</sup> Letter from Russell Wiles (June 19, 1936), in 16 *Preparatory Papers*, *supra* note 228. Wiles, a Chicago lawyer, recommended that the Committee eliminate draft Rule 32(b) because allowing a master to exclude evidence at the discovery stage would be disruptive to the litigation.

<sup>231</sup> Report of the Advisory Committee, in PROPOSED RULES, *supra* note 105, at vii.

restrict the freedom of discovery.<sup>232</sup> In fact, not all the reactions to Rule 32(b) were negative. At an ABA meeting on August 26, 1936, a New York lawyer, Martin Conboy, lamented that “the proposed rule 31 goes the full distance in permitting unlimited discovery before trial.”<sup>233</sup> In order to mitigate such broad right to discovery, Conboy urged that “an oral examination by counsel” should “require the right to judicial determination of the propriety of any question before answer, particularly upon the examination of an adverse party.”<sup>234</sup> Conboy recommended that the judge should play a more active role in controlling the deposition either directly or by means of a master.<sup>235</sup>

*C. The Committee’s Ultimate Rejection of the Proposal to Provide for a Master-Supervised Deposition*

On October 25, 1936, the Committee voted to strike Rule 32(b) from the draft Rules.<sup>236</sup> Instead of allowing a party to request that a judge or master preside over a deposition, the Committee decided to grant the judge two means of supervisory control. First, the drafters empowered the court to issue a protective order “upon motion seasonably made by any party or by any person to be examined and upon notice and for good cause shown.”<sup>237</sup> Second, the court in which the case was

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<sup>232</sup> Edward H. Hammond, *Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure*, 23 A.B.A. J. 629, 632 (1937). (“There was considerable objection by the profession to the master rule, particularly to the provision giving the power to rule on evidence and it was thought that the power to exclude evidence might be so exercised as to hamper the desired freedom of discovery. The matter of costs in the way of master’s fees and expenses might also act as a deterrent to the use of discovery and would give an unfair advantage to those more able to pay them.”); see also Brazil, *supra* note 75, at 168 (noting that the papers preserved in the Clark Papers do not detail the objections to which Hammond referred nor the Committee’s consideration of them).

<sup>233</sup> See Martin Conboy, *Depositions, Discovery and Summary Judgments: As Dealt with in Title V of the Proposed Rules of Civil Procedure for the Federal Courts*, 22 A.B.A. J. 881, 883 (1936).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 883–84. (“The rules contain no provision for the exclusion of objectionable questions before answer, if asked in good faith and in the absence of a master . . . . If resort to the Federal judges is permitted, perhaps they can prevent abuse of the privilege [to discovery] by either the interrogator or the objector. Perhaps the judge should have the power to appoint a master on his own motion, if either objector or interrogator should be unduly aggressive. Power might even be conferred upon the judge to decide who should advance the expense of the master in such cases.”).

<sup>236</sup> Proceedings of the Advisory Committee (October 25, 1936) at 2, in CLARK PAPERS, *supra* note 100, box 96 (notation next to Rule 32(b) (“Depositions Before a Master”) stating: “It was agreed that 32(b) be stricken out.”).

<sup>237</sup> FED. R. CIV. P. 30(b) (1938) (amended 1993), *infra*, Appendix A.

pending was permitted, in addition to a number of enumerated options, “to make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.”<sup>238</sup>

A further means of regulating the deposition was a provision that “at any time during the taking of the deposition . . . any party or the deponent” could make a motion to the court for an order to terminate the taking of the deposition, or to issue a protective order limiting the “scope and manner of the taking of the deposition.”<sup>239</sup> In order to prevail in seeking such an order, the movant would have to show “that the examination is being conducted in bad faith, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party.”<sup>240</sup>

The Rules did not provide for an officer with authority to apply the rules of evidence during the course of the deposition. With the exception of evidentiary privileges, the rules of evidence did not limit what an adversary could discover. The rules of evidence would still regulate what testimony could be admitted at trial.<sup>241</sup>

As part of his public-relations effort to the Bar, Mitchell reported in the *American Bar Association Journal* that the protections available under Rules 30(b) and (d) were superior to those that would have been available under Rule 32(b).<sup>242</sup> In the same journal, Hammond, the

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<sup>238</sup> *Id.* Excessive cost was not a basis for seeking a protective order. See *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 YALE L.J. 117, 138 (1949) (recommending the inclusion of “expense” as a basis for protective orders under Rules 30(b) and (d)).

<sup>239</sup> FED. R. CIV. P. 30(d) (1938) (amended 2000), *infra*, Appendix A.

<sup>240</sup> *Id.* Perhaps to discourage frivolous motions for orders to terminate depositions, the Rule also provided: “In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.” *Id.*

<sup>241</sup> The Committee decided that, instead of providing for an officer who could contemporaneously control the deposition, the judge would, at the request of parties, supervise the discovery process. For one federal judge’s description of the judicial role under the Rules’ discovery provisions, see Irving R. Kaufman, *The Philosophy of Effective Judicial Supervision Over Litigation*, 29 F.R.D. 207, 213 (1962). For a later assessment of the effectiveness of judicial control over discovery, see Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions* 6 AM. B. FOUND. RESEARCH J. 873 (1981).

<sup>242</sup> William D. Mitchell, *Some of the Problems Confronting the Advisory Committee in Recent Months—Commencement of Actions—Effect of Findings of Fact in Cases Tried by Court Instead of Jury, Etc.*, 23 A.B.A. J 966, 969 (1937). (“We [the Advisory Committee] have stricken out the provision that allowed the party to be examined to demand the appointment of a master to supervise the examination. On the other hand, we have fortified the provisions for protection against improper examinations and fishing expeditions. There are now adequate provisions allowing a party or a witness to apply to the court to limit the scope of the examination or to terminate it entirely if the privilege is being abused.”)

Committee staff member, also emphasized that, despite the elimination of Rule 32(b), more than adequate protections against abusive discovery remained in the Rules, from the court itself.<sup>243</sup>

The cost of engaging a master played a significant role in the Committee's ultimate rejection of draft Rule 32(b). In addition to Hammond's reference in 1937 to such concerns on the part of the bar,<sup>244</sup> Mitchell was aware that masters' costs would affect the feasibility of a discovery system that employed them. In November 1935, Wickersham and Dodge both supported the possibility of importing the English "Summons for Direction"<sup>245</sup> – the English equivalent of a pretrial conference under Rule 16 – into American pretrial practice.<sup>246</sup> In response, Mitchell cautioned that Congress would not be willing to appropriate funds to pay for the standing masters that such a procedure required.<sup>247</sup> In a 1937 article, Mitchell explained that standing masters in England were civil servants, paid from state funds. "[I]n the United States the district courts have standing masters, but their compensation is not paid out of the public treasury, and if their services are used their compensation must be paid by litigants and it would be out of line with American ideas to compel the litigants to pay the compensation of a master conducting pre-trial proceedings."<sup>248</sup>

The Advisory Committee did not propose what would have perhaps been a more effective means of deterring strike suits and preventing abusive discovery practices: a loser-pays system. At a 1937 American Bar Association meeting, Mitchell described New York Court of Appeals Judge Edward Finch's endorsement of such an approach at the ABA's

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<sup>243</sup> Hammond, *supra* note 231, at 631 (noting that the protection afforded to parties in the *Preliminary Draft* "of having the taking of the deposition stopped if it is not being conducted in good faith or is being conducted for the purpose of annoying, embarrassing or oppressing a party, has been retained, in improved form, (Old Rule 32(c)) and that protection has been extended to witnesses. (Rule 30(d))"); *see also id.* at 632 ("It is thought that the provisions for the protection of parties and witnesses just mentioned will afford at least as much protection as was intended to be afforded by the master under the old rule. Furthermore, that protection will now come directly from the court itself.").

