TALKING HEADS, SPEAKING OBJECTIONS AND THE USUAL AGREEMENTS: PROCEDURAL AND PRACTICAL TIPS FOR EFFECTIVELY TAKING AND USING DEPOSITIONS

PAUL N. GOLD

AVERSANO & GOLD
"CUTTING EDGE JUSTICE" ™
933 Studewood, 2nd Floor
Houston, TX 77008
Tel: 1/866-654-5600
pgold@agtriallaw.com
www.cuttingedgejustice.com

TALKING HEADS, SPEAKING OBJECTIONS AND THE USUAL AGREEMENTS: PROCEDURAL AND PRACTICAL TIPS FOR EFFECTIVELY TAKING AND USING DEPOSITIONS

I. INTRODUCTION:

If discovery devices were chess pieces, the deposition would be the queen, for it is the most flexible and powerful discovery tool available to the trial attorney. The deposition opens doors that remain closed to other discovery efforts and preserves testimony in a way that it can be effectively and persuasively presented to a jury. Mastery of deposition strategy and technique is an important step toward a successful trial practice.

II. SCOPE OF DISCOVERY

A. General Rule:

Oral depositions, like depositions on written questions, may be taken of "any person," including parties, subject to the relevance constraints set forth in Rule 166(b)(2)(a). The scope of discovery for depositions, which is quite broad, is governed by Rule 166b(2). It generally allows discovery regarding any matter that is relevant to the subject matter in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party.

1. Parties

Mobil Oil Corp. v. Floyd, 810 S.W.2d 321 (Tex. App.--Beaumont 1991, orig. proceeding) held that a party to a suit has the right to depose the opposing party. TEX. R. CIV. P. 200(1). This is so even if the party to be deposed has been declared non compos mentis. Id. at 324 In this negligence action, the defendant sought to depose the plaintiff who had been declared to be non compos mentis. Notwithstanding the plaintiff's mental disability, his medical witnesses testified that he could understand the oath, and could recall and narrate events. The court pointed out that, while testimony might not be admissible at trial, it was discoverable, particularly since the declaration of the plaintiff to be non compos mentis, merely raised a rebuttable presumption of that status. Id.

2. Attorneys

An attorney may be an individual with knowledge of facts relevant to the subject matter of the lawsuit. As such, an attorney's deposition may be taken in a case, even if he is representing parties in the action. **Smith, Wright & Weed v. Stone**, 818 S.W.2d 926, 928 (Tex. App.--Houston [14th Dist.] 1991, orig. proceeding); See also **Borden v.**

Valdez, 773 S.W.2d 718 (Tex. App.--Corpus Christi 1989, orig. proceeding).

Oftentimes when a party seeks to prevent a potential witness' deposition from being taken, they assert that the witness' testimony would be irrelevant or inadmissible at trial. These arguments were made in **Stone**; however, significantly, the court observed that whether the attorney's testimony "...is admissible or will lead to discoverable evidence cannot be determined until his deposition is taken." **Id.** In this particular case it was fairly obvious that the testimony was at least discoverable because there was an unresolved issue in the case (an affirmative defense) as to whether the attorney had participated in an actionable civil conspiracy that perpetrated a fraud.

3. Former Employee

One who is no longer in the corporation's employment may still be deposed if the court finds that he is subject to the corporation's control. In **Wal-Mart Stores, Inc. v. Street**, 754 S.W.2d 153 (Tex. 1988), the plaintiff noticed Sam Walton, who, at the time of the incident, was president of the corporation. However, at the time of the notice, he was no longer an employee. He was, though, chairman of the board of directors and a major shareholder. Wal-Mart objected to the notice, but the trial court ordered Walton to appear. The Texas Supreme Court found no abuse of discretion, saying that the trial court could have found as a fact that Walton, as chairman of the board, major shareholder, and past president, was an agent for Wal-Mart subject to its control, and that Walton could have possessed knowledge reasonably calculated to lead to the discovery of admissible evidence.

B. Depositions: Fishing Line Cut?

Of Guns and Fish. Much has been written by plaintiff=s attorneys over the last couple of decades about finding the Asmoking gun,@ that mythical document that turns the tide of the case, which the defendant unwittingly yields, buried within volumes of otherwise worthless materials. Corporate defendants live in fear of this phenomenon and have strategized how to avoid it. One way is to increase the number and breadth of privileges. Another, however, is merely to limit the permissible scope of the request. If the scope is narrowed, it is predictable the responsive body of documents will be smaller thus reducing the likelihood of the Asmoking gun.@

This brings us to the holdings of the Texas Supreme Court during this last decade of the twentieth century. The Court has focused on what it has referred to as Afishing.@ In one case it equated Afishing@ to exploring, and observed that discovery devices, at least requests for production, were not allowed to be used to explore for additional causes of action or theories of recovery. **See Dillard Dept. Stores, Inc. v. Hall**, 909 S.W.2d 491, 492 (Tex. 1995). In a more recent opinion, despite having reiterated on at least two prior

occasions that interrogatories and depositions could be used to explore or fish[1], the Texas Supreme Court held that fishing was not a proper use of any discovery device.

A reference in Loftin suggests that interrogatories and depositions may properly be used for a fishing expedition when a request for production of documents cannot. Loftin [v.Martin], 776 S.W.2d[145] at 148[(Tex.1989)] (Aunlike interrogatories and depositions, Rule 167 is not a fishing rule.@) We reject the notion that any discovery device can be used to Afish@.

K Mart Corp. v. Sanderson, 937 S.W.2d 429, 431 (Tex. 1996). If depositions cannot be used as a tool for fishing, it is predictable that depositions will become an even more frustrating and acrimonious exercise than at present. This is particularly true if attorneys start objecting at depositions in conformance with the shotgun objection practice that has evolved in the written discovery area. No fishing will be equated with no testimony.

III. CONTENTIONS

A. Depositions May Be Used To Inquire Into Another Party's Contentions

1. Rule 166b(2)(a) provides that "[i]t is also not ground for objection that an interrogatory propounded pursuant to Rule 168 involves an opinion or contention that relates to fact or the application of law to fact . . . ." Arguably this provision also applies to depositions since the scope of discovery in Rule 166b(2) applies to all the discovery devices.

2. At least one court has specifically held that a party must answer a question as to his opinion of the cause of an accident. See **Williamson v. O'Neill**, 696 S.W.2d 431 (Tex. App.--Houston [14th Dist.] 1985, orig. proceeding). The Texas Supreme Court has also said, indirectly, that a party may inquire into another party's contentions during a deposition. **Braden v. Downey**, 811 S.W.2d 922, 927 (Tex. 1991) ("[W]e do not agree that inquiry may not be made into a party's contentions during a deposition . . . .").

3. The question asked of the defendant truck driver in **Williamson** was, "What is your opinion as to the reason for the trailer to leave the truck and hit the vehicle?" The court said that even if the defendant could not "explain" the occurrence, his opinion could be reasonably calculated to lead to the discovery of the cause of the occurrence. The court also said that the driver's opinion fell squarely within Texas Rules of Evidence 701 because it would be rationally based on the perceptions of a party to the accident, and it would help determine a fact issue, namely, causation. The plaintiff was entitled to know the opinion of the defendant as to the cause of the separation of the trailer. Finally, the court noted that under Evidence Rule 704 such opinion testimony is not objectionable merely because it embraces an

---

[1]See **Loftin v. Martin**, 776 S.W.2d 145, 148 (Tex. 1989); See also **Texaco, Inc. v. Sanderson**, 898 S.W.2d 813, 815 (Tex. 1995).

ultimate issue to be determined by the trier of fact.

IV. APEX DEPOSITIONS

A. Definition

The Texas Supreme Court has recently held that, subject to a motion for protection, certain criteria must be met before an apex deposition may be taken. An "apex" deposition is a deposition of a corporate officer at the apex of the corporate hierarchy. **Crown Cent. Petroleum Corp. v. Garcia**, 904 S.W.2d 125 (Tex. 1995)..

B. Guidelines for Taking Apex Depositions

In **Crown Cent. Petroleum Corp. v. Garcia**, 904 S.W.2d 125 (Tex. 1995), the Texas Supreme Court adopted the following guidelines for depositions of persons at the apex of the corporate hierarchy.

1. When a corporate president or other high level corporate official (or the corporation) **files a motion** for a protective order to prohibit a party from deposing him or her, the trial court should first determine whether the party seeking the deposition has arguably shown that the official has **any unique or superior personal knowledge** of discoverable information.

2. If the party seeking the deposition cannot show that the official has any unique or superior personal knowledge of discoverable information, the trial court should issue the protective order and require the party seeking the deposition to attempt to **obtain the discovery through less intrusive methods**. The Court suggested that less intrusive methods could include taking the depositions of lower level employees or the corporation itself, through designated representatives, and directing a request for production of documents to the corporation.

3. After making a **good faith effort** to obtain the discovery through less intrusive methods, the party seeking the deposition may attempt to show (1) that the official's deposition is reasonably calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate. If the party seeking the deposition cannot make this showing, the trial court should leave the protective order in place.

C. Application of Crown Central Guidelines

The plaintiffs in **AMR Corp. v. Enlow**, 926 S.W.2d 640 (Tex. App.--Fort Worth 1996, n.w.h.) sued American Airlines under the Texas dramshop statute after being involved

in an traffic accident with a man who had been served alcohol on an American Airlines flight. The plaintiffs noticed the deposition of American's president, CEO, and Chairman Robert Crandall. American objected and submitted Crandall's affidavit denying knowledge of relevant facts. The plaintiffs asserted that they needed to depose Crandall "'to determine where the authority lies within the organization for making [certain alcohol service and flight attendant training] policy decisions so that Plaintiffs can understand how and why those policy decisions were made and what precisely the policies in place were.'" **Id.** at 643. The plaintiffs pointed to the testimony of two lower level employees and claimed that their testimony showed that only Crandall had the relevant authority and knowledge of the alcohol service policies. The court was not persuaded. One of the employees testified that Crandall would have ultimate authority over any policy only because a "'chairman of the board has about all the authority he needs on most issues in a business.'" The other employee testified that the "'buck'" probably stopped with Crandall. In rejecting the plaintiffs' argument, the court said that "[t]his testimony amounts to nothing more than the simple, obvious recognition that the highest-ranking corporate officer of any corporation has the ultimate responsibility for all corporate decisions and falls far short of the Garcia standard."

While it is unquestionable the Chairman of the Board had authority to ultimately dictate policy for the company, the point remains that it was not shown he had unique knowledge. Further, a corporate representative could have been deposed to obtain the needed information and answers on behalf of the corporation.

D. Federal Experience:

The federal procedure with respect to apex depositions is similar to the procedure recently adopted by the Texas Supreme Court in **Garcia**, supra. As a witness with personal knowledge of facts relevant to the lawsuit, a corporate president is subject to being deposed;[2] however, a court may require that interrogatories first be served. This was the case in **Mulvey v. Chrysler Corp.**, 106 F.R.D. 364 (D. R.I. 1985) where the plaintiffs sought the deposition of Lee Iacocca. The **Mulvey** order allowed the plaintiffs to take an oral deposition at a later time if answers to the interrogatories warranted it. This ruling was given primarily because Iacocca had signed an affidavit professing ignorance of the information the plaintiffs sought. **Mulvey** was relied on by the district court in **Baine v. General Motors Corp.**, 141 F.R.D. 332 (M.D. Ala. 1991). There the court ordered that interrogatories be served on the top executive of General Motors' Buick division before resorting to a deposition. The court noted that several other cases have focused on the "unique personal knowledge" requirement, and have required that resort first be made to interrogatories, deposition of a designated spokesperson, or deposition of lower level employees.

V. CORPORATE REPRESENTATIVES

[2] **CBS, Inc. v. Ahern**, 102 F.R.D. 820, 822 (S.D.N.Y. 1984).

A. Designating the Corporate Representative

A corporation, partnership, association, or governmental agency may be deposed. TEX. R. CIV. P. 200(2)(b). This can be done by examining an officer, agent, or employee of the organization. Recall that the Texas Supreme Court in **Crown Cent. Petroleum Corp. v. Garcia** suggested taking the deposition of corporate representatives prior to seeking apex depositions. The deposing party should make sure that the person examined can bind the corporation with his testimony. If the person's identity is known, he can be noticed by name. The party seeking the deposition must direct the organization to designate the person or persons who will testify in the deponent's behalf. Rule 201(4). The deponent may require the deposing party to designate the matters on which the selected representative will testify. **Id.** The more efficient process is for the deposing party to merely identify the topics on which she wishes to depose the organization and for the organization to then identify who on its behalf will testify on each of the topics.

