4-1-1949

Depositions in Practice

Lucius J. Cushman

DEPOSITIONS IN PRACTICE

LUCIUS J. CUSHMAN*

The right to take depositions "for the purpose of discovery or for use as evidence in the action" [1] conferred by the Federal Rules of Civil Procedure has placed in the hands of trial lawyers the most effective instrument devised in recent years. Many state practice acts [2] permitted depositions to be taken before trial, and in some cases permitted cross-examination of the adverse party before trial, but few of such acts expressly authorized taking depositions for the purpose of discovery; and the right to examine both witnesses and adverse parties was not as broad and unrestricted nor the rules to compel discovery so simple and effective as under the Federal Rules of Civil Procedure.

I

The Importance of Getting the Facts

The purpose of a trial, whether before a judge or jury, is to ascertain the *facts,* and to apply the law to the *facts;* the jury must know the *facts* in order to decide between conflicting claims of the plaintiff and defendant, and the judge must know the *facts* before he can determine the rights of one party as against another and decide what relief to grant, or the amount to award each or either party. Indeed, the entire judicial process consists of first, discovering and determining the *facts,* and second, applying the law to the *facts* so found and determined. The *facts* upon which cases are decided are established by testimony and evidence. To ascertain the facts in a case counsel must have before him all material testimony or evidence tending to prove or establish the *facts.* If he has less than all the evidence, he is likely to err in his conclusion, and the less evidence he has, the greater his risk of error. Depositions are taken "for the purpose of discovery" to obtain testimony and evidence which cannot be obtained through counsel's investigation or from the client or other witnesses and to supplement testimony and evidence obtained from other sources. Through investigation, and examination of his own client, and friendly witnesses, and by taking depositions of the adverse party, and other available witnesses, counsel should be able to secure all material testimony and evidence necessary to enable him to successfully prosecute or defend a cause.

---

* Member of the Florida and Ohio Bars.

1. Fed. R. Civ. P., 26(a).

2. Typical State Practice Statutes: Ind. Stat. § 1728, 1732 (Burns, 1946); Calif. Code Civ. P. § 2021, 2025½, 2028, 2031, 2055 (Deering, 1941); Ohio Gen. Code § 11497, 11502-11504, 11526, 11529, 11534-11535 (1940). For discussion of Ohio Practice see Bevan v. Kreiger, 289 U. S. 459 (1933).

This does not mean that taking depositions will insure winning every case—on the contrary, by taking depositions counsel may learn that his client's case is hopeless, and that he must settle or even surrender. Counsel must know (1) when to take depositions; (2) in what cases not to take depositions; (3) how to prepare for taking depositions; and (4) how to examine the witnesses on deposition to obtain the desired results. These four things the writer will attempt to discuss.

II

When to Take Depositions

Depositions should be taken as early as possible. Whether counsel represents a plaintiff or defendant the client usually seeks his advice *after* the accident has occurred or *after* the transaction out of which the action arises has been concluded, so that to know whether the client has a case or a defense, counsel must learn what has happened, and the sooner the investigation is begun, the better for both client and counsel. If the investigation is begun early, witnesses can be examined who may later disappear, or become active partisans of the other side; and equally important, the witnesses will be examined while the event or transaction is fresh in their recollection. It is impossible for counsel to learn the facts of his case *too early*, and it is much more likely that he will learn them *too late*. If counsel waits until just before trial to take the deposition of his adversary and other witnesses, he may discover too late some fact fatal to his client's case which, had he known it sooner, he could have overcome by an amendment of the pleadings or by testimony then too late to obtain.

Frequently, facts come to light at the trial which make it essential for counsel to amend his pleadings in order to succeed in his case or defense. If the application to amend is made during the trial, the court may deny the application, and in that event the case may be lost because the amendment was not permitted, or the court may grant it and declare a mistrial; then the adverse party has a chance to try the case again after he has learned the vital point. It also happens frequently that the statute of limitations intervenes and prevents an amendment from being made at all, and the client loses his case because the vital fact was not discovered by his counsel in time. If counsel examines the adverse party and his witnesses early, it is unlikely that he will be surprised by some fact unknown to his client or witnesses which would require an amendment. Several years ago, before the rules for taking depositions had been adopted, the writer was called into a case just before trial. The plaintiff had sued a corporation for damages for the death of his son as a result of being shot by a night watchman. It was discovered at the last moment that the corporation which had been sued had not employed the night watchman at all, and it was necessary to amend and name an entirely new defendant in or-

der to proceed, thus necessitating long delay. An early examination of the officers of the defendant corporation would have disclosed the error, and an amendment could have been made early in the case and the delay avoided.

