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DEPOSITIONS AND DISCOVERY, RULES 26 TO 37

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On May 17, 1951, the Colorado Supreme Court adopted the recommendations made by its Rules Committee on September 1, 1948, and made 37 amendments to conform to the Federal Rules of Civil Procedure as amended, two amendments to the Appendix of Forms and nine other amendments. These became effective August 17, and have been printed in *Dicta*. They should be carefully studied by bench and bar, as they are excellent changes which will help the practice in the courts.

General Deposition Procedure

Initially every lawyer should be most careful to be truthful and honest with the court and fellow lawyers and to accommodate opposing counsel whenever possible.

Before taking depositions, unless there is an emergency, counsel should get every possible fact that will affect his case. He should talk over the matter first with his client, get the names of all possible witnesses, and see them. If real or personal property is involved, he should inspect it, check it thoroughly, get the names of adverse witnesses, and, if not hostile, talk to them. Then counsel is prepared to take depositions.

We wrote an article for the June, 1951, Rocky Mountain Law Review based on opinions of the judges and members of the bar as to the new Rules. The Judges generally commented that too many lawyers come to court half prepared. The same is true at the taking of depositions.

We recently took the deposition in a divorce case of a woman who had gone to Florida in her car with her boy friend, and lived there some three months openly and notorously as his wife. After her return to Denver we took her deposition. Her attorney had had no talk of any kind with her about her conduct or what she had been doing in Florida prior to the deposition. We interrogated her about the Florida trip and all she would admit was that she was in Florida and the number of her post office box. She committed perjury on practically every other question. When the deposition was concluded we stated in the record of the court reporter that she had committed perjury and we had the conclusive evidence as to that fact.

We asked her attorney to stay after the deposition was concluded and gave him the detective's reports, and his answer was "Why, I never ask my client or witness anything about what they are going to testify to before their deposition is taken." If he had done so, he then should have refused to allow her to answer ques-

tions which would have incriminated her, thus preventing her from committing perjury. He, however, did not further contest the case. But he should have been prepared on his facts.

We recommend that depositions be taken as soon as the facts are known. Sometimes it may be necessary to take depositions before the complaint is filed. This would be in a case where a party was critically ill or about to leave the state, and you do not know all the facts for your complaint. In such event you must first file the case with the clerk and have him issue the summons. Then all depends on the adverse party; if he is willing to co-operate you can take the deposition quickly but it must be done within ten days, as Rule 3 requires that the complaint be filed within that period after the summons is served, or the action may be dismissed. If necessary a skeleton complaint can be filed, then file an amended complaint after the deposition is taken. This can be done at any time within 20 days after the original complaint is filed if no responsive pleading has been filed in the meantime, otherwise on order of court. As a rule in cases of emergency adverse counsel will co-operate.

We make it a rule in all cases which will be contested to take the deposition of the adverse party, and if the adverse party's attorney is smart he will not delay the taking of the deposition of his client, because, the longer the time before the deposition is taken, the better prepared will be the lawyer who desires to take the deposition.

WHEN WITNESS WILL NOT TALK

Some attorneys are a little confused as to the procedure in case a witness refuses to answer questions and threaten to cite him for contempt of court. There is no contempt of court in refusing to give a deposition or answer questions thereat. The procedure is to certify up the portions of the deposition, which would show the refusal to answer, with a motion to the court to require the witness to answer those questions and others which may be pertinent. If the court orders the witness to answer the questions and complete the depositions, and he refuses so to do, he is then in contempt, and a citation therefor will be issued by the court under Rule 37.

The witness can be examined on direct, then cross-examined, re-examined and finally on re-direct, the same as at trial. However, we seldom interrogate our client if called by the adverse party, and do not do so unless he has been mistaken in some answer he made or if an answer needs clarification. Do not open up holes for the other side.

The great majority of the lawyers and the judges still fail to abide by Rule 43(b) and call the adversary for "cross-examination under the statute". That statute is repealed by the Rules and now you call the adversary "As an adverse party by leading questions."

It is best to let the witness tell his story in his own words without interruption until he finishes, for instance in a divorce case on the grounds of cruelty, ask the following questions:

"When, where and what was the first act of cruelty? Give all the facts about it."

Then ask questions to clarify.

Do not use contradictory evidence at this time; reserve it for trial, get his story in his own words.

Then get the next act of cruelty and continue to interrogate the witness as to every possible phase of the case.

