II. Federal Rules Discovery

In contrast to civil law systems, where litigation proceeds along a continuum with frequent hearings and constant involvement by the judge, litigation in the United States consists of two distinct phases: the pre-trial and trial phases.[12] The former, including service of process, pleading, evidence-gathering, and summary judgment involves relatively slight judicial supervision.[13] Discovery[14] in the United States relies on the adversaries to gather and develop the facts underlying a lawsuit.[15] Accordingly, the judge[16] only narrowly supervises the discovery process.[17] The Federal Rules direct the parties to learn as much relevant and nonprivileged information as possible about the case and resort to the courts only in case of irreconcilable conflicts.[18]

Discovery is rightfully deemed "broad."[19] This broadness appears in three different ways. First, discovery applies to all types of civil litigation, irrespective of the legal field and relief sought.[20] Accordingly, evidence procurement in products liability, divorce or patent infringement cases all follow the Federal Rules' discovery procedures, whether they request injunctions, monetary damages, or other relief. Second, all civil litigants procure potential evidence by means of discovery, regardless of their

12 OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT, 28 (Oscar G. Chase and Helen Hershkoff eds., Thomson/West 2007); *see* also ABBO JUNKER, DISCOVERY IM DEUTSCH-AMERIKANISCHEN RECHTSVERKEHR 97 (Otto Sandrock ed., Verlag Recht und Wirtschaft GmbH 1987).

13 Valerie Davies & Thomas N. Pieper, *English Disclosure and U.S. Discovery*, *in* TRANSATLANTIC COMMERCIAL LITIGATION AND ARBITRATION, 233, 233 – 235 (John Fellas ed., Oceana Publications 2004) (stating that the parties' attorneys drive U.S. discovery while courts take rather passive roles). However, the pretrial phase has received increasing attention by the courts as procedural reforms encourage judges' proactivness regarding case management. Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COM. L. 675, 678 – 683 (1997); *see also* FED. R. CIV. P. 16 (instructing trial judges to use pretrial conferences to speed up the pretrial process and encourage settlement); *see also* 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §26.05 (Matthew Bender 3d ed. 2008) (suggesting that "direct judicial involvement, particularly access by the parties to the judge and judicial activity, are . . . important elements of any soundly managed program of discovery" which can help alleviate difficulties in conducting discovery especially in large and complex lawsuits).

14 Unless otherwise indicated, "discovery" as used herein refers to discovery under the Federal Rules of Civil Procedure.

15 Davies & Pieper, *English Disclosure and U.S. Discovery*, *in* TRANSATLANTIC COMMERCIAL LITIGATION AND ARBITRATION, *supra* note 13, at 233 – 235.

16 Discovery matters are more and more handled by federal magistrate judges in the first instance.

17 *See e.g.* CHASE ET AL., *supra* note 12, at 14 – 15 (discussing the relative passivity of U.S. judges vis-à-vis their civil law counterparts).

18 CHASE ET AL., *supra* note 12, at 29. The extent and manner in which these devices are employed by the parties remain subject to judicial control. *Id*.

19 JUNKER, *supra* note 12, at 117 (explaining that discoverability is best understood as including anything which is not expressly excluded); GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 262 (Kluwer 1989); *see e.g.* CHASE ET AL., *supra* note 12, at 30 (stating that the recent trend has favored a more restrictive interpretation of discovery.)

20 Hickman v. Taylor, 329 U.S. 495, 507 (1947) stating that discovery is not a "one-way proposition." Instead, "[i]t is available in *all* types of *cases* at the behest of *any party*, individual or corporate, plaintiff or defendant." *Id*. (emphasis added).

legal entity status or whether they are plaintiffs or defendants.[21] Third, discovery liberally authorizes parties to seek wide-ranging types of information from each other, regardless of their written, oral or digital form or confidential status.[22]

Courts in patent infringement suits have traditionally exercised relatively tight control over discovery and effectively limited it to the precise issues raised in the pleadings.[23] As a result, information regarding patent validity is deemed non-discoverable without an invalidity defense.[24] Further, courts have required precision of and imposed reasonable limitations on discovery requests concerning production deadlines and subject matter.[25]

Federal Rules of Civil Procedure 26 through 37 govern evidence-gathering in patent infringement lawsuits in United States federal courts.[26] Rule 26 constitutes an umbrella rule, which, generally, outlines discoverability and to which the following discovery rules are subject.[27]

First, Rule 30 depositions represent the most widely employed and internationally criticized[28] discovery device.[29] Any party or non-party with information relevant to the actions may be deposed.[30] Depositions usually take place in the law offices of the attorneys.[31] The deponent must give an oath of truthfulness in front of a notary and a court reporter takes a verbatim record of the questioning.[32] The deponents then undergo interrogation by both parties[33] as they would at trial.[34] The relative inefficiency of oral questioning and the mandated presence of counsel make depositions relatively time-consuming and expensive.[35] The availability of oral depositions in the United States contrasts starkly with procedural tools available elsewhere; even in

21 *See* 6 MOORE ET AL., *supra* note 13, at §§26.03. However, Federal Rule 81 curbs discovery's breadth by limiting its application and rendering it entirely inapplicable in special cases such as prize proceedings in admiralty, habeas corpus, bankruptcy, administrative actions. FED. R. CIV. P. 81.

