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CIVIL DISCOVERY IN OKLAHOMA: DEPOSITIONS*

Charles W. Adams**

I. INTRODUCTION

Depositions are the most important of the discovery tools.¹ They have greater versatility², and, despite their greater expense,³ they are more widely used⁴ than the other discovery tools. Often depositions significantly affect the conduct of litigation.⁵ Trial preparation, in most

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1. W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 52 (1968) [hereinafter cited as GLASER]; J. KELNER, PERSONAL INJURY—SUCCESSFUL LITIGATION TECHNIQUES 2.4 (1979); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 416 (3d. ed. 1976) [hereinafter cited as WRIGHT]; Dunagan & Ricketts, *An Overview of Pre-Trial Preparation for Business Related Litigation*, 16 TULSA L.J. 139, 168 (1980) [hereinafter cited as Dunagan & Ricketts]; Summit, *Conducting the Oral Deposition*, 1 LITIGATION 22, 22 (Spring 1975).

2. GLASER, *supra* note 1, at 63; F. JAMES & G. HAZARD, CIVIL PROCEDURE 181 (2d ed. 1977) [hereinafter cited as JAMES & HAZARD]; WRIGHT, *supra* note 1; Wolfstone, *Discovery—Oral Depositions*, in 4 AM. JUR. TRIALS 119, 122-23 (1966) [hereinafter cited as Wolfstone].

3. CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL DISCOVERY PRACTICE 162, 168 (1975) [hereinafter cited as CALIFORNIA CONTINUING EDUCATION OF THE BAR]; JAMES & HAZARD, *supra* note 2, at 181; WRIGHT, *supra* note 1; Dunagan & Ricketts, *supra* note 1; Wolfstone, *supra* note 2, at 123. *See also* Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1329 & n.101 (1978); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 953 (1961).

4. GLASER, *supra* note 1; JAMES & HAZARD, *supra* note 2, at 180; WRIGHT, *supra* note 1.

5. Facher, *Taking Depositions*, 4 LITIGATION 27, 27 (Fall 1977) [hereinafter cited as Facher]; Kornblum, *The Oral Civil Deposition: Preparation and Examination of Witnesses*, 17 PRAC. LAW.

cases, benefits from the taking of depositions of the adverse party and significant witnesses.⁶ Because of the central role of depositions in modern discovery,⁷ attorneys should be well versed in the procedures for arranging depositions, the techniques of examining witnesses and preparing them for examination, and the methods of using depositions at trial.

This is the last in a series of three articles about civil discovery in Oklahoma appearing in this journal. The first article⁸ addressed the general principles applicable to all forms of discovery in Oklahoma. It discussed the purposes of discovery, the types of proceedings where discovery is used, the scope of discovery, privileges and other defenses to discovery, and the extent of appellate review of discovery orders. The second article⁹ examined the following discovery tools available in Oklahoma: (1) interrogatories, (2) requests for admission, (3) procedures for compelling production of documents and other tangible things, and (4) medical examinations. This Article focuses on depositions. First, the advantages and limitations of depositions are compared to the other discovery devices. Next, the procedures for arranging depositions, including compelling the attendance of witnesses and the production of documents, are examined. A discussion of tactical considerations regarding depositions, including the preparation of witnesses for depositions, techniques for examining witnesses, and the various types of stipulations commonly entered into at depositions follows. Finally, the uses of depositions at trial are examined.

II. ADVANTAGES AND LIMITATIONS OF DEPOSITIONS

A deposition¹⁰ is a pre-trial discovery procedure¹¹ by which parties

11, 11 (May 1971) ("Because such a large number of cases are settled prior to trial, the deposition is probably the single most important event during the course of litigation."); McElhaney, *Trial Notebook—The Horse Shed*, 7 LITIGATION 43, 43 (Summer 1981) ("In many cases, the deposition is the trial. Just because no judge is present does not mean it is not a trial—the witness is being evaluated by one of the most important fact finders, the opposing counsel.") (emphasis in original); Summit, *supra* note 1.

6. See Facher, *supra* note 5.

7. See GLASER, *supra* note 1, at 52, 79-82.

8. Adams, *Civil Discovery in Oklahoma: General Principles*, 16 TULSA L.J. 184 (1980).

9. Adams, *Civil Discovery in Oklahoma: The Discovery Tools*, 16 TULSA L.J. 658 (1981) [hereinafter cited as Adams].

10. OKLA. STAT. tit. 12, § 423 (1971) defines a deposition as follows: "A deposition is a written declaration, under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross examine, or upon written interrogatories." For a recent discussion by the Oklahoma Supreme Court of the various definitions for depositions in Oklahoma state courts, see *St. Francis Hosp., Inc. v. Group Hosp. Serv.*, 598 P.2d 238 (Okla. 1979).

to an action examine a witness before a judicial officer or notary public.¹² The witness testifies under oath¹³ and may be examined concerning matters relevant to the action or reasonably calculated to lead to the discovery of admissible evidence.¹⁴ The examination and testimony of the witness are generally recorded by a certified shorthand reporter¹⁵ who prepares a written transcript of the deposition for submission to the witness.¹⁶ After the deposition transcript has been read and signed by the witness,¹⁷ it is filed with the court.¹⁸ It can then be used at trial to impeach the witness¹⁹ or introduced into evidence if the witness is a party to the action,²⁰ is unavailable to testify at trial,²¹ or is an expert witness.²²

Depositions can perform many functions. The earliest use of depositions in Oklahoma was to preserve for trial the testimony of a witness who would be unavailable to testify at trial.²³ Besides preserving testimony,²⁴ a deposition may be used for discovery purposes—that is,

11. *State ex rel. Westerheide v. Shilling*, 190 Okla. 305, 308, 123 P.2d 674, 677-78 (1942).

12. OKLA. STAT. tit. 12, § 435 (1971).

13. *Id.* § 423.

14. *See* *Stone v. Coleman*, 557 P.2d 904, 905-06 (Okla. 1976) (dictum); *Unit Rig & Equip. Co. v. East*, 514 P.2d 396, 397 (Okla. 1973); *Carman v. Fishel*, 418 P.2d 963, 973-74 (Okla. 1966). This is similar to the scope of discovery under FED. R. CIV. P. 26(b)(1), which provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

15. For Oklahoma's regulations pertaining to court reporters, see OKLA. STAT. tit. 20, §§ 1504, 1505, 1507, 1508 (1971), 1501-1503, 1506 (Supp. 1980), and the Rules of the State Board of Examiners of Official Shorthand Reporters, which are found at *id.* ch. 20 app. (Supp. 1980).

16. *Id.* tit. 12, § 441 (Supp. 1980). This section also provides for recording the testimony of a witness by audiovisual means. See text accompanying notes 233-35 *infra*.

17. OKLA. STAT. tit. 12, § 441 (Supp. 1980). The requirement that the deponent read and sign the deposition transcript can be waived by stipulation. See text accompanying note 196 *infra*.

18. OKLA. STAT. tit. 12, §§ 442, 448 (1971).

19. *Id.* § 447.

20. *Id.*

21. *Id.*, *id.* § 433 (Supp. 1980).

22. *Id.* § 433(4).

23. *See State ex rel. Westerheide v. Shilling*, 190 Okla. 305, 307-09, 123 P.2d 674, 676-78 (1942).

24. The Uniform Perpetuation of Testimony Act allows a deposition to be taken even before an action is filed to preserve the testimony of a witness for trial. OKLA. STAT. tit. 12, §§ 538.1-13 (1971). Before allowing the taking of a deposition to preserve testimony, the court must be satisfied that the petition is not for discovery purposes and "that its allowance may prevent future delay or failure of justice in any civil, probate or other action or proceeding, and that the petitioner is unable to bring the contemplated action or proceeding or cause it to be brought . . ." *Id.* § 538.4 (Supp. 1980). The Uniform Perpetuation of Testimony Act is examined in Note, *Trial*

to ascertain facts pertaining to the litigation through examining a witness.²⁵ Whether a deposition is taken to preserve testimony for trial or for discovery purposes will affect how it is conducted.²⁶ An attorney taking a deposition for use at trial should focus his examination on those areas that are apt to favor his client's position.²⁷ By contrast, a deposition for discovery purposes should seek to elicit all pertinent information possessed by the witness, even if it is unfavorable to his client's position.²⁸ Generally, a deposition taken for discovery purposes will be less formal than one taken for use at trial;²⁹ to reduce expense it may sometimes be prudent for an attorney to examine a witness at a deposition taken solely for discovery purposes without having a court reporter present and instead simply take notes or tape record the responses of the witness himself.³⁰ In addition to obtaining testimony from witnesses, depositions may also be used to obtain document production.³¹

The major advantage of the deposition is its flexibility.³² Unlike interrogatories, requests for admission, and physical examinations, whose use is limited to parties,³³ depositions may be used to obtain information from both parties and nonparties.³⁴ Another advantage is that a witness cannot evade a question asked at an oral deposition as easily as one posed in an interrogatory since the examiner can follow

Practice: Petition to Perpetuate Testimony as a Discovery Device, 14 OKLA. L. REV. 545 (1961). For further discussion of the Uniform Perpetuation of Testimony Act, see text accompanying notes 138-48 *infra*.

25. *State ex rel Westerheide v. Shilling*, 190 Okla. 305, 308-09, 123 P.2d 674, 677-78 (1942).

26. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 204-05.

27. *Id.*; J. UNDERWOOD, A GUIDE TO FEDERAL DISCOVERY RULES 79-80 (1979) [hereinafter cited as J. UNDERWOOD]; Brazil, *supra* note 3, at 1330.

28. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 204-05; J. UNDERWOOD, *supra* note 27, at 79; Fowler & Sokolow, *Discovery Proceedings Under the Federal Rules*, in TRIAL PRACTICE 1, 33 (1955).

29. Dunagan & Ricketts, *supra* note 1; Facher, *supra* note 5, at 29-30.

30. McMillan, *From the Bench—Discovery: A Not So Magnificent Obsession*, 3 LITIGATION 5, 6 (Fall 1976). See also Kornblum, *supra* note 5.

31. Adams, *supra* note 9, at 662 n.21, 683-85. See generally Rey v. Means, 575 P.2d 116, 117, 121 (Okla. 1978); Application of Umbach, 350 P.2d 299, 299-300 (Okla. 1960); Brightmire v. District Court, 424 P.2d 425, 427 (Okla. Crim. App. 1967).

32. See authorities cited at note 2 *supra*.

33. Council on Judicial Complaints v. Maley, 607 P.2d 1180, 1182 (Okla. 1980) (interrogatories); Witte v. Fullerton, 376 P.2d 244, 248 (Okla. 1962) (physical examinations); OKLA. STAT. tit. 12, §§ 549 (1971) (interrogatories), 3010 (Supp. 1980) (requests for admission).

34. See OKLA. STAT. tit. 12, §§ 388, 390, 423, 447 (1971), 433 (Supp. 1980); 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, 33 (1980); Dunagan & Ricketts, *supra* note 1.

up with further questions.³⁵ Also, the opportunity to confront the witness allows the examiner to evaluate the demeanor and personality of the witness as well as the probable effectiveness of the witness in convincing the trier of fact of his version of the facts.³⁶ Finally, deposing an opposing party or an important witness associated with the opposing party can set the stage for settlement discussions either during or immediately after the deposition.³⁷

The major disadvantage of depositions is their cost.³⁸ Moreover, taking a deposition enables the witness to rehearse his testimony and practice his responses to cross-examination.³⁹ In addition, if the witness becomes unavailable for trial, the attorney taking the deposition may find his opponent introducing the deposition testimony of the absent witness into evidence at trial.⁴⁰ Also, interrogatories can often be used more effectively to obtain certain information, such as factual details that a witness is unlikely to recall at a deposition,⁴¹ the facts and contentions a party is making in the litigation, identification of documents and witnesses supporting these contentions,⁴² and the collective knowledge of a party and his agents and attorneys.⁴³ Further, the scope of discovery for document production at a deposition might be

35. GLASER, *supra* note 1; JAMES & HAZARD, *supra* note 2, at 131; Figg, McCullough & Underwood, *Uses and Limitations of Some Discovery Devices*, 20 PRAC. LAW. 65, 70 (April 1974); Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 875 (1933); Wolfstone, *supra* note 2.

36. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3; J. UNDERWOOD, *supra* note 27, at 65; GLASER, *supra* note 1, at 52-53; Goldman, *Examinations Before Trial in a State Court*, in TRIAL PRACTICE 1, 8 (1960); Facher, *supra* note 5; Kornblum, *supra* note 5.

37. Goldman, *supra* note 36; Facher, *supra* note 5; Summit, *supra* note 1; *Developments in the Law—Discovery*, *supra* note 3, at 954.

38. See note 3 *supra*.

39. *Developments in the Law—Discovery*, *supra* note 3. See also Bodin, *Strategy and Technique of Depositions*, in TRIAL PRACTICE 43, 52 (1960); Facher, *supra* note 5.

40. Bodin, *supra* note 39, at 52-53; Fowler & Sokolow, *supra* note 28, at 35; *Developments in the Law—Discovery*, *supra* note 3; see OKLA. STAT. tit. 12, §§ 433 (Supp. 1980), 447 (1971). See also text accompanying note 236 *infra*.

41. Adams, *supra* note 9, at 661; Ehrenbard, *Cutting Discovery Costs Through Interrogatories and Document Requests*, 1 LITIGATION 17, 18 (Spring 1975); Figg, McCullough & Underwood, *supra* note 35.

42. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 338; Adams, *supra* note 9, at 664; Schoone & Miner, *The Effective Use of Written Interrogatories*, 60 MARQ. L. REV. 29, 44-49 (1976); Comment, *Civil Procedure—Opinion Interrogatories After the 1970 Amendment to Federal Rule 33(b)*, 53 N.C.L. REV. 695, 699 & n.33 (1975).

43. Adams, *supra* note 9, at 661; Ehrenbard, *supra* note 41, at 18; Schoone & Miner, *supra* note 42, at 29-30. OKLA. STAT. tit. 12, § 390.1(C) (Supp. 1980) remedies this limitation of deposition to some extent by providing:

When the party to be deposed is a corporation, public or private, partnership, association or governmental agency the notice shall describe with reasonable particularity the matters on which examination is requested, and the party shall then designate one or more officers, directors or other persons who will testify on their [sic] behalf. The person

narrower than the scope of discovery for document production under section 548 of title 12 of the Oklahoma Statutes.⁴⁴ Additionally, in some circumstances, requests for admission are more effective than depositions because the allowable responses to requests for admission are restricted, making it more difficult for a party to equivocate in response to a request for admission than to a question at a deposition.⁴⁵ Despite these limitations, depositions remain the most widely used and generally the most effective of the discovery devices.

III. ARRANGING THE DEPOSITION

A. Introduction

The procedure for arranging the deposition of a witness must accomplish three objectives. First, it must assure that the witness attends the deposition and brings the documents that have been requested to the deposition. Second, notice must be given to all parties to the action so that they may attend and examine the witness. Finally, arrangements must be made for recording the testimony of the witness. Where possible, the deposition should be set up informally through mutual agreement of the parties and the witness since, generally, this is the most efficient and convenient way to proceed. When, as is occasionally the case, such agreement is not possible, the procedures described below should be used. This portion of the Article initially examines the procedures for arranging an oral deposition in Oklahoma for use in a pending Oklahoma state court action. Next, the procedures for interjurisdictional depositions are discussed, and finally, the procedures for taking a deposition before an action is filed to perpetuate testimony and taking a deposition upon written interrogatories are considered.

or persons so designated shall testify to matters known or reasonably available to the organization.

This act does not preclude taking a deposition by any other procedure authorized by law.

44. See *Stone v. Coleman*, 557 P.2d 904, 906 (Okla. 1976) (dictum); *Carmen v. Fishel*, 418 P.2d 963, 972-73 (Okla. 1966) (dictum). Adams, *supra* note 9, at 678-84; Dunagan & Ricketts, *supra* note 1; Vliet, *Oklahoma Discovery Procedures*, 2 OKLA. L. REV. 294, 305 (1949).

45. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2253, at 707 (1970); Adams, *supra* note 9, at 671; Finman, *The Request for Admissions in Federal Civil Procedure*, 71 YALE L.J. 371, 381 (1962); Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055, 1078 (1979).

B. *Depositions in Oklahoma*

1. When Depositions May Be Taken

Section 434 of title 12 of the Oklahoma Statutes⁴⁶ provides that a party may take the deposition of a witness without obtaining a court order at any time after service of the summons on any defendant, or ten days after the issuance of summons in the action,⁴⁷ whichever is earlier. Section 434 also provides that the court, upon motion and for good cause shown, may shorten the time and permit the taking of depositions earlier.⁴⁸ Although an action must be pending before depositions may be taken under section 434,⁴⁹ depositions may be taken despite the filing of a demurrer to the petition in the action, or a challenge to the validity of service of the summons, the jurisdiction of the court, or the venue of the action. Moreover, the taking of a deposition or an appearance at a deposition does not constitute a waiver of any pending motion, demurrer or other objection.⁵⁰ Participation in a deposition could arguably constitute a voluntary appearance, however, in the absence of a prior motion or demurrer challenging the validity of service, jurisdiction of the court, or venue of the action.⁵¹ Accordingly, a prudent attorney wishing to challenge service, jurisdiction or venue in an Oklahoma state court should file the appropriate demurrer or motion

46. OKLA. STAT. tit. 12, § 434 (1971) states:

Any person named in the caption in an action may commence taking testimony by deposition at any time after service of summons is effected on any of the defendants or, in any event, after ten (10) days following issuance of summons for service upon any person or persons named as defendants in the caption. Upon motion, with or without notice, as the court may direct, and for good cause shown, the court may shorten such time. A challenge to the validity of service, the jurisdiction of the court, the venue of the action, or a demurrer to the sufficiency of the petition shall not prevent a party from taking testimony by deposition, and the taking of a deposition or the appearance and participation in the taking of a deposition shall not waive any pending motion, demurrer or other objection.

47. *Gray v. Gray*, 459 P.2d 181, 186 (Okla. 1969).

48. See 5 VERNON'S OKLAHOMA FORMS § 5171 (revised by D. Harris 1979) [hereinafter cited as VERNON'S FORMS].

49. See *Application of Okla. Turnpike Auth.*, 365 P.2d 345, 356 (Okla. 1961). If no action is pending a person may petition the court to be allowed to take depositions under the Uniform Perpetuation of Testimony Act, OKLA. STAT. tit. 12, §§ 538.1-.3, 538.5-.13 (1971), 538.4 (Supp. 1980). For a discussion of the Uniform Perpetuation of Testimony Act, see text accompanying notes 138-57 *infra*.