B. Does the Corporation Have the Exclusive Right to Designate a Representative?

It is unsettled whether the deponent has the exclusive right to designate who will testify on its behalf. In **Hospital Corp. v. Farrar**, 733 S.W.2d 393 (Tex. App.--Fort Worth 1987, orig. proceeding) the defendant asserted that, pursuant to Rule 201(4), only it should be allowed to designate the person or persons to testify on its behalf, and that the plaintiff did not have such authority. The court rejected that contention. Citing the Advisory Committee's commentary to Rule 201(4)'s counterpart in the Federal Rules (Rule 30(b)(6)), the court said that Rule 201(4) was meant to supplement the practice whereby the examining party designates the corporate official to be deposed. Rule 201(4) was designed to aid the deposing party in weeding out those officials whom it should not depose, and to help corporations avoid the time and expense of producing officials when it knows the name of the person who should be deposed. "It was never intended to limit a deposing party's ability to take the deposition of a corporate officer, nor was it intended to allow a corporation to play the corporate information shell game." **Id.** at 395. This holding has not been followed in any subsequent Texas decisions.

C. The Corporation Must Produce a Competent and Prepared Witness as Its Representative

1. The corporation must ensure that the designated representative is competent and can give meaningful testimony. In this regard, the corporation must fully prepare the witness to respond to specific topics delineated by the party noticing the deposition. See **Allstate Texas Lloyds v. Johnson**, 784 S.W.2d 100 (Tex. App.--Waco 1989, orig. proceeding). In **Allstate Texas Lloyds**, the defendant insurance company designated its

investigator who investigated the cause of a fire that consumed the plaintiff's home, despite the fact that the plaintiff "gave exhaustive notice of the matters upon which she expected to question Allstate . . . ." **Id.** at 103. Then, when the plaintiff asked questions concerning what Allstate knew or what facts it had, Allstate's counsel repeatedly objected on the basis of privilege, claiming that the investigator could only know the answers by having conferred with Allstate's counsel or having received privileged communications. The court upheld the trial court's ordering of sanctions against Allstate for its failure "to do just what the notice and the rule [Rule 201(4)] require: produce one or more persons able to testify as to the matters which were described with reasonable particularity in the notice." **Id.** at 104. The court found that the trial judge could reasonably have concluded that Allstate's failure to prepare its representative or produce a competent one was "cavalier or even in bad faith." **Id.**

2. Federal rule 30(b)(6) has been interpreted similarly to its Texas counterpart. In **Federal Deposit Ins. Corp. v. Butcher**, 116 F.R.D. 196, 201-2 (E.D. Tenn. 1986), aff'd, 116 F.R.D. 203 (E.D. Tenn. 1987), it was determined that the witnesses produced were not knowledgeable about the designated areas. The court ordered the organization (the FDIC) to redesignate witnesses and prepare them to testify for the entire corporation. The organization was allowed to limit the areas upon which the respective witnesses would give testimony. The **Butcher** court held that the corporation was required to make a conscientious good faith endeavor

> …to designate the persons having knowledge of the matters sought [by the discovering party] and to prepare those persons in order that they can answer fully, completely and unevasively, the questions posed by [the discovering party] as to the relevant subject matters.

Butcher, 116 F.R.D. at 199, (quoting **Mitsui & Co. v. Puerto Rico Water Resources Authority**, 93 F.R.D. 62, 67 (D.P.R. 1981)).

United States v. Taylor, 166 F.R.D. 356 (M.D. N.C. 1996) explains these requirements. The **Taylor** court explained that the testimony represents the knowledge of the corporation, not of the individual deponent. If the designated representative does not have personal knowledge of the matters set out in the notice, the corporation must prepare the designee so that he or she can give knowledgeable and binding answers for the corporation. Rule 30(b)(6) implicitly requires that the designee review all matters known or reasonably available to the corporation. The designee does not give his personal opinions, but rather presents the corporation's "position" on the topic. Where a corporation indicates that it no longer employs individuals with memory of a distant event, the corporation is not relieved from preparing its designee to the extent matters are reasonably available, whether from documents, past employees, or other sources. The corporation may plead lack of memory, but if it wishes to assert a position based on testimony from third parties, or their documents, the designee still must present an opinion as to why the corporation believes the facts should be so

construed. Similarly, if the corporation claims lack of knowledge, it cannot argue for a contrary position at the trial without introducing evidence explaining the reasons for the change. The corporation may not, after the deposition, review previous deposition testimony and documents previously produced, and then determine its corporate position. The designee must be prepared to state the corporate position in the Rule 30(b)(6) deposition.

D. Can the Corporate Representative Be Questioned About Matters Outside the Scope of Those Described in the Notice?

Two federal trial courts have issued opposing opinions as to whether the deposing party may question the corporate representative about matters outside the issues described in the notice of deposition (FED. R. CIV. P. 30(b)(6)). The District Court for the District of Massachusetts is of the opinion that the deposing party may not do so. In **Paparelli v. Prudential Ins. Co.**, 108 F.R.D. 727 (D. Mass. 1985), the court held that if a party opts to depose a corporate representative pursuant to Rule 30(b)(6), the party must confine the examination to the matters stated "with reasonable particularity" in the deposition notice. The court reasoned that it makes no sense to state in the notice that the deposing party wishes to examine a corporation's representative on certain matters, have the corporation designate a person knowledgeable on those matters, and then ask the person about matters different from those described in the notice. The court also said that if the deposing party is free to ask questions outside the scope of the matters described in the notice, the rule's requirement that the matters be described "with reasonable particularity" makes no sense.

The court in **King v. Pratt & Whitney**, 161 F.R.D. 475 (S.D. Fla. 1995) reached the opposite conclusion, and specifically declined to follow **Paparelli**. The **King** court stated that the rule should not be read to confer some special privilege on a corporate deponent responding to this type of notice. Because the deposing party could simply re-notice a deponent under the regular notice provisions and ask him the same questions that were objected to as exceeding the scope of the Rule 30(b)(6) notice, the party should not be forced to jump through that extra hoop. The court read Rule 30(b)(6) as follows:

(1) The rule obligates the responding corporation to provide a witness who can answer questions regarding the subject matter listed in the notice.

(2) If the designated deponent cannot answer those questions, then the corporation has failed to comply with its Rule 30(b)(6) obligations.

(3) If the examining party asks questions outside the scope of the matters described in the notice, the general deposition rules govern (FED. R. CIV. P. 26(b)(1)), so that relevant questions may be asked and no special protection is conferred on a deponent by virtue of the fact that the deposition was noticed under 30(b)(6).

(4) If the deponent does not know the answer to questions outside the scope of the

matters described in the notice that is the examining party's problem.

Id. at 476.

E. Sanctions

1. Texas Rule of Civil Procedure 215(1)(b) authorizes sanctions when a corporate representative fails to attend a noticed deposition, or fails to answer a question. Cf. **Transamerican Natural Gas Corp. v. Powell**, 811 S.W.2d 913 (Tex. 1991).

2. Similarly, under Federal Rule of Civil Procedure 37(b)(1), if a deponent fails to be sworn or to answer a question, the failure may be considered a contempt of court. If a corporate representative fails to obey an order to provide or permit discovery, the court may order sanctions. Rule 37(b)(2).

VI. TIME AND PLACE OF DEPOSITION

Texas Rules of Civil Procedure 201(5) provides that the time and place designated for taking the deposition "shall be reasonable." A deposition may be taken 1) in the county of the witness' residence, 2) where the witness is employed or regularly transacts business in person, or 3) at a convenient place as directed by the court in which the action is pending. TEX. R. CIV. P. 201(5). If the witness is a party or the designated representative of a corporate[3] party, the deposition may be taken in the county of suit. TEX. R. CIV. P. 201(4) and (5).

In **Wal-Mart Stores, Inc. v. Street**, 754 S.W.2d 153 (Tex. 1988)[4], the plaintiff sought to depose former president and then chairman of the board of Wal-Mart Sam Walton in the county of suit rather than the county of his residence. At the time of the incident, Walton was the corporation's president. At the time of the deposition notice, however, he was chairman of the board. The Texas Supreme Court held that because the deposition was not directed to the corporation, Walton could not be forced to attend the deposition in the county of suit, but had to be deposed in the county of his residence (absent evidence that the county of suit was convenient).

In **Butan Valley, N.V. v. Smith**, 921 S.W.2d 822 (Tex. App.--Houston [14th Dist.] 1996, n.w.h.), the plaintiff sought to depose the sole shareholder of the corporate defendant, who resided in Saudi Arabia. Although he was the sole shareholder and a director of the

[3]Corporations, partnerships, associations, and governmental entities may be deposed by deposing a designated representative of the organization. TEX. R. CIV. P. 201(4).

[4]See Section II.A.3 above.

corporation, he was not a party to the suit and had not been designated as corporate representative. The court held that the trial court abused its discretion when it ordered the witness to appear in Houston, when the record did not show that he resided in Houston, was employed there, or regularly transacted business there, or that Houston was a convenient place for the deposition. **Id.** at 829.

VII.DEPOSITIONS ON WRITTEN QUESTIONS

A. Present Rule 208

1. Texas Rules of Civil Procedure 208(1) provides that any party may take the testimony of any person by deposition upon written questions. Compelling the witness' attendance and the production of documents and things is done as provided in Rule 201. The written questions must be served ten days before the deposition is to be taken.

2. As with oral depositions, the requesting party may notice a corporation, partnership, association, or governmental agency, describe with reasonable particularity the matters on which examination is requested, and direct the organization to designate one or more officers, directors, or managing agents, or other persons to testify on its behalf.

3. Any party may serve cross-questions within ten days after the direct questions are served. Rule 208(3). Within five days after being served with cross-questions a party may serve redirect questions. Within three days after being served with redirect questions a party may serve recross questions.

4. Objections to the form of written questions must be served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized. Failure to serve objections within these time deadlines results in a waiver of the objections. Rule 208(3). See also, **Thomas & Betts Corp. v. Martin**, 798 S.W.2d 366 (Tex. App.--Beaumont 1990, orig. proceeding [leave denied]).[5]

B. Current Problems

1. I have observed that some attorneys utilize "trial subpoenas" to obtain records. The apparent purpose of this approach is to obtain the records without the other side learning they have been requested so as to deny the opponent the opportunity to object to the request or obtain copies of the records. This is quintessentially trial by ambush. This practice should be confronted and condemned whenever it comes to light.

---

[5]The Texas Supreme Court neither approved nor disapproved this ruling. **Ferguson v. Ninth Court of Appeals**, 806 S.W.2d 222 (Tex. 1991).

2. With respect to subpoenas duces tecum, many parties continue to ignore the Supreme Court's admonition enunciated in **Loftin v. Martin**, 776 S.W.2d 145 (Tex. 1989) that requests for production must be for particular types and categories of documents must be specific. There is no reason this holding should not equally apply to subpoenas duces tecum. This is particularly a problem with regard to requests for medical records. **R.K. v. Ramirez**, 887 S.W.2d 836 (Tex. 1994).

3. From time to time I observe a party serve cross questions directed to a corporation's custodian of records for the purpose of demonstrating either the custodian does not have first hand knowledge of the information stated in the records or that there are other individuals who might be more knowledgeable. This seems to be a rather silly waste of time, particularly since Rule 803(6), Tex. R. Civ. Evid. does not require the custodian to have first hand knowledge of the information contained in the document. I recommend directing the notice to the corporation pursuant to Rule 200(2)(b), requesting it to designate a representative who is the custodian of the records or who has the most information in the organization about the manner in which records are maintained and their authenticity. By producing a representative, the deponent then tacitly states the representative is the best available individual to respond to the topic or that the representative is testifying based upon the composite knowledge of the organization. See discussion of Rule 200(2)(b), above.

