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PREPARATION FOR TRIAL*

MILTON D. GREEN†

I. INTRODUCTION

It is often said that trials are won in the office and not in the courtroom. We are told that a case well prepared is half won. These, and similar statements, are truisms, but because of their vague generality they do not help us much in going about the actual business of preparation. In order to be really helpful, any discussion of preparation for trial must get down to practical, specific details. I am going to try to be specific and I am going to try to cover, at least in outline, the steps which a lawyer must take in order to be adequately prepared for trial. In doing so it may sometimes be necessary to labor the obvious, and for this I apologize in advance. But in justification may I remind you that neglect of the obvious is frequently one of the causes of disaster.

To begin, I should like to lay before you the most obvious and basic proposition of all: there are always two sides to every lawsuit. If there were not there would not be a lawsuit. And yet many lawyers make the initial mistake of assuming that they are prepared when they know merely their client's side of the controversy. Such lawyers are only half-prepared. Adequate preparation requires a lawyer to know his client's case, inside and out, and also his opponent's.

It is sometimes said that certain cases are not important enough to warrant much preparation, but this is merely another way of saying that if a thing is not worth doing at all it is not worth doing well. If a case is worth trying it is worthy of thorough preparation. A lawyer's performance, and his reputation, will be judged by all the cases he tries, not merely by the ones he considers most important.

You may hear it said that a case can be overprepared. This is not true. Emory R. Buckner, one of New York's most distinguished lawyers, has said, "It is easy to over-try a case, but impossible to over-prepare one."¹ On another occasion he said:

If I were a client and knew as much about the trial of cases as I have learned as a lawyer, I would rather have a wholly inconspicuous and utterly unknown man of only mediocre ability who would prepare the case, who would exhaust every possibility of finding out all the facts that are relevant, than to have some very

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1. WELLMAN, SUCCESS IN COURT 356 (1941).

well known and very astute and clever and capable forensic orator, who went in as so many of our specialists and celebrities do, with no particular preparation except to pick things up as they develop.²

The point is so important that I would like to quote briefly from one other eminent authority, Francis Wellman, who, in his book, *Day in Court*, says:

Napoleon used to say that the Almighty always seemed to be on the side which had the heaviest artillery; and in the trial of cases luck always seems to be with the advocate who has done the most hard work in the preparation of his case. . . .³

II. PREPARATION OF YOUR CLIENT'S CASE

A. THE FACTS

Students in law school are apt to get the idea that facts are simple things and it is the law which is difficult. This is understandable when one recalls that many of their waking hours are occupied by reading appellate opinions which start out by saying, "The facts in this case are as follows. . . ." Lawyers, on the other hand, know that it is often more difficult to ascertain the facts than the law. It is even difficult to define a fact.⁴ Lawsuits have their origin in transactions or occurrences in the past. What actually happened may never be known, and it can only be reconstructed by assembling all the pertinent evidence of what happened, much of it resting in the fallible memories of witnesses, some of it circumstantial, very often all of it contradictory and inconclusive.⁵

The first duty of the lawyer is to ascertain the facts of his client's case, or more properly, the evidence by which he may be able to establish the facts. In undertaking this duty he will be well advised to bear in mind two basic rules: *first*, take nothing for granted; and *second*, get to work. I would like to say a word or two in explanation of each.

The trial of a lawsuit is an adversary proceeding. There are sides, and each side is out to win. The lawyer is a paid warrior for his client and he is supposed to battle strenuously for his client's cause. Few holds are barred, and ambush and surprise have long been considered legitimate weapons in this battle in the legal arena. The theory is that if each side strives mightily, out of the smoke and dust of the conflict justice will emerge triumphant. This is what Dean Pound

2. TRACY, *THE SUCCESSFUL PRACTICE OF LAW* 148 (1947).

3. WELLMAN, *DAY IN COURT* 74 (1926).

4. This difficulty is explored in the following articles: Cook, *Statements of Fact in Pleading under the Codes*, 21 *COL. L. REV.* 416 (1921); Isaacs, *The Law and the Facts*, 22 *COL. L. REV.* 1 (1922).

5. Professor Karl N. Llewellyn, in his delightful book, *The Bramble Bush*, published in 1951, graphically illustrates the wide gulf which may exist between the "raw facts" and the facts as related in the opinions of appellate courts.

has-called the "sporting theory of justice."⁶ In recent years there has been a movement to modify this theory somewhat, or at least to introduce more civilized techniques. I will have more to say about that in another section of this paper.⁷ My present point is that basically the adversary theory is still in use. You are engaged in a battle and must expect your adversary to ambush you and shoot you down, if he can. It is your duty to accord him the same treatment—all within the rules of the game, of course. In this climate, basic rule number one requires you to take nothing for granted, neither law nor fact. As Cutler has pointed out:

Be conservative and pessimistic. Think your problem through, looking at the worst side of it. . . . The lawyer who accepts his client's brief statement of the facts without digging deeper and probing farther down ordinarily discovers to his dismay upon the trial that he has no cause of action.⁸

The second basic rule is to get to work. Francis Wellman, in his book, *Day in Court*, has neatly summed it up in these words:

He should not postpone the preparation of the case. True, it may not be reached for trial for a year or more, and the temptation to delay preparation is great; but it is likewise fatal. The first man on the ground usually takes title to the verdict.⁹

*Interviewing the Client.*¹⁰ Normally your first contact with the case occurs when your client walks into the office and wants to tell you his story. You may, of course, represent an insurance company or corporate client who sends you its file. In such case a certain amount of the groundwork of preparation has been done for you, but even here you should not rely on the file. Treat it as suspect until you yourself have verified it. We will assume now, however, that you are engaged in your initial interview with your client. He has come to you because he has a "case" and he wants you to represent him. Most authorities agree that, since he wants to tell you his story it is a good idea to let him do so without interruption. Let him tell it in his own way. He has thought it all out before he came to you, and you don't want to run the risk of throwing him off balance by interjecting questions. He knows what *he* thinks is important, so give him a chance to get it all off his chest. Make notes, as he talks, of any questions you want to ask. After he has finished then go back over the whole story, and probe, and cross-examine—in friendly fashion,

6. Dean Pound used the phrase in his memorable address on "The Causes of Popular Dissatisfaction with the Administration of Justice," delivered before the American Bar Association in 1916. 29 A.B.A. REP. 395 (1916).

7. See p. 163 *et seq. infra*.

8. CUTLER, *SUCCESSFUL TRIAL TACTICS* 9 (1949).

9. WELLMAN, *DAY IN COURT* 78 (1926).

10. A good deal of material has been written on the technique of interviewing a client, and naturally there is considerable variety of opinion. See BUSCH, *LAW AND TACTICS IN JURY TRIALS* 251 (student ed. 1950); GOLDSTEIN, *TRIAL TECHNIQUES* 33 (1935); KEETON, *TRIAL TACTICS AND METHODS* 299 (1954).

of course—but do not take anything he says for granted. Whenever he states something as a fact ask him how he knows, how he can prove it, who else knows about it, what other witnesses there are. Probe every weak spot in his case; search for them. Consciously or subconsciously every client tries to cover up or minimize the weaknesses of his position, and there always are weaknesses. He may become irritated or angry with you for not trusting him. If he does, tell him that it is not that you do not trust him, it is merely that a case is bound to have weak spots and it is your job to find them at the beginning rather than to be surprised at the trial. Ask him the names and addresses of witnesses and of anyone with whom he has discussed the case. Ask him if he has ever signed any statements regarding the case; if so, to whom he gave the statements, and whether he has copies.

If the case involves documentary evidence and the client says he is in possession of this evidence, do not take his word for it. Make him produce it. It may not be exactly what he says it is, and it is up to you, not him, to judge the strength of it. Moreover, he may have it now, but may not be able to produce it at the trial because of accident, fire or merely lapse of memory as to where he put it. When he brings the evidence to you, and after examining it you conclude it is important, do not give it back to him; save it for the trial. If he insists the evidence is in books which must be currently used in his business you must, of course, give it back to him, but do not do so without photostating the important pages and passages so that you can introduce secondary evidence at the trial if for any reason the originals are destroyed.

During the course of your interview take notes, and as soon as your client leaves, and while the matter is fresh in your mind, dictate a memorandum of the interview to your secretary. Also, after the client has left your office, check on his story. If he has told you certain witnesses will corroborate him, do not take his word for it—get them in and let them tell you. If there is any way of checking objective facts about which he has told you, do so as early as possible. You do not want to spend a lot of time on a case unless it is a good case, and for more reasons than one, it is important for you to find this out at the earliest possible time. If you decide it is a good case and you want to take it then rule two comes into operation, that is, get to work.

Interviewing the Witnesses. This should be done promptly. Some of them will be friendly, some indifferent and some will perhaps be hostile. But the quicker you interview them the better chance you have of getting the true facts. Moreover, an indifferent or impartial witness is apt to become slightly partisan in favor of the side who first interviewed him. This is not to say that he will lie or color the facts, but he will be more cooperative in making a full disclosure and

may even volunteer other sources of possible information. The late Chief Justice Taft said that witnesses do not "belong" to one party more than to another;¹¹ yet they are human beings and as such generally regard themselves as witnesses "for the plaintiff," or "for the defendant."