50. OKLA. STAT. tit. 12, § 434 (1971).

51. See *ABC Drilling Co. v. Hughes Group*, 609 P.2d 763, 770-72 (Okla. 1980) (Opala, J., concurring in part and dissenting in part). *But cf.* *Ada Dairy Prods. Co. v. Superior Court*, 258 P.2d 939, 941-42 (Okla. 1953) (defendant took plaintiff's deposition and then successfully challenged validity of service of summons); *Harris Foundation v. District Court*, 196 Okla. 222, 224, 228, 163 P.2d 976, 978, 981-82 (1945) (after the parties had participated in depositions taken by the plaintiff and the defendants, the defendants successfully challenged validity of service of summons).

before arranging to take any depositions and should conduct no discovery other than taking depositions until the court has ruled on the demurrer or motion. A defendant's conduct of any other discovery might be found to constitute a voluntary appearance in the action and result in a waiver of the defendant's right to challenge service, jurisdiction or venue.⁵²

Often the order of taking depositions has tactical significance. Frequently an attorney wishes to depose an opposing party or a key hostile witness before his own client is deposed so that he can pin his adversary down to a statement of a particular version of the facts and use this statement in preparing his own client for deposition.⁵³ The effectiveness of the deposition of a key witness is often enhanced, however, if it is taken after the examiner is thoroughly familiar with the facts of the case and has completed a substantial part of his pre-trial investigation by serving interrogatories and requests for admission, obtaining document production and deposing a number of background witnesses.⁵⁴ The Oklahoma Statutes impose no restrictions on the order in which parties may take depositions. Parties to an action in an Oklahoma state court should be permitted to take depositions while conducting other forms of discovery,⁵⁵ and the fact that one party has initiated a deposition should not delay the taking of a deposition by another party,⁵⁶ unless the court orders otherwise.⁵⁷

52. Cf. *ABC Drilling Co. v. Hughes Group*, 609 P.2d 763, 771-72 (Okla. 1980) (Opala, J., concurring in part and dissenting in part) (nonwaiver provisions of § 434 narrowly construed by one justice).

53. GLASER, *supra* note 1, at 212-13; 4 MOORE'S FEDERAL PRACTICE ¶ 26.80 [1], at 26-565 (2d ed. 1979); R. SUGARMAN & S. NORTH, *DEPOSITION STRATEGY, LAW AND FORMS* § 1.02[2][8], at 1-19 to 1-21 (A. Sann & S. Bellman eds. 1981) [hereinafter cited as R. SUGARMAN & S. NORTH]; *Developments in the Law—Discovery*, *supra* note 3, at 954. See also Dunagan & Ricketts, *supra* note 1, at 169.

54. See CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 172; J. UNDERWOOD, *supra* note 27, at 74.

55. Cf. OKLA. STAT. tit. 12, § 549(a) (1971) ("Interrogatories may be served after a deposition has been taken and a deposition may be sought after interrogatories have been answered . . .").

56. Prior to 1970 a practice developed in a number of federal courts that allowed a party who first served notice to take depositions priority to commence and complete his depositions before any other party could institute any of his own discovery procedures. FED. R. CIV. P. 26 advisory committee note (1970), reprinted in 28 U.S.C. app. at 444-45 (1976); 4 MOORE'S FEDERAL PRACTICE ¶ 26.80[1], at 26-561 to 26-567 (2d ed. 1979); 8 C. WRIGHT & A. MILLER, *supra* note 45, at 310; Younger, *Priority of Pre-Trial Examination in the Federal Courts—A Comment*, 34 N.Y.U.L. REV. 1271, 1272 (1959); *Developments in the Law—Discovery*, *supra* note 3, at 954. This priority rule drew much criticism. 8 C. WRIGHT & A. MILLER, *supra* note 45, at 314 & n.49. As a result of this criticism the priority rule was abolished when FED. R. CIV. P. 26 was amended in 1970 by the addition of subdivision (d) which provides in pertinent part that "the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery." FED. R. CIV. P. 26 advisory committee note (1970), reprinted in 28 U.S.C. app. at 444-

2. Compelling Attendance of Witnesses

Assuring the witness' attendance is an essential part of arranging a deposition. Section 388 of title 12 of the Oklahoma Statutes⁵⁸ authorizes the officer⁵⁹ who will administer the taking of a deposition to issue a subpoena to compel the attendance of a witness at the deposition. Accordingly, an attorney arranging a deposition in Oklahoma should prepare a subpoena for issuance by the deposition officer. The subpoena should state the title of the action in which the deposition is to be taken, its time and place, and should also specify any books, writings or other things which the witness will be required to bring to the deposition.⁶⁰ The attorney should arrange to have the subpoena served along with the required witness fees⁶¹ on the witness, either personally or by registered mail, at least three days⁶² before the date specified in the

45 (1976). Because of the difficulties the federal courts had with the priority rule, Oklahoma state courts should be hesitant about adopting a priority rule of their own; instead any party should be permitted to institute discovery procedures regardless of whether another party has served a notice to take a deposition.

57. When the parties cannot agree on a mutually acceptable schedule for taking depositions, the court should establish a schedule for them. *Cf.* FED. R. CIV. P. 26(f) (providing for a discovery conference in federal courts at which the court may issue orders to facilitate discovery). Generally, simultaneous depositions in different locations should not be allowed, unless agreed to by the parties or ordered by the court. *See Gillis v. First Nat'l Bank*, 47 Okla. 411, 413, 148 P. 994, 995 (1915).

58. OKLA. STAT. tit. 12, § 388 (1971) provides: "When the attendance of the witness before any officer authorized to take depositions, is required, the subpoena shall be issued by such officer."

59. For the qualifications necessary to become a deposition officer see text accompanying notes 100-02 *infra*.

60. OKLA. STAT. tit. 12, § 387 (1971) provides:

The subpoena shall be directed to the person therein named, requiring him to attend at a particular time and place to testify as a witness; and it may contain a clause directing the witness to bring with him any book, writing or other thing, under his control, which he is bound by law to produce as evidence.

61. *Id.* § 391 provides:

A witness may demand his traveling fees and fee for one day's attendance when the subpoena is served upon him; and if the same be not paid, the witness shall not be obliged to obey the subpoena. The fact of such demand and non-payment shall be stated in the return, Provided [sic], however, that witnesses subpoenaed by any such State department, board, commission or legislative committee shall be paid their attendance and necessary travel, as provided by law for witnesses in other cases, at the time their testimony is concluded out of funds appropriated to any such State department, board, commission or legislative committee.

Statutory witness fees are set in *id.* tit. 28, § 81 (Supp. 1980) at \$5 per day for attendance less than 60 miles from the residence of the witness (\$12 per day for attendance more than 60 miles from the residence of the witness) plus \$0.15 per mile for travel expenses. Unlike other parties to civil actions, an agency of the state government is not required to pay witness fees to compel the attendance of witnesses through the use of subpoenas unless funds for witness fees have been appropriated for the agency. 3 Okla. Op. Att'y Gen. 12 (1970). *See also State v. Kaemmerling*, 83 Kan. 387, 111 P. 441 (1910).

62. OKLA. STAT. tit. 12, § 389 (1971) does not specify whether the three day time period for

subpoena for the taking of the deposition.⁶³ Under section 390 of title 12 of the Oklahoma Statutes a witness can be required to attend a deposition only in the county where he resides, the county adjoining the county where he resides, or the county where he is located when he is served with the subpoena.⁶⁴ Thus, an attorney may need to travel to another county to depose a witness if the witness whose deposition he seeks does not reside in the county where the attorney's office is located, or an adjoining county.

If a witness refuses to obey a subpoena that is valid and properly served, he may be found in contempt of court. Although certain statutory provisions appear to permit a court reporter serving as a deposition officer to punish a witness who disobeys a subpoena by citing the

service of a deposition subpoena by registered mail should run from the date of mailing by the court reporter or date of receipt by the deponent. Since it is not unheard of for even intrastate mail to take more than three days to reach its destination, the period should probably run from the date of receipt as indicated on the registered mail receipt. Accordingly, an attorney arranging the deposition should allow several days for delivery by the post office if he intends to rely on service of the deposition subpoena by registered mail. *Cf.* CAL. CIV. PROC. CODE § 1013 (West 1980) (providing for a five day extension of time for a party to respond to a notice where the notice is served by mail in California).

63. OKLA. STAT. tit. 12, § 389 (1971) provides:

Service of subpoenas for witnesses in civil and criminal actions in the district, superior, county and justice of the peace courts of this state shall be made by the officer, or other person making the service, by either personal service of such subpoena containing the time, place and the name of the court, and the action in which he is required to testify, or by mailing a copy thereof by registered mail, not less than three days before the trial day of the cause upon which said witness is required to attend, and the person making such service shall make a return thereof showing the manner of service, and if the same be by registered mail, he shall file with such return the registry receipt; provided, that the person or county attorney issuing the praecipe for a subpoena shall state therein the manner in which the witness or witnesses shall be served, and the officer or person serving such subpoena shall serve the same in the manner directed by the praecipe, and make his return in accordance therewith; provided, further, that if the praecipe calls for serving such subpoena by registered letter, then the clerk shall serve the same as provided for the serving of jurors.

64. *Id.* § 390 provides:

A witness shall not be obliged to attend for examination on the trial of a civil action or to attend to give his deposition except in the county of his residence or a county adjoining the county of his residence, or where he may be when the subpoena is served upon him, except in cases where a witness has been subpoenaed by any state department, board, commission or legislative committee authorized by law to issue subpoenas; such witness shall be required to attend in obedience to such subpoena at the time and the place within this state set out therein. Provided, however, that the deposition of a party or witness from an adjoining county shall be admissible in evidence.

Cf. Harwood v. Woodson, 565 P.2d 1, 3 (Okla. 1977) (medical expert witnesses from Oklahoma County could not be subpoenaed to a trial in Creek County); National Zinc Co. v. Sparger, 560 P.2d 191, 193 (Okla. 1977) (witness residing in Tulsa County was not required to comply with a subpoena directing him to attend a hearing before the State Industrial Court in Oklahoma County); *In re* Estate of LaSarge, 526 P.2d 930, 933 (Okla. 1974) (trial court did not have authority to compel out-of-state witnesses to return to Oklahoma for additional proceedings after they had testified in a proceeding to determine heirship).

witness for contempt,⁶⁵ it is clear that a court reporter lacks such authority.⁶⁶ Only courts vested with judicial power have authority to cite a witness for contempt of court.⁶⁷ If a witness does not appear for a deposition after being served with a valid subpoena, the attorney who arranged the deposition can apply to the court for the commencement of contempt proceedings and the issuance of an attachment of the witness directing the sheriff to arrest the witness and bring him before the court.⁶⁸ The punishment authorized by statute for failure of a witness to attend a deposition in obedience to a subpoena is a fine not to exceed \$50 and liability to the party injured by the failure of the witness to attend to the full extent of his damages. The witness may also be imprisoned in the county jail until he submits to the taking of his deposition.⁶⁹ In addition, the party seeking the deposition ought to be entitled, on a sufficient showing of diligence, to a continuance of the

65. OKLA. STAT. tit. 12, § 392 (Supp. 1980) provides: "Disobedience of a subpoena, or refusal to be sworn or to answer as a witness, when lawfully ordered, may be punished as a contempt of the court or officer by whom his attendance or testimony is required." (emphasis added); *id.* § 395 (1971) provides: "A witness so imprisoned by an officer before whom his deposition is being taken, may apply to a judge of a court of record, who shall have power to discharge him, if it appears that his imprisonment is illegal."

66. 1 Okla. Op. Att'y Gen. 236 (1968).

67. *In re Abbott*, 7 Okla. 78, 82, 54 P. 319, 320 (1898) (dictum). See generally *Waugh v. Dibbens*, 61 Okla. 221, 222, 160 P. 589, 590 (1916); *Brightmire v. District Court*, 424 P.2d 425, 429 (Okla. Crim. App. 1967).

68. *Brightmire v. District Court*, 424 P.2d 425, 427 (Okla. Crim. App. 1967). OKLA. STAT. tit. 12, § 393 (1971) provides:

When a witness fails to attend in obedience to a subpoena (except in case of a demand and failure to pay his fees), the court or officer before whom his attendance is required may issue an attachment to the sheriff, coroner or constable of the county, commanding him to arrest and bring the person therein named before the court or officer, at a time and place to be fixed in the attachment, to give his testimony and answer for the contempt. If the attachment be not for immediately bringing the witness before the court or officer, a sum may be fixed in which the witness may give an undertaking, with surety, for his appearance; such sum shall be indorsed on the back of the attachment; and if no sum is so fixed and indorsed, it shall be one hundred dollars. If the witness be not personally served, the court may, by a rule, order him to show cause why an attachment should not issue against him.

69. OKLA. STAT. tit. 12, § 394 (Supp. 1980) provides:

A. The punishment for the contempt provided in Section 393 of this title shall be as follows: When the witness fails to attend, in obedience to the subpoena, except in case of a demand for failure to pay his fees, the court or officer may fine the witness in a sum not exceeding Fifty Dollars (\$50.00). In other cases, the court or officer may fine the witness in a sum not exceeding Fifty Dollars (\$50.00), or may imprison him in the county jail, there to remain until he shall submit to be sworn, testify or give his deposition. The fine imposed by the court shall be paid into the county treasury, and that imposed by the officer shall be for the use of the party for whom the witness was subpoenaed. The witness shall, also, be liable to the party injured for any damages occasioned by his failure to attend, or his refusal to be sworn, testify or give his deposition.

B. The punishment provided in this section shall not apply where the witness refuses to subscribe a deposition.

trial so that the deposition testimony of the witness can be obtained.⁷⁰

Since the procedure for initiating contempt proceedings against a witness who fails to attend a deposition is apt to be cumbersome and expensive, it is probably most effective as an *in terrorem* device. Greater benefits are likely to be derived from explaining fully the available sanctions to a recalcitrant witness than in attempting to have these sanctions imposed. Moreover, an attorney arranging a deposition should accommodate reasonable requests of a witness for postponement of the deposition. He should make a careful record of his reasonableness in accommodating the witness, however, for possible future use if it becomes necessary to initiate contempt proceedings to secure the attendance of the witness or to obtain a continuance of the trial.

Section 390.1 of title 12 of the Oklahoma Statutes⁷¹ was recently enacted to provide a special procedure to compel either a plaintiff or a defendant to attend his own deposition without being served with a subpoena. Under section 390.1, the giving of three days' notice to a party or his attorney at any time after the party to be deposed has been legally served with process or has entered an appearance in the action suffices to compel that party's attendance at his deposition.⁷² A party

70. *In re* Estate of Katschor, 543 P.2d 560, 562 (Okla. 1975).

71. OKLA. STAT. tit. 12, § 390.1 (Supp. 1980) provides:

A. A party to a civil action, either plaintiff or a defendant who has been legally served with summons or entered an appearance in the case, shall be obliged to attend, upon three (3) days' notice to such a party or his attorney, to give his deposition before an officer authorized by law to take depositions, in the county of his residence or in the county adjoining the county of his residence, or where he may be when the notice is served on him, or in the county where the action is pending, and to do so without the tender of travel or attendance fees. No subpoena need be served on such party.

B. The notice provided for in subsection A of this section shall state the time and place for taking the deposition, the name and address of the person or persons to be examined, if known. If the party is to bring with him certain materials, the notice shall designate the book, writing or other thing under the party's control which he is to bring with him, and which he is then bound by law to produce as evidence.

C. When the party to be deposed is a corporation, public or private, partnership, association or governmental agency the notice shall describe with reasonable particularity the matters on which examination is requested, and the party shall then designate one or more officers, directors or other persons who will testify on their [sic] behalf. The person or persons so designated shall testify to matters known or reasonably available to the organization.

This act does not preclude taking a deposition by any other procedure authorized by law.

D. The party's disobedience of the notice or refusal to be sworn to answer when lawfully ordered to do so may be punished as contempt in the manner provided by law.

72. *Id.* § 390.1 does not specify the procedure required for the giving of notice to take the deposition of a party. Since § 390.1 was enacted to expedite the procedure for taking depositions, it would appear that the giving of notice by ordinary mail would suffice as long as the deponent receives actual notice. *See generally* Pine v. Davis, 194 Okla. 427, 430, 152 P.2d 590, 593 (1944) (holding that personal service on opposing parties of a notice to take depositions of witnesses was

who is given proper notice and fails to attend or refuses to testify at the deposition is subject to punishment for contempt in the same manner as if he had been served with a subpoena.⁷³ Moreover, the party seeking the deposition should be allowed to obtain a continuance of the trial until the recalcitrant party submits to the taking of his deposition.⁷⁴ A significant advantage of the deposition procedure in section 390.1 is that it adds the county where the action is pending to the locations permitted for the taking of a deposition.⁷⁵ Furthermore, a party is required to attend his deposition without the payment of any travel or witness fees. This provision may have a drastic effect on a nonresident defendant who, after being subjected to the jurisdiction of an Oklahoma state court under Oklahoma's long arm statute⁷⁶ on the basis of only minimum contacts with Oklahoma,⁷⁷ may be required to attend a deposition in Oklahoma without payment of any of his ex-

not required under OKLA. STAT. tit. 12, § 439 (1971)). In addition, § 390.1 does not state whether the three day notice period should run from the date of mailing or the date of receipt by the deponent party; the period probably should run from the date of receipt since delivery of the notice might take several days. See note 62 *supra*.

73. OKLA. STAT. tit. 12, § 390.1 (Supp. 1980) does not authorize the use of any sanction other than contempt to compel attendance of a party at a deposition. This is unfortunate because the Oklahoma Supreme Court held in *Uffen v. Wilshire Motels, Inc.*, 436 P.2d 644 (Okla. 1968), that a party's refusal to attend a deposition cannot be grounds for entering judgment against him "absent some applicable provision of law of constitutional effect." *Id.* at 645. Surely a trial court that is allowed to dismiss an action or enter judgment against a party that fails to answer interrogatories fully (OKLA. STAT. tit. 12, § 549(c) (1971)) ought to have authority to enter judgment against a party who refuses to be deposed. Until *id.* § 390.1 (Supp. 1980) is amended or the *Uffen* case is overruled, however, it seems that the only sanction a trial court may impose on a party who fails to attend or testify at a deposition is punishment for contempt of court.

74. *In re Estate of Katschor*, 543 P.2d 560 (Okla. 1975). In *Katschor*, decided before the adoption of OKLA. STAT. tit. 12, § 390.1 (Supp. 1980), certain parties had given notice under *id.* § 439 (1971) to the opposing party of the taking of her deposition, but were unable to serve the opposing party with a subpoena. After the opposing party failed to attend the deposition, the parties seeking the deposition requested a continuance of the trial. The Oklahoma Supreme Court found that the parties seeking the deposition were not guilty of lack of diligence and held that the trial court abused its discretion when it refused to grant the continuance. 543 P.2d at 562.

75. Under OKLA. STAT. tit. 12, § 390.1 (Supp. 1980), the deposition of a party may also be taken in any of the locations permitted by *id.* § 390 (1971) for the taking of the deposition of a nonparty witness—in the county where the witness resides, a county adjoining the county where the witness resides, or the county where the witness is served. See note 64 *supra*.

76. OKLA. STAT. tit. 12, §§ 1701.01-.05 (1971). See also *id.* §§ 170.1, 187 (Supp. 1980), tit. 47, §§ 391, 426 (1971), tit. 52, § 501 (1971).

77. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 290 (1980) ("[Oklahoma's long arm statute] has been interpreted as conferring jurisdiction to the limits permitted by the United States Constitution.") (footnote omitted); *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48, 52 (Okla. 1976) ("The intention in Oklahoma is to extend the jurisdiction of Oklahoma courts over nonresidents to the outer limits permitted by the due process requirements of the United States Constitution.") (footnote omitted). See also *Winston Industries v. District Court*, 560 P.2d 572 (Okla. 1977), which is discussed in Note, *In Personam Jurisdiction Over Foreign Corporations: The "Arising From" Requirement*, 30 OKLA. L. REV. 602 (1977).

penses on only three days' notice given to his attorney, or else be subject to punishment for contempt of court. Although section 390.1 extends the reach of the deposition statute to the limits of Oklahoma's long arm statute, fairness requires that the deponent party be permitted to seek a protective order from the court to avoid oppression and undue burden or expense.⁷⁸

The notice to take the deposition of a party must state the time and place of the deposition, and, if known, the name and address of the person or persons to be examined.⁷⁹ It may also specify the books, writings or other things in the control of the deponent party, which he will be required to produce at the deposition.⁸⁰ Further, if the deponent party is an organization (such as a corporation, partnership, association or government agency), the notice to take the deposition must describe with reasonable particularity the matters that will be the subject of examination at the deposition, and the organization must then designate one or more representative persons to testify on its behalf with respect to information known or reasonably available to the organization.⁸¹ This provision allows discovery through deposition of the collective knowledge of a party that is an organization.⁸² Since the representative designated to testify on behalf of the organization must do so with respect to matters known or reasonably available to the organization, that person has a duty to investigate the matters of examination specified in the notice to take the deposition, and the organization is bound by the testimony of its representative concerning those matters. In addition to deposing the representative designated by the organization, the discovering party may take depositions of other witnesses through the use of subpoenas, since section 390.1 does not prevent the taking of depositions by other means.⁸³

78. Cf. FED. R. CIV. P. 26(c) (authorizing a federal court to issue a protective order to protect a person from whom discovery is sought against annoyance, embarrassment, oppression, or undue burden or expense). See also Vliet, *The Inherent Power of Oklahoma Courts and Judges*, 6 OKLA. L. REV. 257, 272-74 (1953).

79. OKLA. STAT. tit. 12, § 390.1(B) (Supp. 1980); cf. FED. R. CIV. P. 30(b)(1) (analogous federal provision).

80. OKLA. STAT. tit. 12, § 390.1(B) (Supp. 1980).

81. *Id.* § 390.1(C). FED. R. CIV. P. 30(b)(6) is the analogous provision in the Federal Rules of Civil Procedure. For a statement of the Advisory Committee's purposes in adopting FED. R. CIV. P. 30(b)(6), see FED. R. CIV. P. 30 advisory committee note (1970), reprinted in 28 U.S.C. app. at 451 (1976).

82. Interrogatories can also be used to obtain the collective knowledge of a party that is an organization. See Adams, *supra* note 9, at 661 & n.14; Ehrenbard, *supra* note 41, at 18; Schoone & Miner, *supra* note 42, at 29-30.

83. OKLA. STAT. tit. 12, § 390.1(C) (Supp. 1980).

3. Notice to Other Parties

Besides compelling the attendance of the witness, the attorney arranging a deposition must give the other parties notice of the taking of the deposition so that they may attend and examine the witness.⁸⁴ Section 439 of title 12 of the Oklahoma Statutes⁸⁵ provides that the notice of the taking of a deposition must be in writing and must specify the title of the action, the name of the court where the action is pending, and the time and place of the deposition. Interestingly, section 439 does not require the notice to state either the name or address of the witness to be deposed or to list the documents that the witness is to bring to the deposition,⁸⁶ although the party receiving the notice would generally need this information to decide whether to attend.⁸⁷ Unless it is very unlikely that the deposition will take more than a day to complete, the notice should also state that the deposition may be adjourned

84. Parties who are not given proper notice of the taking of a deposition can object to its use at trial on the grounds that it is hearsay that does not come within the exception to the hearsay rule in *id.* § 2804(B)(1). For a discussion of the uses of depositions at trial, see text accompanying notes 263-73 *infra*.

85. OKLA. STAT. tit. 12, § 439 (1971) provides:

Prior to the taking of any deposition, unless taken under a special commission, a written notice, specifying the action or proceeding, the name of the court or tribunal in which it is to be used, and the time and place of taking the same, shall be served upon the adverse party, his agent or attorney of record, or left at his usual place of business or residence. The notice shall be served so as to allow the adverse party sufficient time, by the usual route of travel, to attend, and one day for preparation, exclusive of Sunday and the day of service; and the examination may, if so stated in the notice, be adjourned from day to day. Provided, further, that in case a notice to take depositions is served on an opposing party, or his counsel, to be taken in any county or state other than the county where an action is pending, it shall be the duty of the person in whose behalf the notice is given, or his or their attorney, to notify the opposite party, or his or their attorney, that such person, or his or its attorney, does not intend to take said deposition, and such notice shall be given in sufficient time to prevent attendance by opposing party or his or their attorney, at the place stated in said notice. If such notice that such deposition will not be taken is not given as provided for herein, and the party served, or his or their attorney, attend as notified in said notice, and depositions are not taken, then the party so notified shall have the right to file a certified itemized statement of actual and reasonable expenses incurred in attending at such place with the court clerk, and the court or judge where said cause is pending shall not try said cause until said expenses are paid.

86. Compare *id.* with FED. R. CIV. P. 30(b)(1).

87. Although it would have been inclined to construe OKLA. STAT. tit. 12, § 439 (1971) to require a notice of the taking of a deposition to state the name of the deponent, the Oklahoma Supreme Court in *Dietrich v. Dr. Koch Vegetable Tea Co.*, 56 Okla. 636, 638-39, 156 P. 188, 189 (1916), felt constrained to follow precedent from Kansas, from which § 439 was borrowed, which held that it was not necessary for a notice of the taking of a deposition to identify the deponent. See also *Williams v. Williams*, 322 P.2d 645, 647 (Okla. 1958) (no prejudice found from error in the name of the person to be notified in the notice of the taking of a deposition). Also, the notice of the taking of a deposition does not have to state the statutory ground permitting it to be admitted at trial. *Tootle v. Payne*, 82 Okla. 178, 182, 199 P. 201, 205 (1921).

from day to day.⁸⁸ The notice must be served⁸⁹ upon the adverse party, his agent or attorney of record, or left at his usual place of business or residence sufficiently in advance of the deposition so that the adverse party will have enough time to travel to the place of deposition by the usual route of travel, plus one day (exclusive of Sunday and the day of service of the notice) for preparation.⁹⁰ If two or more depositions are to be taken at different locations, they may not be scheduled for the same day.⁹¹ If the time or place is changed for any reason, the attorney who scheduled the deposition is required under section 439 to promptly notify counsel for all parties to the action so that they will not waste their time attending an abortive deposition.⁹²

Although they have different functions,⁹³ the notice of the taking of a deposition found in section 439 of title 12 of the Oklahoma Statutes is in most respects similar to the notice to take the deposition of a

88. See OKLA. STAT. tit. 12, § 439 (1971), which is quoted at note 85 *supra*. A form for the notice of the taking of a deposition appears in VERNON'S FORMS, *supra* note 48, § 5159.

89. In *Pine v. Davis*, 194 Okla. 427, 430, 152 P.2d 590, 593 (1944) the Oklahoma Supreme Court held that personal service of a notice of the taking of a deposition is not required, and that service may be made by mail provided the party affected receives actual notice of the taking of the deposition. Also, in *Kuykendall v. Kuykendall*, 290 P.2d 128, 131 (Okla. 1955), the Oklahoma Supreme Court held that service by registered mail, return receipt requested, to the attorney for the opposing party of a notice of the taking of a deposition "was regular in every respect," where the attorney for the opposing party received actual notice of the taking of the deposition. See also OKLA. STAT. tit. 12, § 440 (1971), which provides for service of a notice of the taking of a deposition by registered mail to a party's last known address if he is absent from or a non-resident of Oklahoma and does not have an agent or attorney in Oklahoma; if the notice is returned undelivered or no address for the party is known, then service may be made by publication.

90. The Oklahoma Supreme Court held in *Shaw v. Stevenson*, 119 Okla. 182, 184, 249 P. 306, 308 (1926), that notice given to the defendant's attorney in Wilburton, Oklahoma on September 6 that a deposition would be taken on September 8 at 1 p.m. in Wilburton was adequate where the defendant's attorney appeared at the deposition and examined the witness. Also, the Oklahoma Supreme Court upheld the validity of the notice of the taking of a deposition in *In re Estate of Klufa*, 78 Okla. 13, 14, 188 P. 329, 330 (1920), where the notice was given in connection with a probate proceeding in Noble County, Oklahoma on March 17 for the taking of a deposition in Redding, California on March 23. See also *Boatman v. Cloverdale*, 80 Okla. 9, 9-10, 193 P. 874, 874-75 (1920) (notice of the taking of a deposition in Kansas City, Missouri on February 16 at 8 a.m. was served on the defendant's attorney in Oklahoma City on February 13, 1917).

91. *Gillis v. First Nat'l Bank*, 47 Okla. 411, 413, 148 P. 994, 995 (1915).

92. OKLA. STAT. tit. 12, § 439 (1971) provides for the award of expenses reasonably incurred by a party or his attorney in attending a deposition that was cancelled without notice to that party or his attorney. See *Godchaux Sugars, Inc. v. Pepsi-Cola Bottling Co.*, 203 Okla. 693, 695, 226 P.2d 413, 416 (1950) (holding that attorney's fees cannot be recovered under § 439 and that only the reasonable expenses incurred by a party or his attorney, but not both, in attending a cancelled deposition can be recovered under § 439); *Knapp v. Gage*, 204 Okla. 30, 32, 226 P.2d 927, 929 (1950) (attorney's fees cannot be recovered under § 439).

93. The notice found in OKLA. STAT. tit. 12, § 439 (1971) is used to provide notice to all parties to an action of the taking of the deposition of any witness. The notice found in *id.* § 390.1 (Supp. 1980) is used to compel the attendance of a party at his deposition without the need for a subpoena duces tecum.

party found in section 390.1.⁹⁴ Where there are multiple parties to an action and the deposition of one of the parties is to be taken, the notice to take the deposition of a party found in section 390.1 should be served on the party to be deposed to compel his attendance, and the notice of the taking of a deposition found in section 439 should be served on the other parties.

4. Reserving a Room for the Deposition and Arranging for a Deposition Officer to Attend

To complete his preparation an attorney should reserve a room for the deposition and arrange for a deposition officer to attend, administer the oath to the witness,⁹⁵ and record the witness' testimony in response to the examination.⁹⁶ In selecting a location for a deposition an attorney should first consider the limitations imposed by sections 390⁹⁷ (for nonparty witnesses) and 390.1⁹⁸ (for parties) of title 12 of the Oklahoma Statutes. Once these limitations are satisfied, the specific site is determined by convenience and tactical considerations.⁹⁹

The persons authorized by statute to be deposition officers include

94. Nevertheless, certain differences in the contents of the notices and times for their service exist. For example, the notice in *id.* § 390.1 must state the name of the person or persons to be examined and specify the documents to be produced at the deposition; this information does not need to be included in the notice in *id.* § 439 (1971). Three days' notice of the deposition must be given under § 390.1; section 439 requires that notice must be given in sufficient time to allow the adverse party to travel by the usual route to the place of deposition, plus one day of preparation, exclusive of Sunday and the day of service. *Compare id.* § 390.1 (Supp. 1980) *with id.* § 439 (1971).

95. *See id.* § 446 (1971).

96. *See id.* § 441 (Supp. 1980).

97. *Id.* § 390 (1971) is quoted at note 64 *supra*.

98. *Id.* § 390.1 (Supp. 1980) is quoted at note 71 *supra*.

99. An attorney arranging a deposition may select his own office as the location for the deposition not only for his own convenience but also so that he will be able to control the seating arrangements at the deposition. *See generally* CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 177; Goldman, *supra* note 36, at 19; Summit, *supra* note 1, at 24. If the deponent is a highly paid expert witness or is required to produce a large number of documents at the deposition it may be desirable to arrange to have the deposition of the deponent taken at his home, his office or the office of his attorney. *See* CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 178; Wolfstone, *supra* note 2, at 164-65. To encourage a deponent to let down his guard a deposition may be taken in a place, such as his home, where he feels comfortable. *See id.* at 164. When it is anticipated that documents may be sought while the deposition is being conducted, the deposition should be taken where the documents are kept so that they can be produced easily at the deposition. *See* Lewis, *Effective Use of Discovery Tools (Part II, Conclusion)*, 52 OKLA. B.J. 1773, 1773 (1981) [hereinafter cited as Lewis]. Also, it may be advantageous to arrange for the deposition to be taken in a neutral location, such as the office of the court reporter or in a conference room at the court house. H. HICKAM & T. SCANLON, PREPARATION FOR TRIAL 111 (1963); Epton, *Effective Use of Pre-Trial Discovery*, 19 ARK. L. REV. 9, 14-15 (1965); Wolfstone, *supra* note 2, at 165.

judges, court clerks, county clerks, and notaries public.¹⁰⁰ Also, Oklahoma judges have the authority to grant anyone a commission to take depositions in Oklahoma or elsewhere.¹⁰¹ A deposition officer must neither be related to any party or attorney to the action, nor have any interest in the action.¹⁰² While the deposition testimony of a witness is generally recorded by a court reporter,¹⁰³ the court may order the testimony to be recorded by audiovisual means.¹⁰⁴ Because the quality of the final product of the deposition, the transcript, will depend on the skill of the court reporter recording the testimony of the witness, an attorney arranging a deposition should select the court reporter with care.¹⁰⁵

C. *Interjurisdictional Depositions*

Occasionally, it is necessary to take a deposition in another state¹⁰⁶

100. OKLA. STAT. tit. 12, § 435 (1971) provides:

Depositions may be taken in this State before a judge or clerk of a court of record, before a county clerk, justice of the peace, notary public, or before a master commissioner, or any person empowered by a special commission; but depositions taken in this State, to be used therein, must be taken by an officer or person whose authority is derived within the State.

A deposition may also be taken before a deputy court clerk since the taking of a deposition is a ministerial act. *Leslie v. Hammer*, 194 Okla. 535, 536-37, 153 P.2d 101, 103-04 (1944).

101. OKLA. STAT. tit. 12, § 438 (Supp. 1980) provides:

Any court of record of this state, or any judge thereof, is authorized to grant a commission to take depositions within or without the state. The commission must be issued to a person or persons therein named, by the clerk, under the seal of the court granting the same. As provided in Sections 388 through 396 of this title, the court given a commission to take depositions may issue subpoenas and punish for contempt, or persons other than the court given such commissions may make application for contempt proceedings to the local district court against persons disobeying such subpoena. Depositions under the commission must be taken upon oral testimony, unless the parties otherwise agree.

102. *Id.* § 437 (1971) provides: "The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding."

103. *See id.* § 441(A) (Supp. 1980).

104. *Id.* § 441(C). *See also* Balabanian, *Medium v. Tedium: Video Depositions Come of Age*, 7 LITIGATION 25 (Fall 1980); Note, *Evidence: The Admissibility of Videotape Depositions*, 27 OKLA. L. REV. 65 (1974); Annot., 66 A.L.R.3d 637 (1975).

105. Epton, *supra* note 99, at 15; Summit, *supra* note 1, at 24; Wolfstone, *supra* note 2, at 166.

106. *See, e.g.*, *Pierce v. Avon Products, Inc.*, 423 P.2d 461 (Okla. 1966) (deposition taken in New York City for use in a personal injury action in Creek County, Oklahoma); *Becker v. State*, 312 P.2d 935, 941 (Okla. 1957) (deposition taken in Colorado for use in an action in Washita County, Oklahoma); *Colvert Ice Cream & Dairy Prod. Co. v. Citrus Prod. Co.*, 179 Okla. 285, 286, 65 P.2d 455, 456 (1937) (deposition taken in Chicago, Illinois for use in an action in Oklahoma County, Oklahoma); *In re Estate of Klufa*, 78 Okla. 13, 188 P. 329 (1929) (deposition taken in Redding, California for use in a probate proceeding in Noble County, Oklahoma); *Boatman v. Coverdale*, 80 Okla. 9, 9, 193 P. 874, 874 (1920) (deposition taken in Kansas City, Missouri for use in an action in Oklahoma County, Oklahoma); *Wichita Falls & N.W. Ry. v. Davern*, 74 Okla. 151, 152, 177 P. 909, 910 (1918) (deposition taken in Massachusetts for use in a personal injury

or a foreign country¹⁰⁷ for use in an action in Oklahoma, or to take a deposition in Oklahoma¹⁰⁸ for use in an action in another state or a foreign country. Oklahoma has adopted model legislation drafted by the National Conference of Commissioners of Uniform State Laws,¹⁰⁹ which provides flexible procedures to deal with such interjurisdictional depositions. This portion of the Article examines the procedures that an attorney can use to arrange for the taking of interjurisdictional depositions by compelling the attendance of witnesses and the production of documents, giving notice to other parties, and obtaining proper authorization for deposition officers.

1. Depositions Taken Outside of Oklahoma for Use in Oklahoma Courts

To arrange for the taking of a deposition outside of Oklahoma for use in an Oklahoma action, an attorney must consider both the law of Oklahoma and the law of the state or foreign country where the deposition is to take place. In general, the law of the other jurisdiction determines the procedures available within that jurisdiction to compel the attendance of witnesses and the production of documents as well as the procedures used to examine witnesses at depositions.¹¹⁰ Oklahoma law, however, determines whether the deposition taken in another jurisdiction is admissible at trial in Oklahoma.¹¹¹ Thus, Oklahoma law governs matters such as whether the deposition falls within an applicable exception to the hearsay rule so as to be admissible at trial,¹¹² whether the other parties to the Oklahoma action received proper notice of the taking of the deposition,¹¹³ and whether the deposition was conducted by a proper deposition officer.¹¹⁴ Determining which law governs other matters, such as the availability of a claim of privilege

action in Jackson County, Oklahoma); *J.M. Hoard, Jr., Co. v. Grand Rapids Showcase Co.*, 74 Okla. 111, 112, 173 P. 844, 845 (1918) (deposition taken in Grand Rapids, Michigan for use in an action in Carter County, Oklahoma).

107. *See, e.g., Cooke v. Coronado Oil Co.*, 112 Okla. 240, 240 P. 739 (1925) (deposition taken in Quebec, Canada for use in an action in Pittsburg County, Oklahoma).

108. *See Application of Umbach*, 350 P.2d 299, 299 (Okla. 1960) (deposition taken in Tulsa, Oklahoma for use in an action in Denver, Colorado).

109. Merrill, *Oklahoma and the National Conference of Commissioners on Uniform State Laws*, 1965, 36 OKLA. B.J. 2205, 2205, 2210 (1965).

110. *See Solliday v. District Court*, 135 Colo. 489, 500, 313 P.2d 1000, 1005 (1957); *Application of Umbach*, 350 P.2d 299 (Okla. 1960).

111. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 138 (1971).

112. *See OKLA. STAT.* tit. 12, § 2804(B)(1) (Supp. 1980).

113. *See In re Estate of Klufa*, 78 Okla. 13, 14, 188 P. 329, 330 (1929).

