CHAPTER XXIV

USE OF DISCOVERY IN PREPARATION OF TRIAL BRIEF

A division of labor is effected in many law firms so that much of the work of preparing for trial is done by men other than those who conduct the actual trial. Younger members of the staff do most of the preparation for trial and the older and more experienced members handle the trial proper. The former compile what is known as a trial brief. Such a brief usually contains an analysis of the pleadings and issues of the case, memoranda of the relevant points of law, statements from witnesses, list of the papers and documents which will be introduced, suggested questions to be asked during the examination of the witnesses and drafts of such motions and instructions as may become necessary. The trial lawyer then uses this brief as a basis for conducting the case. Often the clerk who has prepared the particular brief accompanies his senior to court and aids him there. This serves the additional purpose of giving the clerk an opportunity to see how well his work measures up to the needs of the occasion and to get some little trial experience.

Procedure for discovery fits in well with the system which is thus employed in law offices. It affords means of preparation which are quite necessary in the compilation of a trial brief. The very fact that the adverse party can be examined is in itself a great help. The record of the examination forms an excellent basis for cross-examination at the trial. Many lawyers take an adverse examination and then rearrange and rephrase
the questions in such a fashion as to make the trial cross-examination more effective and more businesslike. Necessary documentary evidence in the possession of the adverse party can be obtained and arranged so that delay and confusion at the trial may be avoided. There is also provided a means of compelling statements from witnesses who refuse to give them voluntarily and a means of preserving the testimony of important witnesses against the contingency of death or removal.

Even law firms and individual lawyers who do not employ an elaborate trial brief system have found that discovery examinations furnish an excellent basis of preparation for trial. The following statement from an active trial lawyer in a large city in the middle west is representative of the way in which such an examination can be used: "When a case is called for trial I ask that the file record of the case be brought to me. Decidedly the most enlightening part and the part which will give me an insight into the case in a hurried fashion is the adverse party's deposition. Without it I would have difficulty in effecting any intelligent sort of handling of the case."

The trial brief system offers a possible way by which disclosure of the principal points of a controversy and of the principal items of evidence can be made known prior to the trial. At least one federal judge requires the lawyer on each side to furnish him before trial with a short statement of the issues, what it is proposed to prove and the principal items of evidence which will be adduced. This enables the judge to get a fairly accurate knowledge of the character of the case and affords him a more intelligent basis upon which to decide questions which may arise at the trial. Suggestions have been made at various times that lawyers for the plaintiff and defendant exchange trial briefs prior to the trial as well as furnish them to the court. Quite early Jeremy Bent-
ham proposed what he termed "An anticipative survey of the budget of evidence on both sides." Recently a visiting French lawyer, Pierre le Paulle, the delegate of the French Society of Comparative Law to the American Bar Association, suggested that there should be some device to require "the parties to prescribe by writing before the trial the facts they want to prove by witnesses," and "oblige the lawyers to communicate the written evidence they have to their colleagues on the other side." Similar proposals have been to the effect that each party be required to file a trial brief, setting forth the facts which would be proved by the witnesses. The object of such a brief, of course, would be to enlighten both the court and the adverse party and to guarantee preparation for trial upon the part of each lawyer. The most recent form of this suggestion is represented by the following bill which was recently proposed in the California Legislature:

"In every civil action, within ten days after issues of fact are joined, plaintiff shall file with the clerk of the court, without service, a statement of issues and witnesses, with affidavits of all witnesses to be used by plaintiff at the trial with as many copies of each as there are defendants. Said statement shall recite in brief numbered paragraphs what plaintiff considers to be the principal issues of fact, with the names under each issue of the witnesses by whom plaintiff expects to prove such issue. Within thirty days after issues of fact are joined, each defendant shall file a like statement of issues and witnesses, and affidavits of all witnesses to be used by defendants at the trial, with as many copies of each as there are plaintiffs.

2 LePaulle, Administration of Justice in the United States, 4 Docket 3192."
"Said affidavits shall state in brief numbered paragraphs the principal facts known to such witness relevant to the said issues, including the date and parties to all documents and writings relevant thereto known to the witness.

"The clerk shall treat all such statements and affidavits as confidential and not permit examination of any of them until all are filed; after which time he shall, as soon as convenient, furnish to each party a copy of the statements and affidavits filed by his opponent.

"Persons having knowledge of facts, documents and/or writings relevant to the said issues, shall, upon request of and upon reasonable notice by a party or his attorney, make affidavit thereto. A party or his attorney may, in case of need, compel the attendance of such a witness before such party or attorney or a notary public, by subpoena at a time and place appointed, to then and there make said affidavit.

"Upon receipt of such copies of statement and affidavit, or affidavits, it shall be the duty of each party to the action to earnestly and actively seek a satisfactory settlement with the other party or parties thereto, to the end that a trial may be avoided. If it is not possible after diligent effort to settle the controversy in whole or in part, the questions of fact remaining in controversy may be tried, and any party to the action may move to set the action for trial. No motion to set for trial may be made until after all such statements and affidavits have been exchanged by the clerk, and said efforts to settle have been made and proven unsuccessful, and said facts are shown to the court.

"Thereafter, the court shall compare statements and affidavits in reference to the issues remaining in controversy, and designate the portions thereof considered by the court to be important in determining said issues.
"At the trial the court shall require the testimony of witnesses to be directed especially to the designated important facts relating to the issues upon which the witnesses appear by their affidavits or testimony to disagree. Unless for good cause shown, a witness shall not be permitted to testify unless the said affidavit of said witness as described in section 597 has been previously filed and copy furnished, nor shall a witness be permitted to testify to important facts not contained in said affidavit. Upon good cause appearing however, any such witness may be permitted to testify, upon such terms and conditions, and under such circumstances as the court may determine to be just."

\[84\] Southern Cal. L. Rev. 193.