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DISCOVERY IS NOT A GAME

Remarks

of

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Federal Trade Commission

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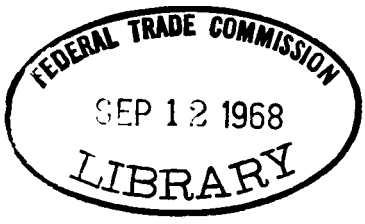

Discovery is Not a Game*

by

James M. Nicholson

> "To the man with an ear for verbal delicacies - the man who searches painfully for the perfect word, and puts the way of saying a thing above the thing said - there is in writing the constant joy of sudden discovery, of happy accident." 1/

The word "discovery" obviously means many things to many people depending upon the vantage point of the speaker. If, as Mencken has observed, it means to a writer the constant "joy of sudden discovery, of happy accident," then in literature it means the exact opposite of what it has come to mean in law, where sudden discoveries and happy accidents can bring little joy and much injustice. In litigation, a party surprised is a party ill-prepared to defend himself. So the aim of the law, when the time for litigation arrives, is to prevent such unhappy accidents as may be attendant upon the occurrence of unpredictable events.

That, simply stated, is the reason why all judicial bodies, the Federal Trade Commission included, incorporate

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* While this text forms the basis for the writer's oral remarks, it should be used with the understanding that paragraphs of it may have been omitted in the oral presentation, and, by the same token, other remarks may have been made orally which do not appear in this text.

1/ H. L. Mencken, "A Book of Prefaces", Chap. 1, Sect. 2 (1917).

provisions for discovery, in one form or another, in their rules of practice. As the Commission itself has stated, its own rules in this regard "are intended to embody the Commission's conviction that, to the fullest extent practicable, the strategy of surprise and the art of concealment will have no place in a Commission proceeding." 2/

The Supreme Court itself aptly expressed this same principle for the courts in the following language taken from its 1958 Procter & Gamble 3/ decision:

> "Modern instruments of discovery serve a useful purpose, as we noted in Hickman v. Taylor, 329 U.S. 495. They together with pretrial procedures make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."

Before reaching a discussion of the Rules themselves, one or two other general observations concerning discovery are necessary to place the subject in its proper perspective. Philosophically, we must be concerned with the question of whether such rules are designed primarily to be fair to the parties or to speed up litigation. One writer has already charged that despite the Commission's protestations to the

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2/ All-State Industries of North Carolina, Docket 8738, Order granting interlocutory appeal, Nov. 13, 1967.

3/ United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958).

contrary in its official pronouncements and decisions "In practice . . . . it appears that greater emphasis has been placed upon expedition of proceedings than upon their fairness." 4/

I think such critics miss the point. The drafters of rules of discovery are not confronted with the necessity of making a choice between speed and fairness - they are instead faced with the task of devising rules which achieve one without sacrifice of the other. Our Rules began to evolve into their present form in 1961 because of the Commission's feeling that its old Rules contributed to needless administrative delay and accounted, at least in part, for the accumulation of a backlog of unfinished business.

If the Commission is sometimes charged with stressing speed at the expense of fairness in the conduct of its trials, the other side of the antitrust bar must recognize that it also sometimes stands accused of the opposite sin. It was recently observed that "It is common knowledge that interlocutory appeals and other procedures for litigating discovery issues are sometimes used by respondents' counsel as a means of delaying the proceeding and postponing a decision on the merits." 5/ As a distinguished state jurist articulated his exasperation with these tactics in the courts, "The list

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4/ Harris, "FTC Pretrial Discovery Procedures", 30 A.B.A. Antitrust Section 136.

5/ Scott and Rockefeller, "Antitrust and Trade Regulation Today-1967", page 304.

of motions or cross-motions which are idled through in quite ordinary lawsuits dooms many from the start to delay and expense which impair or destroy the value of the right to prosecute or defend." 6/

Although most members of the antitrust bar are as concerned as are we with resolving issues as rapidly as is consistent with procedural fairness, there is enough truth in these allegations to justify the Commission's actions designed to eliminate any purely mechanical barriers to the effective discharge of its statutory responsibilities in the public interest. Discovery is simply not a game, or at least is not designed to be, and if there are any members of the bar who listen to or read these remarks with the hope of receiving instruction in the artful use of discovery motions to thwart Commission proceedings, they will receive no lessons from me.