22 FED. R. CIV. P. 26(b)(1); JACK H. FRICKENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON, AND HELEN HERSHKOFF, CIVIL PROCEDURE: CASES AND MATERIALS, 735 – 736 (9th ed. 2005).

23 6 MOORE ET AL., *supra* note 13, at §26.46[12][a].

24 *See e.g.*, Meese v. Eaton Mfg Co., 35 F.R.D. 162, 165 (N.D. Ohio 1964) (information relating to how the patented invention was conceived, its subsequent trials and disclosures deemed irrelevant and non-discoverable absent a claim of invalidity).

25 6 MOORE ET AL., *supra* note 13, at §26.46[12][a]; V. D. Anderson Co. v. Helena Cotton Oil Co., 117 F.Supp. 932, 950 (E.D. Ark. 1953) (mandating reformulation of "useful" subject matter and requests for data implicating a 20-year time span).

26 FED. R. CIV. P. 26 – 37; 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2003 (2d ed. 1987). For a comprehensive background discussion on the development of discovery procedure in the federal courts *see* Note, *Developments in the Law – Discovery*, 74 HARV. L. REV. 940, 949 (1961).

27 *See* FED. R. CIV. P. 26.

28 BORN & WESTIN, *supra* note 19, at 262.

29 FED. R. CIV. P. 30. Depositions are usually oral but may be written as well. Rule 31 addresses written depositions.

30 Parties need only be given "reasonable notice" of the deposition, while non-parties must be subpoenaed by the court or an attorney. *See* FED. R. CIV. P. 45(a)(3).

31 4 AM. JUR. *Trials* § 30 (2008).

32 *Id*. at § 27.

33 However, the right of cross-examination is not uniformly accepted. *Id*. at § 36. ("It is a matter of conflicting opinion whether or not a right to cross-examine exists in favor of a party whose deposition has been taken, when the deposition is strictly a discovery proceeding under the modern rules.")

34 *Id*.

35 *Id*. at § 2.

other common law countries that permit them, their availability is restricted to parties and extends to non-parties only in extraordinary cases.[36]

Second, interrogatories under Rule 33 follow depositions in popularity.[37] They, however, may only be addressed to parties and seek written responses under oath.[38] Parties usually consult their attorneys in answering the questions.[39] Thus, while interrogatories, at first glance, present a relatively cheap and simple discovery device, the potential need to follow up on questions and the responding parties' ability to dodge potentially risky issues can make their use rather cumbersome.[40]

Third, Rule 35 physical and mental examinations constitute a more sensitive and intrusive discovery device.[41] As a result, they remain subject to strict control of the courts that honor requests for such examination only upon a showing of "good cause."[42] They are, generally, limited to parties and persons under their legal control.[43]

Fourth, Rule 36 admissions help in framing the issues and facts in controversy. An admission made during discovery generally determines an issue with regard to that action.[44] Admissions are limited to the adversaries and involve the exchange of questions among them.[45] The receiving party may respond affirmatively or negatively, refuse to answer or object based on irrelevance or privilege.[46] However, under Rule 36(a) an objection is not warranted on the sole basis that it involves a core issue in the litigation.[47]

Supporters[48] of discovery's broadness point to the elimination of surprise, the open, well-informed and fair progress of litigation and efficiency as policy goals.[49] Additionally, the "powerful federal engine of discovery" promotes the public interest and good social policy via private actions initiated by private attorneys generals.[50] In such suits, social policy favors that plaintiffs discover as much pertinent evidence as possible from defendants.[51] Thus, "[c]alibration of discovery is calibration of the level or