You should pursue the same technique in interviewing the witnesses which you used with your client, first letting them tell their version of the facts without interruption, and later questioning them. This is preferable but may not work with the indifferent or hostile witness, where you may have to resort to an inquisitorial technique from the first. Wherever possible the statement of the witness should be reduced to writing and signed by him. The purpose of obtaining signed statements is to prevent the witness from taking a different attitude at the trial and also to preserve his fresh recollection of the facts. Occasionally, a witness will deliberately try to change his story at the trial, and if he merely signed a typewritten statement prepared by you he may attempt to avoid the effect of it by stating he merely signed without reading it. The best protection against this type of conduct is to request the witness to write out the entire statement in his own handwriting. Statements acknowledged before a notary public offer additional protection. However, where the testimony of the witness will be extremely important at the trial, or in the case of a hostile witness, the best method to pursue is to take his deposition. I shall have more to say about this when I discuss the processes of pre-trial discovery.¹²

Examination of the Locus. If the case revolves around a particular physical location, such as an intersection where an automobile accident occurred or a defect in a sidewalk or highway, you should personally visit the scene and closely inspect it. Do not delegate this duty to someone else. Do not rely on photographs or maps. Go to the scene yourself. You have interviewed the client and the witnesses. You know what the important factors are. Then, have photographs made from vantage points which will bring out these factors. Have maps made. Have surveys made. But get a very clear picture of that locus in mind. One author of a book on trial practice relates the sad experience of the lawyer who relied upon photographs and did not himself visit the scene. The photographs were accurate reproductions, but they were taken from positions which failed to disclose that the intersection was in a school zone where a different speed limit was involved. This inadvertence on the part of the lawyer proved fatal.¹³

11. *Shaw v. Ohio Edison Co.*, 9 Ohio Dec. 809, 812 (1887). The same idea has influenced the development of the law of evidence. See MODEL CODE OF EVIDENCE 10, 15, 117 (1942); MO. PROPOSED CODE OF EVIDENCE 78 (1948).

12. See p. 163 *et seq. supra*.

13. TRACY, *THE SUCCESSFUL PRACTICE OF LAW* 180 (1947).

Photographs, Maps and Scientific Aids. This is a subject which is too technical to comprehensively treat in this paper. It properly falls within the field of evidence; however, I merely mention, in passing, that the thorough lawyer, in the course of his preparation, will utilize the many modern scientific aids which are now available for the ascertainment of facts and for the better presentation of facts at the trial. They include: all types of photography—conventional, aerial, still and motion pictures; microscopy; the use of ultraviolet and infrared rays; and chemical and blood tests. The use of such tests has often proved conclusive in cases involving questioned documents, paternity and identification of objects.¹⁴

Become an Expert on the Point Involved. In order to try a case effectively a lawyer must be familiar with every angle of it. Frequently, a case involves a technical business or process about which the ordinary lawyer knows nothing. When this happens counsel should study the point or process and become an expert on it in order to understand the significance of the evidence and in order to make an intelligent cross-examination. Francis Wellman in his book, *Success in Court*, gives a striking illustration from the career of General Benjamin F. Butler, one of America's most distinguished lawyers in his day:

He knew the advantages of having his cases thoroughly prepared. He was known to have spent days in examining all parts of a steam engine and even learning to drive one himself in order to cross-examine some witnesses in an important case in which he had been retained. At another time Butler spent a week in a repair shop of a railroad, part of the time with coat off and hammer in hand, ascertaining the capabilities of iron to resist pressure—a point on which his case turned.¹⁵

Assembling Documentary Evidence. I have already touched upon documentary evidence in the possession of the client. Some of it may be available in public or quasi-public agencies, such as weather reports, police reports and hospital records. Some of it may be in the hands of third parties or in the possession of the enemy. It is just as important for you to see this evidence as it is to interview witnesses. Under the federal rules,¹⁶ and in most states,¹⁷ legal means are available to you to make sure that you do see it. Means are also available to insure its presence at the trial if it is important to your case.

Preparing the Witness for the Trial. Most prospective witnesses are thoroughly unfamiliar with courtroom procedure. Indeed, it is safe to assume that most of them have never seen a real trial. Man

14. See BUSCH, *LAW AND TACTICS IN JURY TRIALS* 256-260 (student ed. 1950); GOLDSTEIN, *TRIAL TECHNIQUE* 5-32 (1935).

15. WELLMAN, *SUCCESS IN COURT* 18 (1941).

16. FED. R. CIV. P. 34, 36.

17. See, e.g., MO. REV. STAT. §§ 510.030, 510.150 (1949).

fears the unknown, and many ordinary witnesses look forward to their day in court much as a surgical patient anticipates the pleasures of the operating room. A scared or confused witness is a poor witness. It therefore becomes the duty of the lawyer to his client to allay these fears and put the witness at his ease—not to mention the humanitarian duty he owes the witness. The lawyer can do this in several ways. One of the best is to take the neophyte witness (or client) to the courthouse and actually attend portions of a trial when testimony is being taken. Thereafter, at the office, explain what was going on, explain that the testimony is taken by question and answer, that the lawyer cannot lead the witness, that a witness may take his time to think before he answers, and if he cannot understand a question he can frankly say so. Impress upon the witness that if he follows two rules he will never get into trouble: (1) always be sure you understand the question before you try to answer it; and (2) always tell the truth. It is well to give the inexperienced witness some practice in the office by asking him questions just as you intend to do at the trial. This is not coaching in the invidious sense. You are not telling him the answers, but are merely acquainting him with the manner in which questions are asked in the courtroom.