114. *See Cooke v. Coronado Oil Co.*, 112 Okla. 240, 242-43, 240 P. 739, 740-41 (1925).

that would be allowed at the place of the deposition but not at the trial in Oklahoma, may be more difficult.¹¹⁵

The Oklahoma statute¹¹⁶ governing the taking of depositions outside of Oklahoma for use in an Oklahoma action is very flexible and

115. For a thorough discussion illustrating the complexity of this problem, see Sterk, *Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems*, 61 MINN. L. REV. 461, 495-506 (1977). In *Application of Umbach*, 350 P.2d 299 (Okla. 1960), the Oklahoma Supreme Court, without addressing the choice of law issue, applied federal law to determine whether federal income tax returns were required to be produced at a deposition taken in Oklahoma for use at a trial in a Colorado state court.

Perhaps the law of the state having the most significant relationship with the privileged communication should determine whether the claim of privilege will be allowed. See *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 76 F.R.D. 47, 54 (W.D. Pa. 1977); cf. *Brickner v. Gooden*, 525 P.2d 632, 637 (Okla. 1974) ("[T]he rights and liabilities of parties with respect to a particular issue in tort shall be determined by the local law of the state which, with respect to the issue, has the most significant relationship to the occurrence and the parties."). But see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(2) (1971). Alternatively the privilege might be allowed if it would be available either in Oklahoma or in the jurisdiction where the deposition is taken. See Comment, *Privileged Communications Under Rule 26(b): Conflict of Laws in Diversity Cases*, 23 U. CHI. L. REV. 704, 718 (1956). See generally *R. & J. Dick Co. v. Bass*, 295 F. Supp. 758, 761 (N.D. Ga. 1968); *Application of Cepeda*, 233 F. Supp. 465, 468-71 (S.D.N.Y. 1964). See also *Kaminsky, State Evidentiary Privileges in Federal Civil Litigation*, 43 FORDHAM L. REV. 923 (1975); *Seidelson, The Federal Rules of Evidence: Rule 501, Klaxon and the Constitution*, 5 HOFSTRA L. REV. 21 (1976); Comment, *Privilege in Federal Diversity Cases*, 10 NAT. RESOURCES J. 861 (1970).

116. OKLA. STAT. tit. 12, § 1703.01 (1971) provides:

(a) A deposition to obtain testimony or documents or other things in an action or proceeding pending in this state may be taken outside this state:

(1) On reasonable notice in writing to all parties, setting forth the time and place for taking the deposition, the name and address of each person to be examined, if known, and if not known, a general description sufficient to identify him or the particular class or group to which he belongs, and the name or descriptive title of the person before whom the deposition will be taken.

(x) The deposition may be taken before a person authorized to administer oaths in the place in which the deposition is taken by the law thereof or by the law of this state, or the United States; or

(y) Before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath; or

(z) Pursuant to a letter rogatory issued by the court. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state or county)."

(2) In any manner, before any person, at any time or place, upon any notice, as stipulated by the parties. A person designated by the stipulation has the power by virtue of his designation to administer any necessary oath.

(b) A commission or a letter rogatory shall be issued after notice and application to the court, and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient, and both a commission and a letter rogatory may be issued in proper cases. Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within this state.

(c) When no action or proceeding is pending, a court of this state may authorize a deposition of any person to be taken outside this state regarding any matter that may be cognizable in any court of this state. The court may prescribe the manner in which and the terms upon which the deposition shall be taken.

lenient. For example, parties may stipulate to the taking of a deposition in any manner and at any time and place.¹¹⁷ Absent a stipulation, a deposition may be taken outside of Oklahoma on reasonable notice¹¹⁸ in writing to the other parties to the action, before almost anyone who could conceivably have authority to conduct a deposition. Thus, the statute permits a deposition to be taken either before a person who has authority to administer oaths in the place where the deposition is taken under the law of that place, the law of Oklahoma, or the law of the United States; before a person who has been granted a commission¹¹⁹ from an Oklahoma court; or pursuant to a letter rogatory¹²⁰ issued by an Oklahoma court.¹²¹

Although Oklahoma law governs whether the parties to the action were given proper notice of the deposition and whether the deposition officer had proper authority to conduct the deposition, the law of the state¹²² or foreign country¹²³ where the deposition is being taken gov-

117. *Id.* § 1703.01(a)(2).

118. The notice must specify the time and place for the taking of the deposition and must identify the witness and the person who will conduct the deposition. *Id.* § 1703.01(a)(1). In addition, it would seem that in order for the notice to be "reasonable" it must be served sufficiently in advance of the deposition date to allow adverse parties at least enough time to travel to the place of deposition by the usual route, plus one day for preparation, not including Sunday and the day of service. *See id.* § 439.

119. A commission is a grant of authority to a person to take a deposition. UNIF. INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 3.01(a)(2) comment, 13 U.L.A. 488-89 (1980); Comment, *International Law: International Judicial Assistance and Oklahoma Practice*, 22 OKLA. L. REV. 217, 224 (1969). OKLA. STAT. tit. 12, § 438 (Supp. 1980) authorizes any court of record in Oklahoma to grant commissions to take depositions. *See also id.* § 436 (1971).

120. A letter rogatory is a request from a local court to a court in another jurisdiction to obtain evidence from a witness found in that other jurisdiction; the request is normally sent through diplomatic channels. UNIF. INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 3.01(a)(3) comment, 13 U.L.A. 489 (1980); Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 519 (1953); Stern, *International Judicial Assistance, Part II: Depositions under Letters Rogatory*, 15 PRAC. LAW 55 (Jan. 1969); Comment, *International Law: International Judicial Assistance and Oklahoma Practice*, 22 OKLA. L. REV. 217, 224 (1969).

121. OKLA. STAT. tit. 12, § 1703.01(a)(1)(z) (1971).

122. The laws governing the taking of depositions in the various states for use in actions in other states may be located most easily at 8 Martindale-Hubbell Law Directory 1-2953 (113th ed. 1981) under the heading "Depositions" for each state.

123. An extensive literature describes the intricate and often perplexing procedures that must be followed to take the deposition of a witness in a foreign country. A bibliography of some of this literature is found in Myrick & Love, *Obtaining Evidence Abroad for Use in United States Litigation, Particularly Patent, Trademark, and Copyright Litigation*, 1980 PATENT LAW ANNUAL 167, 222-25. Stein, *Depositions in Foreign Jurisdictions: "Innocence Abroad,"* 7 LITIGATION 14 (Spring 1981) has a recent description of the problems that may be encountered in attempting to take a deposition in France. The procedures for taking depositions in foreign countries may be drastically different from those followed in the United States. For example, in many civil law countries the examination of a witness must be conducted by a magistrate who dictates a summary of the testimony at its conclusion; testimony is often not given under oath and lawyers are not permitted to examine the witness themselves and cannot obtain a verbatim transcript of the testi-

erns the procedures used and the means available for compelling the attendance of witnesses and the production of documents. Some jurisdictions may require a commission or letter rogatory¹²⁴ from the court where the action is pending before their courts will permit the taking of a deposition. To assist a party desiring to take a deposition or obtain evidence from witnesses in such jurisdictions, Oklahoma's statute provides that an Oklahoma court may, upon motion and notice to other parties, issue a commission or letter rogatory on terms that are just and appropriate.¹²⁵ It is unnecessary to prove that the taking of a deposition through other means is impracticable or inconvenient in order to obtain a commission or letter rogatory.¹²⁶ If a letter rogatory is used to obtain evidence in a foreign country, an Oklahoma court may admit the evidence at trial, despite the fact that the procedures required for taking a deposition in Oklahoma, such as the taking of testimony under oath or the preparation of a verbatim transcript, were not followed in obtaining the evidence in the foreign country.¹²⁷ Finally, an Oklahoma court may prescribe the procedures to be followed for the taking of a deposition outside of Oklahoma when no action is pending and the deposition is taken in order to perpetuate the testimony of a witness.¹²⁸

2. Depositions Taken in Oklahoma for Use in Courts Outside of Oklahoma

Oklahoma has two separate, but similar, statutes which authorize an Oklahoma court to lend assistance to courts in other jurisdictions by compelling the attendance of witnesses and production of documents and tangible things at depositions taken in Oklahoma. Oklahoma

mony. See generally FED. R. CIV. P. 28 advisory committee note (1963), reprinted in 28 U.S.C. app. at 447-48 (1976); Stein, *supra*, at 16-17. In addition, some countries may view the taking of a deposition by a court reporter in aid of litigation pending in the United States as an infringement of their sovereignty and therefore may be hostile to the taking of depositions. Note, *Taking Evidence Outside of the United States*, 55 B.U.L. REV. 368, 374 & nn. 40-41 (1975). See also FED. R. CIV. P. 28 advisory committee note (1963), reprinted in 28 U.S.C. app. at 447-48 (1976); UNIF. INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 3.01(a)(1) comment, 13 U.L.A. 488 (1980).

124. Note, *supra* note 123, at 374-75 & nn. 39-45.

125. OKLA. STAT. tit. 12, § 1703.01(b) (1971).

126. *Id.* Compare CALIF. CIV. PROC. CODE § 2024 (West Supp. 1981) with OKLA. STAT. tit. 12, § 1703.01(b) (1971).

127. OKLA. STAT. tit. 12, § 1703.01(b) (1971); UNIF. INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 3.01(b) comment, 13 U.L.A. 490-91 (1980). See generally Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1058-59 (1961); Stern, *International Judicial Assistance, Part II: Depositions Under Letters Rogatory*, 15 PRAC. LAW. 55, 56 (Jan. 1969).

128. OKLA. STAT. tit. 12, § 1703.01(c) (1971); UNIF. INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 3.01(c) comment, 13 U.L.A. 491 (1980). See also OKLA. STAT. tit. 12, § 538.11 (1971).

adopted the Uniform Foreign Deposition Act¹²⁹ in 1951 and in 1965 adopted the Uniform Interstate and International Procedure Act.¹³⁰ Because the Uniform Foreign Deposition Act was never repealed,¹³¹ Oklahoma now has two similar statutory provisions governing the taking of depositions and the production of documents in Oklahoma for use in actions outside of Oklahoma.¹³²

The Uniform Foreign Depositions Act¹³³ authorizes an Oklahoma court to compel a witness found in Oklahoma to appear for the taking of his deposition for use in an action outside of Oklahoma whenever the court where the action is pending issues a writ, mandate, or com-

129. OKLA. STAT. tit. 12, §§ 461-463 (1971) provide as follows:

§ 461. Citation of Act.—This may be cited as the Uniform Foreign Depositions Act.

§ 462. Compelling witnesses to appear and testify.—Manner, process and proceedings—Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this State, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this State.

§ 463. Interpretation and construction.—This Act shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it.

130. *Id.* § 1703.02 provides:

(a) A court of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be in whole or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath.

(b) A person within this state may give voluntarily his testimony or statement or produce documents or other things for use in a proceeding before a tribunal outside this state.

131. It appears that the Commissioners intended the Uniform Interstate and International Procedure Act to supersede the Uniform Foreign Depositions Act. UNIF. INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 3.02 comment, 13 U.L.A. 493 (1980).

132. Having two similar statutory provisions governing the same topic raises the possibility that a conflict between the two provisions may develop. Such a conflict is unlikely to arise, however, because OKLA. STAT. tit. 12, § 1703.02 (1971) was intended merely to clarify and liberalize the procedures by which an Oklahoma court could assist in obtaining evidence for use in actions in other jurisdictions. UNIF. INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 3.02, 13 U.L.A. 492 (1980). If such a conflict did develop and could not be reconciled by construing the two statutes together, then OKLA. STAT. tit. 12, § 1703.02 (1971) should control as it is the later expression of the Oklahoma Legislature. *Watt v. Alaska*, 101 S. Ct. 1673, 1678 (1981) (dictum); *Brown v. Marker*, 410 P.2d 61, 65-66 (Okla. 1965); *Bynum v. State*, 490 P.2d 531, 533 (Okla. Crim. App. 1971); 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51.02 (4th ed. 1973); Merrill, *Judicial Interpretation of Legislation*, 32 OKLA. B.J. 1347, 1351-52 (1961).

133. OKLA. STAT. tit. 12, §§ 461-463 (1971), which are quoted at note 129 *supra*.

mission for the taking of the deposition or whenever the deposition is required because of notice or agreement of the parties. The same procedures that apply to the taking of a deposition for use in an Oklahoma action apply to the taking of a deposition for use in an action outside of Oklahoma.¹³⁴

Section 1703.02 of title 12 of the Oklahoma Statutes liberalizes the procedure for taking depositions in Oklahoma for use elsewhere to an even greater extent than the Uniform Foreign Depositions Act. Section 1703.02 authorizes an Oklahoma court, upon the application of any interested person or in response to a letter rogatory from another court, to order any person domiciled or found within Oklahoma to give his testimony at a deposition for use in an action outside of Oklahoma. In addition, section 1703.02 explicitly provides that the court can order the production of documents or other things. Under section 1703.02, an Oklahoma court has broad authority to prescribe in its order the practice and procedure for the taking of the testimony or production of documents or other things. If the jurisdiction where the deposition is to be used requires specific procedures to be followed in order for the deposition to be admissible in evidence, then the Oklahoma court's order should specify that these procedures are to be followed at the taking of the deposition. In any event, the party requesting the deposition should ensure that the notice requirements of the jurisdiction where the deposition is to be used have been satisfied if he intends it to be admissible in evidence in that jurisdiction.¹³⁵ If no other procedures are specified in the order, the taking of testimony and production of documents are done in accordance with Oklahoma law. The Oklahoma court can order the taking of testimony and the production of documents or other things before a person appointed by the court who, by virtue of his appointment, has authority to administer any necessary oath.¹³⁶ Finally, section 1703.02 states that any person in Oklahoma can voluntarily give testimony or produce documents or other things

134. *Id.* § 462. Although the statute does not expressly provide for the production of documents, it appears that an Oklahoma court has authority under § 462 to compel the production of documents at a deposition for use in an action outside of Oklahoma. *See* Application of Umbach, 350 P.2d 299 (Okla. 1960). OKLA. STAT. tit. 12, § 1703.02(a) (1971) contains explicit authorization for an Oklahoma court to compel the production of documents or other things at a deposition for use in an action outside of Oklahoma.

135. *See generally* text accompanying notes 112-14 *supra*.

136. Note, however, that the jurisdiction where the deposition is to be used may impose special requirements as to the qualifications of the person administering the taking of the deposition, which would have to be satisfied if the deposition is to be admissible in evidence in that jurisdiction. *See generally* Cooke v. Coronado Oil Co., 112 Okla. 240, 242-43, 240 P. 739, 740-41 (1925).

for use in actions outside of Oklahoma.¹³⁷

D. *Depositions to Perpetuate Testimony*

In addition to the model legislation dealing with interjurisdictional depositions, Oklahoma also adopted the Uniform Perpetuation of Testimony Act¹³⁸ in 1965. The Uniform Perpetuation of Testimony Act was drafted by the National Conference of Commissioners on Uniform State Laws,¹³⁹ and is similar to rule 27 of the Federal Rules of Civil Procedure.¹⁴⁰ Under the Uniform Perpetuation of Testimony Act, a deposition may be taken in Oklahoma even before an action is filed or while an action is on appeal. Oklahoma has the distinction of being the only state to have adopted the Uniform Perpetuation of Testimony Act;¹⁴¹ a number of other states, however, have similar statutory provisions for the perpetuation of testimony.¹⁴²

The Uniform Perpetuation of Testimony Act places many restrictions on the taking of depositions before an action is filed. The major restriction is that the deposition cannot be sought for purposes of discovery.¹⁴³ A person cannot use the Uniform Perpetuation of Testimony Act to gather information that he needs to frame a petition; instead its use is limited to the perpetuation of testimony.¹⁴⁴ Further, a person seeking a deposition under the Uniform Perpetuation of Testimony Act must show that the taking of the deposition is necessary to

137. OKLA. STAT. tit. 12, § 1703.02(b) (1971); UNIF. INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 3.02(b), 13 U.L.A. 492-93 (1980).

138. OKLA. STAT. tit. 12, §§ 538.1-3, 538.5-13 (1971), 538.4 (Supp. 1980).

139. Merrill, *Oklahoma and the National Conference of Commissioners on Uniform State Laws, 1965*, 36 OKLA. B.J. 2205, 2205, 2210 (1965).

140. Although the Uniform Perpetuation of Testimony Act is patterned after FED. R. CIV. P. 27, the Act differs in several ways. Most importantly, the Uniform Perpetuation of Testimony Act, unlike FED. R. CIV. P. 27, provides explicitly that it may not be used for purposes of discovery but only to preserve testimony. Compare OKLA. STAT. tit. 12, § 538.4 (Supp. 1980) with FED. R. CIV. P. 27(a)(3). For a discussion of other differences between the Uniform Perpetuation of Testimony Act and FED. R. CIV. P. 27, see UNIF. PERPETUATION OF TESTIMONY ACT §§ 1, 2, 4, 7 comments, 14 U.L.A. 137, 139, 140, 142 (1980).

141. UNIF. PERPETUATION OF TESTIMONY ACT §§ 1-15 prefatory note, 14 U.L.A. 135-44 (1980).

142. See generally 23 AM. JUR. 2d *Depositions and Discovery* §§ 8-9 (1965).

143. OKLA. STAT. tit. 12, § 538.4 (Supp. 1980); UNIF. PERPETUATION OF TESTIMONY ACT § 4, 14 U.L.A. 140 (1980).

144. *Peters v. Webb*, 316 P.2d 170, 173-74 (Okla. 1957) (construing OKLA. STAT. tit. 12, §§ 531-537 (1951) (§§ 531-536 were repealed in 1965), a forerunner of the Uniform Perpetuation of Testimony Act). See also *Ash v. Cort*, 512 F.2d 909, 912 (3d Cir. 1975); *In re Boland*, 79 F.R.D. 665, 668 (D.D.C. 1978); *Petition of Ferkauf*, 3 F.R.D. 89, 91 (S.D.N.Y. 1943); *In re Vermilion Parish School Bd.*, 357 So. 2d 1295, 1297-98 (La. Ct. App. 1978); *Wiles v. Myerly*, 210 N.W.2d 619, 625-26 (Iowa 1973) (dictum); 8 C. WRIGHT & A. MILLER, *supra* note 45, § 2071, at 332-33. But see Note, *supra* note 24, at 547.

prevent delay or injustice in a future action that he is presently unable to bring or cause to be brought.¹⁴⁵ A showing is also required that there is a substantial danger that the testimony sought to be perpetuated will be lost unless the court orders the taking of the deposition before the filing of the future action.¹⁴⁶ These restrictions severely limit the situations in which a deposition may be taken before an action is filed. In fact, there have been no reported decisions in Oklahoma dealing with the Uniform Perpetuation of Testimony Act.¹⁴⁷ The Uniform Perpetuation of Testimony Act may prove useful, though, in special circumstances, such as where a testator anticipates litigation after his death and seeks to perpetuate testimony relating to his mental capacity.¹⁴⁸

The procedure for taking the deposition of a witness before an action is filed begins with the filing of a petition in the district court of the county of residence of any expected adverse party to the future action. The petition must show: 1) that the person seeking the deposition, or his successors, may be a party to a future action that he is presently unable to bring; 2) the subject matter of the future action and his interest in it; 3) the facts which the deposition will establish and the reasons for the perpetuation of each witness' testimony; 4) the name and address of each expected adverse party to the future action; 5) the name and address of each witness to be examined, and his anticipated testimony.¹⁴⁹ Notice of the hearing on the petition and a copy of the petition must be served on each expected adverse party to the future action

145. OKLA. STAT. tit. 12, § 538.4 (Supp. 1980).

146. *Id.* § 538.1(c) (1971). See also *Ash v. Cort*, 512 F.2d 909, 913 (3d Cir. 1975); *In re Bolland*, 79 F.R.D. 665, 667 (D.D.C. 1978); *In re Vermillion Parish School Bd.*, 357 So. 2d 1295, 1297-98 (La. Ct. App. 1978).