36 CHASE ET AL., *supra* note 12, at 29 – 30 (explaining their more limited applicability in Canada) (2007); *see also*, in the United Kingdom, Civil Procedure Rules (CPR) 34.8.
37 FED. R. CIV. P. 33. Interrogatories and exchange of documents also exist in most other common law systems. CHASE ET AL., *supra* note 12, at 29.
38 FED. R. CIV. P. 33(a)-(b).
39 *See* 23 AM. JUR. 2D *Depositions and Discovery* § 125 (2008).
40 *See* Edwin W. Green & Douglas S. Brown, *Back to the Future: Proposals for Restructuring Civil Discovery*, 26 U.S.F. L. REV. 225, 233 (1992).
41 Despite its inherent intrusiveness into a person's physical and emotional privacy, this discovery device has withstood attacks based on the Constitution and the doctor-patient privilege. Sibbach v. Wilson, 312 U.S. 1 (1941).
42 FED. R. CIV. P. 35. A showing of "good cause" requires more than "relevance;" the requesting party must demonstrate why and that the evidence is necessary and can not be attained otherwise.
43 *Id*. at 35(a).
44 *Id*. at 36(b).
45 *Id*. at 36(a).
46 *See id*.
47 *Id*.
48 *See e.g.* Miner v. Atlass, 363 U.S. 641, 649 (1960) (referring to the discovery rules as "one of the major achievements of the Civil Rules.")
49 Federal Deposit Ins. Corp. v. Cherry, Bekaert & Holland, 131 F.R.D. 202, 204 (M.D. Fla. 1990) (aim of liberal discovery rules is to make trials less of a game of "blindman's bluff" and more of a fair contest); 6 MOORE ET AL., *supra* note 13, at §26.02 ("Liberal pretrial discovery tends to foster simplicity in pleading by permitting the pleadings to assume the form of generalized statements.")
50 Patrick E. Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4 – 5 (1997).
51 *Id*.

enforcement of the social policy set by Congress."[52] The United States legal system heavily relies on suits brought by private litigants due to the system's relative freedom from regulation and bureaucratization.[53] Therefore, Professor Carrington reasons, U.S. plaintiffs require adequate – and possibly superior – discovery tools:

> Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy. Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some hundreds or thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.[54]

In patent infringement cases, Rule 34 represents the key discovery device.[55] It covers the production of documents, tangible things and the inspection of premises. Inventors' increasing reliance on the internet and computer technologies for conducting and documenting research and development amplifies Rule 34's significance as a discovery device.[56] Rule 34, titled "Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes," subdivides into three subsections outlining the scope of the inspection, its procedures and deadlines, and third party production.[57]

52 *Id*.
53 *See* Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997).
54 *Id*.; *see also* JUNKER, *supra* note 12, at 96 (explaining that in contrast to German law, private plaintiffs in the United States, motivated by treble damages, sue and thereby perform a "Gewerbeaufsichtsfunktion" or business monitoring function which in Germany constitutes the task of federal agencies).
55 *E.g.* Kenneth R. Adamo et al., *Document Discovery in Patent Litigation*, *in* PATENT LITIGATION STRATEGIES HANDBOOK 2004 CUMULATIVE SUPPLEMENT *supra* note 1, at 79.
56 *Id*.
57 (a) In General. A party may serve on any other party a request within the scope of Rule 26(b):
(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:
(A) any designated documents or electronically stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or
(B) any designated tangible things; or
(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.
(b) Procedure.
(1) Contents of the Request. The request:
(A) must describe with reasonable particularity each item or category of items to be inspected;
(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and
(C) may specify the form or forms in which electronically stored information is to be produced.
(2) Responses and Objections.
(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.
(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.
(C) Objections. An objection to part of a request must specify the part and permit inspection of the rest.

A. *Rule 34*

Because probative evidence in patent infringement cases tends to exist in the form of documents or physical objects, Federal Rule 34 is particularly important to proving and defending patent infringement claims.[58] While Rule 34 is simplistically known as "documentary discovery," it covers more than just documents. Rather, Rule 34 details the mechanism by which parties may inspect and obtain documents and electronic information, as well as objects or things under another's control or enter upon the premises of another party or non-party.[59] The obligation to disclose specific documents under a party's control extends far.[60] For example, in *Societe Internationale v. Rogers*, the United States Supreme Court held the plaintiff under an obligation to disclose documents to the defendant even though applicable Swiss law forbade this under criminal penalty.[61] The Court deemed the plaintiff in "control" of the requested documents for discovery purposes,[62] because it found the plaintiff in a position to either prompt the Swiss lawmaker to change the criminal statute or create an exception.[63] Like pre-trial discovery in general, Rule 34 operates extrajudicially and puts the adversaries in the driver's seat.[64] Broadly speaking, Rule 34 controls the inspection[65] of two types of property: items[66] and premises.[67] First, "items" as used in this thesis

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form--or if no form was specified in the request--the party must state the form or forms it intends to use.
(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
(iii) A party need not produce the same electronically stored information in more than one form.
(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection. FED. R. CIV. P. 34

58 *See* Kenneth R. Adamo et al., *Document Discovery in Patent Litigation*, *in* PATENT LITIGATION STRATEGIES HANDBOOK 2004 CUMULATIVE SUPPLEMENT *supra* note 1, at 79.

