

Tulsa Law Review

Volume 16 | Issue 2

Winter 1980

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Recommended Citation

Sidney G. Dunagan, & Ronald N. Ricketts, *An Overview of Pre-Trial Preparation for Business Related Litigation*, 16 Tulsa L. J. 139 (2013).

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TULSA LAW JOURNAL

Volume 16

1980

Number 2

AN OVERVIEW OF PRE-TRIAL PREPARATION FOR BUSINESS RELATED LITIGATION

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I. INTRODUCTION

Though personal-injury litigation certainly may be complex by any trial lawyer's standard, business-related litigation is generally more exacting in terms of organization and analysis in the pre-trial stage and often so during the course of the trial itself. The importance of the selection of the proper theories of relief or defense and the necessity for some form of immediate relief forces the practitioner engaging in business-related litigation to assess and analyze his case at the earliest possible stage in order to achieve the best possible results throughout the entire civil process.

The following discussion is intended as an overview of various considerations and some practical techniques which may be helpful in preparing for business-related litigation, from both the position of the plaintiff and defendant.

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II. INITIAL FACT FINDING RESEARCH AND CASE ANALYSIS

A. *Obtaining Underlying Facts to Support Claims for Relief or Defense*

All too frequently it is observed that an action has been filed or a defense pleaded before it was carefully thought out. The facts upon which the plaintiff or defendant were relying did not support the particular theory of relief or defense asserted.¹

At the outset, counsel must make every effort to obtain as much factual information as is available from the client concerning the matters in controversy. Counsel, if time permits, may wish to attempt to verify from other sources the allegations made to corroborate or support the position taken by the client. To accomplish initial fact finding, it is recommended that interviews with one's own clients and employees be summarized in memorandums prepared either by counsel or someone under counsel's supervision. These may be used initially to assist counsel in his preliminary analysis and later, as the case progresses, for quick recall of facts and for source references to obtain more facts on particular issues. In addition to these memorandums, counsel may desire to take sworn statements, either in the form of affidavits or statements given to a court reporter using a "question-and-answer" format.² The advantage of the prepared sworn statement or transcribed statements prepared by a court reporter is that it generally causes witnesses to take the matter more seriously and serves as a reminder to them of the original position which they have taken on a particular issue. A witness' willingness to state, under oath, what he knows concerning a particular matter is a solid indication he will be willing to testify to those facts at trial. The value of the sworn statement becomes apparent when the attorney has taken a position based upon a witness' verbal statement only later to have the witness either

1. *E.g.*, *Vinzant v. Hillcrest Medical Center*, 609 P.2d 1274 (Okla. 1980). In an appeal of a declaratory judgment Hillcrest challenged appellee's allegation of venue in Rogers County, Oklahoma, as improper and argued that the patient resided in Tulsa County and that therefore Tulsa County was the only county where the action could be properly brought. The supreme court held that the evidence presented to the trial court was sufficient for it to conclude that the patient's residence was in Rogers County. *Id.* at 1276. *Accord*, *Johnston v. Woodard*, 376 P.2d 602 (Okla. 1962) (holding that a defendant who failed to raise the affirmative defenses of laches and estoppel in trial court could not raise them on appeal); *City of McAlester v. King*, 317 P.2d 265 (Okla. 1957) (holding that while the original petition failed to state a cause of action, an admission of evidence, without an objection, was sufficient to prove compensable injuries).

2. OKLA. STAT. tit. 12, § 421 (1971) provides that the testimony of witnesses can be taken in three forms: affidavit, deposition, and oral examination.

deny, forget, or refute his previous statement. If possible, the attorney should find out at the earliest possible stage those witnesses who will support his client's allegations and will do so at trial, if necessary.

In addition to obtaining statements from the client and witnesses, it is essential to obtain all the documentary evidence available which may relate to the dispute. It is rare that a client will be able to produce all the "relevant" documents. This is because it is difficult to determine at an early stage what is "relevant." When the attorney knows what types of documents his client or others may have, he should begin his review with those documents which appear to set out the transaction or situation in controversy in the most general terms. Often, correspondence files are the best place to start. He should then proceed into a more detailed review of invoices, purchase orders and the like. Generally, the attorney should have his client produce the documents which he anticipates his opponent might request in a motion to produce. As is often discovered, documents frequently do not support verbal contentions. Therefore, it is better to obtain an explanation of a document prior to the bringing of an action or asserting a defense, than later trying to explain it after a position has already been taken.

In some instances, obtaining an expert prior to the filing of an action or the asserting of a defense may be necessary. The expert may be used to analyze the transactions between the plaintiff and the anticipated defendants to determine, for example, whether the events the plaintiff has alleged resulted in any actual damages or whether market trends may have had an impact on the plaintiff equivalent to or greater than any actions of the potential defendants. In actions relating to anti-trust, unfair trade practices, for example, a meeting with an economist, or similarly qualified expert, to discuss the facts of the case might be helpful to avoid future pitfalls and to prepare the attorney for obtaining evidence to further support his client's position. As some cases rest entirely on the testimony of expert witnesses, obtaining the proper expert prior to the filing of the action is essential.³

B. *Determining Appropriate Theories of Recovery or Defense*

Once the material facts have been obtained concerning the events surrounding a client's claim or defense, counsel must then determine what theories of recovery or defense are available under those facts. Consideration should be given to both legal and equitable theories.

3. See notes 111-118 *infra* and accompanying text.

A business-related civil action frequently involves claims based in contract, tort, and equity.⁴ For example, litigation frequently arises when an employee departs from his employment with alleged trade secrets and customer lists and begins employment with a competitive organization. The situation may give rise to contract claims for the breach of an employment agreement, to tort claims for deceptive trade practice, unfair competition, tortious interference with contract or business relationships, and civil conspiracy; and to possible statutory claims under both state and federal antitrust laws as well as the deceptive trade practice laws. Equitable issues may also arise as to whether the ex-employee and his new employer may be enjoined from the alleged trade secrets and customer lists and disparagement.

Business-related litigation is often well suited for equitable theories of relief, such as injunctive relief which can frequently be obtained more quickly than relief under a pure action at law.⁵ When a temporary injunction to enjoin a business activity is successfully obtained at the initial stage of the litigation, the court will have already heard the facts upon which a substantial portion of the litigation will be based.⁶ As a result, it is not unusual for the litigation to terminate at an early stage, particularly if the paramount issue in the case is injunctive relief. Most defendants do not wish to retry what has already been decided against them and will frequently opt for a hearing on a temporary injunction which can usually be obtained within thirty days of the filing of the complaint.⁷ The seeking of temporary injunctive relief can be a useful tool to obtain swift relief and a rapid conclusion to litigation.

4. See, e.g., *Telex Corp. v. International Business Machs. Corp.*, 510 F.2d 894 (10th Cir. 1975) (involving an antitrust action brought against the manufacturer of electronic data processing systems and a counterclaim by the defendant alleging unfair competition and misappropriation of trade secrets and confidential information); *Central Plastics Co. v. Goodson*, 537 P.2d 330 (Okla. 1975) (involving action for unfair competition by reason of alleged misappropriation and wrongful use of trade secrets).

5. FED. R. CIV. P. 65; OKLA. STAT. tit. 12, § 1381, et seq. (1971). Rule 65(a) provides for a preliminary injunction and permits the trial court to order the trial on the merits to be advanced and consolidated with the hearing on the temporary injunction. Under federal practice, evidence received upon the application for the preliminary injunction which would be admissible at the trial on the merits is considered part of the record at the trial and need not be repeated. OKLA. STAT. tit. 12, § 1382 permits the issuance of a temporary injunction "[w]hen it appears, by the petition, that the plaintiff is entitled to the relief demanded, and such relief . . . consists in restraining the commission of continuance of which, during the litigation, would produce injury to the plaintiff . . ." See generally, *Annual Survey of Oklahoma Law: Pleadings and Procedure*, 2 OKLA. CITY U.L. REV. 337, 399 (1977); *Annual Survey of Oklahoma Law: Pleadings and Procedure*, 3 OKLA. CITY U.L. REV. 314, 354 (1978).

6. See FED. R. CIV. P. 65(a)(2).

7. The time when a suit for an injunction can be heard is dependent upon the statutes and court rules of the jurisdiction governing the defendant's time for answer or appearance. 43A.

When determining the theories upon which a party elects to proceed, it must be kept in mind that the paramount issues as set forth in the pleadings will determine whether a party will be entitled to a jury.⁸ If the paramount issue is one of equity, then there will be no jury and the case will be tried to the judge alone.

C. *Initial Assessment of Client's Claim or Exposure to Liability and Damages*

At the earliest point possible in the initial fact-finding process, a general assessment should be made as to the potential liability under the known or pleaded facts. Moreover, a determination must be made as to whether actual damages can be shown. The purposes for this assessment are twofold: first, to advise the client of potential exposure and second, to enable counsel to determine the value of the pursuit of litigation. All too often, there is liability and no actual loss or loss but no legal theory upon which to proceed.

D. *Jurisdiction and Venue Considerations*

Prior to filing a petition or complaint or the filing of an initial response to either, consideration must be given as to whether jurisdiction⁹ and venue¹⁰ are proper. Subject matter jurisdiction, unlike in personam jurisdiction, cannot be waived. Where a court does not have

C.J.S. *Injunctions* § 226 (1978). In Oklahoma, the defendant has twenty days to answer. OKLA. STAT. tit. 12, § 283 (1971).

8. *Luke v. Patterson*, 192 Okla. 631, 139 P.2d 175 (1943) (holding that in an action on contractual indebtedness and to foreclose the mortgage security, when the defendant pleads a defense that only a court of equity may entertain, the action is one of equitable cognizance and the verdict of the jury is advisory only and the court should make its own findings on the factual issues); *Reynolds v. Conner*, 190 Okla. 323, 123 P.2d 664 (1941) (holding that an action to enforce specific performance of an oral contract to devise real property in consideration of services to be performed or in the alternative to recover the value of such services or, quantum meruit, is of equitable cognizance). *But see* FED. R. CIV. P. 39 which provides for trial in federal courts of both jury and non-jury questions. *See also* *Bruckman v. Holzer*, 152 F.2d 730 (9th Cir. 1946). The Ninth Circuit held that the Federal Rules of Civil Procedure provide a party having a claim triable by jury at common law, the power to preserve that right when that claim is joined with other equitable claims. The court also required a trial by jury on the issue of damages before a discussion of the equitable issues. *Id.* at 732.

9. In Oklahoma, a trial court's jurisdiction over the person of the defendant is determined under OKLA. STAT. tit. 12, §§ 187, 1701.03 (1971) and FED. R. CIV. P. 4, subject, of course, to court established boundaries. *E.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) *rev'g*, 585 P.2d 351 (Okla. 1978). *See generally* Note, *State Adjudicatory Jurisdiction Over Nonresident Defendants*, 15 TULSA L.J. 827 (1980).

10. Oklahoma's general venue statutes are found at OKLA. STAT. tit. 12, §§ 131-43. The general federal venue statute for diversity and federal question actions is found at 28 U.S.C. § 1391 (1976).

subject matter jurisdiction, any judgment rendered therein will be void.¹¹

Where one has a choice of jurisdictions, a determination must be made as to which of the available forums has had more experience in dealing with complex business problems. As a general rule, the more experienced the judge is with complex types of business-related litigation, the better position trial counsel will be in if his case or defense has any merit. Even where jurisdiction and venue are proper, a defendant may be able to assert a claim of forum non conveniens which may effectively remove the action from the forum in which the plaintiff has elected to proceed.¹² In Oklahoma state court practice, the issue of forum non conveniens must be raised before the defendant has answered, or it is considered waived.¹³

E. *Outline Anticipated Discovery*

In preparing the prosecution or defense of an action, counsel should compose an outline of what discovery will be necessary to develop the admissible evidence. A determination should be made as to whether further statements of witnesses should be taken or whether depositions are necessary for particular witnesses. Consideration must also be given to the extent of document production that will be required, the evidence that may be obtained through requests for admissions, and the nature and type of interrogatories which may be necessary. As the case progresses, the outline should be continually updated regarding what additional evidence is needed and the method by which it can be best obtained.

