



Side BAR

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The Federal Bar Association

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FROM THE CHAIR

By Kent S. Hofmeister

As we rapidly approach the latter pages of the 1994 calendar, the official FBA catch phrase has become "A Peach of a Time." Our good friends in Atlanta are finalizing what should be one of the most dynamic and successful conventions ever. More information on the Convention, scheduled for October 5-8 and headquartered in the European-styled elegance of the Swissôtel, can be found in the most recent edition of the *Federal Bar News & Journal*. In addition to the annual National Council meeting, meetings of chapter, circuit, section and division officers, and the Presidential Installation Banquet for incoming president Alan Harnisch, the Convention also will feature a full-day, CLE program focusing on 42 U.S.C. § 1983 civil rights litigation. So check out the *Journal*, make your reservations soon, and we will see you in Atlanta, the heartland of mansions and magnolias (and look for pictures of the festivities in the next issue . . .)!

So far, the response to *Sidebar's* new format has been very enthusiastic. I hope that you find both the substance and presentation to be interesting, informative and to your liking, and I welcome any suggestions from our readership to help me make this publication what you want it to be. In this issue, Ernest Svenson and S. Ann Saucer of New Orleans profile recent procedural and jurisdictional problems addressed by the Fifth Circuit Court of

Appeals, Irah H. Donner of Alexandria, Virginia scrutinizes the new mandatory disclosure considerations of Rule 26, and Major Michael J. Davidson of Phoenix explores the distinction between trial and discovery depositions under the Federal Rules. I also have included an insightful article authored by Judge Morris B. Hoffman of the Denver District Court concerning what he perceives to be the ten most common trial mistakes of the trial lawyer. While technically outside the forum of the federal arena, Judge Hoffman's comments are relevant to trial attorneys practicing anywhere, at any time. Finally, *Serious About Our Humor* looks at the lighter side of practicing law, and solicits your publishable contributions of any anecdotes, deposition excerpts or the like that make us practitioners pause for a brief hint of a smile during our otherwise busy day.

Have a great end of summer, and disregard the fear and trepidation experienced in *The Love Song of J. Alfred Prufrock* -- Go ahead, "Eat the Peach!"

See you in Atlanta. ■

10 TRIAL MISTAKES

By Morris B. Hoffman
Judge, Denver District Court

I've long suspected, both as a lawyer and more recently as a judge, that a trial judge knows no more about how to be a good trial lawyer than a piano tuner knows about how to be a concert pianist. All too often judges confuse our

See 10 TRIAL MISTAKES on Page 10

FEDERAL JURISDICTION AND PROCEDURE

By Ernest Svenson and
S. Ann Saucer

Our survey of Fifth Circuit cases includes a variety of interesting procedural and jurisdictional problems decided recently by the court. The cases that we selected for discussion highlight common procedural pitfalls and recent developments in the law.

I. PROPER SERVICE UPON THE UNITED STATES

The plaintiff in *Peters v. U.S.*¹ lost her day in court due to improper service of the defendant, the United States. *Peters* outlines the service of summons procedure prior to the December 1, 1993 amendments to the Federal Rules. As illustrated in *Peters*, it was not unusual for litigants to botch the procedure for service of the United States, with fatal results in cases where the statute of limitations had run at the time of dismissal. The amended rules provide plaintiffs with an added service option, eliminating the requirement of delivery of the summons and complaint to the United States Attorney. The recent amendments also allow district courts to forgive tardy service. Litigants are reminded nonetheless that the amended rules still carve out a special procedure for service of the United States. Moreover, the *Peters* decision instructs that the Fifth Circuit has little tolerance for deviation from the "easily understandable"² service requirements delineated in Federal Rule of Civil Procedure 4.

Service on the United States, pre-amendment, required: 1) *delivery* of a copy of the summons and complaint to the United States Attorney for the district in which the action was brought; *and* 2) *sending* a copy of the summons and complaint by registered or certified mail to the Attorney General and any applicable officer or Agency.³ The amended Federal Rule of Civil Procedure 4 permits, as an alternative to delivery to the United States Attorney in the applicable district, "sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney[.]"⁴ The requirements of sending copies to the Attorney General in Washington, D.C. and to any applicable officer or Agency are still in effect.⁵

Both the pre- and post-amendment rules provide that failure to effect service within 120 days of filing the complaint may justify a dismissal "without prejudice."⁶ For many plaintiffs, like that in *Peters*, the ostensible without prejudice dismissal operates as a *de facto* dismissal with prejudice because the statute of limitations has already expired at the time of dismissal.⁷ *Peters* illustrates the potential significance of the recent amendment to Rule 4 in preserving claims against the United States.