Subpoenaing Your Witnesses. The unexplained absence of a witness at a trial is good ground for a continuance provided the lawyer calling the witness used due diligence to get him there. Granting or refusing the continuance rests largely within the discretion of the trial judge¹⁸ and he is very apt to hold that you have not used diligence unless the witness is under subpoena;¹⁹ therefore, you should always subpoena your witnesses. Do not wait until a day or two before the trial—they may have made an unexpected trip out of town. Play safe and have the subpoenas served at the earliest possible time.

Depositions of Non-Resident Witnesses. Do not rely upon the promise of a non-resident witness to appear voluntarily. Circumstances may arise at the last minute making it impossible for him to attend. If his testimony is important to your case take his deposition. It is also a good policy to take the depositions of key witnesses even though they are residents and subject to subpoena. They are also subject to the common ills of mankind and may, without notice, be removed from the jurisdiction of all terrestrial courts.

B. THE LAW

By and large the law is easier to ascertain than the facts, but the same thoroughness in preparation is essential. Begin by taking noth-

18. Pulliam v. Wheelock, 319 Mo. 139, 3 S.W.2d 374 (1928); Seelig v. Missouri, K. & T. Ry., 287 Mo. 343, 230 S.W. 94 (1921).

19. Langener v. Phelps, 74 Mo. 189 (1881); Farmers' and Drovers' Bank v. Williamson, 61 Mo. 259 (1875).

ing for granted. Be prepared to cite authority for any legal proposition involved in your case, no matter how elementary. Remember the story of the young lawyer who was arguing his first appeal to the state supreme court. The case involved a contract problem and he began by citing long lines of authority for the proposition that a contract involved a meeting of the minds, that a consideration was required, that . . . here the chief justice interrupted to ask, "Young man, can't you assume that this court knows the elementary principles of contract law?" "No, your honor," replied the young advocate, "That's the mistake I made in the trial court."

Know Your Facts Before You Research the Law. The facts are the heart of your case. The law books teach us that even slight variations in fact patterns are the basis for hair-line legal distinctions. Hence, it is extremely advisable to know as much about your facts as possible before you go to the books for your supporting law.²⁰ And, before you go to the books it is wise to analyze your facts and develop a working hypothesis for your legal theory. Tracy, in his book, *The Successful Practice of Law*, states:

If you have a righteous case or a righteous defense, you are bound to find authority to support it, but you should obtain your authority to support your theory rather than to get together a bunch of cases and then think out a theory under which you can use them. In the words of Plato, "a searcher must have some knowledge of the thing he searches after. Otherwise he will not know when he has found it."²¹

Examine the Law Before You Draw Your Pleadings. There may be emergencies when, in order to stop the statute of limitations or to prevent a default, a pleading must be drawn and filed in great haste. However, as a general rule, it is good practice to study the law before you draw your pleadings. They are the blueprints of the litigation, they mark out the issues for the trial, and they should be drawn with care. Let me give you a couple of illustrations. Let us suppose you draw a complaint in haste and a demurrer to it is sustained on the ground it does not state facts sufficient to constitute a cause of action. True, you may usually file an amended complaint, but some courts have held that the amendment will not relate back so as to toll the statute of limitations.²² Other cases have held that where, in an amended complaint, you switch theories you have abandoned the old "cause of action," thus making the new one subject to attack on the ground it is barred by the statute of limitations.²³ Danger also lurks

20. On this point some lawyers take a different view. See KEETON, *TRIAL TACTICS AND METHODS* 297 (1954).

21. TRACY, *THE SUCCESSFUL PRACTICE OF LAW* 150 (1947).

22. *Walters v. Ottawa*, 240 Ill. 259, 88 N.E. 651 (1909). See CLARK, *CODE PLEADING* 729 (2d ed. 1947).

23. *Union Pacific Ry. v. Wyler*, 158 U.S. 285 (1895). The Federal Rules of Civil Procedure have changed this. See FED. R. CIV. P. 15(c).

in hastily drawn answers. At the trial you may be stopped from making your strongest defense because it was not specially pleaded as required by law.²⁴ Even if not fatal, mistakes in pleading are often damaging—always embarrassing. And mistakes are usually easy to avoid at the price of a little work.