Recently the writer witnessed the trial of a case which had occupied a week of the court's time when an entirely new fact was developed by the evidence, which if it could be relied upon would almost surely clinch the case for the plaintiff. The judge, however, held that under the pleadings as drawn, the fact was not admissible on behalf of plaintiff, and because of the time the trial had already consumed refused to permit it to be introduced by amendment, with the result that plaintiff never got the benefit of the fact. Had depositions been taken early that fact in all probability would have been discovered in ample time to amend to make it available on the trial. In another case, defendant filed a plea denying that its employee was operating the automobile which struck plaintiff, and denying that defendant owned the car. Counsel for plaintiff, although warned of the issue by the pleas, took no steps to meet those defenses by examining either the defendant or the operator of the car. At the trial it developed that the car was owned, and the driver employed, by a corporation which was a subsidiary of the defendant corporation but nevertheless a separate and distinct corporation; the wrong corporation had been sued. In the meantime, the statute of limitations had run, so that the proper defendant could not be brought in by amendment nor could a new suit be brought against the proper corporation, and counsel lost a case he could have won. Take the deposition of the adverse party, and all witnesses you cannot otherwise interview as early as possible, thereby avoiding costly and disastrous surprises.

The time to take depositions of the adverse party and his witnesses is before opposing counsel has had time to investigate, study, plan and organize his case. After opposing counsel has had an opportunity to investigate, study, plan and organize his case, he will discuss it with his client and witnesses, and inevitably the party and his witnesses are likely to become most emphatic about the facts that help their case, and forgetful about those which are damaging. If depositions are taken early, you are much more likely to secure admissions which will aid your case than if you wait until opposng counsel has prepared his case and discussed it with the client and his witnesses. If counsel for plaintiff knows early in the proceeding that he has a strong case, or knows the weakness of his case, he will know whether to settle or not and how much to settle for; he will know what his case is worth. Many good cases are settled for small amounts because counsel for the plaintiff does not know how good a case he has, and many defendants' counsel fail to settle a case which should be settled because they do not realize how serious a case they have. If counsel, whether he represents plaintiff or defendant, takes the deposition of the adverse party, and all witnesses who cannot be interviewed in any other manner

early in the proceedings, he will know whether to settle or not, and how much the case is worth on settlement.

It should also be remembered that a case can usually be settled early in the proceedings more easily than after the parties have engaged in bitter litigation over a period of months or years. Many years ago the writer was counsel in an action against the manufacturer of a die press in a large factory. The die press had repeated, and the operator had lost four fingers; he sued the manufacturer, claiming negligence in the manufacture and assembly of the press by the manufacturer. The fellow employees of the injured plaintiff were, as might be expected, sympathetic to the plaintiff, and the manufacturer, from a distant city, received little information and less encouragement to aid him in determining whether the press repeated because of negligence in its manufacture and assembly, or negligence of the plaintiff in operating it. On behalf of the manufacturer the writer examined the press, but found it to be working properly, and interviewed all witnesses who would discuss the case, and after mastering the mechanical operation of the press, and the various causes of repeating, called plaintiff and every other employee in the shop for examination on deposition. After examining about twenty witnesses, including plaintiff, it became reasonably clear that the press was in fact defective and that a defense would be difficult if not impossible; a settlement was effected before the case was ready for trial. If the client has a bad or hopeless case, his counsel should ascertain that fact as soon as possible so that the case can be settled. Counsel should also bear in mind that he will obtain a very definite and distinct advantage for his client if he acts first, taking his adversary's deposition, and those of the adversary's witnesses before his own client is called upon to disclose his side of the case. It is unnecessary to state that a client should not be encouraged to change his testimony in order to meet that of his adversary disclosed on deposition, but the client may remember facts he had forgotten or considered unimportant after hearing the other side. From this point of view as well as the others already discussed, the importance and value of taking depositions early cannot be overemphasized. Therefore, whether counsel represents plaintiff or defendant he should take depositions as soon as he can after the case comes to his office—every day he delays is dangerous to his client's case.