III. SELECTING A FAVORABLE FORUM

The initial consideration in any lawsuit is to determine whether more than one forum is available to resolve the dispute and, if so, pur-

11. FED. R. CIV. P. 60(b)(4); *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir. 1974) (holding that a void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside); OKLA. STAT. tit. 12, § 1031 (1971); *Cassina v. Jones*, 340 P.2d 482 (Okla. 1959) (holding that in an action to set aside that part of a final decree ordering a life estate in homestead to widower of intestate that the court was without power to make an order or decree giving the widower a life estate where the facts indicated that no life estate in homestead had been created prior to intestacy). *See also* notes 14-55 *infra* and accompanying text.

12. *Gulf Oil Co. v. Woodson*, 505 F.2d 484, 490 (Okla. 1972), 28 U.S.C. § 1404 (1976) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

13. *Haliburton Co. v. District Court*, 525 P.2d 628, 630 (Okla. 1974).

suing that forum which offers the best advantage to your client. Concurrent jurisdiction may exist between a state and federal court, the courts of two or more states, or between the courts and an administrative agency. Indeed, arbitration, as an alternative to litigation itself, should be considered at the outset.

A. *Arbitration or Litigation*

On October 1, 1978, the Uniform Arbitration Act¹⁴ became effective in Oklahoma, and for the first time in the state, an alternative to litigation was available for the final resolution of disputes. The Act makes valid any written agreement between parties to submit an existing or future controversy to arbitration.¹⁵ Additionally, the Act makes such agreements judicially enforceable by application to the state district court for an order directing arbitration.¹⁶ Likewise, the Act confers jurisdiction on the district court to enter judgment upon the

14. OKLA. STAT. tit. 15, §§ 801-818 (Supp. 1 1980).

15. *Id.* § 802 reads:

A. This act shall apply to a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. This act shall not apply to collective bargaining agreements or contracts with reference to insurance except for those contracts between insurance companies.

B. The term "court" as used in this act means any court of competent jurisdiction of this state. The making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder.

16. *Id.* § 816 lists the various county district courts to which the application for arbitration may be made:

An initial application shall be made to the district court in the county in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise the application shall be made in the county where the adverse party resides or has a place of business in this state, to the district court in any county of this state. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

Additionally, the procedure to be followed by the district court in ordering arbitration by the parties and staying the arbitration proceedings is determined by OKLA. STAT. tit. 15, § 803:

A. On application of a party showing an agreement described in section 802 of this title and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue raised and shall order arbitration if the court resolves the issue in favor of the moving party; otherwise, the application shall be denied.

B. On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no valid agreement to arbitrate. Such an issue shall be summarily tried. If the issue is resolved in favor of the moving party, the court may order a permanent stay of such proceeding. If the issue is resolved in favor of the opposing party, the court shall order the parties to proceed to arbitration.

C. If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under

arbitration award,¹⁷ and requires the court clerk to place that judgment on the judgment roll.¹⁸

Procedurally, the Act provides that parties are entitled to a hearing¹⁹ at which they may be represented by counsel,²⁰ present evidence, and cross-examine witnesses. The arbitrators are vested with subpoena powers and may authorize the depositions of witnesses unable to attend

subsection A of this section, the application shall be made to that court. Subject to section 816 of this title the application may be made in any court of competent jurisdiction.

D. Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this act or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

E. An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or because any fault or grounds for the claim sought to be arbitrated have not been shown.

17. *Id.* § 813(D) provides:

Upon the granting of an order confirming, modifying or correcting an award, a judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements, may be awarded by the court.

18. *Id.* § 814 states:

A. On entry of judgment or decree, the court clerk shall prepare the judgment roll consisting, to the extent filed, of the following:

1. The agreement and each written extension of the time within which to make the award;

2. The award;

3. A copy of the order confirming, modifying or correcting the award; and

4. A copy of the judgment or decree.

5. The judgment or decree may be docketed as if rendered in an action.

19. The technical requirements of the arbitration hearing are contained in *id.* § 805:

Unless otherwise provided by the agreement or this act:

1. The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this act.

2. The arbitrators shall appoint a time and place for hearing and cause notification to the parties to be served personally or by registered mail not less than five (5) days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary. On request of a party and for good cause, or upon their own motion, the arbitrators may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

3. The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

4. The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

20. The right to counsel under the Act is not qualified by previous waiver under *id.* § 806:

A party has the right to be represented by an attorney at any proceeding or hearing under this act. A waiver of such right prior to the proceeding or hearing shall have no force or effect.

the hearing.²¹ Subsequent to an award, application may be made to the district court to either confirm,²² modify or correct,²³ or vacate the award.²⁴ The grounds for modifying an award center on a showing of

21. *Id.* § 807 provides:

A. The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served and upon application to the court by a party or the arbitrators, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action.

B. On application of a party and for use as evidence, the arbitrators may authorize a deposition to be taken of a witness who cannot be subpoenaed or is unable to attend the hearing, in the manner and upon the terms designated by the arbitrators under the laws for such procedure of this state.

C. All provisions of law of this state compelling a person under subpoena to testify are applicable.

D. Fees for attendance as a witness shall be the same as for a witness in a district court of this state.

22. *Id.* § 811 provides:

Upon application of a party to the agreement, the court shall confirm an award, unless within the time limits imposed herein grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections [812 and 813 of this title].

23. Modification or correction of an arbitration award is authorized by *id.* § 809:

On application of a party or, if an application to the court is pending under this act, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in Section [813 of this title] or for the purpose of clarifying the award. The application shall be made within twenty (20) days after delivery of the award to the applicant. Written notice of the application shall be given the opposing party. Any objections by the opposing party shall be submitted to the court or arbitrators within ten (10) days from receipt of the notice. The award so modified or corrected is subject to the provisions of Sections [811, 812 and 813 of this title.]

24. The provisions for vacating an award are governed by *id.* § 812:

A. Upon application of a party, a court shall vacate an award if:

1. The award was procured by corruption, fraud or other illegal means;
2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
3. The arbitrator exceeded their powers;
4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the requirements of this act, as to prejudice substantially the rights of a party; or

5. There was no arbitration agreement and the issue was not adversely determined in proceedings under Section [803] of this act and the party did not participate in the arbitration hearing without raising the objection.

B. The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

C. An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant. If predicated upon corruption, fraud or other illegal means, the application shall be made within ninety (90) days after such grounds are known or should have been known.

D. When vacating the award on grounds other than stated in paragraph 5 of subsection A of this section, the court may order a rehearing before new arbitrators chosen as provided in the agreement. In the absence of such provision, new arbitrators shall be chosen by the court in accordance with Section [804] of this act. If the award is vacated on grounds set forth in paragraphs 3 and 4 of subsection A of this section, the court may order a rehearing before the arbitrators who made the award or their succes-

technical errors, such as miscalculation and misdescription,²⁵ that do not go to the merits of the award. Judicial vacation of an award requires a showing of fraud, prejudice, or misconduct on the part of the parties or the arbitrators.

Arbitration should be given particular consideration where the disagreeing parties anticipate and desire a continuing business relationship, but need a simple, quick, convenient, and private forum to resolve existing or future disputes between them. Likewise, if a technical knowledge of the subject would be helpful, arbitration offers the advantage of a forum in which the arbitrators may be preselected based on their familiarity with the subject matter of the dispute. However, arbitration will likely prove less satisfactory than litigation in disputes where extensive discovery and formal pre-trial proceedings are necessary, a large monetary claim is at stake, or the parties are particularly hostile, and future business dealings are unlikely. Because arbitrators are not bound by the rules of law or evidence, one disadvantage to arbitration can be the unpredictability of results.²⁶

It should be noted that many of the disadvantages of arbitration may be avoided by including in the arbitration agreement provisions which afford the right to pre-trial discovery, provide that legal precedent be honored, and that an arbitrator with a legal as well as technical

sors appointed in accordance with Section [804] of this act. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

E. If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

25. Grounds for modification or correction of awards are explained in *id.* § 813:

A. Upon application made within ninety (90) days after delivery of a copy of the award of the applicant, the court shall modify or correct the award when:

1. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

2. The award is imperfect in a matter of form, not affecting the merits of the controversy; or

3. The arbitrators have made an award upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted.

B. If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as modified and corrected. Absent any modification or correction, the court shall confirm the award as made.

C. An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

26. See Bowman, *Oklahoma's New Uniform Arbitration Act*, 50 OKLA. B.A.J. 1337 (1979) for a general discussion of the advantages and disadvantages of arbitration, explanation of the provisions of the Act, as well as a thorough bibliography and relevant annotations concerning nationwide use of arbitration. See generally Sanbar & Pataki, *Arbitration and Screening Panels in Medical Malpractice*, 3 OKLA. CITY U.L. REV. 33 (1978); Comment, *Arbitration: Uniform Act in Oklahoma*, 32 OKLA. L. REV. 652 (1979).

background be selected. Finally, the Act provides the safeguard of an appeal from a district court order confirming, modifying, or vacating an award, and directs that the appeal be taken in the same manner as in any other civil action.²⁷

B. *State or Federal Court*

In order to determine whether concurrent subject matter jurisdiction over a dispute exists in both federal and state court, it is necessary to ascertain whether the federal court, which has the more limited access of the two forums, has jurisdiction. Basically, original federal district court jurisdiction falls into three classes:

- (1) Federal question jurisdiction, involving issues arising under the United States Constitution, treaties or statutes;²⁸
- (2) Diversity jurisdiction, involving citizens of different states and an amount in controversy exceeding \$10,000.00; and²⁹
- (3) Express jurisdiction, involving those disputes where Congress has expressly conferred jurisdiction in the federal district courts, regardless of the amount involved or citizenship of the litigants.³⁰

Where concurrent jurisdiction exists, the plaintiff, of course, enjoys the right of initial selection through the option of filing in either the

27. OKLA. STAT. tit. 15, § 817 (Supp. 1 1980) provides:

A. An appeal may be taken from:

1. An order denying an application to compel arbitration made under Section [803 of this title;]
 2. An order granting an application to stay arbitration made under Section [803 of this title;]
 3. An order confirming or denying confirmation of an award;
 4. An order modifying or correcting an award;
 5. An order vacating an award without directing a rehearing; or
 6. A judgment or decree entered pursuant to the provisions of this act.
- B. The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

28. The \$10,000 amount in controversy for federal questions has been totally eliminated by the Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 49 U.S.L.W. 196 (Jan. 13, 1981).

29. 28 U.S.C. § 1332 (1976). For the purposes of determining diversity, a corporation is deemed a citizen of any state in which it is incorporated and where it has its principal place of business.

30. In these instances, grants of jurisdiction to the federal district courts are generally exclusive, so concurrent jurisdiction does not exist. Particular areas given original federal jurisdiction include: admiralty and maritime, *id.* § 1333; bankruptcy, *id.* § 1334; patents and copyrights, *id.* § 1338; commerce and anti-trust regulations, *id.* § 1337.

state or federal court.³¹ A defendant, however, may also have the right to exercise control over the forum by effecting removal of the lawsuit from state to federal court.³² No equivalent right exists to remove a properly-filed federal court case to state court. In order to remove a state action to federal court, the case must be one in which it appears from either the original or amended complaint that the federal court would have had federal question, diversity, or express federal jurisdiction.³³ A plaintiff can effectively prevent anticipated removal by limiting his prayer to less than the \$10,000.00 jurisdictional amount.³⁴

One significant factor in forum selection is whether the desired forum will have jurisdiction over the entire dispute or only a portion of it. In the case of the more exclusive federal forum, this includes analyzing the applicability of the doctrine of pendent jurisdiction.³⁵ The pendent jurisdiction doctrine is pertinent to controversies in which federal question jurisdiction is applicable in part, but which also involve a claim or

31. Two common methods of manufacturing federal diversity jurisdiction are the appointment of out-of-state representatives and the assignment of claims. Both have been closely scrutinized by courts interpreting 28 U.S.C. § 1359 (1976) which reads: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." See *McSparran v. Weist*, 402 F.2d 867 (3rd Cir. 1968) (out-of-state guardian appointed to prosecute resident minor's injury suit in federal district with high verdict reputation was manufacture of diversity since other duties to his ward were only nominal); *Kramer v. Caribbean Mills*, 394 U.S. 823 (1969) (assignment to an attorney for \$1 to obtain diversity in an alienage suit held to be collusive).

