Washington University Law Review

Volume 1955 | Issue 4

January 1955

Production and Inspection of Documents, Papers, and Tangible Things in Missouri: A Comparison to the Federal Rules

MISSOURI SECTION

NOTES

THE PRODUCTION AND INSPECTION OF DOCUMENTS, PAPERS, AND TANGIBLE THINGS IN MISSOURI: A COMPARISON TO THE FEDERAL RULES

Of the six methods of pre-trial discovery used in Missouri and in the federal courts,[1] this note will consider one: the production in civil actions of documents, papers, and tangible things, and the inspection of real and other property. Discovery in criminal actions will not be considered. The scope of the discussion is designed to emphasize Missouri law, with federal law being considered only for comparison. The purpose of this note is to set forth and analyze the law pertaining to this one phase of discovery, and to evaluate the results which the courts have reached.

Discovery procedure developed because pleading technique failed to narrow the issues and provide the notice necessary for adequate preparation of a case.[2] Ragland, in his landmark book, *Discovery Before Trial*, explains how two practices—fictitious allegations and extensive use of the general issue—destroyed the efficiency of both common law and code pleading, and how discovery techniques were developed in order to ameliorate this condition.[3] The evolution of discovery procedure has been, in large measure, a search for the answer to the question: How much is a party entitled to learn from his opponent before trial? The ever-broadening scope of discovery indicates that the question has not yet been fully answered.

At common law discovery of any kind was, as a general rule, prohibited.[4] In equity, a bill of discovery could be obtained for the inspection of property, although it was more commonly used for obtaining testimonial evidence.[5] Such a bill might be granted by the chancellor in aid of actions at law as well as in equity cases.[6] The equity bill of discovery, however, permitted only partial discovery, as it could be

1. The five methods not considered are: depositions, interrogatories to the parties, orders for physical or mental examination, pre-trial conferences, and requests for admission of the genuineness of documents.

2. 6 WIGMORE, EVIDENCE § 1845 (3d ed. 1940) (hereinafter cited as WIGMORE); RAGLAND, DISCOVERY BEFORE TRIAL 1-8 (1932); Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863 (1933).

3. RAGLAND, *op. cit. supra* note 2, at 2-11. See also Green, *Preparation for Trial*, 1955 WASH. U.L.Q. 154, 163.

4. 6 WIGMORE § 1845; SUNDERLAND, *supra* note 2, at 865. Although there were five limited situations in which a party might inspect an adversary's documents before trial, Wigmore considers only two of them to be true exceptions to the general rule proscribing discovery. 6 WIGMORE § 1858.

5. 6 WIGMORE § 1857; 23 IND. L.J. 333, 334 (1948).

6. *Ibid.*

used only to seek evidence in support of a party's own case.[7] Discovery in the modern sense, on the other hand, allows a party to seek evidence in support of a claim or defense of the adversary, as well as evidence in support of his own claim or defense.

The earliest discovery statutes did nothing more than permit common-law courts to employ the procedures used in equity.[8] During the mid-nineteenth century, however, the legislatures of many states, inspired by the same liberal spirit which gave birth to code pleading, passed statutes providing for unrestricted discovery procedure.[9] Such legislation was motivated by the conviction that existing discovery procedures were too narrow in scope and that justice required wider usage of pre-trial discovery.[10] In some states, however, the legislative intent was thwarted by judicial interpretation of discovery statutes as a summary, rather than as an expansion, of the *status ante*.[11]

Missouri was one of the earliest states to reform its discovery technique. In 1849 the Missouri legislature adopted statutory provisions allowing broad pre-trial production of papers and documents. These provisions remained substantially unchanged until the present Code of Civil Procedure went into effect on January 1, 1945.[12] The early, pre-1945 statutory provisions for discovery were construed by the Missouri courts not merely as a replacement of the bill of discovery and its statutory counterpart; they were interpreted as allowing a party to inspect matter material to any of the issues in the pending action, and not as limiting discovery to matter in support of the seeking party's own case.[13]

The present Missouri Code of Civil Procedure contains two provisions for pre-trial production and inspection: Sections 86 and 142. Section 86, which permits the pre-trial inspection of *res* under the control of parties, can be traced to the original Missouri statutes providing for production and inspection.[14] Section 142, on the other hand,

