Chapter 24: Rule 15: Pretrial Oral Discovery in Massachusetts

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CHAPTER 24

Rule 15: Pretrial Oral Discovery in Massachusetts

FRANCIS J. LARKIN and JAMES W. SMITH

§24.1. Background and applicability of Rule 15. It may well be argued that the most significant development in the entire spectrum of Massachusetts law during the 1966 Survey year was the promulgation by the Supreme Judicial Court of the new Rule 15 of its General Rules. This rule, made effective April 1, 1966, provides for oral depositions and other significant discovery procedures. The rule was quickly hailed as a "Landmark in Massachusetts Procedure." It merits this description not only for the conspicuous substantive changes which it effects in Massachusetts pretrial discovery practice but also because it marked a virtually unprecedented dynamic exercise of the Supreme Judicial Court's rule-making power. The vigor of the Court's invocation of this power was made more manifest in the light of a rejection of pretrial oral discovery by the Massachusetts legislature less than two years earlier. The Court's action ignited a wave of legislative response which expired without forcing the type of confrontation...

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3 The following represents a brief conspectus of the 1966 legislative response triggered by the Court's action on the oral discovery issue.
1. House No. 3343 (1966) sought absolutely to nullify and prohibit any rule on oral discovery. This bill, in effect, received an adverse report by the Judiciary Committee by virtue of the fact that no committee report was ever filed again, (see Joint Rule 10), despite the fact that extensive hearings were held on May 31 and June 15. The bill was again recommitted to the Judiciary Committee on June 20. However, no further action on this bill was thereafter taken.
2. House No. 3592 (1966) sought to change Rule 15 by raising the requisite minimum ad damnum to $10,000 and, more significantly, to limit deponents to "parties" alone. This bill was reported favorably in the House on May 10 by the Judiciary Committee. However, a point of order on the ground that the redraft was beyond the scope of the original petition was sustained, and the bill was laid aside. A proposal embodying similar subject matter was later recommitted to the Judiciary Committee on May 12. Moreover, on May 12, a duplicate of House No. 3592 was also substituted in the House for a portion of the 1965 Judicial Council Report dealing with oral discovery. On May 16, this bill was ordered to a third
between the legislature and the judiciary which has fortunately been avoided in this country with but few exceptions. The exceedingly interesting and elusive question of the nature and scope of the judicial rule-making power—particularly in the context of a clash with the legislative power ostensibly operating in the identical area—must be left for another time. This article will examine the substantive and procedural provisions of the rule, together with a consideration of some of the problems, practical as well as legal, which are likely to arise in its implementation.

Rule 15 has its origins in the Federal Rules of Civil Procedure and particularly in a combination of Rules 26, 28-30, 32, 34, 35 and 37.

reading; on July 11, it was recommitted to the Judiciary Committee. On July 27, the duplicate of House No. 3592 was reported out favorably as House No. 3906. However, the Senate took no action on this proposal.

3. House No. 3906 (1966) was a redraft based on House Nos. 3592 and 2463 (1966) and embodied a caustically worded petition concerning the Supreme Judicial Court's rule-making power. The bill was reported favorably in the House by the Judiciary Committee on July 27. On July 28, it was ordered to a third reading. On August 16 an order was adopted in the House requesting an opinion from the Justices of the Supreme Judicial Court as to the bill's constitutionality. This order never received final concurrence in the Senate.

4. House No. 4016 (1966) was substituted for House No. 3906 on August 30; it was an order authorizing the Judiciary Committee to sit during the recess of the General Court to study the matter of oral discovery. The order was referred to the Joint Rules Committee on August 30. That committee issued no report, and no further action was taken.

4 There is no dearth of literature on the subject of rule-making. Indeed, "the flood of rule-making literature is so great that citation is currently to bibliographies." See 6th Ann. Rep. to Supreme Judicial Court by its Executive Secretary, pp. 9-10.

5 The following are the parallel references to the Federal Rules:

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The latter deal broadly with pretrial oral discovery, the production and inspection of documents and the physical and mental examination of parties. To a lesser extent, Rule 15 is derived from the modifications of the Federal Rules which already exist in Maine, New Jersey, Iowa, and Rhode Island. Of course, until a body of Massachusetts decisional precedent arises, federal interpretations of its own rules will continue to be highly persuasive for Massachusetts lawyers and judges seeking guidance in this area.6

Before turning to a section by section analysis of the provisions of Rule 15, its operating philosophy should be emphasized. The basic philosophy of the rule—like its federal precursor—is that there should be broad discovery as to facts and documents prior to trial in order to make the trial more efficient. The central theme of the discovery practice is that the right to take statements and the right to use them in court must be kept entirely distinct. Accordingly, discovery

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6 This reliance has been frequently recognized by the Massachusetts Supreme Judicial Court. As Commissioner of Banks v. Prudential Trust Co., 242 Mass. 78, 84, 136 N.E. 410, 412 (1922), points out: "It is an established rule that the adjudged interpretation of the words of a statute by the courts of the jurisdiction where it was enacted is intended to be adopted when afterwards the same statute is passed by the Legislature of another State or country. Courts of the latter State or country commonly feel constrained to give the statute the same constructions as that earlier given it by the courts of the State or country first enacting it, in the absence of compelling reasons to the contrary."

at the pretrial stage is not fettered by the rules on admissibility which apply at a trial; at this early stage, the utmost freedom is allowed. Contrary to prior practice, Rule 15 proceeds on the premise that the right of recourse to litigation before a jury should be preserved but the courtroom should not be the place for the formulation of issues. Rather, a trial should be essentially concerned with the litigation of issues that have already been formulated through appropriate discovery procedures. To this end, the rule contemplates that no one should be exempt from examination and that the widest latitude of pretrial examination should be encouraged in order to narrow issues, to simplify trials and to expedite settlements. “Thus, in a very real sense the Rule is remedial and should be liberally construed in the light of its broad purposes and intentions.”