Delivering the opinion in *Kramer*, Mr. Justice Harlan explained:

If federal jurisdiction could be created by assignments of this kind, which are easy to arrange and involve few disadvantages for the assignor, then a vast quantity of ordinary contract and tort litigation could be channeled into the federal courts at the will of one of the parties. Such "manufacture of Federal jurisdiction" was the very thing which Congress intended to prevent when it enacted § 1359 and its predecessors.

Id. at 828-29.

32. 28 U.S.C. §§ 1441-1451 (1976) contain the relevant provisions for removal.

33. 28 U.S.C. §§ 1441, 1446 (1976). Specifically, § 1441 provides in part:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

34. See 28 U.S.C. §§ 1331, 1332 (1976). An equally, perhaps more, effective method of preventing removal is to sue the defendant in his home state, since removal cannot be effected if any of the defendants is a citizen of the state in which the action is brought. 28 U.S.C. § 1441(b) (1976).

35. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (court held that the pendent claims must arise from a common nucleus of operative facts).

claims grounded in state law. Where the state claim is closely related to the federal claim and the several requirements of pendent jurisdiction are satisfied, the doctrine allows the state claim to be joined with the federal claim and litigated within the federal court.

Plaintiff's counsel considering the federal forum in a diversity case should recall the federal court sits, in essence, as another state court and is required, under the doctrine of *Erie Railroad v. Tompkins*³⁶ to decide the case in accordance with the substantive law of the forum state. Accordingly, where relief will be sought on the basis of a new legal theory which will require the rejection of an established precedent, the choice of the state over federal forum is necessary for the prevailing precedent to be overturned, no matter how well established the new legal theory is in other jurisdictions. Simply stated, the federal district court will not second guess what the state's highest court may do in future opinions.³⁷

The status of court dockets can vary greatly between federal and state courts. Further, the speed with which a lawsuit will reach trial will often vary depending on such factors as the judicial assignment in a multi-judge judicial district. The prospect of potential recovery being deferred two to three years may operate to deflate an excessive claim into a favorable settlement for the opposing side. Procedural distinctions, likewise, play an important role in influencing the selection between the state or federal forum. For example, in federal class action suits, members of the class will be bound by the judgment, favorable or unfavorable, unless the class member elects to "opt out" of the suit;³⁸

36. 304 U.S. 64 (1938) (federal court in diversity actions must use the statutory and case law of the forum, together with federal procedural rules).

After *Erie*, a series of decisions expanded the substance/procedure dichotomy to allow more state influence in federal courts. In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) the Court applied state law to procedural aspects of the case which were outcome determinative in diversity cases. The Court then adopted a balancing test of the compelling interests of both the federal and state governments to decide which procedural rule will govern a determinative issue. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958). Finally in *Hanna v. Plumer*, 380 U.S. 460 (1965) the Court returned to the dichotomy pronouncement of *Erie*, but also allowed state law to govern procedural issues which were outcome determinative at the outset of the litigation. The present division of applicable law is that a federal court in diversity actions should apply the substantive law of the forum states including conflict of law statutes and federal procedural laws as well as any state procedural law which is outcome determinative at the outset.

37. Indeed the federal court may even certify to the state supreme court any issue unresolved by that court's pronouncements. *See Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959).

38. FED. R. CIV. P. 23(c)(2) states:

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice

while under the Oklahoma class action statute, a class member will not be bound by the judgment unless he elects to "opt in" to the litigation.³⁹

While the same fundamental discovery tools exist under Oklahoma state procedure as are provided for in the Federal Rules of Civil Procedure, the state procedure requires a showing of "good cause" to obtain court ordered production of evidence. The federal procedure allows the moving party to initiate production requests and then places the burden of objecting on the responding party.⁴⁰

Major differences exist in trial procedure between the state and federal forums. Federal judges customarily conduct the questioning of prospective jurors and limit counsel's participation in the voir dire examination to the submission of written questions to the court. Federal rule 47 governs voir dire examination of jurors and conditions counsel's right to directly question jurors upon permission of the court. However, in Oklahoma state practice, lawyers are assured of the right to supplement the trial judge's voir dire examination by their own independent questioning.⁴¹ The right of voir dire examination must be regarded as a significant trial tool. Not only is it important to the proper exercise of preemptory challenges, but skillful use of voir dire can operate to create a favorable first impression of a client's case for the jury which could likely last through to verdict.

Federal courts follow the common law rule requiring a unanimous verdict on any issue submitted to the jury,⁴² but reject the common law

shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

39. OKLA. STAT. tit. 12 § 13 (C) (Supp. 1 1980) reads: "The order permitting a class action shall describe the class. The court shall limit the class to those members who request inclusion in the class within a specified time after notice."

40. See notes 98-101 *infra* and accompanying text.

41. OKLA. CT. R. 6 reads:

The judge shall initiate the voir dire examination of jurors by identifying the parties and their respective counsel. He may briefly outline the nature of the case, the issues of fact and law to be tried, and may then put to the jurors any questions which he thinks necessary touching their qualifications to serve as jurors in the cause on trial. The parties or their attorneys shall be allowed a reasonable opportunity to supplement such examination. Counsel shall scrupulously guard against injecting any argument in their voir dire examination, shall avoid repetition, shall not call jurors by their first names or indulge in other familiarities with individual jurors, and shall be fair to the court and opposing counsel.

42. The Court explained in *Patton v. United States*, 281 U.S. 276 (1930) the fundamental concept of trial by jury:

That it means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the

rule that a trial jury consists of twelve jurors. Thus in federal court, civil cases are customarily submitted to a panel of six jurors.⁴³ In state court, a civil jury may return a verdict when three-fourths of the members concur. No right to a jury trial exists in state practice in controversies involving less than \$100.00; a six-person jury is provided for in cases involving up to \$2,500.00; and a twelve-member panel resolves civil cases in excess of \$2,500.00.⁴⁴ A forum which allows a judgment on a less than unanimous verdict is generally considered to be favorable for the plaintiff, and hung juries are less common. Justice Blackman, referring to empirical studies conducted since six-person juries began being used in 1973, concluded that smaller juries, though more likely to be able to reach a verdict, were more apt to reach an extreme result and were less likely to return a verdict for a defendant.⁴⁵ These factors obviously deserve consideration when a choice of forums is presented.

Constitution was adopted, is not open to question. Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.

Id. at 288.

43. The United States Supreme Court first approved the use of six-person juries in *Colgrove v. Battin*, 413 U.S. 149 (1973). Examining the historical preference for twelve jurors, Mr. Justice Brennan explained:

Our inquiry turns, then, to whether a jury of 12 is of the substance of the common-law right of trial by jury. Keeping in mind the purpose of the jury trial in criminal cases to prevent government oppression, and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues, the question comes down to whether jury performance is a function of jury size. In *Williams*, we rejected the notion that “the reliability of the jury as a factfinder . . . [is] a function of its size,” and nothing has been suggested to lead us to alter that conclusion. Accordingly, we think it cannot be said that 12 members is a substantive aspect of the right of trial by jury.

Id. at 157 (citations omitted).

44. OKLA. CONST. art. 2, § 19 states:

The right of trial by jury shall be and remain inviolate, except in civil cases wherein the amount in controversy does not exceed One Hundred Dollars (\$100.00), or in criminal cases wherein punishment for the offense charged is by fine only, not exceeding One Hundred Dollars (\$100.00). Provided, however, that the Legislature may provide for jury trial in cases involving lesser amounts. Juries for the trial of civil and criminal cases shall consist of twelve (12) persons; but in the trial of misdemeanors, proceedings for the violation of ordinances or regulations of cities and towns, juvenile proceedings, actions for forcible entry and detainer, or detention only, of real property and collection of rents therefor, and civil cases concerning causes of action involving less than Twenty-five Hundred Dollars (\$2,500.00), juries shall consist of six (6) persons. In civil cases, and in criminal cases less than felonies, three-fourths (3/4) of the whole number of jurors concurring shall have power to render a verdict. In all other cases the entire number of jurors must concur to render a verdict. In case a verdict is rendered by less than the whole number of jurors, the verdict shall be in writing and signed by each juror concurring therein.

45. *Ballew v. Georgia*, 435 U.S. 223, 232-39 (1978).

In the federal courts, the judge has the power to comment on the evidence, as well as express his views to the jurors, as long as it is made clear to the jury that they are the final determiners of the facts.⁴⁶ This practice is impermissible in the Oklahoma state courts.⁴⁷ Accordingly, the federal practice injects the risk of an unfavorable comment significantly hindering the litigant's chance for a favorable verdict. As a consequence, the predilection of a federal judge toward this practice may influence counsel to seek relief in the state, rather than federal court.

Finally, it is important to note that federal practice allows oral instruction of the jury,⁴⁸ while the Oklahoma state trial judge must instruct in writing.⁴⁹ This distinction may become very important where the legal concepts relied upon to establish a claim or defense are technical in nature, detailed and complex, or otherwise difficult for the average juror to grasp. Without having the opportunity to review written instructions in the jury room, it is difficult for jurors to agree, much less understand, what law they are being instructed upon.

It is obvious from the foregoing that many factors influence the decision to elect between the state and federal forum, but weighing and assessing the various factors, and reaching the best result possible for the client is the first important strategic decision to be made by the competent lawyer.

C. *State vs. State*

In business litigation it is likely the plaintiff may be presented with the option of one or more state forums within which to bring the lawsuit. If so, a dual analysis must be made. First, as with selecting the

46. *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 571-72 (1951). In *United States v. Murdock*, 290 U.S. 389 (1933) the Court explained:

In the circumstances we think the trial judge erred in stating the opinion that the respondent was guilty beyond a reasonable doubt. A federal judge may analyze the evidence, comment upon it, and express his views with regard to the testimony of witnesses. He may advise the jury in respect of the facts, but the decision of issues of fact must be fairly left to the jury. Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases.

Id. at 394 (citations omitted).

47. *Missouri, O. & G. R.R. v. Collins*, 47 Okla. 761, 774-75, 150 P. 142, 147 (1915).

48. *See* FED. R. CIV. P. 51.

49. OKLA. STAT. tit. 12, § 577 (1971) provides in part:

When the evidence is concluded and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered, and signed by the party or his attorney asking the same, and delivered to the court. The court shall give general instructions to the jury, which shall be in writing, and be numbered, and signed by the judge, if required by either party.

state or federal forum, distinctions between the procedural rules governing pleading, discovery, and trial practice must be understood, considered, and balanced to determine which forum is most favorable. Secondly, an additional consideration must be given as to the substantive law which will be applied by the state forum ultimately selected.

In contract litigation, the long-standing traditional rule is *lex loci contractus*; that is, the construction and validity of a contract are governed by the law of the place where it is made. However the modern trend, adopted in 1971 by the *Restatement (Second) Conflict of Laws* § 188, places emphasis on the law of the forum having the most significant relation, connection or contacts with the matter in dispute.⁵⁰ Much the same history has been experienced in tort litigation. The traditional rule (*lex loci delictus*) requires application of the substantive law of the place of the wrong, while the modern trend, and Oklahoma rule, require application of the law of the place which has the most significant contacts with the litigation incident.⁵¹

With critical issues such as statute of limitations, monetary limitations on recovery in wrongful death actions, recognition of loss of consortium for a wife, as well as modern tort theories and defenses at stake, plaintiff's counsel must give careful consideration to state forum selection. Likewise, defense counsel must be knowledgeable so that he can effectively utilize an opportunity to argue that the law of another forum, favorable to his client, is applicable.

D. Court or Administrative Agency

A cardinal rule of administrative agency law is that a party must exhaust his administrative remedies before being entitled to resort to

50. *Global Commerce Corp. v. Clark-Babbitt Indus., Inc.*, 239 F.2d 716 (2d Cir. 1956); *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99, 140 N.Y.S.2d 82 (1954).

51. *Brickner v. Gooden*, 525 P.2d 632 (Okla. 1974) (airplane crash in Mexico involving an airplane and passengers from Oklahoma). See *RESTATEMENT (SECOND) CONFLICTS OF LAW* § 145 (1971):

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

the courts.⁵² With the adoption of the Oklahoma Administrative Procedures Act,⁵³ that rule has been substantially curtailed, and the validity or applicability of an agency rule or regulation may be challenged by declaratory judgment when the "rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges" of the party.⁵⁴ The agency must be made a party in the action, and the suit may be brought in the "district court of the county of the residence of the person seeking relief or, at the option of such person, in the county wherein the rule is sought to be applied."⁵⁵ This specific declaratory judgment procedure is particularly useful to a business client who needs to know where he stands legally vis-a-vis an agency rule before taking a definitive stand carrying with it a significant economic impact.