C. Gold Agreement

In personal injury cases, it is often hard for the plaintiff's attorney to obtain all the plaintiff's medical records. Either the plaintiff does not accurately recall all the medical care providers she has seen or the medical care provider for one reason or another fails to turn over a complete complement of documents. To avoid waiver of privileged/private matters, I have developed the following procedure: 1) I agree to provide the defendant as broad an affidavit as desired; 2) In return, the defendant agrees the reporter will obtain the records, number them sequentially, place them in a sealed envelop and turn them over only to me; 3) I then have 10 days within which to assert objections and privileges with respect to the documents; 4) those documents to which I do not assert objections are automatically turned over to the defendant; 5) those documents to which I assert objections or privileges are submitted to the court for *in camera* inspection.[6]

D. New Rule

1. The Supreme Court Advisory Committee's Proposed Rule 17 leaves the rule on deposition upon written questions essentially unchanged, although the notice requirement has been extended from ten to twenty days. The time limits for serving cross,

[6]See Appendix A for a sample agreement.

redirect, and recross questions remains the same.

2. Proposed Rule 22 will allow for the issuance of a subpoena commanding the person to whom it is directed to produce documents or tangible things at a specified time and place without the necessity of appearing in person. In other words, this device will allow a party to obtain documents from a non-party without having to submit questions.

VIII.SUBPOENAS AND REQUESTS FOR PRODUCTION

A. Present Rules

1. Non-parties

a. A deposition witness may be compelled by subpoena duces tecum to bring to the deposition items or things within his care, custody, or control, subject to the limits of the scope of discovery as provided in Rule 166b. TEX. R. CIV. P. 201(2).

b. As the rule states, a deposition witness may be compelled to bring things within his custody to a deposition. A court, however, may not order a witness to obtain such things. For example, in **Villages of Greenbriar v. Hutchison**, 880 S.W.2d 777 (Tex.App.--Houston [1st Dist.] 1993, orig. proceeding) the court held it was an abuse of discretion for the trial court to compel a witness to obtain a copy of a sworn statement given to one party in order for the statement to be given to the opposing party. Rule 166b(3), which entitles a person to obtain a copy of his own statement, even when it is privileged or otherwise not subject to disclosure, was intended to benefit the person giving the statement. **Id**. at 780. Implicit in the rules is the choice to not to exercise the right to obtain a copy. The rules clearly do not command the person who gave the statement to obtain a copy. In this case, Athe trial court stretched a rule of discovery beyond its intended bounds. **Id**. at 779.

c. A non-party objecting to a subpoena duces tecum should file a motion for protection prior to the date of the scheduled deposition to prevent waiver of the objection. **Thomas & Betts Corp. v. Martin**, 798 S.W.2d 366 (Tex. App.--Beaumont 1990, orig. proceeding [leave denied]).[7]

2. Parties

a. If the witness is a party or an employee or agent subject to the party's control, he can be compelled to produce documents and things simply by service of the

[7]The Texas Supreme Court neither approved nor disapproved this ruling. **Ferguson v. Ninth Court of Appeals**, 806 S.W.2d 222 (Tex. 1991).

notice to take the deposition upon the party or the party's attorney. Rule 201(3). A request for production served on a party in conjunction with a notice of deposition is to be treated as a subpoena duces tecum. Technically, this means that under present practice a party may be required to produce documents and things at a deposition upon less than 30 days notice required by a standard Rule 167 Request for Production. The federal rule is different, in that it incorporates the federal request for production rule time period into any deposition notice served upon a party. Rule 30b(5). The amendments proposed by the Texas Supreme Court Advisory Board would bring the Texas in line with the federal practice in this regard.[8]

b. Under the present rule, I oftentimes either send both requests for production and a subpoena duces tecum that track each other or include both a subpoena duces tecum and request for production in my notice. The benefit of this approach is that if the deposition is canceled or the notice is retracted, the request for production remains alive. Also, by serving a request for production, I obtain a written response, which is not required in response to a subpoena duces tecum. This potentially (depending on how completely the responding party has responded) allows me to dispense with having to specifically identify on the deposition record what has and has not been produced.[9] The benefit of subpoenaing the documents in conjunction with the deposition is that I can require the production of the original documents for inspection.[10]

B. New Rule

As in current Rule 201, under the Supreme Court Advisory Committee's Proposed Rule 14, a party may in the notice request production at the deposition documents or tangible things within the scope of discovery and within the witness' care, custody, or control. When the deponent is a party or subject to the control of a party, the deponent shall have 30 days within which to respond to the production request.

C. Degree of Specificity Required

---

[8]See discussion under B. New Rule, below.

[9]Relevant to this consideration is the proposition that the requesting party is entitled to a response that specifically indicates which documents are responsive to which requests. See, e.g., **Texaco, Inc. v. Dominguez**, 812 S.W.2d 451, 458 (Tex. App.--San Antonio 1991, orig. proceeding) (upholding trial court's ordering the producing party, who is most familiar with the documents, to identify which documents satisfied which requests).

[10]Under Rule 206(3) a party may substitute copies of documents as exhibits to a deposition, provided they make the originals available for inspection upon 7 days notice of any trial of hearing. I interpret this rule as tacitly recognizing that a witness is to produce original documents in response to a subpoena duces tecum.

Davis v. Pate, 915 S.W.2d 76 (Tex. App.--Corpus Christi 1996, orig. proceeding [leave denied]) provides a useful discussion of the degree of specificity required in a subpoena duces tecum. The case involved claims of defamation, slander, and negligent misrepresentation arising out of a negative reference that the defendant gave to a former employee's (the plaintiff) prospective new employer. At issue were 26 requests for production, to which the plaintiff objected on the ground that they "did not set forth items to be inspected either by individual item or by category, and did not describe each item and category with reasonable particularity." The court held that two of the requests were insufficiently specific, and upheld the rest. The requests held to be insufficiently specific are as follows:

> 17. Please produce any and all documents and tangible things and/or all tape recordings, videos, electrical or mechanical recordings or transcriptions, evidencing, reflecting or pertaining in anyway to the subject matter of this litigation.
>
> 18. Please produce copies of any and all photographs that evidence, reflect or pertain in anyway to the subject matter of this litigation.

By way of contrast, two of the requests held to be sufficiently specific are as follows:

> 2. Produce any and all documents which evidence, reflect or pertain in anyway to your contention that The Bank of Robstown and/or William D. Dodge III had a personal animosity towards you.
>
> 5. Produce any and all documents which evidence, reflect or pertain in anyway to your contention that the alleged slanderous statements injured you in your profession as a banker, finance/credit manager.[11]

Citing **Loftin v. Martin**, 776 S.W.2d 145 (Tex. 1989), the court said that "a request for all evidence that supports an opposing party's allegations, but which does not identify any particular class or type of documents, amounts to merely an improper request to be allowed to generally peruse all evidence the opposing party might have." **Id.** at 79. "However, a request for 'any and all' documents does not in itself violate the specificity requirements of **Loftin**, so long as the request is further restricted to a particular type or class of documents." **Id.**

[11]Nineteen of the 26 requests are reproduced verbatim in the opinion.

In holding that requests 17 and 18 were not sufficiently specific, the court rejected the defendant's contention that it eliminated the specificity problem by defining "documents" to include a large number of specific types of communicative media. The error, according to the court, was not that the term "documents" is uncertain, but that the class of documents requested, with regard to subject matter and content, is uncertain and open to speculation.

As to the other requests, each specified a particular subject matter to which the request was limited, such that they were sufficiently restricted to a particular type or class of documents. Each request specified a particular aspect or element of the plaintiff's claims. Unlike the plaintiffs in **Dillard Dept. Stores, Inc. v. Hall**[12], **Texaco v. Sanderson**[13], and **General Motors Corp. v. Lawrence**[14], who were fishing for additional causes of action or theories, the defendant here was merely trying to discover the nature of the claims against it. As such, according to the court, the requests were not a fishing expedition so much as a request for the plaintiff to put his cards on the table.

IX. OBJECTIONS

A. Objections to the Notice:

1. A party challenging the reasonableness of a notice of deposition must file a motion for protection before the scheduled deposition. **Bohmfalk v. Linwood**, 742 S.W.2d 518 (Tex. App.--Dallas 1987, no writ).

2. The Texas Lawyer's Creed mandates that an attorney will "not arbitrarily schedule a deposition. . . until a good faith effort has been made to schedule it by agreement." Texas Lawyer's Creed at III(14).

B. Motions to Quash:

1. At least one case has held that it is the responsibility of the party filing a motion for protection to obtain a hearing on the motion prior to the deposition. **Pelt v. Johnson**, 818 S.W.2d 212, 217 (Tex. App.--Waco 1991, orig. proceeding).[15]

---

[12]909 S.W.2d 491 (Tex. 1995).

[13]898 S.W.2d 813 (Tex. 1995). See Section II.B.

[14]651 S.W.2d 732 (Tex. 1983).

[15]This author has been unable to find any Texas case addressing the issue of when a hearing on a motion to quash a deposition must be obtained. For a federal case that implies a hearing on a motion to

2. A non-party objecting to a subpoena duces tecum should file a motion for protection prior to the date of the scheduled deposition to prevent waiver of the objection. **Thomas & Betts Corp. v. Martin**, 798 S.W.2d 366 (Tex. App.--Beaumont 1990, orig. proceeding [leave denied]).[16]

C. Motions for Protection:

1. An individual objecting to the videotaping of a deposition must demonstrate a particularized harm that will arise from this form of recording. Absent such proof an objection to videotaping should be overruled. **Masinga v. Whittington**, 792 S.W.2d 940 (Tex. 1990).

D. Invoking The Rule

1. The trial court may only invoke "the Rule" to the extent requested by the party. **Kennedy v. Eden**, 837 S.W.2d 98 (Tex. 1992, orig. proceeding) (per curiam); TEX. R. CIV. EVID. 614. In **Kennedy** the defendants requested under Rule 614, that an individual be excluded from the depositions of the plaintiffs. The trial court issued an order not only prohibiting the individual from attending the depositions, but also from talking with anyone else about the case, reading any report related to the case, or commenting on testimony in the case. The Texas Supreme Court held this to be an abuse of discretion because the additional restrictions were not requested. **Id.** at 98. The Court expressed concern that the order was perpetual in duration. Although the Court declined to rule on whether such a broad order is authorized, they determined the order was not justified under the circumstances. **Id.**

2. In **Burrhus v. M & S Supply, Inc.**, the San Antonio appellate court held that, according to the notice requirement of Rule 200(2)(a), a party is required to give notice that an expert witness will attend the deposition of another witness. 933 S.W.2d 635, 641 (Tex.App--San Antonio September 18,1996, *writ requested*). In this case, the defendant=s expert witness appeared for the deposition of the plaintiff=s expert witness. **Id.** at 638. Plaintiff=s counsel objected to his presence at the deposition, claiming no notice was given that the defendant=s expert would be appearing. As a sanction for violating the notice requirement, the plaintiff moved to exclude the testimony of the defendant=s expert. **Id**. at 639. The defendant=s expert witness was permitted to testify.

---

quash must be obtained before the deposition, see **Goodwin v. City of Boston**, 118 F.R.D. 297, 298 (D.Mass. 1988).

[16]The Texas Supreme Court neither approved or disapproved this ruling. **Ferguson v. Ninth Court of Appeals**, 806 S.W.2d 222 (Tex. 1991).

In reaching its conclusion, the court made a distinction between an expert witness who is an employee of counsel and one who is an independent contractor. **Id**. at 641. While an employee of counsel is exempt from the notice requirement under Rule 200(2)(a), there is no exemption for an expert witness who is an independent contractor. The defendant=s expert was not an employee of counsel, and therefore notice he would attend the deposition was required. Thus, the court reviewed the admissibility of the expert=s testimony under an abuse of discretion standard, and found that the trial court acted within its discretion by denying the plaintiff=s requested sanction. **Id**. at 642.

Additionally, in **Burrhus**, the court noted that Rule 200(2)(a) does not contain a provision for contesting either the adequacy of a notice or the attendance of a non-exempted person. 933 S.W.2d. at 641. However, the history of the rules makes clear that Athe drafters of the rule intended that once proper notice was given, the non-exempted person named in the notice could attend the deposition unless the objecting party obtained a protective order precluding the non-exempted person=s attendance. **Id**.

E. Objections to the Questioning

1. Rule 204(4) sets out the procedures for making objections.

a. Absent express agreement to the contrary recorded in the deposition, objections to the form of questions or the nonresponsiveness of answers are waived if not made at the deposition. Rule 204(4)(a).

b. Absent express agreement to the contrary recorded in the deposition, objections other than to the form of questions or to the nonresponsiveness of answers are not waived if not made at the deposition. These objections can be made at the trial. Rule 204(4)(b).

c. The deposition officer is to record the objection and go on recording the testimony given after or subject to the objection. Action on the objection is reserved for the court. Rule 204(4).