III

In What Cases Not to Take Depositions

The best rule to follow is: "Take depositions in every case." There are undoubtedly some cases in which depositions should not be taken, but those cases are the exception and not the rule. The amount involved makes it inadvisable to take depositions in some cases, of course. If the amount is so

small that the cost, usually $100 or less, would be out of proportion, it should not be done unless, as sometimes happens, the client is primarily concerned in winning the case, regardless of the costs. Counsel should never attempt to take the deposition of his adversary, or his adversary's witnesses unless and until his own client, and his witnesses are prepared to stand a similar examination by opposing counsel. When notice of taking depositions is served, it usually results in opposing counsel retaliating with the same maneuver. The risk involved makes it important that an attorney be prepared for that eventuality, because if he is unable to get enough evidence out of the adverse party and his witnesses to prove his case, and his own client and his witnesses, through want of preparation, can be cross-examined out of the case, damage may be done beyond repair. Recently, the writer decided to take the deposition of the adverse party and his witnesses in an automobile accident case arising out of a collision at a street intersection, and having the risk in mind, first examined his own client and discovered that she knew very little about the accident; had she been cross-examined by opposing counsel, she would have been committed to knowing so little that her case would almost surely have been lost. Therefore, no depositions were taken until the plaintiff and her witnesses were thoroughly prepared for examination; and when notice of taking depositions was served on defendant, as expected, he retaliated with a similar notice, but plaintiff and her witnesses were prepared. Counsel cannot afford to assume, merely because his client was personally involved in the matter, that he will be able either to recollect the matter, or to state it clearly or convincingly without reviewing it with his counsel thoroughly.

The same thing is true of other witnesses, to an even greater degree. Perhaps opposing counsel may not retaliate by taking the deposition of your client and his witnesses, but you should never rely on that chance. Opposing counsel may neglect to prepare his client and his witnesses for your examination, and as a result, you may be able to eliminate them as witnesses at the trial by getting them committed to a statement which will either clinch your case or destroy the other side's case; to avoid any possibility of your own client and his witnesses being put into a position from which you cannot later extricate them you must, before you arouse opposing counsel, be certain that they are not vulnerable should they be called for examination. Statutes prohibit a party to a cause, or person interested in the event, from testifying as to conversations or transactions with decedents or incompetents; in taking depositions, counsel must exercise care not to waive the benefit of the statute, and before taking depositions he should be certain that by doing so he is not waiving the protection of the statute. Recently the writer had a case in which the opposing side's case depended upon being able to prove a common law marriage with a person deceased. It was decided not to take a deposition, notwithstanding the protection

afforded by Rules 26(d) and (f) because, on account of the peculiar facts in that case, it was felt that the judge might consider it an exception to the general rules and might hold that the benefit of the statute had been waived. Counsel must be thoroughly familiar with the Rules 26(d) and (f) prescribing the conditions under which depositions may be used so that he may avoid preserving evidence for his adversary. Several years ago the writer was counsel for defendant in a case in Ohio, in which he had taken the plaintiff's deposition. Plaintiff thereafter moved to Tennessee and when the case came to trial he was unable to return. Since the case depended almost entirely on his testimony, it appeared that his absence would be fatal to his case, but because of his absence his counsel was able to use the deposition we had taken and with it won the case. This danger is not great, however, first, because counsel for a party will seldom rest his case upon his client's deposition or upon the deposition of a vital witness if their presence can be obtained at all; and second, because of the limitations on the right to use depositions imposed by Rules 26(d) and (f), designed to make it safe to take depositions for discovery, but it is a matter that should be considered in the light of the rule.

Fear that you may uncover or preserve testimony for your adversary should seldom deter you from taking depositions freely, however, because the value of having all the evidence usually outweighs the possible disadvantage which may result from having the deposition used against your client. If you are certain to be faced either with the witness in person or his deposition, the danger of taking his deposition is slight, because his deposition is likely to be less damaging in any event, than testimony given in person as a witness to the trial. Other considerations will doubtless occur to the reader which would make it inadvisable to take a deposition, but, before leaving the subject, let us say that the danger of "exposing your hand" or "giving your side of the case away" should not, except in *extremely rare cases*, be considered a sufficient reason for not taking depositions. Contrary to what might be expected, a full disclosure of all facts on both sides before the trial puts no one at a disadvantage if his cause is just or his position debatable. If his cause is unjust, he cannot well complain if a full disclosure of the truth has destroyed it.