Scope of Legal Research. Some lawsuits are quite simple. Others are almost incredibly complex. The amount of legal research required will vary accordingly. However, the following rough check-list may have some value. In the first place, have the substantive law thoroughly briefed on your cause of action or defense. This is basic. If you fall down here your case is as good as lost. I have already mentioned the importance of having authorities at your fingertips to support your pleadings.²⁵ You should also brief the law on whatever attacks you plan to make on your opponent's pleadings. Assuming, however, that the pleadings are closed and the case is at issue, you should analyze the pleadings as a whole to determine: (a) what issues you have to prove; and (b) what issues your opponent must prove. This requires you to check on the law on the burden of proof. Next you should check the authorities on what evidence is admissible on every issue made by the pleadings, and what evidence is inadmissible. Whenever there is the slightest doubt of the admissibility of evidence intended to be offered you should have the law briefed on that point. By the same token, you should have the law briefed on every point of evidence which you think your opponent *may* offer and to which you intend to object. If your research on the law has covered all of the above you will be almost prepared for an argument on a motion for directed verdict—but not quite. You will still need to know the law which the court has laid down for determining the sufficiency of the evidence to withstand such a motion. The well prepared lawyer will have authorities collected to support each of the requested instructions to the jury which he proposes to tender. He will also be familiar with the law relating to proper instructions for his opponent's theories so that he may object to ones which deviate from the accepted pattern. In Missouri where, I am told, the law on instructions is rather more technical than it is elsewhere, such pre-trial research seems doubly essential.

One other point on preparing the law. No matter how just your cause, how thorough your preparation, there is always a chance you

24. Even under the Federal Rules, the most liberal and non-technical system of pleading, at least nineteen defenses must be specially pleaded. FED. R. CRV. P. 8(c). For a local case in point see *Baxter v. St. Louis Transit Co.*, 198 Mo. 1, 95 S.W. 856 (1906).

25. See pp. 160, 161 *supra*.

will lose. As part of your pre-trial preparation you should familiarize yourself with the things you must do in the lower court in order to lay a proper foundation for an appeal.²⁶

III. PREPARATION OF YOUR OPPONENT'S CASE

It is said that Abraham Lincoln was never taken by surprise in court for the reason that he always prepared the other side of the case as the best means of ascertaining the strength or weakness of his client's case.²⁷ In the time of Abraham Lincoln it was necessary to guess or try to figure out and deduce what your opponent's case was about because common law rules were then still quite vigorous and modern methods of discovery were unknown.

The common law theory was that the pleadings would develop the issues to be tried and that they would serve as adequate notice to the court and the parties of what the case was about. They really did not give adequate notice to all, because the declarations were framed in terms of formulae. For instance, one could prove a case of fraud under a vague allegation of general *assumpsit*.²⁸ Likewise, many special defenses could be introduced under the general issue.²⁹ After two centuries of indifference the common law finally developed the feeble bill of particulars.

The situation in equity was not much better. It is true that equity invented the "Bill of Discovery" under which the defendant was required to answer interrogatories under oath. However, this was not discovery in the modern sense. The plaintiff was only permitted to discover facts in support of his own cause of action and was not permitted to inquire into his opponent's case. Fishing expeditions were not permitted.³⁰ The adoption of the Field Code in New York in 1848 and by a majority of states from time to time up until the beginning of this century did not radically change the situation. The adversary theory of justice still prevailed. The lawyers were warriors fighting in the judicial arena and surprise was a recognized technique for winning a case. The wily and skillful lawyer drew his pleadings so as to set up a show of activity on a wide front, thereby confusing his opponent and masking the real point of attack. He would often win in a flourish by springing a surprise witness. It was a good show and if the lawyers on each side of the case were of equal ability there was a good chance justice would prevail. However, with a lawyer like

26. Generally speaking, appellate courts will not consider points which have not been raised in the lower court. Moreover, many points (*e.g.*, venue, jurisdiction over the person, etc.) must be raised at a particular time or in a particular manner or they will be deemed waived.

27. WELLMAN, *DAY IN COURT* 92 (1926).

28. *Minor v. Baldrige*, 123 Cal. 187, 55 Pac. 783 (1898).

29. SHIPMAN, *COMMON LAW PLEADING* 306, 307 (3d ed. 1923).

30. RAGLAND, *DISCOVERY BEFORE TRIAL* 12 *et seq.* (1932); SUNDERLAND, *CASES ON TRIAL AND APPELLATE PRACTICE* 3 (2d ed. 1941).

Clarence Darrow on one side and a fresh law school graduate on the other, the final decision often reflected the relative ability of counsel and not the merits of the client's case.

About the beginning of the present century, some people were becoming disturbed about this situation. They felt that something more could be done to insure a just decision on the merits. They knew that in many trials the full facts were never brought to the attention of the court and jury; their idea was that if there were some means of insuring that the full facts were presented to the court and jury a more just result would follow. Ragland's famous book, *Discovery Before Trial*,³¹ was one of the important stimuli which led to the promulgation of the Federal Rules of Civil Procedure in 1938. Those rules expressed a new, fresh philosophy regarding discovery. It was felt that if each side were furnished a means of ascertaining in advance of trial not only the full facts regarding his own case, but the full facts regarding the opponent's case, the actual decision would rest on a solid foundation of fact and justice. It was also felt that by employing the pre-trial discovery procedure many trials would be eliminated by settlement. In my opinion, the experience under the Federal Rules has tended to prove both propositions.³²

I should like briefly to review the Federal Discovery Rules. They constitute a complete arsenal of weapons which, judiciously used, will enable counsel to find out the real facts concerning the opponent's case.