<sup>244</sup> *See supra* note 231.

<sup>245</sup> *See supra*, note 112 and accompanying text.

<sup>246</sup> Proceedings of the Advisory Committee (Nov. 4, 1935) at 252, *in* CLARK PAPERS, *supra* note 100, box 94.

<sup>247</sup> *Id.*

<sup>248</sup> Mitchell, *supra* note 241, at 970. Mitchell reiterated: "[N]o rule can be adopted which assumes that Congress will appropriate money to pay masters for such service." *Id.* *See also* Brazil, *supra* note 75, at 171 n. 190 ("[In American practice] we have no trained masters").

1936 meeting.<sup>249</sup> Mitchell explained that the Advisory Committee had declined to make “any substantial change in the present basis for taxing costs or disbursements” because any such reform is “a matter for Congress and not properly embodied in the proposed rules of practice of procedure.”<sup>250</sup> Mitchell suggested that “in places like New York City,” “where the conditions are admittedly bad and many dishonest actions are brought in the courts, the rules relating to discovery and examination before trial offer opportunities to lawyers of low ethical standards,” the “remedy is an improvement in the machinery for disbaring or disciplining lawyers guilty of misconduct.”<sup>251</sup> Given the Committee’s constraints, Mitchell believed that improving the self-regulatory regime of the legal profession was a better way to prevent abuse of the discovery system than a loser-pays system.

#### *D. Congressional Testimony Regarding the Relationship Between Jury Trial and the Discovery Provisions in the Final Draft of the Rules*

In 1938 both the House and the Senate Committees on the Judiciary held hearings on the new Federal Rules.<sup>252</sup> Under the Enabling Act, the Rules would come into force unless the Congress took “affirmative advance action.”<sup>253</sup>

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<sup>249</sup> See *supra* note 218; Mitchell, *supra* note 241, at 969 (reporting that Judge Finch’s “principal suggestion was that the law should punish the plaintiff who brings a strike suit by requiring him to pay not merely the ordinary costs, but *all the expenses of the defendant, including reasonable counsel fees, if the defense is successful.*”) (emphasis added).

<sup>250</sup> Mitchell, *supra* note 241, at 969.

<sup>251</sup> *Id.*

<sup>252</sup> See *Rules of Civil Procedure for the United States District Courts: Hearings Before a Subcomm. of the Comm. on the Judiciary United States Senate, 75th Cong., 3rd Sess., on S.J. Res. 281, A Joint Resolution To Postpone the Effective Date of the Rules of Civil Procedure for the District Courts of the United States, Part 2, 75th Cong. 29 (1938)* [hereinafter *Senate Hearings*]; *Rules of Civil Procedure for the District Courts of the United States: Hearings Before the Comm. on the Judiciary House of Representatives, 75th Cong., 3d Sess., with Regard to The “Rules of Civil Procedure for the District Courts of the United States,” Adopted by the Supreme Court of the United States Pursuant to the Act of June 19, 1934 (48 Stat. 1064) and on H.R. 8892, 75th Cong 1 (1938)* [hereinafter *House Hearings*]

<sup>253</sup> *House Hearings, supra* note 252, at 1 (Statement of Hatton W. Summers, Chairman). In fact, some of the Federal Rules, once enacted, were on at least one occasion applied to an action pending before the effective date of the Rules. See, e.g., *Columbia Metaloy Company v. Bank of America* (N.D. Cal, Nov. 7, 1938) (Rule 26(a), permitting taking of depositions without leave of court after answer is filed, applied to action pending before effective date of the Federal Rules of Civil Procedure). *Columbia Metaloy* was cited in *Decisions on the Federal Rules of Civil Procedure: From Bulletins II, III, IV and V Issued by the Department of Justice*, 24 A.B.A. J. 984, 986 (1938).

At the hearing before the Senate Judiciary Committee, two D.C. lawyers, Challen B. Ellis and Kahl K. Spriggs, testified that the expanded discovery regime under the new Federal Rules had radical implications for the right to jury trial under the Seventh Amendment. Ellis noted that, overall, the Rules established the private exercise of judicial powers: “These [new] rules put power in the hands of the parties which even in equity cases are only in the hands of the court.”<sup>254</sup> The parties to a suit could engage in a lengthy discovery process in which each side could deploy any number of discovery devices, with a limited role for the judge.

Spriggs argued that the Rules endangered the existence of the jury trial. Spriggs submitted to the Senate Judiciary Committee a memorandum entitled “Analysis of Some of the Rules which Particularly Affect or Change the Nature of Trial by Jury.”<sup>255</sup> In his report, Spriggs concluded:

In general, the various powers of discretion reposed in the court under the new rules, together with the power of every litigant to try the case piecemeal, serve to whittle down the right of trial by jury. Heretofore the theory has been that a case may be submitted at one time through the medium of oral testimony and in open court, except in the infrequent instances in which depositions are used. Now, by a kind of inquisition conducted under rule 26, interrogatories under rule 33, discovery under rule 34, and admission of facts under rule 36, together with the consequences imminent under rule 37, there is left little further to be done.<sup>256</sup>

Whereas before the 1938 Rules the right to discovery was a limited right to gather information that would help a party prepare its case for trial, Spriggs recognized that, under the Rules, the greatly expanded right to discovery could eliminate altogether the need for a jury trial.<sup>257</sup>

Spriggs may have been correct that the rules he alluded to were intended to reduce the frequency of jury trials. Sunderland, who drafted

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<sup>254</sup> *Senate Hearings*, *supra* note 252, at 42.

<sup>255</sup> *Id.* at 48.

<sup>256</sup> 83 CONG. REC. 8481 (June 8, 1938) (memorandum regarding the effect of the *Federal Rules* on substantive rights, submitted by Kahl K. Spriggs to Senate Judiciary Committee). Spriggs’s memo was also submitted to the Committee. *See Senate Hearings*, *supra* note 252, at 52.