147. *But cf.* *Peters v. Webb*, 316 P.2d 170 (Okla. 1957) (decided before the adoption of the Uniform Perpetuation of Testimony Act and construed Oklahoma's earlier statutes pertaining to the perpetuation of evidence).

148. UNIF. PERPETUATION OF TESTIMONY ACT § 1 comment, 14 U.L.A. 137 (1980). Other examples include: *Texaco, Inc. v. Borda*, 383 F.2d 607 (3d Cir. 1967) (deposition of 71 year old witness allowed in suit that had been stayed pending resolution of a parallel criminal prosecution); *Martin v. Reynolds Metals Corp.*, 297 F.2d 49 (9th Cir. 1961) (aluminum plant operator, fearing a future action by cattle raisers based upon discharge from operator's plant, was permitted to take deposition of cattle raiser and enter on land of cattle raisers to examine their land and cattle); *De Wagenknecht v. Stinnes*, 250 F.2d 414 (D.C. Cir. 1957) (alien, who was not presently entitled to bring an action against the Attorney General of the United States for the return of property confiscated under the Trading With the Enemy Act, was permitted to take the deposition of a 74 year old witness); *Moseller v. United States*, 158 F.2d 380 (2d Cir. 1946) (mother of injured minor seaman, who could not file an action against the United States until her claim against the United States had been disallowed, was permitted to take her son's deposition when medical opinion indicated her son might die before the United States acted to disallow her claim).

149. OKLA. STAT. tit. 12, § 538.1 (1971).

in the same manner and within the same time as provided for service of summons, unless the court orders otherwise.¹⁵⁰ If the court determines that the deposition is not sought for purposes of discovery and that it is needed to prevent delay or injustice in a future action that the person seeking the deposition cannot presently bring, the court must order the deposition to proceed so that the testimony will be perpetuated.¹⁵¹ The order must specify the name of each witness to be deposed, his anticipated testimony, the name of the deposition officer, and the time, place, and manner of the taking of each deposition.¹⁵² Once a deposition to perpetuate the testimony of a witness is taken, it is admissible at trial in future actions where it is offered against a party,¹⁵³ where it is used to impeach a witness,¹⁵⁴ or where the witness is unavailable and the party against whom it is offered (or a person with a similar motive and interest) had an opportunity to cross-examine the witness at the deposition.¹⁵⁵

The Uniform Perpetuation of Testimony Act also provides a similar procedure for perpetuating the testimony of a witness in connection with an action that is on appeal.¹⁵⁶ Unlike a deposition taken before the filing of an action, a deposition in an action on appeal can be taken for the purpose of discovery.¹⁵⁷

E. *Depositions Upon Written Interrogatories*

A deposition upon written interrogatories is an alternative to an oral deposition by which the parties to an action may send interrogatories and cross-interrogatories to a deposition officer who then submits them to a deponent.¹⁵⁸ The deponent is required to answer the interrogatories and cross-interrogatories under oath, and the deposition officer records his answers and files the deposition transcript with the

150. *Id.* § 538.2. See generally *id.* §§ 159, 163, 165-169 (1971), 153.1, 155, 170.1, 170.3, 170.4, 170.10 (Supp. 1980).

151. *Id.* § 538.4 (Supp. 1980).

152. *Id.*

153. *Id.* §§ 538.5 (1971), 2801(4)(b) (Supp. 1980).

154. *Id.* §§ 538.6 (1971), 2613 (Supp. 1980).

155. *Id.* §§ 538.5 (1971), 2804(B)(1) (Supp. 1980).

156. *Id.* § 538.7 (1971).

157. *Id.*; UNIF. PERPETUATION OF TESTIMONY ACT § 7, 14 U.L.A. 142 (1980).

158. For discussions of the analogous depositions upon written questions under FED. R. CIV. P. 31, see 4A MOORE'S FEDERAL PRACTICE ¶ 31.01-.07 (2d ed. 1981); R. SUGARMAN & S. NORTH, *supra* note 53, § 2.02; WRIGHT, *supra* note 1, § 85; 8 C. WRIGHT & A. MILLER, *supra* note 45, §§ 2131-2133; *Developments in Law—Discovery*, *supra* note 3, at 958-59. For a discussion of depositions upon written interrogatories under CAL. CIV. PROC. CODE § 2020 (West Supp. 1981), see CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 255-78.

court. Because the attorneys' attendance is unnecessary, a deposition upon written interrogatories may be less expensive than an oral deposition, especially for a distant deponent.¹⁵⁹ Like oral depositions, and in contrast to the written interrogatories authorized by section 549 of title 12 of the Oklahoma Statutes,¹⁶⁰ depositions upon written interrogatories can be used to obtain information and the production of documents from nonparty witnesses. Depositions upon written interrogatories, however, lack many of the advantages of oral depositions, such as their flexibility and spontaneity, since the interrogatories must be prepared before they are submitted to the deponent. Thus, although authorized by section 423 of title 12 of the Oklahoma Statutes,¹⁶¹ depositions upon written interrogatories are seldom used either nationally¹⁶² or in Oklahoma.¹⁶³

IV. PREPARING FOR THE DEPOSITION

A. Introduction

Once a deposition has been arranged, the attorneys for the parties can begin preparation for it by analyzing the legal and factual issues raised in the pleadings, reviewing information acquired through investigation and discovery, and attempting to visualize the deponent's role in the transaction involved and to anticipate the testimony that he will give at the deposition. Further preparation dependent upon the role of the attorney at the deposition and the purpose of the deposition is also necessary. This portion of the Article offers general suggestions about preparing for depositions, both for discovery purposes and for preserving testimony.

159. The expenses of the deposition officer's attending, however, cannot be avoided.

160. Written interrogatories can be served only on adverse parties. *Council on Judicial Complaints v. Maley*, 607 P.2d 1180, 1182 (Okla. 1980); OKLA. STAT. tit. 12, § 549 (1971); Adams, *supra* note 9, at 662.

161. OKLA. STAT. tit. 12, § 423 (1971) is quoted at note 10 *supra*.

162. A survey conducted in 1963 reported that only 2% of the nearly 1000 attorneys who responded to national mail questionnaires used depositions upon written interrogatories. GLASER, *supra* note 1, at 53.

163. Depositions upon written interrogatories were utilized in *Marathon Ins. Co. v. Arnold*, 433 P.2d 927, 930 (Okla. 1967), and in *Scott v. Vulcan Iron Works, Inc.*, 31 Okla. 334, 341, 122 P. 186, 189-90 (1912). For a brief discussion of depositions upon written interrogatories in Oklahoma, see Vliet, *supra* note 44, at 300-01.

B. *Discovery Depositions*

1. Preparation by the Examining Attorney

After his preliminary preparation, the examining attorney formulates goals for the examination which vary depending on the circumstances.¹⁶⁴ Frequently, the examining attorney's goal is simply to discover information from the deponent and to see how he reacts to cross-examination. Another possible goal is to freeze the deponent's testimony so that he will be unable to give testimony at trial that differs from his deposition testimony without exposing himself to impeachment with the prior inconsistent statements. Another goal is to obtain admissions from the deponent in order to narrow factual issues for trial, facilitate settlement, or support a motion for summary judgment. Regardless of the examining attorney's goals, his chances of attaining them are improved if the goals are clearly defined and kept in mind in planning the deposition.¹⁶⁵

To increase his effectiveness, the examining attorney should learn as much as he can about the character and personality of the deponent before the deposition.¹⁶⁶ It is helpful, for example, to know how the witness reacts to stress, whether he angers easily, and whether he is a morning or afternoon person. Also, the examining attorney should prepare for objections to his examination that the deponent's counsel might raise.¹⁶⁷ In many cases, the examining attorney will find that it is essential to make an outline of the subjects he wishes to cover at the deposition.¹⁶⁸ The outline should be attuned to the goals of the examination and complete enough so that the attorney can use it as a checklist to avoid overlooking an important area of examination,¹⁶⁹ but not so detailed that it inhibits the attorney from asking spontaneous ques-

164. See VERNON'S FORMS, *supra* note 48, § 5143; Fowler & Sokolow, *supra* note 28, at 17; Lewis, *supra* note 99, at 1774; Summit, *supra* note 1.

165. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 204.

166. J. UNDERWOOD, *supra* note 27, at 80; Lewis, *supra* note 99, at 1774; Summit, *supra* note 1, at 22-23. The examining attorney can learn about the deponent and his relationship to the transaction by interviewing friendly witnesses; if the deposition concerns a technical subject he might consider consulting an expert. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 205.

167. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 205.

168. Examples of outlines for depositions can be found in D. DANNER, PATTERN DEPOSITION CHECKLISTS (1973); H. HICKAM & T. SCANLON, *supra* note 99, at 127-42; Kornblum, *supra* note 5, at 28-35; and Wolfstone, *supra* note 2, at 128-33.

169. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 206; Facher, *supra* note 5, at 28; Lewis, *supra* note 99, at 1774.

tions in response to answers given by the witness.¹⁷⁰

2. Preparation by the Attorney for the Deponent

Counsel's control over his client and friendly witnesses allows him to maximize the benefits of preparation.¹⁷¹ Initially, the deponent's attorney should review the notice of the taking of the deposition and (for a nonparty deponent) the subpoena. If the deponent has been deposed in the action previously, his attorney might consider seeking a protective order from the court¹⁷² or a stipulation from opposing counsel limiting the scope of examination to areas not inquired into earlier. Similarly, if the production of documents is sought in the notice of the taking of the deposition or subpoena, the deponent's attorney might consider objecting to the production of documents at the deposition or seeking a protective order or stipulation limiting production. After reviewing the notice of the taking of the deposition and the subpoena, the attorney should notify the deponent in writing of the time and place of the deposition and schedule a meeting to prepare him for the deposition and to examine the documents whose production has been requested.¹⁷³

The preliminary meeting before the deposition, between the deponent and his attorney, can accomplish many objectives.¹⁷⁴ The deponent can be given background information about the mechanics of the

170. The examining attorney might consider arranging the order in which the subjects are covered at the deposition so that it will be difficult for the deponent to anticipate the examiner's questions. Summit, *supra* note 1, at 24.

171. Facher, *supra* note 5, at 28 ("Counsel should never permit his client or a witness over whom he has control to be deposed without adequate advance preparation."); Kornblum, *supra* note 5, at 12 ("If your own client or a witness favorable to your case is to be deposed, it is essential to prepare him for a deposition by opposing counsel."); Lewis, *supra* note 99, at 1774 ("No client or witness over whom you have control should ever be permitted to be deposed without adequate advance preparation. If necessary, delay the start of depositions to be sure preparation is thorough."); McElhaney, *supra* note 5, at 43 ("[F]ailure to prepare witnesses for depositions is a genuine professional disservice."); Winter, *The Purpose, Planning and Use of Depositions in Contested Child Custody Litigation*, 1 AM. J. TRIAL ADVOCACY 75, 84 (1977) ("Obviously counsel must never allow his client, or a witness over whom he has control, to attend a sworn deposition without adequate advance preparation.").

172. It may be difficult to obtain such relief, however. See *United States v. IBM Corp.*, 453 F. Supp. 194, 195 (S.D.N.Y. 1977).

173. An example of a form letter to a client notifying him of a deposition and explaining the nature of a deposition is found at A. MORRILL, TRIAL DIPLOMACY 184-87 (2d ed. 1972). Other form letters notifying a client of his deposition are found in CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 210-11; Ratner, *Plaintiffs' Attorneys Hows and Whys of Plaintiffs' Depositions*, 9 PRAC. LAW. 63, 69-75 (Feb. 1963); Wolfstone, *supra* note 2, at 142-43.

174. Useful discussions of techniques for preparing a witness for a deposition are found in CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 211-20; R. SUGARMAN & S. NORTH, *supra* note 53, §§ 1.02[5]-[6], at 1-40 to -67.

deposition, the deponent's role at the deposition,¹⁷⁵ the difference in the roles of opposing counsel and his own attorney,¹⁷⁶ the difference between the deposition and trial,¹⁷⁷ and the importance of making a favorable impression on opposing counsel.¹⁷⁸ Once the deponent is given this background information, the attorney can review the facts of the lawsuit with the deponent¹⁷⁹ and give him practice answering ques-

175. The deponent should be aware that he has a general obligation to answer opposing counsel's questions and that he should do so unless his own attorney instructs him otherwise. Facher, *supra* note 5, at 28; Winter, *supra* note 171. The deponent should also know that the scope of examination at depositions is broad and be prepared to answer questions on a wide range of subjects. See CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 212; Fowler & Sokolow, *supra* note 28, at 22. The deponent should appreciate that opposing counsel's primary purpose will probably be to obtain as much information from him as possible and that the deponent's case will not be helped by his volunteering information. R. SUGARMAN & S. NORTH, *supra* note 53, § 1.02[5][b], at 1-47; Facher, *supra* note 5, at 28; Winter, *supra* note 171, at 85. Finally, the deponent should be informed that after the deposition is completed he can review the deposition transcript and make any changes that he wishes. Wolfstone, *supra* note 2, at 146. The deponent should be aware, though, that correcting the transcript may be disadvantageous because opposing counsel can comment on the changes at trial or recall the deponent for a second deposition to examine him regarding the changes. R. SUGARMAN & S. NORTH, *supra* note 53, § 1.05[3][b], at 1-154; Wesely, *Pretrial Development in Major Corporate Litigation*, 1 LITIGATION 8, 11 (Spring 1975). Accordingly, the deponent should be encouraged to correct any errors in his testimony at the time of the deposition, if possible. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 216; R. SUGARMAN & S. NORTH, *supra* note 53, § 1.02[5][b], at 1-53 to -54; Winter, *supra* note 171.

176. The deponent should realize that opposing counsel will probably dominate the deposition by vigorously cross-examining the deponent while the deponent's attorney will probably refrain from examining the deponent or developing his side of the case; instead, the deponent's attorney will probably limit his participation in the deposition to raising objections to protect the deponent from harassment or improper questions. See text accompanying note 226 *infra*. The deponent should not mistake his attorney's relatively passive role at the deposition for lack of interest or a failure of effective representation. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 212-13; Facher, *supra* note 5, at 28; Winter, *supra* note 171, at 85-86.

177. Facher, *supra* note 5, at 28; Winter, *supra* note 171.

178. Settlement negotiations may be influenced by the examining attorney's impression of the effectiveness of the deponent as a witness and the impact his testimony could have at trial. See CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 212-13; Facher, *supra* note 5, at 28; Winter, *supra* note 171, at 85-86. See generally R. SUGARMAN & S. NORTH, *supra* note 53, § 1.02[5][b], at 1-53; Report of Association of Trial Lawyers of America Annual Convention, 50 U.S.L.W. 2085, 2086 (Aug. 11, 1981); Kornblum, *supra* note 5, at 14; McElhaney, *supra* note 5, at 44; Wolfstone, *supra* note 2, at 143.

179. The attorney should protect confidential or privileged information in the course of preparing witnesses for the deposition. If the attorney represents the deponent, their discussions are protected by the attorney-client privilege. See OKLA. STAT. tit. 12, § 2502 (Supp. 1981). *But cf.* Wesely, *supra* note 175 ("Some judges take the view that any document your client uses to refresh his recollection during the course of your private preparation must be produced if your opponent asks for it."). If the deponent is not a client of the attorney but is instead a friendly witness, discussions between the deponent and the attorney will not be protected by the attorney-client privilege and accordingly, the attorney should not discuss confidential matters with the deponent or show him confidential documents unless he is prepared to have the deponent disclose the confidential matters or documents at the deposition. R. SUGARMAN & S. NORTH, *supra* note 53, § 1.02[6][d], at 1-66 to -67.

tions in a simulated deposition.¹⁸⁰ The deponent can also be given a transcript from a previous deposition to review before his own deposition.¹⁸¹ Finally, counsel can examine the documents the deponent has been requested to produce and consider objections to their production.¹⁸²

C. *Depositions to Preserve Testimony*

Where depositions are taken to preserve testimony rather than for discovery, the roles of counsel are reversed. At a discovery deposition, the role of the attorney for the deponent is limited to protecting the deponent from harassment and ensuring that the examination is conducted within appropriate bounds. Opposing counsel, who typically initiates the deposition, plays the dominant role and conducts the greater part of the examination at the deposition. In contrast, with a deposition to preserve testimony the attorney for the deponent plays a role analogous to that of an attorney conducting direct examination while the opposing counsel's role is more restricted and is analogous to that of an attorney conducting cross-examination.

Because a deposition to preserve testimony is conducted differently than a discovery deposition, the preparation techniques differ. The attorney for the deponent prepares him for the deposition as he would a witness for trial, reviewing all the areas of examination with the deponent in advance.¹⁸³ The deponent can be encouraged to develop fully the most favorable aspects of the lawsuit since the deposition is being taken for use at trial. Opposing counsel prepares for cross-examination

180. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 217; Facher, *supra* note 5, at 28; Wolfstone, *supra* note 2, at 143-44.

The deponent's attorney should impress upon him the importance of his telling the complete truth at the deposition and should warn the deponent that opposing counsel may use the slightest departure from the truth to attack his credibility at trial. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 215-16; Winter, *supra* note 171, at 85-86. The deponent should be advised that if asked about whether he discussed the testimony he was to give with anyone, he should respond by stating that he consulted with his attorney before the deposition. Kornblum, *supra* note 5, at 14; McElhaney, *supra* note 5, at 46. He should also be instructed that if he is examined about inconsistencies between his testimony and any pleadings he has signed, he should state that the pleadings were prepared by his attorney based upon his attorney's familiarity with the facts, and that he relied on his attorney for the accuracy of the statements in the pleadings. Ratner, *supra* note 173, at 67; Wolfstone, *supra* note 2, at 145-46.

181. Winter, *supra* note 171.

182. See Adams, *supra* note 9, at 677-78.

183. After receiving a preview of his examination, the deponent may be tempted to memorize pat answers to questions. He should be discouraged from doing so, however, because memorized testimony is apt to be lacking in conviction and easily attacked on cross-examination. See generally McElhaney, *supra* note 5, at 53.

of the deponent as he would prepare to cross-examine a witness at trial; he should review the information he has obtained through investigation and discovery, and be ready to raise objections to the deponent's testimony in order to preserve the objections for trial.¹⁸⁴

V. CONDUCT OF THE DEPOSITION

A. Introduction

This portion of the Article deals with procedures and tactical considerations involved in conducting a deposition. First, it examines such preliminary matters as determining who is allowed to attend the deposition and the stipulations which the attorneys may make to facilitate the taking of the deposition. A discussion of techniques for examining witnesses and handling documents follows.