The basic rule, Rule 26(b), defines the scope of pre-trial discovery. It applies to depositions, but by express reference is applicable to other instruments of discovery. It provides that the deponent (adverse party or any witness)

may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, 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.

In 1946, to set at rest a conflict in interpretation, an amendment was added providing that "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." Even a casual reading of the rule indicates how broad it is. The door is practically wide open. The only expressed limitation is in regard to matter which is privileged.

31. RAGLAND, *op. cit. supra* note 30.

32. Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205 (1942); Pike and Willis, *Federal Discovery in Operation*, 7 U. OF CHI. L. REV. 297 (1940); Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132 (1951); *A Symposium on the Use of Depositions and Discovery under the Federal Rules*, 12 F.R.D. 131 (1952).

Under Rule 26(b) you can inquire of the witness not only what he personally knows about the case, but you can inquire about matters which he knows only through hearsay if it is relevant to the action and "appears reasonably calculated to lead to the discovery of admissible evidence."³³ Where the case involves injuries resulting from defective premises or appliances, you can inquire about subsequent repairs.³⁴ Generally, evidence of subsequent repairs is not admissible,³⁵ but since it may lead to the discovery of admissible evidence,³⁶ it is a proper subject of inquiry. You may ask the witness the names and addresses of other witnesses.³⁷ Thereafter, you may take their depositions. You may inquire about documentary and real evidence and find out in whose possession it is and where it is located.³⁸ On the basis of this information you can use other discovery tools to examine it.³⁹

The leading case on the subject is *Hickman v. Taylor*,⁴⁰ decided by the United States Supreme Court in 1947. In that case the court said:

No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation. To that end either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.⁴¹

In the *Hickman* case, the court held that the work product of a lawyer in preparation for trial was not subject to discovery, but intimated that this privilege was not absolute and that upon a showing of necessity—that is, no other means of obtaining the information available—relevant facts in the lawyer's possession might be subject to discovery.

The rules themselves contain provisions vesting the courts with power to see that the legitimate purpose of discovery is not perverted.⁴² Therefore, one lawyer cannot sit idly by and wait until his opponent has made a thorough preparation of the case and then "pick

33. FED. R. CIV. P. 26(b). See note 32 *supra*.

34. *Mackerer v. New York Central R.R.*, 1 F.R.D. 408 (E.D.N.Y. 1940). See 3 FED. RULES SERV. 326 (Pike & Fischer ed. 1940).

35. *Columbia & Puget Sound R.R. v. Hawthorne*, 144 U.S. 202 (1892).

36. In the *Mackerer* case, the court said:

It is possible . . . that the repairs which were made after the accident disclose certain defects in the crane which by their very nature will appear to have been in existence before the accident.

Mackerer v. New York Central R.R., 1 F.R.D. 408, 410 (E.D.N.Y. 1940).

37. FED. R. CIV. P. 19(b).

38. *Ibid.*

39. FED. R. CIV. P. 34.

40. 329 U.S. 495 (1947).

41. *Id.* at 507.

42. FED. R. CIV. P. 30(b), 30(d), 31(d), 33, 34.

his brains" by demanding an inspection and copies of everything in his file.

Rule 30 provides for the pre-trial oral deposition of any witness or party for the purpose of obtaining discovery. Oral depositions are usually much more effective tools for the discovery of facts than depositions on written interrogatories because the answer of a witness to a particular question may suggest an entirely new line of inquiry. However, depositions by written interrogatories are sometimes preferable as being less expensive, especially where the witness resides at a distance and where the matters to be inquired about are few and relatively simple. Provision for depositions on written interrogatories is found in Rule 31.

Interrogatories to Parties. Rule 33 provides that any party may serve upon an adverse party written interrogatories to be answered under oath. The rule provides that the scope of inquiry is the same as under Rule 26(b) and that the number of interrogatories is not limited "except as justice requires to protect the party from annoyance, expense, embarrassment or oppression." This rule is in addition to the rules authorizing depositions and it may often be used very effectively where the inquiring party is after specific and accurate information on crucial points.

Rule 34 deals with discovery and production of documents and real evidence. You will recall that on oral deposition you are permitted to find out the existence of documentary evidence and the place where it can be found. Having done so, you may then proceed under Rule 34 which provides that "any party showing good cause therefor" may move the court for an order requiring

any party to produce and permit the inspection and copying or photographing . . . of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged . . . relating to any matters within the scope of the examination permitted by Rule 26(b). . . .

It also provides that the court may order entry upon designated land for the purpose of inspecting, measuring, surveying or photographing "the property or any designated object or operation thereon" within the scope of the examination permitted by Rule 26(b).