§24.2. Depositions pending trial. Section 1 of Rule 15 deals principally with such matters as the taking of depositions with or without leave of court, the scope of examination permitted in the deposition proceeding and the permissible use of depositions at the trial. It is by far the broadest section of Rule 15.

a. When depositions may be taken. Section 1(a) of Rule 15 provides that any party to an original civil proceeding pending in the Supreme Judicial Court, or to a civil proceeding pending in the Superior Court, Land Court, or Probate Court, may take oral depositions of any person including a party. The attendance of witnesses may be compelled by the use of a summons or subpoena. Oral depositions may be taken as a matter of right without the necessity of obtaining leave of court in all cases except the following:

1. If notice of the taking of a deposition is served by the plaintiff prior to the time allowed the defendant for appearance in court.

See Facher, Rule — Landmark in Massachusetts History, 51 Mass. L.Q. 5, 6 (1966). In this regard, courts and counsel might profit from the brief comment by Mr. Justice Black, dissenting in Ackerman v. United States, 340 U.S. 193, 205, 71 Sup. Ct. 209, 215, 95 L. Ed. 207, 214 (1950): “It does no good to have liberalizing rules like 60(b) if, after they are written, their arteries are hardened by this Court’s resort to ancient common-law concepts.”

§24.2. While §1 does not specifically so state, it appears reasonably clear that “any person” includes the Commonwealth of Massachusetts. Section 8, which imposes sanctions for failure to comply with the provisions of Rule 15, provides in subsection (d) that expenses and attorneys’ fees are not to be imposed upon the Commonwealth for such failure, and buttresses the conclusion that the Commonwealth is a “person” within the rule.

The breadth of this provision might be contrasted with the statutory limitations imposed on the filing of written interrogatories, G. L., c. 231, §61. Unlike the latter which provides a right to only 30 questions, §1(a) of Rule 15 imposes no limit on the number of questions which may be asked. Furthermore, under the statute permitting interrogatories, questions may be directed only to an “adverse party,” whereas under §1(a) “any person” may be deposed.

Rule 15, §§1(a) and 4(a). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. Id. §1(a).

Since this requirement of obtaining leave of court for the taking of a deposition when the giving of notice occurs prior to the time allowed to the defendant for appearance runs only to the plaintiff, the defendant, in effect, is given the first
2. In an action at law where there is no reasonable likelihood that recovery will exceed $5000 if the plaintiff prevails;\(^5\)
3. In a creditor's bill in equity when the claim does not exceed $5000;
4. In an action at law where there has been a trial in a district court before transfer;
5. In an action at law where there has been a hearing before an auditor;
6. In proceedings for custody of minor children, divorce, annulment, separate support, or like proceedings.

b. *The scope of examination.* Rule 15 makes the distinction between the discovery of facts prior to trial and the admissibility of evidence at the trial itself. Thus, except for privileged matters, it is not a ground for objection that the testimony sought during deposition would be inadmissible at the trial if such testimony appears reasonably calculated to lead to the discovery of admissible evidence.\(^6\) Specifically, opportunity to obtain discovery. This will be true if Massachusetts follows the federal decisions interpreting the comparable Rule 26(a) of the Fed. R. Civ. P. Note, however, that the federal decisions have taken the position that leave of court to the plaintiff to give notice of the taking of depositions prior to the time the defendant must appear will be granted only upon a showing of unusual circumstances or conditions which will be likely to prejudice him if he is compelled to wait the required time. Brause v. Travelers Fire Ins. Co., 19 F.R.D. 231 (S.D.N.Y. 1956); Babolia v. Local 456, Teamsters & Chauffeurs Union, 11 F.R.D. 423 (S.D.N.Y. 1951). But cf. Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co., 9 F.R.D. 432 (S.D.N.Y. 1949). Furthermore, federal cases have held that discovery under the federal rules shall be given in the order demanded. Shulman, Inc. v. Shertz, 18 F.R.D. 94 (E.D. Pa. 1955). This rule relates to discovery of any kind. Technical Tape Corp. v. Minnesota Mining & Mfg. Co., 18 F.R.D. 318, 321 (S.D.N.Y. 1955). See Facher, Rule 15, Landmark in Massachusetts Procedure, 51 Mass. L.Q. 5, 8-9 (1966). Thus by being able to be the first to give notice of discovery, the defendant may be able to complete all of his discovery before the plaintiff is able to commence his discovery. Where, however, such priority would be oppressive, consideration should be given to the language in the last sentence of Section 4(a) of Rule 15: "The court may regulate at its discretion the time, place and order of taking depositions as shall best serve the convenience of the parties and witnesses and the interests of justice." (Emphasis supplied.)

\(^5\) In determining whether no reasonable likelihood exists that the damages will exceed $5000 if the plaintiff prevails, little weight should be given to the ad damnum in the writ. Otherwise, in a close case the plaintiff could attempt to avoid discovery by claiming under the $5000 amount or attempt to obtain discovery by claiming over $5000. Of greater significance than the ad damnum of the writ would be the statement which the plaintiff must file under Rule 33A of the Rules of the Superior Court setting out the facts in full detail upon which he relies as constituting his damages.

It should be emphasized that a finding by the court that there is no reasonable likelihood that the damages will exceed $5000 if the plaintiff prevails, has the effect of denying the party seeking to take depositions under Rule 15 the opportunity of obtaining such discovery as a matter of right. The court may nevertheless still grant the right to take depositions under Rule 15.


This approach might be contrasted with the approach under our written interrogatories statute, G.L., c. 231, §61 which limits discovery of facts and documents to those which would be admissible in evidence at the trial of the case.

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§24.2 RULE 15: PRETRIAL ORAL DISCOVERY

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the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending proceeding, whether it relates 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.7

There are of course certain exceptions to the wide scope of discovery, permitted under Section 1(b) of Rule 15. As mentioned previously, discovery may not be had of matters which are privileged.8

Secondly, the court is granted wide discretion under Rule 15, upon motion by the party or other persons to be examined and upon notice and a showing of good cause, to limit the scope of examination.

