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Civil Procedure - Discovery - Oral Examination of Opponent's Expert Witness

Sydney B. Nelson

importance to litigants. Henceforth, action to be taken upon final and executory judgments of the courts of appeal must be preceded by careful examination of the time the notices of judgment were received by counsel of record, with the above rules in mind.

H. F. Sockrider, Jr.

CIVIL PROCEDURE — DISCOVERY — ORAL EXAMINATION OF OPPONENT'S EXPERT WITNESS

The state expropriated defendant's property for an amount certified by two licensed realtors to be just compensation.[1] Before trial contesting the appraised fair market value of the property, defendant sought by oral deposition to determine the manner in which one realtor arrived at his valuation. The realtor testified he could not remember without referring to his notes, which counsel for the state had instructed him not to do. Subsequently, on the trial of a rule to show cause why he should not answer all questions, the court ordered the realtor to consult whatever material he planned to use upon trial of the case and to answer questions in regard to *facts* upon which he based his appraisal. The state contended this order violated Louisiana

§ 1; *id.* 1:55, as amended, La. Acts 1956, No. 549, provides that the following days are legal holidays all over the state: Sundays; January 1; January 8; January 19; February 22; May 30; June 3; July 4; August 30; Labor Day (1st Monday in September); November 1; November 11; Thanksgiving Day (4th Thursday in November); Christmas Day; Inauguration Day in Baton Rouge. For cases involving the question of legal holidays, see Interstate Oil Pipe Line Co. v. Friedman, 137 So. 2d 700 (La. App. 3d Cir. 1962) (February 12, Lincoln's Birthday, held not a legal holiday); Hulin v. Hale, 137 So. 2d 709 (La. App. 3d Cir. 1962) (same); Genovese v. Abernathy, 135 So. 2d 802 (La. App. 3d Cir. 1962) (Christmas is a legal holiday); Guarisco Constr. Co. v. Talley, 126 So. 2d 793 (La. App. 3d Cir. 1961) (same); McGee v. Southern Farm Bureau Cas. Ins. Co., 125 So. 2d 787 (La. App. 3d Cir. 1960) (Sunday is a legal holiday).

Further, courts of appeal are without authority to grant additional time for the application (*Uniform Rules of the Courts of Appeal XI*, § 1, in LA. R.S. ANN. 70, 75 (West, Supp. 1961); Gautreaux v. Harang, 190 La. 1060, 183 So. 349 (1938); Kelley v. Ozone Tung Coop., 38 So. 2d 232 (La. App. 1st Cir. 1948)), even though the untimeliness is due solely to a miscarriage of the mails (McGee v. Southern Farm Cas. Ins. Co., 125 So. 2d 787 (La. App. 3d Cir. 1900)), a party's change in attorneys (Clark v. Delta Tank Mfg. Co., 22 So. 2d 135 (La. App. 1st Cir. 1945)), or a secretary's misinterpretation of the attorney's instructions (Clostio's Heirs v. Sinclair Ref. Co., 37 So.2d 44 (La. App. 1st Cir. 1948)).

1. LA. R.S. 48:441-460 (Supp. 1962). The procedure is basically the following: amount of money estimated to be just and adequate is paid into registry of court; ex parte order issued declaring property has been taken for highway purposes; title vests in state when money deposited; defendant must contest within ten days, or every claim waived except claims for compensation; defendant has the burden of proof in establishing any market value other than the one alleged by the state.

Code of Civil Procedure Article 1452 by requiring the production or inspection of a writing prepared by an expert. On certiorari, the Supreme Court of Louisiana affirmed the order. *Held,* an order requiring an expert witness to refresh his memory from written memorandum within his possession, in order to testify to facts upon which he based his opinion, does not require production or inspection of any writing prepared by an expert. *State, Through Dep't of Highways v. Spruell,* 142 So. 2d 396 (La. 1962).

Discovery procedure enables all parties to obtain information essential to the presentation of their cases, thus advancing the cause of justice through ascertainment of the truth, and often leads to settlements that minimize litigation. However, opposition to the discovery of opinions of an opponent's *expert* witness is encountered. Such opposition is often based on deprivation of property without due process of law, attorney-client privilege, "work product" doctrine, or unfairness to the opposing party or the expert.[2] The lower federal courts have developed two lines of authority, one allowing discovery of an expert's opinion when good cause is shown, the other denying the right to obtain the expert's opinion.[3]

The Louisiana Code of Civil Procedure adopted a modified version of the discovery provisions of the Federal Rules of Civil Procedure.[4] One important Louisiana discovery provision allows deposition upon oral examination of any person by merely giving proper notice to all parties to the action.[5] Any party or witness who wishes to oppose the deposition must initiate court action,

2. See generally 4 MOORE, FEDERAL PRACTICE ¶ 26.24 (Supp. 1962); Friedenthal, *Discovery and Use of an Adverse Party's Expert Information,* 14 STANFORD L. REV. 455 (1962); Annot., *Pretrial Deposition — Discovery of Opinions of Opponent's Expert Witnesses,* 86 A.L.R. 2d 138 (1962).

