CHAPTER XI

GENERAL CONDUCT OF ORAL EXAMINATION

Swearing of Witness

The statutes uniformly require that the party to be examined be sworn by the officer in charge.

Examination by Attorney for Party Seeking Discovery

The attorney who desires discovery propounds oral questions to the witness. The Wisconsin statutes specifically provide that the examination may assume the form of a cross-examination. Some of the states which allow use of deposition procedure for discovery have extraneous statutes which provide that a party may be examined as if under cross-examination by the adverse party, either orally or by deposition as any other witness. Such a statute, taken together with the deposition statute, allows the discovery questioning to be in the form of a cross-examination. Without such a statute the theoretical rule is that questions shall not be leading, because the party makes the witness his own by taking his deposition. But as a practical matter lawyers in conducting discovery hearings usually probe a party, or even a witness, about as thoroughly as if a cross-examination were allowed. The chief reason for this is that the attorney for the party who is being examined seldom makes objection to the form of the questions. Of course there is the danger that the adverse party may take advantage of his right to file written objections to the form of the questions before trial and thus deprive the examining lawyer of that part of the testimony which was obtained upon leading questions. This is very infrequently done in actual practice.
EXAMINATION BY ATTORNEY FOR PARTY AGAINST WHOM DISCOVERY IS SOUGHT

After the attorney seeking discovery has finished questioning the witness, his own attorney is allowed to propound questions. Only in Wisconsin was it found that attempts have been made to limit the extent of questioning by the latter on the ground that it is a misconception of the purposes of discovery and works a hardship in that it forces the applicant to pay in the first instance for folios increased by his adversary. Ordinarily there is no desire upon the part of the party’s lawyer to ask questions, unless they are for the purpose of explaining some incidental statement or straightening out the witness where it is thought he has misunderstood the question. Occasionally such questions are interposed during the course of the principal examination. Lawyers who have had experience in the matter say they refrain from questioning their client at a discovery hearing initiated by the adverse party, not because it is considered improper but simply because they have no desire to add to the adversary’s knowledge. In only three cases out of fifty examined in Toronto, for instance, did the party’s solicitor ask a single question. When a lawyer becomes accustomed to the use of discovery procedure he adjusts his tactics and does not ordinarily ask questions of his own client. The fact that either party can use the deposition if the deponent is unavailable at the trial does not counteract the tactical advantages of non-questioning in the usual discovery situation.

ART OF EXAMINING FOR DISCOVERY

Lawyers who have had considerable experience in conducting discovery examinations say that they have developed a peculiar technique as to the mode of questioning. Seldom is a hostile cross-examination indulged. The reasons are that a hostile cross-examination would reveal
the examining party's own line of attack, and would render less effective the cross-examination at the trial. The tactics which are employed are: The lawyer assumes a friendly role; sometimes he assumes a false front of more or less aimless, haphazard searching after information; his principal object is to get the witness to talk and to disclose the whole story in his own way. His object is to get as much information as he can from the witness and to disclose as little of his own objective as possible. Ontario practitioners have developed this art to a finer point than found elsewhere but various lawyers throughout the states which were visited said they employed the same technique.

Usually a discovery hearing is very informal, amounting in some instances to a virtual conference between adversaries. This is especially true in states which allow use of the ordinary deposition procedure for discovery. Perhaps too great an informality prevails. Examinations have been witnessed in which attorneys and parties alike smoked cigarettes as they pleased. This feature seemed especially soothing to one particular party who was being probed in an action wherein he sought to obtain payment of an insured loss which the insurance company claimed was the result of a fire started by himself. The informality of discovery hearings reaches its height in Montreal, Quebec. In true French style banter and repartee are indulged in by the lawyers throughout the proceedings.

**Record of Examination**

In Wisconsin and Ontario either the officer in charge of the examination takes it down and transcribes it or a reporter does so under his direction. The latter practice is the more general in the larger cities. The usual practice elsewhere, especially under the ordinary deposition procedure, is for the officer to do the reporting himself.
There are statutory requirements in some states that the deposition be written up by the officer in the presence of the deponent. The courts have not applied such requirements strictly but have allowed the reporting to be done in the fashion now generally employed by firms of reporters. The usual practice is for the reporter to take down all questions, answers and objections. If the officer is allowed to make rulings upon the objections, as in Wisconsin, such rulings also are noted. The more careful reporters make it a practice to number the questions so as to expedite any subsequent use of, or objection to, the record of the examination. In New York the statute provides that no objections, except those to the form of the questions, are to be noted.