Rule 35 provides that in any action in which the mental or physical condition of a party is in controversy, the court may order him to submit to a physical or mental examination by a physician. It further provides that upon the request of the party so examined, he shall be entitled to a detailed written report of the examining physician setting out his findings and conclusions, and that, after such request and delivery, the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination previously or thereafter made of the same mental

or physical condition. The constitutionality of this rule was upheld in *Sibbach v. Wilson & Co.*⁴³ It has been held that under this rule where the paternity of a child was in issue the court could properly order the defendant and the child to submit to a blood grouping test.⁴⁴

Rule 36 provides that either party may serve upon the other a written request for the admission by the latter of the genuineness of any relevant documents described in, and exhibited with, the request, or of the truth of any relevant matters of fact set forth in the request. This is an excellent device for securing admissions.

Rule 37 contains a long list of sanctions to enforce compliance; these include: citations for contempt of recalcitrant witnesses; an order designating certain facts to be taken as true (where the party resisted discovery); an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing evidence on certain matters; an order striking out pleadings, or staying further proceedings until the order is obeyed, or dismissing the action, or rendering judgment by default. The rule also provides that the court may make orders requiring the disobedient party to pay reasonable expenses incurred in making a proof, including reasonable attorney fees.

One of the purposes of the discovery procedure is to eliminate sham and irrelevant issues from the trial. It may also happen that after the discovery procedure is fully employed the result will show that on the facts there are no real issues and that one or the other of the parties is entitled to judgment as a matter of law. Where this situation appears, the party can move for a summary judgment under Rule 56, thus entirely eliminating the trial.

Missouri Practice. I have not lived under Missouri law long enough to feel that I am in familiar surroundings. However, I have read the code of procedure and a group of Missouri cases on discovery. On the basis of them I have come to certain tentative conclusions and will attempt to give my version of how Missouri discovery practice compares with that under the Federal Rules.

In 1943 the legislature enacted a group of statutes which are now found in Chapter 510 of the Missouri Revised Statutes and entitled "Pre-Trial Procedure—Discovery." These new statutes followed the Federal Rules in certain respects, but not in others. In the first place, there is nothing in these new statutes nor anywhere else in the Missouri Statutes, as far as I am able to determine, comparable to Federal Rule 26(b) concerning the scope of pre-trial discovery. There is also nothing in the statutes dealing with discovery by depositions. There are provisions adding certain discovery tools which were taken largely

43. 312 U.S. 1 (1941).

44. *Beach v. Beach*, 114 F.2d 479 (D.C. Cir. 1940).

from the Federal Rules. Section 510.020, which deals with interrogatories to the parties, is substantially the same as Federal Rule 33 prior to its amendment in 1946. That amendment was extremely significant because it provided that the scope of inquiry under the Rule was to be determined by Rule 26(b). Section 510.030, relating to production of documents, is the same as old Federal Rule 34 before it was broadened by the 1946 amendment. Section 510.040, dealing with physical and mental examinations, does not contain some of the provisions of the Federal Rule which were calculated to elicit full disclosure. Section 510.050, relating to admissions of fact and of the genuineness of documents, is substantially the same as old Federal Rule 36 prior to its broadening amendment. I find nothing in the Missouri law comparable to Federal Rule 56 on summary judgment.

From reading the Missouri cases interpreting these provisions, I have come to the conclusion that Missouri made a significant forward step in the 1943 revisions of its code by adding to the lawyers' armament a number of tools for discovery which are found in the Federal Rules. It is true that nothing was said about discovery by depositions. However, it seems that this may be accomplished under the old deposition statutes⁴⁵ either by way of oral depositions or depositions on written interrogatories.

The chief difference between the Missouri law and the Federal law is that in Missouri the scope of pre-trial discovery is sharply limited. The cases indicate that discovery under interrogatories, requests for admissions and inspection of documents cannot go further than the old law applicable to depositions.⁴⁶ In other words, discovery is limited to evidence which will be admissible at the trial. Discovery will not be permitted of hearsay even though it would probably lead to the discovery of admissible evidence. One gathers from the opinions that the court still frowns on "fishing expeditions."⁴⁷ Nevertheless, a vigorous use of the discovery process under the Missouri law should enable the careful lawyer to get a pretty clear picture of what his opponent's case is about. He can still force his opponent, or indeed any witness, to give the names and addresses of other witnesses provided the deponent has firsthand knowledge of these witnesses.⁴⁸ By going on from there and taking the depositions of other witnesses he can pretty well cover the ground.⁴⁹

45. MO. REV. STAT. § 492.080 *et. seq.* (1949).

46. *State ex rel. Thompson v. Harris*, 355 Mo. 176, 195 S.W.2d 645 (1946); *State ex rel. Williams v. Buzard*, 354 Mo. 719, 190 S.W.2d 907 (1945). See Crawford, *Written Interrogatories to Parties Under the Missouri Code*, 1953 WASH. U.L.Q. 1, 9.