<sup>257</sup> As Subrin has described, in October 1936, the Patent Section Committee of the American Bar Association conveyed their concerns to the Advisory Committee that “the new rules would detract from the essential goal of the Equity Rules to have trials in open court; [the Patent Section Committee] did not think their concerns were ‘peculiar to the practice of patent law.’” Subrin, *supra* note 10, at 731.

the discovery rules that Spriggs criticized, had in 1925 described the civil jury trial as “the most archaic, cumbersome, expensive and inefficient means of trying cases that could well be devised.”<sup>258</sup> Prior to serving as Chief Justice, Charles Evans Hughes had also advocated fewer jury trials, suggesting that jury trials be replaced by bench trials, rather than by a permissive pretrial discovery regime.<sup>259</sup> Notwithstanding criticisms of the Rules’ discovery provisions,<sup>260</sup> the Rules came into force on September 16, 1938.<sup>261</sup>

## VI. CONCLUSION

A striking attribute of the American deposition is that opposing counsel conducts the questioning in the absence of a judicial officer. Because of the novelty and centrality of the deposition procedure, I have looked for the origins of the absence of an officer with authority to rule on evidentiary objections. I have determined that the Advisory Committee considered providing such an officer in the Rules, but

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<sup>258</sup> Edson R. Sunderland, *Cooperation Between the Bar and the Public in Improving the Administration of Justice*, 1 Ala. L.J. 5, 8 (1925). “If one should deliberately search for a system of trial which would open the widest door to sympathy, prejudice, chance and ignorance, I do not know how he could improve on our present jury system.” *Id.*

<sup>259</sup> *Do Away With Trial By Jury, Hughes Urges*, CHICAGO DAILY TRIBUNE, Dec. 7, 1928 at 11.

<sup>260</sup> Ellis testified:

Why should the defendant be required to answer under oath plaintiff’s claims on penalty of punishment? Why should this be required of the defendant, when the plaintiff is not even required to state his claim on oath? Every defendant in a law case is ordinarily permitted to require the plaintiff to prove his case, and not be required to prove his case for him. Why should all this be allowed? The facts thus extorted from the defendant may be “relevant,” although inadmissible as evidence and wholly unnecessary.

*Senate Hearing, supra* note 252, at 47. Spriggs testified through his memorandum: “Rule 26 goes further, it is believed, toward permitting a ‘fishing expedition’ to be indulged in concerning matters which may or may not be admissible in evidence than has ever been sanctioned by Congress in a jury action.” *Id.* at 51.

<sup>261</sup> LETTER FROM THE ATTORNEY GENERAL TRANSMITTING THE “RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES”, ADOPTED BY THE SUPREME COURT OF THE UNITED STATES PURSUANT TO THE ACT OF JUNE 19, 1934, CH. 651, *in* RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (JANUARY 3, 1938 – REFERRED TO THE COMMITTEE ON THE JUDICIARY AND ORDERED TO BE PRINTED) at v); *see also* 83 CONG. REC. 8473. Justice Brandeis did not approve of the new Federal Rules. When Chief Justice Hughes transmitted the new Rules to Attorney General Cummings on December 20, 1937, Hughes wrote in his covering letter: “I am requested to state that Mr. Justice Brandeis does not approve of the adoption of the rules.” H.R. DOC. NO. 460 (1938) at v. Subrin has attributed the ultimate acceptability of the *Rules* at the hearings to the “brilliance of the advocacy before Congress” by Edgar Tolman and William Mitchell. *See* Subrin, *supra* note 10, at 740–43.

decided in October 1936 that it would be unworkable to provide an examinant with the right to request that his examination be supervised by a master with the power to rule on the admissibility of evidence.<sup>262</sup>

The modern American deposition traces back to evidence-gathering methods in equity practice, in which an agent of the court would examine a witness by administering party-propounded written interrogatories outside the presence of the parties and of counsel. In mid-nineteenth-century federal practice, very limited pretrial discovery existed. After 1842, the Federal Equity Rules authorized a party to ask questions of an adversary, in the presence either of an examiner who merely recorded testimony or of a master who played a more collaborative role with the party's counsel. By the end of the nineteenth century, the examiner presided over examinations to gather evidence, but had no power to rule on admissibility.

When the Advisory Committee merged the examination for the preservation of potential testimony with the examination for discovery, the lack of existing judicial personnel played a major role in the Committee's decision not to provide for an officer to apply the rules of evidence at the examination itself.<sup>263</sup> If standing masters had continued

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<sup>262</sup> Brazil concludes that federal judges may rely on the judiciary's "inherent power" to appoint pre-trial special masters to handle discovery tasks. See generally, Brazil, *supra* note 75. Irving Kaufman, a federal judge, has supported the use of masters to preside at the taking of depositions:

For our purposes, the significance of history lies not in whether the Master was in fact conceptually regarded as a judge or clerk. It is to be found rather in the fact that the Master has traditionally been able to dispose of the more routine and ministerial duties thereby freeing the judge for the more pressing trial work. Consider, if you will, the most universally accepted extra judicial officer now employed in this country—the Referee in Bankruptcy. The Bankruptcy Referee was our response to the burgeoning bankruptcy business that deluged the courts in the last century. It was apparent early in our history that to invest exclusive and nondelegable jurisdiction over the administration of bankruptcy laws in the courts themselves would seriously impede the effective judicial handling of equally important matters. The same practical considerations should govern our discussion today.

Irving R. Kaufman, *Use of Masters to Preside at the Taking of Depositions*, 22 F.R.D. 465, 467–68 (1958).

<sup>263</sup> The establishment of Federal Magistrates in the 1960s could have been an opportunity to resurrect the Committee's draft Rule 32(b). Magistrates could have presided over pretrial depositions. Under the *Magistrates Act*, magistrates are appointed to office by the district courts. Section 636(b) of the Act, which is the source of the magistrate's civil authority, empowered the magistrate, when authorized by local rule, to perform such duties "as are not inconsistent with the Constitution and laws of the United States." The Act suggested that the magistrate (1) perform the fact-finding function of the special master as set forth in the Federal Rules of Civil Procedure, (2) assume the role

to be in widespread use in the federal system by the time the Advisory Committee was meeting in the 1930s, there might have been a role for them under the *Federal Rules*.<sup>264</sup>

The evidence-gathering purpose of the examination at equity meant that all objectionable testimony was recorded. If such testimony were excluded on the basis of an objection, the judge would not be able, at the later stage of the litigation, to review the decision to exclude. Because the deposition under the 1938 *Federal Rules* also had an evidence-gathering function, the same logic dictated that testimony could not be excluded. The law of evidence plays no role at the pretrial deposition because no judge is present.

Contemporaries recognized the radical nature of discovery provisions in the *Federal Rules*. Some lawyers anticipated that expanded discovery would displace some trials by clarifying fact issues in the pretrial process.<sup>265</sup> The cost of discovery might also function to promote settlement. In 1932 Sunderland had alluded to the “widespread fear of liberalizing discovery” because “hostility to ‘fishing expeditions’ before trial is a traditional and powerful taboo.”<sup>266</sup> By 1947 the Supreme Court was endorsing wide-ranging discovery:

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of pretrial assistant (taking on duties similar to those of the English master) and (3) review applications for post-trial relief made by individuals convicted of criminal offenses.

Congress was careful to state, however, that the Act’s enumerated suggestions do not exhaust the possible duties that the magistrate may perform. The legislative history of the Act indicates that Congress did not intend to limit the magistrates’ duties to those enumerated:

Proposed 28 U.S.C. 636(b) mentions three categories of functions assignable to magistrates under its provisions. The mention of these three categories is intended to illustrate the general character of duties assignable to magistrates under the act, rather than to constitute an exclusive specification of duties so assignable . . . .