The *Peters* plaintiff filed a wrongful death action against the United States but failed to complete proper service within 120 days. The district court accordingly dismissed the complaint pursuant to the then-existing rule that a complaint "shall be" dismissed without prejudice if the late-serving party cannot show good cause.⁸ The amended rule gives district courts the option of exercising mercy; as an alternative to dismissal, the district court may "direct that service be effected within a specified time[.]"⁹ In addition, if the plaintiff can show good cause, then the district court "shall extend the time for service for an appropriate period."¹⁰ Notably, the amendment creates a kinder, gentler Rule 4 with regard to service of any defendant, not just the United States.¹¹

Peters may portend that if a district court cannot be convinced to exercise clemency pursuant to the new, more lenient rules, then the Fifth Circuit is not likely to grant relief. The Fifth Circuit, for example, did not relax its standard of review in *Peters*, but instead recited the "abuse of discretion" standard fatal to many appeals.¹² This standard is relaxed in appeals of dismissals for failure to prosecute if the dismissal is *de facto* with prejudice.¹³ The *Peters* court gave no credence to the fact that the district court dismissal in the case before it likewise operated *de facto* with prejudice, as the statute of limitations had expired. The disparate treatment of failure to prosecute and failure to serve cases may lie in the Fifth Circuit's attitude that the Rule 4 service requirements are "easily understandable."¹⁴ Finding no justification for

Illustration, page 1: *Plea for the Defense*, Honoré Daumier (undated). *Sidebar* gratefully acknowledges and thanks The Phillips Collection, Washington, D.C., for permission to use this reproduction.

the plaintiff's noncompliance with Rule 4, the Fifth Circuit in *Peters* affirmed the dismissal of the case.

Also instructive is the *Peters* court's reminder that the Fifth Circuit has been a stickler for proper service of the United States. For example, the United States Attorney's actual notice of an action is no substitute for timely service.¹⁵ Similarly, mere service on the United States Attorney by certified or registered mail has been deemed insufficient.¹⁶

II. PERSONAL JURISDICTION

When a defendant files a motion to dismiss for lack of personal jurisdiction and provides uncontradicted affidavits showing that he has virtually no connection with the forum state he stands a good chance of winning his motion. But, where there is a fact dispute on a jurisdictional issue, Fifth Circuit law favors the party seeking to establish personal jurisdiction.

In *Ruston Gas Turbines, Inc. v. Donaldson Co.*,¹⁷ the Fifth Circuit reversed a trial court that granted a motion to dismiss for lack of personal jurisdiction. The plaintiff in that suit had filed a breach of contract action in state court against Donaldson Company. After removing the case to federal court, Donaldson filed a third party complaint against Corchran, a corporation that subcontracted with Donaldson to manufacture certain component parts of the system that Donaldson sold to the plaintiff.

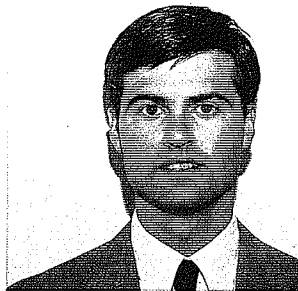
Corchran filed a motion to dismiss for lack of personal jurisdiction. In support of the motion, it attached the affidavit of its president, who stated that Corchran did not conduct business or maintain a place of business in Texas, did not employ

sales representatives or manufacturing representatives in Texas, and had not recruited any employees in Texas. Corchran had not designated a registered agent for service of process in Texas, and was not required to do so. Corchran also stated, through the affidavit of its president, that it did not contract by mail with any Texas resident and had not committed any torts in Texas.

In response to Corchran's motion to dismiss, Donaldson submitted affidavits of its employees, which raised a fact question about the level of activity that Corchran had maintained in Texas. For example, Donaldson explained that its opponent had agreed to manufacture air infiltration systems with the knowledge that the parts it was manufacturing would be shipped to Texas. Additionally, the purchase orders submitted to Donaldson specifically indicated that the systems would be sold in Houston. A number of other facts also contradicted the affidavits of Corchran's president on the question of whether there was significant activity in Texas.¹⁸

The district court found that it did not have personal jurisdiction over Corchran. The Fifth Circuit began by noting that the question of whether personal jurisdiction may be exercised over a non-resident defendant is a question of law to be examined *de novo* by the court. However, where jurisdictional facts are disputed, the court noted that it "must resolve all conflicts in favor of the party seeking to invoke the court's jurisdiction."¹⁹

The court noted that the Texas long-arm statute permits the exercise of personal jurisdiction to the limits of due process. The court then went on to find that the exercise of personal jurisdiction would not offend notions of fair play and substantial justice.



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III. PROCEDURAL ISSUES IN SECURITIES EXCHANGE ACT CASES

A. Jurisdiction in Securities Exchange Act Cases

The Fifth Circuit's decision in *Busch v. Buchman, Buchman & O'Brien*,²⁰ affords Securities Exchange Act plaintiffs wide latitude in choosing the federal district in which to try their case. The *Busch* district court's Rule 12(b) dismissal of the plaintiff's²¹ case for lack of subject matter and personal jurisdiction was reversed on appeal. *Busch* delineates the subject matter and personal jurisdiction rules that Securities Exchange Act plaintiffs must follow to avoid Rule 12(b) dismissal.

