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## INTRODUCTION

More than fifteen years ago Virginia made a very important and progressive modification of the rules of practice and procedure in actions at law and suits in equity. The promulgation of the Rules of the Supreme Court of Appeals in 1950 substituted a modern system for an archaic, outmoded, and cumbersome one. Under the Rules litigants can state their case and plead in a brief and succinct manner, unhampered with unnecessary and ancient verbiage. There is less emphasis on form and more on substance, and this facilitates the better administration of justice. Generally, the Rules have unquestionably served the purposes which motivated their adoption, and the bench and bar have been reasonably satisfied with the utilization of the present system.

## RULE 3:23 OF THE RULES OF THE SUPREME COURT OF APPEALS

The one exception which has caused some concern, and which has been the subject of much discussion and perhaps of more varied interpretations by the trial courts and trial lawyers,[1] is Rule 3:23, particularly subpart (c), which was adopted in 1954. Rule 3:23 is generally known as the discovery rule. It is divided into four subparts.

[1]Boyd, *Pleading and Practice, 1962-63 Annual Survey of Virginia Law,* 49 VA. L. REV. 1621, 1624 (1963).

Subpart (a) sets forth the procedure for objecting to the taking of *de bene esse* depositions. Upon a motion being made to quash the notice to take such deposition, the Court shall quash such notice unless satisfied that the taking of the deposition is in good faith.

Subpart (b) is a novel provision prohibiting discovery of an expert witness whose first connection with the case was his employment to give his opinion as an expert. The Rule states that the deposition of such witness can only be taken at the instance of the party who employed him. There is perhaps no counterpart to this Rule in any other state or federal rule or statute. The intendment of the Rule was to adopt the majority decisional rule in the United States that neither the findings nor the opinions of the expert can be discovered by depositions unless the expert is one of the parties to the litigation or is an employee of one of the parties and has direct knowledge of the facts because of such employment.[2] Further comment will be made with reference to subpart (b) under the discussion of Federal Rule 30 (b).

Subpart (c) directs the trial court to allow discovery in general upon a determination to its satisfaction "that the moving party in good faith desires access, by way of discovery, to evidence, the names and addresses of witnesses, or other information subject to the control of the adverse party or of a third person." The trial court shall only deny the motion for discovery "if it finds that granting the motion would unreasonably delay the case or impose unreasonable hardship or expense on the adverse party."

Subpart (d) permits the independent medical examination of a party if the pleadings raise an issue as to the mental or physical condition of such party, and the

[2]Annot., 86 A. L. R. 2d 138 (1962); *Cooper* v. *Norfolk Redevelopment and Housing Authority,* 197 Va. 653, 90 S. E. 2d 788 (1956); *Hornback* v. *State Highway Commissioner,* 205 Va. 50, 135 S.E. 2d 136 (1964).

introduction of the report of the examining doctor by the party who submitted to the examination. The intent and purpose of this part of Rule 3:23 are substantially the same as Rule 35 (a) of the Federal Rules of Civil Procedure.[3]

## HISTORY OF RULE 3:23

Rule 3:23 was not adopted until 1954. During the first four years of the new Rules there was no rule in effect pertaining to discovery. In the report of the Judicial Council for Virginia to the General Assembly and the Supreme Court of Appeals of Virginia for 1954 and 1955, the following brief historical background is given with regard to the adoption by the Supreme Court on March 17, 1954, of Rule 3:23:

> The year 1954 was noteworthy for the adoption of a new Rule pertaining to Depositions and Discovery. A rule relative to depositions for discovery was included in the Proposed Modifications of Practice and Procedure prepared by the Judicial Council in January, 1949. The proposed rule read as follows:
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> "RULE 16.
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> "Depositions taken pursuant to the provisions of a statute may be used for purposes of discovery. Parties and their agents may be required to answer any relevant question the answer to which is not privileged and may be required to give the names and addresses of witnesses."
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> The explanation given for this proposed rule at the time was as follows:
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> "Rule 16, permitting depositions to be used for

[3]See *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964), which states that "Rule 35 on its face applies to all 'parties', which under any normal reading would include a defendant."

purposes of discovery, makes no change in the present law. Code Section 6225 (§8-304 Va. Code of 1950) allows either party to take the other party's deposition; and the familiar rule of evidence allows anything relevant to the case said by a party to be introduced in evidence against him as an admission."

When the Rules of Court were adopted on October 13, 1949, proposed Rule 16 regarding depositions for discovery was not included in the final draft because the Council had reached the conclusion that no rule of court on this subject was necessary.