*Commentary on the Magistrates Act*, H.R. REP. NO. 1629 (1968) at 19. See generally, Linda J. Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1299–1300 (1975) (describing the possible duties that a magistrate may perform).

<sup>264</sup> For a discussion of post-1938 proposals to establish standing masters, paid from public funds, to supervise discovery, see Note, *Developments in the Law: Discovery*, 74 HARV. L. REV. 940, 1006–07 (1961).

<sup>265</sup> John Langbein has recently provided an excellent analysis of the vanishing trial in the United States. Langbein argues that expanded discovery (including, *inter alia*, the absence of a judge or judge-like officer from the oral deposition) has rendered trial obsolete. See *Disappearance of Civil Trial*, *supra* note 5, at 546, 572.

<sup>266</sup> Edson R. Sunderland, *Foreword*, in RAGLAND, *supra* note 81, at iii. In a 1980 survey of 180 civil litigators in Chicago, the most common terms used to describe the state of discovery was “overdiscovery” and “harassment.” Wayne D. Brazil, *Civil Discovery: Lawyers’ Views of Its Effectiveness, Its Principal Problems and Abuses*, 5

[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of “fishing expedition” serve to preclude a party from inquiring into the facts underlying the opponent’s case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.<sup>267</sup>

Amendments to the discovery rules in 1970 and 1993 further expanded the right to discovery.<sup>268</sup> The mandatory disclosure rules provided for near-mandatory discovery without requiring a formal request for discovery.<sup>269</sup> The 1938 Advisory Committee’s decision not

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AM. B. FOUND. RESEARCH 787, 830-31 (1980). According to one Chicago lawyer, “discovery is too much of a game to see how much you can hide.” *Id.* at 824.

<sup>267</sup> *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). It is worth noting that in *Hickman* the Supreme Court upheld the attorney work-product doctrine, which protects lawyers’ mental impressions and strategies from discovery:

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the ‘Work product of the lawyer.’ Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

*Id.* at 510–11.

The work-product doctrine has yielded attempts to “play games” to which the Rules sought to put an end. *See, e.g.,* Liesa L. Richter, *Corporate Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver*, 76 *FORDHAM L. REV.* 129 (2007) (describing attempts by corporations to use selective waiver to cooperate with the government and yet protect themselves from shareholder derivative suits and class action securities suits).

<sup>268</sup> Advisory Committee’s Statement Concerning Amendments of the Discovery Rules, 48 *F.R.D.* 487 (1970); *FED. R. CIV. P.* 26 (1993).

<sup>269</sup> *See* *FED. R. CIV. P.* 26 (1993). In his initial draft of the discovery rules, Sunderland had included a method of forcing an adversary “to furnish adequately descriptive lists of documents, books, accounts, letters or other papers, photographs, or tangible things, which are known to him and are relevant to the pending cause or any designated part

to provide a master to supervise a deposition was a significant, and overlooked, element in the shaping of modern American civil procedure, including the displacement of civil trial by pretrial discovery.

APPENDIX A: DRAFTS OF *FEDERAL RULES* PROVIDING FOR DEPOSITIONS  
BEFORE A MASTER

*I. Tentative Draft II*<sup>270</sup> (December 23, 1935 – January 15, 1936)  
(unpublished)

Rule 30(c) [Officers Before Whom Depositions May be Taken.  
Letters Rogatory]<sup>271</sup>

If the adverse party, upon being served with a notice of taking a deposition by oral examination, shall promptly apply to the court for an order that such deposition be taken before a standing master of the court or a special master appointed for such purpose, and shall show in such application special and unusual circumstances sufficient to satisfy the court that the deposition cannot be satisfactorily taken before an examiner as provided by the preceding paragraphs, the court may make such order, and fix therein the time and place of examination, and may also by the terms thereof authorize such master to receive or exclude evidence in all respects as though the evidence were offered before the court. In such case the master's fees shall be fixed by the order and they shall be advanced by the party applying therefor.

Notes:

The taking of testimony by a master should be the exception rather than the rule. It is very expensive. Federal equity rules regarding the use of masters have been widely criticized on account of the expense. Lane, in 35 *Harvard Law Rev.* 296-7,

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thereof.” Subrin, *supra* note 10, at 718–19 (quoting Rule 57(a), Tentative Draft No. 1 (Oct. 16, 1935)). This rule did not become a part of the final 1938 *Federal Rules*.

<sup>270</sup> *Preparatory Papers: Drafts, Reports and Correspondence used in the Preparation of the Rules of Civil Procedure for the District Courts of the United States*, in CLARK PAPERS, *supra* note 100, box 98. “Tentative Draft II” was marked “Confidential – Not Published.”

<sup>271</sup> This version of Rule 30(c) was dated January 13, 1936, following Wickersham's proposal for the appointment of a master.

suggests that these rules “should be eliminated or radically changed.”

It is questionable whether a master should exercise the power of excluding evidence in the taking of depositions. In performing this duty he is not engaged in making findings or giving opinions by only in taking testimony.

‘A referee appointed merely to take evidence should take all that is offered and leave it to the court to determine what is not competent. But if the reference is to report the evidence with the opinion of the referee as distinguished from a reference merely to take testimony, the referee is not bound to take testimony which appears to him to be not relevant to the issue.’ – 53 C.J. [*Corpus Juris*] 731.

Common practice in taking depositions on commission does not involve rulings on evidence by the commissioner. ‘Generally he (the commissioner) has no authority to determine the competency of the witness, the propriety of the questions, or the admissibility of the evidence, but must take down the questions and answers and not the objections and exceptions for subsequent determination by the court.’ – 18 C.J. 684.

Modern discovery and deposition procedure makes practically no use of officers having power to decide objections.

In his Notes above, Sunderland also referred to Ragland’s *discovery Before Trial* regarding the Wisconsin and Missouri rules regarding the powers of the presiding officer at depositions. The drafters of the notes also cautioned that using a master would be cumbersome with respect to appeals of the master’s decisions. The drafters cited *Dowagiac Mfg. Co. v. Lochren*, in which the auxiliary court refused to compel production of certain testimony and the appellate court disagreed, but the appellate court could not consider the rejected evidence and render a final decree without remanding the case for further proof.<sup>272</sup>

## II. Tentative Draft III (March, 1936) (unpublished)<sup>273</sup>

Rule 33(b):

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<sup>272</sup> 143 F. 211, 214 (8th Cir. 1906).

<sup>273</sup> CLARK PAPERS, *supra* note 100, Box 98 [Tentative Draft III].

When notice is served for taking the deposition by oral examination of any party, or of an officer, director, agent or employee of any party, the court in which the action is pending may, on motion promptly made by such party and on good cause shown, make an order directing that such deposition shall be taken before a standing master of the court or a special master appointed for that purpose, and authorizing such master to rule on the admission of evidence. The order shall fix the master's fees and they shall be advanced by the moving party.

Rule 33(c) – if the deposition is not held before a master, the deponent:

may at any time, on a showing that the examination is being conducted in bad faith, or for the purpose of oppressing, annoying or embarrassing the deponent or such party, apply to the court in which the action is pending, or to the court in the district where the deposition is being taken, for an order directing the officer conducting such examination to cease forthwith from taking the deposition. If such an order is made, the examination shall proceed thereafter only upon the order of the court in which the action is pending.”