Subject matter jurisdiction pursuant to the Securities Exchange Act is defined geographically by the *Busch* majority: The Act grants subject matter jurisdiction to a federal court sitting in a district wherein any act or transaction constituting the violation occurred.²² The *Busch* plaintiff filed suit in a federal district court in Texas and effected long-arm service of the defendant, a New York law firm. The Fifth Circuit analyzed whether the challenged securities fraud "occurred" in Texas for purposes of the Securities Exchange Act. The *Busch* complaint faulted the defendant for drafting a tax opinion and confidential memorandum regarding the beneficial tax-sheltering effects of an investment marketed by Barrister Associates, a New York promoter. Barrister Associates thereafter sent a prospectus including the defendant's tax opinion and memo to the plaintiff, a Texas resident. The defendant successfully argued to the district court that because the defendant drafted the documents in New York for a promoter in New York, any alleged violation of the Act occurred in New York. The Fifth Circuit disagreed. The court reasoned that the defendant drafted the opinion and memo knowing that both would be included in a prospectus intended for a nationwide securities marketing campaign. The defendant had to know that investors nationwide would rely on the tax opinion, as tax savings were the only attractive feature of the investment.

Judge Emilio Garza, in a dissenting opinion, agreed that the *Busch* district court had subject matter jurisdiction over the case but disagreed with the Fifth Circuit's reading of Section 78aa. The majority's interpretation that an act constituting the violation must occur in a specific federal district confuses

Section 78aa's separate treatment of subject matter jurisdiction, personal jurisdiction, and venue, explained Judge Garza.²³ The statute's language concerning where an action may be brought refers to venue, and not subject matter jurisdiction. According to Judge Garza, the statutory language relevant to subject matter jurisdiction provides plainly that "[t]he district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter."²⁴ Accordingly, the dissent adopted a nationwide definition of subject matter jurisdiction under the Act, whereas the majority interpreted subject matter jurisdiction to include an intranational geographic inquiry.

Ironically, the *Busch* majority and dissent reversed roles on the issue of personal jurisdiction under the Securities Exchange Act. The majority considered the nationwide service of process delineated in the Act to be permissible for any defendant having minimum contacts with the United States.²⁵ The dissent, by contrast, argued that a nationwide contact test is insufficient to protect a defendant's Due Process Clause rights.²⁶ The dissent reasoned that because personal jurisdiction is a function of individual liberty, the proper focus should be on protecting the individual defendant's liberty interest in avoiding the burdens of litigating in a distant or inconvenient forum.

B. Heightened Pleading of Fraud Claims

Shareholders' failure to comply with the heightened pleading rule applied to federal securities fraud claims justified dismissal of the consolidated class action complaints in *Tuchman v. DSC Communications Corp.*²⁷ The *Tuchman* decision illustrates the rigorous requirements for pleading the crucial element of scienter in Rule 10b-5 cases.

The *Tuchman* plaintiffs were shareholders of DSC Communications Corp., a software company implicated in a series of embarrassing and highly publicized telephone system failures that were the subject of congressional hearings before House Subcommittees. In these hearings, a DSC vice president acknowledged that DSC equipment had been a contributor to the multi-state telephone service outages and that it made a mistake in delivering upgraded software without performing certain quality control tests.²⁸ The contrast between this testimony and the CEO's statement in DSC's 1990 annual report that DSC had a "total commitment to quality" was the *Tuchman* plaintiffs' principal example of alleged fraud

by DSC and its management.²⁹ The DSC management's alleged misstatements and omissions fell into three general categories of representations made in, *inter alia*, the 1990 annual report: 1) the quality, reliability, and competitiveness of DSC and its products; 2) DSC's marketing position and growth prospects; and 3) DSC's financial position. DSC and its management allegedly gave a false or misleading explanation for the downturn of DSC's sales by pointing to current economic conditions and reporting an expectation that the factors causing decreased profitability were temporary obstacles.³⁰ The defendants were also blamed for an allegedly false characterization of a re-negotiated contract and for reporting inventory at inflated values without explaining that returned and defective product were included in the inventory.

The allegations of corporate mismanagement and failings were held insufficient to satisfy the heightened pleading requirements applied to securities fraud complaints.³¹ The crucial element of scienter under section 10(b) of the Securities Exchange Act and Rule 10b-5 is defined as "a mental state, embracing intent to deceive, manipulate, or defraud."³² Federal Rule of Civil Procedure 9(b)'s heightened pleading requirement for fraud claims applies in federal securities fraud cases and specifically requires particularized pleading of scienter.³³ A simple allegation that a defendant acted with fraudulent intent is insufficient. To plead scienter, a federal securities fraud plaintiff must set forth specific facts that support an inference of fraud.³⁴ To discern whether the specificity requirement has been complied with, the Fifth Circuit first examines pleadings related to motive: Factual allegations that show a defendant's motive to commit securities fraud may be adequate to support an inference of fraudulent intent. If, however, a defendant's fraudulent motive is not sufficiently apparent, then the court looks to other circumstantial evidence. A plaintiff may adequately

plead scienter by alleging particular circumstances that reflect conscious behavior on the part of the defendant; however, the strength of these circumstantial allegations must be correspondingly greater.³⁵

Applying these guidelines, the Fifth Circuit found that the *Tuchman* complaint did not contain sufficient allegations of defendants' motives to lead to an inference of scienter.³⁶ The court noted that the plaintiffs did *not* allege that the defendants purchased or sold any stock during the time period at issue. The *Tuchman* complaint did claim that the defendants created an artificially inflated picture of DSC's financial and operating conditions to preserve their positions, compensation, and stock ownership. Incentive compensation alone, however, does not create an inference of fraudulent intent.³⁷