Except in Wisconsin, the applicant for discovery has an option as to whether or not the examination shall be transcribed. In Wisconsin it is always written up. The practical importance of the matter is that if there is no necessity of writing up, the examining lawyer can save that expense if he cares to. Perchance the questioning has proved entirely futile, or perchance the lawyer's own stenographer, by agreement, has done the reporting, in which event he can simply have the shorthand notes preserved. It is a quite usual practice in some offices, especially in the smaller towns, for the examining lawyer to take enough notes to refresh his memory as to the testimony of the witness, and, if it becomes necessary to use the examination at the trial, to call the stenographer and have her read her notes. If an outside reporter is used it usually is possible to adjust the fees if transcription of the notes is not desired. In the larger offices, especially in the cities, the expense is considered secondary to the more thorough preparation and depositions always are written up. This is especially true

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1 The discussion of the Ohio situation in 14 Ohio Jurisprudence, pages 41, 42, is representative.  
2 Rules of Civil Practice 129.
where the examination for discovery and the trial work are handled by different members of the law office.

RIGHT TO COPIES OF RECORD

The rules discussed in the preceding section are subject to the limitation that the adverse party can compel that the deposition be written up so that he can obtain a copy, if he will agree to pay the cost thereof. This is the uniform practice with the possible exception of Indiana. While the statutes are silent on the matter, a majority of the Indiana lawyers who were interviewed were of the opinion that the only way a copy of the examination could be had, over the objection of the taker, was for the party examined to bring his own stenographer. The theory seems to be that the examination is the taker’s own private affair until it is filed. In New Hampshire and in Texas some of the lawyers go to the other extreme of giving their opponents copies free of charge. But the usual rule is that the adverse party can have a copy if, and only if, he will pay for it.

READING OVER AND SIGNING RECORD

There is a uniform requirement, except in Ontario, Quebec and West Virginia, that the party examined read over and sign the record of the examination. But in almost every jurisdiction there is a widespread waiver of the requirement. In Wisconsin, for instance, there had been a waiver of signature in ninety-one of the hundred cases which were inspected in Milwaukee and Madison. Commissioners said that this was about the usual ratio. Even so, a majority of the lawyers in the states which have the requirement do not favor its abolition. They prefer to be able to require a signature if they choose to, so as to render use of the deposition more
effective at the trial. Ontario and Quebec have abolished the requirement. In Toronto, the Examiner (officer in charge) signs the deposition and either he, if he reports it himself, or the reporter certifies that it is correct. Toronto practitioners regard this as a distinct improvement over the older practice of having the party read over and sign the deposition. One of the advantages pointed out is that a saving of time and trouble is effected, since it is no longer necessary for the parties to reappear for the signing formalities. West Virginia has tried the same expedient in regard to depositions, but no use is made of the deposition for discovery purposes in the state. A number of West Virginia lawyers to whom letters of inquiry were addressed replied that there is general satisfaction with the provision as far as ordinary depositions are concerned.

**Correcting Record**

Uniformly the deponent is allowed to make corrections of clerical errors on the part of the reporter. His right to make substantial corrections to the testimony which he has previously given presents a more difficult problem. A case taken from the records in Milwaukee, Wisconsin, indicates the character of the problem. In a case involving fraud the parties came back three weeks after the deposition was taken, for the signing thereof. At this time the following occurred:

Mr. A: “I ask for another adjournment so I can have the witness correct some errors in the testimony.”

Mr. B: “I object to this.”

Commissioner: “Do you mean errors on part of witness or in the transcribing?”

Mr. A: “On part of witness.”

8 Rule 340.

4 W. Va. Code (Barnes, 1923) ch. 130, sec. 33.
Commissioner: “This is cross-examination, no direct examination is permitted except on the trial, because this is supposed to be discovery of one side only.”

Mr. A: “Do I understand the rule to be that a party may not read over his deposition and any corrections he desires to make, the witness may make them?”

Commissioner: “I understand he may correct any errors of the reporter in writing the testimony.”

Mr. A: “He may correct any errors he has made in the testimony. I understand that to be the rule.”

Commissioner: “I understand the rule that any correction, not taking into consideration mistakes of the reporter, cannot be made before the commissioner over objection, because this is strictly a cross-examination. Now I have never been reversed on that, but I don’t think it has ever been tried out. It might be certified up and get a ruling from the Circuit Court. That has been my ruling for upward of ten years. I may be wrong but if I am I would like to be corrected. I do not want to rule one way in one case and another way in another case.”

Mr. A: “I know of rulings of that kind where the deposition is closed and adjournment taken simply for the purpose of permitting the witness to read it over and sign it. I appreciate your position that the opposite side may not directly examine their own witness, but I think this is true, that if a witness testified in the forenoon and came back in the afternoon and said to the commissioner ‘I said so and so in the forenoon but I was mistaken’, that the witness might have an opportunity to correct his testimony.”

Commissioner: “Suppose on the trial he made a mistake in testifying, and I want to correct the testimony—the court may say ‘You may when your counsel examines you, correct your testimony.’ But the only opportunity he has to make it is at the close of the trial, or when a
deposition is taken at the close of the reading of the deposition.’’