B. Preliminary Matters

The Oklahoma Statutes do not specify who may attend a deposition.¹⁸⁵ Certainly, the deponent, the deposition officer, and attorneys for all the parties must be allowed to attend a deposition so that the examination of the deponent can proceed. Also, the parties¹⁸⁶ and expert witnesses¹⁸⁷ for the parties generally are permitted to attend a deposition in order to assist the attorneys. A deposition is not a public proceeding, however, and a deponent may not be compelled to testify before the public.¹⁸⁸ Moreover, a trial court has authority to issue a

184. See generally Lewis, *supra* note 99, at 1777.

185. Graham v. District Court, 548 P.2d 1010, 1013 (Okla. 1976).

186. Gillis v. First Nat'l Bank, 47 Okla. 411, 413, 148 P. 994, 995 (1915) ("The taking of testimony [at a deposition] is in a sense part of the trial, and the opposing party has the right to confront the witnesses whose depositions are taken under the notice, and to have his counsel present to aid in the examination thereof."). OKLA. STAT. tit. 12, § 423 (1971) states that the purpose for the giving of notice of the taking of depositions is to enable adverse parties to attend and cross-examine the deponent. See also Colvert Ice Cream & Dairy Prod. Co. v. Citrus Prod. Co., 179 Okla. 285, 286, 65 P.2d 455, 456 (1937). In addition, although OKLA. STAT. tit. 12, § 2615 (Supp. 1980), which is quoted in full at note 190 *infra*, authorizes a court to exclude witnesses at trial so that they cannot hear the testimony of other witnesses, § 2615 provides explicitly that it does not authorize exclusion of a party who is a natural person, or, in the case of a party that is not a natural person, a representative designated by its attorney. One commentator has stated that a corporate party is entitled to have one representative besides the deponent attend a deposition and that the representative does not have to be the same person for each deposition. Lewis, *supra* note 99, at 1775.

187. See generally CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 202; Ruth, *The Rule of Exclusion of Witnesses in Oklahoma*, 49 OKLA. B.J. 275, 277 (1978).

188. Graham v. District Court, 548 P.2d 1010, 1013 (Okla. 1976); Lewis, *supra* note 99, at 1775.

protective order¹⁸⁹ to exclude other witnesses from the deposition to prevent them from hearing the deponent's testimony.¹⁹⁰

The use of stipulations can greatly facilitate the deposition process. For example, the attorneys can avoid cluttering the deposition transcript with unnecessary objections if they stipulate to reserve all objections to questions at the deposition until the time of trial,¹⁹¹ or stipulate to reserve all such objections except to the form of a question.¹⁹² Also, possible objections to the validity of the notice of the deposition¹⁹³ and to the qualifications of the court reporter¹⁹⁴ can be disposed of before the deposition begins through waiver by stipulation. Another possible stipulation waives the requirement¹⁹⁵ that the deponent read, correct

189. See *Graham v. District Court*, 548 P.2d 1010, 1013 (Okla. 1976); *VERNON'S FORMS*, *supra* note 48, § 5172; *Lewis*, *supra* note 99, at 1775.

190. See OKLA. STAT. tit. 12, § 2615 (Supp. 1980) which provides:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The court may make the order of its own motion. This rule does not authorize exclusion of:

1. A party who is a natural person; or
2. An officer or employee of a party which is not a natural person designated as its representative by its attorney.

See also CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 202-03; R. SUGARMAN & S. NORTH, *supra* note 53, § 1.03[1][b], at 1-72 to -73; § C. WRIGHT & A. MILLER, *supra* note 45, at 297-98; *Epton*, *supra* note 99, at 17; *Lewis*, *supra* note 99, at 1775.

191. *Lewis Drilling Co. v. Brooks*, 451 P.2d 956, 960 (Okla. 1969); *General Explosives Co. v. Wilcox*, 131 Okla. 190, 191, 268 P. 266, 267-68 (1928); *Dunagan & Ricketts*, *supra* note 1, at 169. See also *Facher*, *supra* note 5 at 28-29; *Lewis*, *supra* note 99, at 1775.

In the absence of such a stipulation an attorney attending a deposition must raise all objections to questions at the deposition in order to preserve them for trial. *Oklahoma State Bank v. Buzzard*, 73 Okla. 250, 252, 175 P. 750, 752 (1918) (dictum). OKLA. STAT. tit. 12, § 451 (1971) provides:

Where the adverse party appears at the taking of the deposition, no objections to questions propounded therein shall be considered unless stated at the time and set forth in the deposition: Provided that it may be otherwise stipulated by the parties at the time of taking the deposition, and such stipulation [sic] set forth in the deposition and certified to by the officer taking the same.

192. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 227-28; R. SUGARMAN & S. NORTH, *supra* note 53, § 1.03[1][c], at 1-73 to -76; *VERNON'S FORMS*, *supra* note 48, § 5162. *Facher*, *supra* note 5, at 28-29; *Kornblum*, *supra* note 5, at 15.

193. See *Buttrick v. Gardner*, 169 Okla. 566, 567-68, 37 P.2d 979, 980-81 (1934); *VERNON'S FORMS*, *supra* note 48, § 5162; *cf.* *Williams v. Williams*, 322 P.2d 645, 647 (Okla. 1958) (error in notice to take depositions was harmless and was waived because no proper exception to the admission of the deposition was taken).

194. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 229; *Kornblum*, *supra* note 5, at 15.

195. OKLA. STAT. tit. 12, § 441(B) (Supp. 1980) provides:

When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties, by stipulation, waive the signing or the witness is ill, cannot be found or refuses to sign. If the deposition is not signed by the

and sign the deposition before it may be used at trial.¹⁹⁶ If the attorneys want the deponent to have an opportunity to correct the transcript before trial, they ought to consider stipulating that the transcript may be corrected and signed before any notary public¹⁹⁷ or that changes in the transcript may be made by means of a letter from the deponent's attorney to the examining attorney. Otherwise, the deponent is required to correct and sign the deposition transcript in the presence of the deposition officer who administered the deposition.¹⁹⁸ In many cases it will be beneficial to stipulate to the authenticity¹⁹⁹ of any documents produced at the deposition and to waive the best evidence rule²⁰⁰ so that copies of any documents produced at the deposition may be admissible at trial to the same extent as the originals.²⁰¹ Finally, a stipulation waiving the requirement²⁰² that the deposition transcript be

witness within thirty (30) days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or of the refusal to sign together with the reason, if any, given therefor unless the court extends or shortens the time for the witness to sign the deposition. The thirty days as provided herein, commences on the date the court reporter, who has taken the deposition, delivers or mails the deposition to the witness deposed or the attorney of the witness. The deposition may be used as fully as though signed unless the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

196. See *Buttrick v. Gardner*, 169 Okla. 566, 567, 37 P.2d 979, 980 (1934); CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 228-29; VERNON'S FORMS, *supra* note 48, § 5162; A. MORRILL, *supra* note 173, at 183; Facher, *supra* note 5, at 28; Kornblum, *supra* note 5, at 15-16; Lewis, *supra* note 99, at 1775. Some authorities contend that the examining attorney should not stipulate to waive the deponent's signature because requiring the deponent to sign the deposition makes it more difficult for him to claim at trial that he did not understand specific questions in the deposition or that his testimony was transcribed inaccurately. A. MORRILL, *supra* note 173, at 183; H. HICKAM & T. SCANLON, *supra* note 99, at 119-20; Palmer, *Cross-Examination: Using Depositions at Trial*, 3 LITIGATION 21, 22 (Winter 1977). See also J. UNDERWOOD, *supra* note 27, at 80-81; Facher, *supra* note 5, at 28. Effective October 1, 1980, OKLA. STAT. tit. 12, §§ 392, 394, 441 (Supp. 1980) were amended so that a deponent is no longer subject to punishment for contempt of court for refusing to sign a deposition. Under *id.* § 441(B), if a deponent is unable or refuses to sign a deposition transcript within thirty days after it is submitted to him, the deposition officer who recorded the deposition may sign it and state on the transcript the reason given, if any, for the failure of the deponent to sign the transcript. The deposition may then be used as though it were signed by the deponent unless the court orders otherwise.

197. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 229-30; R. SUGARMAN & S. NORTH, *supra* note 53, § 1.03[1][c], at 1-74.

198. See *Smith v. Standard Fixture Co.*, 182 Okla. 152, 76 P.2d 1072 (1938). OKLA. STAT. tit. 12, § 446 (1971) provides in pertinent part: "The officer taking the deposition shall annex thereto a certificate showing . . . that the deposition was subscribed in the presence of the officer certifying thereto. . . ."

199. See generally OKLA. STAT. tit. 12, § 2901 (Supp. 1980).

200. See generally *id.* §§ 3001-3009.

201. Such a stipulation is useful because it facilitates the introduction of documents into evidence at trial and permits the deponent to retain his originals. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 230.

202. OKLA. STAT. tit. 12, § 448 (1971) provides: "Every deposition intended to be read in evidence on the trial, must be filed at least one day before the day of trial."

filed with the court in order to be admissible in evidence at trial is often used.²⁰³

C. Examination Techniques

To conduct a successful deposition, it is essential for the examining attorney to maintain control over it.²⁰⁴ Having initiated the deposition, the examining attorney can direct the seating at the deposition,²⁰⁵ the timing of breaks and its conclusion,²⁰⁶ when discussion will be off the record,²⁰⁷ and the pace of the examination.²⁰⁸ When he is ready to begin examination of the deponent the examining attorney should request the deposition officer to administer the oath to the deponent.²⁰⁹ After instructing the deponent about the procedures at the deposition and asking a number of background questions,²¹⁰ the examining attorney can direct his examination to the subject matter of the lawsuit.

Attention to proper questioning techniques can enhance the effectiveness of examination at both discovery depositions and depositions to preserve testimony. For example, the examining attorney should

203. See *Brown v. Brown*, 465 P.2d 777, 779 (Okla. Ct. App. 1969) (waiver of time limit for filing of deposition before trial); R. SUGARMAN & S. NORTH, *supra* note 53, § 1.03[1][c], at 1-76; VERNON'S FORMS, *supra* note 48, § 5163; Facher, *supra* note 5, at 28-29; Lewis, *supra* note 99, at 1775.

204. See R. SUGARMAN & S. NORTH, *supra* note 53, §§ 1.03[2], 1.03[4][a], at 1-81, 1-82, 1-83, 1-85.

205. Generally, the examining attorney should place the deponent and his attorney directly across the table from him so that he can maintain direct eye contact with the deponent. The court reporter should usually be placed between the deponent and the examining attorney so that the court reporter can observe both the attorney as he poses questions and the deponent as he responds to the questions. Summit, *supra* note 1, at 24.

206. R. SUGARMAN & S. NORTH, *supra* note 53, § 1.03[8][a], at 1-102; Lewis, *supra* note 99, at 1777; Summit, *supra* note 1, at 24.

207. If he wishes a discussion to be off the record the examining attorney should make this clear not only to the deposition officer but also to the deponent and his attorney. Kornblum, *supra* note 5, at 23.

208. R. SUGARMAN & S. NORTH, *supra* note 53, § 1.03[2], at 1-83.

209. See OKLA. STAT. tit. 12, §§ 423, 426 (1971).

210. Typically, the deponent is asked to give his name and his business and residential addresses and telephone numbers. He is also asked about previous litigation experience and whether his attorney has discussed the deposition procedure with him. The examining attorney then generally instructs the deponent about the deposition procedure to prevent him from later attempting to explain away his deposition testimony on the basis of his not having understood the deposition process. Lewis, *supra* note 99, at 1775-76. The deponent is also told that he can make corrections in the transcript, but that any changes he makes may be the subject of comment at trial. Further, counsel can advise the deponent not to guess in answering questions and not to answer questions he does not understand since it will be assumed that he understood any question that he has answered. Finally, the deponent can be asked if he has any physical or personal problems which would interfere with his ability to testify truthfully at the deposition. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 230-31; Kamine, *The First Five Minutes of an Oral Civil Deposition*, 18 PRAC. LAW. 45, 47 (March 1972); Winter, *supra* note 171, at 91-92.

avoid ambiguous questions²¹¹ and should always allow the deponent to finish his answers,²¹² since the deponent's responses may suggest follow-up questions.²¹³ If the examining attorney makes it a point to enunciate his questions clearly and gets into the habit of making appropriate statements to record gestures (such as nods of the head) of the deponent or his attorney, it will greatly assist the court reporter in preparing an accurate transcript of the deposition.²¹⁴

In a discovery deposition the examining attorney should encourage the deponent to give lengthy narrative answers, to explain and qualify his answers, and to volunteer information. Insights into the lawsuit are obtained by delving into the deponent's background and exploring areas that are at the periphery of the dispute. In contrast, where a deposition is taken to preserve testimony, the examination is similar to examination at trial. Typically, the examining attorney has prepared the deponent as he would a witness who is to testify on direct examination at trial, and the questions and answers are in proper form to be admissible at trial. A proper foundation is laid for the deponent's testimony and the deponent's answers should be complete and responsive. If the opposing counsel objects to the form of a question, the examining attorney can consider restating the question to avoid difficulty with its admissibility at trial.²¹⁵

Especially in discovery depositions it is essential to obtain the deponent's complete recollection of significant events or conversations. This can be accomplished by requesting the deponent to describe a particular event or conversation in narrative form and then asking him specific questions to cause him to elaborate on his general narrative account. The deponent's recollection can be refreshed by showing him documents or by referring to information obtained from other sources. The examining attorney can also ask the deponent to identify other witnesses to the event or conversation, and to state whether a written record of the event or conversation was made. In addition, the deponent can be asked to identify any persons or documents that might re-

211. Kornblum, *supra* note 5, at 17-19.

212. *Id.*; R. SUGARMAN & S. NORTH, *supra* note 53, § 1.03[4][c], at 1-86; Fowler & Sokolow, *supra* note 28, at 29.

213. Kornblum, *supra* note 5, at 19; Summit, *supra* note 1, at 23-24.

214. Kornblum, *supra* note 5, at 22-23.

215. See generally CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 233-34; Facher, *supra* note 5, at 29-31; Lewis, *supra* note 99, at 1776-77. See also J. UNDERWOOD, *supra* note 27, at 79-87; H. HICKAM & T. SCANLON, *supra* note 99, at 111-13; A. MORRILL, *supra* note 173, at 182-83; Fowler & Sokolow, *supra* note 28, at 33-34; Weseley, *supra* note 175; Winter, *supra* note 171, at 92-93.

fresh his memory. The examining attorney should conclude each area of examination by asking the deponent whether he recalls any more information concerning the events or conversations as to which he has been examined. Even if it does not elicit more information such probing is useful because it enables the examining attorney to defend against the deponent's surprising him at trial with new information.²¹⁶

Documents are an important part of many depositions. If the documents to be produced at the deposition are made available shortly before the deposition commences, the examining attorney can inspect them to see that the documents requested have been produced and also have them copied and marked²¹⁷ by the deposition officer. Documents which have been marked as exhibits at the deposition are referred to by their exhibit numbers throughout the course of the deposition.²¹⁸ Before the deponent is examined about an exhibit, the examining attorney describes it for the record and then lays a proper foundation for the exhibit by having the deponent identify it.²¹⁹ The examining attorney can also inquire about the existence of documents other than those produced at the deposition. If the deponent discloses the existence of other documents, the examining attorney can ask the deponent to describe them and disclose their whereabouts. If the documents are in the custody of the deponent or his attorney, the examining attorney can seek a stipulation for the production of the documents at a specific time.²²⁰ If the requested stipulation is refused, the examining attorney can seek production of the documents formally either at a second deposition or through one of the procedures for document production available in Oklahoma.²²¹ The deposition transcript can be used to identify the

216. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 235; H. HICKAM & T. SCANLON, *supra* note 99, at 113-15; R. SUGARMAN & S. NORTH, *supra* note 53, § 1.03[4][e], at 1-88 to -89; Facher, *supra* note 5, at 30; Lewis, *supra* note 99, at 1776-77; Summit, *supra* note 1, at 26; Winter, *supra* note 171, at 93.

If a deponent is unable or refuses to give an estimate of a time, distance or speed, counsel can request him to place upper and lower limits on the critical figure and then attempt to have the deponent narrow the range between the upper and lower limits. Kornblum, *supra* note 5, at 20-21.

217. It is customary for exhibits to be marked by numbers for the plaintiff (e.g., Plaintiff's Exhibit 1) and by letters for the defendant (e.g., Defendant's Exhibit A); double letters are used after the alphabet is exhausted. Kornblum, *supra* note 5, at 24.

218. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 241; Facher, *supra* note 5, at 30; Kornblum, *supra* note 5, at 24; Lewis, *supra* note 99, at 1777.

219. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 241; A. MORRILL, *supra* note 173, at 182; R. SUGARMAN & S. NORTH, *supra* note 53, § 1.03[7], at 1-100 to -101; Facher, *supra* note 5, at 30; Kornblum, *supra* note 5, at 24; Lewis, *supra* note 99, at 1777.

220. If the documents are readily accessible, the examining attorney can adjourn the deposition briefly so that the deponent can produce them. See note 99 *supra*.

221. See Adams, *supra* note 9, at 675-87.

documents sought.²²²

The examining attorney must be ready to deal with objections from the deponent's attorney. Absent a stipulation, all objections to questions must be made at the deposition in order to be preserved for trial.²²³ Even if the parties have stipulated to reserve all objections for trial, the deponent's attorney may still raise objections at the deposition in order to have a reminder on the deposition transcript that a particular question is objectionable or to suggest that the examining attorney rephrase an ambiguous question.²²⁴ If the examining attorney believes that an objection is valid, he may attempt to obviate it by rephrasing his question. Otherwise, he may insist that the deponent answer the question subject to the court's ruling on the objection at trial. If a question is outside the scope of discovery, however, the deponent's attorney may instruct the deponent to refuse to answer it. Since the scope of discovery is broad, a deponent should rarely be instructed to refuse to answer a question at a deposition. But occasionally it may be necessary for the deponent's attorney to protect the deponent's interests by instructing him to refuse to answer a question that seeks privileged information²²⁵ or attorney work product or lacks relevance to the subject matter of the action. It may also be appropriate to instruct the deponent to refuse to answer questions when the examining attorney is being overbearing or argumentative.²²⁶ So long as his questions are within the scope of discovery permitted at a deposition, the examining attorney can insist on obtaining responsive answers.²²⁷ If a responsive answer is not forthcoming, the examining attorney can rephrase and restate his question until the deponent decides it is easier to give a responsive answer than to refuse to do so.²²⁸ The examining attorney

222. Fox, *Planning and Conducting A Discovery Program*, 7 LITIGATION 13, 16 (Summer 1981).

223. OKLA. STAT. tit. 12, § 451 (1971).

224. See CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 242; R. SUGARMAN & S. NORTH, *supra* note 53, § 1.02[5][b], at 1-52; Facher, *supra* note 5, at 32-33; Lewis, *supra* note 99, at 1778. See also Brazil, *supra* note 3, at 1331.