After concluding that the defendants' motives to commit fraud were not readily apparent on the face of the plaintiffs' complaint, the Fifth Circuit looked for other circumstantial evidence.³⁸ After reviewing the several allegations directed to the DSC management, the *Tuchman* court concluded that these allegations did not show that the defendants intentionally or knowingly made misleading statements. "[C]orporate mismanagement does not, standing alone, give rise to a 10b-5 claim, and mea culpa does not sufficiently satisfy the scienter requirements of pleading in securities fraud cases unless it is shown to relate to activities that have a definable nexus or relationship with the sale or purchase of a security."³⁹

Two additional cases decided during the survey period also reflect plaintiffs' failures to comply with the heightened pleading standard of Federal Rule of Civil Procedure 9(b). In *Buford v. Howe*,⁴⁰ the Fifth Circuit concluded that a plaintiff in a medical malpractice case failed to comply with the particularity requirement for pleading fraud. The plaintiff alleged that the



At the Circuit Officers' meeting in Washington, D.C. on April 30, 1994, First Circuit Officer Russell Del Toro provided details of the upcoming 1997 National Convention to be held in Puerto Rico, while Fourth Circuit Officer Eugene Kane (at left) takes note and Immediate Past President Malcolm Monroe (at right) looks on.

defendant doctor fraudulently induced her to submit to surgery, but the plaintiff did not make particular and specified allegations of fraudulent activity.⁴¹ The issue of the plaintiff's inadequate pleading did not arise in a Rule 12(b) motion, but later, in the context of the plaintiff's challenge to the district court's exclusion of evidence of similar surgeries performed by the defendant. The argument that the excluded evidence would support the fraud claim was rejected on the grounds that fraud was not adequately pled.⁴²

As another example, in *Matter of Haber Oil Co.*,⁴³ the Fifth Circuit explained that the heightened pleading requirements for fraud are imposed in adversary proceedings filed in bankruptcy cases. Like the *Busch* and *Buford* plaintiffs, the *Haber Oil* claimant failed to allege the existence of facts and circumstances sufficient to plead the claimed fraud.⁴⁴

IV. EXPERT WITNESSES

The Fifth Circuit has often commented that trial judges should carefully consider whether an expert's testimony is useful before allowing such testimony to take place.⁴⁵ Trial judges in the Fifth Circuit have therefore not been reluctant to exclude expert testimony that would not be helpful to a jury. However, after the Supreme Court decided the case of *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*,⁴⁶ many people wondered whether judges in the Fifth Circuit would continue to exclude expert testimony with the same vigor as they had in the past. Preliminary indications are that *Daubert* will not substantially change the way that trial judges make decisions about whether to admit or exclude expert testimony.

In *Marcel v. Placid Oil Company*,⁴⁷ the Fifth Circuit upheld a trial judge's decision to exclude the defendant's expert in a case involving a personal injury on an offshore oil platform. The defendant wanted to have an expert economist testify about the work life expectancy of an oil field worker, presumably to reduce the plaintiff's potential damages. The expert's opinion that oil field workers have a diminished work life expectancy was based on a study known as the "Camus" study.

Plaintiffs criticized the Camus study and the testimony based upon it, claiming that it was outdated, statistically suspect, and untrustworthy. They also argued that evidence at trial regarding longer work laws contradicted the study's conclusions. Finally, the

plaintiffs contended that the study was inadmissible hearsay.⁴⁸

The Fifth Circuit, quoting *Daubert*, explained that the Rules of Evidence require the trial judge to insure that an expert's testimony is based on a proper foundation and is relevant. The Fifth Circuit then noted that, in presenting the proposed testimony of its expert, the defendant did not provide any evidence that compared the work life in the oil field with a national average, or with the work life of any other occupation. Instead, the defendant simply "attempted to introduce the specific statistics in the Camus study without reference to any other information which would show that [plaintiff] would likely have a shorter work life and thus should not receive damages based on an average work life."

The court explained that had the defendant "adequately developed [its expert's] discussion of the Camus study in the context of relevant general economic evidence, it might be a closer question whether the district court abused its discretion in excluding his testimony."⁴⁹ The court then noted that there were several possible reasons that the trial court could have used to exclude the evidence, including a finding that the expert's testimony was not sufficiently reliable in the context in which it was being presented. Therefore, the court held that, upon the record presented to it, the district court did not abuse its discretion in excluding the expert evidence. ■

ENDNOTES

¹9 F.3d 344 (5th Cir. 1993).

²*Id.* at 346 (citing *King v. Stone*, No. 92-7551 (5th Cir. Feb. 3, 1993) (unpublished; appearing as Appendix A)).

³Fed.R.Civ.P. 4(d)(4) (superseded by amendment); see also 9 F.3d at 345. Federal Rule of Civil Procedure 4(d)(4) provided for service:

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

⁴Fed.R.Civ.P. 4(i)(1)(A) (as amended effective December 1, 1993).
The new service rule provides:

(i) Service Upon the United States, and Its Agencies, Corporations, or Officers.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

⁵Fed.R.Civ.P. 4(i)(1)(B), 4(i)(1)(C) (as amended effective December 1, 1993).