The evolution of our present Rules began in 1961. Perhaps the most significant change made at that time, and certainly the one with the most drastic effect on the rules of discovery, was the adoption of the continuous hearing policy. 7/ Under this Rule, hearings are to be held, insofar as practicable, at one place and are to continue without suspension until concluded, subject, of course, to exceptions in unusual and exceptional circumstances for good cause stated.

6/ Peck, "Court Organization And Procedures To Meet The Needs Of Modern Society," 33 Indiana Law Journal. 182.

7/ Organization, Procedures, Rules of Practice (July 1, 1967), sec. 3.23.

Prior to this amendment, hearings in adjudicative proceedings were held at intervals and in different locales. Under this type of practice there was little need to afford respondents the right to pretrial discovery for they were customarily afforded an ample interval to prepare their defenses subsequent to the close of the case in chief. 8/

This change itself has not been free of controversy and it must be acknowledged that prior Commissions were equally convinced that the former rule providing for intervals between hearings was itself designed to insure justice and fair play. In fact, there were indications that the old rules were felt to be superior in this respect, for in one decision the Commission commented in the following manner on the Examiner's action in denying discovery subpoenas:

> "Under the Commission's method of procedure the respondent will not be prejudiced by the denial of its request. At the close of the case in chief, it may make application to the hearing examiner for such subpoenas as it deems necessary to its defense. At that time the hearing examiner having heard the evidence supporting the complaint will be better able to determine the permissible scope of the requested subpoenas and will, of course, cause those to issue which in his judgment are reasonable and proper." (Underscoring supplied.) 9/

Despite some dissent, the Commission is now committed to the view that the continuous hearing rule offers the best procedure for the fastest possible resolution of the

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8/ L. G. Balfour Company, Interlocutory Order, 62 F.T.C. 1541 (1963).

9/ Joseph A. Kaplan & Sons, Interlocutory Order, 57 F.T.C. 1537 (1960); accord, Standard Distributors, Inc. v. F.T.C. (2nd Cir. 1954) 211 F.2d 7.

issues consistent with procedural fairness. It can even be argued that the present rule incorporates the best features of each system in that, as now drafted, the rule provides sufficient flexibility to permit intervals between hearings where the circumstances indicate good cause therefor.

This change has required far greater attention to the problems of pretrial conferences and discovery. Interval hearings permit a process of continuous refinement of the issues as the hearings progress and further development of the evidence during the intervals. But where the hearings must be held in one place and continue without interval until all evidence in support of and in opposition to the complaint has been received, respondents must be prepared to offer their evidence immediately after the close of the case in chief.

Since the hearings are not to be "conducted under the 'sporting theory' of litigation where the goal is to surprise and confound your opponent," 10/ the Commission's rules provide for the convening of prehearing conferences under the supervision of the hearing examiner. These hearings are for the purpose of simplification and clarification of the issues, stipulations, admissions and such other matters as may aid in the orderly and expeditious disposition of the proceeding, including disclosure of the names of witnesses and of documents which will be introduced in evidence. 11/ I do not intend here

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10/ L. G. Balfour Company, note 8, supra.

11/ Rules of Practice, sec. 3.21.

to dwell upon the subject of prehearing conferences except to set the stage for discovery and to point out that the Commission itself has recognized the impropriety of attempting discovery until "a clear delineation of issues to be tried" has been accomplished to permit intelligent assessment of the scope and need for discovery. 12/

It is important to recognize the expanded role which the Commission's present rules assign to the hearing examiner. As one writer has noted, the examiner is now "the governor of a lawsuit" who must exercise close control of all pretrial activity, including discovery, and the success of the continuous hearing procedure will rest largely upon his ability properly to exercise his expanded role. 13/

Some years ago, the Commission took note of its failure to delegate its powers in the manner contemplated by the Administrative Procedure Act. 14/ In the intervening years the Commission has taken steps to place a greater degree of authority in its examiners, where it rightfully belongs, thus

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12/ Topps Chewing Gum, Interlocutory Order, Docket 8463, July 2, 1963.