47. *State ex rel. Cummings v. Witthaus*, 358 Mo. 1088, 219 S.W.2d 383 (1949).

48. *State ex rel. Uregas Service Co. v. Adams*, 262 S.W.2d 9 (Mo. 1953); *Johnson v. Cox*, 262 S.W.2d 13 (Mo. 1953); *State ex rel. Kansas City Public Service Co. v. Cowan*, 356 Mo. 674, 203 S.W.2d 407 (1947).

49. I have assumed in my discussion that a policy of broad pre-trial discovery

The Law. If you have thoroughly probed your opponent's case by the use of pre-trial discovery and have armed yourself with the facts, you can then go to the books and dig out the law to ascertain the strength of his case. What I have previously said about researching your own case applies equally here.⁵⁰

IV. PREPARING THE TRIAL BRIEF

When I speak of the trial brief I do not mean a formal brief or a memorandum of authorities filed with the court. I am talking about the brief you should make for your own use and information at the trial. Merely collecting a vast amount of material, no matter how relevant, will do you very little good at the trial unless it is put into a form which makes it readily available when needed. A trial is a battle and you should have your weapons and ammunition readily accessible for instant use.

In the first place you should make a careful analysis of the pleadings in order to determine exactly what is admitted and what is denied. You should prepare a check list of every fact you must prove to win your case and be sure you have the facts and the law on every point. You should do the same for every point relied upon by your opponent so you will be ready to oppose him if he slips up in any particular.

Many lawyers find it helpful to list after every fact the witness or witnesses by whom that fact will be proved. At least in the case of important witnesses you should have a check list of each point you intend to bring out by the witness' testimony. Then as you examine him you can tick off each point as it is proved. It not infrequently happens that where there is an objection and a long argument concerning some point of evidence a lawyer will be thrown off balance and forget where he was, and omit to ask certain important questions. Your check list will prevent this from happening to you. It is desirable to have a list of the exhibits which you intend to introduce and a note as to where each will be offered in evidence. It is more difficult to plan in advance the conduct of your cross-examination. However, if as a result of your investigation of the facts you have a pretty clear idea as to what an opposing witness will testify, you can figure out the possible weak points in his testimony and make a list of them. It may be that on the trial you will not want to cross-examine at all, but if you have such a list before you, it will prevent you from forgetting possible points of attack.

is a good thing. This is, I think, the prevailing modern view. See the authorities cited in note 32 *supra*. However, the matter has not yet passed beyond the realm of the controversial. For one of the most eloquent arguments against a policy of broad pre-trial discovery see Hocker, *What Price Limitless Discovery?*, 9 J. MO. BAR 172 (1953).

50. See p. 160 *et seq. supra*.

Your brief on the law should contain a digest of, and citations to, all of the statutes, cases and other authorities upon which you intend to rely at the trial. If you do not bring the actual books to court with you, your brief should include quotations from, or briefs of, your basic authorities. Your brief of the law should be arranged chronologically (as the points will arise on the trial) and should contain an index for quick reference.

Organization of the File. I know of no sadder spectacle in court than that of a trial lawyer searching frantically in his unorganized file for something which he knows must be there, who ruffles through his loose papers causing some to flutter about the floor and who finally gives up in despair. This causes great embarrassment to the jury, the witness, the judge, even to opposing counsel, and certainly it does his case no good. There is no excuse for such sloppy housekeeping. A good file should be organized in a methodical manner. The following is suggested: First, you should have a separate folder containing all of the pleadings in the case. They should be stapled together with the most recent pleading on top. In some cases where there are many parties involved, it may be necessary to have more than one pleading file, but the pleadings should be kept separate. Second, you should have a separate folder containing all of the correspondence, also stapled together so that it cannot become loose and become confused with other things. Third, you should have a folder containing the exhibits which you propose to introduce during the course of the trial. Fourth, you should have a folder containing all the proposed requested instructions which you intend to tender to the court. And lastly, you should have a separate folder with your trial brief on the law and the facts.

Any lecture on trial practice is bound to be filled with advice since it is dealing with techniques. It is bound to sound a little like the part from Hamlet where Polonius, giving advice to Laertes, says, "Do this, my son, and you need fear no man";⁵¹ and I am moved to conclude by saying to you in the same vein that if you have done all of these things, my son, any one of four things is bound to happen. First, somewhere along the line you will find out that your client did not have a case in the first place and you will kick him out of the office. Second, if you prepare the case as I suggested you will scare your opponent so badly that he will come to you with an offer of a handsome settlement which you can take and thus avoid the trial. Third, you will have a nervous breakdown. Or fourth, after going through all this agony you will still have to try the case.

51. This is a paraphrase and not an exact quotation. See SHAKESPEARE, HAMLET, Act I, Sc. iii.

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