⁶Fed.R.Civ.P. 4(j) (superseded by amendment); now Fed.R.Civ.P. 4(m).

⁷See e.g., *Peters*, 9 F.3d at 345.

⁸Fed.R.Civ.P. 4(j) (superseded by amendment).

⁹Fed.R.Civ.P. 4(m) (as amended effective December 1, 1993).
Compare former Rule 4(j):

(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

with present Rule 4(m):

(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the

plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

¹⁰Fed.R.Civ.P. 4(m) (as amended effective December 1, 1993) (emphasis supplied).

¹¹Timely service has never been the rule for foreign service; accordingly, there is no change with regard to the foreign service time limit.

¹²See 9 F.3d at 345 ("This Court reviews a Rule 4(j) dismissal for an abuse of discretion.") (citation omitted).

¹³See *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992) (citing *Price v. McGlathery*, 792 F.2d 472, 474 (5th Cir. 1986); *Callip v., Harris County Child Welfare Dept.*, 757 F.2d 1513, 1519 (5th Cir. 1985)).

¹⁴9 F.3d at 346.

¹⁵9 F.3d at 345 (citing *McDonald v. United States*, 898 F.2d 466, 467-68 (5th Cir. 1990)).

¹⁶*Id.* (citing *McDonald*, 898 F.2d at 468).

¹⁷9 F.3d 415 (5th Cir. 1993).

¹⁸For example, the bills of lading covering the goods Corchran shipped showed the goods were shipped to a Houston address; on 211 different occasions between December 1, 1977 and June 17, 1992, Corchran shipped equipment directly from its plant in Minnesota to locations in Texas; these 211 shipments were to 44 different entities and locations in Texas; on several occasions during this 15-year period, Corchran employees accompanied Donaldson employees to Texas to assist and meet with Donaldson's customers in Texas who were purchasing products containing Corchran components; and Corchran's practice of shipping items directly to Ruston continued even after the transaction that was made the subject of the lawsuit.

¹⁹9 F.3d at 418.

²⁰11 F.3d 1255 (5th Cir. 1994).

²¹Only one of the original *Busch* plaintiffs reaped the benefit of the Fifth Circuit appeal because the notice of appeal, filed prior to the recent amendment to Federal Rule of Appellate Procedure 3(c), contained the fatal "et al." designation. See *Busch*, 11 F.3d at 1256 n.1 (citing *Torres v. Oakland Scavenger, Co.*, 487 U.S. 312, 317-18 (1988) (further citations omitted)).

²²11 F.3d at 1256-57 (quoting 15 U.S.C. § 78aa (West Supp. 1993)). Section 78aa provides:

The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and

regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violations occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. . . .

²³11 F.3d at 1258 n.1 (E. Garza, J., dissenting).

²⁴15 U.S.C § 78aa (quoted in 11 F.3d at 1258 n.1 (E. Garza, J., dissenting)).

²⁵11 F.3d at 1257-58.

²⁶11 F.3d at 1259 (E. Garza, Jr., dissenting).

²⁷14 F.3d 1061 (5th Cir. 1994).

²⁸14 F.3d at 1064.

²⁹14 F.3d at 1069.

³⁰14 F.3d at 1066.

³¹14 F.3d at 1070.

³²*Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976) (quoted in *Tuchman*, 14 F.3d at 1067).

³³See 14 F.3d at 1067 (citing *Whalen v. Carter*, 954 F.2d 1087, 1097 (5th Cir. 1992)).

³⁴14 F.3d at 1068 (citations omitted).

³⁵*Id.*

³⁶14 F.3d at 1068.

³⁷14 F.3d at 1068-9 (citing *Tuchman* district court decision and *Ferber v. Travelers Corp.*, 785 F. Supp. 1101, 1107 (D. Conn. 1991)).

³⁸14 F.3d at 1069.

³⁹14 F.3d at 1070.

⁴⁰10 F.3d 1184 (5th Cir. 1994).

⁴¹10 F.3d at 1188.

⁴²*Id.*

⁴³12 F.3d 426 (5th Cir. 1994).

⁴⁴12 F.3d at 439 (citing *Glinka v. Dartmouth Banking Co. (In re Kelton Motors, Inc.)*, 121 B.R. 166, 187 (Bankr. D. Vt. 1990) (further citations omitted)).

⁴⁵See *Peteet v. Dow Chemical Corp.*, 868 F.2d 1428, 1431 (5th Cir. 1982); *In Re Air Crash Disaster at New Orleans, Louisiana*, 795 F.2d 1230, 1234-35 (5th Cir. 1986).

⁴⁶113 S. Ct. 2786 (1993)

⁴⁷11 F.3d 563 (5th Cir. 1994).

⁴⁸However, the Fifth Circuit rejected this argument noting that "[e]xperts generally may rely on hearsay ... if the data is reliable and qualifies under Rule 403." 11 F.3d at 567 n.6.

⁴⁹11 F.3d at 567.