13/ Harris, note 4, supra. The Commission itself has stressed this same point in the clearest and strongest language possible, thereby freely acknowledging what was already obvious to all, that the effective conduct of any litigation is dependent upon the diligence and ability of the trial judge. Topps Chewing Gum, note 12, supra.

14/ Capitol Records Distributing Corp., Interlocutory Order, 58 F.T.C. 1170 (1961).

avoiding the injection of the Commission into the conduct of hearings. Rulings on interlocutory appeals are no longer subject to appeal as a matter of right, but will now be entertained by the Commission only upon a showing that the ruling involves substantial rights which will materially affect the final decision and that a determination by the Commission before conclusion of the hearing is essential to serve the interests of justice. Further, the examiner's rulings on such matters will not be reviewed or disturbed in the absence of unusual circumstances. 16/

In my view, these steps are of extreme importance in light of the constantly increasing volume of work which is being pressed upon the Commission both by new legislation and the normal increment of an expanding economy. Much has been done, but I think it is wise to give even more thought to devising ways in which we can make even more efficient use of our examiners' time and talents both in our consideration of matters which the parties seek to have us review and in further appropriate revisions in our rules where the need becomes evident.

My objective here is to address myself more to the problems of discovery than to the details of our discovery rules themselves. These rules make a number of discovery techniques available to both parties involved. Opposing

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16/ Topps Chewing Gum, note 12, supra.

counsel are authorized to make use of admissions as to facts and documents, 17/ orders requiring access, 18/ depositions 19/ and subpoenas. 20/ Orders for the production of documents, as such, are no longer authorized because proper use of depositions and subpoenas makes the use of such orders superfluous. 21/ These then are the tools of discovery at hand. Their proper use will, of course, depend upon the circumstances and the nature of the information sought.

I suppose we have all become accustomed to think of discovery in terms of what a respondent can get from the government to the extent we forget that "discovery is a two-way street," 22/ equally available to counsel supporting the complaint. The only difference is that the Commission does exact a somewhat higher standard from its own staff. As the opinion in All-State made clear, the Commission may excuse technical non-compliance with its rules on the part of respondent's counsel who may not be completely familiar with the procedure, but, as a general proposition, it is not unreasonable to insist that Commission counsel observe the letter and the spirit of the rules.

17/ Rules of Practice, sec. 3.31.

18/ Rules of Practice, sec. 3.32.

19/ Rules of Practice, sec. 3.33.

20/ Rules of Practice, sec. 3.34.

21/ All-State Industries of North Carolina, note 2, supra.

22/ All-State Industries of North Carolina, note 2, supra.

Fundamental to the successful operation of the continuous hearing procedure is the assumption that complaint counsel will, at the time the complaint issues, have all the evidence he will need to establish a prima facie case. To that end they have been furnished with a broad range of investigatory powers which are more than adequate for comprehensive precomplaint investigation. Therefore, as a general proposition, use of the discovery processes are not allowable when the purpose is to investigate and obtain materials and information required as part of complaint counsel's prima facie case in chief. Fairness to the respondent, who must be prepared to begin his defense as soon as the case in chief has been completed, envisions a situation in which complaint counsel is prepared to make a full disclosure of all relevant data at the time of the pretrial conference so that neither party will need to go "fishing" for more after the trial begins.

The All-State decision itself brought this principle to bear in a graphic manner when the Commission granted respondent's motion to quash the examiner's order to permit the inspection and copying of a vast array of documents, all of which appeared to the Commission to be more in the nature of an investigational subpoena. The crux of the matter is that the rules are not intended to provide for comprehensive

post complaint investigation, but only post complaint discovery. But the Commission also made clear that complaint counsel need not have all evidence he will need prior to issuance of the complaint. Discovery will still be allowed "to round out, extend, or supply further details" for the particular transactions to be pursued.