59 FED. R. CIV. P. 34; *see* JUNKER, *supra* note 12, at 165 – 66 (criticizing with regard to definitions such as "things" and "property," U.S. law, unlike German law, has failed in providing clear terms.)

60 For example, courts tend to require subsidiaries to produce documents in possession of their parents and vice versa. *See e.g.* Japan Halon Co. v. Great Lakes Chem. Corp, 155 F.R.D. 626, 627 – 629 (N.D. Ind. 1993).

61 Societe Internationale v. Rogers, 357 U.S. 197, 204 – 206 (1958). Swiss law applied to the requested banking records, because they were controlled by a Swiss affiliate of the Plaintiff and located in Switzerland.

62 *Id*. at 204 – 205.

63 *Id*. at 205 – 206. ("Petitioner is in a most advantageous position to *plead* with its own sovereign *for relaxation* of penal laws or for adoption of plans which will at the least achieve a significant measure of compliance with the production order… .") (emphasis added). In fact, the Swiss law is an example of a blocking statute discussed in note 334 *infra*.

64 *See* Nash v. City of Oakwood, 90 F.R.D. 633, 637 (S.D. Ohio 1981) (stating that the procedures outlined in Rule 34, generally, operate without judicial intervention).

65 The word "inspecting," and its various forms, as used in this paper are meant to include all the activities authorized by Rule 34, that is, measuring, surveying, photographing, testing, and sampling. *See* FED. R. CIV. P. 34(a)(2).

66 *Id*. at 34(a)(1).

67 *Id*. at 34(a)(2).

includes objects, text and other information packaged in both paper and electronic format.[68] By referring vaguely to "any designated document or electronically stored information" and "any designated tangible things", Rule 34 casts a wide net that expressly includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations."[69] The requesting or receiving party may "inspect, copy, test or sample" such items.[70]

Second, inspection of "premises" covers land or other property under the responding party's control.[71] Since real property can not be "produced," the Rule requires the responding party to allow the requesting party to enter the property.[72] As with tangibles, the requesting party or, here, entering party may conduct a series of inspecting activities, which include "measur[ing], survey[ing], photograph[ing], test[ing], or sampl[ing]" the property and the designated objects and operations it hosts.[73]

Rule 34 specifically outlines the procedures for producing documents, electronic information[74] and permitting entry upon premises.[75] Requests for such inspections must set forth, individually or categorically, the items sought to be inspected.[76] The request also *must* denote a reasonable time, place and manner for the inspection activities and *may* specify a form for producing electronic information.[77] Courts have even ordered restoration and production of deleted electronic- or voice-mail messages.[78] Although the responding party may object to Rule 34 requests, it must provide its reasons for doing so.[79] In Rule 34's application to patent infringement actions, four areas of particular interest arise.

1. *Inspections of Things – Type of Items Covered*

Rule 34(a)(2) allows the inspecting, sampling and testing of things, including documents and electronically stored information.[80] The reference to "tangible things" brings almost any type of item within its purview. While a dead body[81] and fingerprints[82] were ordered subject to production, discovery in patent infringement cases

68 *See id*. at 34(a)(1)(A).
69 *Id*. at 34(a)(1)(A).
70 *Id*. at 34(a)(1).
71 *Id*. at 34(a)(2).
72 *See id*.
73 *Id*.
74 *See id*. 34(b)(2)(D)&(E); *e.g.* Simon Prop. Group L.P., v. mySimon, Inc. 194 F.R.D. 639, 640 (S.D. Ind. 2000) (computer records, including deleted ones, are discoverable under Rule 34); *see* Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled its Promise?* 4 RICH J.L. & TECH. 7 (2008). Further, the Federal Rules of Evidence, like the Federal Rules of Civil Procedure, apply to electronically stored data as they do to other types of evidence. *See* 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 900.01 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 2005).
75 FED. R. CIV. P. 34(b).
76 *Id*. at 34(b)(1)(A).
77 *Id*. at 34(b)(1).
78 *E.g.* Simon Prop. Group L.P., v. mySimon, Inc. 194 F.R.D. at 640 (trademark infringement case where court granted a motion to compel recovery of data from both office and home computers of certain individuals).
79 FED. R. CIV. P. 34(b)(2)(B).
80 FED. R. CIV. P. 34(a)(1)(A); *see id*. at 34(a) advisory committee's note (2006).
81 Zalatuka v. Metropolitan Life Ins. Co., 108 F.2d 405 (C.A.7 1939).
82 Alford v. Northeast Ins. Co., 102 F.R.D. 99, 101 (N.D. Fla. 1984).