RULE 26 AND DISCOVERY: A MANDATORY "OPTIONAL" RULE

By *Irah H. Donner* © (1993)

This is the first in a series of articles analyzing the new discovery rules which became effective December 1, 1993. This article is devoted to analyzing Rule 26(a)(1), and in particular, Rules 26(a)(1)(A) and 26(a)(1)(B).

Rule 26(a)(1) was drafted to accelerate the exchange of basic information about a case and to eliminate the paper work involved in requesting such information. The basic information relates to potential witnesses (a)(1)(A) ("subparagraph (A)"), documentary evidence (a)(1)(B) ("subparagraph (B)"), damages (a)(1)(C) ("subparagraph (C)"), and insurance (a)(1)(D) ("subparagraph (D)").

The timing of the mandatory disclosure is also governed by this rule. As indicated at the end of 26(a)(1), "[u]nless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f)." Fed.R.Civ.P. 26(a)(1).

Rule 26(f) provides for a mandatory meeting of the parties to discuss the possibility of settlement as well as to make or arrange for the disclosures in subdivision (a)(1) subject to exemption by local rule or court order. No discovery is generally permitted before this meeting of the parties under subdivision (d) of Rule 26. In addition, subdivision (d) can be altered by the discovery rules, local rules, order of court or agreement of parties, *i.e.*, just about anyone. However, it is unlikely that parties would agree to, or a court would order, discovery sooner than the meeting of parties since the meeting may result in narrowing of issues or even settlement. Thus, the

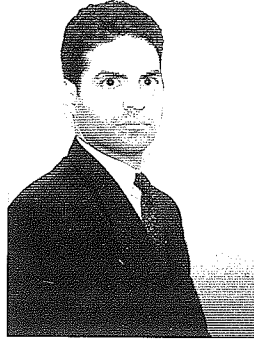
timing of the mandatory disclosure rules is, at best, unpredictable since the timing of discovery may be:

- (1) postponed or eliminated by the parties or court under subdivision (a)(1) in its entirety,
- (2) postponed for a time to be determined by the parties or court if the meeting of the parties is exempted by the court or local rule under subdivision (f), or
- (3) expedited by local rule, order or agreement of parties.

In addition, Rule 26 does not clearly indicate what happens when the parties wish to stipulate out of the new rules but the court does not. The committee notes indicate that in this situation, the parties will have to follow the court's "wishes" to use the new discovery rules. As stated in the notes, "similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case." However, the plain wording of Rule 26(a)(1) appears to indicate that either the court *or* the parties may decide not to use the new discovery rules. Accordingly, this issue requires clarification.

Assuming for the moment, that the time for mandatory discovery has come, the next issue is what is included in the disclosed information.

The committee notes on Rule 26 indicate that subdivision (a)(1) is the "functional equivalent of court-ordered interrogatories." The mandatory disclosures of the four types of information indicated in subparagraphs (A) - (D) are considered as the types of information which have been "customarily secured early in litigation through formal discovery." Accordingly, the new rules are designed to reduce the paper work involved in formal discovery.



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Subparagraph (A) requires the identification of all persons who "are likely" to have information relevant to the "factual disputes" between the parties. This subparagraph requires disclosure of persons whether or not their testimony will be supportive of the position of the disclosing party. The identity of the person and the general topic on which the person has information must also be disclosed.

Subparagraph (B) requires the identification and categorization of the nature and location of "potentially relevant" documents and records. The purpose of this subparagraph is to enable opposing parties (1) to make an informed decision concerning documents that might need to be examined and (2) to properly identify documents to be requested. This subparagraph does not require the production of actual documents; however, it does permit the submission of documents instead of describing the documents. Finally, the disclosing party does not waive its right to object to the production of the documents on the basis of privilege or work product protection. However, the disclosing party should be careful not to describe in detail the protected information to prevent inadvertent waiver of protected information.

For both subparagraphs (A) and (B), a party need not identify potential evidence with respect to admitted allegations. The new rule creates an incentive for detailed pleading. As indicated in the committee notes, "[t]he greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence." The propriety of this incentive is clearly questionable in view of the traditional notice pleading principles of the complaint under Rule 8(a) of the Federal Rules of Civil Procedure.

The above discussion demonstrates that the new mandatory disclosure rules will clearly create significant transition problems while all the details of these rules are being hammered out. As stated by Justice Scalia (joined by Justices Thomas and Souter)

in his dissent to the approval of the discovery rules, the new discovery rules are

promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But that duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it *adds a further layer of discovery*. It will likely *increase* the discovery burdens on district judges, as parties litigate about what is "relevant" to "disputed facts," whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure.

123 L.E.2d xxx (1994) (emphasis in original). ■

10 TRIAL MISTAKES

Continued from Page 1

role of keeping the mechanism running with the mechanism itself. We also tend to confuse our own administrative agendas with notions of good lawyering. A good lawyer is not always the lawyer that makes our jobs as judges easier.

As a result of holding these convictions, I am particularly skeptical about judicial contributions to the growing literature of trial "how to's." But at least a piano tuner tunes a lot of pianos, and armed with the rather humble principle of sheer osmosis, I'd like to offer these observations, about ten common mistakes I've seen trial lawyers make in my courtroom in my short time on the bench.