In 1951 and 1952 many members of the bench and bar in Virginia became concerned about the growing use of depositions for discovery. These depositions were being taken under authority of §§8-304 and 8-305 of the Virginia Code of 1950. In some cases the taking of these depositions amounted to what lawyers termed "fishing expeditions." Some judges of courts of record began to rule against the taking of such depositions while other judges allowed the practice. Under these circumstances the Judicial Council recognized that there was confusion in regard to the proper interpretation of the statutes, and that a rule was needed for clarification. Accordingly, the Chairman of the Judicial Council appointed a committee to study a suggested rule on depositions.

This committee did a great deal of work, and various proposed rules during a period of about two years were discussed by the Judicial Conference, the Virginia State Bar, and the Virginia State Bar Association. Finally, on March 17th, 1954, Rule 3:23, a new Rule, was recommended and adopted to be effective on July 1st, 1954.

It is interesting to note that Rule 3:23 was adopted not only to establish some uniformity in discovery procedure in Virginia but also to contain the practice within the guide lines fixed in the Rule because of the increased use of discovery depositions under the statute without the limitations of a rule. It is important to understand this genesis of Rule 3:23, with its restricted right of discovery, because this procedural philosophy has permeated and influenced the various and conflicting concepts of the trial courts.

Within five years after the adoption of Rule 3:23 there was a growing opinion among the bar that there should be some broadening of discovery procedure under the Rules. There was little uniformity of interpretation of the Rule by the trial courts, and this made it difficult for the trial lawyer to know when or to what extent he would be permitted to undertake discovery procedure. For instance, in the original Rule there was no positive provision for discovering the names and addresses of the witnesses of the adverse party, and many trial courts would not allow such discovery. The reasons advanced several years ago in support of procuring such information about witnesses are accepted today without question, and the names and addresses of witnesses are exchanged willingly and freely among the trial bar without the formality of even a court order. Each party now knows before trial all of the known eyewitnesses, all of the medical witnesses and their specialties, and any other witnesses who may be called. The element of surprise is eliminated, as it should be in the arena of justice.

It may have been intended, by subpart (c) of the original Rule 3:23, that the names and addresses of witnesses were discoverable, but it was necessary to add several definitive words to the Rule in 1961 to accomplish this purpose.

## AMENDMENT OF RULE 3:23

Subpart (c) of Rule 3:23 was amended, effective April 1, 1961, and is set out here, with the words stricken out by the amendment being enclosed in brackets and the new matter italicised:

> Rule 3:23. Depositions [under Code Sections 8-304 and 8-305] and Discovery *in Actions at Law.*
>
> (c) On motion of any party, the court, if satisfied by affidavit, testimony, inspection of the pleadings or otherwise that the moving party [should have] *in good faith desires* access *by way of discovery* to evidence, *the names and addresses of witnesses,* or other information subject to the control of the adverse party or of a third person, [may] *shall* permit the taking of a deposition for discovery and [may] *shall* enter an order requiring the adverse party or such third person to attend at a time and place and before a notary or commissioner named in the order and to make available for inspection, copying or photographing any writing, chattel or real property described in the order. *The court shall deny the motion if it finds that granting the motion would unreasonably delay the case or impose unreasonable hardship or expense on the adverse party.*

The permissive word "may" was changed to the mandatory word "shall," but certain restrictive language was added "to avoid abuses." Although the amendment was intended to decrease the unlimited discretion of the trial judge, to make uniform its application, and to give more discovery, the addition of a few words to the original context again resulted in conflicting interpretations and a dichotomy of procedural concepts. The amendment provided that the moving party has to satisfy the court that he wants the discovery in good faith, and having

done that, the Rule says that the discovery shall be granted unless granting it would cause delay or unreasonable expense.[4]

The present Rule 3:23(c) has not brought about a uniform pattern of discovery in Virginia, and it has not resulted in more discovery. The original philosophy of containment still pervades. This is understandable to some extent when it is considered that the original rule was retained with amendatory verbiage which had an enlarging purpose but was still wrapped in discretionary guide lines. Does the moving party in *good faith* desire discovery? Would discovery cause unreasonable delay? Would it impose unreasonable hardship or expense upon the adverse party? These are matters which the trial judges are directed to rule upon, and many consider the Rule as being restrictive, and even though they may grant some discovery, they limit its scope.

## PURPOSE OF DISCOVERY

What is the true and proper function of discovery? In *City of Portsmouth* v. *Cilumbrello*[5] the Supreme Court of Appeals of Virginia said:

> The purposes of the rule [3:23(c)] are to aid in the dispatch of litigation, to encourage the settlement of cases, to reduce the issues so as to shorten time consumed in trial and to prevent surprise.