225. See *Avery v. Nelson*, 455 P.2d 75, 77 (Okla. 1969).

226. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 241-47; Facher, *supra* note 5, at 33-34. See also Lewis, *supra* note 99, at 1778-79; Wolfstone, *supra* note 2, at 173-74. In federal practice, under FED. R. CIV. P. 30(d) the deponent can move to terminate or limit the examination if it is being conducted unreasonably. See generally Dunagan & Ricketts, *supra* note 1, at 169.

227. See Dunagan & Ricketts, *supra* note 1, at 169; Summit, *supra* note 1, at 26. Further, the examining attorney can adjourn the deposition to seek a court order if the deponent's attorney persists in interrupting his examination with frivolous objections. R. SUGARMAN & S. NORTH, *supra* note 53, § 1.03[2], at 1-83.

228. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 236; Facher, *supra* note 5, at 32; Kornblum, *supra* note 5, at 20; Lewis, *supra* note 99, at 1777; Summit, *supra* note 1,

should avoid being drawn into an argument with a deponent or his counsel concerning a deponent's refusal to answer a question.²²⁹ It may be effective, however, for the examining attorney to explain to the deponent that he may be subject to punishment for contempt of court if he refuses to answer the questions, and to outline to the deponent the sanctions that may be imposed for his refusal.²³⁰ If all else fails, the examining attorney may adjourn the deposition and seek a court order compelling the deponent to respond.²³¹

When counsel encounters a deponent whom he believes is lying, it is advisable to commit the deponent to the false statement. Once the deponent is committed, a tactical decision about whether to expose the lie at the deposition or later during settlement discussions or at trial should be made. If the attorney decides to expose the lie at the deposition, he can proceed by breaking the statement down into its basic elements and then attacking the weakest and least logical of these elements. If the deponent stays committed to the false statement, the examining attorney can discredit his testimony by demonstrating the falsity of his statement at trial.²³²

Recording depositions by videotape or other audiovisual means is an alternative way to preserve testimony and has been authorized by statute in Oklahoma since 1974.²³³ Videotaped depositions can be very effective because they can capture the deponent's demeanor, voice in-

at 25. If the deponent persists in refusing to answer questions, the examining attorney can also continue on to other questions and later return to the unanswered questions. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 238.

229.

The examiner has a definite advantage over the witness and his counsel as long as the examiner just asks questions. The witness may guess but is never quite sure as to the direction of the examination. The job of the witness is to answer, and all his counsel can do is to record objections to the questions or advise the witness not to answer.

The examiner surrenders this advantage if he allows himself to be drawn into argument or discussion with the witness or his counsel.

Fowler & Sokolow, *supra* note 28, at 31.

230. See *Brightmire v. District Court*, 424 P.2d 425, 429 (Okla. Crim. App. 1967); OKLA. STAT. tit. 12, § 392 (Supp. 1980), which is quoted in full at note 65 *supra*.

231. Facher, *supra* note 5, at 34; Lewis, *supra* note 99, at 1777.

232. See Lewis, *supra* note 99, at 1777-78; Summit, *supra* note 1, at 25-26; Winter, *supra* note 171, at 93-94.

233. See OKLA. STAT. tit. 12, § 441(C) (Supp. 1980) which provides:

The court may, upon motion, order that the testimony taken at a deposition be recorded by audio visual means, in which event the order shall designate the manner of preserving and filing the deposition and the payment of costs. The order may also include other provisions the court deems necessary to ensure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense. If the deposition is recorded by other than stenographic means, then the party taking the deposition shall be required to furnish a copy of the deposition to the adverse party.

flections, and gestures so that his personality and conviction are communicated to the trier of fact. Further, videotaped depositions can hold the attention of the trier of fact better than a lengthy excerpt read from a deposition transcript. If an attorney decides to take a videotaped deposition, he must first obtain a court order or a stipulation from all parties to the lawsuit.²³⁴ The court order or stipulation should specify how a number of procedural questions involved with videotaped depositions are to be resolved. These questions include what equipment is to be used, who is to operate it, how objections to testimony are to be made and decided, whether and how the deponent may correct the videotape recording, whether a written transcript of the videotaped deposition should be made, how the videotape recording is preserved for trial and which party pays for the videotape recording and any written transcript.²³⁵

After the examining attorney has completed his examination, the deponent's attorney may examine the deponent to elicit favorable testimony and clarify or correct the deponent's earlier testimony. Generally, extensive examination by the deponent's attorney is avoided since it is unlikely to benefit the deponent's case and may educate opposing counsel. If the deponent's attorney extensively examines the deponent, however, it may indicate that his attorney is attempting to preserve his testimony because the deponent will be unavailable for trial. In this situation, the examining attorney should consider re-examining the deponent to ensure that the deponent's earlier testimony is in proper form to be admissible at trial.²³⁶ The examining attorney may desire to leave open the possibility of additional examination of the deponent after he has had an opportunity to review the deposition transcript.²³⁷ Stipulat-

234. See *Stiles v. Morris*, 634 P.2d 776, 777 (Okla. Ct. App. 1981) (Released for Publication by Order of Court of Appeals); OKLA. STAT. tit. 12, § 441 (C) (Supp. 1980).

235. For a court order dealing with these important details, see *Continental Fed. Sav. & Loan Ass'n v. Delta Corp.*, 71 F.R.D. 697, 701-02 (W.D. Okla. 1976). For sample stipulations, see Miller, *Videotaping the Oral Deposition*, 18 PRAC. LAW. 45, 57-58 (Feb. 1972); Thornton, *Expanding Video Tape Techniques in Pretrial and Trial Advocacy*, 9 FORUM 105, 108-12 (1973).

At the taking of a videotaped deposition counsel should pay particular attention to the technical aspects of videotape recording such as ensuring that there is proper lighting and that the deponent and attorneys face the camera when speaking. Lewis, *supra* note 99, at 1775. Useful bibliographies reflecting the increasing volume of literature dealing with videotaped depositions can be found in Balabanian, *supra* note 104, at 29; Annot., *supra* note 104, at 638-39; UNIF. AUDIO-VISUAL DEPOSITION ACT prefatory note, 12 U.L.A. 8, 10 (Supp. 1981).

236. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 3, at 241, 247-48; Facher, *supra* note 5, at 34; Lewis, *supra* note 99, at 1777, 1779. See also H. HICKAM & T. SCANLON, *supra* note 99, at 118-19; Ratner, *supra* note 173, at 68.

237. See Weseley, *supra* note 175.

ing that the deposition will be adjourned to a later date, rather than concluded, so that the deponent can produce additional documents that he identified during his deposition or be examined on other matters, may accomplish this objective.²³⁸

VI. PROCEDURES AFTER THE DEPOSITION

A. *Introduction*

Frequently, the primary reason for taking a deposition is to discover facts pertaining to a lawsuit before trial. Often, however, a deposition is taken for other purposes, such as for use on motions, for introduction into evidence at trial, and for impeachment of witnesses. This portion of the Article examines the procedures that, unless otherwise stipulated, must be followed if the deposition is to be used for these purposes. Statutory requirements for objecting to the use of depositions are noted and the limitations on the uses of depositions at trial are examined. Finally, the procedures for taxing the costs of depositions after trial are discussed.

B. *Correction of Deposition Transcript*

After a deposition is completed, the court reporter who recorded the deponent's testimony prepares a transcript of the deposition. Unless otherwise stipulated,²³⁹ the court reporter is required to deliver or mail the original deposition transcript to the deponent or his attorney. Any changes that the deponent desires must be entered on the transcript by the deposition officer along with a statement by the deponent of the reasons for the changes. After the deponent's changes are made, the deponent signs the deposition transcript in the presence of the deposition officer²⁴⁰ unless the parties have waived the signature requirement or the witness is ill, cannot be found, or refuses to sign. If the transcript is not signed within 30 days (or such other time as the court orders) after being delivered or mailed to the deponent or his attorney, the deposition officer is required to sign it and state the reason for the deponent's failure to sign the deposition transcript. The transcript may then be used as if it had been signed by the deponent, unless the court directs otherwise.²⁴¹

238. See Fox, *supra* note 222, at 15-16.

239. See notes 195-98 *supra* and accompanying text.

240. See OKLA. STAT. tit. 12, § 446 (1971).

241. *Id.* § 441 A, B (Supp. 1980) provides:

The deposition officer is required to attach a certificate to the deposition transcript showing that the deposition was taken at the time and place specified in the notice,²⁴² that the deponent was properly sworn before giving his testimony, that the deposition was recorded and transcribed by a proper person specified in the certificate, and that the deponent subscribed the deposition transcript in the deposition officer's presence.²⁴³ The deposition officer should also affix his official seal (if he has one) to the deposition transcript in order to authenticate it so that the deposition transcript may be admitted into evidence at trial.²⁴⁴

A. The deposition shall be written or transcribed in the presence of the officer taking the same, either by the officer, the witness or some disinterested person or the deposition may be taken in shorthand by the officer or some disinterested person, and then transcribed.

B. When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties, by stipulation, waive the signing or the witness is ill, cannot be found or refuses to sign. If the deposition is not signed by the witness within thirty (30) days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or of the refusal to sign together with the reason, if any, given therefor unless the court extends or shortens the time for the witness to sign the deposition. The thirty days as provided herein, commences on the date the court reporter, who has taken the deposition, delivers or mails the deposition to the witness deposed or the attorney of the witness. The deposition may be used as fully as though signed unless the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

242. Even if the time and place of the taking of the deposition given in the certificate of the deposition are not accurate the deposition may still be admitted at trial as long as the parties to the action have suffered no prejudice from the error. *Colvert Ice Cream & Dairy Prod. Co. v. Citrus Prod. Co.*, 179 Okla. 285, 286, 65 P.2d 455, 456 (1937), *modifying Dunham v. Holloway*, 2 Okla. 78, 35 P. 949 (1894).

243. OKLA. STAT. tit. 12, § 446 (1971) provides:

The officer taking the deposition shall annex thereto a certificate, showing the following facts: That the witness was first sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition was reduced to writing or taken in shorthand and transcribed by some proper person, naming him; that the deposition was subscribed in the presence of the officer certifying thereto; that the deposition was taken at the time and place specified in the notice.

The certificate of the deposition officer does not have to track the language of § 446 verbatim, but it must contain its substance. *Smith v. Standard Fixture Co.*, 182 Okla. 152, 153, 76 P.2d 1072, 1073 (1938). Also the certificate does not have to state that the deposition officer is not related to any of the parties even though the deposition could not be used if the deposition officer were related to any party. *Eldridge v. Compton*, 30 Okla. 170, 171, 119 P. 1120, 1121 (1911). Forms for the certificate of the deposition officer appear in *VERNON'S FORMS*, *supra* note 48, §§ 5165-67.

244. OKLA. STAT. tit. 12, § 445 (1971) provides:

Depositions taken pursuant to this article, by any judicial or other officer herein authorized to take depositions, having a seal of office, whether resident in this State or elsewhere, shall be admitted in evidence, upon the certificate and signature of such officer, under the seal of the court of which he is an officer, or his official seal; and no other or further act of authentication shall be required. If the officer taking the same have no official seal, the deposition, if not taken in this State, shall be certified and signed by such officer, and shall be further authenticated, either by parol proof, adduced in court, or by

After the deponent has had an opportunity to review the deposition transcript, the deposition officer (unless the parties stipulate otherwise)²⁴⁵ will seal up the original transcript and send it to the trial court where it will remain sealed until opened by the clerk by order of the court, or at the request of any party or his attorney.²⁴⁶ The deposition officer also will send copies of the deposition transcript to all parties to the action.²⁴⁷ Each attorney can then review the deposition transcript, observe what changes, if any, the deponent made and locate errors in the transcript that the deponent may not have found.²⁴⁸

C. Admissibility of Depositions

A deposition must be filed at least one day before trial in order to be admissible in evidence.²⁴⁹ The Oklahoma Supreme Court has stated that the purpose for this time of filing requirement is to enable other

the official certificate and seal of the Secretary of State or other officer of the State keeping the great seal thereof, or of the clerk or prothonotary of any court having a seal, attesting that such judicial or other officer was, at the time of taking the same, duly qualified, and acting as such officer. But if the deposition be taken within this State by an officer having no seal, or within or without this State under a special commission, it shall be sufficiently authenticated by the official signature of the officer or commissioner taking the same.

See also *id.* § 2902 (Supp. 1980).

245. The parties may agree not to file deposition transcripts in order to keep them confidential. See Lewis, *supra* note 99, at 1775; Wesely, *supra* note 175.

246. Graham v. District Court, 548 P.2d 1010, 1011 (Okla. 1976). OKLA. STAT. tit. 12, § 442 (1971) provides:

The deposition, so taken, shall be sealed up and indorsed with the title of the cause and the name of the officer taking the same, and by him addressed and transmitted to the clerk of the court where the action or proceeding is pending. It shall remain under seal until opened by the clerk by order of the court, or at the request of a party to the action or proceeding, or his attorney.

247. OKLA. STAT. tit. 12, § 449 (1971) provides that the party who initiated the taking of the deposition is required to pay for it, including the cost of transcribing the testimony, and is also required to furnish a copy of the deposition transcript to each adverse party free of charge. Certain expenses incurred in taking a deposition may be taxed as costs and recovered by the prevailing party after the trial. See notes 278-81 *infra* and accompanying text.

248. See Lewis, *supra* note 99, at 1779. An abstract of the deponent's testimony can be prepared and significant parts of his testimony can be indexed by subject matter so that counsel will be able to locate them easily and make effective use of the deposition transcript at trial. *Id.*; Palmer, *supra* note 196; Wesely, *supra* note 175; Winter, *supra* note 171, at 95.

249. Kuykendall v. Kuykendall, 290 P.2d 128, 131 (Okla. 1955) (deposition filed 25 hours and 5 minutes before commencement of trial was admissible since it was filed more than one day before trial. *But see* OKLA. STAT. tit. 12, § 73 (1971)); Cunningham v. North British & Mercantile Ins. Co., 179 Okla. 550, 551, 66 P.2d 515, 516-17 (1937). OKLA. STAT. tit. 12, § 448 (1971) provides: "Every deposition intended to be read in evidence on the trial, must be filed at least one day before the day of trial." See also *id.* § 442 (1971). This time of filing requirement can be waived by stipulation of the parties. Brown v. Brown, 465 P.2d 777, 779 (Okla. 1969). The trial court can also continue the trial for one day so that a deposition can become admissible. Kepley v. Dingman, 36 Okla. 771, 772, 130 P. 284, 284 (1913).

parties to raise objections to a deposition as a whole before trial.²⁵⁰ The Oklahoma Statutes provide that objections to the use of a deposition as a whole²⁵¹ must be in writing, must specify the grounds of the objections,²⁵² and must be filed with the court before commencement of the trial or else they are waived.²⁵³ The Oklahoma Statutes also state that objections to specific questions at a deposition must be made at the time of the deposition in order to be preserved for trial,²⁵⁴ unless the

250. *Wichita Falls & N.W. Ry. v. Davern*, 74 Okla. 151, 152-53, 177 P. 909, 910-11 (1919); *Oklahoma Ry. v. Boles*, 30 Okla. 764, 766, 120 P. 1104, 1105 (1912) (dictum). See also *Kuykendall v. Kuykendall*, 290 P.2d 128, 131 (Okla. 1955).

251. Objections to a deposition as a whole include objections such as that the deponent was not sworn before giving his testimony (*Bagg v. Shoenfelt*, 71 Okla. 195, 196, 176 P. 511, 511 (1918); *Lowrance v. Richardson*, 23 Okla. 343, 347, 100 P. 529, 531 (1909)); that the deposition was taken before the filing of the action (*Buttrick v. Gardner*, 169 Okla. 566, 568, 37 P.2d 979, 981 (1934)); that sufficient notice of the deposition was not given (*Shaw v. Stevenson*, 119 Okla. 182, 184, 249 P. 306, 308 (1926)); that the deposition transcript was not subscribed by the deponent (*Dungey v. Dowdy*, 195 Okla. 361, 365, 159 P.2d 231, 232 (1945)); that the deposition transcript was not sealed and delivered to the court in accordance with OKLA. STAT. tit. 12, § 442 (1971) (see *Oklahoma Hay & Grain Co. v. T.D. Randall & Co.*, 66 Okla. 277, 279, 168 P. 1012, 1014-15 (1917)); that the deposition was taken in another action (*Bennett v. Winfrey*, 173 Okla. 441, 443-44, 50 P.2d 363, 366 (1935)); that the deposition lacked the certificate of the deposition officer as required by OKLA. STAT. tit. 12, § 446 (1971) (*Lowrance v. Richardson*, 23 Okla. 343, 347, 100 P. 529, 531 (1909)); and that the deposition transcript was not filed with the court at least one day before trial (*Kuykendall v. Kuykendall*, 290 P.2d 128, 131 (Okla. 1955); *Wichita Falls & N.W. Ry. v. Davern*, 74 Okla. 151, 152-53, 177 P. 909, 910-11 (1919)). See VERNON'S FORMS, *supra* note 48, § 5170.

252. *Oklahoma Hay & Grain Co. v. T.D. Randall & Co.*, 66 Okla. 277, 279, 168 P. 1012, 1015 (1917).

253. *Marathon Ins. Co. v. Arnold*, 433 P.2d 927, 930 (Okla. 1967); *Williams v. Williams*, 322 P.2d 645, 647 (Okla. 1958) (alternative holding); *Becker v. State*, 312 P.2d 935, 941 (Okla. 1957); *North v. Evans*, 199 Okla. 284, 285-86, 185 P.2d 901, 903 (1947); *Dungey v. Dowdy*, 195 Okla. 361, 362-63, 159 P.2d 231, 232 (1945); *Bennett v. Winfrey*, 173 Okla. 441, 443-44, 50 P.2d 363, 366 (1935); *Buttrick v. Gardner*, 169 Okla. 566, 568, 37 P.2d 979, 981 (1934); *Shaw v. Stevenson*, 119 Okla. 182, 184, 249 P. 306, 308 (1926); *Wichita Falls & N.W. Ry. v. Davern*, 74 Okla. 151, 153, 177 P. 909, 910-11 (1919); *Bagg v. Shoenfelt*, 71 Okla. 195, 196, 176 P. 511, 511 (1918); *Eldridge v. Compton*, 30 Okla. 170, 171-72, 119 P. 1120, 1121 (1911) (alternative holding); *Trower v. Roberts*, 30 Okla. 215, 221-23, 120 P. 617, 619-620 (1911); *Brown v. Brown*, 465 P.2d 777, 779 (Okla. Ct. App. 1969).

OKLA. STAT. tit. 12, § 450 (1971) provides: "Exceptions to depositions as a whole shall be in writing, specifying the grounds of objections, and filed with the papers in the cause before the commencement of trial." See also FED. R. CIV. P. 32(d). A party must not only file the objections with the court, but must also direct the court's attention to the objections before the trial begins. *Welch v. Church*, 55 Okla. 600, 605-06, 155 P. 620, 622 (1916); *Root v. Coyle*, 15 Okla. 574, 576, 82 P. 648, 648-49 (1905). The requirement that objections to the deposition as a whole must be filed before trial may be waived by stipulation of the parties. *General Explosives Co. v. Wilcox*, 131 Okla. 190, 191, 268 P. 266, 267 (1928).