1. Underestimating the intelligence of jurors

If there is one cleaving character trait that separates spectacular trial lawyers from all others, I believe it is the ability to communicate to the jurors a sincere belief that the lawyer respects the intelligence of the jurors. Of course, if one does not hold that belief, it cannot be sincerely communicated.

Underestimating jurors is easy to recognize, but, like many deeply rooted personality traits, it is very difficult to fix. Maybe that's why there seems to be only a handful of lawyers truly gifted in this area, and

why underestimating jurors is such a common problem.

Even if you are in the majority for whom this gift does not seem to come naturally, work on it. Try to approach every aspect of your case with the assumption that the jurors are just as smart as you are. More often than not, they will be. Your appreciation of that fact many not only pay big dividends in terms of the outcome of the case, but it will make you a more courteous and humane person, not bad effects in and of themselves.

2. Over-discovering/Under-preparing

The discovery tail is now in full wag of the dog. A substantial number of trials I have presided over, especially if the parties have any kind of economic wherewithal, have been so over-discovered that the lawyers have had no time to prepare or even think about the trial. Presumably, they did a bang-up job at depositions; unfortunately, they had no idea what they were doing at trial.

Some lawyers seem to be afflicted with the notion that a trial is simply a container into which every fact learned in discovery must be dumped. There also seems to be an entire generation of young lawyers who have been trained to believe that the trial war is merely the sum of discovery battles, and that if you "win" enough of these battles this somehow translates into victory. Don't fall into either of these "litigator's" abysses. A seasoned former partner of mine gave all young associates in our firm this advice: "If you have a choice between spending a day taking a deposition or spending it staring out our window just thinking about your case, take the window route." I couldn't agree more.

3. Taking too long in voir dire

Most prospective jurors report for jury duty angry and skeptical. The first thing most lawyers do is to make them more angry and more skeptical by engaging in a process whose fundamental assumption is that there are prospective jurors who must be hunted down like dogs and removed for their "biases." These "biases" are discovered by a series of tricky Rorschach questions designed to open hidden psychiatric vistas in mere minutes.

My trial observations have confirmed my instincts that this entire approach to voir dire is baloney. All

any of us can realistically hope for in voir dire is to find out if any jurors have a direct financial interest in the litigation, are related to any of the parties or the lawyers, or for any other gross reason cannot be fair or impartial. In my opinion, all the other energy lawyers waste on pop psychology in voir dire is not just a waste, it is waste which insults the jurors, and does irreparable damage to the legendary "rapport" which is supposed to be created at this stage of the trial.

The most effective voir dire I've ever seen was by a well-known Denver trial lawyer who stood up, asked about five minutes' worth of questions aimed simply at whether the prospective jurors thought they could be fair, and sat down. That exchange did more to build rapport than a hundred questions about the jurors' children, reading habits and toilet training.

4. Over cross-examining

I've included this traditional criticism in my list of rather non-traditional criticisms because it is such a common mistake. Cross-examining effectively, as opposed to cross-examining in a way that makes the lawyer feel he's won some psycho-sexual battle to the death with the witness, is very difficult. It requires an uncommon kind of restraint and patience.

There is no law that requires a cross-examiner to ask five questions about each question asked on direct. At best it simply irritates the judge and the jury, and at worst it reinforces the direct. Go to the heart of what you think is weak about the witness's testimony, and then stop. The most effective question on cross is often the question that the lawyer is smart enough to leave unasked.

It is a common mistake for lawyers not only to over cross-examine in the substantive sense, but also in the emotional sense. Don't treat every witness as if he is a lying slug. Not all of them are.

5. Not knowing what hearsay is, let alone its exceptions

It's truly amazing to me how often lawyers respond to a hearsay objection with words to this effect: "Your honor, the declarant will be testifying." That response is never a proper response to a hearsay objection. The only proper response is to argue that the statement is not hearsay (because, for example, it is not offered for the truth of the matter or because it

is otherwise definitionally excluded, such as an admission by party-opponent), or to rely on an exception. If your mind goes completely blank, rely on the residual exceptions of 803(24) or 804(b)(5), if for no other reason than to stall until another exception comes to mind.

Perhaps the easiest solution to this problem, and other evidence problems, is simply to remember to bring your copy of the rules with you. Believe it or not, I have had several lawyers respond to an evidentiary objection by stating, in front of God and the jury, that they forgot to bring their rules of evidence and could they please borrow mine. My suspicion is that jurors tend to frown on such forthright but pathetic confessions.

You do not have to memorize all 12 jillion hearsay exceptions. Just become proficient at using your copy of the rules of evidence to look these exceptions up. And when you have raced through your list and exhausted all possible hearsay exceptions, it is not against any natural law to admit that your opponent's hearsay objection is well taken, and to withdraw the question or exhibit.