The drafters indicated in a Note to Rule 33(b) that it is “substantially” identical to the one in the printed preliminary draft circulated for comment: “It is introduced as a safeguard on account of the unlimited right of discovery given by Rule 32 [“Depositions – Their Form, Purpose, Scope and Effect”].<sup>274</sup>

### *III. Preliminary Draft (May, 1936)*

*The Advisory Committee had this version published in order to solicit “suggestions by the Bench and Bar.”<sup>275</sup>*

Rule 32(b):

(b) *Deposition Before a Master.* When notice is served for taking the deposition by oral examination of any party, or of an officer, director, agent or employee of any party, the court in which the action is pending may, on motion promptly made by such party and on good cause shown, make an order directing that such deposition shall be taken before a standing master of the court or

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<sup>274</sup> *Id.*

<sup>275</sup> PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA iii (1936).

a special master appointed for that purpose, and authorizing such master to rule on the admission of evidence. The order shall fix the master's fees and they shall be advanced by the moving party.<sup>276</sup>

Note to Rule 32(b):

(b) The provision for reference to a master is for the purpose of protecting parties from oppression in cases where there is reason to believe that the examination is likely to include matters not properly subject to discovery. It is introduced as a safeguard on account of the unlimited right of discovery given by Rule 31. Missouri has a somewhat similar provision, by which the party served with notice for taking depositions, may, in cities of more than 50,000 population, apply for the appointment of a special commissioner with the power to rule upon the admission of evidence. Mo., Rev. Stat. (1929), § 1759.<sup>277</sup>

Rule 32(c):

(c) *Examinations not Conduction in Good Faith May be Enjoined.* When the deposition of a party, or of any officer, director, agent, or employee of any party, is being taken upon oral examination, before any officer other than a master, the deponent or party may at any time, on a showing that the examination is being conducted in bad faith, or for the purpose of oppressing, annoying or embarrassing the deponent or such party, apply to the court in which the action is pending, or to the court in the district where the deposition is being taken, for an order directing the officer conducting such examination to cease forthwith from taking the deposition. If such an order is made, the examination shall proceed thereafter only upon the order of the court in which the action is pending.<sup>278</sup>

*IV. Preliminary Draft II (October 22, 1936) (unpublished)*<sup>279</sup>

Rule 32(b), which replaced Rule 33(b) from Tentative Draft III:

Substitute presented by Professor Sunderland at Meeting of 10/22/36. (b) *Orders for Protection of Deponents.* When notice is served for taking a deposition by oral examination, the court in

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<sup>276</sup> *Id.* at 60–61.

<sup>277</sup> *Id.* at 61.

<sup>278</sup> *Id.*

<sup>279</sup> CLARK PAPERS, *supra* note 100, box 99 [Preliminary Draft II]. This source is labeled: “mimeographed after meeting of October 22, 1936.”

which the action is pending may, on application of any party or any person to be examined, promptly made and on good cause shown, make an order directing that the deposition shall be taken before a standing or special master of the court, or before some designated person, or that certain matters shall not be inquired into, or that the examination shall be held with no one present except the parties to the record or their officers or counsel and that after being sealed the deposition shall be opened only by order of the court, or make any other order which justice may require to protect the party or witness from annoyance, embarrassment or oppression. If an order is made that the deposition be taken before a master, the order shall fix the fees and they shall be advanced by the party or witness applying for the order.

The text of Rule 51(c), “Subpoena,” indicated that as of October 1936 the drafters still contemplated the possibility that a master might preside over a deposition:

(c) – “*Subpoena for Taking Depositions; Place of Examination.* A copy of the notice to take a deposition, as provided in Rule 34, and proof of service thereof, shall constitute a sufficient authorization for the issuance of subpoenas for the persons named therein by the clerk of the district court for the district in which the deposition is to be taken. He shall not, however, issue a subpoena commanding the production of books, papers, or document directed to any such person without an order of the court, *unless the deposition is taken before a master with authority to rule upon the admission of evidence.*”<sup>280</sup>

Charles Clark reported in the minutes to the Advisory Committee’s meeting of October 25, 1936: “It was agreed that Rule 32(b) [“Depositions Before Masters”] be stricken out, subject to the agreement to transfer certain parts of it to (c).”<sup>281</sup>

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<sup>280</sup> *Id.* (emphasis added).

<sup>281</sup> Proceedings of the Advisory Committee (Oct. 22, 1936) at 2, in CLARK PAPERS, *supra* note 100, box 96.

*V. Preliminary Draft III (December, 1936 – January 1937)  
(unpublished)*<sup>282</sup>

In this draft someone has drawn a red line through the text “32(b) Depositions Before a Master” and indicated that the text of the rule had been moved to Rule 34 (Oral Examination).

*VI. Preliminary Draft (February 1937) (unpublished)*<sup>283</sup>

In this version the drafters eliminated the provision for reference to a master. They instead included Rule 34(f):

(f) *Orders for the Protection of Parties and Deponents:*

(1) After notice is served for taking a deposition by oral examination, the court in which the action is pending, on motion of any party or of any person to be examined, seasonably made and upon notice and good cause shown, may make an order that such deposition shall not be taken, or that certain matters shall not be inquired into =, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the record or their officers or counsel and that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court, or may make any other order which justice may require to protect the party or witness from annoyance, embarrassment or oppression.

(2) At any time, during the taking of the deposition, on motion of any party or the deponent, and upon a showing that the examination is being conducted in bad faith, or for the purpose of oppressing, annoying or embarrassing the deponent or party, the court in which the action is pending, or the court in the district where the deposition is being taken, may make an order directing the officer conducting such

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<sup>282</sup> CLARK PAPERS, *supra* note 100, box 100 [Preliminary Draft III]. This bound volume also contains “Notes and Reporter’s Comments.”

<sup>283</sup> *Id.*

examination to cease forthwith from taking the deposition. If such order is made, the examination shall proceed only upon the order of the court in which the action is pending.

*VII. Proposed Rules (April 30, 1937) (published)*

When the Advisory Committee published its April 30, 1937 report to the Supreme Court, the drafters transferred the text of Rule 34(f)(1) to Rule 30(b), “Orders for the Protection of Parties and Deponents.”<sup>284</sup> The Committee also transferred the text of Rule 34(f)(2) to Rule 30(d), “Motion to Terminate Examination.”<sup>285</sup> The Advisory Committee included the following Note:

*Note to subdivisions (b) and (d).* These are introduced as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery granted by Rule 26.<sup>286</sup>

The April 1937 version of Rule 28, “Persons Before Whom Depositions May be Taken,” no longer included the option of requesting that a master preside.<sup>287</sup>

*VIII. Final Draft of the 1938 Rules*<sup>288</sup>

Rule 30(b):

(b) *Orders for the Protection of Parties and Deponents.* After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall

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<sup>284</sup> Rule 30, CLARK PAPERS, *supra* note 100, box 100 [Report of the Advisory Committee to the Supreme Court of the United States, April 30, 1937]; REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE APPOINTED BY THE SUPREME COURT OF THE UNITED STATES CONTAINING PROPOSED RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 76–81 (1937). Rule 30(b), *supra*, at 76–77.