Finally, Section 1(b) provides either absolute or qualified immunity with respect to the production of certain documents or other items.9

The procedure for examination and cross-examination of deponents can be the same as at trial in the court in which the proceeding is pending.10

c. Permissible use of depositions at the trial. The use of depositions taken under Rule 15 is, of course, not limited to discovery purposes. In certain defined instances, such depositions may be used at the trial.11 The deposition of a party to the action may be used at the trial by the adverse party for any purpose.12 The deposition of a witness who is not a party to the action may be used for the purpose of impeaching or contradicting the testimony of such witness.13 It may also be used as independent evidence in the following instances:

1. if the witness is dead;
2. if the witness is out of state, unless it appears that the absence of the witness was procured by the party offering the deposition;
3. if the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment;
4. if the party offering the deposition has been unable to procure the attendance of the witness by subpoena;

7 Rule 15, §1(b). This approach might be contrasted with our written interrogatories statute, G.L., c. 231, §§61, 63, which provides that a party need not disclose the names of witnesses unless the court otherwise orders such disclosure.
8 A complete discussion of this absolute or qualified privilege is contained in the treatment of §6 of Rule 15, §24.7 infra.
9 Rule 15, §4(b). A more complete discussion of this matter appears in the textual treatment of §4 of Rule 15, §24.5 infra.
10 Rule 15, §1(c).
11 Obviously, the matter contained in the deposition which a party is attempting to use at the trial must be admissible under the rules of evidence. Objections may be made at the trial to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. See id. §1(c).
12 Id. §1(d)(2). The word "party" includes an officer, director or managing agent of a public or private corporation which is a party.
13 Id. §1(d)(1).

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5. if upon application and notice that such exceptionable circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.\textsuperscript{14}

If only a part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced. Any party may introduce any other part.\textsuperscript{15}

Except with respect to the deposition of an adverse party, the introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition.\textsuperscript{16} Any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.\textsuperscript{17}

§24.3. Persons before whom depositions may be taken. Section 2 provides that within the Commonwealth depositions may be taken before anyone authorized by law to administer the oath or before any one appointed by the court.\textsuperscript{1} The appointment by the court confers the power to administer the oath. Section 2(b), like its counterpart, Federal Rule of Civil Procedure 28(b), provides for three alternatives in establishing the appropriate modus operandi under this section. Foreign depositions may be taken (1) before a person authorized to administer the oath at the place of the depositions; (2) before a person commissioned by the court before which the action is pending; or (3) pursuant to a letter rogatory.\textsuperscript{2}

\textsuperscript{14} Id. §1(d)(3).
\textsuperscript{15} Id. §1(d)(4).
\textsuperscript{16} Id. §1(f). It should be noted that merely taking the deposition of a witness does not make the deponent the witness of the party taking the deposition.
\textsuperscript{17} Ibid.

§24.3. 1 This section should be read in conjunction with §3. See §24.4 infra.

\textsuperscript{2} Letters rogatory are issued by a domestic court upon application after notice. The letters constitute a request by the domestic court that a foreign court examine a person within its jurisdiction. The foreign court examines the witness or appoints someone to do it. See generally, 4 Moore, Federal Practice §28.05 (2d ed. 1966).

Where depositions are sought to be taken in foreign countries, there may be a practical problem deriving from the fact that there is no procedure for compelling witnesses to attend and answer questions. In this regard, Professor Moore in 4 Federal Practice §28.07 (2d ed. 1966), suggests the following procedure for a party taking a deposition in a foreign country:
1. He should ascertain from the Department of State the precise methods available to him for taking testimony in the foreign country in question.
2. If the notice procedure is available he should utilize it, without resorting to the issuance of a commission or letters rogatory.
3. If the foreign country does not permit the taking of depositions by the notice procedure, but does permit the taking of testimony by commission, he must apply to the district court for the issuance of a commission to take testimony.
4. If the foreign country does not permit the taking of depositions either by the notice procedure or by commission, he may apply to the district court for the issuance of letters rogatory. Similarly, he may apply to the district court for the issuance of letters rogatory when a witness refuses to appear or to answer upon the taking of a deposition by the notice procedure or by commission, if the courts of the foreign country will not compel the witness to appear or answer without the issuance of letters rogatory. And under an appropriate showing of necessity
Section 2(c) provides that no deposition shall be taken before an "interested" party. Under its terms, persons so disqualified include persons having a financial interest in the outcome of the prospective litigation, relatives, employees, or attorneys of any party, and persons associated with such disqualified attorneys. Objections under this subsection are deemed to be waived unless raised at the beginning of the deposition "or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence."8

§24.4. Stipulations regarding the taking of depositions. While very short, Section 3 is one of the more important sections of Rule 15. It provides that if the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken may be used in the same manner as any other depositions. The use of Section 3 by attorneys can significantly ease the burdens, financial and otherwise, of taking depositions under Rule 15. Thus, for example, the parties may stipulate to eliminate the requirements under §4(e) and (f) that the officer who takes the deposition submit a transcript of the testimony to a witness for his signature, make a certification that the witness was duly sworn by the officer, and that the deposition is a true record of the testimony given by the witness, seal the transcript and file it with the court in which the proceeding is pending.

§24.5. Procedures for deposition upon oral examination. Section 4 sets forth the procedure under which the deposition process is commenced. It is a manifestation that the drafters contemplated the rule to be largely self-executing and that recourse to the courts, either to commence the procedure or for supervisory assistance during the deposition process, would be a rare event. Under this section, to initiate the deposition process a party need only give written notice to every other party to the action at least seven days prior to the date set for the deposition,1 and file a copy of the notice in court.2 In the vast majority

or convenience, letters rogatory may be issued in the first instance, but it must clearly appear wherein letters rogatory are necessary or more convenient than the taking of depositions by the notice procedure or by commission.

3 In one case, attorneys stipulated that a deposition could be taken before any one of a group of named persons. The attorney never investigated possible disqualifications of this group. In fact, the individual chosen as "officer" to take the deposition was a secretary of one of the opposing attorneys. This defect was held to be waived. However, with respect to future deposition testimony, the complaining party could be relieved of the stipulation if he had misgivings as to the fidelity with which the secretary had performed her functions. Lavarett v. Continental Briar Pyne Co., 25 F. Supp. 790 (E.D.N.Y. 1938).