commonly involves business records, including corporate books and records,[83] photographs,[84] drawings,[85] bank records,[86] scientific research data[87] and lab notebooks.[88] Any of these items can be relevant and, thus, producible in an infringement action if they are already in existence.[89]

2. *Premise Inspections*

The same relevancy, scope and timing considerations extending to both parties and nonparties that cover document discovery also apply to premise inspections.[90] Patent infringement litigants tend to make use of premise inspections to scrutinize – mostly by testing, videotaping and photographing – their adversaries' processes and manufacturing facilities.[91] Experts and consultants often accompany the inspecting party to ensure an efficient performance of the inspection.[92] Usually the parties collectively plan the parameters of access and inspection.[93] One practitioner describes the process as follows:

> It is usually the technique on such an inspection to attempt to simultaneously conduct a "walking" Rule 30(b)(6) [ ] deposition. This is consistent with [the notice requirement and may include] asking the deponent to recreate certain events on videotape. These "walking" depositions are, however, not easy to do properly and may require an initial or several days of access by the party inspecting to enable full familiarization with the plant, process, and physical constraints applied before commencing the deposition. Often a separate camera for

83 *See e.g.* Federal Sav. & Loan Ins. Corp. v. Commonwealth Land Title Ins. Co., 130 F.R.D. 507, 509 (D.D.C. 1990).
84 *See e.g.* Daniels v. AMTRAK, 110 F.R.D. 160, 161 (S.D.N.Y. 1986).
85 *See e.g.* Financial Bldg. Consultants, Inc. v. American Druggists Ins. Co., 91 F.R.D. 59, 60 (N.D. Ga. 1981).
86 *See e.g.* Societe Internationale v. Rogers, 357 U.S. 197, 204 – 206 (1958); *contra* Duracell Inc. v. SW Consultants, Inc. 126 F.R.D. 576, 579 (1989) (stating that discovery of research and development information, financial statements, bank accounts and records, net profits and losses, investments was especially sensitive for a company in a vulnerable competitive position and, thus, merited a protective order under Rule 26(c)(1)(G)).
87 *See e.g.* Simon v. G.D. Searle & Co., 119 F.R.D. 680, 681 (D. Minn. 1987).
88 Fresenius Med. Care Holding Inc., v. Baxter Int'l, Inc., 224 F.R.D. 644, 649 (2004); E.I. Du Pont de Nemours v. Phillips Petroleum Co. 24 F.R.D. 416, 424 – 425 (2006). However, in deciding whether to permit production of laboratory notebooks and record courts ask how important those records are to the case. *Id.*
89 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §34.12[2] (Matthew Bender 3d ed. 2008). This means that the producing party has no obligation to create or draft new documents solely for Rule 34 discovery. *E.g.* Alexander v. FBI, 194 F.R.D. 305, 310 (D.D.C. 2000). However, a defendant in a defamation case *was ordered to create* and produce handwritten exemplars. In doing so, the judge construed Rule 34 broadly in conjunction with Rule 26(b) and referred to the common occurrence during depositions of compelling deponents to make a sketch in accident cases. Harris v. Athol-Royalston Reg'l Sch. Dist. Comm., 200 F.R.D. 18, 20 (D. Mass. 2001).
90 *See* FED. R. CIV. P. 34; FED. R. CIV. P. 45.
91 *E.g.* Micro Chem., Inc. v. Lextron, Inc., 193 F.R.D. 667, 670 (D. Colo. 2000); *see* Kenneth R. Adamo et al., *Document Discovery in Patent Litigation*, *in* PATENT LITIGATION STRATEGIES HANDBOOK 2004 CUMULATIVE SUPPLEMENT *supra* note 89, at 79, 104 – 105.
92 *E.g.* Eirhart v. Libbey-Owens-Ford Co., 93 F.R.D. 370, 372 (N.D. Ill. 1981) (access to plant by plaintiffs, their counsel and consultants).
93 Kenneth R. Adamo et al., *Document Discovery in Patent Litigation*, *in* PATENT LITIGATION STRATEGIES HANDBOOK 2004 CUMULATIVE SUPPLEMENT *supra* note 1, at 79, 104; *e.g.* National Dairy Prods. Corp. v. L.D. Schreiber & Co., 61 F.D.R. 581, 583 (E.D. Wisc. 1973) (performance of tests only in presence of opponent's counsel and experts).