IV. PLEADING

It is generally recognized that the pleadings should perform the following functions:

- (1) screen unsustainable contentions by requiring that a cognizable claim or defense be alleged;
- (2) inform the court and parties of the points in controversy; and
- (3) frame the issue that will be tried.⁵⁶

Technical forms of pleading are unnecessary in federal practice, and a pleading is deemed sufficient if it gives adequate notice of the party's

52. *E.g.*, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (unfair labor practices); *Oklahoma Pub. Welfare Comm'n v. State ex rel. Thompson*, 187 Okla. 654, 105 P.2d 547 (1940) (social security pension).

53. OKLA. STAT. tit. 75, §§ 301-327 (1971 & Supp. 2 1980).

54. OKLA. STAT. tit. 75, § 306 (Supp. 2 1980).

55. *Id.*

56. Fraser, *Pleading In Perspective*, 19 OKLA. L. REV. 241, 253 (1966). At common law pleadings were used to reduce the dispute to a single issue of law or fact that would dispose of the case. An intricate scheme of pleadings was developed that involved numerous stages of denial, avoidance, or demurrer. Eventually procedure ruled substance. 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1202 (1969). The Field Code, which abolished the common law forms of action and merged law and equity, stressed clarification of the facts. Code pleading may be referred to as fact pleading. C. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING*, 56 (2d ed. 1947). Code pleading required that the pleader state only facts and not conclusions of law or evidentiary material. Because this was often a question of degree and not kind, it caused difficulties. The Federal Rules of Civil Procedure, adopted in 1938, sought to simplify the process by focusing on the notice function. Basically, it required the pleader to show a claim on which he was entitled to relief. Federal pleading is commonly referred to as 'notice pleading.' 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1202 at 63 (1969).

claim or defense.⁵⁷ Oklahoma is a code pleading state and requires “a statement of the facts constituting the cause of action.”⁵⁸ The Oklahoma Supreme Court has construed this to mean that a party must allege ultimate facts, rather than evidentiary facts or conclusions of law.⁵⁹ Two or more statements of claims or defenses may be set forth alternatively or hypothetically under Federal Rule 8(e)(2). Likewise, in state practice, by recent statute, a party may rely on two or more legal theories for relief or defense in the alternative and regardless of their consistency.⁶⁰

A. Joinder

In state practice, section 231 governs the joinder of parties defendant. It permits the joinder of a person as a defendant who has or claims an interest adverse to the plaintiff, or who is necessary to settle the question involved.⁶¹ Section 243 permits a defendant to bring in new parties when a counterclaim is asserted,⁶² while section 323 governs a defendant’s right to bring in a party on a cross action when no counterclaim or setoff is maintained.⁶³ Court permission is necessary for a

57. FED. R.CIV. P. 8(e)(1); see also C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 319-20 (3d ed. 1976).

58. OKLA. STAT. tit. 12, § 264 (1971). It is generally held that a petition states a cause of action when it alleges facts that show that the plaintiff has suffered a loss due to defendant’s wrongful conduct, the amount of the loss, and that the loss is one for which there is a legal remedy. *E.g.* *Town of Braggs v. Slape*, 207 Okla. 420, 421, 250 P.2d 214, 216 (1952); *Moseley v. Smith*, 173 Okla. 503, 505, 49 P.2d 775, 779 (1936); *Security National Bank v. Geck*, 96 Okla. 89, 93, 220 P. 373, 376 (1923); *Smith v. Gardner*, 37 Okla. 183, 185, 131 P. 538, 539 (1913).

59. *Spence v. Norick*, 513 P.2d 1295, 1297 (Okla. 1973) (conclusions do not delineate facts but rather state the pleader’s reaction or inference); *Soper v. Enid Hotel*, 383 P.2d 7, 8 (Okla. 1963) (*per curiam*); *Morriss v. Barton*, 200 Okla. 4, 9, 190 P.2d 451, 457 (1948). *Fraser, supra* note 56, at 257.

60. OKLA. STAT. tit. 12, § 264.1 (Supp. 1 1980). *Fraser, Contracts, Quasi Contracts, and Pleading*, 27 OKLA. L. REV. 440, 444 (1974) (pleading under alternative contract theories).

61. OKLA. STAT. tit. 12, § 231 (1971). *Annual Survey—Pleadings and Procedure—Parties*, 3 OKLA. CITY U.L. REV. 340 (1978); *Annual Survey—Pleadings and Procedure—Joinder*, 2 OKLA. U.L. REV. 337, 389 (1977); *Fraser, Joinder of Parties and Causes of Action*, 26 OKLA. B.A.J. 1285, 1286 (1955).

62. OKLA. STAT. tit. 12, § 243 (1971). This section does not expand the right of a defendant to assert a claim against the plaintiff. Therefore it should be read in conjunction with sections 272, 273, and 274. In addition, the plaintiff and the new defendant must stand such that the original defendant could have joined them as defendants if he had sued originally as the plaintiff. *Fraser, The New Oklahoma Joinder Status*, 34 OKLA. B.A.J. 2199, 2199 (1963).

63. OKLA. STAT. tit. 12, § 323 (1971). Claims may be joined if they arose out of the same transaction or occurrence as plaintiff’s claim and contain common questions of fact. Parties liable under such claims may be joined. *Id. See, e.g., Puckett v. Cook*, 586 P.2d 721, 723 (Okla. 1978) (court did not abuse discretion in ordering consolidation of cases where petitioner and his wife were each plaintiffs in separate cases arising out of same transaction, where both were represented by same counsel, where cases involved common defendant and common questions of fact); *Chicago, R.I. & P. R. Co. v. Davila*, 489 P.2d 760, 763 (Okla. 1971) (section 323 does not require that

plaintiff to bring in a new party because amendment of the petition is required, but a defendant need not obtain judicial permission to bring a new party in on a counterclaim or cross-claim unless the pleading is out of time, or is being amended.

Joinder of causes of action is controlled by section 265 which permits all claims, whether legal or equitable, to be brought together so long as they arise out of the same transaction or occurrence.⁶⁴ In both federal and state practice, an indispensable party must be joined, or the action is subject to dismissal.⁶⁵

Intervention is joinder considered from a different perspective. Put simply, an outsider is seeking to come into the lawsuit, rather than the more usual instance of an existing party seeking to bring the outsider in. Intervention in federal practice is allowed by rule 24 as a matter of right where resolution of the case in the outsider's absence would prejudice his rights. Permissive intervention arises when the outsider's claim or defense and the main action have common questions of law or fact.⁶⁶

Intervention in Oklahoma is technically limited to actions for the recovery of real or personal property at the court's discretion.⁶⁷

all questions of fact be common to both claims or that the theories of recovery be the same). Fraser, *supra* note 62, at 2200-01.

64. OKLA. STAT. tit. 12, § 265 (1971). Prior to the 1959 amendment, separate claims could not be joined if each plaintiff was not affected by the claims of the other plaintiffs. Gardner v. Rumsey, 81 Okla. 20, 21, 196 P. 941, 942 (1921). The principle of all claims arising out of the same transaction was recognized by the Oklahoma Supreme Court in Franklin v. Margay Oil Corp., 194 Okla. 519, 153 P.2d 486 (1944). For the effects of the amendment on procedural devices, see Comment, *Federal Jurisdiction and Practice: Effect of New Oklahoma Joinder Statute on Removal*, 13 OKLA. L. REV. 203 (1960); Fraser, *Venue Oklahoma Style*, 23 OKLA. L. REV. 182 (1970). The term 'cause of action,' in the context of sections 265 and 323, is defined by reference to the transaction so that a single wrong gives rise to only one cause of action even though it may encompass numerous items of damage. Retherford v. Halliburton Co., 572 P.2d 966, 969 (Okla. 1977). *Accord*, Greater Oklahoma City Amusements, Inc. v. Moyer, 477 P.2d 73, 75 (Okla. 1970); Lowder v. Oklahoma Farm Bureau Mutual Ins. Co., 436 P.2d 654, 658 (Okla. 1967).

65. FED. R. CIV. P. 19; OKLA. STAT. tit. 12, § 232 (1971). The federal standard for determining whether a party is indispensable under rule 19 is set out in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 108 (1968). The Oklahoma statute requires a unity in interest. *E.g.*, Haught v. Continental Oil Co., 192 Okla. 345, 347, 136 P.2d 691, 693 (1943) (joint interest in property); Nicholos v. Melton & Melton, 141 Okla. 210, 211, 284 P. 642, 643 (1929) (partners); Title Guaranty & Surety Co. v. Foster, 84 Okla. 291, 298, 203 P. 231, 237 (1922) (joint obligees).

66. For intervention as a matter of right under the federal rules, the applicant must show: (1) an interest in the property or transaction; (2) an impairment of his ability to protect his interest if disposition of the case is made without his participation; and (3) inadequate representation by existing parties. FED. R. CIV. P. 24(a). *See, e.g.* Smuck v. Hobson, 408 F.2d 175, 178 (D.C. Cir. 1969) (intervention allowed after judgment); Atlantis Dev. Corp. v. United States, 379 F.2d 818, 822 (5th Cir. 1967).

67. OKLA. STAT. tit. 12, § 237. The most recent cases discussing intervention are Campbell v.

Through interpretation, however, the Oklahoma Supreme Court has allowed intervention in controversies not included in section 237. It has been permitted where the intervenor claimed a substantial right in the subject matter of the action or merely an interest in the action.⁶⁸ Intervention was also allowed where the intervenor attempted to protect a right involved in the object of the action.⁶⁹ Finally, intervention has been permitted when the party is needed for complete adjudication of the controversy.⁷⁰

B. *Challenging Jurisdiction*

Successfully challenging in personam jurisdiction in Oklahoma, as in most other code pleading states, requires a special appearance to object to jurisdiction only. If the objection is improperly denied, however, the defendant may proceed and defend on the merits without waiving the objection.⁷¹ In federal court, the time honored special appearance has no place, and rule 12(b) specifies that no objection is waived by being joined with one or more defenses.

C. *The Answer*

Section 272 of the state code controls the contents of the answer and provides that a denial controverts allegations of the petition.⁷² It

Edinger, 607 P.2d 697, 699 (Okla. 1980); *Deen v. Fruehauf Corp.*, 562 P.2d 505, 507 (Okla. 1977) (recognizes intervention as a matter of right when petitioner claims an interest in specific property within exclusive jurisdiction of the courts and the interest can be protected no other way). *See Note, Parties to Actions: How the Supreme Court of Oklahoma Expanded the Right to Intervene*, 31 OKLA. L. REV. 463 (1978). *Note, Pleading: Intervention in Oklahoma*, 17 OKLA. L. REV. 102 (1964).

68. *Cherry v. Hutchman*, 205 Okla. 206, 209, 236 P.2d 687, 691 (1951) (assignee of a judgment against the record title holder of property at time of tax sale had a sufficient interest to intervene to plead and prove invalidity of sale in order to protect his lien).

69. *Green Constr. Co. v. Oklahoma County*, 174 Okla. 290, 292, 50 P.2d 625, 627 (1935) (the Board of County Commissioners was allowed to intervene in order to protect the county's rights in the disputed contract).

70. *Proctor v. Royal Neighbors of America*, 172 Okla. 529, 531, 45 P.2d 734, 736 (1935) (original beneficiary of an insurance policy is a necessary party to a suit brought by substituted beneficiaries). *Westbrook v. General Motors Acceptance Corp.*, 173 Okla. 66, 68, 47 P.2d 114, 115 (1935) (third party claiming title to property is a necessary party in a replevin action).

71. OKLA. CT. R. 3. *See generally, Fraser, The New Rules for the District Courts*, 44 OKLA. B.A.J. 2665 (1973). *See also Chronister v. Payne*, 571 P.2d 869, 870 (Okla. Ct. App. 1977) (defendant waived all objections to summons and service when he failed to raise them at the time he filed a motion to strike.)