---

7. 6 WIGMORE § 1846.
8. 6 WIGMORE § 1856a. See, *e.g.*, Mo. Laws 1822, c. 363, § 44.
9. RAGLAND, DISCOVERY BEFORE TRIAL 17 (1932).
10. 6 WIGMORE § 1859.
11. 6 WIGMORE § 1859c; *cf.* RAGLAND, *op. cit. supra* note 9, at 144.
12. Mo. Practice in Courts of Justice Act art. XXIV (1849). Mo. Laws 1849, at 97. *Compare* the wording of MO. REV. STAT. §§ 1075, 1076, 1079 (1939), *with* that of MO. REV. STAT. c. 128, art. X, §§ 36, 37, 40 (1855).
13. *Cf.* State *ex rel.* Atchison, T. & S.F. Ry. v. Trimble, 254 Mo. 542, 163 S.W. 860 (1914).
14. See note 12 *supra*. Section 86 (MO. REV. STAT. § 510.030 (1949)) provides: Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying,

permits the pre-trial inspection of documents under the control of witnesses, and apparently has no ancestor in the earlier Missouri statutes.[15] The 1945 Missouri Code of Civil Procedure, however, admittedly was inspired by the liberal provisions of the 1938 Federal Rules of Civil Procedure; and indeed, Section 86 of the Missouri code contains the same wording as the original Federal Rule 34.[16] Despite this inspiration, this writer contends that the scope of discovery by means of production and inspection has broadened only slightly under the present Missouri code, and the influence of the old Missouri statutes on discovery has been paramount.

In appearance, at least, the new code brought about two changes which broadened the scope of production and inspection. One was the addition of several new types of things which a party could be allowed to inspect. The early statutes referred only to "books, papers, and documents," whereas Section 86 of the present code permits inspection of "documents, papers, books, accounts, letters, photographs, objects, or tangible things," as well as entry upon "land or other property." The importance of the new wording can be minimized, however, because the Missouri Supreme Court had already permitted the inspection of tangible things under the old statute by virtue of the courts' inherent power to see that justice is done.[17] Likewise, it seems that the same power could have been used to permit entry upon real property.

The second change accomplished by the adoption of the new code was the addition of Section 142, as mentioned above. This section makes available the production and inspection of documents at the taking of a deposition by means of a subpoena *duces tecum*. By this method, discovery of documents may be obtained from anyone who can be compelled to give a deposition; Section 86, as well as the old law, permits discovery only from parties to the case.[18]

Because of the inspiration derived from the Federal Rules, and because of the similarity of wording of the respective statutory provisions, it would seem that production and inspection under the Missouri Code of Civil Procedure ought to be as widely allowed as is production and inspection under the Federal Rules of Civil Procedure.

---

sampling, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

15. Section 142 (MO. REV. STAT. § 492.280 (1949)) provides:
Upon order of the court in which a cause is pending a subpoena may command the production of documentary evidence on the taking of a deposition and the court may also order a party to produce documentary evidence on the taking of a deposition.

16. Federal Rule 34 was amended in 1946. See text supported by note 31 *infra*.

17. State *ex rel.* American Mfg. Co. v. Anderson, 270 Mo. 533, 194 S.W. 268 (1917).

18. 1 CARR, MISSOURI CIVIL PROCEDURE § 661 (1947).

This, however, is not the case; the scope of production and inspection allowed by the federal courts is considerably broader than that allowed by the Missouri courts. The difference arises out of the diversity of opinion over the judicial requirements which must be met before an order for production and inspection will be given. The federal courts, liberally interpreting the Federal Rules, have restricted the requirements and broadened the scope of discovery; the Missouri courts have apparently continued to enforce those requirements established in regard to the prior code, making little concession to the spirit in which the new code was conceived. It is in this area that the distinction between the Missouri code and the Federal Rules arises, and it is here that the controversy between the protagonists and opponents of liberal discovery procedures is centered.

Before considering these judicial requirements for production and inspection under the Missouri code, it should be pointed out that Sections 86 and 142 have been construed *in pari materia.*[19] The courts have thus held that a party seeking discovery under Section 142 must meet the same standard of materiality and relevancy that is required under Section 86.[20] Similarly, Section 85 of the code, which provides for discovery by interrogatory, has been construed *in pari materia* with Sections 86 and 142;[21] hence, cases regarding that section will be considered when they aid the analysis of the two sections under consideration.