The preambles to a Joint Resolution[6] adopted by the General Assembly of Virginia during its 1960 session,

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[4]See Speech delivered to the Judicial Conference of Virginia, May 11, 1962, by Aubrey R. Bowles, Jr., Esquire, who is a member of the Judicial Council and who participated in the framing of Rule 3:23(c); *City of Portsmouth* v. *Cilumbrello*, 204 Va. 11, 129 S.E. 2d 31 (1963). See also, 1 U. RICH. L. N. 215 (1961).

[5]204 Va. 11, 14; 129 S.E. 2d 31, 33 (1963).

[6]House Joint Resolution No. 88, Acts of 1960, p. 1082.

requesting the Judicial Council to study further the matter of discovery, were as follows:

> WHEREAS, such practice could be established for uniform application throughout this State; and
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> WHEREAS, this procedure might better serve the ends of justice by requiring full disclosure of both the plaintiff's and defendant's testimony in certain circumstances; and
>
> WHEREAS, such procedure might speed the cause of justice; . . . .

Similar purposes of the federal pre-trial discovery procedure have been repeatedly asserted:

1. To narrow the issues.
2. To provide evidence for trial.
3. To produce testimony reasonably calculated to lead to the discovery of admissible evidence.[7]
4. To assist in ascertaining the truth and in checking and preventing perjury.
5. To detect and expose false, fraudulent, and sham claims and defenses.
6. To make available in a simple, convenient, and often inexpensive way facts which otherwise could not have been proved except with difficulty, and sometimes not at all.
7. To educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements out of court.

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[7] *Hickman* v. *Taylor,* 329 U.S. 495, 501 (1947). Accord, 2A Barron & Holtzoff, FEDERAL PRACTICE AND PROCEDURE §646, at 10 (rules ed. Wright 1961); 4 Moore, FEDERAL PRACTICE ¶26.01(7), at 1009 (2d ed. 1950). See generally *Developments in the Law—Discovery,* 74 HARV. L. REV. 940, 944-48 (1961); 48 Va. L. Rev. 122, 124 (1962).

8. To expedite the disposal of litigation.
9. To safeguard against surprise at trial, and to narrow and simplify the issues.[8]

In *Hickman* v. *Taylor*,[9] the Court said:

> The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method . . . [Under the new procedure, however] civil trials in the federal courts no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial . . . .[10]

> Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession . . . .[11]

## BROADER DISCOVERY PROPOSALS

It is apparent that the intended purposes of discovery in Virginia are the same as those in the federal courts. If this be so, then what are the best means of attaining the ultimate goals of uniform discovery procedure as well as more discovery? Can this be done by adding a few words, a phrase, a clause, a sentence, or even a para-

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[8] 4 Moore *Federal Procedure* ¶26.02 (2d ed. 1950), at 1034; 74 HARV. L. REV. at 944-946.

[9] 329 U.S. 495 (1947).

[10] Id. at 500 (dictum).

[11] Id. at 507.

graph to Rule 3:23(c)? Although this procedure has not proven effective in the past, there is some opinion which suggests that Rule 3:23 can be amended[12] so as to change the philosophy of containment and restriction, to dispel any ambiguities, and to minimize, if not eliminate, any judicial reservations as to the acceptance of discovery.[13]

Instead of amending Rule 3:23, should we scuttle the Rule and substitute in its place Rules 26 through 37 of the Federal Rules of Civil Procedure, which are the rules of discovery in federal civil trials? The Federal Rules were promulgated by the United States Supreme Court in 1938,[14] and they constituted the first comprehensive scheme of discovery adopted in this country. They have, over the intervening years, proven to be useful in increasing the efficiency of the administration of justice in the federal courts.[15]

## FEDERAL DISCOVERY RULES

Rule twenty-six[16] provides that "any party" can take a deposition of any other person "for the purpose of discovery . . ." or to use as evidence, or for both purposes. Except as limited by the court, the deposition may cover any nonprivileged matter relevant to the claim or defense of the examining party or his opponent, including discovery as to the location [not production] of books, records, or tangible things, and the identity and location of persons who may have knowledge of relevant facts. Evidence may be sought even though inadmissible

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[12]The official text of any proposed amendments to rule 3:23 has not been published.

[13]Piecemeal reform is merely repeating the mistake of the past, Wright, *Procedural Reforms in the States,* 24 F.R.D. 85, 87 (1959). "Code is followed by commentary, and commentary by revision, and thus the task is never done," CARDOZO, *The Growth of the Law* 135 (1924).