72. OKLA. STAT. tit. 12, § 272 (1971). *See generally Note, Effect of Statute of Limitations on Counterclaims*, 30 OKLA. L. REV. 990 (1977); *Morgan, Denials in an Oklahoma Answer*, 13 OKLA. L. REV. 288 (1960). The answer may also contain defenses in abatement that do not appear on the face of the petition. OKLA. STAT. tit. 12, § 322 (1971). *See, Rieck v. Town of Longdale*, 389 P.2d 482, 483 (Okla. 1964); *Suter v. City of Okmulgee*, 373 P.2d 527, 531 (Okla. 1962).

further provides for a statement of new matter to support affirmative defenses or to plead a counterclaim or setoff against the plaintiff. A counterclaim is permissive under state practice. Section 273.1 controls third party practice and allows a defendant to bring a cross-petition against another defendant or a new party.⁷³

The federal rule makes a counterclaim compulsory if it arises out of the transaction or occurrence that is the subject of the adverse party's claim,⁷⁴ and permissive if it does not.⁷⁵ A party may cross-claim in federal court when the cross-claim arises out of the transaction or occurrence that is the subject matter of the original action or counterclaim.⁷⁶ A cross-claim is always permissive.

D. Amendments

Under the federal rules a party may amend a pleading once as a matter of right before a responsive pleading is filed, and otherwise by leave of court which is freely given.⁷⁷ Section 317 governs amendments under state practice,⁷⁸ and, generally, judicial approval is required. Amendments may be allowed before or after judgment, so long as the amendment does not substantially change the claim or defense.⁷⁹

Two general restrictions limit amendments. First, amendment will not allow an entirely new claim to relate back to the original filing time

73. OKLA. STAT. tit. 12, § 273.1 (Supp. 1 1980).

74. FED. R. CIV. P. 13(a). In the Oklahoma District Court, a counterclaim must be logically related to the original claim in order to be compulsory. *See Vieser v. Harvey Estes Constr. Co.*, 69 F.R.D. 370, 377 (W.D. Okla. 1975) (allegations that plaintiff withheld trust funds necessary for the satisfaction of defendants' liens arose out of same fact situation and was therefore a compulsory counterclaim). *American Airlines v. Transportation Workers Union*, 44 F.R.D. 236, 237 (N.D. Okla. 1968) (union's claim for recession of disciplinary action is totally separate from the company's suit to prohibit a walkout). Failure to raise a compulsory counterclaim bars it from being raised in a subsequent suit in federal court. *See Wright, Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading*, 38 MINN. L. REV. 423, 428 (1954).

75. FED. R. CIV. P. 13(b). Because permissive counterclaims are not waived, barred, or estopped when not raised in the original action, the court may refuse to entertain them on the ground that it would unduly complicate the litigation. *Aviation Materials, Inc. v. Pinney*, 65 F.R.D. 357, 358 (N.D. Okla. 1975). *See generally* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1420 at 112 (1971).

76. FED. R. CIV. P. 13(g) & (h). A properly assertable cross-claim is one that involves many of the same factual and legal issues present in the main action. *Allstate Ins. Co. v. Daniels*, 87 F.R.D. 1, 4 (W.D. Okla. 1978).

77. FED. R. CIV. P. 15(a). *See, e.g., McGoffin v. Sun Oil Co.*, 539 F.2d 1245, 1248 (10th Cir. 1976); *Polin v. Dun & Bradstreet, Inc.*, 511 F.2d 875, 877 (10th Cir. 1975); *King and King Enterprises v. Champlin Petrol. Co.*, 446 F. Supp. 906, 908 (E.D. Okla. 1978).

78. OKLA. STAT. tit. 12, § 317 (1971).

79. *See, e.g., C & C Tile Co. v. Independent School Dist.*, 503 P.2d 554, 559 (Okla. 1972); *Booth v. Red Eagle Oil Co.*, 393 P.2d 871, 873 (Okla. 1964). *See generally Fraser, Change in Actions by Amendment and by Proof*, 19 OKLA. L. REV. 150 (1966).

so as to defeat a statute of limitations defense;⁸⁰ and, second, a complete substitution of parties cannot be permitted by amendment.⁸¹ The proper vehicle by which to allege transactions, occurrences or events that have occurred since the date of the former pleadings is a supplemental, rather than amended, pleading.⁸²

E. *Summary Judgment*

A movant is entitled to summary judgment under both federal and state practice if he can satisfy the court that the evidence gathered through interrogatories, admissions, depositions, and affidavits shows that there is no genuine issue on any material fact, and that the moving party is entitled to judgment as a matter of law.⁸³ The idea behind the rule is to eliminate useless trials on issues not factually supported. When a plaintiff moves for summary judgment, his burden is to show that there is no material controversy as to all facts which are necessary to prove his case. A defendant moving for summary judgment must either show there is no substantial controversy as to the absence of one fact that is essential to support plaintiff's case, or, if relying on an affirmative defense, that no substantial controversy exists as to facts necessary to support that defense.⁸⁴

The denial of a summary judgment motion is not an appealable order.⁸⁵ While the granting of a complete summary judgment is an appealable order, the granting of a partial summary judgment is not and may even be modified or withdrawn by the court before final judg-

80. *Weston v. Acme Tool, Inc.*, 449 P.2d 887, 889 (Okla. 1969); *Fowler v. City of Seminole*, 202 Okla. 635, 636, 217 P.2d 513, 515 (1950); *Turner v. Pitts*, 162 Okla. 246, 249, 19 P.2d 563, 566 (1933).

81. Generally, a complete change of parties, plaintiff, or defendant will not be permitted if it effects a change in the cause of action. *See generally* 67A C.J.S. *Parties* §§ 59, 60 (1978). However, if no change in the cause of action is effected, substitution may be allowed, at least where the defendant has notice of the proceedings. *Harting v. Benham Eng'r Co.*, 490 P.2d 1100, 1104 (Okla. Ct. App. 1971).

82. OKLA. STAT. tit. 12, § 321 (1971).

83. FED. R. CIV. P. 56; OKLA. CT. R. 13. *See, e.g.*, *Garner v. Johnson*, 609 P.2d 760, 762 (Okla. 1980) (school board's answers to interrogatories raised a substantial fact issue as to whether the board has adopted school policy expanding the plaintiff's rights concerning termination of his employment).

84. *See generally* *Fraser, Summary Judgment Where Facts Not Controverted*, 51 OKLA. B.A.J. 1611 (1980); *Fraser, Judgment Where Facts Not Controverted*, 36 OKLA. B.A.J. 723 (1965).

85. OKLA. CT. R. 13 is patterned after FED. R. CIV. P. 56. *Reams v. Tulsa Cable Tel., Inc.*, 604 P.2d 373, 375 (Okla. 1979). Under the federal rules, a denial of a motion for summary judgment is an interlocutory order which, without express statutory permission, is unappealable. 6 J. MOORE, FEDERAL PRACTICE ¶ 56.20(2) at 56-1207 to 8 (2d ed. 1976).

ment is rendered.⁸⁶

V. DISCOVERY

As a result of modern discovery procedures in the state and federal courts, the term "trial lawyer" has become an anachronism. The term "litigation lawyer" is now more appropriate. The litigation lawyer's responsibility covers every aspect of the case, including essential pre-trial discovery. Discovery should be approached with three goals in mind. First, to identify the strong and weak points of the lawsuit so that settlement may be realistically approached by both sides; second, to assure that the trial will be focused upon those merits and demerits; and third, that the adverse party will not gain an artificial advantage through the surprise of unexpected evidence. In business litigation, particularly, carefully conducted discovery may allow early termination of the litigation by summary judgment.

Formal discovery should not be commenced until initial fact finding, research, and case analysis has been completed and appropriate theories of recovery or defense have been settled upon.

A. *The General Scope of Discovery*

Federal rule 26, after recognizing each litigant's right to use the five basic discovery tools (depositions, interrogatories, motions to produce, physical exams, and requests for admission), establishes the general rule that any matter "relevant to the subject matter involved in the pending action" may be discovered unless the material is privileged or is trial preparation material for which the necessary showing of need has not been made. Information, even if inadmissible at trial itself, is discoverable if reasonably expected to lead to admissible evidence. Under *Carman v. Fishel*,⁸⁷ the same relevancy concept has been applied in Oklahoma discovery practice.⁸⁸ However, some specific situations should be addressed.

The importance of placing initial client and witness interviews in written form—memorandums, transcribed or even sworn statements—has been emphasized earlier.⁸⁹ It is important to remember, however,

86. *Reams v. Tulsa Cable Tel., Inc.*, 604 P.2d 373, 376 (Okla. 1979); *See also Recent Development—Pleading: Right to Amend After Summary Judgment Granted*, 31 OKLA. L. REV. 1011 (1978).

87. 418 P.2d 963 (Okla. 1966).

88. *Id.* at 973-74.

89. See text accompanying note 2 *supra*.

that such material may be the subject of disclosure through discovery.

Obtaining trial preparation material from the adverse party requires a special showing under both state and federal discovery practice. To obtain witnesses' statements obtained by the other side, it must be shown that the witness gave a fresh account of the events, that the witness was at the time unavailable to the requesting party, and that the witness' memory has now lapsed or dimmed, or the witness has grown hostile.⁹⁰ The same basic showing is required under state practice to obtain production of a witness' previous statement.⁹¹ It should be remembered, however, that witnesses and parties are entitled to copies of *their own* statements without the need of this special showing. Accordingly, it is possible through the cooperation of a witness to obtain what would otherwise remain inaccessible.

Both the federal and Oklahoma rules provide for the discovery of the adverse party's expert witnesses. The federal rule⁹² specifies three categories of experts: (1) those expected to be called as witnesses; (2) those not to be witnesses but who are specially retained or employed in preparation of litigation; and (3) those informally consulted though not retained or employed.

Concerning sanctions, federal rule 37 establishes four categories of sanctions to be applied against those not cooperating in discovery procedures. Basically, the first category provides for court orders compelling discovery; the second penalizes the recalcitrant party through handicaps such as striking pleadings; the third consists of contempt orders; and the fourth authorizes economic sanctions.

90. FED. R. CIV. P. 26(b)(3).

91. *See* Carman v. Fishel, 418 P.2d 963, 970-73 (Okla. 1966) where the Oklahoma Supreme Court held:

Where party applying for the production, inspection and copying of witnesses' statements obtained by his adversary makes no showing that the witnesses are no longer available, or cannot be located, or are hostile and will not furnish information, or that the information desired cannot be obtained elsewhere upon diligent effort, there is no showing of "good cause" sufficient to justify an order of production.

Id. at 972.

The Court did note that an exception to the above rule may exist:

where statements of witnesses were taken immediately after an accident and movant was prevented from taking such statements then or for a considerable time thereafter. Some courts have treated such last described statements as having a "unique value" because they were taken while the witness's memory was vivid and recent, whereas the same person several months later perhaps might have a much less effective recall of the events.

Id.

92. FED. R. CIV. P. 26(b)(4). *See, e.g.*, Unit Rig & Equip. Co. v. East, 514 P.2d 396 (Okla. 1973) where the Oklahoma Supreme Court recognized that the plaintiff was entitled to depose defendant's medical expert, and that the court could require the plaintiff to pay the expert's fee.

Some state discovery statutes provide for sanctions that are unavailable under the federal rules.⁹³ But, in a recent case, the Oklahoma Supreme Court recognized that any of the four federal sanctions would be available to the Oklahoma trial judge as being within the inherent power of the court.⁹⁴ At the same time, the supreme court also specified that the extreme sanction of default judgment may be rendered only upon a “willful and extreme” failure to comply with discovery. The same would hold true for imposition of contempt sanctions.

Most business litigation lawyers agree that in complex business litigation, discovery must proceed in a regular systematic fashion in order to maximize efficiency.

The first stage of discovery usually follows the disposition of preliminary motions and is conducted through interrogatories to identify witnesses and documents for further discovery on the merits. Production of documents is ordinarily sought as a follow-up in the first stage of discovery. Consideration should be given to deposing aged, ill or otherwise potentially unavailable witnesses during the early stages of discovery.

Discovery should then evolve into a second stage, which commonly includes deposing witnesses, such as the expert witnesses employed by each side. Follow-up depositions and document production are necessary to round out the second stage of discovery.