IV

How to Prepare for Taking Depositions

Before attempting to take the depositions of the adverse party or other witnesses, counsel should investigate the facts as carefully, and thoroughly as possible. For example, if he represents either plaintiff or defendant in an automobile accident, he should secure and examine all available police or accident reports and especially any photographs taken at the scene; if the accident happened at night or during a rain or snow storm, then he should visit

the scene *with his client,* under as nearly the same circumstances as to time, lighting and weather as possible and re-enact the accident, except for the crash and injuries, so that he will *know from personal observation* the extent to which obstructions to vision, light or darkness, weather, the width and condition of the highway and other factors entered into the matter. He should also *personally* examine (not merely interview) the client and his witnesses carefully so that he will be in full and complete possession of all facts obtainable from (1) an examination of all available police or accident reports and any photographs taken at the scene; (2) a personal examination of the scene, aided by the client, under conditions as similar to those prevailing at the time of the accident as possible, and (3) a thorough examination of the client and his witnesses. In his investigation of every case, counsel should be especially alert and vigilant to seek and obtain any statements, written or oral, made by his own client, the adverse party or any other witnesses, because if any such statements, made by the adverse party or his witnesses, are favorable to his client, counsel should seek in the course of taking the deposition of the adverse party or witness who made the statement to have him confirm it by admitting it. If his own client or witnesses are alleged to have made a statement it may be that the statement as reported by the adverse party or his witnesses is only part of the statement, omitting the part favorable to your client, or your client or witness may have never made the statement at all, yet when the witness or witnesses are prepared to testify to such a statement counsel must be thoroughly prepared to cross-examine as to it in order to disprove it, or minimize its effect as much as the facts will honestly permit.

The same method of preparation should be followed in other accident cases, and to resourceful counsel many other avenues of investigation will occur. In actions on written contracts counsel should thoroughly read, study and understand the contract and all written memoranda or correspondence relating to the matter and as in other types of action, counsel should thoroughly examine his client and all available witnesses, as to the facts relating to the point in question. In actions involving oral contracts counsel should carefully examine and study all written memoranda, or correspondence and examine the client and all witnesses as to the terms of the contract or other matters in issue. In divorce, alimony or domestic relations cases counsel should thoroughly examine his client and all available witnesses and *classify the facts,* for example, make note of the various incidents which are the basis of the complaint, with reference to time or place or type of incident, in order to avoid floundering in a welter of charges and counter-charges between the parties.

Malpractice suits against physicians, dentists, and hospitals deserve special mention. In this type of case, in order to take the deposition of a doctor-defendant, or any of his medical colleagues who may become witnesses on his behalf counsel must first master the medical problem involved. If possible

discuss it thoroughly with a friendly physician and then read all standard texts available on the subject. Discuss the case with the client and master the facts of his case as completely as possible; study all hospital and clinical reports, charts and x-rays, and understand their relation to the medical problem involved in the case. If you can find any physicians or medical experts willing to discuss the case or testify, you should take their depositions as witnesses on your client's behalf as early as possible, because the writer has found from experience that physicians often change their minds when the time for trial actually arrives, arranging a trip out of town just ahead of the process server in order to avoid becoming witnesses. The writer's firm recently tried a malpractice case in which a physician had repeatedly assured us he would voluntarily appear and testify for the plaintiff. The day before the trial he announced that he would not testify, and succeeded in concealing himself so successfully that we were unable to serve him with a subpoena, thus losing the benefit of his testimony. Had we taken his deposition sometime prior to the trial we could have forced him to appear for that purpose or to conceal himself indefinitely to avoid the subpoena, and we could have used his deposition at the trial, which would have been better than nothing.

Depositions for discovery are peculiarly desirable in fraudulent conveyance suits, creditors' bills, and any proceeding involving fraud, making it necessary to go into the adversary's camp and wrest from the adverse party himself and his henchmen proof of their fraud or duplicity. In this type of case as in malpractice cases, a careful, painstaking examination of all the facts is essential in order to succeed in the purpose of the examination.

