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Use and Misuse of Discovery Procedure

Phillip S. Van Cise

USE AND MISUSE OF DISCOVERY PROCEDURE

PHILIP S. VAN CISE
of the Denver Bar

A surprising number of lawyers go into court half prepared and without taking depositions. A soldier wins his battle with ammunition; a lawyer wins his case with facts. The discovery procedure produces the facts which win the case and shorten the trial. Discovery also greatly aids settlement out of court.

A client gives you his side of the story which looks like a good case. But there are two sides to every case, and the other side may be much stronger.

How can you get all the possible facts? You talk to your client and his witnesses and examine his papers. If haste is necessary, you often file your case before this examination is completed. But you need to use the Discovery Rules to find out what is the defendant's side.

Three times, after taking a deposition, I have found that I had a very weak case and promptly dismissed the action. I much prefer to lose a case on depositions in the office rather than on a trial in court. As against that I have won many cases by getting the adverse party committed to answers in his depositions.

The first question we face is when should depositions be taken. The answer is at the earliest possible moment after you fully know what questions you want answered. Don't take a deposition on guess work.

WHEN CAN DEPOSITIONS BE TAKEN

In Colorado, under our Rules and without leave of court, you can serve notice to take the deposition at the same time as you serve the summons, and you can fix whatever date you desire in the notice. We think this is excellent procedure.

However, Federal Rule 26 as amended in March, 1949, provides:

> After commencement of the action the deposition may be taken without leave of court, *except that leave* granted with or without notice, *must be obtained if notice* of the taking *is served* by the plaintiff *within 20 days after commencement of the action.* (Italics supplied.)

Note there are no limitations placed on the defendant. This Rule and the reasons for it are well stated in *Keller-Dorian Color Film v. Eastman Kodak Company.*[1]

Two cases were filed. The defendant was represented by the firm of Donovan, Leisure et al, of New York, and their contention was that depositions should not be taken until issue was joined

[1] 9 F.R.D. 432 (S.D. N.Y. August, 1949).

and then only after the defendant had first taken the depositions of officers of the plaintiff. The court ruled to the contrary and stated:

> Plaintiff filed its complaints in these actions on November 19, 1948 and on the same day obtained an ex parte order from . . . this Court, granting plaintiff leave to serve simultaneously with the service of its complaints notice to take the deposition of two of defendant's officers. On the same day (November 19, 1948) the complaints, ex parte orders and the notices of examination were served on the defendant. The examinations were noticed for December 15 and 16, 1948.

Note that the date set for taking the deposition was 26 days after the date of filing and service. Defendant entered its appearance November 30. The court also stated:

> Under Rule 26(a), before amendment, . . . it was generally held that priority went to the party first serving the notice for examination.
>
> This gave a practical advantage to the defendant who would normally and naturally serve the notice to take the deposition with the answer.
>
> The report of the Advisory Committee on Amendments to the Rules . . . indicates an intent to broaden the former Rule so that now either party may start taking depositions after the complaint is served but with a 20-day delay period against the plaintiff (except by order of the Court), and this only as the note says because it is a protection for a defendant who has not had an opportunity to retain counsel and inform himself of the nature of the suit.
>
> I believe that the Rule makers . . . intended that the plaintiff should go to Court for leave so that the Court might protect such a defendant, one without an attorney and one who was not informed of the nature of the proceeding.
>
> This defendant did not need the protection of the Court in those respects. It had attorneys and it appeared in the action before the expiration of the 20 days and about two weeks before the date set for the taking of the deposition.

Therefore bear this in mind if you are the plaintiff. When you file your complaint without notice to the defendant, you can apply to the court for leave to take depositions at any date after 20 days after you serve the defendant, and you can serve that notice with the summons and complaint and a copy of the order. Then you are sure that you can take the first deposition, because the party who serves the first notice to take a deposition of the

other party or of a witness has priority, and it is of the utmost value that you and your client hear or read his opponent's testimony before the adverse party takes your client's deposition.