This opinion has itself been the subject of a great deal of misunderstanding and the occasion for a number of motions and interlocutory appeals by respondents who mistakenly assumed they were thereby furnished with still another ground upon which to oppose efforts by Commission counsel to obtain additional information. The notion seemed to be that objection could now be raised on the ground that the information sought should have been obtained during the course of the investigation and could not be sought after complaint had issued. This misunderstanding persisted to such an extent that the Commission recently issued a Supplemental Clarifying Opinion designed to put this principle in proper perspective by making clear that the opinion did not give a respondent the right to put into litigation the adequacy of the investigation. 23/ The guidelines laid down by the Commission internally do not confer upon a respondent a legal right -

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23/ All-State Industries of North Carolina, Docket 8738, Supplemental Clarifying Opinion, August 9 , 1968.

and on reviewing courts the burden - to police the implementation of the Commission's housekeeping rules in this regard. A discovery request by complaint counsel is not open to objection on the ground that the materials should have been in hand at the time of issuance of the complaint. As a still more recent opinion has made clear, in dealing with discovery requests the sole criteria to be applied is that set forth in the discovery rules. 24/ Complaint counsel may himself bear a heavier burden than he did before but respondents will not find theirs any lighter as a result.

The most controversial problems have been encountered when respondents have sought access to information in the possession of the Commission. The rules make clear that respondents are to be furnished with all relevant data concerning documents and other evidence which complaint counsel plans to introduce at the hearing, as well as the identity of the witnesses who will testify. But it is when respondents desire to go behind or beyond this material to obtain other data to explain, clarify or contradict, that the main problems arise. Just how far they can go, and with what effect, are often perplexing questions.

Unfortunately, there can be no hard and fast black letter rule by use of which we can solve all the complex

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24/ Lehigh Portland Cement Company, Docket 8680, Order and Opinion Denying Interlocutory Appeal, August 9, 1968.

questions which arise. Too much depends upon the facts of each individual case to permit more than the evolvement of general principles to be applied in each situation. 25/ We start from the premise that the Commission should not be motivated by a desire to conceal anything which can be legitimately disclosed. Instead, I think the feeling is that we should operate as openly as is consonant with the effective discharge of our duties. We are a public agency and, as such, should be willing to submit ourselves to as much public inspection as is possible in connection with all of our activities. Liberality should, in my view, mark our approach to these problems, not a closely guarded, grudging reaction in which we only reveal so much as we are legally compelled to disclose.

However, there are conflicing principles involved. As a public agency we have more than the interests of respondents to protect. We have the obligation to protect the confidentiality of information received from others. Many times there are situations in which their interest in maintaining the integrity of our files operates to override the interest of a respondent in gaining access to all or part

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25/ "But, the question . . . should not be solved by resort to rules, whether strict or liberal, for in order for justice to be done each problem which arises should be approached without the handicap of an arbitrary formula." L. G. Balfour Company, note 8, supra.

thereof. The exercise of Commission's broad and extensive power to investigate encompasses not only evident violations, but also situations where there is a mere "suspicion that the law has been violated, or even because it wants assurance that it is not" 26/. This entails the acquisition of detailed information concerning the business assets and other confidential data concerning persons or corporations being investigated or who possess information relevant to an investigation. This information goes into the confidential files where it is protected by law from unauthorized disclosure.

If liberality in the interest of justice should mark our decisions as to when to authorize disclosure, irresponsibility is to be equally avoided. Therefore, the party seeking access to any of this information must be prepared to show good cause sufficient to outweigh the public interest in the integrity of the Commission's files. Although it has been held that the Commission itself must make the determination that good cause has been shown 27/, the new rules vest this authority in the examiner 28/. Respondent must be able to demonstrate that he has a need for the information and be able to specify what it is that he needs. 29/

26/ United States v. Morton Salt Co., 338 U.S. 632 (1950).

27/ Viviano Macaroni Company, Docket 8666, Interlocutory Opinion, March 9, 1966.

28/ Rules of Practice, sec. 3.36.

29/ The Crown Cork & Seal Company, Inc., Docket 8687, Interlocutory Opinion, February 8, 1967.

The requirement that respondent show "good cause" has not been precisely defined in the decisions, except in a negative manner. It has been held that a mere averment of need is not enough nor is the assertion that respondent must of necessity defend himself against the charges. 30/ "Fishing" expeditions in the hope of turning up something that might prove useful will be equally unproductive, as was observed in the Balfour decision, which also made the cogent observation that it is not desirable to frame a firm rule of general application in view of the difficulty of anticipating the wide variety of situations which may arise which should be met with "flexibility and discretion, not rigid formula." I might observe here that were the Commission to adopt a rigid rule it would thereby deprive itself of the opportunity to follow a liberal approach where the need can be shown, for it would find itself shackled by its own definition. Reason and fairness can, and I am convinced will, characterize the application of this rule by the examiners and the Commission.