§24.5. 1 This provision differs slightly from Fed. R. Civ. P. 30(a), which requires only that "reasonable" notice be given.

2 This provision also deviates from the Federal Rules which establish no requirement that a copy of the notice be filed with the court in which the action is pending. This section undoubtedly sought to give a court increased control over the action or, at the least, insure a greater awareness of the development in the case. However, again, the parties could stipulate under §3 to forego the filing if this was deemed desirable.
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of cases there will be no necessity of obtaining leave of court to take the deposition.

The form of the notice will be fundamentally the same whether the deposition is to be taken of a party or a witness, although the manner in which the deposition of a party may be utilized at trial may differ significantly from the manner in which the deposition of a witness is used. Usually, the party initiating the deposition process will select the time and place for the deposition. In most instances, the deposition will be taken at the examining attorney's office during normal court hours.

To compel the attendance of a party, the mere giving of notice, as under the Federal Rules, is sufficient; there is no requirement that any further action be taken. On the other hand, to insure the presence of a witness at the deposition hearing, the initiating party must serve him with a subpoena directing him to appear at the prescribed time and place. The notice must specify the name and address of each person to be examined. If the name is not known, Section 4(a) provides that "general description sufficient to identify him or the particular class or group to which he belongs" will suffice.

As indicated above, when a corporation is a party, notice must be given of the taking of the deposition of an officer or managing agent. To charge an adversary corporation with an admission, the deposition must be of an officer or managing agent when the deposition is taken. The determination of whether the person sought to be deposed qualifies as a "managing agent" will have importance in determining the use that can be made of the deposition at trial and in imposing sanctions for either a failure to appear or a failure to testify. The issue of who qualifies as a "managing agent" has been an elusive one. One excellent opinion has set out the criteria for making this qualification in the following language:

A managing agent, as distinguished from one who is merely "an employee," is a person invested by the corporation with general powers to exercise his judgment and discretion in dealing with corporate matters; he does not act "in an inferior capacity" under

3 Collins v. Wayland, 139 F.2d 677, 678 (9th Cir. 1944), cert. denied, 322 U.S. 744 (1944); Peitzman v. City of Illmo, 141 F.2d 956, 961 (8th Cir. 1944).
5 The purpose of this rule is to avoid, to the extent feasible, the prospects of disgruntled former employees making damaging statements that would bind a former employer. However, this rule is not inflexible. In Curry v. States Marine Corp., 16 F.R.D. 376 (S.D.N.Y. 1954), an individual who was master of a ship at the time of the accident, but only chief mate on another vessel of the same employer at the time of the deposition, was held properly subject to notice of the corporation.
close supervision or direction of "superior authority." He must be a person who has "the interests of the corporation so close to his heart that he could be depended upon to carry out his employer's direction to give testimony at the demand of a party engaged in litigation with the employer."\textsuperscript{6}

Finally, on the question of geographic limitations, Section 4(a) contains two limitations on the distance which a witness may be required by subpoena to travel in order to appear at a deposition. A resident of the Commonwealth shall not be required to travel more than 50 miles from his place of residence or his place of business unless the court orders otherwise. A nonresident cannot be compelled to travel more than 50 miles from the place in which he is subpoenaed unless the court orders that another location would be more convenient.\textsuperscript{7}

Section 4(b) sets forth various specified protective orders which the court may direct in order to avoid possible abuse caused by the broad scope of discovery provided for in Section 1. Section 4(b) provides this protection before the examination is begun, whereas Rule 4(d) seeks to provide protection during the course of the examination. When good cause is shown, the court in which the action is pending may direct any of several specified orders or "any other order which justice requires to protect the party or witness from annoyance, undue expense, embarrassment, or oppression." The first ten types of protective orders which are set forth under this section parallel exactly the provisions of Rule 30(b) of the Federal Rules of Civil Procedure.\textsuperscript{8}

\textsuperscript{6} Krauss v. Erie R.R., 16 F.R.D. 126, 127 (S.D.N.Y. 1954). If the "managing agent" issue cannot be resolved at the outset of the taking of the deposition, then the person should be noticed as a "witness" and served with a subpoena. It will then be for the trial judge to determine whether the person is or is not a "managing agent" within the rule so as to permit the deposition to be used against the adverse part. See Atlantic Coast Insulating Co. v. United States, 34 F.R.D. 450 (E.D.N.Y. 1964).

\textsuperscript{7} These restrictions do not exist where a witness is being summoned to appear at a trial. In this event, the "summons may be served in any county" in the Commonwealth. See G.L., c. 233, §2.

\textsuperscript{8} Rule 30(b) lists ten types of protective orders which a court can make prior to the taking of the deposition. They are listed in Mississippi Law Institute, Federal Practice and Procedure, 114-116 (1964), in substance as follows:

1. \textit{That the deposition shall not be taken}. In view of the general freedom of discovery depositions, this motion is rarely granted under the federal experience. It must be remembered that the right to discovery is not dependent on disclosure by the party seeking discovery of the facts which he knows. He may have discovery even though he himself has refused on the ground of privilege, United States v. 47 Bottles, 26 F.R.D. 4 (D.N.J. 1960). Moreover, it should be noted that witnesses cannot escape examination by claiming that they have no knowledge of any relevant facts, since the party seeking to take the deposition is entitled to test their lack of knowledge at a deposition hearing, Republic Products, Inc. v. American Fedn. of Musicians, 30 F.R.D. 159 (S.D.N.Y. 1962).

2. \textit{It may be taken at some designated place other than that stated in the notice}. Under the Federal Rules, normally a plaintiff will be required to make himself available for examination in the district in which the suit was brought. However, the court may order that a deposition be taken at some place other than that desig-
ever, Rule 15 is considerably broader than the Federal Rules and adds two provisions designed to alleviate the economic burden for poorer litigants. When a party contemplates taking a deposition outside the state, he may be required to pay the traveling expenses of the opposing party and his attorney if it can be shown that their attendance is reasonably necessary at the deposition proceeding. In addition, when that witness is under the control of the party taking the deposition, the court may direct that the witness should be brought into the state for the deposition.