2. The Texas Lawyer's Creed mandates that an attorney will "not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. . . ". id at III(17)

3. It is improper to prevent a witness from expressing an opinion during a deposition. **Williamson v. O'Neill**, 696 S.W.2d 431 (Tex. App.--Houston [14th Dist.] 1985, orig. proceeding).

4. Courts across the country recognize the wisdom of allowing witnesses to

answer subject to objections. See, e.g., **Eggleston v. Chicago Journeymen Plumbers**, 657 F.2d 890 (7th Cir. 1981), cert. denied, 455 U.S. 1017 (1982) (absent a claim of privilege, it is improper for counsel to instruct client not to answer; if counsel objects to question, should state objection for record and then allow question to be answered); **Ralston Purina Co. v. McFarland**, 550 F.2d 967 (4th Cir. 1977) (action of counsel in directing principal witness not to answer question at deposition was indefensible and at variance with discovery rules; should have placed objections on record and evidence would have been taken subject to such objection); **Hanlin v. Mitchelson**, 623 F.Supp. 452 (S.D. N.Y. 1985) (proper procedure is to note objection to deposition question but allow question to be answered); **Coates v. Johnson & Johnson**, 85 F.R.D. 731 (N.D. Ill. 1980) (absent a claim of privilege, it is improper for counsel at deposition to instruct a client not to answer; should state objection for record and allow question to be answered subject thereto); **W. R. Grace & Co. v. Pullman, Inc.**, 74 F.R.D. 80 (W.D. Ok. 1977) (proper procedure is for counsel to note objections and allow deponent to answer).

a. In **Lapenna v. Upjohn Co.**, 110 F.R.D. 15 (E.D. Pa. 1986), the court held that instructions not to answer irrelevant, argumentative or misleading questions were proper. Caveat: Read this case carefully and do not simply accept it for the proposition that anytime you think a question is unclear, misleading or irrelevant, you can instruct a witness not to answer. The situation in **Lapenna** was fairly exaggerated and the conduct egregious. For example, see **Hall v. Clifton Precision**, 150 F.R.D. 525 (E.D. Penn 1993), which held that a deponent may be instructed not to answer only when it is necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present the court with a motion regarding the impropriety of the question.

b. **Hall v. Clifton Precision** also held that a witness and his or her attorney may not confer during the course of a deposition, unless the conference is for the purpose of determining whether or not to assert a privilege. **Id.** at 529. As the court put it, "a lawyer and client do not have an absolute right to confer during the course of a deposition." **Id.** at 528. The court went as far as prohibiting conferences between the witness and the lawyer during recesses, and declared that communications that did occur between witness and lawyer during a recess would not be protected by the attorney-client privilege. **Id.** at 529. The court also held that when a witness is presented with a document at a deposition, the witness may not confer with his or her attorney before the witness answers questions concerning the document. **Id.**.

Hall v. Clifton Precision has been an influential opinion. The court also prohibited witness-coaching in the form of objections or comments meant to suggest or limit a witness' answer to an unobjectionable question. **Id.** at 531. The court reminded lawyers that they should comport themselves as if the questioning of the witness were taking place in the courtroom at the trial. **Id.** As will be discussed below, the new proposed Texas rule is in the spirit of **Hall**.

c. It has been held that it is highly improper for an attorney to coach a deponent and suggest answers to the deponent during cross-examination. **Halvet v. Royal Indemnity Co.**, 277 F.Supp. 769 (E.D. Wisc. 1967). See also, **Hall v. Clifton Precision**, 150 F.R.D. 525 (E.D. Penn. 1993).

F. The New Proposed Texas Rule

Generally, under the amendments proposed by the Supreme Court Advisory Board, the deposition shall be conducted in the same manner as if the testimony were being obtained in court during trial. Objections are limited and must be made in a particular, prescribed manner. Instructions not to answer are improper except (a) to preserve a privilege, (b) to enforce a limitation on evidence directed by the court, (c) to protect a witness from an abusive question, or (d) to secure a ruling regarding the suspension of the deposition.[17]

G. Preserving Privileges and Exemptions:

1. Rule 166b(4) provides that, if a party objects to questions propounded to him during a deposition on the basis of a specific exemption or privilege, the following procedure must be followed if the court determines that an *in camera* review is necessary:

> [T]he objecting party must produce the discovery to the court . . . by answers made *in camera* to deposition questions, to be transcribed and sealed in the event the objection is sustained.

2. In **International Surplus Lines v. Wallace** , 843 S.W.2d 773 (Tex. App.--Texarkana 1992, orig. proceeding), the trial court ordered the party asserting the privilege to answer questions on all subjects asked and that at the conclusion of the deposition, the record of the entire deposition would be sealed and filed with the court. The court of appeals held this to be an abuse of discretion because the order allowed the opposing counsel to hear the answers to the objected questions before the trial court ruled on the privilege claims. **International Surplus v Wallace**, 843 S.W.2d at 775.[18]

3. Presumably under Rule 166b(4) if the objection to the question was that it was improper or it involved undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional or property rights, no *in camera* procedure

---

[17] See Section XVIII.C.3.-5. below for a further discussion of the new proposed Texas rule governing attorneys' conduct, objections, and instructions not to answer.

[18] Presumably the questioning should take place outside the presence of the other attorneys. The court reporter should be instructed to segregate the testimony in issue, place it in a sealed envelope, and deliver it to the court or party seeking relief, for *in camera* review.

would be necessary.

H. Agreements

1. Question whether, if an agreement is reached that all objections except as to form and responsiveness are reserved to time of trial, it is proper to make objections other than to form and responsiveness at the deposition. Cf. **National Life and Acc. Ins. Co. v. Hanna**, 195 S.W.2d 733 (Tex. Civ.App.--Dallas 1946, writ ref'd n.r.e.).

2. Notwithstanding the fact that a party may now impeach his own witness, there is still a problem if the party contemplating offering the deposition has not been careful to object to the form of the questions or responsiveness of the answers at the time the deposition was taken. If these objections are not reserved by agreement, a party may likely find that nonresponsive testimony of a witness whose deposition he is offering at trial mitigates or destroys the point he is trying to establish by offering the deposition in the first place.[19]

X. MOTIONS TO SUPPRESS

A. General Rules:

Rule 207(3) provides that when a deposition transcript has been certified by the deposition officer and delivered to the custodial attorney according to Rule 206, and notice of delivery has been given at least one entire day before the trial, errors and irregularities in the notice of delivery, and errors in the manner in which the testimony is transcribed or the deposition transcript is prepared, signed, certified, sealed, endorsed, delivered, or otherwise dealt with by the deposition officer are waived, unless a motion to suppress the deposition transcript is made. Rule 205 gives the deposition witness twenty days within which to make changes to the form or substance of the transcript. If the witness does not avail himself of this opportunity, the transcript may then be used as fully as though signed, unless on motion to suppress pursuant to Rule 207 the Court determines that the reasons given for the refusal to sign require rejection of the deposition. It is not clear whether a motion to suppress is appropriate where a party objects to the form or substance of the transcript but failed to make

[19]A potential problem arises where a party takes a discovery deposition, asking leading questions, and then has the deposition used against him by another party at trial. Under Rule 204(4), the deposing party would be required to object to his own questions at the time the deposition was taken in order to preserve his objection at trial. Apparently, this scenario was not considered by the framers of the rule. Possibly, the deposing party should make a statement at the beginning of the deposition that he is taking the deposition for discovery purposes. If another party seeks to use the deposition against him at trial, he might request a running objection to the responses to leading questions or alternatively request leave to reserve such objections until the time of trial. This approach is only one way to handle this situation and may or may not be tactically advantageous, depending on the circumstances.

changes to the form or substance within the twenty day window. It is arguable that a motion to suppress is limited to remedying only those technical irregularities specified in Rule 207(3).

B. Finesse Your Opponent

First, if you want to finesse your opponent into having to file written motions to suppress in advance of trial, simply file the deposition with the court and give notice of such action no less than one full day before the date the case is called for trial. If this is done, all objections to the technical sufficiency of the deposition process are waived unless a motion to suppress the deposition is made before trial begins. TEX. R. CIV. P. 207(3). This rule, however, is a tactical option and not a requirement for the deposition's admissibility.[20]

C. Mere Lack of Signature Does Not Justify Suppression of Deposition

Suppression of a deposition has been held to be unjustified for mere lack of a signature.[21] In this vein, an unsigned deposition is admissible in evidence when the signature of the witness has been waived. **Nicholson v. Memorial Hosp. Sys.**, 722 S.W.2d 746, 749 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.).

D. No Requirement of Cross-examination

Nothing in the rules requires that all parties have cross-examined the witness to permit use of a deposition as evidence. TEX. R. CIV. P. 207; see **McInnes v. Yamaha Motor Corp., U.S.A.**, 659 S.W.2d 704 (Tex. App.--Corpus Christi 1983) rev'd on other grounds, 673 S.W.2d 185 (Tex. 1984).

XI. SUPPLEMENTATION

A. Correcting a Deposition:

1. A witness has a right under Rule 205 to read, correct and sign her deposition. There is an ongoing debate about whether a witness may make substantive corrections to her deposition or whether she is confined to merely clerical corrections. I take

---

[20]See **Klorer v. Block**, 717 S.W.2d 754 (Tex. App.--San Antonio 1986, writ ref'd n.r.e.); **De Forest v. Dear**, 659 S.W.2d 90, 91 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.). Although these decisions precede the 1988 amendments, it would appear that they would still be authoritative on this point. See also **Ortiz v. Flintkote Co.**, 761 S.W.2d 531 (Tex. App.--Corpus Christi 1988, writ denied).

[21]See also, **Smith v. Smith**, 720 S.W.2d 586, 599 (Tex. App.--Houston [14th Dist.] 1986, no writ); **Klorer v. Block**, 717 S.W.2d at 757; **Bell v. Linehan**, 500 S.W.2d 228 (Tex. Civ. App.--Texarkana 1973, writ ref'd n.r.e.).

the view a witness may make substantive corrections; however, these corrections do not extinguish the original answers, which still may be presented to the jury. Further, if substantive corrections are made to the deposition, the deposing party should be permitted to further cross examine the witness about the amendment.

2. A good practice to follow when taking a deposition of a witness is to encourage that the witness read, correct and sign the deposition and that the Texas rule be followed in this regard. There are several advantages to this approach: First, many trial attorneys believe a signed deposition is more persuasive before the jury for purposes of impeachment than an unsigned transcript. Second, under Rule 205, a witness has 20 days from the date she receives a deposition to make corrections to it. By following the rule you reduce the likelihood of the witness amending or supplementing the deposition on the eve of trial.

B. Duty to Supplement

1. Closely related to the rule regarding correction of the deposition is the rule requiring supplementation of discovery. Rule 166b(6)(a) provides that a party must "reasonably" supplement his response to a previously propounded discovery request if he obtains information upon the basis of which (1) he knows that the response was incorrect or incomplete when made or (2) he knows that the response though correct and complete when made is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading. TEX. R. CIV. P. 166b(6)(a). Presumably, the rule applies to depositions of the parties, since the rule states it applies to all "discovery requests" and nothing in the rule excludes depositions. A failure to seasonably supplement, absent a showing of good cause, would no doubt result in an automatic exclusion of the modified testimony.[22] How a party would go about supplementing a deposition remains an open question. No matter whether the deponent filed a written correction or merely a notice of a need for correction, it is predictable that the other side would request, and would probably be granted leave to redepose the witness on the particular point being corrected.

2. **Foster v. Cunningham**, 825 S.W.2d 806 (Tex. App.--Fort Worth 1992, writ denied) illustrates the duty to supplement deposition testimony. At the deposition the plaintiff's attorney asked the deponent, the defendants' representative, for the locations of certain potential witnesses. The defendants' representative answered, "[i]f we have got them we'll provide them to you." **Id.** at 808. Later the defendants' attorney located a witness but did not inform the plaintiff of the witness' location. The plaintiff objected to the admission of the witness' testimony at the trial. The appellate court sustained the objection and held that the defendants had failed to show good cause for not supplementing the deposition testimony of

[22] See **E.F. Hutton & Co. v. Youngblood**, 708 S.W.2d 865 (Tex. App.--Corpus Christi 1986), rev'd 741 S.W.2d 363 (Tex. 1987); **Morrow v. H.E.B., Inc.**, 714 S.W.2d 297 (Tex. 1986).

their representative with the later-found information responsive to the request made during the deposition. The court also rejected the defendants' argument that the plaintiff did not make a proper discovery request for the names and addresses of potential witnesses because the request was not by interrogatory. The court said that a party is not precluded from obtaining by deposition the same sort of information which could also be gotten by interrogatories.