RULE 26 (b) SCOPE OF EXAMINATION

This provision is very broad; "Unless otherwise ordered by the court . . . the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts." But don't use this to ask all sorts of useless and needless questions.

You can introduce the whole or part of the deposition of an adverse party or of an officer of an adverse corporation party without being bound by it just the same as if he were called as an adverse witness at the trial. But if only part of any deposition is introduced, you may be required to introduce all of it which is relevant to the part introduced. A very important point to remember is that you are not deemed to make a person your witness for any purpose by taking his deposition. Another point to remember is that at the trial you may rebut any relevant evidence contained in a deposition whether introduced by you or any other party. This differs from attempting to contradict your own witness who testifies at the trial.

RULE 27 DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

This Rule gives the procedure to perpetuate testimony. As a matter of form it should be amended so that a motion should be filed instead of a petition. The Rule is seldom invoked but is very necessary in many instances.

A case must be filed in the United States District Court in the residence of any expected adverse party. Hence if there are several adverse parties, resident in different districts, separate actions must be brought in each district. Proper service is required upon each person named in the petition, and if any parties are not properly served the Court shall appoint an attorney to represent them.

However, this Rule is not involved in our discussion as the courts have held that it may not be used for discovery purposes to enable the petitioner to frame a complaint.[2]

RULE 28 PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

The Rule provides that "no deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is financially interested in the action." However, in some of the smaller towns where notary stenographers are scarce, counsel very frequently stipulated that it can be taken

[2] 2 Federal Rules Digest 4.

by the secretary of one of the attorneys, and this, of course, waives the Rule.

Also, in some of these places, it often happens that the local County or State District Judges take depositions in cases pending before them, but I have found no case where our Federal Judges have done so although they have that power. They are too busy to do so, and it would be bad practice to start it.

In case of a deposition in foreign countries the Rule should be strictly followed so that the proper authority is selected to take the deposition. A few lawyers have been fortunate enough to have estates or other litigation which required a trip, at the client's expense, to other countries to take depositions on oral interrogatories. As one of the unlucky ones who never had that chance, I have been rather skeptical when oral interrogatories have then been requested.

PLACE WHERE DEPOSITIONS CAN BE TAKEN

There is a distinction as to the place where the deposition of a party and the deposition of a witness may be taken on oral interrogatories. Rule 45 provides:

> d(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service or at such other convenient place as is fixed by an order of court.

Hence if you subpoena a party for oral examination at a deposition, you are limited to the places stated in Rule 45.

Note, however, that it is only when a subpoena is served upon a party that the place of taking his deposition is limited by Rule 45. No subpoena is necessary for the attendance of a party, or of an officer of a defendant corporation if notice to take his deposition is served upon him or his attorney.

Now let us examine Rule 5; it provides:

> (a) . . . every written notice . . . shall be served upon each of the parties affected thereby . . .
>
> (b) Whenever . . . service is required . . . to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court.

How about Rule 30, which provides:

> (a) *Notice of Examination: Time and Place.*
>
> A party desiring to take the deposition of any per-

son upon oral examination *shall give reasonable notice* in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined. (Italics supplied).

(b) *Orders for the protection of parties and deponents.*

After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, *the court in which the action is pending may make an order* that the deposition *shall not be taken, or that it may be taken only at some designated place other than that stated in the notice* . . . (Italics supplied).

How have the United States Courts construed Rules 5 and 30 as to taking *the deposition of a party* after being served with notice?