Section 4(c) sets forth the procedures for putting the deponent under oath and for recording the testimony. To illumine a point left

notated in the notice, and it may order the taking at a time other than that designated. The plaintiff must show good cause for not adhering to the forum which he selected in commencing the suit. Good cause is shown if the plaintiff is physically or financially unable to come to the forum, Sullivan v. Southern Pacific Co., 7 F.R.D. 206 (S.D.N.Y. 1947); Hyam v. American Export Lines, Inc., 213 F.2d 221 (2d Cir. 1954).

3. It may be taken only on written interrogatories. Under normal circumstances, the party taking the deposition is entitled to choose the method by which it is to be conducted, and the court will not interfere with his choice, Greenberg v. Safe Lighting, Inc., Inertia Switch Div., 24 F.R.D. 210 (S.D.N.Y. 1959). However, where the examination will be brief or simple, or there are some other good causes, the courts have ordered the deposition taken on written interrogatories, see 2A Barron & Holtzoff, Federal Practice & Procedure §715.1 (Wright ed. 1961).

4. Certain matters shall not be inquired into; and

5. The scope of the examination shall be limited to certain matters. These two rules of prevention are quite similar. The principle has been applied in the instance in which discovery was stayed until the question of jurisdiction, which was challenged, had been resolved. See Wright, Federal Courts §§81-90 (1963), reprinted in 35 F.R.D. 39, 60 (1963). Where separate issues are to be tried, discovery has been limited to the one issue. However, it is well to remember that such a limitation could lead to wasted effort by requiring two depositions from the same witness and the court would often be justified in refusing such a limitation.

If it is contended that the depositions are intended for discovery in another case, such as a closely related criminal action or an action in another court, the scope may be limited.

6. The examination shall be held with no one present except the parties to the action and their officers or counsel. It is obvious that a party, or officer of a corporate party, has to be present at the deposition proceeding.

7. The deposition shall be opened only by order of the court. This provision is similar to the sixth type just mentioned and means that after being sealed the deposition shall be opened only by order of court. Without such a protective order the deposition is a public document and is freely open to inspection after it is filed by the clerk, Burnham Chemical Co. v. Borax Consolidated, Ltd., 7 F.R.D. 341 (N.D. Cal. 1947).

8. Secret processes, etc., need not be disclosed. Trade secrets are not under the coverage of privilege and disclosure could be harmful. Accordingly this rule is frequently invoked.


10. Any other orders which, in effect, justice requires. As under the language of Rule 15, this tenth provision is the only principle that would be necessary to entitle a court to issue a protective order. If a court may make any order which justice requires, this provision, of itself, gives the trial courts sufficient latitude to prevent any undue harassment, and to prevent unfairness to a party.
in doubt by Federal Rule of Civil Procedure 30(c), Section 4(c) provides that the cost of the stenographer and transcription shall be borne by the party taking the deposition, except that the court may equitably apportion that cost when cause is shown. This equitable apportionment is again intended to prevent abuse of the discovery procedure.

Section 4(c) sets forth the manner in which objections arising during deposition are to be noted. In addition, it provides for the presentation of written interrogatories to the deponent, who then will respond in the customary manner.

As noted above, while Section 4(b) seeks to prevent abuse of the discovery procedures before the deposition is taken, Section 4(d) is aimed at preventing abuse during the course of taking the deposition. It provides that, upon the motion of any party or the deponent "that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, oppress the deponent or party," the court may terminate the deposition or make any other order necessary to eliminate the abuse.

Under Section 4(e), when the testimony of the deposition has been fully transcribed, the deponent is given the opportunity to read the transcript. If any change is thereafter made, a statement must be included showing the reasons for making the change. Thereafter, the deponent signs the deposition, although his refusal to sign does not affect the deposition's usefulness. After the transcript has been submitted to the witness, Section 4(f) requires that the officer certify it and either mail or deliver it to the clerk of the court in which the action is pending. The parties may stipulate in writing to waive these transcription and filing requirements. It is the responsibility of the party taking the deposition to notify all other parties of the filing. Unless the court otherwise orders, the copy on file is open for inspection. Finally, any party or the deponent may obtain copies of the deposition upon payment of the cost of the copy. This cost would not include the stenographic fee nor the cost of transcription, since their payment is provided for in Sections 4(c) and 9.

Section 4(g) provides that the court may assess reasonable expenses and attorney fees which have been incurred in two situations. The first is when the party giving notice of the deposition fails to attend and the other party or his attorney does attend. The second is when the party giving notice fails properly to compel the attendance of the prospective witness and the witness does not attend, while the other party or his attorney does attend.

Section 4(h) has no equivalent under the Federal Rules. Its purpose is to equate an appointment for a deposition with a court engagement, to the extent the court in which the proceeding is pending recognizes the deposition. When a deposition is deemed to be such a court engagement, the counsel will not be required to set up and keep any conflicting court appearances. In order for counsel to obtain court recognition of the deposition appointment, he must file an applica-
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tion with the court in which the proceeding is pending at least three
days prior to the time for the taking of the deposition.