3. A more problematic concern regards depositions of non-parties, since the witness is obviously under no formal duty to supplement. An attorney wishing to be completely thorough might send the witness a copy of his deposition and written deposition questions asking whether any circumstances have occurred that make any of the previous answers no longer complete or correct.

4. The First District Court of Appeals and the Texas Supreme Court addressed the duty to supplement deposition testimony in **Collins v. Collins**, 904 S.W.2d 792 (Tex. App.--Houston [1st Dist.] 1995), writ denied per curiam, 923 S.W.2d 569 (Tex. 1996), a divorce case. In the wife's deposition of the husband, she asked him whether he was planning to testify as to the value of two corporations he owned. He said that he was not, and that if he changed his mind he would tell her so. At trial the husband did testify as to the value of the corporations, as did another witness for the husband. The wife objected on the ground that the two had not been designated as experts, and that the husband's failure to supplement his deposition testimony should have precluded him and the other witness from testifying as to value. The husband argued that they should be allowed to testify as lay witnesses. The appellate court held that the testimony should have been excluded for failure to supplement the husband's deposition testimony that he would not offer an opinion as to value at trial. Apparently the appellate court viewed the testimony as expert testimony. The court cited Texas Rules of Civil Procedure 166b(6)(a)(2) and 166b(6)(b). Rule 166b(6)(a)(2) requires supplementation when a response to discovery is misleading, even though it was initially correct. Rule 166b(6)(b) requires supplementation when an expert changes his opinion about a material issue after being deposed.

The dissenting opinion argued that the majority erred because the testimony was lay testimony and there is no authority "for the proposition that a party who says in a deposition that he will not testify on a matter at trial must 'supplement' his deposition answers if he changes his mind and does decide to testify on the matter." **Id.** at 807. The dissent disagreed with what it perceived as the majority's holding that supplementation was required whether the opinions were lay or expert.

The Texas Supreme Court, in denying the application for writ of error in this case, issued the following per curium opinion:

> The court of appeals holds, in part, that the trial court erred in allowing two witnesses to testify to the market value of a corporation . . . because they did not supplement their deposition testimony in which each stated that he did not

> plan to testify at trial about the value of the corporation. (Citation omitted.) Unlike the dissenting justices in the court of appeals, we do not read the court of appeals' opinion so broadly as to require supplementation of a fact witness' deposition testimony generally, or in any situation other than when a witness renders an expert opinion.

Collins v. Collins, 923 S.W.2d 569 (Tex. 1996).

XII. VIDEOTAPING

A. Introduction

Videotape may be used a number of effective ways to enhance the presentation of a deposition at trial.[23] Over the last decade videotaped depositions have gained wide acceptance and they are now commonplace. The Texas rules now even make provision for an entire trial to be conducted by videotape.[24] Both the Texas and federal rules allow the taking of a videotaped deposition as a matter of right. TEX. R. CIV. P. 202(1); FED. R. CIV. P. 30(b)(2).[25]An individual objecting to the videotaping of a deposition must demonstrate a particularized harm that will arise from this form of recording. Absent such proof an objection to videotaping should be overruled. **Masinga v. Whittington**, 792 S.W.2d 940 (Tex. 1990).

B. Advantages

There are several key advantages to recording depositions by videotape for use at trial.

1. First, videotaped depositions give the trial attorney greater flexibility in preparing and putting on the case. The most obvious advantage in this regard is that, if the key witness' deposition has been videotaped and the witness is unavailable for trial, thoughts of a continuance are not mandatory. This can be crucial in a medical malpractice case if your star medical witness is a no-show. The videotaped deposition also comes in handy when a

---

[23]See generally **Sandidge v. Salem Ref. Co.**, 764 F.2d 252, 259 n.6 (5th Cir. 1985); In Focus: Nat'l Video L. Rev. No. 1 (Fall 1986).

[24]TEX. R. CIV. P. 264. (The trial may allow this so long as there is agreement of all the parties.)

[25]The different techniques and technology that can be employed in presenting a videotaped deposition in the courtroom is a topic too involved to be covered in this article. I refer the reader to several well-written discussions on the topic: Murray, Videotaped Depositions: Putting Absent Witnesses in Court, 68 A.B.A.J. 1402 (November 1982); Belli 4 Modern Trials (2d Ed.), ' 59 (West 1982); Misko, Videotape for Litigation, 265 S. Tex. L.J. 487 (1985); Buchanan and Bos, How to Use Video in Litigation (Prentiss-Hall, Inc. 1986); Eatwell, Client Preparation for Video, 22 Tex. Trial Law. F. 39 (1988).

witness must be taken out of order, or an unforeseen problem arises in getting the next planned witness to the courthouse. In this same regard, keep in mind that the witness' videotaped deposition can be shown to the jury; and then, depending on the reception the witness receives from the jury or the effect of the other side's cross-examination, the witness can be called live, either during your case-in-chief or in rebuttal.

2. Second, the camera lens can focus upon models, drawings, documents, or other objects being explained by the witness. This brings the jury an even closer view than if the witness were actually present in the courtroom.

3. There is a special and rewarding advantage in videotaping your opponent's deposition. It enables you to both capture and lock in his virgin testimony and demeanor in giving it. The most gratifying moment in deposition practice comes when you have methodically tracked and finally cornered your adversary. You put to him the key question, catching him cold. He gives you a spontaneous, uncoached, honest and self-destructive answer. The words that begrudgingly pass through the witness' lips are only part of the victory; the real spoils of battle are the expressions of shock, frustration, anger, anxiety, despair and ultimately, helplessness which serially flash in his eyes, crease and dampen his previously smug, cool exterior, and bring nervous animation to his hands. Don't lose the moment. Capture it forever on film.

4. Despite the wide acceptance of videotaped depositions, I still encounter occasional objections to my videotaping a deposition, particularly when it is of a party. The argument usually is that the party will be available at trial; therefore, there is no need to incur the expense of videotape. This objection should be summarily overruled. **Rice's Toyota World, Inc. v. S.E. Toyota Distrib., Inc.**, 114 F.R.D. 647, 650 (M.D.N.C. 1987). First, as stated earlier, in Texas it makes no difference that a witness is available to give live testimony at trial. Indeed, the deposition may be read into evidence with the witness sitting in the courtroom. Second, to deny an attorney the opportunity to videotape the opponent's deposition is to arbitrarily impede the effectiveness of the cross-examination. The jury is entitled to not only hear the witness' response, but also see it given. An individual objecting to the videotaping of a deposition must demonstrate a particularized harm that will arise from this form of recording. Absent such proof an objection to videotaping should be overruled. **Masinga v. Whittington**, 792 S.W.2d 940 (Tex. 1990).

5. Once your opponent's deposition has been videotaped, you have the opportunity to package not only your case-in-chief but also the entire trial. Instead of the plaintiff waiting for the defendant to take the stand, allowing him and his attorney to present their well-rehearsed rendition of what happened, the plaintiff can mount a preemptive strike by producing the previously videotaped testimony given at the defendant's deposition. Even if the testimony at the deposition is not substantively different from that given at trial, there is still an advantage in that the opponent will not come across as smoothly and persuasively. Additionally, when the opponent finally does take the stand, the jury will not want to listen to

the same testimony again and will probably scrutinize every word and expression for inconsistencies with the videotape.

6. There are several variations on this tactic. One can present the opponent's entire deposition or simply parts of it in the case-in-chief, or the deposition can be used as impeachment when the opponent takes the stand.[26]

C. Who to Videotape

1. General Rule:

Depending on feasibility and cost/effectiveness, I tend to advocate that if you are seeking to preserve testimony by way of a deposition, you should videotape it.

2. Client:

I have found that videotaping my client's deposition usually tends to offer more advantages than disadvantages; however, this approach should be considered on a case by case basis. One particular advantage of videotaping your client arises if there are considerations for not having your client sit through trial.

3. Experts:

Generally, I lean toward videotaping my experts' depositions. In the event the expert is unavailable for trial at the time I need him, the videotape gives me added flexibility. It also provides me some additional testimony to show in rebuttal, if my expert is unavailable to rebut the testimony of my opponent's expert at trial. I usually do not advocate videotaping the opponent's experts so as not to provide the opponent with the benefits referred to above.

D. Where to Take the Deposition

A videotaped deposition taken at the scene of an incident can be a very effective device for orienting the jury to the actual circumstances and conditions that confronted the parties. For instance, in a product liability case involving an allegedly defective and unreasonably dangerous lawn mower, the defendant might notice the deposition of the plaintiff for his front lawn to demonstrate how he was operating the lawn mower when the demon device ate his hand.[27] Similarly, I have used this tactic to overcome the objections

---

[26]Keep in mind that the predicates for impeachment with prior inconsistent statements do not apply to admissions of a party opponent. See TEX. R. CIV. EVID. 613(a) and 801(e)(2).

[27]See **Gillen v. Nissan Motor Corp.**, 156 F.R.D. 120 (E.D. Pa. 1994); **Roberts v. Homelite Div. of**

typically lodged against day-in-the-life films, which allege that the films are staged and should be kept out of evidence because the defense was not permitted to cross-examine the participants. The plaintiff's attorney can graphically demonstrate the plaintiff's injuries and limitations by noticing the videotaped deposition of the plaintiff for his home, his physician's office, or the place where he receives rehabilitation therapy. Further, by allowing the opposing party the opportunity to conduct cross-examination, the hearsay objection is overcome.

E. Notice

Rule 202 (1)(b) provides that a party intending to take a deposition by videotape must give five (5) days notice by certified mail.

F. Expense

Rule 202(1)(f) provides that the expense of videotaping the deposition shall not be taxed as costs unless before the deposition there is an agreement or order of the court. I typically file a motion requesting the court to defer consideration of taxing the video as costs until the conclusion of the case, when the court is in a better position to evaluate the value of the videotape to the trial of the case.

XIII. PRESENTATION TO COURT

A. Unavailability

1. Texas has no requirement that, in order to use a deposition, a witness must be unavailable at trial. **Norsul Oil & Mining Ltd. v. Commercial Equip. Leasing Co.**, 703 S.W.2d 345 (Tex. App.--San Antonio 1985, no writ). The rules state specifically that unavailability is not a requirement. TEX. R. CIV. P. 207(1)(a); and TEX. R. CIV. EVID. 801(e)(3). This is in stark contrast with the federal policy, which disfavors the use of depositions at trial. FED. R. CIV. P. 32(a)(3); see also 8 Wright and Miller, Federal Practice and Procedure ' 2142 n.7 (1970).

2. Even federal practice does not stringently require unavailability in all instances in which a party wishes to use a deposition. A party's deposition may be used against that party for any purpose, regardless of the party's availability at trial. FED. R. CIV. P. 32(a)(2). Similarly, a deposition of a director, managing agent, or person designated to testify on behalf of an institutional party may be used. FED. R. CIV. P. 32(a)(2); see also **United States v. One Parcel of Real Estate at 5860 N. Bay Rd.**, 121 F.R.D. 439, 440 (S.D. Fla.

Textron, Inc., 109 F.R.D. 664 (N.D. Indiana 1986); **Carson v. Burlington Northern, Inc.**, 52 F.R.D. 492 (D. Neb. 1971). See also **Kiraly v. Berkel, Inc.**, 122 F.R.D. 1986, 1987 (E.D. Penn. 1988). But cf. **In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989**, 131 F.R.D. 127 (N.D. Ill. 1990).

1988). The deposition may be used for impeachment. FED. R. CIV. P. 32(a)(1). The deposition of any witness may be used if the witness is unavailable by reason of death,[28] the witness is beyond 100 miles from the place of trial,[29] infirmity, beyond subpoena, despite reasonable effort, or upon demonstration of exceptional circumstances.[30] A party may even offer his own deposition if the above circumstances are met,[31] but this is a disfavored practice.[32] In all instances, for a deposition to be admissible in federal court, the above criteria must be met under Rule 32 of Federal Rules of Civil Procedure, and the testimony must be admissible under the Federal Rules of Evidence. **Kolb v. County of Suffolk**, 109 F.R.D. 125 (E.D.N.Y. 1985).