The requirements which must be met in the Missouri courts before an order for production and inspection will be given are: (1) an action must be pending; (2) the matter sought must be admissible evidence; (3) the matter sought must be non-privileged; (4) the matter sought must be "designated"; (5) the matter sought must be in the possession, custody, or control of the person to whom the order is to be addressed; (6) there must be "good cause" for discovery.

The first requisite to discovery by production and inspection is that an action must be pending.[22] This means that a petition, based upon a legitimate grievance between the parties, must have been filed.[23] The Supreme Court of Missouri has held that a party who has filed a petition need not wait for an answer before seeking production.[24] That is, a case is "pending" for discovery purposes before issue is joined.

19. State *ex rel.* Thompson v. Harris, 355 Mo. 176, 195 S.W.2d 645 (1946).

20. *Ibid.* The adoption of this canon of construction is not unusual in the interpretation of discovery statutes. Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure,* 41 MICH. L. REV. 205, 222 (1942).

21. State *ex rel.* Thompson v. Harris, 355 Mo. 176, 195 S.W.2d 645 (1946).

22. This is a common requirement. See RAGLAND, DISCOVERY BEFORE TRIAL 54 (1932).

23. In some jurisdictions this requirement has been circumvented by the filing of "skeleton" pleadings. See RAGLAND, *op. cit. supra* note 22, at 60.

24. State *ex rel.* St. Louis Union Trust Co. v. Sartorius, 351 Mo. 111, 171 S.W.2d 569 (1943). See also State *ex rel.* Pieper v. Mueller, 227 Mo. App. 1101, 59 S.W.2d 719 (1933).

The possibility of an order for production and inspection before issue is joined creates at least a theoretical difficulty in the application of the second requirement that the matter sought by discovery must be admissible evidence. Without issue, a precise determination of admissibility cannot be made. Although the problem has been encountered by the courts of other states,[25] the Missouri courts apparently have never been confronted with this dilemma.

The second requirement, that the matter sought be admissible evidence, has been steadfastly followed by the Missouri courts under both the new and old codes, despite the fact that neither statute explicitly calls for admissible evidence.[26] Section 86 of the present code does require "evidence material to any matter involved in the action." It is generally agreed, however, that material evidence is not necessarily admissible,[27] and so it would seem that a literal construction of the statute would not demand admissibility as a standard. This suggestion is reinforced by the fact that the special mention in the statute of the third requirement, that the matter sought be non-privileged, would have been unnecessary if the legislature had intended "material" to mean "admissible," because privileged matter is not admissible.

Federal Rule 34, as mentioned previously, originally had the same provision as Section 86 of the Missouri code, in that it required "evidence material to any matter involved in the action."[28] Some federal courts gave this provision the same narrow interpretation that the Missouri courts follow, *i.e.*, they read into the statute the requirement that the evidence must be admissible.[29] Other federal courts, however, took a broader view and permitted discovery if the evidence was relevant and gave promise of leading to admissible evidence.[30] In 1946, the latter view was adopted by an amendment to Rule 34, which now requires "evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b)"[31]—*viz.*, "any matter . . . which is relevant to the subject matter. . . . It is not ground for ob-

25. Horlick's Malted Milk Co. v. Spiegel Co., 155 Wis. 201, 144 N.W. 272 (1913) (The entire complaint was considered to be in issue.); *cf.* Boston & M. R.R. v. State, 75 N.H. 513, 77 Atl. 996 (1910) (An answer had actually been filed, but the issues were not defined so that the court could determine admissibility. The court said the test is whether there *may* be admissible evidence.).

26. *Compare* State *ex rel.* Evans v. Broaddus, 245 Mo. 123, 149 S.W. 473 (1912), *with* State *ex rel.* Thompson v. Harris, 355 Mo. 176, 195 S.W.2d 645 (1946).

27. WIGMORE, STUDENT'S TEXTBOOK OF EVIDENCE 36 (1935); see MCCORMICK, EVIDENCE 315 (1954).

28. 4 MOORE, FEDERAL PRACTICE 2422 (1950).

