Vanderbilt Law Review

Volume 7
Issue 4 *Issue 4 - A Symposium on Federal Jurisdiction and Procedure*

Article 8

6-1954

The Elimination of Surprise in Federal Practice

Alexander Holtzoff

THE ELIMINATION OF SURPRISE IN FEDERAL PRACTICE*

ALEXANDER HOLTZOFF†

There are occasions when in the interest of clarity of thought it behooves us to get back to first principles. When brought back to mind, these principles appear simple and obvious, but so much of our life's work is devoted to details that the tendency is for the trees to obscure the view of the forest, unless we stop at intervals and refresh ourselves by recalling fundamentals.

The courts exist for the purpose of administering justice. The objective of a law suit is to determine a controversy between man and man by ascertaining the facts, finding the governing principles of law, and applying them to the facts. At common law there developed what is known as the adversary system of litigation. The merits of a controversy are determined by the presentation of facts and arguments on the law by counsel, who are partisans on behalf of the parties whom they represent. The judge, or the judge and jury, as the case may be, reach their conclusions from the partisan presentations. On the whole the system works well. In the course of time, however, some deficiencies were found to exist and some improvements were needed. Every human institution must be improved with time. Nothing can stand still. It will either progress or go backward. At common law each of the parties was free to procure his evidence where he found it, but was at liberty to withhold any information from his adversary. Either party could secure his evidence and obtain his information from any source whatever, except that he could not require his opponent to disclose what the latter knew. It was otherwise in equity. From early days the Chancellors, who originally were prelates, adopted the practice of ecclesiastical law of permitting each party to search the conscience of his opponent and for that purpose to require the latter to answer written interrogatories, which sometimes were deep and penetrating.

Since the court and the jury must determine the merits of the controversy, they have a right, in the interest of justice, to have before them all of the available evidence, no matter in whose possession it may be found. Under our system of trials, however, the courts do not ordinarily search for evidence on their own initiative and have no machinery for doing so. They are dependent upon counsel for the respective parties to produce all of the available and pertinent

---

* The substance of this paper was delivered before the Insurance Section of the American Bar Association at the annual meeting in Boston, in August, 1953; and before the Connecticut Bar Association in Hartford, in October, 1953.

† United States District Judge, District of Columbia.

information. It gradually became evident that without according to each party the right to bring out into the open whatever evidence may be in the possession of his adversary, justice cannot always be effected.

The code states were among the first to take steps to destroy some of these restrictions. They developed the practice of permitting each party to take the deposition of his opponent prior to the trial. In some states, this procedure is known as an "examination before trial." By this means a great deal of evidence has been often unearthed, which otherwise might have remained concealed. Incidentally, it has frequently led to shortening trials by abbreviating the evidence to be introduced and narrowing the issues. In addition, it at times has led to the abandonment of claims or defenses that could not stand the light of day.

As originally introduced, however, the use of this weapon was seriously circumscribed. In some of the states an adverse party could be questioned only for the purpose of securing evidence on which the examining party had the burden of proof. He might not be interrogated concerning his own case. A still further and drastic limitation was that only such evidence could be elicited as would be admissible at the trial. Some jurisdictions evolved the practice of written interrogatories, which were an outgrowth of old equity pleading and practice. Written interrogatories, however, are frequently not as efficacious as an oral examination.

These developments, inadequate as they were, began to batter down the ancient walls. The Federal Rules of Civil Procedure completed the task and entirely demolished them. The new procedure—if a procedure that has been in effect for 15 years can still be called new—effectively carried out the basic concept that the purpose of litigation is not to conduct a contest or to oversee a game of skill, but to do justice as between the parties and to decide controversies on their merits. For this purpose the courts are entitled to have laid before them all available and pertinent material. With this end in view, each party may procure all germane information no matter in whose possession it may be, subject of course to the rule of privilege. It necessarily follows that each party has the right to have made available to it whatever relevant data may be in the possession of his adversary. The new rules operate on this principle. They do not just render lip service to this doctrine but actually carry it into practice from day to day.

The limitations that a party may secure from his opponent only such evidence as is admissible at the trial, and only such proof as will support his own case, are gone. The old doctrine that discovery may not be used for the purpose of a fishing expedition has been thrown into discard. In fact, fishing is permitted if there is a reason-

able prospect of fish being caught. All this is done in the interest of reducing to a minimum what years ago was so aptly called by Professor Wigmore, I believe, "the sporting theory of justice." We must again emphasize that litigation is not a sport and that it is not a game, but a serious effort to do justice.

Frequently a party may not be in possession of evidence admissible at the trial, but may know where such evidence can be found. It makes no sense, either as a matter of reason or as a matter of justice, to say that he should not be required to disclose the sources of evidence. For example, in an accident case he may have the names of eye witnesses. In many instances it may be necessary to ascertain what documentary evidence is available. Examples may be multiplied *ad infinitum*. The new procedure permits the use of discovery not only for the purpose of obtaining evidence, but also of ascertaining where evidence may be secured.

I have never heard any argument advanced against this innovation except the contention that a litigant should not be required to help his adversary. This suggestion has been made from time to time in various forms. It cannot withstand penetrating analysis. Why should not one party to a law suit be compelled to disclose information in his possession, even if it will aid his opponent? The moment one gets rid of the idea that a trial of a law suit is a contest, and accepts the premise, as one must, that its purpose is to ascertain the truth and enable the court to do justice, it follows that there should be no right on the part of either party to withhold pertinent information from the court. The manner in which the court can obtain such information is to enable the adverse party to secure and produce it. I venture to suggest that this is in accord with elementary principles of justice and logic.