§24.6. Effect of errors and irregularities in depositions. Situations
will arise in the taking of depositions under Rule 15 in which one
of the parties may wish to object. For example, procedural objections
may be raised such as an irregularity in notice, the disqualification of
the officer before whom the deposition is being taken, or the conduct
of the parties. On the other hand, the objection may relate to a
substantive matter such as the competency of a witness or the compe-
tency, relevancy, or materiality of testimony. Section 5 of Rule 15 deals
with the question of when objection must be made to such matters in
order to be effective.

a. Errors or irregularities as to procedure. Generally speaking ob-
jections relating to procedure are waived unless promptly taken. More
specifically Section 5 provides as follows:

1. As to notice. All errors and irregularities in the notice for taking
a deposition are waived unless written objection is promptly served
upon the party giving the notice.1

2. As to disqualification of officer taking the deposition. Objection
to taking a deposition because of disqualification of the officer before
whom it is to be taken is waived unless made before the taking of the
deposition begins or as soon thereafter as the disqualification becomes
known or could be discovered with reasonable diligence.2

3. As to taking of the deposition. Errors and irregularities occurring
at the oral examination in the manner of taking the deposition, in the
form of the questions or answers, in the oath or affirmation, or in the
conduct of the parties, and errors of any kind which might be obviated,
or cured if promptly presented, are waived unless seasonable objection
is made at the taking of the deposition.3

4. As to completion and return of deposition. Errors and irregular-
ities in the manner in which the testimony is transcribed or the deposi-
tion is prepared, signed, certified, sealed, endorsed, transmitted, filed,
or otherwise dealt with by the officer are waived unless a motion to
suppress the deposition or some part thereof is made with reasonable
promptness after such defect is, or with due diligence might have been,
ascertained.4

b. Errors or irregularities as to substantive matters. Section 5(c)(I)
of Rule 15 provides that objections to the competency of a witness or
to the "competency, relevancy, or materiality of testimony are not
waived by failure to make them before or during the taking of the
deposition, unless the ground of the objection is one which might have
been obviated or removed if presented at that time." The main diffi-
culty with this provision is the so-called "obviation clause." The pur-

§24.6. 1 Rule 15, §5(a).
2 Id. §5(b).
3 Id. §5(c).
4 Id. §5(d).
pose of the clause is clear. It would be rather unfair, for example, to permit a party at the trial to object to the competency of an expert witness whose deposition the other party is attempting to use as evidence at the trial, where the witness is not now available and the matter could have been clarified at the time of the deposition. On the other hand, with respect to the relevancy or materiality of questions, difficulties certainly arise. The scope of questioning under Rule 15 is not limited to what is admissible at the trial but rather by whether a question is reasonably calculated to lead to the discovery of admissible evidence. As a result, an attorney may find himself objecting to numerous questions which in his opinion would not be admissible at the trial, but are proper at the deposition, in order to avoid the possibility that the obviation clause might be used against his trial objections if an attempt is made to ask the same questions, or to introduce into evidence the answers to the questions appearing in the deposition. Perhaps the best way to avoid this difficulty is to have the parties stipulate that no objections to the competency, relevancy, or materiality of a question is deemed to be waived for failure to take such objections at the time of the taking of the deposition.

§24.7. Discovery and production of documents and things for inspection, copying, or photographing. Section 6 of Rule 15 has two parts: (1) it authorizes the inspection, copying, or photographing by or on behalf of the moving party of documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of examination permitted by Section 1(b) and which are in the possession, custody, or control of the other party; (2) it permits entry upon land or other property in the possession or control of a party for the purpose of inspecting, measuring, surveying, testing, or photographing the property or any designated object or operation thereon within the scope of examination permitted by Section 1(b).

5 Id. §1(b).

6 The scope of the language of Section 3 of Rule 15 would certainly seem to encompass such a stipulation.

§24.7. 1 Section 6 is taken verbatim from Rule 34 of the Fed. R. Civ. P. Hence the cases interpreting Rule 34 should be helpful in interpreting Section 6.

2 It may be recalled that the general test of the scope of examination under §1(b) is not whether the testimony would be admissible at the trial but rather whether the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. There are, however, certain exceptions which are discussed above in the text. See §24.2 supra.

3 For a discussion of the meaning of the word "control" used in Rule 34 of the Fed. R. Civ. P., see Note, 107 U. Pa. L. Rev. 103 (1958). It is clear that a party cannot avoid an order under Section 6 by turning possession of an item over to someone else such as his attorney or insurer. Bingle v. Liggett Drug Co., 11 F.R.D. 593 (D. Mass. 1951).

4 If the land or other property is in the possession or control of a non-party to the action, §6 is inapplicable. However, a party seeking such an entry might resort to a bill in equity for discovery in aid of an action at law. See MacPherson v. Boston Edison Company, 356 Mass. 92, 142 N.E.2d 758 (1957).

5 See note 2 supra.
Differences from deposition sections. Section 6 differs from the deposition sections in several respects. First, irrespective of the amount involved in the litigation, discovery under Section 6 can be obtained only upon the granting of a motion by the court upon a showing of good cause. Second, discovery under the section is limited to the parties to the action. Third, the section does not contain a provision, comparable to Section 1, pertaining to the courts in which discovery is available.

Scope of discovery. The general test of the scope of discovery under Section 6 is not whether the item would be admissible as evidence at the trial but whether the item sought appears reasonably calculated to lead to the discovery of admissible evidence. There are, however, certain exceptions to this broad category. Discovery may not be obtained of privileged matter. Section 6 specifically incorporates the protective provisions of Section 4(b). It will be recalled that this section deals with orders protecting parties and deponents from annoyance, undue expense, embarrassment, or oppression. Of particular significance to the production of items under Section 6 is the following language in Section 4(b):

... Upon notice and for good cause shown, the court in which the proceeding is pending may make an order that certain matters shall not be inquired into, 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.

Section 6 expressly incorporates the provisions of Section 1(b), which include the so-called "work product rule" developed in the famous United States Supreme Court decision of Hickman v. Taylor. In the Hickman case the Court held that a lawyer's work product had a qualified immunity from discovery; such material is discoverable only upon a substantial showing of necessity. Section 1(b) separates (1) writings, plans, recordings, photographs, or other things prepared by or for the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial from (2) a

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6 A question arises as to whether the "good cause" requirement of §6 can be avoided by the use of a subpoena duces tecum, proceeding under §1(b). It is hardly likely that such circumvention will be allowed. See 4 Moore, Federal Practice §26.10(1) (2d ed. 1963).

7 The question thus arises as to whether §6 may be utilized in connection with an action in the district court. It is the authors' opinion that the answer is no.

8 A specific exception to this rule is a liability insurance policy or indemnity agreement. In order to obtain discovery of these items, they would have to be admissible in evidence at the trial.