29. Galbreath v. Bond Stores, Inc., 8 F.R.S. 34.11, case 1 (W.D. Mo. 1944); Barwick v. Powell, 1 F.R.D. 604 (S.D.N.Y. 1941); Kenealy v. Texas Co., 29 F. Supp. 502 (S.D.N.Y. 1939).

30. Mackerer v. N.Y. Cent. R.R., 1 F.R.D. 408 (E.D.N.Y. 1940); Walling v. Richmond Screw Anchor Co., 4 F.R.D. 265 (E.D.N.Y. 1943); See 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 797 (1950).

31. See 5 F.R.D. 433 (1946) for the committee report on the amendment.

jection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

Even before the adoption of the amendment, the Missouri Supreme Court rejected the liberal federal view in *State ex rel. Thompson v. Harris*.[32] Nominally, the Court thus superimposed the whole framework of the law of evidence upon the pre-trial stage of litigation. It may be wondered how the rules designed for one purpose can serve another. Nevertheless, the Missouri courts have prohibited the production of documents because they contained hearsay statements;[33] have compelled production under the business records exception to the hearsay rule;[34] and have even hinted that they might permit discovery of a statement which constitutes an admission against interest.[35] Even within the admissibility requirement itself the Missouri Supreme Court has tended to restrict the scope of production and inspection by refusing to permit discovery of matter admissible solely for the purpose of impeaching a witness.[36]

It is this requirement that the matter sought be admissible which is the primary distinction between Missouri and federal discovery practice, and the one which places Missouri out of that group of jurisdictions permitting broad use of discovery techniques.

The requirement of admissibility is intertwined with the third requirement that the matter sought be non-privileged. The non-privilege requirement has been construed to encompass the traditional evidentiary privileges recognized at trial.[37] It might seem, therefore, that a treatment of it apart from the admissibility concept is redundant. The justification for considering it separately is its special mention in the Missouri statute which gives it an existence independent of the court-imposed admissibility requirement.

The most common situations in which the statutory privilege has been invoked involve communications between attorney and client. Thus, privilege has been used in Missouri to prohibit production of letters from an attorney to his client.[38] A distinction must be made, however, between the fact communicated and the document itself.

---

32. 355 Mo. 176, 195 S.W.2d 645 (1946).
33. State *ex rel.* Missouri Pac. R.R. v. Hall, 325 Mo. 102, 27 S.W.2d 1027 (1930).
34. State *ex rel.* Iron Fireman Corp. v. Ward, 351 Mo. 761, 173 S.W.2d 920 (1943).
35. *Id.* at 767, 173 S.W.2d at 923.
36. State *ex rel.* Missouri Pac. R.R. v. Hall, 325 Mo. 102, 27 S.W.2d 1027 (1930).
37. State *ex rel.* Terminal R.R. Ass'n v. Flynn, 363 Mo. 1065, 257 S.W.2d 69 (1953), 1954 WASH. U.L.Q. 100; State *ex rel.* Chicago, R.I. & P.R.R. v. Wood, 316 Mo. 1032, 292 S.W. 1033 (1927).
38. State *ex rel.* Chicago R.I. & P.R.R. v. Wood, 316 Mo. 1032, 292 S.W. 1033 (1927).

While the facts communicated to a lawyer in a written document are privileged just as they would be if the client had disclosed them orally, the document itself, unlike oral communications, will not be privileged solely because it was transferred to counsel. Both the Missouri and the federal courts hold that such documents or other matter submitted to counsel are privileged from discovery only when prepared for the use of counsel in pending or threatened litigation; and it will not be privileged where the material was prepared in the client's regular course of business.[39] The privilege will be recognized, however, even though the material was actually prepared by the client's agent.[40]

The difficulties that may arise in determining what is preparation for counsel, what is pending or threatened litigation, and, conversely, what is the regular course of business, are illustrated by two Missouri cases. In *State ex rel. Iron Fireman Corp. v. Ward*,[41] the court denied privilege and ordered production of records showing the results of inspections of a damaged boiler made within the month after it exploded. Because the defendant was in the business of installing and repairing boilers, and had made several regular inspections prior to the explosion, the court seemed willing to accept the idea that the inspections after the explosion were also made in the regular course of business. From the facts of the case, however, it seems as likely that the inspections were made to aid in anticipated litigation as it does that they were merely in the course of business. On the other hand, in *State ex rel. Terminal R.R. Ass'n v. Flynn*,[42] the court denied, on the basis of privilege, production of photographs of the scene of the accident taken immediately after the accident occurred by an employee of the defendant company, despite the fact that no litigation was pending and that the employee testified that he took the photographs because he thought it was his duty to do so. The borderland between the *Ward* case and the *Flynn* case is a hazy one. Either case, it seems, could have been decided the other way.