B. Entire Transcript

The courts have recognized two general ways of offering a deposition into evidence. One may introduce the transcript in its entirety or read the transcript into the record. **Purolator Armored Inc. v. Texas R.R. Comm'n**, 662 S.W.2d 700, 705 n.6 (Tex. App.--Austin 1983, no writ). No magic or exclusive words need be used. **Robertson Truck Lines, Inc. v. Hogden**, 487 S.W.2d 401, 402 (Tex. Civ. App.--Beaumont 1972, writ ref'd n.r.e.). Both methods may be used at the same time; one may introduce the entire transcript and then read only selected portions to the jury. **Fenn v. Boxwell**, 312 S.W.2d 536 (Tex. Civ. App.--Amarillo 1958, writ ref'd n.r.e.).

C. Excerpts

1. Any portion of a deposition may be offered by either party to support the contention of the offering party so long as it is admissible under the Texas Rules of Civil

---

[28]FED. R. CIV. P. 32(a)(3)(A).

[29]FED. R. CIV. P. 32(a)(3)(B). See **Nash v. Heckler**, 108 F.R.D. 376 (W.D. N.Y. 1985); **Hill v. Equitable Bank**, 115 F.R.D. 184 (D. Del. 1987) (adopting the straight line rather than usual and shortest route standard). (Under federal Rule 45 a witness may be subpoenaed to trial from beyond 100 miles, if he is found within the district where the case is being tried. Under Rule 32, a witness' deposition may be used even if the witness is in the district, if he is beyond 100 miles from the trial forum.)

[30]FED. R. CIV. P. 32(a)(3)(E). "Exceptional circumstances" is a narrowly construed concept, but is available upon a demonstration that an unexpected development has occurred. **Huff v. Marine Tank Testing Corp.**, 631 F.2d 1140 (4th Cir. 1980).

[31]**Derewecki v. Pennsylvania R.R.**, 353 F.2d 436 (3d Cir. 1985).

[32]Wright & Miller, Federal Practice and Procedure ' 2147 (1970). Even if the criteria are technically met, the court may not allow the use of the party's own deposition if it finds that the party purposefully did not attend the trial to avoid giving live testimony. **Colonial Realty Corp. v. Brunswick Corp.**, 337 F. Supp. 546 (S.D.N.Y. 1971).

Evidence. **Jones v. Colley**, 820 S.W.2d 863, 866 (Tex. App.--Texarkana 1991, no writ); TEX. R. CIV. P. 207(1)(a). The offering party is not required to offer the whole deposition or any particular part of it. **Gilcrease v. Hartford Accident & Indem. Co.**, 252 S.W.2d 715, 719 (Tex. Civ. App.--El Paso 1952, no writ). Nor is it necessary to read it into the record or play it for the jury in chronological order. **Jones**, 820 S.W.2d at 866. As with other evidence, a party is entitled to present the deposition in the order he believes constitutes the most effective presentation of his case, provided that it does not convey a distinctly false impression.[33]

2. It is reversible error to exclude a deposition in its entirety when only portions are read. Only the sections to which objections are sustained should be excluded. **Johnson v. Hermann Hosp.**, 659 S.W.2d 124 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.). In **Johnson**, the testimony of an expert nurse witness was offered in rebuttal. Out of the jury's presence, the plaintiff read portions of the nurse's testimony, but did not offer the entire deposition. The appellate court observed that, had the entire deposition been offered, the inadmissible portions would have to have been excluded before it could be admitted. This raises the question of whose burden it is to point out and seek the exclusion of inadmissible portions. With regard to exhibits, the rule is that if they are voluminous, and the opposing party properly brings to the court's attention that the deposition contains a number of inadmissible sections, it is the burden of the party offering the exhibit to exclude the offensive portions. **Hurtado v. Texas Employers Ins. Ass'n**, 574 S.W.2d 536 (Tex. 1978). It is reasonable to assume that this rule could apply to depositions; however, no cases to date have been directly on point and the continued viability of the rule itself has been questioned, in view of Rules of Civil Evidence 103(a)(1). See James P. Wallace, "General Provisions," Texas Rules of Evidence Handbook, 2d Ed. 137, 158 (HOUS. L. REV. 1993).

D. Methods of Presentation

1. The customary, although least effective, way of presenting deposition testimony to a jury is for an attorney to take the witness stand and read the deposition to the jury, or for an attorney to have another individual read the answers from the witness stand as the attorney reads the questions. This approach gets the testimony before the jury, but is predictable they will generally tune it out entirely.[34]

---

[33]As examples of presentations that would convey distinctly false impressions, the court mentioned partial answers to partial questions, and mismatched questions and answers. **Jones v. Colley**, 820 S.W.2d 863, 866 (Tex. App.--Texarkana 1991, no writ).

[34]It is interesting to note that the Manual for Complex Litigation states that "[r]eading of depositions, even when appropriately purged, may be tiring, if not boring [but] . . . of course, counsel for tactical reasons sometimes prefer a deposition to be dull." If you are representing the plaintiff, you can never afford to be boring or allow the trial to be boring. If your opponent insists on reading depositions, suggest to the court that the trial could be expedited by the use of summaries. Manual for Complex Litigation ' 22.333 (2d ed. 1985). One commentator has suggested that this might even foster the perception that you are the counsel in command of the case. Dombroff, Demonstrative Evidence ' 4.11 (Wiley & Son 1983).

2. **Narrative summaries** can be particularly useful when deposition transcripts are lengthy and no other technique is available for making the testimony interesting. Basically, you prepare the testimony as though you would a bill of exceptions; that is, instead of reading the deposition in verbatim question/answer style, you would state that "if witness x were present, he would testify as follows: . . ." Manual for Complex Litigation ' 22.332 (2d ed. 1985).

3. Another way to dress up the deposition testimony could be to employ the services of a **professional actor** to read the answers from the stand.[35] The Manual for Complex Litigation contains the following observation:

> [T]o keep the jury's attention, [during deposition readings] counsel usually intersperses depositions with other evidence and sometimes engage in dramatic readings of the questions and answers, complete with pauses, changes in inflection, and even feigned surprise at some answer.

Manual for Complex Litigation ' 22.333 n.41 (2d ed. 1985).[36]

4. With a bit more expense and ingenuity, the reading of a deposition can be enhanced by showing the jury the passages that are being read so they can follow along. This could be accomplished by making enlargements of the testimony made, but these would tend to be cumbersome.

a. A more flexible and efficient approach is to use an overhead projector. Once you have obtained the projector and access to a photocopier, you have the unfettered ability to put any page of the deposition before the jury by merely copying it onto an acetate sheet run through the copier. You can then highlight the pertinent sections for the jury as the deposition soliloquy progresses.

b. An improvisation on the above theme is to employ a video camera. By having a camera trained on the deposition and a monitor placed before the jury, you can even more graphically emphasize the key answers upon which you wish to focus. Of

---

[35]Manual for Complex Litigation '' 4.10-4.14 (2d ed. 1985). See Ree, They're Playing Up to the Jury, Time 70, August 1, 1988.

[36]Nothing in the Texas rules says that the reading of deposition testimony has to be as dull as a farm report; however, for some reason most attorneys are reluctant to be creative in this area. Of course, over-exuberance might draw the objection that the witness is adding too much drama to the rendition, but this call falls within the judge's discretion. For the most part, he will probably grant the attorneys wide latitude. He will most likely be as delighted as the jury that someone has taken the initiative to infuse some life into what can otherwise be an exercise in mental cruelty.

course, a prudent attorney will chat with the judge about this proposed technique before trial to avoid surprising the judge. A rule of thumb when using this type of technology in the courtroom is that the freedom to use it is inversely related to the amount of surprise with which it is sprung upon the court.

c. Recently, computer projectors have appeared on the market which allows you to project information on your computer directly out a television or screen.

E. Preparing the Presentation

1. Prior to trial, be sure that you go through the deposition exhibits that you intend to offer at trial, and if you have not sequentially numbered all pretrial exhibits, renumber them so that there will be no confusion about how the exhibit is identified and referred to at trial. For instance, if you take ten depositions, each with five exhibits numbered one through five, and at trial you mark several trial exhibits one through five before you ever get to your first deposition exhibit, you have set the stage for total chaos.

2. The best approach is to discipline your self to sequentially number all pre-trial exhibits so the same numbers that are assigned the items during the pre-trial litigation are retained during trial. If this approach is not followed (and I will tell you it is difficult to do consistently), you should renumber the items prior to trial and provide the trial judge and court reporter a conversion table showing how the item was labeled during the pre-trial litigation and what number it is being assigned for trial.

F. Dealing with Objections

Another thing to consider in preparing the deposition presentation is how you will deal with deletions that you intend to make and those that are ordered in response to your opponent's objections.

1. The more quickly and smoothly the deposition testimony is presented to the jury, the more impact it will have. While there may be some advantage in keeping your adversary in the dark about which portions of a deposition you are going to present, this is offset by the disadvantage of delay and distraction that will likely occur from your opponent's attorney continually asking you where in the deposition you are and requesting time to read the pertinent passages. Delay is your enemy and should be avoided.

2. It is probably not a bad idea in advance of trial, or at least in advance of the presentation of a particular deposition, to indicate which deposition portions you intend to offer. Opposing counsel would then be obliged to indicate those passages that will be read in response. If there are rebuttal passages, these should probably be indicated as well. See Manual for Complex Litigation ' 22.331 (2d ed. 1985). Of course, this is merely a suggestion

for streamlining and expediting the presentation of depositions. In view of the vicissitudes of trial, neither side should be prevented from adding to or deleting from its designation of passages during trial.

G. Editing Videotape

1. I typically prepare a "script" for the other side and the court indicating by page and line where I intend to start and end a passage.[37] This script is then presented to the court and my opponent about a day before the presentation of the deposition, giving my opponent an opportunity in advance of the presentation to make objections and obtain rulings on them from the court. This can present the frustrating situation in which an opponent under the guise of Rule 106 offers voluminous, duplicative and additional testimony in an attempt to distract the jury from the focal points of the offered testimony. In such an instance the offering party might appeal to the court for protection under Rule 403, which permits the court to exclude relevant evidence if it might tend to confuse the issues, mislead the jury, cause undue delay or present cumulative evidence.

2. If the court sustains an objection and orders a particular passage stricken, I merely indicate to my videotape operator to black out the monitor and fast forward over that section during the presentation.

3. In preparation for this process, my videotape operator will have made a duplicate tape from the master video, conforming to the script that I will have prepared. Both the master and the edited version are brought to the courthouse in the event the court wishes to see any edited segments.

The appeal of this approach is that it expedites the smooth presentation of the videotaped deposition and encourages the attorney to refine the presentation in advance of trial. The same advantages can be realized by employing the technique with written transcripts.[38]

H. Rule of Optional Completeness

1. Under the rule of optional completeness,[39] if a portion of a deposition

[37]I cannot ever recall an instance where there have been objections which required the advance viewing of the videotape rather than merely referring to the script and actual transcript. The recommended approach, however, would have to be modified if the opponent was not objecting to what was asked or said, but rather to the video depiction itself.

[38]For additional alternative techniques in handling objections in a videotaped deposition, see Murray, Videotaped Depositions: Putting Absent Witnesses in Court, 68 A.B.A.J. at 1403-1404 (November 1982).

[39]TEX. R. CIV. EVID. 106.

is read into evidence, the opposing party may, upon request, present another portion of the deposition at that time, in order to place the original excerpt in context.[40]

2. The trial court may exercise its discretion in the administration of this rule. For instance, it might be considered inappropriate when one party reads a page of a deposition and the other party demands that the remainder of the entire deposition be presented. The rule typically comes into play when a line, paragraph or page is omitted. The court is within its discretion to defer the supplemental presentation until the end of the underlying presentation, or until the opposing party's cross-examination.

3. In **Jones v. Colley**, 820 S.W.2d 863 (Tex. App.--Texarkana 1991, writ denied) the appellate court found that a trial judge would be within his/her discretion under Rule 106 to require the admission of a full, unedited videotape deposition, rather than allowing the edited presentation of it, if the trial judge first found that the repetitious playing of the tape or portions of it would unduly delay the trial, mislead the jury, or needlessly present cumulative evidence.[41] The court found that the judge had abused his discretion in preventing a party from presenting an edited videotape deposition; however, it held that this was harmless error, primarily because the offering party had read the entire deposition into evidence when the court prevented him from offering the edited videotape. The court reasoned that since the jury heard the testimony, seeing the witness would have added very little. Also, while noting that non-verbal messages are important for a jury's evaluation of a witness' testimony, the Texarkana court concluded that the particular witness' credibility was not really in question, so there was no harm in excluding the videotape.