If he is your witness set him at ease, let him smoke and relax. Do not interrogate too fast and remember to take rests for the court reporter.

If the witness desires to refer to a memorandum or book, let him do so but be sure to identify it in the record.

When you get to the end of a deposition ask the witness if there is anything else about the case about which he has not been interrogated that he wants to state, that you want the full facts from him.

If he is your client or one of the witnesses whom you expect to use at the trial, watch him very closely for accuracy. You can, if advisable, object to any question if privileged or incriminatory or if the question has nothing to do with the case in any manner whatsoever, and instruct him not to answer.

QUESTIONS ASKED AT THE INSTITUTES

Quite a number of questions were asked the committee at some of the Institutes and we will now answer the ones that are pertinent to these sections of Rules.

1. Q. "Is a notice to a party's attorney sufficient to compel the party's attendance for deposition or must a subpoena be served?"

A. Rule 5 provides among other things that every written notice, appearance, demand and similar paper must be served on each of the adverse parties, and that this service shall be made upon the attorney for the adversary if he has one. This, of course, could refer only to the adverse party, as to all other witnesses subpoenaes must be served.

2. Q. "If documents are desired must a subpoena duces tecum be issued or is a demand for documents incorporated in the Notice to Take Deposition sufficient?"

A. The demand should be sufficient but it depends upon the adverse lawyer. If he is courteous and cooperative he will produce them; if he is not he may refuse to do so, and you will save time by issuing subpoena.

3. Q. "If a party does not appear in response to a notice to his attorney what remedies from a practical standpoint are available?"

A. Thereafter deal with that discourteous attorney at arms length. Issue and serve a subpoena forthwith and set a new date.

4. Q. "Can depositions be taken of witnesses other than a party in a county other than that in which the witness resides?"

A. "No." See Rule 45 (c) (2). Of course if the witness is willing to appear and the other side agrees it can be taken any place. However, the testimony of the plaintiff can be taken in the county in which the case is filed, and the defendant in that county if he has been served within the State or has appeared. See 4 Federal Rules Decisions, page 474 for an excellent brief on this requirement that the plaintiff may be made to appear, even though he lives in another State.

5. Q. "Can a party to a civil action refuse to testify at his deposition on the grounds that his "testimony may incriminate him?"

A. The answer is "yes", but he does so at his peril because it will prejudice him to the court or a jury.

6. Q. "If so can he thereafter testify at the trial on his own motion in this respect?"

A. "Yes" but he can be impeached by reading to him his prior refusal to answer at the time of the deposition. See address No. 8 by a member of the Rules Committee in the Colorado Rules of Civil Procedure, Page 480.

7. Q. "May a defendant's deposition be taken before answer is due?"

A. "Yes" under Rule 30 in the Colorado Courts. In the U. S. Court under Rule 26 only by leave of court.

8. Q. "When a statement has been given by a party prior to the institution of a suit as for instance, statements to claim adjusters, can the party who gave the statement force the production of the statement itself under the Rules of Discovery?"

A. The answer is "Yes" under Rule 26(b). See 1 Federal Rules Digest, pages 414 to 418.

9. Q. "Can the production of documents be demanded before answer by either the plaintiff or defendant?"

A. "Yes". Depositions may be taken on any matter not privileged, it may be a fishing expedition, anything that has any possible bearing on the litigation is proper.

COSTS OF TAKING DEPOSITIONS

The costs of taking depositions have been pretty generally awarded by the district courts to the successful party, however, in a decision of the Supreme Court of June 25, 1951, *Morris vs. Redak,* the Supreme Court reversed the Denver District Court as to that part of a judgment which covered the costs of taking depositions of witnesses who were present at the trial. Rule 16 of the Denver District Court provided "whether depositions or any parts thereof shall be taxed as costs shall be in the discretion of the trial court." The Supreme Court held:

> "There is no provision in our Rules of Civil Procedure authorizing the assessment, as costs, of stenographic expense incurred in the taking of a deposition for purposes of discovery. We consider that taking depositions of witnesses in preparation for trial is something in the nature of a luxury, and that one who avails himself of this procedure does so as his own expense."

While the ruling stands until changed, we do not agree that depositions are a luxury. We believe that they are a necessity and that most trial lawyers share this view. We hope the Rules will soon be amended to allow them to be taxed as costs at the discretion of the Court.