The question of damages should never be neglected. Counsel should be prepared to examine the adverse party and his witnesses minutely upon the party's claim of injury or damage. In all cases, counsel should personally master the facts of the case as completely as possible before attempting to take the deposition of the adverse party and other witnesses. The course of preparation suggested presupposes that counsel has made a sufficiently thorough examination of the law to know the legal principles upon which both the action and the defense rest. Unless counsel has examined the law, he may overlook a point vital to his action or defense, or an examination of the law may alter the trend of the examination entirely. The reader may feel that such thorough preparation is unnecessary, or that it would require too much time to be practical. The fact is, however, that a successful trial lawyer wins his cases by a thorough mastery and development of the *facts;* the actual trial of the case, while it requires some skill and ability, is really less important than preparation before trial. Brilliant trial lawyers may win cases occasionally with little or no preparation, but a lawyer of only ordinary attainments can win consistently if he is the master of the facts and the law as it applies to those particular facts. The value

of early, thorough and painstaking investigation, study and preparation of the law and the facts of a case cannot be overemphasized.

Depositions "for discovery" are a valuable aid in a thorough and painstaking investigation and preparation of the facts in litigated cases.

V

How to Examine Witnesses on Deposition

To know *how* to examine witnesses on deposition, counsel *must know what he is seeking to accomplish.* He must have a *purpose, an object to accomplish* in order to know *how* to proceed. There are two general objects to be accomplished by examination of the adverse party or other witnesses in every case: (1) To obtain evidence or testimony to support your own case, or to corroborate the testimony of your client and his witnesses; (2) To obtain the evidence or testimony upon which the adverse party relies to support his action or defense.

In order to obtain successfully from the adverse party or his witnesses testimony and evidence to support your own case or corroborate your client and his witnesses *you must first know your side of the case,* and then you must examine for *probabilities.* In practically every lawsuit the witnesses on both sides will all agree on many facts and disagree on others. The point of disagreement is the point to the lawsuit. In examining for testimony or evidence to support your own case, you should seek to draw from the adverse party and his witnesses an admission of as many facts as possible; in other words, reduce the conflict between your client and his witnesses and the adverse party and his witnesses to the minimum. From the admitted facts counsel must determine where the probabilities lie, because the probabilities will decide the issue between the parties. The more facts counsel can establish consistent with his client's contention, the more the probabilities favor that side of the case. Thus, the easiest and most direct method is to examine and eliminate difference between adversary's case and your client's case. Examine particularly for admissions by the adverse party or his witnesses in favor of your client's case and for *conduct* of the adverse party and his witnesses consistent with the facts as you contend them to be, and inconsistent with the facts as your adversary must prove them to be to succeed. Examine for physical evidence, for example: skid marks on the street; the location of glass or wreckage on the highway; the point of impact by one vehicle on another or on another object; the force of the impact, as indicated by the damage done, which is often a clear indication of the speed at which the vehicle was traveling; the position of the vehicles before and after the collision; the location of land marks, and circumstances which turn the scales between witnesses whose testimony would otherwise be in direct and irreconcilable conflict. Frequently it is possible to establish your

case by the adverse party and his witnesses. For example, the writer recently tried a case involving the validity of a lease. If the leased property was subject to rent control at the time the lease was made the lease was void but if it was de-controlled the lease was valid. Under the Housing and Rent Act property used as a "Tourist Home," and known as such in the vicinity was de-controlled, and on cross-examination the adverse party and her witnesses all insisted that the property had been used as a "Tourist Home" and was known as such in the vicinity, and thus by their testimony on cross-examination helped establish the plaintiff's case. In another case, by cross-examination plaintiff and his witnesses all fixed the date upon which plaintiff paid rent to defendant which was the basis for an action for treble damages, but all fixed it at a date more than one year prior to the filing of suit, and thus plaintiff's cause of action was destroyed. These illustrations reinforce what was said earlier about the necessity of knowing the facts from your client's side of the case and the law applicable thereto as well as the necessity for having a definite *object* in mind when you examine the witness.