93. Neither OKLA. STAT. tit. 12, § 548 (1971) nor OKLA. CT. R. 12, dealing with document production and inspection, provide specific sanctions for noncompliance. OKLA. STAT. tit. 12, § 549(c) (1971), dealing with interrogatories, however, does provide sanctions for violations of that section:

If a party or the officer, partner or agent who is served fails to serve answers to interrogatories after proper service of such interrogatories, or fails to fully answer the interrogatories, the court on motion and notice may order the party to answer or to more fully answer within a time stated in the order and, in the alternative, may for good cause shown strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against the party, or impose the cost of proving the facts involved on that party. Moreover, the offending party may be proceeded against for indirect contempt of court.

94. In *Amoco Prod. Co. v. Lindley*, 609 P.2d 733, 737-39 (Okla. 1980) the court commented:

Section 548 provides no sanctions for failure to produce, while Section 549, dealing with interrogatories, does allow sanctions, and one of those is for default judgment. Therefore, Appellee asserts that the court can impose a default judgment by analogy to the interrogatory statute, or in the alternative it is within the inherent power of the court “to do all things that are necessary for the administration of justice within the scope of its jurisdiction.”

Again, it is not a question of the power of the Court to impose the sanction because the power is there. The question is, rather, whether the extreme sanction of default judgment would be appropriate under the facts of this case.

Id. at 738 (citation omitted).

Four of the five available discovery procedures have particular relevance in business litigation.

B. *Requests for Admission*

Requests for admission differ from the other discovery devices in that they are not designed to gather information. Instead, their purpose is to define the parameters of the lawsuit by determining what is and is not in dispute.

Requests for admission may be effectively utilized at two points during the pre-trial proceedings. Admissions obtained after the issues are formed by the pleadings, but before formal discovery is commenced, may reduce the scope of necessary discovery. Second, admissions secured as a result of discovery, but prior to trial, reduce the time, expense, and inconvenience of proving matters at trial which are not actually in dispute.

Rule 36 in the federal practice, prior to its amendment in 1970, limited requests to admissions "of fact." At present, inquiry is allowed if it relates to "statements or opinions of fact or of application of law to fact, including the genuineness of any document described in the request." The scope of admission requests in state practice is more vague, with the current statute providing that the requesting party may seek the admission "of the truth of *any relevant matters* or facts."⁹⁵ The Oklahoma Supreme Court has not addressed the meaning of "relevant matters."

It is important to keep in mind that the federal practice provides for an affirmative answer to a request for admission. This is similar to a judicial admission and is regarded as conclusive against the party making it, unless the admission is permitted to be withdrawn. In state practice, neither the statute nor case interpretation provide insight into whether an admission is to be considered conclusive, or is capable of being explained away or otherwise controverted at trial.

C. *Written Interrogatories*

Epistolary discovery is authorized by rule 33 in the federal practice and title 12, section 549 of the Oklahoma Statutes.⁹⁶ Properly conducted, such discovery can be used to:

1. Ascertain specific contentions left vague in a pleading;

95. OKLA. STAT. tit. 12, § 3010 (Supp. 1 1980).

96. OKLA. STAT. tit. 12, § 549 (1971).

2. Narrow the issue in controversy;
3. Obtain fundamental information upon which to conduct further discovery;
4. Obtain information with which to impeach a witness;
5. Obtain admission for use at trial; and
6. Obtain information to support a motion for summary judgment.

In business litigation, interrogatories are usually considered superior to depositions for obtaining information such as business statistics, the identity of relevant documents, an organizational structure, and the identity of persons within a business with relevant information. In both state and federal practice, written interrogatories may be directed only to parties and not to non-party witnesses. Interrogatories are subject to objection only where they place an unreasonably great burden on the respondent or are deemed to be oppressive or burdensome; otherwise, they are limited neither in number of questions asked nor number of sets propounded.

Interrogatory practice is similar under both state and federal practice. In both forums, the plaintiff can propound interrogatories only after the defendant is *served* with summons; while the defendant may propound interrogatories once summons is *issued*. Consequently, a defendant may serve interrogatories before he is served with process. Both forums allow interrogatory answers to be used at trial as evidence. Two minor differences exist between the two interrogatory rules. In federal practice thirty days are given to answer interrogatories, while in state practice twenty days are allowed. In federal practice when objections to interrogatories are made, the burden is on the interrogating party to move to compel answers, while in state practice the objecting party is responsible for obtaining an early hearing on his objections.

A more significant distinction is the "business records option" available in federal,⁹⁷ but not state practice. Under that provision, the respondent has the right to offer the interrogating party a reasonable

97. FED. R. CIV. P. 33(c) states:

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

opportunity to inspect records in lieu of assembling the requested information from the records himself. This option, while offering an opportunity to “shift the burden” of inspection, obviously should be exercised where opening the records would provide access to unrequested and sensitive information.

D. *Production of Documents and Things*

Federal rule 34 is the primary discovery device for gathering tangible information from the adverse party. Such information, once obtained, may be inspected, copied, tested, and sampled.

To be subject to a production request, the adverse party must have “possession, custody or control” of the desired item.⁹⁸ The rule 34 procedure is initiated by a request with no motion being required unless the parties cannot agree upon a time, place or the right to production itself. In that event, a motion to compel discovery is required.

A response is required to the time and place suggested in the request within thirty days or, in the initial stages, within forty-five days after service of summons.

The state practice concerning production of documents and things is a bit more complicated because two statutes and a court rule are applicable. Section 548⁹⁹ controls production from other parties and requires as a prerequisite a court order based upon a motion showing “good cause” and notice. Rule 12¹⁰⁰ adopts the same procedural requirements of a section 548 motion, but provides that the order may be directed to a non-party to the action, and further affords the adverse party the right to be present at the inspection and to likewise inspect, copy, survey or photograph.

Though the federal rules dispensed with the good cause showing in the 1970 revisions, its significance in state practice was reaffirmed

98. The *right to possess* will serve as a basis for court direction to a party to obtain items from a non-party. See *Reeves v. Pennsylvania R.R.*, 80 F. Supp. 107 (D. Del. 1948) where the court ordered a party to produce copies of income tax returns not in her possession.

Having in mind the broad and liberal purposes of the discovery process provided by Rule 34 and that copies of the income tax returns retained by the taxpayer are subject to production under the Rule and that the taxpayer alone has the right to inspect filed returns and obtain copies thereof, I am of the opinion that the taxpayer retains such a *potential right to the custody or control* of the copies *as to require production* of such copies. The potential right to the custody and control of the copies may be converted into an actual custody and control solely upon the exercise of the option of the taxpayer. *Id.* at 108-09 (emphasis added); *George Hantscho Co. v. Michle-Goss-Dexter, Inc.*, 33 F.R.D. 332, 334-35 (S.D.N.Y. 1963) (documents in possession of party's subsidiary subject to production).

99. OKLA. STAT. tit. 12, § 548 (1971).

100. OKLA. CT. R. 12.

recently in *Amoco Production Co. v. Lindley*.¹⁰¹ There, it was held that an order of production without requiring the requisite "good cause" showing was a nullity and unenforceable.

Section 482 of title 12 is the second state production statute. It is similar to the federal procedure in that a request is first made for production. If compliance is not forthcoming within four days, a court order to produce may then be entered upon motion. It should be noted that section 482 is limited to documents, papers or books *containing evidence*, and the sanction for continued refusal to comply is that the document is presumed to contain such evidence as the requesting party set out by affidavit.

E. *Depositions*

Depositions, while normally the most expensive, are nevertheless generally regarded as the most effective of discovery tools. They are recognized as serving at least four functions:

1. To discover information;
2. To impeach trial testimony at variance with deposition testimony;
3. To obtain admissions from the adverse party; and
4. To preserve testimony of a witness unavailable for trial.

Oral depositions are considered superior to interrogatories in that an opportunity is provided for assessing the demeanor of a witness and for immediately pursuing questions on new subjects. Depositions are the only discovery tool affording compulsory pre-trial access to non-party witness testimony.

The form of deposition questioning will necessarily reflect the purpose for which the deposition is taken. The "discovery" deposition ordinarily is conducted with broad, sweeping questions. The form of the questions are of secondary concern to the information obtained. On the other hand, a deposition taken for preserving testimony will be of little value if the questions and answers are not in a form to be admissible at trial.

Whether a deposition may be used at trial is dependent largely upon whether it is of a non-party witness or of a party. In the latter instance both state and federal practice allow the use of depositions regardless of the party's presence at trial, while in the former event, the

101. 609 P.2d 733 (Okla. 1980). "The order itself to produce was *absolutely ineffective* for failure to show 'good cause'." *Id.* at 739 (emphasis added).

unavailability of the non-party witness must be shown before his deposition is admissible.¹⁰² Deposition testimony recorded under objection is taken subject to that objection being ruled upon at trial. Generally, counsel stipulate that objections themselves may be reserved to the time of trial to be made only if the deposition is offered in evidence.

Rule 30(d) allows the federal court to enter an order terminating or limiting the examination of a deponent. While one Oklahoma case raises some questions about the jurisdiction of the state district judge to exercise control over the taking of a deposition,¹⁰³ a subsequent opinion clearly recognizes the right of a state judge to take action to prevent improper conduct in a deposition in litigation pending under the jurisdiction of his court.¹⁰⁴

A major procedural distinction exists between the state and federal practice concerning the ability to require a deponent to bring with him documents or tangible things to the deposition. Under the federal rule, a subpoena duces tecum may be issued as a matter of course. However, the state rule is that only the discovery statute relative to the production of documents, and not the statutes relating to subpoena duces tecum, may be used to compel production prior to trial.¹⁰⁵

Basic deposition strategy calls for first taking the deposition of the adverse party or witness believed to possess the most information, thereby eliminating or limiting the need of other depositions. It is not considered advantageous to allow depositions of your witness substantially in advance of deposing the other side's witnesses. Further, it is normally advisable to take the depositions of all adverse witnesses as close together as possible.

102. FED. R. CIV. P. 32(a). In state practice, OKLA. STAT. tit. 12, § 447 (1971) allows the use of depositions in three circumstances: first, when the witness is unavailable; second, to point out a party's conflicting admission; and third, depositions that would impeach later testimony. OKLA. STAT. tit. 12, § 433 (Supp. 1 1980) was amended in 1979 to allow the use of the deposition testimony of expert witnesses *regardless* of their unavailability.

103. *Brightmire v. District Court*, 424 P.2d 425 (Okla. Crim. App. 1967). Quoting an earlier case, the Court of Criminal Appeals reasoned:

The respondent, the Judge of the Superior Court is not vested with jurisdiction to control the taking of depositions; that right is controlled by the terms of the statute.

.
We are also of the opinion that the statutes provide sufficient remedy for anyone cited for contempt to preclude the district court from entertaining jurisdiction.

Id. at 430.

104. *Avery v. Nelson*, 455 P.2d 75 (Okla. 1969). The Oklahoma Supreme Court held that "the district court in which an action is pending has the duty as well as the authority to prevent another party . . . from eliciting . . . by deposition taken before trial . . . any information which . . . is privileged." *Id.* at 80.

105. See *Carman v. Fishel*, 418 P.2d 963, 973 (Okla. 1966).

Federal rule 31, a rarely used federal discovery device, permits the deposition upon written questions.¹⁰⁶ This device is a hybrid of the oral deposition and the written interrogatory. Like the interrogatories, the direct and cross-examination questions are written; but like the oral depositions, and unlike interrogatories, the answers are oral. Lack of spontaneity due to advance knowledge of the question is ordinarily considered the chief drawback to the deposition on written questions. However, rule 31 should be favorably considered for obtaining non-controversial information from neutral or friendly witnesses, since, unlike the rule 33 written interrogatories, they are not confined to being served on adverse parties.

F. *Organization of Discovery*

In order to effectively utilize information obtained through discovery, an efficient system to quickly retrieve desired information must be devised. At a minimum, this includes a comprehensive index of relevant exhibits keyed into deposition, interrogatory, and admission responses for their identification.

Depositions should be summarized with the descriptive passage of the testimony being referenced to the transcript page number. The extent of summary detail is largely a matter of individual style, however, approximately five or six descriptive lines per deposition page would be considered typical.