However, in the United States Courts depositions, in the discretion of the Court, are generally taxable as costs under Rule 54(d). See citation of authorities in Federal Rules Digest Volume 1, pages 411 and 412.

RULE 26—DEPOSITIONS PENDING ACTION

Depositions were permitted under the Code of Civil Procedure, but that did not allow the broad discovery practices under the new Rules. We have won a great many cases because our depositions enabled us to contradict the testimony of the adversary. Also, three or four times, by taking depositions our own case has been blown up, and we promptly dismissed it. We much prefer to have a case shown to be without adequate proof in the office rather than in Court.

Paragraph (b) of this Rule has this Amendment:

> "It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

That admendment fortifies discovery procedure.

This Rule under Section (d) (3) provides when the entire deposition may be used at the trial. The best way so to do is to have one of the attorneys for the party using it sit in the witness box and read the answers to the questions as the other lawyer asks them. This is much more effective than for the lawyer to read both questions and answers.

Taking depositions does not waive the objections of the party taking them to the competency of the witness. And this is so in will contests under *Gottesleben v. Luckenbach.*[1] Hence there are no risks in taking the deposition of a party or witness whose testimony would be objected to as incompetent at the trial.

RULE 27—DEPOSITIONS BEFORE ACTION, OR PENDING APPEAL

The procedure on this is so adequately covered in Rule 27, which sets forth the complete details, that comment on the same is unnecessary. This Rule is only invoked in very rare cases.

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[1] Supreme Court of Colorado, No. 16465, Advance Sheet No. 15, April 21, 1951.

RULE 28—PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

This Rule gives the procedure in detail. Paragraph (a) thereof is amended by adding the following additional persons within the United States before whom a deposition can be taken: "or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony."

The only portion of this Rule to which we wish to call attention is paragraph C(c), the capital C throughout the Rules, of course, means that it is a Colorado and not a Federal Rule. This paragraph prevents the stenographer for one of the attorneys in the case from taking the deposition unless the adverse party is agreeable thereto. The best way to arrange for taking the deposition is to phone the adverse attorney, have him agree on the place, time and reporter, then no question can be raised.

We were surprised to find that a few of the District Judges take depositions, and that one does so at pre-trial conferences. We believe this is an imposition on the judges and doubt if they have time so to do except in rare major cases where a witness continues to refuse to answer questions. It also is not pre-trial procedure.

CAN DEPOSITIONS BE TAKEN BY WIRE RECORDING?

Rule 80 provides that when the testimony at "a hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony."

Under this section one Denver lawyer has refused to attend a deposition taken by wire recording, and the transcript if not taken stenographically might be thrown out. This might also apply to machine typing reporting. To save later trouble have such reporting approved by stipulation or don't use it.

RULE 29—STIPULATIONS REGARDING THE TAKING OF DEPOSITIONS

This Rule gives the attorneys power to do almost anything they will agree upon. An attorney should cooperate in these stipulations so as to expedite matters. It is quite a general practice to agree that all objections will be waived in the deposition but can be raised at the trial, including objections as to the time, place and reporter.

RULE 30—DEPOSITIONS UPON ORAL EXAMINATION

Rule 30(b) has been amended by this addition:

> "The provisions hereof shall be liberally construed by the Court in order to prevent unnecessary inconvenience and expense to parties and to witnesses, and to avoid unnecessary delay."

Paragraph (f) provides that the officer taking the deposition shall seal the same and file it with the Clerk of the Court in which the action is pending. To save expense attorneys usually stipulate

at the deposition that the one who takes the deposition may keep the original, subject to inspection by his adversary, and that he will file it with the Clerk of the Court at the time of the trial. If not so stipulated the one taking the deposition will have to pay for a copy. Otherwise the original must be filed promtly and copies paid for.

Any witnesses in the county in which the case is filed can be required to attend by a subpoena issued by a Notary or the Clerk unless documentary evidence is demanded, in which case the Clerk is the only one who can issue it and then it must be by order of Court.

If the examination becomes improper counsel can state in the record that he refuses to proceed because of misconduct and refer it to the court for a decision thereon. He can then move the court to terminate it under Rule 30.

RULE 31—DEPOSITIONS ON WRITTEN INTERROGATORIES

These are usually taken of witnesses out of the County or out of the State. Such a witness should be contacted earlier by attorney, if possible, to be sure that he will know the answers to the questions. It is always desirable to have an attorney for your client present at the deposition.