3. *E.g.,* Sachs v. Aluminum Co. of America, 167 F. 2d 570 (6th Cir. 1948) (opinion of an expert may be discovered); *cf.* Boynton v. R. J. Reynolds Tobacco Co., 36 F. Supp. 593 (D. Mass. 1941) (court in its discretion refused to allow discovery of experts' opinion). See also Annot., 86 A.L.R. 2d 138, 142 (1962): "The very general import of the federal cases on the matter is that although pretrial deposition discovery of the expert opinion of an opposing party's expert witness is not per se prohibited by the Federal Rules of Civil Procedure, and may, in a proper case, be authorized, such discovery ordinarily will not be permitted except in instances of extreme need thereof by the examining party and inability on his part to obtain expert opinion on the same matter from other sources."

4. LA. CODE OF CIVIL PROCEDURE arts. 1421-1515 (1960), originally adopted as LA. R.S. 13:3741-3794 (Supp. 1952); see Hubert, *The New Louisiana Statute on Depositions and Discovery,* 13 LA. L. REV. 173 (1953).

5. LA. CODE OF CIVIL PROCEDURE art. 1451 (1960) (proper notice requires statement of time and place for taking deposition and name and address of each person to be examined).

and bears the burden of proving good cause for the issuance of a protective court order.[6]

In Louisiana, an expert witness is treated as any other witness with one exception: the court cannot order production or inspection of any *writing* obtained or prepared by the expert, unless denial of access to the writing would unfairly prejudice or cause undue hardship to the party seeking it,[7] and in no event can the order encompass any part of such writings which reflect the mental impressions, conclusions, opinions, or theories of the expert.[8]

In *State, Through Dep't of Highways v. Spruell*[9] the Louisiana Supreme Court announced that an order by the trial court requiring an expert to prepare himself for oral examination by consulting his written notes was not an order for production or inspection of any writing of an expert,[10] and consequently there was no need to show undue hardship or injustice. The court clearly indicated an expert can be *orally* examined the same as any other person.[11] Since other persons can be questioned in discovery proceedings on any relevant matter,[12] including opinion, it should follow that an expert can be questioned as to his mental impressions, conclusions, and opinions.[13] However,

6. *Id.* art. 1452.

7. *Ibid.*; State, Through Dep't of Highways v. Spruell, 243 La. 202, 142 So. 2d 396 (1962); see Hubert, *The New Louisiana Statute on Depositions and Discovery*, 13 LA. L. REV. 173, 193-94 (1953).

8. See note 7 *supra*.

9. 243 La. 202, 142 So. 2d 396 (1962).

10. As early as 1907 a Massachusetts court in requiring an expert witness to refresh his memory from notes within his possession indicated this was similar to requiring a witness to listen to a question and to reflect on it in order to give a proper answer. Stevens v. Worcester, 196 Mass. 45, 56, 81 N.E. 907, 910 (1907).

11. State, Through Dep't of Highways v. Spruell, 142 So. 2d 396, 399 (La. 1960). Referring to oral examination of an expert under Article 1436 the court emphasized that testimony of *any person* could be taken and stated "there is no specific exclusion of experts as such from the provisions of this article." The court then referred to writings in 13 LA. L. REV. 173, 193-94, by Leon D. Hubert, Jr., one of the Reporters who drafted the projet of the Code of Civil Procedure, as further support for the proposition that experts were not intended to be excluded.

12. LA. CODE OF CIVIL PROCEDURE art. 1436 (1960) provides in part: "Unless otherwise ordered by the court as provided by Article 1452 or 1454, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . 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."