The art of examination and cross-examination is beyond the scope of this article—the writer is here concerned only with *what* to ask and how to develop the facts. Counsel should try, by the testimony of the adverse party and his witnesses, to place his own client and witnesses on the scene in positions where they had an opportunity to see and hear what was done and said, and thus corroborate their testimony. In planning a deposition counsel should master the facts, and then with his imagination, based on probabilities, figure out what occurred, and cross-examine the adverse party and his witnesses to prove the facts as he contends and believes them to be.

VI

Getting the Other Side's Case

Before attempting to obtain the evidence or testimony on which the other side relies it is usually best to establish as many of the facts as possible in accordance with your own client's version. Sometimes that is not practical, however. For instance, in an action for assault and battery, the writer, having first examined his client, the defendant, and his witnesses and having visited the scene of the assault, took the deposition of the plaintiff. It was first developed when the plaintiff left the scene of the conflict, where he went, and the fact that he never visited a doctor until the following day, all to confirm the claim that there were no substantial injuries. Then he was asked to tell what happened, and in that way his version was obtained. At the same time the names of his witnesses were obtained and the presence of our own witnesses at the scene was confirmed. An admission of provocative language by the plaintiff as stated by defendant's witnesses was also secured. There is no *order* which

should be followed in all cases. The *order* depends on each case; the extent to which the examiner succeeds will depend upon how well he has prepared his side of the case and the art with which he puts his questions. In most cases, if a more adroit approach cannot be worked out, counsel should ask the adverse party directly to tell his side of the matter, and when he has finished ask him: "Is that all?" or, "Have you told me all you know about the matter?" These questions should be asked of every witness to get him committed so that he cannot consistently say at the trial that he knew something else about which he was not asked. Insist upon an answer to the question, and keep at the witness until he states that he has told you everything and has nothing more to tell. Be sure you get his complete story—pin him down so he cannot come in later and say he only told part of it. Unless you plug that hole opposing witnesses will have an opportunity to add to their story at the trial. The writer had a suit on a note; he called the defendant in on a deposition and asked him: "Tell me why you should not pay this note?" Then he was allowed to talk freely until he said he had told everything and had no other reason for not paying. With that information in hand a brief was prepared demonstrating that none of his reasons constituted a defense as a matter of law; when he presented the same facts in his answer, the court on our motion struck it out and entered judgment against him on the note. By taking that deposition we learned what his contentions were and were able to meet them with a well prepared brief, whereas, had we waited until the trial it is doubtful that we would have been sufficiently prepared to obtain judgment in our favor on his facts.

VII

Other Uses for Depositions

In some cases, depositions may be used to obtain evidence to aid in criminal cases. It happens occasionally that a civil suit and a criminal prosecution may arise out of the same transactions. In those cases, counsel for the defendant should not fail to use the available deposition procedure to aid in the defense of the criminal case. For example, an automobile collision may result in death or serious injury to a person, and the driver of the car involved may be indicted for driving under the influence of liquor, or manslaughter in the criminal courts; a civil action for damages may be commenced against him. His counsel should take the depositions of all the State's or prosecution's witnesses, *as witnesses in the civil suit for damages,* thus obtaining their story and getting them committed before he has to go to trial in the criminal case. Frequently an action on a fire insurance policy may result in the insurance company having the assured indicted for arson. Here again, counsel for the defendant in the arson case would do well to examine the State's or prosecution's wit-

nesses in the civil action brought on the policy, as a means of investigating the prosecution's case against his client.

Recently a number of parties were indicted for assaulting and beating several persons. The victims of the beating each brought civil actions for assault and battery against the corporation which had employed the men charged with committing the assault. The writer, who had been retained to defend one of the defendants in the criminal proceeding, arranged with counsel for the corporation in the civil suit to appear for the corporation and take the depositions of each of the plaintiffs. Thus, by examining the four plaintiffs in the damage suits, a searching examination of the witnesses in the criminal case was conducted well in advance of the trial of the criminal case, and at the same time, counsel for defendant in the civil cases had the benefit of the information thus developed.