The most controversial area in which the privilege clause has been invoked involves matter gathered by counsel from a third party, or documents and papers prepared by counsel himself. This material, popularly termed "work product," does not actually warrant immunity from discovery under the evidentiary attorney-client privilege because

39. Missouri: State *ex rel.* Terminal R.R. Ass'n v. Flynn, 363 Mo. 1065, 257 S.W.2d 69 (1953), 1954 WASH. U.L.Q. 100; State *ex rel.* Iron Fireman Corp. v. Ward, 351 Mo. 761, 173 S.W.2d 920 (1943). Federal: Eiseman v. Pennsylvania R.R., 3 F.R.D. 338 (E.D. Pa. 1944); Stark v. American Dredging Co., 3 F.R.D. 300 (E.D. Pa. 1943).

40. Missouri: State *ex rel.* Iron Fireman Corp. v. Ward, 351 Mo. 761, 173 S.W. 2d 920 (1943). Federal: Byers Theaters, Inc. v. Murphy, 1 F.R.D. 286, 289 (W.D. Va. 1940). The same rule applies at the time of trial. 8 WIGMORE § 2317.

41. 351 Mo. 761, 173 S.W.2d 920 (1943).

42. 363 Mo. 1065, 257 S.W.2d 69 (1953), 1954 WASH. U.L.Q. 100.

no communication between client and counsel is involved. The confusion in the work product situation was vastly relieved in the federal courts by the Supreme Court in the leading case of *Hickman v. Taylor*,[43] although the rule set forth in that case created new problems of application. In that case, the work product was recognized by the Court as being outside the usual evidentiary attorney-client privilege, but production was not granted because it was believed that "privilege," as it is used in the discovery statutes, should be interpreted to include the material constituting a lawyer's preparation of a case, unless good cause for production is shown.[44]

There are no reported Missouri cases concerning production and inspection of the work product of counsel. The probable reason for this is that the admissibility requirement, as it has been interpreted by the Missouri courts, exempts so much from discovery that there is no room for the development of a doctrine like that expressed in the *Hickman* case. The Missouri Supreme Court has held, however, that the privilege for work product recognized in the *Hickman* case should also apply to the work product of the parties and their investigators. Thus, in *State ex rel. Miller's Mut. Fire Ins. Ass'n v. Caruthers*,[45] discovery of intracompany instructions to the defendant insurance company's adjustor was denied.

The federal courts have limited the scope of the work product privilege, with few exceptions,[46] to the work of counsel.[47] In fact, while the *Hickman* case was pending, the Supreme Court rejected a proposed amendment to the Federal Rules of Civil Procedure which provided for the exclusion of material prepared or obtained in anticipation of litigation or in preparation for trial by the party, his surety, indemnitor, or agent, as well as the party's attorney.[48]

The immunity granted to matter submitted to counsel and to the

---

43. 329 U.S. 495 (1947).

44. The good cause condition indicates that the privilege is not absolute. Good cause must be shown in all cases under §§ 86 and 142 of the Missouri civil code, and under Federal Rule 34. See the discussion of this requirement at p. 424 *infra*. Except where the work product of counsel is involved, good cause need not be shown for depositions or interrogatories in either jurisdiction, or for a subpoena *duces tecum* under Federal Rule 45.

The Court in Hickman v. Taylor, 329 U.S. 495 (1947), suggested that good cause might exist: (1) whenever production of witness's statements was necessary to forestall a failure of proof; or (2) whenever such statements might be admissible as evidence or give clues to relevant evidence not otherwise available, or be useful for impeachment or corroboration; or (3) whenever the witness who gave the statement was no longer available.

45. 360 Mo. 8, 226 S.W.2d 711 (1950).

46. Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949); Snyder v. Atchison, T. & S.F. Ry., 11 F.R.S. 33.351, case 1 (W.D. Mo. 1948); Hanke v. Milwaukee Elec. Ry, 7 F.R.D. 540 (E.D. Wis. 1947).