<sup>285</sup> *Id.* at 78

<sup>286</sup> *Id.* at 81

<sup>287</sup> See Rule 28, *id.* at 75–76.

<sup>288</sup> H.R. DOC. NO. 460 (1938). This pamphlet was published in 1938 without the Advisory Committee’s Notes.

be held with no one present except the parties to the record or their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression.<sup>289</sup>

Rule 30(d):

(d) *Motion to Terminate or Limit Examination.* At any time during the taking of the deposition, on motion of any party or the deponent and upon a showing that the examination is being conducted in bad faith, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.<sup>290</sup>

#### APPENDIX B: THE HISTORICAL ORIGINS OF PARTY-DIRECTED ORAL EXAMINATION: ONTARIO

##### *Background*

In 1837, the legislature of Upper Canada (Ontario) established a Court of Chancery.<sup>291</sup> The *Act* stated that the court's powers would include the authority to “. . . compel the discovery of concealed papers or evidence, or such as may be wrongfully withheld from the party claiming the benefit of the same . . . .”<sup>292</sup> The procedure provided for

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<sup>289</sup> *Id.* at 39.

<sup>290</sup> *Id.* at 40.

<sup>291</sup> An Act to Establish a Court of Chancery in this Province, 7 Wm. IV c. 2 (U.C.).

<sup>292</sup> *Court of Chancery Act*, s. 2.

oral witness testimony and examination by counsel in the presence of the Vice Chancellor or of a Master.<sup>293</sup> These provisions predated the 1852 English reform of Chancery, which provided that parties could present evidence orally or by affidavit.<sup>294</sup> The statute provided that an Examiner would conduct oral examinations, rather than the judge at the hearing itself.<sup>295</sup> Peter Fraser has speculated that the Ontario Act establishing the Court of Chancery “was perhaps inspired by a Nova Scotia statute of 1833, permitting its Court of Chancery to have examination of witnesses *viva vice* before the Court.”<sup>296</sup>

The new oral method of discovery was short-lived initially.<sup>297</sup> In practice, oral examinations for discovery in Upper Canada occurred before a Special Master or Special Examiner rather than before the Vice-Chancellor.<sup>298</sup> W.D. Gwynne, writing in the 1890s, criticized contemporary examiners: “Folio after folio of evidence is inserted in almost every brief, whose only end is to lengthen the examiner’s bill.”<sup>299</sup> Gwynne also narrated the developments in the procedure for oral examination for discovery beginning with the establishment of the Court of Chancery in Ontario in 1837.<sup>300</sup> Due to deficiencies among the

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<sup>293</sup> *Id.*, s. 5.

<sup>294</sup> An Act to Amend the Practice and Course of Proceeding in the High Court of Chancery, 15 & 16 Vict. C. 86 (1852).

<sup>295</sup> *Id.*, s. 31.

<sup>296</sup> PETER FRASER, *DISCOVERY OF FACT IN ONTARIO AND BRITISH COLUMBIA* (LL.M. Thesis, University of Toronto 1970) 27. *See* An Act for Amending the Practice of the Court of Chancery and Diminishing the Expenses Thereof, 3 Wm. IV c. 52, s. 12 (N.S.) cited in SIR CHARLES TOWNSEND, *THE HISTORY OF THE COURT OF CHANCERY IN NOVA SCOTIA* (1900) 89-91. Townsend remarked: “The process of the process of the Court is simplified in respect to execution of decrees, and a settled mode of procedure ratified by statute, and I should think a very great improvement was made in allowing witnesses to be examined *viva voce* in Court. Hitherto the practice was to have them examined by means of interrogatories before examiners, which can never be as satisfactory as in open Court.” *CHANCERY IN NOVA SCOTIA* at 91.

<sup>297</sup> The oral examination would return in 1850.

<sup>298</sup> *See* W.D. Gwynne, *The Special Examiners*, 15 CAN. L. TIMES 221, 223 (1895) (“... it appears to have been customary to obtain an order for the examination of country witnesses before a master extraordinary, instead of going to the expense of bringing them up to town.”).

<sup>299</sup> W.D. Gwynne, *The Special Examiners*, 15 CAN. L. TIMES 221, 221 (1895).

<sup>300</sup> *Id.* at 223-226. Gwynne leveled four criticisms at the contemporary discovery procedure:

The system is abused in four ways:

- (1) By examining counsel exceeding the limits of proper discovery.
- (2) By cross-examining counsel going into unnecessary matters and at undue length.
- (3) By want of careful preparation by counsel.

Masters, the Court of Chancery replaced its innovative procedure for oral examination with the traditional system of examining witnesses using written interrogatories.<sup>301</sup> Under the latter procedure, the parties' counsel exchanged interrogatories and cross-interrogatories prior to the examination; each party was entitled to fourteen days' notice from the opposing party before the examination.<sup>302</sup>

*The Upper Canada Chancery Commission*

The next step in the reform of discovery procedure occurred as a result of the union between Upper and Lower Canada in 1841. After the union, the Legislative Council of Canada "directed the removal of the Court of Chancery" to Kingston although the Court of King's Bench continued to be located in Toronto.<sup>303</sup> On January 1, 1842 the Vice-Chancellor ordered that all solicitors who practice before the Court of Chancery must specify "an agent residing in the Town or Township of Kingston . . ." for service of documents.<sup>304</sup> Many in the Ontario legal community were unhappy with the relocation of the court. In response, in November 1842 a group of prominent lawyers, led by then-Treasurer of the Law Society of Upper Canada and former judge Levis Peters Sherwood and Attorney-General W.H. Draper, agreed to lobby the Governor-General, urging that the Court of Chancery remain permanently situated in Toronto.<sup>305</sup> Moreover, the Ontario bar association objected to the fact that Vice-Chancellor, Robert Sympson Jameson, had been appointed Speaker of the first Legislative Council of Canada; the bar objected to "the union of legislative and judicial duties in the same person."<sup>306</sup>

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(4) By giving uncontrolled liberty to the witness.

*Id.* at 227.

<sup>301</sup> See Chancery Order LXXIV (Upper Canada), Dec. 23rd, 1839 (noting that the contemporary method of examining witnesses may lead to the introduction of improper testimony and re-introducing the written interrogatory as a means of eliciting evidence). The Order also required that all objections, "either to the interrogatories or depositions, shall be taken, not at the time of the examination, but after publication."

<sup>302</sup> *Id.* In 1840 the notice was increased to twenty-eight days. See Chancery Order LXXVI (Upper Canada), Aug. 25th, 1840.

<sup>303</sup> WILLIAM RENWICK RIDDELL, *THE BAR AND THE COURTS OF THE PROVINCE OF UPPER CANADA, OR ONTARIO* 188 (1928).

<sup>304</sup> *Id.* at 189.

<sup>305</sup> *Id.* The group emphasized that the law library, courtrooms and offices already existed in Toronto.