The use of depositions in this situation has this advantage: counsel for the adverse party in the civil case cannot call the defendant, who is the defendant in both the civil and criminal case, because the defendant, if called for examination, can excuse himself by claiming his privilege against self-incrimination in the criminal prosecution. In a divorce suit a husband charged his wife with adultery. The writer immediately served notice to take the deposition of the husband and other members of his family to see whether he did, in fact, have any substantial or credible evidence to prove the charge of adultery. Upon the examination, the husband denied that he had employed a detective to shadow his wife, or that any member of his family had done so, swearing that he knew nothing about any facts upon which his counsel had based the charge of adultery. The other members of the husband's family similarly disclaimed any knowledge of the matter. When the case was tried, the husband's counsel produced as a witness a private detective who swore that the husband and another member of the husband's family had hired him and paid him; that he had made regular reports of his investigation to the husband each day during the time he shadowed the wife. The husband then attempted to explain his testimony on deposition, but was so discredited that his testimony and that of his detective carried little weight with the court. Frequently counsel will encounter a case, such as the divorce suit just mentioned, in which his client will be in complete ignorance of the case or defense made against him. In all such cases counsel should proceed at once to take depositions of the adverse party, thereby forcing him to reveal the basis for the action or defense, or at least placing him in such a position that when he does attempt to offer his evidence, he and his witnesses will be completely discredited. In Florida, as in most states, there are rules of practice which permit sham pleas or defenses to be stricken, and to enter summary judgment.[3] In many cases, such as actions on store accounts, ac-

3. FLA. STAT. § 50.21 (1941).

tions to recover property sold on retain title contract, it is possible to demonstrate beyond any doubt the lack or absence of any valid defense to the action. In such cases, by taking the defendant's deposition, it is usually possible to force an admission of plaintiff's case sufficient to obtain a summary judgment, thus avoiding the delay of waiting for trial and the trouble of trying a case against which there is no defense.

A Word of Caution

When counsel for the adverse party takes the deposition of your client and your witnesses, should you examine or cross-examine them at the conclusion of his examination? Ordinarily, you should not, but if in the course of the examination opposing counsel has succeeded in getting your client or witness confused, or has succeeded in obtaining from them an admission or statement which requires explanation in order to extricate the witness from a damaging admission or statement, you should always ask any question necessary to explain or correct the admission or statement. From the standpoint of the trial it is much better to correct the matter at the time the deposition is given rather than to wait until the trial. If you wait, the correction when made may appear to be an afterthought or a belated attempt to patch a hole or change the witnesses' story. Counsel who attends the taking of his client's deposition or that of one of his client's witnesses should be on the alert to correct such matters; for that reason it is unwise and unsafe to send an inexperienced counsel to attend the taking of such a deposition or to send anyone who has not investigated and studied the case. If inexperienced counsel, or counsel unacquainted with the case attend, the client or a witness may be driven into a position from which it may be impossible to extricate him at the trial; yet the matter may pass unnoticed because of the inexperience or lack of knowledge of the case on the part of counsel. It is just as important for counsel who is to try the case to be present at the taking of depositions of his own client and witnesses as it is that he be present to take the depositions of the adverse party or his witnesses or be present at the trial. Whether you are taking depositions of the adverse party and his witnesses or opposing counsel is taking the depositions of your own client and his witnesses, trial counsel should *personally* attend.

Skill in taking depositions for discovery comes only from practice and experience. If counsel employs it only on rare occasions, he cannot expect to become effective or to obtain satisfactory results. This instrument, unlike other instruments, becomes keener with constant use; disuse makes it blunt or dull. It is significant that counsel for insurance companies rarely fail to take the deposition of the adverse party. They know the value of knowing their opponent's case and make excellent use of it. Perhaps plaintiff's counsel in personal injury

suits, who usually handle the case on a contingent basis, do not feel that they can afford to advance the costs to take a deposition. Regardless of the costs, plaintiff's counsel should take the deposition of the defendant and his witnesses even though he himself has to advance the costs. If the case has merit, it should be worth trying properly; and counsel will find from experience that money spent for that purpose is well spent. The plaintiff, who has the burden of proving a case, stands in far greater need of the information obtainable by discovery than the defendant. Defendant is not required to disclose his case until plaintiff has offered his evidence and rested; the defense can thus be shaped or adapted to the plaintiff's case, but plaintiff must prove his case the best he can, without knowing with any certainty the plan of defense unless he has taken the defendant's deposition. Counsel for plaintiffs, particularly, should become adept at taking the deposition of defendant and his witnesses, and should rarely, if ever, fail to do so. With this weapon in hand, any counsel who meets with surprise at the trial has only himself to blame. There is little or no excuse for want of preparation with this remedy available.