The first step toward a successful integration of discovery information is the development of a comprehensive topical index. Upon this skeleton outline of disputed issues, the pertinent evidence each witness will be expected to give on each issue can be briefly noted with the proper references to deposition pages, exhibit index numbers, and interrogatory answers.

Nothing proves more frustrating for judge and jury than for counsel to spend seemingly endless minutes searching for a pertinent deposition answer or relevant document. The truth is that such frustration is justified because the courtroom is not the proper place to get "organized".

VI. DEMONSTRATIVE EVIDENCE

Demonstrative evidence plays a very important role in business-

106. FED. R. CIV. P. 31.

related litigation. It assists counsel in visually summarizing substantial amounts of data which, if left for the jury to assimilate, could not or would not be done. Demonstrative evidence gives the jury not only the opportunity to hear the evidence but also to see it. Demonstrative evidence generally falls in the categories of charts and graphs, photographs and videotape, illustrations, maps, and models.¹⁰⁷

A. *Charts and Graphs*

Charts and graphs are the most frequently used demonstrative evidence in business-related litigation. They can be used to illustrate the testimony of a witness for the purpose of comparison or for information and data. As an example, it is particularly helpful to a jury in an antitrust action to see a graphic illustration of the change in sales volumes over a period of time between competitors; to see by a bar graph competitors' respective market shares at various points in time; to see on a chart a company's sales in relation to capacity to produce; or to see charts and graphs reflecting various competitors' product fluctuations over periods of time.

B. *Photographs and Videotape*

Photographs, whether still or moving, and videotape may play a role in business-related litigation.¹⁰⁸ In a deceptive trade practices case, photographs may be used to illustrate not only the similarity of products in appearance, but also in the manner in which products are displayed to potential customers.

Though photographs are an extremely useful tool, they can prove to be a problem at trial if a witness identifies a small photograph which the jury does not see as it is being described. When the jury subsequently receives the photograph, they have often forgotten the significance of the evidence that went with it. It is recommended the photographs be reproduced in such a size that they can be observed by the witness, the court, counsel, and the jury at the same time. This may be accomplished by greatly enlarged photographs or by the use of a projector to project the photograph onto a screen for easy viewing. This method is recommended over the use of distributing copies of a photograph to each member of the jury, particularly where counsel in-

107. F. BUSH, TRIAL PROCEDURE MATERIALS 166, 187 (1961).

108. See generally C. SCOTT, PHOTOGRAPHIC EVIDENCE—PREPARATION & PRESENTATION (1969).

tends to use a substantial number of photographs. Jurors often become interested in the photographs and forget to listen to testimony given as to the significance of each.

C. *Illustrations*

In some instances in business litigation, the use of an illustration is more helpful than that of a photograph. The illustration can eliminate unwanted background materials which a photograph would reflect and may be more attractive to the eye and thus more appealing to the jury. Like charts, graphs, and photographs, it is an easy way to convey what may be difficult to describe.

This category of demonstrative evidence includes the enlargement of documentary evidence which may be used both during the course of examination and in closing argument to accentuate important documents. Frequently, in litigation of this nature, there are several key documents in which favorable language is found supporting one's particular position on an issue. These documents may be enlarged by photographic process and placed on poster-type boards some thirty to forty inches in size. The jury's ability to read and see the language along with counsel when these documents are discussed, either in direct, cross-examination, or in closing arguments, increases the chances that the jury will retain and understand what counsel is intending to convey.

D. *Maps*

In certain types of actions, maps are the most essential form of demonstrative evidence that will be presented at trial. With maps, special care must be taken to show that they accurately depict the scene they are supposed to represent. Judges tend to place a stricter form of proof on the accuracy of maps than on other forms of demonstrative evidence.¹⁰⁹

E. *Models*

Though the use of models is more commonly found in personal-injury litigation, they can also serve a useful purpose in business-re-

109. *See, e.g.*, *Farrior v. Payton*, 562 P.2d 779 (Hawaii 1977) (trial court excluded maps purporting to show boundary lines for lack of proper foundation and relevancy). *Accord*, *Ross v. McLain*, 246 S.W.2d 1012 (Ky. 1952) (maps and diagrams used in a demonstrative sense are not subject to the strict proof of accuracy as those offered as independent evidence); *Barrow v. Champion Paper & Fibre Co.*, 327 S.W.2d 338 (Tex. Civ. App. 1959) *writ ref. n.r.e.* (for map to be admitted into evidence its validity must be certain and not founded on vague conjecture).

lated litigation. Often, in disputes where the objects sought to be described are of such a size that they cannot be shown in the courtroom, the model serves as the best substitute. Caution, however, is urged in using models which are to perform some working function. Nothing can be more devastating to counsel than for the model to fail in the same manner that his opponent has urged that the original piece of equipment failed.

Though both the Oklahoma and Federal Rules of Evidence provide that the contents of writings, recordings or photographs may be presented in the form of a chart, summary, or calculation, whether they may be taken to the jury room is left to the discretion of the trial judge.¹¹⁰ Thus, it is helpful to know a judge's predisposition as to the matter of charts, graphs and other demonstrative evidence. This matter should be taken up at the pre-trial hearing so that counsel will not be caught unaware later at trial.

As a final note, counsel should carefully consider the extent to which he intends to use demonstrative evidence. Too much demonstrative evidence may turn his case into a sideshow and too little may leave the jury with an inaccurate understanding of what counsel is attempting to convey. A careful approach to the use of demonstrative evidence can be the difference between winning and losing a case.

VII. EXPERT WITNESSES

Complex business litigation generally requires the use of expert witnesses. Both the Oklahoma statutes¹¹¹ and Federal Rules of Evidence¹¹² provide for the use of expert witnesses at trial, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise."¹¹³

"Experts" may consist of individuals in the employment of a client

110. See FED. R. EVID. 702.

111. OKLA. STAT. tit. 12, §§ 2701-2705 (Supp. 1 1980).

112. FED. R. EVID. 701-706.

113. *Id.* 702 (The Oklahoma section is identical to the federal rule. See OKLA. STAT. tit. 12, § 2702 (Supp. I 1980)). For a discussion of the differences between the Oklahoma provisions and the federal provisions relating to expert witnesses, see generally Blakey, *An Introduction to the Oklahoma Evidence Code: Relevancy, Competency, Privileges, Witnesses, Opinion, and Expert Witnesses*, 14 TULSA L.J. 227, 312-20 (1978); Blakey, *An Introduction to the Oklahoma Evidence Code: The Thirty-Fourth Hearsay Exception, Information Relied upon as a Basis for Admissible Expert Opinion*, 16 TULSA L.J. 1 (1980).

as well as outside "consultants." While particularly helpful during the investigative stage, experts may be used at all stages of litigation. They can also assist in drafting pleadings involving discovery, negotiations, and, most obviously, at trial.

A. *Use of Expert Witness in Preliminary Stages of Action*

During the preliminary stage the expert may be used to assist counsel to assimilate and understand information which counsel may use at trial to support his theories of relief or defense. Because of the complex nature of business transactions which take place on a regular basis in our society today, such assistance is often necessary in order to understand the mechanics of a particular industry or business. For example, the consultant or expert can assist counsel in understanding the process by which an industry actually conducts its business; the methods of competition employed by that industry; factors which affect price; normal profit margins; sources of raw materials; market structure; customary methods of record keeping in the industry; trade associations related to the industry; and other areas about which counsel may know little without the advice of an expert.

The need for special expertise in complex business litigation is obvious. But an isolated recognition of that need will not benefit the attorney. Successful use of an expert witness often depends on two crucial determinations: the type of expertise needed and the time of retention.

B. *Determining and Locating the Expertise Needed*

Choosing the type of expertise needed for a particular case is critical. Though one may be capable of determining the general area of expertise involved in the case, narrowing the field to the specific expertise relevant to the pertinent issues may prove more difficult. Locating one or more experts who have the particular knowledge, background, and experience needed for a complex case is not always a simple task. The problem becomes even more difficult when counsel seeks an individual who is willing to assist in the preliminary stages and, if necessary, to testify at trial.

Professional associations will often help an attorney locate individuals with the particular knowledge and experience counsel is seeking.

For additional aid, there are publications which list consultants.¹¹⁴

C. *When to Retain the Expert Witness*

Upon determining the type of expert needed for the case, the question becomes when to retain such expert. In federal actions, the Federal Rules of Civil Procedure¹¹⁵ provide that discovery of fact and opinions held by experts which are relevant to the subject matter involved in the action may be obtained through interrogatories which may require the expert to state "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."¹¹⁶ The rule also provides that a party may discover facts and opinions of an expert who has been retained or specially employed in anticipation of litigation or for trial preparation but who is not expected to be called as a witness upon a showing that it is impracticable for the parties seeking discovery to obtain such facts or opinion on the same subject by any other means.¹¹⁷ Thus, the immediate retention of an expert may subject him to the discovery process before counsel has discovered that his expert may have views harmful to the case.¹¹⁸

Counsel should proceed with caution in retaining an expert. The interviewing process should be of sufficient depth to eliminate, to the extent possible, an expert who may harbor opinions detrimental to one's position. Though early retention of an expert witness may be necessary for plaintiff's counsel, defense counsel may find it advisable to conduct some initial discovery before retaining an expert in order to have enough information available to know the specific type of expertise needed.

D. *Choosing the Expert Witness*

In choosing the expert or experts for a case, never settle upon the first expert interviewed. Consider whether the expert's credentials fit

114. See the Martindale-Hubbell Law Directory, a legal directory service which includes an index of special services for lawyers, such as ballistic experts, handwriting experts, and technical service firms.

115. FED. R. CIV. P. 26(b)(4).

116. *Id.*

117. *Id.* Oklahoma provides for the discovery of facts and opinions of an expert in rule 14 of the Rules for District Courts of Oklahoma, OKLA. CT. R. 14.

118. For a discussion of the scope of discovery of expert information and precautionary measures associated therewith, see generally Conners, *A New Look at an Old Concern—Protecting Expert Information from Discovery under the Federal Rules*, 18 DUQ. L. REV. 271 (1980).

the area which is to be developed through his expertise. Particular attention should be paid to his previous trial experience as an expert witness. Contact other lawyers who have used this particular expert to obtain their opinions of his availability for consultation and the manner in which he handled himself before the jury. The availability of the expert witness for pre-trial conferences should also be arranged. Expert witnesses should be apprised of the factual developments in the case as it may relate to their particular area of expertise. Care must be exercised to minimize the amount of discoverable material conveyed to the expert so that he has only such knowledge and facts as are required for purposes particular to the litigation.

In choosing an expert witness, the general demeanor of the witness is extremely important and must compliment the anticipated attitudes of those before whom the case is to be tried. Although the expert may have extraordinary credentials and a vast array of experience as a witness, if his demeanor would not fit in with the mannerisms of the locality in which the case will be tried, the entire effectiveness of his performance as an expert witness may be lost simply because the fact finders do not like his personality.

Once an expert is chosen for a particular facet of a case, his task should be fully and carefully outlined. The expert witness must understand the facts of the case, the basic theories of recovery, and precisely what counsel is seeking to do with the use of his testimony. Should the situation arise where the expert is to be deposed, he should be as prepared for the deposition as he would be for trial. Similar preparation should be made in responding to interrogatories concerning facts known to the expert and his opinion based on those facts. In regard to interrogatories, the expert will be of particular value in preparing the examination of opposing parties as well as the opposing parties' expert witnesses. His presence at depositions may also be of great assistance.

VIII. PRE-TRIAL CONFERENCE AND ORDER

In both Oklahoma and federal court procedure, the pre-trial conference can play a very important role. Often, however, neither the court nor counsel give the pre-trial conference the attention which it deserves.

Rule 16 of the Federal Rules of Civil Procedure¹¹⁹ and rule 5 of

119. FED. R. CIV. P. 16.

the Rules for District Courts of Oklahoma¹²⁰ provide for a pre-trial conference.