In this respect civil litigation must be treated differently from criminal cases. In Anglo-American jurisprudence, it is an inherent right of the accused to stand mute and to decline to furnish any information that may help convict him. In this country this principle is safeguarded by the Constitution of the United States and by most, if not all, state constitutions. Even in criminal cases, however, it cannot be said that this right is a part of the law of nature. It is something that is accorded to the defendant in countries where Anglo-American jurisprudence prevails, but not elsewhere. For instance, in French courts, the defendant is subject to interrogation. The precise, logical, Gallic mind takes the position that the best way of ascertaining the facts is to ask the person who knows most about them and that person, of course, is the defendant. One of the first and most important items of business at a criminal trial in France is a searching and sometimes hostile interrogation of the defendant

by the presiding judge. Naturally, in the light of our zeal to preserve the rights of the accused, we would not tolerate such a procedure, because it is abhorrent to our fundamental ideas. No such principles, however, are applicable to civil cases. It has always been the rule that a party to a law suit may call his adversary to the witness stand. No reason appears why the far-reaching step taken by the Federal Rules of Civil Procedure is not in accord with this tendency, and why an adverse party should not be required to disclose to his opponent before the trial relevant information as well as admissible evidence. To be sure this course reduces the element of surprise to a minimum. For this very reason, in the interest of arriving at just results, this step is an important move in the right direction. Ordinarily, in a present day law suit in a federal court, what with taking of depositions of parties and witnesses, discovery of documents, medical examinations, and pre-trial, there is little that either counsel does not know about the matter by the time the trial has arrived.

I have already stated that a trial should not be regarded as a contest or a game of skill. I might now add that it should not be viewed as a melodrama or a mystery play, in which the success of the performance depends upon keeping the denouement secret from the beholders and leaving them in a state of suspense until the end.

There are indeed rare occasions in which surprise has a legitimate function to perform in a trial of a civil case. For example, if the plaintiff's claim is absolutely fraudulent and the fraud can be exposed either on cross-examination or by extrinsic evidence, the ends of justice may at times be best achieved by lulling the plaintiff into security and taking him by surprise. For example, I remember a case tried before me in which the plaintiff sued to recover damages for personal injuries said to have resulted from a fall on a rainy day on a wet floor in a department store. The facts that the floor was wet and that the plaintiff fell on it were not disputed. The plaintiff claimed that as a result of the accident he was required to have an operation on his knee at a famous medical clinic. On cross-examination the plaintiff was confronted by written statements made by him to his employer, from which it appeared that he had gone to this clinic, not for the purpose of the operation, but to see his wife, and that while staying in the city where the clinic was located, he went ice-skating, fell on the ice and injured his knee. The operation on the knee was necessitated by this accident. I need hardly say that it took the jury but a few minutes to find a verdict in favor of the defendant. The use of surprise was legitimate in this instance. The new rules do not bar it. Such cases, however, do not occur very frequently. Claims or defenses that are actually fraudulent are comparatively few and far between. There are many claims and

defenses that are exaggerated or padded, which is an entirely different thing.

On the other hand, the element of surprise sometimes frustrates the ends of justice. For example, instances are not unknown of a party to a negligence action producing at the last moment at the trial a witness who is claimed to have been a bystander or a passerby and to have seen the accident. That witness may be a perjurer. This has actually happened, though rarely of course. Yet the adverse party has no opportunity to investigate and determine whether the witness really saw the accident. How much better it is for each party to require the other to submit in advance of the trial a list of all persons who are claimed to have seen the accident. This does not require either side to call all of such witnesses, but it would preclude either party from producing a surprise eyewitness, the truth of whose testimony could not be investigated at the last moment.

I am afraid that what I have been saying sounds very elementary. If so, I have achieved my objective, because we are in fact dealing with matters that should be governed by elementary first principles. The new Federal Rules have been justly acclaimed as an outstanding advance in judicial procedure. Broad discovery is an important feature of the new practice. It should be remembered that the rules expressly leave residual control in the trial judges over the application of the Rules in order to enable the courts to prevent their abuse and their becoming a vexatious burden. The judge is clothed with full discretionary power to stop the use of the discovery weapons for harassment or other ulterior motives. Judges do not hesitate to invoke this authority in proper cases. I earnestly urge that no attempt be made to turn the clock back by an endeavor to narrow the scope of the discovery rules.

Occasionally there has been a misunderstanding as to one of the aspects of federal discovery procedure. The objection has been raised that under the Federal Rules, counsel may see his opponent's file. This apprehension is not well-founded. No such result is in fact permitted. While depositions may be taken on notice, discovery and inspection of documents may be procured only by an order of the court granted on motion. In order to secure this relief, it is necessary to identify specific documents, to indicate that they probably constitute or contain evidence relevant to the issues, and further, to make a showing of good cause for the inspection.[1]

The Supreme Court in *Hickman v. Taylor*[2] expressly held that discovery and inspection should not be ordered as to such papers as constitute the "work product" of a lawyer; that is, statements, memo-

1. FED. R. CIV. P. 34.
2. 329 U.S. 495, 67 Sup. Ct. 385, 91 L. Ed. 451 (1947).

randa and other similar papers, prepared by the lawyer, unless there are exceptional circumstances. Consequently, what with the limitations to which I have just referred, and the power expressly vested in the courts to prevent abuse and to limit discovery to its proper channels, there need be no fear that improper use of discovery procedure may be permitted at will. The discovery procedure provided by the Federal Rules of Civil Procedure constitutes a far-reaching advance in the interests of achieving justice.