47. De Bruce v. Pennsylvania R.R., 6 F.R.D. 403 (E.D. Pa. 1947); 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 792 (1950).

48. Advisory Comm. on Rules for Civil Procedure, *Report of Proposed Amendments to Rules of Civil Procedure*, 5 F.R.D. 436, 456-57 (1946).

work product of counsel can be justified on well-accepted grounds of policy. It is generally conceded that privileged matter is not admitted at trial because the interests protected are deemed sufficiently important to warrant the exclusion of reliable evidence.[49] Communications between husband and wife, attorney and client, and physician and patient are privileged mainly to promote full disclosure and stronger relations between these parties. The reasons for granting immunity to communications between these parties apply just as forcefully at the pre-trial stage as at the trial itself. Related to the need to protect the attorney-client relationship is the need to protect counsel in the privacy of his work. There have been arguments in favor of the work product privilege based upon the fear of encouraging laziness among counsel and the need to prevent the unjust enrichment which would result from allowing discovery of the fruits of the adversary's labor.[50] The Supreme Court reached its decision in the *Hickman* case, however, solely because:

> 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. . . . Proper preparation of a client's case demands that he [counsel] 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. . . . 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.[51]

The privilege granted by the Missouri courts to the work product of the party, his agent, or indemnitor can only be justified, if at all, on grounds which go to the very foundation of the discovery process: How much is a party entitled to know of his opponent's case? The issue is a question of fairness to the parties—notice to the adversary *versus* privacy in gathering information. To exempt summarily the work product of a party, his agent, or indemnitor on the ground of privilege fails to take account of the real problem, which is this question of fairness to the parties involved in the particular litigation. In place of a standard categorical answer of "privilege" to the question whether a party is entitled to a motion to produce, a more flexible, and probably more just, result could be obtained by including this question in the consideration of whether good cause has been shown, and thereby leave it to the discretion of the court.

49. 8 WIGMORE § 2291; MCCORMICK, EVIDENCE § 91 (1954).
50. Note, 68 HARV. L. REV. 673, 680 (1955).
51. Hickman v. Taylor, 329 U.S. 495, 511 (1947).

A fourth requirement is that the matter sought must be "designated," which means that the seeking party must specify or particularize the matter he wishes to inspect. The question arises, naturally, as to what degree of particularity is necessary to comply with the statute. The statute itself gives no indication. Both the Missouri and the federal cases show the greatest amount of uncertainty regarding the adoption of a minimum standard which would meet the requirement. The federal cases suggest two standards. Judge Woolsey in *United States v. American Optical Co.* set out the more conservative view:

> I hold that such designation in a motion under Rule 34 must be sufficiently precise in respect of each document or item of evidence sought to enable the defendant to go to his files and, without difficulty, to pick the document or other item requested out and to turn to the plaintiff saying "here it is."[52]

The more liberal view was recognized in the *Report of Amendments to the Rules of Civil Procedure* issued by the Advisory Committee on Rules of Civil Procedure when it reported:

> An objection has been made that the word "designated" in Rule 34 has been construed with undue strictness in some district court cases so as to require great and impractical specificity in the description of documents, papers, books, etc., sought to be inspected. The Committee, however, believes that no amendment is needed, and that the proper meaning of "designated" as requiring specificity has already been delineated by the Supreme Court. See Brown v. United States, 1928, 276 U. S. 134, 143. . . .[53]

The *Brown* case authorized the production of *all* letters and telegrams related to a certain subject matter which passed between specified points within a given time. In other words, under the rule of the *Brown* case, it is sufficient to designate material by a category such as "all letters relating to the contract for the sale of Blackacre."