I. The Deposition Does Not Go Into the Jury Room

1. No matter what form the deposition is in when ultimately admitted into evidence, it cannot be taken into the jury room. **Harris v. Levy**, 217 S.W.2d 154 (Tex. Civ. App.--El Paso 1949, writ ref'd n.r.e.). Allowing even an exhibit to a deposition to go into the jury room has been held to be reversible error. **City of Denton v. Hunt**, 235 S.W.2d 212 (Tex. Civ. App.--Fort Worth 1950, ref'd n.r.e.). However, this may be an overly strict interpretation of the rule.

2. Tactics:

A printed chart, reflecting testimony given during trial, has been held not to be a deposition, and its being sent into the jury room not reversible error. **Fenn v.**

[40]The Texas rule contrasts slightly with the federal counterpart, Federal Rule of Civil Procedure 32(a)(4), which provides that the adverse party may require the offeror to introduce the supplemental omitted portions of the deposition.

[41]The court relied upon Texas Rules of Civil Evidence 403 in this regard.

Boxwell, 312 S.W.2d 536 (Tex. Civ. App.--Amarillo 1958, writ ref'd n.r.e.). In **Speier v. Webster College**, 616 S.W.2d 617 (Tex. 1981), the Texas Supreme Court held that it was permissible to both summarize on charts testimony given at trial and send the charts into the jury room.[42] It stands to reason that, the more accurate the chart is in relation to the actual testimony, the stronger will be the argument in support of its admissibility. If this is so, a reproduction of the deposition page would be the most accurate depiction of the testimony and should be allowed to go into the jury room. In short, while the general rule is well established, the logic behind it has been severely eroded. **Speier**, 616 S.W.2d at 618, n.2.

J. Deposition Excerpts Submitted As Summary Judgment Evidence Need Not Be Authenticated

Deerfield Land Joint Venture v. Southern Union Realty Co. was overruled in 1994 by **McConathy v. McConathy Deerfield** dealt with how to offer deposition excerpts as summary judgment evidence. In the trial court, both parties filed motions for summary judgment. Although seven depositions had been taken, none were filed with the trial court. Only the court reporters' certificates were filed, as Rule 206(1) does not require filing of the transcript, only the court reporter's certificate. Summary judgment was granted to the defendant. On appeal, both parties wanted to supplement the record with the seven deposition transcripts. The appellate court refused, on the ground that they had not been made a part of the record below for the summary judgment proceeding. The court held that a party wishing to rely on an original transcript to support a motion for summary judgment should attach it to the motion along with the court reporter's certificate to authenticate it. If the party wishes to rely only on a copy of the transcript or copies of excerpted portions, the court said, he should attach the copy along with the court reporter's certificate and his own affidavit certifying the truthfulness and correctness of the copied material. **Deerfield Land Joint Venture v. Southern Union Realty Co.**, 758 S.W.2d 608 (Tex. App.--Dallas 1988, writ denied).

In 1994 the Texas Supreme Court held that deposition excerpts submitted as summary judgment evidence do not have to be authenticated to be competent summary judgment proof. **McConathy v. McConathy**, 869 S.W.2d 341 (Tex. 1994). The Court's conclusion was informed by Texas Rules Civil Procedure 166a(d), which provides that discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs. The Court held that the Rule, which contains no authentication requirement,

---

[42] **Speier v. Webster College**, 616 S.W.2d 617 (Tex. 1981), citing **Champlin Oil & Ref. Co. v. Chastain**, 403 S.W.2d 376 (Tex. 1965), where it was held that "charts and diagrams designed to summarize or perhaps emphasize" the testimony of witnesses are, within the discretion of the trial court, admissible into evidence.

supersedes any authentication requirement articulated in **Deerfield**. **McConathy**, 869 S.W.2d at 342.

XIV. DEPOSITIONS IN FOREIGN JURISDICTIONS

A. Parties

1. A party may generally be deposed in the county of his residence, or where he is employed or regularly transacts business in person or at such other convenient place as may be directed by the court in which the cause is pending. TEX. R. CIV. P. 201(5). In addition, if the party is a corporation, partnership, association, or governmental entity, or such organization's designated representative, the deposition may be taken in the county of the suit. Id.[43]

2. Conflict of Laws

The Texas Supreme Court recently held that the attorney-client privilege will be governed by the law of the state with the most significant relationship to the communication. In **Ford Motor Co. v. Leggat**, 904 S.W.2d 643 (Tex. 1995) the Court was faced with the question of whether to apply Michigan's or Texas' law of attorney-client privilege. Ford claimed the attorney-client privilege as to a communication that took place in Michigan, and urged that the attorney-client law of Michigan should apply. The Texas plaintiffs argued for the application of Texas' attorney-client privilege law. The Court turned to the RESTATEMENT (SECOND) OF CONFLICT OF LAWS ' 139(2) (1988) which provides that

> [e]vidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

Because it took place in Michigan, that state had the most significant relationship with the communication. Following Section 139(2), the Court looked to see if there is "some special reason" to not admit the evidence despite the Restatement's policy favoring its admission. The Court concluded that the nature and purpose of the attorney-client privilege dictate that, as to that particular privilege, the forum should defer to the state with the most significant relationship to the communication. The Court cited the following factors: the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law; it is recognized by every state; its purpose, to ensure the free flow of information between

[43]This provision is subject to Rule 166b(5), which allows the court to make a protective order if necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. TEX. R. CIV. P. 201(5).

attorney and client, serves the broader societal interest of effective administration of justice; and a client must be able to confide in an attorney secure that the communication will not be disclosed. The Court said that although it may reach a different result as to other privileges, "in view of the nature and purpose of the attorney-client privilege, we hold that it will be governed by the law of the state with the most significant relationship to the communication." **Id.** at 647.

B. Nonparties

The Texas rules provide for taking the deposition of nonparties in other jurisdictions. Absent consent of a non-party, he must be deposed in the county of his residence. The important thing to remember is that a Texas court only has jurisdiction in Texas. To issue a subpoena on an individual outside of Texas you must invoke the jurisdiction of the courts in the county where the witness is located. The subpoena power emanates from that court. Rule 188 provides several alternative methods for taking a deposition of a non-party in another state or country. The deposition may be taken on notice before a person authorized to administer oaths in the other jurisdiction, either by the law of the other jurisdiction or by the law of Texas. Rule 188(1).

1. The deposition may be taken before a person commissioned by the court in which the action is pending. The commission gives the person the power to administer any necessary oath and to take testimony. Rule 188(1).

2. The deposition may be taken pursuant to a letter rogatory or a letter of request. Rule 188(1). A letter rogatory authorizes and requests the appropriate authority to summon the witness and take the deposition. Rule 188(3).

3. The deposition may be taken pursuant to the means and terms of any applicable treaty or convention. Rule 188(1).

4. Generally, the privilege rules of the jurisdiction in which the deposition is taken will apply. **Palmer v. Fisher**, 228 F.2d 603, 608 (7th Cir. 1955).

XV. DEPOSITIONS FROM OTHER PROCEEDINGS

A. Texas

1. Depositions from other proceedings may be effectively used at trial, if offered in accordance with the Texas Rules of Civil Evidence. TEX. R. CIV. P. 207(2).

2. If the deposition is taken in the "same proceeding," as that term is defined in 207(1)(b) of Texas Rules of Civil Procedure, then the deposition testimony may be

admissible regardless of whether the witness is unavailable at trial. TEX. R. CIV. EVID. 801(e)(3).

3. If a non-party witness is "unavailable" at trial, as that term is defined in Texas Rules of Civil Evidence 804(a), then the deposition testimony taken in a former proceeding will not be excluded as hearsay, provided that the party against whom the deposition is presently offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. TEX. R. CIV. EVID. 804(b)(1).

4. There is some uncertainty about what is meant by "unavailability" of the witness. In **Victor M. Solis Underground Util. & Paving Co. v. City of Laredo**, 751 S.W.2d 532 (Tex. App.--San Antonio 1988, writ denied). In **Solis**, the court considered Texas Rules of Civil Evidence 804(a)(5), which provides that "unavailability as a witness" includes situations in which the witness "is absent from the hearing and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means." At issue was the admissibility of the deposition of nonparty witness taken in a prior proceeding. The court held that the proponent of the deposition did not show that he was unable to secure the witness' attendance or testimony by process or other reasonable means. The witness lived in Laredo at the time of trial. A subpoena was issued three days before trial, but it was not served. The constable only attempted to serve it at the witness' workplace, and no one tried to reach the witness at his home. The court noted that "[i]t was known for approximately two years prior to trial that [the witness] was a potential witness, yet his deposition was never taken. Under these circumstances, therefore, the trial court correctly excluded his former testimony. "See also **White v. Natural Gas Pipeline Co.**, 444 S.W.2d 298, 303 (Tex. 1969) (even though witness lived 800 miles away and outside the reach of a subpoena, he was within the jurisdiction of the court; proponent could have taken his deposition; former deposition testimony should have been excluded). It appears, then, under **Solis** and **White**, that it is not enough to show unavailability--one must have attempted to take the witness' deposition as well. This would seem a needless imposition of additional costs.

5. In **Smith v. Smith**, 720 S.W.2d 586 (Tex. App.--Houston [1st Dist.] 1986, no writ), this interplay between the Texas Rules of Civil Procedure and Civil Evidence was interpreted and explained:

> [I]f use of a deposition from another lawsuit is permitted under TEX. R. CIV. P. 207(1), then TEX. R. EVID. 801(e)(3) dictates that such deposition testimony is not hearsay.

Smith, 720 S.W.2d at 589.

B. Federal

1. Deposition testimony taken in the course of another proceeding is not excluded from the hearsay rule as long as the party against whom it is offered, or a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, provided that the former witness is unavailable at the present trial. FED. R. EVID. 804(b)(1).

2. The parties, in the previous litigation and the immediate case do not have to be identical or in a legal relationship; instead, they must share a common goal to develop testimony. Most jurisdictions have adopted a "practical and expedient view" in this regard. See, e.g., **Lloyd v. American Export Lines, Inc.**, 580 F.2d 1179, 1184-87 (3d Cir. 1978), cert. denied, 439 U.S. 969 (adopting "practical and expedient view" that "if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party" (quoting MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE ' 256 at 619-20 (2d ed. 1972)). "Predecessor in interest" has been interpreted broadly. For a discussion of the meaning of "predecessor in interest," see **Lloyd**, 580 F.2d at 1184-87; **Dykes v. Raymark Indus., Inc.**, 801 F.2d 810, 816 (6th Cir. 1986) (preferring a definition that is realistically generous over one that is formalistically grudging; taking the "practical and expedient view" as in **Lloyd**, supra); **In the Matter of Johns-Manville/Asbestos Cases**, 93 F.R.D. 853, 856 (N.D. Ill. 1982) (searching for a "sufficient community of interest" or a "like motive" for cross-examination, and stating that Congress did not intend to use "predecessor in interest" in the strict sense of corporate privity); and **Clay v. Johns-Manville Sales Corp.**, 722 F.2d 1289, 1294-95 (6th Cir. 1983).

3. A prior party's choice to limit the scope of cross-examination will not bar the use of the deposition. In **Hendrix v. Raybestos-Manhattan**, 776 F.2d 1492, 1506 (11th Cir. 1985), the court allowed the use of a deposition from a previous case even though the defendant limited his cross-examination. The court reasoned that he had the opportunity to cross-examine but made a strategic choice and a calculated risk to confine his cross-examination.

4. If the court determines that the relevance of the depositions from the prior litigation outweighs its prejudicial effect, then they may be admitted into evidence pursuant to FED. R. EVID. 804(b)(1). A deposition from a previous case is an exception to the hearsay rule. In the alternative, some courts have admitted prior depositions under the residual hearsay exception. See FED. R. EVID. 804(b)(5); **Dartez v. Fibreboard Corp.**, 765 F.2d 456, 461-63 (5th Cir. 1985); see also **United States v. Thevis**, 665 F.2d 616, 629 (5th Cir.), cert. denied, 459 U.S. 825 (1982) (admission of prior grand jury testimony under residual hearsay exception). In order to use either of these exceptions to the hearsay rule, the declarant must be unavailable. See FED. R. EVID. 804(b).