10 Section 1(b) broadened the qualified immunity of Hickman v. Taylor so as to make it applicable not only to items prepared by an attorney but also to items prepared by the adverse party, his surety, indemnitor, or his agent.
writing which reflects an attorney's mental impressions, conclusions, opinions, or legal theories or the conclusions of an expert. With respect to the former, the immunity is qualified. Thus a court may as to the items order production on the ground that a denial of production or inspection will result in injustice or undue hardship. With respect to the latter, the immunity is absolute.\textsuperscript{12}

\textit{Interpretive problems.} Perhaps the major problem of interpretation with respect to Section 6 is the meaning of the term "good cause." What is required to show "good cause?" The opinions of the federal courts have not been uniform in their interpretation. Some courts have taken the view that as long as the item sought is not privileged or immunized under the doctrine of \textit{Hickman v. Taylor},\textsuperscript{13} good cause is shown by a demonstration that the item would be admissible evidence or would lead to admissible evidence.\textsuperscript{14} As applied to Massachusetts Rule 15, the same would be true as long as the item was not privileged and was outside the limitations of Sections 1(b) and 4(b). However, since the limitations of these two sections are expressly incorporated into Section 6, this interpretation of the latter section is subject to the criticism that it renders the "good cause" language redundant and thus violates an elementary rule of statutory construction of giving meaning to every word of a statute.

Another interpretation of "good cause" is that it requires a showing of special circumstances.\textsuperscript{15} Such an interpretation does not, however, appear to be within the spirit of the discovery rules. Despite the fact that it may render the term "good cause" somewhat redundant, our courts will probably interpret the term in not too strict a fashion, perhaps requiring only that none of the limitations of Sections 1(b) and 4(b) are present.

Section 6 raises another problem for judicial interpretation in establishing the standards of specificity with which the movant must designate the item sought. For example, could a party merely make a motion for all of the documents in the control of the defendant pertaining to the subject matter of the litigation? Again there is a split in the federal cases. One case has held that the motion must be sufficiently specific to enable a party to go to his files and, without difficulty, pick out the document required.\textsuperscript{16} Another case, expressing

\textsuperscript{12}There is one exception to this absolute immunity attaching to the conclusions of an expert. This is found in §7(b) dealing with the right of a party under some circumstances to request medical reports from the other party. This matter is discussed in the text, §24.8 \textit{infra}.

\textsuperscript{13}\textsuperscript{13}U. S. 495, 67 Sup. Ct. 585, 91 L. Ed. 451 (1947).


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a more liberal view, held that it is proper to demand all the documents under the other party's control pertaining to the particular subject matter.\(^\text{17}\) Perhaps the best approach is a compromise of these extremes. The description should be sufficient to appraise a man of ordinary intelligence as to what documents are required and sufficient enough so that the court will be able to ascertain whether the order has been complied with.\(^\text{18}\) What will often happen, is that the identity of documents or other items will be ascertained at the time of the deposition. Then, subsequently, a motion will be made to produce such documents or items under Section 6.

§24.8. Physical and mental examination. Under Section 7 of Rule 15, if the mental or physical condition of a party to a proceeding is in controversy or may affect the conduct of the proceeding, the court in which the proceeding is pending may order him to submit to a physical or mental examination conducted by a physician.\(^\text{1}\) If requested by the person examined, the party causing the examination to be made shall deliver a copy of the report of the examining physician, setting out his findings and conclusions.\(^\text{2}\) After such requests and delivery the party causing the examination to be made will be entitled upon request to receive from the party examined a like report of any examination,\(^\text{3}\) previously or thereafter made, of the same mental or physical condition.\(^\text{4}\)

Differences from deposition sections. Section 7 differs from the deposition sections in several respects. First, irrespective of the amount involved in the litigation, discovery under Section 7 can be obtained


\(^{1}\) Rule 35 of the Fed. R. Civ. P., the provisions of which are comparable to §7 of Rule 15, does not contain the language, "or may affect the conduct of the proceeding."

\(^{2}\) It has been held under Rule 35 of the Fed. R. Civ. P. that the right to obtain a copy of the report is not lost when a party submits voluntarily to the examination. See Rucker v. Calmar SS. Corp., 188 F. Supp. 528 (E.D. Pa. 1960), and cases cited in 2A Barron & Holtzoff, Federal Practice and Procedure §823 n.22 (Wright ed. 1961).

\(^{3}\) While the word "examination" is in the singular, it seems reasonably clear that it refers to all examinations relating to the same mental or physical condition.

\(^{4}\) Most cases have held under Rule 35 of the Fed. R. Civ. P. that the examined party cannot be required to turn over his own reports where he made no request but had been given a copy of the examining party's report voluntarily. See Sher v. DeHaven, 199 F.2d 777, 36 A.L.R.2d 937 (D.C. Cir. 1952), cert. denied, 345 U.S. 936 (1953). Since Massachusetts does not have a physician-patient privilege, Commonwealth v. Gordon, 307 Mass. 155, 29 N.E.2d 719 (1940), the question arises as to whether such medical reports could be obtained under §6 of Rule 15. Since §6 incorporates §1(b) which excludes from discovery "conclusions of an expert," it would seem that discovery may be obtained under §6 only with respect to matters in the medical reports which are not conclusions. Currie v. Moore-McCormack Lines, Inc., 23 F.R.D. 660 (D. Mass. 1959).
only upon the granting of a motion by the court upon a showing of good cause.5 Second, discovery under the section is limited to parties to the action.6 Third, Section 7 does not contain a provision comparable to Section 1 pertaining to the courts in which discovery is available.

Scope of discovery. The first matter involving scope of discovery under Section 7 is the type of proceeding in which it may be utilized. Although the rule states "any proceeding," was it intended to apply only to personal injury cases? Initially, Rule 35 of the Federal Rules of Civil Procedure was given this restrictive construction,7 but this was subsequently changed.8 It is hardly likely that the Supreme Judicial Court would give it such a restrictive construction.