Where good cause has been shown, it is still not always necessary that confidential information in the Commission's files be spread on the public record for all to see. Various techniques have been developed to permit respondent or his

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30/ The Crown Cork & Seal Company, Inc., note 29, supra.

counsel access to such information as is necessary for defense short of unrestricted disclosure. Thus in the Grand Union case 31/, the Commission ordered that certain special reports filed by respondent's competitors not be disclosed to respondent, but that disclosure could be made to respondent's counsel and to others upon permission of the examiner for use in respondent's defense, following which all copies were to be returned to the Commission.

Then in Mississippi River Fuel Corp. 32/ the Commission directed that similar material to be produced in response to a subpoena should be submitted to an independent accounting firm which would compile and present the material to respondent's counsel in such manner that no individual company's confidential data or arrangements would be revealed.

With the adoption of different techniques in a flexible manner to meet individual situations, later actions seem inevitably to follow a course which would make binding rules of law or procedure out of what was intended to be the application of common sense to particular situations which called for individual solutions. Thus the Commission in other cases

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31/ The Grand Union Company, Interlocutory Order, 62 F.T.C. 1491 (1963).

32/ Mississippi River Fuel Corp., Docket 8657, Interlocutory Order, June 8, 1966 and July 15, 1966.

has been forced to rule that neither technique was mandatory, and was not intended to be a substitute for the exercise of the sound and responsible discretion of the examiner. 33/ The examiner is in a far better position than the Commission, because of his proximity to the case, to assess the multitude of variables and arrive at an informed decision as to the procedure best to use in the case before him. It is his initial responsibility to apply the principles of reason and fairness.

In a similar matter involving Texas Industries, Inc. 34/ the fact was that the information had not been available to complaint counsel and the Commission therefore declined to make it available to respondent. After pointing out the sensitive nature of such information and the Commission's need for cooperation in obtaining it on the part of the competitors, the Commission stated it still would have done so had basic fairness so dictated. But since fairness in that situation did not so demand, the Commission saw no need to balance the interests involved and respondent's motion for production of the information was denied.

Problems of a similar nature are encountered when respondents seek by means of subpoenas to obtain evidence in

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33/ Furr's, Inc., Docket 8581, Interlocutory Opinion, November 18, 1963; Lehigh Portland Cement Company, Docket 8680, Interlocutory Opinion, August 2, 1968.

34/ Texas Industries, Inc., Docket 8656, Interlocutory Opinion, May 18, 1965.

the possession of third parties or depositions to secure needed testimony. Depositions are not to be used as a substitute for the continuous hearings required by the rules or to delay the proceeding and there must be a showing of good cause for the use of the procedure and of the need for eliciting the information by deposition rather than by testimony at the hearings. 35/

In the area of respondents' discovery, much as been said and written of late concerning the right of access to interview reports of potential witnesses prepared by members of the Commission's staff. Starting with the Supreme Court's landmark Jencks decision 36/ and the subsequent enactment of the so-called Jencks Act 37/, the Commission has taken the position that, after a witness has testified on direct examination, respondent is entitled to inspect, for possible use in cross-examination, all written statements made or approved by him and all substantially verbatim transcriptions of oral statements made by the witness. 38/ However, the Commission has consistently refused to grant access to attorneys' summaries of such statements on the ground that such summaries "reflect the attorney's own state of knowledge at the time of the

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35/ Topps Chewing Gum, Inc., note 12, supra; See also Koppers Company, Inc., Docket 8755, Interlocutory Order, July 2, 1968.

36/ Jencks v. United States, 353 U.S. 657 (1957).

37/ 18 U.S.C. 3500.

38/ Inter-State Builders, Inc., Docket 8624, opinion and order directing remand, April 22, 1966; final order and opinion, July 28, 1967.

interview and also his own thoughts and subjective impressions of what he is being told . . .".

As most of you know, this decision brought forth a vigorous dissent by one Commissioner. He felt that the majority had, in practical terms, ruled that interview reports would no longer qualify for production under the Jencks rule since interview reports in the Commission's files are ordinarily agent's summarizations not usually cast in the form of substantially verbatim, contemporaneously recorded transcriptions of witnesses' oral statements. The dissent added ". . . it is safe to presume that, after today's rulings by the Commission, interview reports are not likely to be cast in that form in the future."