Mr. A: ‘‘It seems to me you do not catch my distinction. I appreciate a witness may not be asked to explain his testimony. But if the witness says, ‘I made a mistake in my testimony’, I think the court will and should permit correction at any time.’’

Commissioner: ‘‘I think it is in the discretion of the trial court, ‘You may correct it now or you may correct it when you have your direct examination.’’

Mr. A: ‘‘Well, I will ask some questions in order to get the matter before the court.’’

He then asked 23 questions by telling the witness what he had stated and asking if he desired now to correct it. These questions covered almost the whole case. Then Mr. A said: ‘‘There are other questions of the same character but these are enough to get a ruling.’’

The case was certified to the trial judge and he ruled that the correction should be allowed. The exact words of the ruling were: ‘‘Said party is hereby given leave to correct the answers to questions asked on said examination and his counsel may examine him as to all matters tending to explain or qualify any testimony given by her on said examination.’’

A number of the Wisconsin commissioners refuse to follow such practice but require the witness to sign without corrections.

Corrections, even substantial corrections, are allowed under the New York practice. In one case it was disclosed on appeal that there had been thirty-five different corrections, varying from slight changes in figures to very substantial changes. It was urged that the defendant should have signed the transcript as prepared by the reporter but the court held otherwise. The reasoning of the court was that there would be no sense in having

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5 Milwaukee Circuit Court Records, No. 79847.
the transcribed testimony read before it is signed, if no corrections are to be allowed.⁶

The view of the Ohio court is indicated by the following quotation from Minshall, J.: "The witness must be the judge as to whether his testimony had been accurately taken down by whomever it is done. What he signs is his sworn statement, and he should not be required to sign what he under oath says is not accurate. In case of a controversy about the matter, witnesses might be called at the trial to state what the defendant stated in the first instance, for the purpose of reflecting on his credibility, but he cannot be compelled to sign a deposition which he says on oath is not correct."⁷

Officers in charge of discovery proceedings have devised practical ways of solving disputes as to the right to correct the record. Sometimes they instruct the deponent to sign and to write out any corrections he desires to make underneath as a qualification of the signature. This allows the correction, and yet does not deprive the examining party of the full effect of the previous discovery. Any scheme which will separate the corrections from the previous testimony and label the latter as such has a similar effect. In fact, if the correction is obviously a change of testimony upon advice of other persons, it does little harm to the examining party so long as the contradictory statements are preserved. Indeed some lawyers say they are glad to get such corrections because they tend to discredit the whole story of the witness. Other officers allow corrections subject to the proviso that the party allow himself to be re-examined by his adversary as to the new part.

**FILING THE RECORD**

The statutes uniformly require that the officer file the record of the examination, with the proper certification,

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⁷ Ex parte Hafer (1901) 65 O. S. 170, 172, 61 N. E. 702.
with the clerk of the court in which the action is pending. The clerk then places the record with the papers of the case. In Wisconsin always, and in Missouri and Nebraska usually, the officers obey this rule. In Missouri this is due in part to the fact that all depositions which are filed may be taxed as costs. In Ontario the record need be filed only in the event that the taker requests the transcription of the reporter's notes, but it must be filed then. There is a widespread disregard of the statutory requirement in all other jurisdictions. The reasoning in justification of the failure to follow the statutes is that they prescribe the requirement only as a condition precedent to the use of the deposition as such at the trial; that ordinarily a deposition taken for discovery purposes will be used only for purposes of impeachment at the trial, rather than as original evidence, and that it can be used for this purpose as a signed statement, or as a contradictory previous statement, without any official sanctions. Another reason why some lawyers do not file the record is that such tactics deprive the adverse party, or his attorney, of access to the record for purposes of preparation for trial, unless he is willing to pay for a copy. Accordingly, it is a widespread practice for the officer to return the record to the examining attorney, unless directed otherwise by him, and for the latter to keep the same in his files. Court rules in Concord, New Hampshire and in Louisville, Kentucky, specifically directed at this practice, have been disregarded by the bar. Of course, if a lawyer thinks there may be occasion for the use of the deposition as original evidence at the trial he should have the record filed. If he is the attorney for the party examined in a state where either party is entitled to use the deposition at the trial if the deponent is unavailable, he may obtain a court order requiring that the particular deposition be filed for his use.
A difference of practice exists as to whether depositions which are filed must remain sealed until opened by court order or until published by the taker. Usually it is required that it be sent sealed to the clerk by the officer taking. In Ontario there is no such requirement. But even in some states where the deposition is sent sealed, the clerk opens it as soon as he receives it. This is the general practice in Wisconsin, but within the last year or so the Milwaukee judges have required that all depositions be kept sealed until the court orders them opened. The purpose is to check the activities of certain newspaper reporters. An Indiana appellate court has held that once a deposition is filed the taker loses control over it so that he cannot remove it from the files.8

8 Grant v. Davis (1892) 5 Ind. App. 116.