I cite a few cases: Notice was served on defendant's counsel that defendant's deposition would be taken at Bangor, Maine, his place of residence in the district where he lived. He did not appear. The Court held that he could not be compelled to attend without a subpoena but that he could be subjected to the penalties under Rule 37(d) for wilfully failing to attend when he was one of the parties and that he had been properly notified.[3] In a New York district court case defendants did not appear on a notice to have their depositions taken, and the Court held they could be penalized by striking out their answer.[4] In a libel case the plaintiff failed to appear for a deposition on which notice had been served on his attorneys. He was in India, and did not come to New York for the deposition. The case was dismissed.[5] A resident of Oregon brought an action in Arizona. Notice to take his deposition in Phoenix where the action was filed, was disregarded. He raised the question of no subpoena, but the Court held none was required and dismissed his case.[6]

There are many other decisions to the same effect, and we have found none to the contrary. Therefore, *notice to a party* to take his deposition can be relied upon as sufficient if served upon him or his attorney, and no subpoena is required.

Where Can You Take The Deposition of A Party

The Federal decisions are very much in conflict, some holding it must be at the place where the action was filed, others allow

[3] Millinocket v. Kurson, 35 F. Sup. 754 (D. Me. 1940).
[4] French v. Zalstem, 1 F.R.D. 240 (S.D. N.Y. 1940).
[5] Roerich v. Esquire Coronet, 1 F.R.D. 692 (S.D. N.Y. 1941).
[6] Collins v. Wayland, 139 F. 2d 677 (9th Cir. 1944), Certiorari denied 88 L. Ed. 1576.

it at the town of the party or place of business of a corporation. I cite a few illustrative cases requiring the deposition to be taken where the case was filed: A Cuban corporation brought an action in the New York District Court. The decision is by the Second Circuit Court. The president of the plaintiff corporation was ordered to appear with its books and records for his deposition in New York, and for his failure to appear the case was dismissed.[7] A plaintiff who brings suit in a particular district must appear and give his deposition there.[8] A resident of Chicago brought $100,000 suit in New York; required to give deposition in New York.[9] Non-resident plaintiff required to give his deposition where the suit was pending unless showing of special hardship made.[10] Plaintiff required to give his deposition where case is pending, even though he had removed to another state.[11] A Canadian corporation with its office in Vancouver, British Columbia, sued the defendant for breach of contract in New York. Notice was served by defendant to take the deposition of plaintiff's officers in New York. Held that the deposition would be taken in New York except that at plaintiff's option it could be taken in Canada, conditioned on the payment by plaintiff of the expenses and reasonable counsel fees of defendant.[12]

Here are some cases to the contrary: Plaintiff was without funds, had lost both legs, was not required to go to New York, but deposition was ordered taken at Minneapolis, where he lived or by written interrogatories.[13] The plaintiff was ordered to come to New York from Florida on condition that defendant pay his costs and traveling expenses or that it be taken in Florida if defendant pay plaintiff's counsel's travel and hotel expenses; otherwise by written interrogatories.[14] There are also many opinions that deposition of corporate officers be taken at its place of business.[15]

Hence under Rule 30 the place of taking the deposition where the action is pending is subject to modification by the court if good cause is shown therefor. As a result the place for taking a party's deposition on notice is wide open, and the party who objects to that place should at once file his motion to change the place and state very good and complete reasons therefor. Then it is entirely up to the court where and under what conditions it will be taken.

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[7] Producers Releasing Corporation of Cuba v. P.R.C. Pictures, 176 F. 2d 9 (2nd Cir. 1949).

[8] Petnel v. Am. T. & T., 16 F.R. Ser. 396 (S.D. N.Y. 1952).

[9] Worth v. Trans. World Films, 11 F.R.D. 197 (S.D. N.Y. 1951).

[10] Zweifler v. Sleco Laces 11, F.R.D. 202 (S.D. N.Y. 1950).

[11] Anthony v. R.K.O. Radio, 8 F.R.D. 422 (S.D. N.Y. 1948).

[12] Morrison Export Co. v. Goldstone, 12 F.R.D. 258 (S.D. N.Y. 1952).

[13] Sullivan v. So. Pac. Co., 7 F.R.D. 206 (S.D. N.Y. 1947).

[14] Stevens v. Minder Construction Corp., 3 F.R.D. 498 (S.D. N.Y. 1943).

[15] Article by J. H. McChord, 4 F.R.D. 374.