It would be inappropriate for me to attempt to resolve the controversy in a forum such as this. I am impressed, as I am sure all are who have taken the trouble to read the various opinions written, with the time, research and the depth of the thinking which obviously went into the decisions. I am also impressed with the fact that it has not been resolved in a manner satisfactory to all concerned, as the dissent has drawn at least some support from writers in the field 39/, although no one should mistake the import of the clear holding of the majority or derive false hope from the existence of the controversy.

39/ Harris, note 4, supra.

It is important, I think, to distinguish between interview reports prepared by attorneys of the Commission in the field during the process of investigation, and interview reports prepared by the trial attorney during the process of getting ready for trial. The investigatory interview reports are prepared at a time when it is uncertain whether a complaint will be issued, or even recommended, and thus the more general report, interspersed with opinions and evaluations of the witness could be issued. The reasons for protecting these reports would seem obvious, for they represent a perfect illustration of an attorney's work product, defined in its narrow sense as the distillation of his subjective impressions, evaluations and interpretations, which is traditionally protected from disclosure. 40/ However, when a trial attorney is preparing an interview report of a witness whom he knows he intends to call, the type of report should be different -- so also the propriety of disclosure.

With respect to trial attorney interview reports, a middle ground seems worthy of consideration. If, as I have suggested, secrecy is not the Commission's objective and if the aim of our discovery rules is to make available to respondents all the information they will need to conduct an effective defense, then we might

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40/ Viviano Macaroni Company, Docket 8666, Interlocutory Opinion, March 9, 1966.

well take another look to see if there are ways in which they can be more adequately advised as to the nature of the testimony they might expect from Commission witnesses. Commission attorneys read Commission opinions, or at least I hope they do, so one can see merit in the contention that once having read these opinions all interview reports will be prepared in summary form.

Rather than attempting to resolve the resulting problem by legal opinions which interpret such reports as being covered by or excluded from the Jencks rule, the Commission might consider having these reports in the future prepared in a form suitable for inspection by respondent's counsel, with a separate confidential memorandum of comments and evaluation. My own thinking has not fully crystallized, for I can foresee obvious problems in determining the form in which such reports should be cast and the type of approval which would have to be obtained from the witness himself. It would be necessary that the report accurately reflect what the witness said rather than what someone reported he said. But I do make the suggestion as a possible way in which the Commission can conduct its proceedings in a manner which is fair to all. If this can be accomplished by

a simple internal directive from the Commission to its staff, then I for one would be favorably disposed. 41/ From personal trial experience this type of statement would seem to best suit the needs of the trial counsel in preparing his witness for testifying.

To conclude these remarks I would return to the beginning and remind one and all that discovery is not a game to be played by opposing counsel at the expense of their clients and the public interest. The rules discussed above are not designed to enable counsel to demonstrate their technical skills in delaying proceedings or to display their mastery of procedure in order to gain an advantage over the other side. They are there for one purpose and one purpose only and that is to get at the truth. Hearings in Commission cases, like judicial proceedings everywhere, should be concerned with matters of substance, not form and only as the rules of discovery contribute to that end can they be said to be justified.

Due to their very nature, I suppose it is inevitable that they will be subject to some abuse by those few who hold their own special interests to be higher than the

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41/ None of these problems would be affected by the Freedom of Information Act under the present state of the law. See The Seeburg Corp., Docket 8682, Interlocutory Opinion, October 25, 1966, where the Commission took the position the "Act does not enlarge the discovery rights of a private party engaged in litigation with the Commission to secure documents of this nature which have hitherto never been considered as subject to discovery in this Agency's proceedings."

common good. While this is regrettable, it cannot be regarded as justification for restrictions on the legitimate right of discovery which the law confers upon parties to litigation and without which the whole truth might never come to light. Consequently, if this Commission is, as I think it should, to be ever vigilant in guarding against abuse of its rules, it must also constantly seek new ways to improve those rules so that they can better serve their intended purpose in the hands of those on both sides who are sincerely and honestly interested in serving the cause of truth.