Professor Moore states that the trend in the federal courts is toward the more liberal position.[54] Which of the two views will have the stronger attraction for the Missouri courts is uncertain. The Missouri Supreme Court has had no trouble in approving orders which conform to the "here it is" test, although the catch phrase itself has not been expressed in any of the opinions. The court has thus ordered production of: an office diary, books of account, check stubs, and canceled checks;[55] cash books, journals, and general ledgers;[56] a revoked will;[57]

52. 2 F.R.D. 534, 536 (S.D.N.Y. 1948).
53. 5 F.R.D. 433, 463 (1946).
54. 4 MOORE, FEDERAL PRACTICE 2447 (1950).
55. State *ex rel.* Laughlin v. Sartorius, 234 Mo. App. 798, 119 S.W.2d 471 (1938).
56. State *ex rel.* Missouri Broadcasting Co. v. O'Malley, 344 Mo. 639, 127 S.W.2d 684 (1939).
57. State *ex rel.* St. Louis Union Trust Co. v. Sartorius, 351 Mo. 111, 171 S.W.2d 569 (1943).

and books showing the withholding of income tax, earnings, and remittance of social security.[58]

In *State ex rel. Pieper v. Mueller*[59] the court approved an order to produce all records and memoranda made during the defendant physician's diagnosis and treatment of the plaintiff. Although this may appear at first glance to coincide with the liberal view of the federal courts, the order actually falls within the scope of the strict rule. This conclusion follows when it is considered that there was no discretion involved in selecting the medical records as there was in the *Brown* case, where the order called for all records *relating* to a particular subject. In the *Mueller* case the defendant could have selected the medical record and said, "Here it is," just as easily as he could have picked out a check stub or an account book.

The same analysis applies to the order in *State ex rel. Cummings v. Witthaus*[60] calling for "all written agreements" between defendant and his agent. Although this order would meet the strict test of the federal courts, it was denied by the Missouri Supreme Court because it was not shown that all agreements would be admissible evidence. The moving party was left with the possibility of returning to the lower court and asking for all agreements *material* to the issue,[61] but the court did not indicate what the result would have been had he done so.

A very unusual problem of designation arose in *State ex rel. Bostelmann v. Aronson.*[62] A motion for the inspection of a safety deposit box was predicated upon the assumption that the box contained relevant evidence. The box itself could be identified precisely—it was box 2060—but there was only slight circumstantial evidence to suggest that it might contain admissible evidence, and it was not known what form the evidence, if any, might take. The court denied the respondent access to the box, but it is difficult either to condemn or to justify the holding because the court failed to make evident the reasons for this denial. If the motion in the *Aronson* case were considered to be a request for the production of documents, the question before the court would have been: Should the relator be compelled to produce all documents, papers, and tangible things relating to the issue which may be found within box 2060? On this basis, it seems that production could have been granted only if the court were willing to accept the liberal interpretation of "designated" used in the federal courts.

On the other hand, if the motion were interpreted as a request for

58. State *ex rel.* Cummings v. Witthaus, 358 Mo. 1088, 219 S.W.2d 383 (1949).
59. 227 Mo. App. 1101, 59 S.W.2d 719 (1933).
60. 358 Mo. 1088, 219 S.W.2d 383 (1949).
61. To the same effect see State *ex rel.* Clemens v. Witthaus, 360 Mo. 274, 228 S.W.2d 4 (1950).
62. 361 Mo. 535, 235 S.W.2d 384 (1950).

the inspection of property under the second part of Section 86[63] the court would have had two issues to decide. First, does "designated land or other property," as it is used in the latter part of Section 86, include the "tangible things" mentioned in the first part of the section, or is it limited, as it seems to be under the Federal Rules,[64] to such things as buildings and ships? If a safety deposit box could be entered as "other property," the second question would involve a determination of whether it is necessary to further designate objects maintained upon the premises, *i.e.*, upon the land or other property. If it were necessary to designate the objects within the safety deposit box in order to inspect them, the issue would again be whether the liberal interpretation of "designated" should be used.

Neither of the two remaining prerequisites, *i.e.*, that the designated *res* be in the possession, custody, or control of the party from whom discovery is sought, and that good cause for discovery be shown, has been held to be of much significance by the courts of this state. The only question concerning good cause that has arisen in the Missouri courts is whether a moving party can show good cause when he already has the information sought or can obtain it by other means. In *State ex rel. Schlueter Mfg. Co. v. Beck*[65] the court denied to the respondent the right to inspect the premises of his former employer on the ground that he should have been familiar with the location, and also prohibited enforcement of the order of the lower court granting production of samples, because they could have been obtained on the open market. The federal courts have also denied discovery under circumstances similar to those in the *Beck* case.[66] Production has been granted in the federal courts, however, where the only knowledge the moving party had was the interpretation of a document offered by the adversary in an interrogatory,[67] or where production would obviate delay, expense, and complicated legal questions.[68]