Another matter involving the scope of discovery under Section 7, is the type of examination that the court will order. Will the court order an examination which is novel or which involves a great deal of pain? The type of examination allowed will no doubt depend upon a balancing of the pain involved with the need in the particular case for such an examination.9 This balancing process is probably necessitated by the term "good cause." At a minimum, it would seem that the type of examination requested must be medically acceptable. Courts have ordered painful examinations under Rule 35 of the Federal Rules of Civil Procedure where the safety of the examination and its need in the particular case was adequately demonstrated.10

Finally, while unlike Section 6 of Rule 15, Section 7 does not expressly incorporate the safeguards of Section 4(b), it would appear that such safeguards are impliedly present in the language, "for good cause shown."11

Problems of interpretation. As with Section 6 of Rule 15, one of the more significant matters for interpretation under Section 7 is the meaning of the term "for good cause." Since, generally speaking, the submission by an individual to a physical or mental examination is more personal and often more onerous than turning over a document or object to the other party, it is likely that the courts will be more strict in their application of the "good cause" requirement in Section

5 For a discussion of the term "good cause" in connection with §7, see text supported by notes 9-14 infra.
6 For a discussion of the word "party" in §7, see text supported by note 15 infra.
7 In Wadlow v. Humberd, 27 F. Supp. 210 (W.D. Mo. 1939), the court held it inapplicable in a libel action where the defendant was attempting to establish the truth of his statements about the plaintiff's physical and mental condition.
8 In Beach v. Beach, 114 F.2d 479, 131 A.L.R. 804 (D.C. Cir. 1940), the court held the rule applicable to permit blood tests in a divorce action on the ground of adultery.
11 While the rule does not so state, it is likely that the party examined would be entitled to have his own physician present during the examination. See Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595 (D. Md. 1960).
7 than in Section 6. The United States Supreme Court has recently pointed out that the "good cause" requirement of Rule 35 of the Federal Rules of Civil Procedure is not satisfied by mere conclusory allegations in the pleadings nor by mere relevance to the case, but that it necessitates "an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." As mentioned previously, it is likely that the "good cause" requirement constitutes a weighing of the particular need for the examination against the pain and novelty of the examination.

Finally, the word "party" as used in Section 7 of Rule 15 may require interpretation. Does it refer to named parties only or does it encompass a person with a substantial interest in the outcome of the litigation? May, for example, a defendant obtain a physical examination of a wife when her husband is suing for her injuries? While the courts in interpreting Rule 35 of the Federal Rules of Civil Procedure have occasionally ordered an examination of a person who is a party "in substance" although not "in form," the situations are rare where such a liberal interpretation has prevailed.

§24.9. Consequences of refusal to make discovery. Section 8(a) provides sanctions in those situations where a party or other deponent wrongfully refuses to answer a question. The party seeking the answer must then obtain a court order before the deponent can be compelled to answer. The court may in its discretion assess reasonable expenses and attorney's fees if either the questioner or the deponent acted "without substantial justification.”

Section 8(b) provides the sanction which the court may impose if a court order has not been complied with. A refusal to answer a question after a Section 8(a) order may be considered contempt of court. Section 8(b)(2) states that the court may make such orders as it deems just where a party or an officer or managing partner of a party has violated an order made under Section 8(a), Section 6 (discovery of documents and real estate), or Section 7 (mental or physical examination). Section 8(b)(2) then specifies four additional sanctions at the disposal of the court:

(a) an order which admits as facts, propositions which the party seeking the order was attempting to establish;

(b) an order which precludes the disobedient party from introducing facts or defenses or claims contrary to those sought to be established by the party obtaining the order;

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13 Id. at 118, 85 Sup. Ct. at 242-243, 13 L. Ed. 2d at 164.
14 See text supported by notes 9-10 supra.
15 In Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940), the court ordered a blood-grouping test for a newly born child in a separate maintenance action where the husband counterclaimed for divorce on the ground of adultery, on the basis that the child had a direct interest in the action and his interest was being represented.
(c) an order striking out pleading or staying the proceedings until the order is obeyed or awarding default judgment against the disobedient party; or

(d) an order directing the arrest of any party or agent of any party, except in a case involving a mental or physical examination.

Section 8(c) provides sanctions against a party or an officer or managing agent of a party who willfully fails to appear at a deposition according to the notice he received. The court on motion may strike any part or all of his pleadings, dismiss the proceedings, or issue a default judgment.

Section 8(d) provides that expenses and attorney's fees may not be imposed upon the Commonwealth under Section 8. It also provides strong if indirect evidence that the Commonwealth was intended to be subject to the discovery provisions.

Section 9, which has no counterpart in the Federal Rules, provides that the court in its discretion may assess the costs of taking a deposition on one of the parties as part of taxable costs. The taxable costs include the fees of the officer and stenographer, the cost of the summons, and the costs of transcription. Section 4(c) states that the cost of stenographer and transcription will generally be borne by the party taking the deposition, except that, for cause shown, these expenses may be equitably apportioned. In order to reconcile the two provisions, Section 4(c) must, therefore, deal with the initial payment of these expenses, while Section 9 deals with the ultimate payment, i.e., payment if the court determines at the end of the action that the expenses should constitute a part of the assessable costs of the action.

§24.10. Conclusion. As the foregoing review of Rule 15 indicates, there are many unanswered questions which will have to be resolved. As with all things that are new, there will be problems of interpretation and practical problems of procedure which will have to be settled as Massachusetts lawyers become more familiar with Rule 15. Pretrial oral discovery is not a panacea. However, it cannot be gainsaid that it is a great step forward if one is willing to accept the premise that the trial of a lawsuit should be a quest for truth and not an exercise in gamesmanship. If given a fair chance to operate by counsel and if accorded a liberal interpretation by the judiciary, civil trials in the state courts of Massachusetts will no longer be "carried on in the dark." Indeed, with the use of Rule 15 "a trial [will be] less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." In short, it can be hoped that victory will more frequently go to the party entitled to it, on all of the facts, instead of going to the side which may be best


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in hiding facts or exploiting the element of surprise at the trial. The trial will be henceforth more of a contest between parties rather than attorneys, although the expertise and art of the trial lawyer will still play a great part in the trial of cases.