<sup>306</sup> *Id.* For this proposition Riddell cites Minute Book, Law Society of Upper Canada, No. 2, 363 *et seq.*

In response to the Ontario bar's complaints, the Parliament of Upper and Lower Canada appointed a Commission of Enquiry to examine the rules and procedures of the Court of Chancery.<sup>307</sup> The Commission was appointed on July 20, 1844 and included both the Chief Justice and the Senior Puisne Judge of the Court of Queen's Bench, as well as prominent Chancery Counsel: Henry John Boulton, Robert Easton Burns, William Hume Blake, James C. Palmer Esten.<sup>308</sup> The Commission reported in April, 1845 and in January, 1846.<sup>309</sup> In 1849, the Legislature passed *An Act for the More Effectual Administration of Justice in the Court of Chancery of the Late Province of Upper-Canada*, which incorporated the Commission's reports.<sup>310</sup>

In their 1845 report, the Commissioners had issued the following "quite daring"<sup>311</sup> recommendation, proposing a system of oral examination before trial three years before the Field Code:

That the Plaintiff and Defendant shall be respectively permitted to examine each other, *viva voce*, by Counsel,—the one upon the matters stated in his bill, and the other upon the answer; such examinations to be conducted at *nisi prius* before the Judge presiding . . .

It will be requisite to provide for restraining the examination within proper bounds as to relevancy, leading questions, &c. for the method of taking down, settling and authenticating the answers . . . .

If we can, by proper regulations, prevent the proposed mode of examination by Counsel *viva voce* in an open Court from occasioning delay, we think great advantage will be gained by such a manner of eliciting the truth.<sup>312</sup>

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<sup>307</sup> See Journals of the Legislative Assembly of the Province of Canada, No. 3, 1843, at 67.

<sup>308</sup> See 12 Vic. c. 64, s. 11 (May 30<sup>th</sup>, 1849); 3 PROVINCIAL STATUTES OF CANADA (1849) 399-400; Riddell, 195n20.

<sup>309</sup> 12 Vic. c. 64, s. 11

<sup>310</sup> *Id.*; 3 PROVINCIAL STATUTES OF CANADA (1849) 397-402. See Riddell at 195n20 ("Much of the [b]ill passed in 1849 was the outcome of their reports").

<sup>311</sup> FRASER, DISCOVERY OF FACT, at 31.

<sup>312</sup> Commissioner's report (cited in Fraser at 31; ORIGINAL REPORT in Manuscript and Archives, SML, and to be consulted – the report is unpaginated and consists of an appendix to the Journal of the Legislative Assembly of the Province of Canada). The reference to truth-generation is striking because most twentieth-century Anglo-American commentators expressed great concern over the potential for perjury in pretrial oral examinations, so much so that many opposed a liberal pretrial discovery regime on the

According to Stephen Subrin, New York's Field Code of 1848 was "the biggest systemic procedural change in the United States, after the adoption of common law systems."<sup>313</sup> The Code provided for pre-trial depositions of adverse parties, but such an examination was a substitute for testimony at trial.<sup>314</sup> Moreover, the deposition under the Field Code took place "before a judge of the court or a county judge" who would rule on objections.<sup>315</sup> The Field Code presumed that the pleadings would properly frame the issues in the case and did not include any interrogatory provisions.<sup>316</sup> Although the Field Code itself did not restrict the scope of the pretrial examination, "New York lawyers even after the adoption of the code were restricted by the traditional idea that in Chancery the right of a party to a discovery did not extend to all facts material to the issue, but was limited to such material facts as were necessary to establish his cause of action or defense."<sup>317</sup>

The Commissioners noted that, with respect to the defendant, the innovation "goes no further than the substituting one mode of examination for another." With respect to the plaintiff, however:

the change is far greater, for it is [sic] not hitherto been allowed in Equity to examine the Plaintiff at all. In regard to the matters charged in his bill; nor has the plaintiff . . . .

Conscious of the ambitious nature of their recommendation, the Commissioners continued:

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grounds that it would suborn false testimony. See GORDON D. CUDMORE, CHOATE ON DISCOVERY, 2d ed. at 1-1 to 1-2 (1993).

<sup>313</sup> Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 696 (1998). For background on David Dudley Field himself, see Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 L. & HIST. REV. 311, 313-27 (1988). For a detailed narrative of the enactment of the Field Code, see Mildred V. Coe and Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L. Q. 238 (1942). Field's own reflections on the legacy of his reforms can be found in David Dudley Field, *Law Reform in the United States and its Influence Abroad*, 25 AM. L. REV. 515 (1891).

<sup>314</sup> (1848) N.Y. Laws, c. 379 (71st Sess., April 12, 1848) [hereinafter "1848 Field Code"] § 345. The examination would be taken "subject to the same rules of examination, as any other witness." *Id.* § 344.

<sup>315</sup> *Id.*

<sup>316</sup> Subrin, *Field and the Field Code*, *supra* note 313, at 332.

<sup>317</sup> Martin Conboy, *Depositions, Discovery and Summary Judgments: As Dealt with in Title V of the Proposed Rules of Civil Procedure for the Federal Courts*, 22 A.B.A. J. 881, 882 (1936). By the end of the nineteenth century the Field Code had been adopted by about half the states. Subrin, *supra* note 79, at 939.

We do not recommend this change without hesitation. Its merely being a departure from the English system, in a very essential point, has lead us to apprehend, that objections and inconveniences which cannot readily be foreseen, may discover themselves in practice . . . .

We are at present, however, of opinion, that an experiment should be made of this system, as it affords a promise of doing something effectual, towards bringing the expences [sic] of a suit in Chancery, within reasonable bounds, by the only means by which it can be accomplished,—that is, by shortening and simplifying the proceedings.<sup>318</sup>

#### *The Ontario Chancery Rules*

The 1849 legislation that empowered the judges of the Court of Chancery to make its own rules specifically authorized them to promulgate rules that implemented the oral examination:

[A]nd whereas it is desirable that the suggestions of the said Commissioners, in regard to shortening the bill and answer, and enabling the Plaintiff to obtain discovery through the medium of a *viva voce* examination of the Defendant, and for extending a like privilege to the Defendant in relation to the *viva voce* examination of the Plaintiff, should be adopted; and whereas it is believed that the adoption of the above suggestion, the abolition of all unnecessary proceedings, and enabling matters to advance uninterruptedly in the Master's Office, will greatly tend to diminish the costs of proceedings in the said Court, and to promote the ends of Justice, but it is nevertheless expedient for the purpose of more conveniently and safely carrying out these and other alterations, that power should be vested in the Judges to be appointed under this Act, to make such rules and orders respecting the pleadings and practice of the said Court, for the

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<sup>318</sup> *Id.* The recommendation also included reducing the Plaintiff's bill to: a mere statement of his case, setting forth concisely the facts necessary to shew his claim to the relief prayed, and ending with a suitable prayer for relief,—not inserting any matters which are mere evidence of facts nor any interrogatories for the purpose of obtaining a discovery from the Defendant's answer; that the Defendant may, in his turn, demur or plead the bill as heretofore, but if he answers, he must confine his answer to the mere setting forth of his defence, inserting nothing more than is strictly necessary to a precise and intelligible statement of the matter on which he relies; and that anything beyond these statements in the bill or answer, shall be deemed impertinent, and be expunged or disallowed on taxation. Chancery Commissioners' Report.

purpose of carrying out the aforesaid suggestion, as well as such others as to them may seem expedient for the purposes mentioned in the hereinbefore recited Commission, and for amending or modifying any of the rules or orders, which have been or may be made for that purpose, and for regulating the Offices of Master and Registrar of the said Court of Chancery, as well as for rescinding the said rules and orders, or any of them . . .<sup>319</sup>

The legislature thus emphasized both the reduction in litigants' costs as well as the promotion of justice.