13. MCCORMICK, EVIDENCE §§ 10-18 (1954); 7 WIGMORE, EVIDENCE §§ 1917-1929 (3d ed. 1940). "In all jurisdictions testimony to the value of a specific piece of property is now received, as not obnoxious to the Opinion rule." *Id.* § 1943. *Cf.* as to criminal procedure LA. R.S. 15:464 (1950): "On questions involving a

writings of an expert on these matters are privileged.[14] Although this distinction between writings and oral examination has been attacked as unsound,[15] a practical distinction is easily discernible. It is one thing to answer specific questions thought of by the examining party and quite another to produce a written document containing a description of the problem, detailed analysis, and listing of alternative solutions. An expert, just as an attorney preparing his case,[16] must sift the facts he considers relevant from the irrelevant. Prohibiting disclosure of the expert's writings requires the opposing attorney to marshal the facts himself; he cannot rely on the expert's work, paid for by his adversary. Furthermore, if the expert's writings were available to other parties, he might avoid writing many things he would otherwise have recorded. Inefficiency, and perhaps unfairness, would result.

In *Spruell* the court required the expert to consult written materials he expected to use upon trial of the case. Perhaps the court would have been unwilling to require the expert to do additional research, and rightly so.[17] Nevertheless, an expert

knowledge obtained only by means of a special training or experience the opinions of persons having such special knowledge are admissible as expert testimony."

14. LA. CODE OF CIVIL PROCEDURE art. 1452 (1960).

15. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STANFORD L. REV. 455, 477 (1962): "A comment following the Louisiana provision, as originally enacted, stated that insofar as experts were concerned only writings were prohibited, and that it was expressly intended that the depositions of the experts would freely be allowed. Such a distinction between reports and other forms of discovery is absurd, particularly when the rule provides that reports cannot be produced under any conditions whatsoever. If a party may discover an expert's opinion by deposition when the expert is available, there seems little reason to deny automatically discovery of such information in reports if the expert cannot be found."

16. Much of what was said in Hickman v. Taylor, 329 U.S. 495, 510-11 (1947), about an attorney can aptly be applied to an expert: "In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways — aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."

17. See United States v. 284,392 Square Feet of Floor Space, 203 F. Supp. 75, 77 (1962): "While an expert may under certain circumstances be required to

should not be allowed to avoid answering all questions by claiming lapse of memory. Although the court carefully noted that *the order* of the lower court only required the expert to answer questions in regard to facts, it did not indicate that oral examination must be limited to facts. Thus, as a minimum, the expert must be prepared to answer questions as to facts; but if at the time of examination he can draw an opinion from facts within his knowledge, this, too, is evidence which generally should be available to the examiner.[18]

Because abuse of discovery procedure is possible, the federal trial courts have been granted broad discretionary power to control this procedure.[19] For similar reasons broad discretion like that existing under the federal rules, upon which Louisiana discovery procedure is largely based, seems appropriate. However, since for purposes of discovery upon oral examination the expert must be prepared to answer questions as to facts; but if mitted that the opponent of the deposition is the party who must show good cause to warrant the court's exercising its discretion in limiting discovery of an opponent's expert witness.[20]

Sydney B. Nelson

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testify at a trial, he cannot be compelled to make examinations or experiments, or otherwise acquire knowledge upon which an opinion may be based. 8 Wigmore, Evidence (3d Ed.) § 2203, p. 134; Boynton v. R. J. Reynolds Tobacco Co., D.C. Mass., 1941, 36 F. Supp. 593."

18. See notes 2 and 13 *supra*.

19. BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 715 (1961), referring to Federal Rule 30(b) and 30(d): "These provisions give the court broad power to control the use of the discovery process and to prevent its abuse and the exercise of this power is in the sound discretion of the court." *E.g.*, National Bondholders Corp. v. McClintic, 99 F.2d 595 (4th Cir. 1938); Portman v. American Home Products Corp., 9 F.R.D. 613 (S.D. N.Y. 1949).

In a recent eminent domain proceeding a federal trial court disallowed discovery of an expert's opinion of the value of property, but required each party to furnish the other with a list of comparable sales and of all other sales of property considered relevant in evaluating the property in question. United States v. 19.897 Acres of Land, More or Less, 27 F.R.D. 420, 422 (E.D. N.Y. 1961): "Nevertheless, it would tend to shorten the trial if both sides knew in advance of the trial what sales of other properties each party may contend on the trial can possibly be relevant to the issue of value of the damaged parcel. Such advance notice would afford each party the opportunity to examine all such parcels and inquire into the terms and conditions of each sale before the trial for the purpose either of supporting or attacking the weight to be given to the same by the trier of the fact, without committing either party to state now what particular factor or factors will be relied upon by their experts to support their respective opinions."

20. LA. CODE OF CIVIL PROCEDURE art. 1452 (1960) (party seeking to limit right to oral examination must establish good cause for protective court order to issue).