Such depositions are usually taken when the cost might be excessive for an oral examination or if the deposition is short.

RULE 32—EFFECT OF ERRORS IN DEPOSITIONS

This Rule generally provides that most errors in the taking of a deposition are waived unless prompt objection is made.

RULE 33—ITERROGATORIES TO PARTIES

This Rule has been amended to read as follows:

"Any party may serve upon any adverse party written interrogatories to be aswered by the party served or, if the party served is a public or private corporation or a partnership, association, or body politic, by any officer or agent *who shall furnish such information as is available to the party.* The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the *service* of the interrogatories, unless the court, on motion and notice *and* for good cause shown, enlarges or shortens the time. *Within 10 days after service of interrogatories a party may serve written objections thereto. Such objections shall be determined by the court at the earliest practicable time.* Answers *to interrogatories to which objection is made* shall be deferred until the objections are determined.

"Interrogatories may relate to any matters which

can be inquired into under Rule 26 (b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30 (b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule."

The amendments are italicized.

Written interrogatories are served on the adverse party's attorney to be answered under oath in 15 days unless the court enlarges or shortens the time. Objections, however, must be in writing and served within 10 days. Proceedings are then stayed until the objections are ruled on by the court.

Only one set of interrogatories may be served on an adverse party without leave of court. If the client is short of money, interrogatories may have to be used instead of depositions. Interrogatories can be used to advantage if there are only a few matters to be determined. They must be very carefully worded so that they unquestionably require the answer desired.

INTERROGATORIES ARE NOT EVIDENCE

Answers to interrogatories are not evidence in the case unless voluntarily introduced by the interrogator as admissions against interest on the part of the party interrogated. They do not limit proof upon trial as different facts may develop after the taking.

Interrogatories may be helpful in taking later depositions of witnesses by getting the names thereof and data on the documents which may become material such as their existence, description and nature, and as to who has their custody.

The court has very wide discretion as to whether or not interrogatories should be answered. Many lawyers make the mistake of having a tremendous number of interrogatories and it consumes a great deal of time of the court in passing upon them. They should be relatively few and related to the important facts of the case.[2]

The interrogated party need only answer as to facts within his knowledge and not give his opinions. He also cannot be required to search for matters not readily known to him.

Existing photographs can be secured but they cannot be required to be taken by the adversary.

Conclusions of law and incriminatory matters are barred.

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[2] F. R. D. 411, 2 F. R. D. 199, 4 F. R. D. 210.

RULE 34—DISCOVERY AND PRODUCTION OF DOCUMENTS

This Rule has been amended by three clauses tying it to the provisions of Rule 30(b) and the scope of the examination in Rule 26(b).

This Rule should be reread before moving for documents.

RULE 35—PHYSICAL AND MENTAL EXAMINATION

This Rule is very helpful in cases where there will be expert Medical testimony.

RULE 36—ADMISSION OF FACTS AND DOCUMENTS

This Rule will save a lot of trial time. Many of the judges require all documents to be produced at pre-trial.

RULE 37—REFUSAL TO MAKE DISCOVERY

This Rule contains penalties which the Courts are reluctant to assess, but in most cases should do so.

JURY SELECTION AND OPENING STATEMENTS

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First consideration should be given to the advisability of demanding a jury. This depends on many factors including amount involved, whether problems presented are more legal than factual, and predisposition by the particular trial Judge as disclosed by the Judge's rulings in similar cases decided by him. A jury trial takes longer than a trial to the Court and is more costly. There are more chances for reversible error in jury trials. In most Courts, trials to the Court can be obtained faster than jury trials. On disputed facts and where the quantum of damages is involved, trial Judges generally prefer jury trials and often order a jury trial although the parties do not desire one under the Rules, this being discretionary under Rule 39. Where a conflict in the facts is anticipated, it is important to determine, if possible, whether the factual ideas of your client and his witnesses can be more readily "sold" to a Judge or to a jury of persons from different walks of life.

Jurors are put on the panel in Denver by the Jury Commissioner and in other Counties by the County Commissioners. Courts still have the power under the Statute to select persons for jury service on an open venire.

1935 C.S.A., Chapter 95, Section 1, as amended in 1945, states that jurors must be citizens, male or female, age 21 years or over, who have not been convicted of a felony and who are able to speak and understand the English language. Theoretically at least, any person who is put on the panel has the statutory qualifications, but may be otherwise disqualified.