5. Procedurally, the proponent's counsel should submit copies of the depositions to opposing counsel in a Rule 36 request for admissions. Counsel ought to ask that the accuracy of the depositions be admitted. If the defendant admits that the depositions are authentic, then the foundation is complete. Boon to Design-Defect Cases: Rule 804(b)(1), Leaders Prod. Liab. Law & Strategy, Vol. VIII, No. 8, at 4 (February 1990). If counsel denies their authenticity, then one must take the deposition of the court reporter who will establish that the proper procedures were followed and the depositions are authentic. Id.

C. Tactical Considerations:

1. Using depositions from other lawsuits can be an incredibly effective and cost-efficient technique at trial. For example, in a product liability case against a manufacturer for a defect that has been the subject of litigation all over the country, and the defendant's managers, directors, agents[44] and experts have been previously deposed on one or more occasions, it may be possible, absent protective orders entered in the other cases,[45] to not only obtain the depositions, but also use them as evidence in your trial.

2. One potential advantage of this tactic is that you might obtain the original deposition of the key witnesses when they were first deposed on the subject and had not yet perfected their responses or delivery. The witness may no longer be available either by death or disappearance. The person who took the deposition may have been superbly prepared and an excellent cross-examiner. These advantages would be even further accentuated if by fortuity the deposition were videotaped.

XVI. DEPOSITIONS TAKEN BEFORE ALL PARTIES ARE JOINED

A. Rule 207(1)(c)

In multiparty litigation, a number of depositions are often taken before all the parties are joined. When a new party is added, the deposition may be used against it only if it is shown that the new party's interests are similar to those of a party who was present at, or

---

[44]The Supreme Court of Texas has ruled that the Chairman of the Board, major shareholder, and past president of a corporation (Sam Walton) may be found to be an agent of the company, subject to its control--and under TEX. R. CIV. P. 201(3), available for deposition. **Wal-Mart Stores, Inc. v. Street**, 754 S.W.2d 153, 154 (Tex. 1988).

[45]See generally **Garcia v. Peeples**, 734 S.W.2d 343 (Tex. 1987) (The Texas Supreme Court examines the use of confidentiality orders and holds that generally they are in contravention of the purpose of the Rules of Civil Procedure (See TEX. R. CIV. P. 1) and should not be condoned: "[T]exas courts should be guided by a principle encouraging the free exchange of information and ideas. Tex. Const. art. I ' 8; **Ex Parte Uppercu**, 239 U.S. 435, 440 (1915)."); **Chapa v. Garcia**, 848 S.W.2d 667 (Tex. 1992) (Doggett, J., concurring).

represented at, or given reasonable notice of the depositions. It must also be shown that the new party had an opportunity to redepose the deponent and failed to exercise the opportunity. TEX. R. CIV. P. 207(1)(c).

B. New Party Has Burden to Demonstrate It Did Not Have Reasonable Opportunity to Depose Witness

Rule 207(1)(c) shifts the burden to the newly added party to demonstrate that it did not have a reasonable opportunity to depose a witness who had been deposed before the new party was added. In **Stevenson v. Kourtzarov**, 795 S.W.2d 313 (Tex. App.--Houston [1st Dist.] 1990, writ denied), the newly added parties were able to successfully demonstrate that their interests were not similar to those of parties who participated in the original depositions and that they had good cause for not having previously tried to take the witness' deposition because her testimony was irrelevant to their interests in the case, until the plaintiff, ten days before trial amended his petition to add a new complaint against them. The appellate court held that the trial court committed reversible error in allowing the deposition to be used at trial.

C. New Party Must Make Specific Objection

If a deposition is offered at trial and one party wishes to keep it out because it alleges it did not have a reason to cross-examine the witness in the prior proceeding, it must make a specific objection to the particular portions of the deposition that it claims are inadmissible. An objection simply that the motives of the parties originally taking the deposition were different from those of the objecting party has been held to be inadequate, resulting in the waiver of objection. **Celotex v. Tate**, 797 S.W.2d 197 (Tex. App.--Corpus Christi 1990, no writ).

D. Finesse the Reasonable Opportunity

An effective, cost-efficient way to finesse the reasonable opportunity for retaking the deposition would be to renotice the previous deposition, but this time on written questions. The noticing party would attach a copy of the prior deposition transcript to the notice and merely propound a few questions to authenticate the previous deposition and verify that it fairly and accurately represents the witness' sworn testimony. The new parties must then either file written cross-questions or conduct an oral examination of the witness. See **Morehouse v. Brink**, 647 S.W.2d 712, 715 (Tex. App.--Corpus Christi 1982, no writ).

XVII. TELEPHONE DEPOSITIONS

A. Texas

1. The parties may stipulate, or the court may upon motion order, that a

deposition be taken by telephone. TEX. R. CIV. P. 202(2).

2. In **Clone Component Distributors, Inc. v. State**, 819 S.W.2d 593 (Tex. App.--Dallas 1991, no pet.) the Dallas Court of Appeals held that it is not necessary that the court reporter be in the room with the deponent, either for the swearing in or for the recording. The reporter can take the witness' oath and record the testimony over the telephone. **Id.** at 598.

The court also suggested how to deal with the objection that the attorneys, the witness, and the court reporter will be unsure of which exhibits have been identified and whether the deponent at one end of the telephone line has copies of the same exhibits as the attorneys at the other end of the line. One solution, according to the court, is to send the witness, ahead of time, marked copies of the exhibits and to have the witness identify the exhibits in his possession during the deposition. "The witness should then be instructed to examine the exhibits in the deposition when he receives it for his signature and to note any discrepancies on the deposition before signing it." **Id.** at 599-600. Another solution suggested by the court is to send a copy of the exhibit to the witness during the deposition by fax.

B. Federal

1. The federal rule is nearly identical to the Texas rule. It allows for telephone depositions upon stipulation of the parties or upon court order. The deposition is considered to be taken in the district and at the place where the deponent is to answer questions. FED. R. CIV. P. 30(b)(7).

2. Telephone depositions can be a very cost-effective device, particularly when the amount of testimony needed from the witness is marginal (e.g., character, or "grunt and groan" witnesses), and the cost of traveling to the deposition would be prohibitive. The problems with this technique are logistical. Generally, the court reporter should be located where the witness is presented, and speaker phones need to be used. In addition, videotaping the telephone deposition is a good technique for keeping everyone honest and keeping the jury interested.

3. It has been held that leave to conduct a telephone deposition should be liberally granted, and that the movant need only demonstrate a "legitimate reason." **Jahr v. IU Int'l Corp.**, 109 F.R.D. 429, 431-32 (M.D. N.C. 1986).

XVIII. VOLUNTARY WAIVER OF PRIVILEGE

A. General Rule

If a party requesting discovery asserts that the party from whom the discovery is sought has voluntarily waived its privilege as to such documents and things, it is the burden of the party responding to the discovery request to prove that no waiver has occurred. See **Jordan v. Fourth Court of Appeals**, 701 S.W.2d 644, 649 (Tex. 1985);[46] **Arkla, Inc. v. Harris**, 846 S.W.2d 623 (Tex. App.--Houston [14th Dist.] 1993, orig. proceeding).

B. Rule 511 TEX. R. CIV. EVID.: Waiver by Voluntary Disclosure

1. Rule Stated:

A person upon whom these rules confer a privilege against disclosure waives the privilege if (1) he or his predecessor while holder of the privilege **voluntarily discloses or consents** to disclosure of **any significant part** of the privileged matter **unless** such disclosure itself is privileged, or (2) he or his representative calls a person to whom privileged communications have been made to **testify** as to his **character** or a **trait of his character** insofar as such communications are relevant to such character or character trait. (Emphasis added.)

2. Documents Reviewed by Testifying Experts:

Privileges as to documents relied upon by the expert may be deemed as having been waived. **Aetna Casualty & Surety Co. v. Blackmon**, 810 S.W.2d 438 (Tex. App.--Corpus Christi 1991, orig. proceeding). Although the decision did not discuss whether an expert "reviewing" such documents would result in the same effect, it is arguable it would under the same rationale applied by the court.

C. Rule 612 TEX. R. CIV. EVID.: Writing Used to Refresh Memory

1. Rule Stated:

If a witness uses a writing to refresh his memory for the purpose of testifying either (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interest of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the

[46] While this case discusses the burden of proving non-waiver it does not address the issue of how waiver should procedurally be raised.

writing contains matters not related to the subject matter of the testimony, the court shall examine the writing *in camera*, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires. (emphasis added.)

2. Texas Case Law:

a. In **City of Denison v. Grisham**, 716 S.W.2d 121 (Tex. App.--Dallas 1986, orig. proceeding), the Court of Appeals held that, when a witness refreshes his recollection from documents, while testifying during a deposition, the deposing party has a right to inspect the documents, and the trial court has no discretion to deny this right. The court further held that use of a writing to refresh the memory of a witness while he is testifying waives both attorney/client privilege and work product protection of the documents.

b. **Grisham** focuses almost exclusively on the situation where a witness refreshes his recollection while testifying and provides very little or no guidance with respect to how the situation should be handled where the witness refreshes his recollection before testifying. In this connection the federal case law interpreting the federal counterpart of Rule 612 can be instructive, particularly with regard to the balancing the competing interests of the need for the information versus the protection of privileged matters.

3. Federal Case Law:

Since FED. R. EVID. 612 was enacted in 1975, there have been a number of cases holding that documents used to refresh recollection before a deponent's deposition are, to one extent or another, discoverable.[47] See, e.g. **Audiotext Communications Network, Inc. v. US Telecom, Inc.**, 164 F.R.D. 250 (D. Kansas 1996); **Ehrlich v. Howe**, 848 F. Supp. 482 (S.D. N.Y. 1994); **In re Shell Oil Refinery**, 125 F.R.D. 132 (E.D. La. 1989); **In re Joint Eastern and Southern District Asbestos Litigation**, 119 F.R.D. 4 (S.D. N.Y. 1988); **United States v. Acres of Land**, 107 F.R.D. 20, 25 (N.D. Cal. 1985); In re Comair Air Disaster Litigation, 100 F.R.D. 350, 353 (E.D. Ky. 1983); **Barrer v. Women's National Bank**, 96 F.R.D. 202 (D. D.C. 1982); **James Julian, Inc. v. Raytheon Co.**, 93 F.R.D. 138 (D. Del. 1982) (cited in **Grisham**); **Wheeling-Pittsburgh Steel Corporation v. Underwriter's**

[47] There is a line of cases that holds that things selected by an attorney for a witness to review should be protected. See **Sporck v. Peil**, 759 F.2d 312, 317 (3d Cir. 1985), cert. denied, 474 U.S. 903 (1985); **Shelton v. American Motors Corp.**, 805 F.2d 1323 (8th Cir. 1986); **Santiago v. Miles**, 121 F.R.D. 636 (W.D. N.Y. 1988). However, these opinions have been strongly criticized. See **In re San Juan Dupont Plaza Hotel Fire Litigation**, 859 F.2d 1007 (1st Cir. 1988).

Laboratories, Inc., 81 F.R.D. 8 (N.D. Ill. 1978) (cited in **Grisham**); **Prucha v. M & N Modern Hydraulic Press Co.**, 76 F.R.D. 207 (W.D. Wis. 1977). In **Dederian v. Polaroid Corp.**, 121 F.R.D. 13 (D.C. Mass. 1988), it was held that where, before testifying, a witness refreshed her recollection from a personal diary her attorney instructed her to keep in preparation for trial, the other side, absent a demonstration that the notes were "necessary in the interests of justice," was not entitled to have the documents produced.

D. Rule 166b(3)(b) TEX. R. CIV. P.: Work Product of Consulting Experts Reviewed by Testifying Experts

1. Rule Stated:

> **Experts.** The identity, mental impressions and opinions of an expert who has been informally consulted or of an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial or any documents or tangible things containing such information if the expert will not be called as an expert witness, **except that** the identity, mental impressions and opinions of an expert who will not be called to testify as an expert and any documents or tangible things containing such impressions and opinions are discoverable if the consulting expert's opinion or impressions have been reviewed by a testifying expert. (emphasis added.)

2. Considerations:

Consider whether the above rules and decisions regarding voluntary waiver would apply in the event that a party's testifying expert witness were to inadvertently be provided a consultant's report, which he were then to review. Nothing in the rule indicates that the providing of the report or the review has to be intentional; therefore, it could be argued that there is no exception to the waiver if it occurs.[48]

[48]See **Gulf Oil Corp. v. Fuller**, 695 S.W.2d 769 (Tex. App.--El Paso 1985, orig. proceeding).