[14]308 U. S. 645 (1939).

[15]4 Moore, FEDERAL PRACTICE ¶26.02 [2] (2d ed. 1962).

[16]Fed. R. Civ. P. 26(a), (b).

at the trial, if it appears reasonably calculated to lead to the discovery of admissible evidence.

Rule thirty-three[17] covers written interrogatories to parties, which are addressed to and served directly on a party.

Rule thirty-four[18] deals with the production of documents and other objects for inspection, copying, or photographing. Unlike depositions and interrogatories, production must be sought by court order.[19] Upon a showing of good cause, the order may compel the production and copying of any nonprivileged materials constituting or containing evidence relating to any of the matters within the scope of examination permitted by Rule twenty-six, subpart(b), and in the custody, possession, or control of the party.

These provisions for depositions, interrogatories, and discovery are subject to rule thirty, subpart (b),[20] by which the court may limit the scope of the examination for good cause and protect confidential or secret material by *in camera* inspection. The court also may protect the party or witness from annoyance, embarrassment, or oppression. Rule thirty, subpart (d),[21] further

[17]Fed. R. Civ. P. 33.

[18]Fed. R. Civ. P. 34.

[19]In Virginia discovery depositions and the inspection, copying, or photographing of any writing, chattel or real property, and the medical examination of a party must be sought by court order; Rule 3:23. The production of book accounts or other writing in possession of an adverse party or claimant is sought by affidavit, and the clerk of the court then issues a summons, requiring the proper officer to summon such adverse party or claimant to produce such writing. Va. Code Ann. 1950 §8-324 (Repl. Vol. 1957). The production of any book, writing, or document in the possession of a person not a party to the matter in controversy is sought by affidavit, and upon order of the court the clerk of such court is directed to issue a *subpoena duces tecum* to compel such production. Va. Code Ann. 1950 §8-301 (Repl. Vol. 1957). Effective June 27, 1966, it will be necessary for the moving party to give notice to the adverse party of the motion for such *subpoena duces tecum.* Senate Bill No. 253 adopted by the General Assembly of Virginia, 1966.

[20]Fed. R. Civ. P. 30(b).

[21]Fed. R. Civ. P. 30(d).

protects deponents by providing for motions to terminate or limit the examination upon a showing of bad faith or harrassment.

Upon the adoption of Rule 30 (b), some consideration should perhaps be given to including in said Rule a provision embodying the case law which has developed with respect to the discoverability of the findings and opinions of expert witnesses.[22] In Virginia the discovery deposition of an expert whose first connection with the case is his employment to testify as a witness cannot be taken.[23] This rule could be clarified with greater specificity and made a part of Rule 30(b). In 1946, before *Hickman* v. *Taylor*[24] was decided, the Advisory Committee on Rules of Civil Procedure of the United States Supreme Court proposed an amendment to Rule 30(b) which would have protected from discovery any writing reflecting the conclusions of an expert.[25] The amendment was not adopted by the Supreme Court. There was some opposition on the grounds that "this [amendment] is too restrictive."[26] The majority decisional rule of both the federal and state courts prohibits the discovery of the opinions of experts.

Some consideration may also be given to making some provision for protecting the "work-product" of counsel. In preparing such addition to Rule 30(b) it will be necessary to define the "work-product" of the lawyer,[27] al-

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[22]Annot., 86 A.L.R. 2d 138 (1962), Pre-trial depositions—discovery of opinions of opponent's expert witnesses; Emroch, *Examination of Adversary's Expert,* PERSONAL INJURY ANNUAL, 727 (1961); Emroch, *The Expert Witness and the Hypothetical Question,* VIRGINIA LAYWER'S HANDBOOK, SOURCES OF PROOF IN PREPARING A LAWSUIT 93, 130, 132 (1964).

[23]Rule 3:23(b).

[24]329 U.S. 495 (1947).

[25]The proposed amendment and committee note thereto are set out in 4 Moore, FEDERAL PRACTICE 2006-2012 (2d ed.).

[26]4 Moore, FEDERAL PRACTICE 1157 (2d ed.).

[27]For an exhaustive discussion of the "work-product" doctrine, see *Developments in the Law—Discovery,* 74 HARV. L. REV. 940 (1961).

though this may be difficult to emcompass in a brief rule. It has been suggested that the case law which began with *Hickman* and which has developed during the intervening years would suffice as interpreting guide lines for the trial courts on this question of "work-product" without requiring any amendment to Rule 30(b).