The enacting clause of the 1849 legislation stated:

Be it therefore enacted, That [sic] it shall be lawful for the Judges to be appointed under this Act for the time being, to make such rules and orders as to them may seem expedient, for regulating the Offices of Master and Registrar of the said Court of Chancery, and for the carrying into effect the recommendations of the said Commissioners as aforesaid, and from time to time to make other rules and orders, amending, altering or rescinding the same, or any of them, and also to make all such rules and orders as to them may seem meet, for the purpose of adapting the proceedings of the said Court of Chancery to the circumstances of this Province, as well in regard to the Process and Pleadings, as in the practice and proceedings of the said Court, and more especially the taking, publishing, using and hearing of testimony in any suit therein pending, or the examination of all, or any of the parties to any such suit upon their oaths, *viva voce* or otherwise, including also the power to regulate by rules or orders, the allowance and amount of costs . . .<sup>320</sup>

In 1850 the judges of the Court of Chancery promulgated Orders that established the rules regarding oral examination before trial. Order L stated:

Any party to a suit may be examined as a witness by the party adverse in point of interest, or by any one of several parties adverse in point of interest, without any special order for that purpose: and may be compelled to attend and testify in the same manner upon the same terms, and subject to the same rules of examination as any other witness, except as hereinafter provided.

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<sup>319</sup> 12 Vic. c. 64, s. 11.

<sup>320</sup> *Id.* The Act included a proviso that “no such rule or order shall have the effect of altering the principles or rules of decision of the said Court . . .,” i.e. the procedural changes could not affect or undermine the substantive law.

And any person, for whose immediate benefit a suit is prosecuted or defended, though not a party to the record, may be regarded as a party for the purpose of this order.<sup>321</sup>

Order LVII authorized cross-examination. “Evidence taken under Order L. may be rebutted by adverse testimony.”<sup>322</sup> Any party that had been examined under Order L could testify on his own behalf “in relation to any matter respecting which he has been examined in chief.”<sup>323</sup>

Furthermore, Order LIII abolished interrogatories, replacing them with the party-conducted or lawyer-conducted deposition. Notably, the Order applied to both witnesses and parties:

No written interrogatories for the examination of either witnesses or parties, either before or after decree, shall henceforth be filed, except by direction of the Court; such examinations shall be *viva voce*, and may be conducted either by the parties, their solicitors or counsel.<sup>324</sup>

Under Order LVIII, “any party refusing or neglecting to attend at the time and place appointed for his examination under Order L. may be punished as for contempt . . .”<sup>325</sup>

The new rules provided more flexibility than the previous practice. For example, “previous to the new rules . . . it was only under the most special circumstances, and indeed very rarely, that a witness could be recalled.”<sup>326</sup> Order LX, in contrast, provided that a witness might be recalled to be examined before the Court after publication if the Master Extraordinary erred in his examination of the examinant.<sup>327</sup>

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<sup>321</sup> ROBERT COOPER, *THE RULES AND PRACTICE OF THE COURT OF CHANCERY OF UPPER CANADA, COMPRISING THE ORDERS OF 1850 AND 1851, WITH EXPLANATORY NOTES REFERRING TO THE ENGLISH ORDERS AND DECISIONS* 61 (1851). Order L preserved the common law adversarial structure within the discovery process:

Provided always that, where it shall appear upon the hearing that any party examined under this Order is united in interest with the examining party, the evidence so taken shall not be used on behalf of either the examining party, or of the examinant, but may be struck out on the hearing at the instance of any party affected thereby.

<sup>322</sup> *Id.* at 62.

<sup>323</sup> *Id.*

<sup>324</sup> Chancery Order LIII, *RULES AND PRACTICE OF THE COURT OF CHANCERY OF UPPER CANADA* at 54.

<sup>325</sup> Chancery Order LVIII, *Id.*

<sup>326</sup> *Id.* at 63.

<sup>327</sup> *See* Chancery Order LX. Gwynne was more impolitic: “to guard against the dangers of arising from the incompetence of the country examiners, it was provided that a witness might be recalled after publication on special order.” Gwynne, *supra* note 299 at 224.

*Further Ontario Developments*

In 1856, Ontario adopted the English Common Law Procedure Act (1854), allowing for written interrogatories in the common law courts. Oral examination for discovery continued to be available in Ontario's Court of Chancery. (There was therefore one court (Chancery) in which the only mode of discovery was by oral examination and one court (Common Law) in which the only mode of discovery was by written interrogatories.) The Administration of Justice Act of 1873 extended the availability of oral discovery to the common law courts, and amendments in 1877 permitted litigants to examine "any party adverse in point of interest . . . touching the matters in question in the action."<sup>328</sup> Common law litigants were required to seek an order to obtain oral discovery, but such orders were "issued as of course."<sup>329</sup>

When the Administration of Justice Act of 1873 introduced oral examination for discovery to the common law courts of Ontario,<sup>330</sup> Eight comments regarding the *Justice Act* appeared in the *Canada Law Journal*; two pertained to the discovery provisions. Ontario's experience with oral examination for discovery most likely explains the dearth of reaction.<sup>331</sup>

Ontario's *Judicature Act* was passed in 1881. By 1887 a set of consolidated rules combining equity and common law procedures was introduced, which expressly provided for the oral examination of an adverse party without a court order.<sup>332</sup>

Rule 487 under the Consolidated Rules (1887) provided:

Any party to an action or issue whether plaintiff or defendant, or in the case of a body corporate, anyone who is or has been one of the officers of such body corporate, may without any special Order for the purpose be orally examined before the trial touching the matters in question in the action by any party adverse in point of interest; and may be compelled to attend and

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<sup>328</sup> CUDMORE, *supra* note 312, at 1-4 to 1-5; *Leitch v. Grand Trunk Ry. Co.*, 13 Ont. P.R. 369, 379-380 (1890). Also in 1877, revisions to the Common Law Procedure Act permitted parties to hold the examination before a Special Examiner or local Master in Chancery without an order, instead of holding the examination before a judge.

<sup>329</sup> *Menzies v. McLeod*, 34 O.L.R. 572, 573 (1915).

<sup>330</sup> Stat. Ont., 36 Vict. c. 8.

<sup>331</sup> *See Note, Administration of Justice Act*, 9 CAN. L. JOURNAL 109, 111 (1873) ("The clauses for the examination of parties, &c. we do not stay to examine in detail, but recognize their great value, and similar powers have worked well in Chancery Procedure.").

<sup>332</sup> A party could be examined on any matter "touching the matters in question in the action." *See Fraser* at 41.

testify in the same manner, upon the same terms, and subject to the same rules of examination as any witness except as hereinafter provided.<sup>333</sup>

From 1887 to the 1980s there were no significant changes to the rules regarding examination for discovery.

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<sup>333</sup> Rule 496 authorized cross-examination.