A. *Purpose of the Pre-trial Conference*

The purpose of the conference is to simplify the issues, obtain admissions of fact, identify witnesses, delineate the factual and legal issues, and set the stage for an efficient trial of the facts which remain in dispute.¹²¹ Counsel should be prepared at a pre-trial conference to state to the court what his evidence will be, what the applicable law is as it relates to that evidence, as well as the witnesses and exhibits that he intends to use to support his evidence and theories.¹²² Counsel should also be prepared to discuss the admissibility of his evidence and to enter into appropriate stipulations in order to expedite the trial of the case.¹²³

B. *Extent of Preparation Necessary for the Pre-trial Conference*

To properly prepare for a pre-trial conference, one must assimilate his entire case and determine how he intends to present it. The pre-trial conference can be used by counsel to shape the admitted facts and uncontested evidence and to eliminate legal and factual issues which may be troublesome to his theories of recovery or defense. Therefore careful planning and knowledge of the facts and law pertinent to the case will put counsel in a position to use the pre-trial conference to his advantage.

At the pre-trial hearing, the court has every right to expect, and does expect, counsel to be in a position to explain the facts which support the legal theories propounded. Where evidentiary issues are apparent, the court will inquire of counsel how he intends to admit the evidence to support his case. Counsel must be sufficiently prepared to make knowledgeable responses. A court will be less receptive to one who is not prepared and less tolerant of theories which, though possibly viable, are not well articulated or explained at the conference.

120. OKLA. CT. R. 5.

121. One school of thought sees the primary goal of the pre-trial conference as a means of obtaining settlements or otherwise disposing of cases without trial. *See* M. ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* 8 (1964). After conducting a study on pre-trial conferences, Rosenberg concludes that although the result of such conference is not a greater number of settled cases or a shortened trial time, pre-tried cases tend to be better prepared and better presented, thus leading to "juster" results. *Id.* at 67-70.

122. OKLA. CT. R. 5(d).

123. *Id.* 5(c).

C. *The Pre-trial Order*

As is the general rule, most courts enter an order following the pre-trial conference reciting the action taken at the conference, the amendments allowed to the pleadings, the agreements made by the parties, and that the pre-trial order controls the subsequent course of the action.¹²⁴ The significance of the conference and the order delineating the determinations made at it are of particular importance and accentuate the importance of counsel being prepared.

A pre-trial order normally sets forth a general statement of the causes of action as delineated in the petition or complaint. Next, the order reflects the basis for both jurisdiction and venue. Each party's contentions are then set out as to each claim, counterclaim or cross-claim. Following the contention of the parties, those facts which are admitted, but not contested, are set out in detail. Facts which are not admitted, but which are not to be controverted, are then set out in the order. This is generally followed by the issues of fact to be presented to the jury. The issues of fact should be set out in detail and not in general statements. Next, and in similar detail, the issues of law are delineated. Exhibits to be introduced by each party are identified or a schedule for their production and exchange between opposing parties is set out. The order should provide that copies of all exhibits to be introduced in the party's case in chief must be produced at a given time and location, and that they are to be premarked with the same numbers which will be used at the trial of the action. The pre-trial order should contain the names of all witnesses to be called by each party and a general description of the nature of their testimony. The order normally concludes with specific time frames for concluding depositions, adding additional trial witnesses, exchanging of exhibits, charts, graphs and demonstrative evidence, the date for the submission of trial briefs, voir dire, and requested instructions.¹²⁵

IX. TRIAL NOTEBOOK

Following the pre-trial conference and entry of the pre-trial order, counsel must prepare in earnest for the actual trial of the case. Com-

124. *Id.* 5(f). See *Commercial Ins. Co. v. Smith*, 417 F.2d 1330 (10th Cir. 1969). "The pre-trial order formulating the issues for trial controls the subsequent course of the action unless modified at trial to prevent manifest injustice." *Id.* at 1333. *Accord*, *Case v. Abrams*, 352 F.2d 193 (10th Cir. 1965).

125. For an overview of pre-trial procedure, including a pre-trial order "checklist", see Kincaid, *A Judge's Handbook of Pre-Trial Procedure*, 17 F.R.D. 437 (1955).

plex business litigation, as previously noted, normally requires substantial organization of materials in order to accomplish an effective delivery at trial. To assist in organizing this material, the use of a trial notebook or similar organization tool is essential.

The trial notebook generally consists of loose-leaf, ring-type binders containing the “skeleton” of one’s entire case. The notebook should include an outline reflecting the trial sequence:

- Voir dire;
- Plaintiff’s Opening Statement;
- Defendant’s Opening Statement;
- Plaintiff’s Case in Chief;
- Demurrer to Evidence (Motion to Dismiss);
- Defendant’s Case in Chief;
- Plaintiff’s Rebuttal;
- Motion for Directed Verdict;
- Requests and Objections to Instructions;
- Instructions (following Closing Statements in Federal Court);
- Plaintiff’s Closing Statement;
- Defendant’s Closing Statement;
- Plaintiff’s Rebuttal Statements;
- Verdict; and
- Polling the Jury.

This outline should be expanded to include specific witnesses which the opposing party intends to call to testify and should also reflect those witnesses which one intends to call on behalf of his client. Too often, because of the stress of a trial, even those matters which we believe could not be forgotten, are forgotten. The outline serves to remind counsel whom he must next be prepared to examine or cross-examine; to demur to the evidence or move to dismiss; to ask for a directed verdict; and if he chooses to do so, to poll the jury.

In addition to the general outline, the trial notebook should include the following:

- Copy of the Petition or Complaint;
- Copy of the Answer and any Counterclaims or Cross-Claims;
- Copy of the Reply, where appropriate;
- Copy of the Pre-Trial Order;
- Outline of the voir dire;
- Outline of the Opening Statement;
- Outline or specific questions for each witness which are to be called for direct examination, with references to exhibits to be introduced through each witness;

- Outline or specific questions for witnesses expected to be cross-examined, with references to depositions, exhibits, interrogatory responses, and requests for admission;
- Outline of or a statement of the grounds for demurring to the evidence or moving to dismiss;
- Outline of or a statement of the grounds for a directed verdict;
- Outline of the Closing Statement;
- Outline, with supporting authority, for all procedural issues and issues concerning the admissibility of evidence which are anticipated to arise at trial;
- Chart reflecting the designated number of each exhibit to be offered and containing a brief description of each exhibit, with spaces showing its identification, offer, and admission into evidence; List of opposing counsel's exhibits, with space to reflect their identification and admission into evidence; and
- A "Things to Do" list.

The trial notebook will serve as a guide to locate all of the material which you intend to use during the course of the trial. In that the exhibits and depositions generally cannot be placed in the trial notebook, the trial notebook can make reference to the pertinent depositions and exhibits so that when inquiry is made into a particular area, the appropriate exhibits can be easily located and made available for identification by a particular witness or the pages of a particular deposition found for impeachment or introduction.

Just as the trial notebook is important in organizing a complex case for trial, it is equally important to have the exhibits which are to be introduced well organized and readily accessible. This includes documents which, though not marked, may be necessary for purposes of impeachment. An index to the exhibits and related documents will save counsel time and embarrassment at trial. Having an impeaching document readily available for cross-examination not only reflects that one is prepared, it makes a very positive impression on the jury. The trial notebook forces counsel to be well organized, and organization is essential to a successful result in complex litigation.

X. FINAL TRIAL PREPARATION

Following the pre-trial conference and the entering of the final pre-trial order, a trial brief or memorandum, requested instructions,

voir dire (in federal court), and any pre-trial motions designed to limit the admission of evidence must be prepared and submitted to court.

A. *Trial Brief or Memorandum*

The trial brief or memorandum should cover all the pertinent facts which counsel intends to offer into evidence to support his theories of relief or defense and set forth the law applicable to those facts. The facts and law should support counsel's requested instructions which, along with the trial brief and proposed voir dire, should be submitted to the court several days in advance of trial. The trial brief or memorandum should also cover any problems which may be anticipated over the admissibility of certain evidence.

B. *Jury Instructions*

Care should be taken in the drafting of instructions¹²⁶ to avoid invading the province of the jury,¹²⁷ singling out evidence or giving undue influence to certain evidence,¹²⁸ or phrasing an instruction so that it constitutes an argument in favor of or against one of the parties.¹²⁹

C. *Voir dire*

In Oklahoma state courts, the court permits counsel to voir dire

126. Oklahoma provisions pertaining to jury instructions are found in OKLA. STAT. tit. 12, §§ 577(5)-578 (1971). In 1968, in response to the problem of erroneous jury instructions causing verdicts to be set aside, Oklahoma provided for the compilation and adoption of a body of uniform jury instructions. *Id.* § 577.1. The Oklahoma Uniform Jury Instructions (OUJI) are to be used when appropriate, unless the court determines that to do so would not accurately state the law. *Id.* § 577.2. For a thorough treatment of federal jury practice, see E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS (2d ed. Supp. 1971).

127. If a requested jury instruction points out one item of testimony and directs the jury that, if it finds such item to be supported by the evidence, that item shall be given a certain effect, while there is other evidence from which the jury might reach a different conclusion but for the requested instruction, then that proposed instruction should be refused as going to the weight of the evidence and in so doing invading the province of the jury. *Williams v. McCants*, 104 Okla. 168, 230 P. 730 (1924). *See also Hamre v. Wagon*, 204 Okla. 118, 226 P.2d 934 (1950). The Oklahoma Supreme Court held that giving an instruction which invades the province of the jury constitutes reversible error. *Id.* at 936.

128. "Undue prominence should not be given to particular phases of a case and the refusal to give an instruction which would do so is not error." *Brown v. Reames*, 364 P.2d 906, 910 (Okla. 1961).

129. It is generally held that jury instructions which are argumentative in character are improper and should be refused. *See Leahy v. Monk*, 162 Okla. 256, 258, 19 P.2d 1077, 1079 (1933).

the jury,¹³⁰ and it is not necessary to present the court with requested voir dire prior to trial. However, in the federal courts in Oklahoma, it is the standard practice for the court to conduct voir dire.¹³¹ Any inquiry which counsel wishes to have the court make must generally be submitted to the court, in writing, prior to the trial. Because most federal courts will not conduct an extensive voir dire, care must be taken to draft any requested inquiry in as concise a manner as possible in order to elicit what counsel believes to be the most relevant information needed to select a jury.

D. *Exclusionary Motions*

An often overlooked pre-trial motion is the motion in limine. This motion is designed to raise, prior to trial, the issue of the admissibility of certain evidence.¹³² This avoids the possibility of prejudice to a party should such evidence be offered and be deemed inadmissible. Once damaging, though relevant, testimony is heard, it is rarely forgotten even though a jury may be admonished to disregard it.

E. *The "Second Chair"*

In litigation where a substantial number of witnesses are called and exhibits offered, the assistance of an additional counsel or a legal assistant during trial preparation and the course of the trial is most helpful. Maintenance and retrieval of exhibits, checking on availability of witnesses, note taking, and locating testimony for purposes of impeachment are just a few of the many purposes which the "second chair" can provide.

F. *Final Checklist*

An often overlooked, but crucial item in one's pre-trial preparation is to be sure that all depositions which counsel intends to use are on file with the clerk and are properly executed, where necessary, to be

130. OKLA. STAT. tit. 12, § 572 (1971). *E.g.*, *Wagers v. State*, 370 P.2d 567 (Okla. 1962) (defendant's duty to question qualifications of jury upon pain of waiver).

The phrase voir dire refers to the preliminary examination which the court may make of potential jurors in order to ascertain competency, interest, prejudice, etc., and to allow counsel to object to certain persons sitting on the jury. The extent of voir dire examination of jurors is within the discretion of the court. *See Rhodes v. Lamar*, 145 Okla. 223, 225, 292 P. 335, 338 (1930). *See also Rogers v. Citizens Nat. Bank*, 373 P.2d 256 (Okla. 1962).

131. Under FED. R. CIV. P. 47, the court may permit the parties to conduct the examination or may itself conduct the examination.

132. *See* Annot., 63 A.L.R.3d 311 (1975).

admissible. It is recommended that all witnesses, with the exception of employee witnesses, be subpoenaed with their witness fees paid. This ensures that the witness will be present, or that counsel will be in a position to ask for a continuance if such a witness does not appear.

XI. CONCLUSION

Deliberate, thorough, and accurate pre-trial preparation places counsel in a position to set forth his theories of recovery or relief in the most favorable manner possible. The advantages of such preparation become even more significant when counsel is involved in complex business litigation. The time and effort spent on pre-trial preparation will be reflected in an efficient presentation of one's case and, the jury willing, a favorable result.