RULE 29 STIPULATION ON DEPOSITIONS

More and more attorneys are stipulating as to the time and place of taking depositions, and they are usually held in the office of the attorney who is taking them. My experience is always to be obliging to other counsel and agree on a time and place for the deposition and the production of documents without requiring it in writing. Then we dictate the stipulation at the start of the deposition.

In defending a libel case brought by a very belligerent lawyer who gets very personal, my defendant's deposition was to be taken before a shorthand reporter. So as to get the shouting and yelling of the opposing attorney in the record, I employed an additional reporter with a wire-recorder to get this data for the Court, just as it sounded at the deposition in case I discontinued the deposition. We started rather late in the morning, and he yelled and shouted and called names as I expected. I was about to take my client and leave, but decided to come back after lunch. When I did, my reporter told me the wire-recorder had failed to register. But luck was with me, his associate attorney showed up with him, apologized and we finished the deposition.

RULE 31 DEPOSITIONS ON WRITTEN INTERROGATORIES

Where the client is poor, the witness is at a distance or the interrogatories are short, written interrogatories should be used. Care should be taken that they fully cover all possible facts, and as a rule they should be shown to the client before they are served. It is wise to use this general question at the end of the deposition:

> Have you fully stated all the facts that you know about the matters on which you have been questioned? If not, state them now.

However, oral interrogatories are preferable to written interrogatories.

RULE 32 EFFECT OF ERROR AND IRREGULARITIES

In brief this Rule requires prompt objection to errors in the notice to the officer taking the deposition, to errors and irregularities at the deposition, to the form of the written interrogatories and to the completion and return of the deposition. If not made in time, all are waived.

When I take a deposition if it is necessary to save expense, I stipulate with counsel that the deposition does not have to be filed until the trial; but can be delivered to me, and can be examined at any time by the adverse party. If my client is not short of funds, I much prefer to have my copy in the office and the original filed in Court.

RULE 33 INTERROGATORIES TO PARTIES

Note, this Rule is limited to parties only and is not applicable

to witnesses. This Rule was very properly amended so that both depositions and interrogatories may be used. The only limitation is that:

> interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of Court granted with or without notice must first be obtained.
>
> The number of interrogatories to be served is not limited except as justice requires to protect a party from annoyance, expense, embarrassment or oppression.

The courts hold that this Rule is as broad as Rule 26, and that it is limited only by rules of relevancy.

The leading case under this Rule is *Hickman v. Taylor*.[16] While this reversed the Circuit Court, it very thoroughly analyzed the Rule and should be carefully studied by every lawyer who has problems as to what interrogatories he can ask. The case states the following:

> Disclosure by an adverse party's counsel of information gathered by him in anticipation of possible litigation may not be required by interrogatories . . .
>
> A party cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney.
>
> The deposition-discovery rules (Nos. 27-37) of the Federal Rules of Civil Procedure are to be accorded a broad and liberal treatment, to the end that either party may obtain in advance of trial knowledge of all relevant facts in possession of the other.
>
> Memoranda made by an attorney while acting for his client in anticipation of litigation, of information secured from witnesses, brief, communications and other writings prepared by him for his own use in prosecuting his client's case, and writings which reflect his mental impressions, conclusions, opinions or legal theories, are outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis.
>
> A party is not entitled to discovery under the Federal Rules of Civil Procedure of written statements in the files of the attorney for the adverse party and of memoranda made by him in anticipation of litigation, without any showing of the necessity for the production of such material or any demonstration that denial of production would cause hardship or injustice, where for aught that appears the essence of what he seeks either has been revealed to

[16] 329 U.S. 495 (1947).

him through interrogatories or is readily available to him direct from the witnesses for the asking.

Without a showing of necessity, the attorney for an adverse party should not be required to disclose to his opponent his mental impressions or memoranda as to oral statements made to him by witnesses equally available to the other party, and it is not enough that such party's counsel wants the statements to help prepare himself to examine witnesses and to make sure that he has overlooked nothing.