254. *Oklahoma State Bank v. Buzzard*, 73 Okla. 250, 252, 175 P. 750, 752 (1918) (holding that it was harmless error for a party to be permitted to raise objections at trial to irrelevant questions that had not been objected to at a deposition). OKLA. STAT. tit. 12, § 451 (1971) provides:

Where the adverse party appears at the taking of the deposition, no objections to questions propounded therein shall be considered unless stated at the time and set forth in the deposition: Provided, that it may be otherwise stipulated by the parties at the time

objecting party did not attend or was not represented at the deposition²⁵⁵ or unless the parties stipulate otherwise.²⁵⁶ Nevertheless, certain objections should be allowed at trial even though they have not been raised at the deposition because the standards for discoverability and admissibility at trial differ.²⁵⁷ Since the relevance standard for admissibility at trial is narrower than the scope of relevance in discovery, an attorney should be allowed to raise a relevance objection to deposition testimony at trial even though he did not raise it at the deposition.²⁵⁸ Also, objections that the deponent's testimony contains hearsay²⁵⁹ or violates the best evidence rule do not apply at a deposition and should not be raised then. Objections to the form of questions which could be cured if raised promptly²⁶⁰ and objections based upon claims of privilege,²⁶¹ however, should be made promptly and will be waived if not raised at the deposition. A deposition may be used only in the action in which it is taken or in other actions between the same parties involving the same subject matter.²⁶²

A deposition can be a devastating tool for impeaching a witness on cross-examination. If a witness makes a statement while testifying on direct examination that is inconsistent with a statement made earlier at

of taking the deposition, and such stipulation set forth in the deposition and certified to by the officer taking the same.

255. See *Hart v. Frost*, 73 Okla. 148, 150, 175 P. 257, 258 (1918); *Hamm v. Walker*, 594 P.2d 1233, 1235-36 (Okla. Ct. App. 1979) (Released for Publication by Order of Court of Appeals) (waiver of objection at trial).

256. See *Lewis Drilling Co. v. Brooks*, 451 P.2d 956, 960 (1969); *General Explosives Co. v. Wilcox*, 131 Okla. 190, 191, 268 P. 266, 267 (1928).

257. *State ex rel. Westerheide v. Shilling*, 190 Okla. 305, 308, 123 P.2d 674, 678 (1942) ("The right to take the deposition is not limited by the restrictions on its use.")

258. See generally *Adams*, *supra* note 8, at 189-90; *Vliet*, *supra* note 44, at 298-300; Note, *Evaluation of Judicial Administration in Oklahoma*, 4 OKLA. L. REV. 369, 372 (1951).

259. See *New York Life Ins. Co. v. Gibbs*, 176 Okla. 535, 536, 56 P.2d 1179, 1180 (1936); *Vliet*, *supra* note 44, at 299. See also *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 392-93, 364 P.2d 266, 285-86, 15 Cal. Rptr. 90, 109-10 (1961); FED. R. CIV. P. 26(b)(1).

260. See Note, *supra* note 258. See also FED. R. CIV. P. 32(d)(3)(B).

261. OKLA. STAT. tit. 12, § 2511 (Supp. 1980).

262. Compare *In re Estate of Fullerton*, 375 P.2d 933, 940 (Okla. 1964) (deposition taken in probate proceeding in county court was admissible at trial de novo on appeal to district court) with *Florence v. Russell*, 105 Okla. 20, 25-26, 231 P. 301, 305-06 (1924) (deposition taken in one action could not be used in another action involving different parties). OKLA. STAT. tit. 12, § 444 (1971) provides:

When a deposition has been once taken, it may be read in any stage of the same action or proceeding, or in any other action or proceeding upon the same matter between the same parties, subject, however, to all such exceptions as may be taken thereto under the provisions of this article.

Cf. id. § 2804(B)(1) (Supp. 1980) (deposition is admissible under the former testimony exception to the hearsay rule if the deponent is unavailable and the party against whom the deposition is offered, or a predecessor in interest, had an opportunity and similar motive to examine the deponent at the deposition). See also *Travelers Fire Ins. Co. v. Wright*, 322 P.2d 417 (Okla. 1958).

his deposition, he exposes himself to impeachment on cross-examination. The attorney attempting to impeach the witness should first have him repeat clearly the statement that is inconsistent with his deposition testimony. The attorney can next ask the witness whether his deposition was taken in the case, whether he testified under oath and was represented by counsel at the deposition, and whether he had an opportunity to correct the deposition transcript before trial. Then the attorney can impeach the witness by simply reading his prior inconsistent statement from the deposition transcript to the jury.²⁶³

A deposition may also be used in certain circumstances for purposes other than impeaching a witness. Section 447 of title 12 of the Oklahoma Statutes²⁶⁴ provides that the deposition of a party, or the agent, servant or employee of a party,²⁶⁵ may be read into evidence by

263. Palmer, *supra* note 196, at 21-23, 49; Winter, *supra* note 171, at 96. See also OKLA. STAT. tit. 12, §§ 447 (1971), 2613, 2801(4)(a)(1) (Supp. 1980). Under § 2801(4)(a)(1) a prior inconsistent statement made at a deposition may be offered not only for purposes of impeaching a witness at trial, but also for its truth. OKLA. STAT. ANN. tit. 12, § 2801 comment, at 463-71 (West 1980).

264. OKLA. STAT. tit. 12, § 447 (1971) provides:

When a deposition, or any part thereof, is offered to be read in evidence, it must appear to the satisfaction of the court that for some legal cause the attendance of the witness cannot be procured. Provided, however, if the witness be a party to the action, or the agent, servant or employee of a party to the action, and his or her deposition has been taken, any part or portion thereof may be read in evidence, whether the witness be available in court or not, if such deposition is determined by the court to contain admissions against the interest of said party to the action then on trial. Provided further, as to a party or witness to the action whose deposition has been taken, the deposition or any part thereof may be read in evidence if such deposition or any part thereof is determined by the court to contradict or impeach the testimony of such party or witness testifying in such action.

265. Under the Oklahoma Evidence Code a statement by an agent or servant of a party concerning a matter within the scope of his agency or employment is not hearsay if offered against the party. OKLA. STAT. tit. 12, § 2801(4)(b)(4) (Supp. 1980). Interestingly, the requirement that the statement must have been "made during the existence of the [agency or employment] relationship" was omitted when the hearsay definition in the Oklahoma Evidence Code was borrowed from the Federal Rules of Evidence. Compare FED. R. EVID. 801(d)(2)(D) with OKLA. STAT. tit. 12, § 2801(4)(b)(4) (Supp. 1980); OKLA. STAT. ANN. tit. 12, § 2801 comment, at 471 (West 1980); Note, *The Status of Vicarious Admissions Under the Oklahoma Evidence Code*, 32 OKLA. L. REV. 474, 479-81 (1979). Apparently then, a statement by a disgruntled former employee made after being terminated by his employer would not be hearsay and would be admissible in an Oklahoma state court if it concerned a matter within the scope of his former employment and was offered against his employer. This result is criticized in *id.*, however.

The Oklahoma Supreme Court held in *Gasko v. Gray*, 507 P.2d 1231, 1233-34 (Okla. 1972) (decided before the adoption of the Oklahoma Evidence Code), that the deposition of an employee of a corporation could not be admitted against the corporation where the corporation was not a party to the action at the time of the deposition and had no opportunity to cross-examine the employee at the deposition, but was later added as a party defendant in the action. Under OKLA. STAT. tit. 12, § 2801(4)(b)(4) (Supp. 1980), however, a statement by an employee of a party is not hearsay and is therefore admissible against the party if it concerned a matter within the scope of employment, regardless of whether the party had an opportunity to cross-examine the employee at the time he made the statement; accordingly, the *Gasko* case would probably be decided differently under the Oklahoma Evidence Code.

an opposing party.²⁶⁶ Under sections 433²⁶⁷ and 447 the deposition of a witness may be used at trial if the witness is unavailable to testify at trial because the witness does not reside in the county where the action is being tried,²⁶⁸ is absent from the county,²⁶⁹ is too ill to attend the trial,²⁷⁰ is imprisoned,²⁷¹ or is dead.²⁷² The party offering the deposition is required to satisfy the trial court that the witness is unavailable to testify at trial.²⁷³ A deposition may also be used in connection with a

266. *Miller Constr. Co. v. Wenthold*, 458 P.2d 637, 644 (Okla. 1969); *Brown v. Marker*, 410 P.2d 61, 65-66 (Okla. 1965); OKLA. STAT. tit. 12, § 447 (1971). Prior to its amendment in 1961, § 447 permitted a deposition of a party to be used only after it had been shown that the deponent was unavailable for trial. *Brown v. Marker*, 410 P.2d 61, 65 (Okla. 1965); *Cowan v. Pearson*, 354 P.2d 194, 198-99 (Okla. 1959).

267. OKLA. STAT. tit. 12, § 433 (Supp. 1980) provides:

The deposition of any witness may be used only in the following cases:

1. When the witness does not reside in the county where the action or proceeding is pending, or is sent for trial by change of venue; or is absent therefrom.
2. When, from age, infirmity or imprisonment, the witness is unable to attend court, or is dead.
3. When the testimony is required upon a motion, or in any other case where the oral testimony of the witness is not required.
4. When such witness is an expert witness, provided that for purposes of this paragraph an expert witness is a person educated in a special art or profession or a person possessing special or peculiar knowledge acquired from practical experience. Nothing in this paragraph shall be construed to limit the authority of a court to issue a subpoena to compel an expert witness to appear in the same manner as any other witness.

268. *Missouri-Kan.-Tex. R.R. v. Miller*, 486 P.2d 630, 636 (Okla. 1971); *Bride v. Bride*, 131 Okla. 176, 179, 268 P. 212, 215 (1928); *Cooke v. Coronado Oil Co.*, 112 Okla. 240, 243, 240 P. 739, 741 (1925); *Producers' & Refiners' Corp. v. Castille*, 89 Okla. 261, 266, 214 P. 121, 126 (1923).

269. *Smart v. Cain*, 493 P.2d 821, 823-24 (Okla. 1972) (deposition of defendant who was absent from the county could be offered into evidence regardless of whether he was a resident of the county and regardless of the reason for the defendant's absence); *Missouri-Kan.-Tex. R.R. v. Miller*, 486 P.2d 630, 636 (Okla. 1971); *Roger Givens, Inc. v. Mustex, Inc.*, 410 P.2d 42, 44-45 (Okla. 1966); *Bride v. Bride*, 131 Okla. 176, 179, 268 P. 212, 215 (1928); *Quapaw Co. v. Varnell*, 566 P.2d 164, 166-67 (Okla. Ct. App. 1977) (Released for Publication by Order of Court of Appeals).

270. *Briggs v. Waggoner*, 375 P.2d 896, 901 (Okla. 1962); *Tootle v. Payne*, 82 Okla. 178, 182, 199 P. 201, 205 (1921). *See also* *Boise v. Atchison, T. & S.F. Ry.*, 6 Okla. 243, 246-47, 51 P. 662, 663 (1897) (holding that the deposition of a witness could not be used where the witness claimed that she was unable to attend trial because she was caring for her sick husband).

271. *In re Rich*, 604 P.2d 1248, 1252 (Okla. 1979).

272. *Briggs v. Waggoner*, 375 P.2d 896, 901 (Okla. 1962); *see* *Hall v. Orthopedic Clinic*, 444 P.2d 191, 192 (Okla. 1968).

273. *General Explosives Co. v. Wilcox*, 131 Okla. 190, 191, 268 P. 266, 268 (1928); *Schaff v. Coyle*, 121 Okla. 228, 234, 249 P. 947, 952-53 (1925); *Boise v. Atchison, T. & S.F. Ry.*, 6 Okla. 243, 246-47, 51 P. 662, 663 (1897). No additional showing is required on appeal, however, since an appellate court assumes that the trial court properly found that the witness was unavailable to testify, unless a contrary showing is made. *Lewis Drilling Co. v. Brooks*, 451 P.2d 956, 960 (Okla. 1969) (dictum); *Producers' & Refiners' Corp. v. Castille*, 89 Okla. 261, 267, 214 P. 121, 126 (1923). Also the Oklahoma Supreme Court has found the admission of a deposition into evidence at trial to be harmless error where the improperly admitted deposition testimony was cumulative of other properly admitted evidence (*St. Louis-S.F. Ry. v. Fox*, 359 P.2d 710, 714-15 (Okla. 1961)); the deposition testimony was irrelevant and the jury was instructed to ignore it (*Chase v. Watson*, 294

motion where oral testimony is not required.²⁷⁴ Finally, since 1979, it has been permissible to use the deposition of an expert witness at trial in lieu of his testimony; the trial court, however, has discretion to subpoena the expert witness to appear and testify.²⁷⁵

Once one party introduces a portion of a deposition into evidence, any adverse party can require him to introduce any other part of the deposition that in fairness should also be considered.²⁷⁶ Moreover, a party who introduces a deposition into evidence is not bound by it and may introduce other evidence to contradict or impeach statements from the deposition.²⁷⁷

After trial the prevailing party can request the court clerk to tax the costs of transcribing²⁷⁸ or videotaping²⁷⁹ the depositions that he has taken in the action and the sheriff's fees and witness fees incurred in

P.2d 801, 804 (Okla. 1956)); and the deponent was cross-examined at trial regarding the improperly admitted deposition testimony (Henry Bldg. Co. v. Cowman, 363 P.2d 208, 214 (Okla. 1961)).

274. OKLA. STAT. tit. 12, § 433(3) (Supp. 1980); Adams, *supra* note 8, at 204-06. See OKLA. CT. R. 13; cf. St. Francis Hosp. v. Group Hosp. Serv., 598 P.2d 238, 241 (Okla. 1979) ("oral" depositions consisting of live testimony in open court at an evidentiary hearing are not appropriate on a motion for summary judgment); OKLA. STAT. tit. 12, § 431 (1971) (affidavits may be used on motions).

275. OKLA. STAT. tit. 12, § 433(4) (Supp. 1980). See *Stiles v. Morris*, 634 P.2d 776, 777 (Okla. Ct. App. 1981) (Released for Publication by Order of Court of Appeals). See also OKLA. WORKMEN'S COMP. R. 20. In order to be admissible at trial a deposition of an expert witness must also come within a hearsay exception. The residual exception to the hearsay exclusionary rule in OKLA. STAT. tit. 12, § 2803(24) (Supp. 1980), would probably be applicable if the notice requirements for use of the residual exception had been satisfied. See generally Yasser, *Strangling Hearsay: The Residual Exceptions to the Hearsay Rule*, 11 TEX. TECH. L. REV. 587 (1980). In most cases the notice requirements would be satisfied at the pretrial conference. See OKLA. CT. R. 5(c) (3), (e).

276. See *M.E. Trapp, Associated v. Tankersley*, 200 Okla. 117, 121, 191 P.2d 202, 207 (1948); *Sealey v. Smith*, 81 Okla. 97, 101, 197 P. 490, 494 (1921); *Oklahoma State Bank v. Buzzard* 73 Okla. 250, 251-52, 175 P. 750, 751-52 (1918). OKLA. STAT. tit. 12, § 2107 (Supp. 1980), provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which should in fairness be considered contemporaneously with it." See also OKLA. STAT. ANN. tit. 12, § 2107 comment (West 1980); FED. R. CIV. P. 32(a)(4); FED. R. CIV. P. 106 advisory committee note reprinted in 28 U.S.C. app. at 543 (1976); MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 56 (2d ed. E. Cleary 1972); 4A MOORE'S FEDERAL PRACTICE ¶ 32.06 (2d ed. 1981); 8 C. WRIGHT & A. MILLER, *supra* note 45, § 2148.

277. *Hall v. Orthopedic Clinic*, 444 P.2d 191, 192-93 (Okla. 1968). See also *Austin v. King*, 404 P.2d 1009, 1011-12 (Okla. 1965); *M.E. Trapp, Associated v. Tankersley*, 200 Okla. 117, 121, 191 P.2d 202, 207 (1948); OKLA. STAT. tit. 12, § 2607 (Supp. 1980); OKLA. STAT. ANN. tit. 12, § 2607 comment (West 1980).

278. OKLA. STAT. tit. 12, § 449 (Supp. 1980) states that the maximum cost allowable for transcribing depositions is that set for preparing appellate transcripts. This amount is determined by *id.* tit. 20, § 106.4 (Supp. 1980), which was amended in 1980 to raise the prescribed cost for preparing an original appellate transcript to \$2 per double-spaced typewritten page having 25 lines to the page. While *id.* tit. 12, § 449, and *id.* § 106.4, fix the maximum amount that the prevailing party can recover as the costs of transcribing depositions, they place no limits on the rates court reporters can charge for transcribing depositions. 10 Okla. Op. Att'y Gen. 198 (1977).

connection with these depositions.²⁸⁰ Upon motion of another party, however, the court can retax these costs if it finds that the depositions were not authorized by statute or were not reasonably necessary to the prevailing party's prosecution of his case.²⁸¹

VII. CONCLUSION

Preparation is the key to success at trial and discovery is essential to pre-trial preparation. Indeed, mastery of discovery techniques may be more important than trial skills because effective discovery often resolves lawsuits before trial. This Article has focused on depositions, the most powerful and widely used of the discovery tools. The other discovery tools discussed in an earlier article in this series should not be forgotten, however. Depositions, while very important, are best used as part of a comprehensive discovery plan which incorporates not only the other discovery tools available in Oklahoma but also resourceful informal investigation.

279. *Stiles v. Morris*, 634 P.2d 776, 778 (Okla. Ct. App. 1981) (Released for Publication by Order of Court of Appeals).

280. *Owens v. Clark*, 177 Okla. 519, 61 P.2d 201 (1936); *Ford Motor Credit Co. v. Goings*, 527 P.2d 603, 610 (Okla. Ct. App. 1974) (Released for Publication by Order of Court of Appeals). OKLA. STAT. tit. 12, § 449 (Supp. 1980) provides:

Each party who takes testimony of a witness or of another party by deposition shall bear all expense incident thereto, including the cost of transcription, and shall furnish to the adverse party or parties, free of charge, at least one copy of the transcribed deposition so taken. The cost of transcription, when supported by court reporter's verified statement, the sheriff's fee for serving notice to take deposition and fees of witnesses shall each constitute an item of cost to be taxed in the case in the manner generally provided by law, unless the court, upon timely motion of a party to retax costs, finds the deposition so taxed was unauthorized by statute and unnecessary for protection of the party's interest. In no case shall transcription cost be taxed at a higher per-page rate than that which is now or may be hereafter prescribed by law for appellate transcripts.

281. *Compare Largent v. State Indus. Court*, 556 P.2d 262, 264 (Okla. 1976) (deposition expenses not allowed as costs) with *Ford Motor Credit Co. v. Goings*, 527 P.2d 603, 610 (Okla. Ct. App. 1974) (Released for Publication by Order of Court of Appeals) (deposition expenses allowed as costs).