Rule thirty-five[28] provides for a physical or mental examination by a physician of a party whose mental or physical condition is in controversy. This is done by order of the court on motion for good cause shown and upon notice to the party to be examined. Upon request the party examined may procure a copy of the report of the examining physician. This procedure is very similar to that provided by subpart (d) of Virginia Rule 3:23, except that the written report of the examination is required to be filed with the court before the trial and a copy furnished to each party.

Rule thirty-six provides for the admission of facts and the genuineness of documents by permitting a party, after commencement of an action, to serve on any other party a written request for the desired admission. Such matter is deemed admitted unless denied or objected to in writing to the court within ten days. Such admission constitutes an admission for purposes of the pending action only. Virginia has, by statute,[29] enacted the exact same provisions of Rule 36 (a) and (b). If rules similar to the Federal Rules are promulgated by the Supreme Court of Appeals of Virginia, the statute, of course, would be repealed upon adoption of the comparable rule.

Virginia has already adopted by rule and statute several of the Federal Rules of discovery, and, with some minor tailoring, the other discovery Rules could be made to fit into the Rules of the Supreme Court of Appeals of Virginia.

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[28]Fed. R. Civ. P. 35.

[29]Va. Code Ann. 1950 §8.1-111 (Repl. Vol. 1957).

## REASONS FOR ADOPTION OF FEDERAL RULES

Some of the reasons which justify serious consideration being given to the adoption in Virginia of the Federal Rules 26 through 37 are:

1. They have proven effective in aiding parties in the preparation and presentation of their cases.

2. A large body of law interpreting the Rules has developed over the years and under familiar rules of construction will prove of inestimable value to the courts in decision-making concerning any problems arising under similar rules which may be promulgated in Virginia.

3. Under the dual federal-state system of jurisprudence the task of the trial lawyer will be less burdensome where the procedures are similar and uniform.

4. More discovery is permissible under the Federal Rules, and this is as it should be to accomplish the fundamental purpose of discovery. The concern of improper, unfounded, or harassing "fishing expeditions" has not materialized. It is rarely that experienced and qualified trial lawyers ever find it necessary to raise any such objections to discovery depositions, for, although they are thorough and exhaustive, they are nevertheless conducted properly and kept within lawful bounds.

5. Settlements are expedited by their use. Counsel often invoke the discovery procedure to evaluate the claims of injured parties where liability has been reasonably fixed or determined. The congestion of court dockets is relieved, and the heavy burden of the trial judges is lessened.

## CONCLUSION

It is the opinion of this writer that there is a consensus among the trial lawyers of Virginia which favors the adoption of the Federal Rules of Civil Procedure because they do permit broader discovery and uniform-

ity. At the annual meeting of the Virginia Trial Lawyers Association held in March, 1965, an overwhelming majority of the trial lawyers voted in favor of such adoption after hearing an excellent discussion of the question by the Honorable Walter A. Page, Judge of the Court of Law and Chancery of the City of Norfolk, Virginia, Aubrey R. Bowles, Jr., Esquire, long-time member of the Judicial Council of Virginia, and the Honorable George M. Cochran, member of the Senate of Virginia and President of the Virginia State Bar Association. Any changes in the rules of practice and procedure are of major concern to the trial bar, and their composite knowledge and experience should be given great weight in the determination of and decision as to any such changes.

Those in support of the adoption of the Federal Rules are of both the plaintiff's and the defendant's persuasion. In our area arrangements have existed for some time with counsel of defense firms for use in State proceedings of unlimited discovery which simulates the procedure under the Federal Rules. Under Federal Rule 26 a discovery deposition is taken on notice, and no order of the court is required. Counsel agree on an appropriate date and hour for the taking of the depositions, and the parties appear without summons. Upon stipulation the depositions are transcribed, filed in court, and can be used at the trial, if necessary, for impeachment purposes. Under Rule 3:23(c) an order authorizing and limiting the scope of the taking of the depositions is required. Since the lawyers in most instances voluntarily agree to the taking of discovery depositions of their respective clients, and on occasions other witnesses, much time of the court and counsel can be saved by permitting such taking of discovery depositions on notice. The use of the depositions is also much broader under Federal Rule 26 than it is under Virginia Rule 3:23, and there are some good reasons to justify such use.

Discovery is a two-way street. It is and can be used by the plaintiff and the defendant. There are no advantages for either party. Its use is increasing, and it is being utilized today more and more by both parties.

The ultimate goal of litigation and the proper administration of justice is to seek out all of the facts and justiciable issues to the end that the factual and scientific truth may be established. Discovery has proven to be a very vital and important tool in search of this goal. The bench and the trial bar should be permitted the use of this tool in their commitment to ferret out and to present the truth in each case.