Rules 31, on written interrogatories to witness and 33 on interrogatories to parties have this distinction: Rule 31 is a deposition on which cross and redirect interrogatories can be asked the same as at a trial, Rule 33, being limited to parties, gets the answers just to the questions you ask without explanations of any kind and therefore, if the questions are very carefully framed and not made too long, it is the better practice as to parties. The answers are definite commitments and are very helpful in narrowing the issues and thus shortening the trial.

The difficulty with this Rule is that many lawyers ask a tremendous number of trivial and unimportant questions. The adverse party can file written objections within ten days, and a lot of needless time of court and counsel is then consumed.

If the court's docket is crowded, and the lawyers do not live at the place where the court has its sessions, the adverse party can thus greatly delay the trial. The court should not hesitate to censure the counsel who wrote improper interrogatories or asked too many trivial questions and also to censure the other attorney for illegal objections. If the questions and objections are very long, the attorneys should be first told to get together and try to shorten them and thus save the time of the court.

If you use this Rule, first check the court docket and then check with your adversary lawyer. If both are satisfactory, use Rule 33; otherwise use Rule 31 (written interrogatories) or preferably Rule 30 (oral interrogatories). Don't overlook the fact that if you want more information than you got under Rule 33, you can then take the deposition by oral or written interrogatories.

COSTS OF DEPOSITIONS

Rule 54(d) provides: "Except when express provisions therefor are made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Under all the U. S. decisions the taxation of costs under this Rule has been held to be in the discretion of the Court.[17]

We have found only three Federal cases on deposition costs:

[17] 2 Federal Rules Digest 261-263.

> The taxation of expenses in taking depositions as costs is a matter within the court's discretion under Rule 54(d) and as confirmed by Rule 80(a) and the court's action will not be overruled except for an abuse of discretion.[18]
>
> Costs may be taxed for the expenses of a deposition, the use of which became unnecessary as the result of a pre-trial hearing.[19]
> Where a local rule provides that expenses of taking a deposition shall be taxable as costs only if the deposition was read or offered in evidence, the costs of taking a deposition not used may not be taxed.[20]

Colorado, in the main, adopted the Federal Rules in 1941. Ten years later in a case won by us, *Morris v. Redak*,[21] the Colorado Supreme Court unanimously and very vigorously, and in my opinion very wrongly, modified that portion of the decree of the district court which allowed the costs of taking the deposition of the defendant and stated:

> Taking depositions of witnesses in preparation for trial is something in the nature of a luxury, and one who avails himself of this procedure does so at his own expense.

The deposition of the defendant which we took in that case was the main factor which resulted in a judgment for our client of over $50,000. The deposition costs were $375.70. Hence we did not file any motion for reconsideration against that part of the judgment although we then thought, and still think, that it was thoroughly improper and rendered without any conception of the fact that in most cases a lawyer who fails to take depositions is not doing his job. In that case the defendant on direct examination repeatedly testified differently from his deposition. It was a jury case, and time after time on cross-examination he was contradicted by statements in his deposition.

We hope that the Colorado Supreme Court will some time amend its Rules to provide that costs of depositions shall be in the discretion of the court. The Denver District Court Rules had previously so provided.

Abraham Lincoln told a story about the steamboat. Everytime the whistle blew it took all the steam and the boat came to a standstill. The reverse is true by the new procedure; the whistle of discovery has been the signal for the advance of the boat, and it has enabled the boat to delivery the case at its destination.

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[18] Harris v. Twentieth Century Fox, 139 F. (2d) 571 (2nd Cir. 1943).
[19] Federal Deposit Ins. Corp. v. Fruit Growers Service Co., 2 F.R.D. 131 (E.D. Wash 1941).
[20] Amerman v. Butte Copper Co., 5 F.R.D. 30 (D. Mont. 1945).
[21] 124 Colo. 27, 234 P. 2d 908 (1951).