More should be said, however, regarding the precept that good cause be shown, because the requirement has been of such critical importance in the Federal Rules. About the only statement that can be made concerning a standard which would meet the requirement is that it is difficult, if not impossible, to set out a definition which would apply to every case. A review of the federal cases shows that it has variously been said that the matter should aid in the preparation of a

63. See note 14 *supra*.
64. 4 MOORE, FEDERAL PRACTICE 2473 (1950).
65. 337 Mo. 839, 85 S.W.2d 1026 (1935).
66. Dellameo v. Great Lakes S.S. Co., 9 F.R.D. 77 (N.D. Ohio 1949); Garrett v. Faust, 8 F.R.D. 556 (E.D. Pa. 1949).
67. Electric Furnace Co. v. Fire Ass'n, 13 F.R.S. 34.13, case 4 (N.D. Ohio 1950).
68. Hawaiian Airlines, Ltd. v. Trans-Pacific Airlines, Ltd., 12 F.R.S. 34.11, case 2 (D. Hawaii 1948).

case;[69] that the matter should be relevant to the issues;[70] that the matter should facilitate proof or progress at the trial;[71] and that considerations of "practical convenience" are of prime importance.[72] It has also been said that good cause cannot be shown where production would cause unreasonable hardship,[73] or where the seeking party passed up previous opportunities to obtain the desired information.[74] The flexibility with which this requirement has been applied is the source of its signal importance in federal discovery practice. The determination of good cause is within the discretion of the court,[75] and the starting point in the federal courts is a philosophy favoring notice to the parties. In short, good cause has been used as the balancing agent which the court can apply to see that justice is done in the contest between notice and privacy in the preparation of a case.

In Missouri there is no such balancing process in the consideration of the facts of a particular case. The admissibility requirement and the broad interpretation of the privilege requirement exempt so much from discovery that there is little room to apply a flexible concept of good cause. The inflexibility of the Missouri procedure results in an automatic restriction of the scope of discovery.

CONCLUSION

It can be seen that there is a wide divergence between the Missouri and federal law relating to pre-trial production and inspection of documents, papers, and tangible things, and the inspection of real and other property. The reasons for the more extensive use of this type of discovery procedure under federal law have been pointed out. Generally speaking, the reasons seem to be justified. No attempt has been made to present the opinions of practicing attorneys regarding the federal law, but most legal writers support its liberal interpretation. It is submitted that the judicial interpretation of the Missouri Code of Civil Procedure is outdated and overly restrictive. The standards which the Missouri courts have adopted to guide this state's discovery procedure are not well suited to the pre-trial stage. It should be remembered, however, that an outright adoption of the federal law

69. Schuyler v. United States Air Lines, Inc., 14 F.R.S. 34.411, case 1 (M.D. Pa. 1950); Garrett v. Faust, 8 F.R.D. 556 (E.D. Pa. 1949); United States v. National City Bank, 40 F. Supp. 99 (S.D.N.Y. 1941).

70. Electric Furnace Co. v. Fire Ass'n, 13 F.R.S. 34.13, case 4 (N.D. Ohio 1950); Michel v. Meier, 8 F.R.D. 464 (W.D. Pa. 1948).

71. Gordon v. Pennsylvania R.R., 5 F.R.D. 510, 511 (E.D. Pa. 1946) (dictum).

72. United States v. 5 Cases, 9 F.R.D. 81 (D. Conn. 1949).

73. Sonken-Galamba Corp. v. Atchison, T. & S.F. Ry., 30 F. Supp. 936 (W.D. Mo. 1939).

74. Goldboss v. Reimann, 55 F. Supp. 811 (S.D.N.Y. 1943).

75. Hawaiian Airlines, Ltd. v. Trans-Pacific Airlines, Ltd., 8 F.R.D. 499 (D. Hawaii 1948); Lever Bros. Co. v. Proctor & Gamble Mfg. Co., 38 F. Supp. 680 (D. Md. 1941).

would not eliminate problems of construction. In fact, it would probably create new problems in such areas, for example, as "good cause" and "designation." Nevertheless, the cause of justice would justify the additional burden.

KENT D. KEHR