6. Using depositions in lieu of live testimony

If there is a capital offense among the crimes of the trial lawyer, in my judgment it is reading depositions in lieu of live testimony. I cannot overstate the brain-numbing, rapport-killing, and stupefying effect this has on what is already in most cases, at least in most civil cases and excepting the actual process of deliberation, a juror's most boring life experience. I have seen close cases lost the moment lengthy depositions have begun to be read. If you feel you have no choice but to read a deposition, be selective. Read as little as possible. Hire someone to read who doesn't sound brain-dead themselves. And save it for near the end of your case, because jurors may not listen to anything you or your witnesses say afterwards.

7. Not listening to your witness's answers

It's always nice to give the jury the impression that you are asking questions for a reason. So when your witness answers, try to forget that you have already asked this witness this question ten different times in discovery, and five different times already in this trial, and actually listen to the answer. It may be different

than you expect and it could have some effect on your next question.

8. Overacting

It is my observation that very few lawyers can get away with the Sturm and Drang that many think they can get away with. Part of this goes back to underestimating the intelligence of jurors. Jurors will know if you are acting, and they will generally forgive you. They will not forgive you if you are overacting. Gary Cooper is acceptable in court. William Shatner is not.

9. Being a true believer

The flip side of the overacting problem is the problem of the lawyer who has tied his own emotional, political, and/or philosophical wagon to his client's cause, and whose in-court angst is actually sincere. Jurors (and judges) can pick up on this, and can lose confidence in the advocate's independent professional credibility. If you are really a true believer, do your cause a big favor and have it hire a good trial lawyer who isn't a true believer.

10. Thinking your performance will make a difference

I've saved the most important observation for last. After presiding over my first dozen or so trials, a startling notion became clear to me. The side with the best case almost always wins, and the performance of the lawyers almost never matters. Some of the best lawyering I've ever seen has resulted in spectacular losses. And some of the most bumbling lawyers have had the fortune of attaching themselves to strong, and therefore winning, cases.

Two special guests were warmly received at the Circuit Officers' meeting at the National Council Meeting in Washington, D.C. on April 30, 1994. Mrs. Marge Barnhart (center), wife of Eighth Circuit Officer Robert Barnhart, who passed away this past February, and Bob's daughter Connie (right), a long-time FBA member and a private practitioner in New York City, are pictured above with Tenth Circuit Officer and Acting Circuit Officers Chair Wanda Davis (left). The Barnharts were invited to the National Council meeting to accept a memorial resolution that extended the FBA's deepest sympathy for our mutual loss. Upon accepting the resolution, the Barnharts addressed the Council, and generously presented the FBA Foundation with a contribution to be used for activities furthering the administration of justice.

If you can get over the humbling effects of this proposition, I think it can truly be liberating. You can relax, you can have fun, and, ironically, you can do a better job. Don't blame yourself for having bad facts, and don't confuse the value of your performance with the outcome of the case.

In Conclusion

Before leaving you with the impression that I think these ten mistakes are just the tip of an iceberg of incompetence, I believe it important to put observations like these into context. Next to discovering that the best case almost always wins, the most pleasant discovery I've made in my first few years on the bench is that the in-court performance of lawyers has been much better than conventional judicial wisdom sometimes suggests. With really only a very few exceptions, the lawyers in my courtroom have been well-prepared, courteous, and energetic. I think it imperative that we maintain some measure of perspective whenever we engage in the institutional bench/bar turkey shoot that seems irresistible to us.

We should not, either as lawyers or judges, lose sight of those among us who are bright, competent, and hardworking, in our relentless pursuit of those who are not.

Indeed, by considering these ten rather modest mistakes, it is my hope that the vast majority of good lawyers can without much additional effort become even better. ■

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TRIAL OR DISCOVERY DEPOSITIONS: IS THERE A DISTINCTION UNDER THE FEDERAL RULES?

By Major Michael J. Davidson

I. INTRODUCTION

Federal Rule of Civil Procedure 16 authorizes a district court to issue a scheduling order limiting the time to complete discovery, and such an order may not be modified except by leave of court following a showing of good cause.¹ The federal courts have taken inconsistent positions as to whether the pretrial schedule limits the taking of depositions after the end of the discovery period when the purpose of the deposition is to preserve testimony for trial, rather than to conduct discovery.

The gravamen of the debate is whether a deposition of a party's own witness taken for purposes of trial presentation is conceptually -- and procedurally -- different from a deposition taken to discover information. Under a literal interpretation of the language of Rule 16, a trial deposition would not fall within the confines of a pretrial scheduling order limiting the time to complete "discovery." Further, the Federal Rules of Civil Procedure do not ordinarily require leave of court to take a deposition.

II. A SPLIT IN THE COURTS

The seminal case for the position that a distinction exists between trial and discovery depositions arose within the Fifth Circuit. In *Charles v. Wade*,² the plaintiff moved to depose his own witness -- critical to the case -- who was confined in an out-of-state maximum security prison. Because the deponent was confined in prison, Fed.R.Civ.P. 30(a) required that the deposition be taken only with leave of court. Plaintiff's counsel, who had acted diligently throughout the discovery period, filed a motion seeking to depose the witness. The district court denied the motion solely because the discovery period had closed.³

On appeal, the Fifth Circuit reversed, opining that the denial of permission to depose the witness "on the basis that the discovery period had closed . . . was clearly an inappropriate reason . . ."⁴ In so ruling, the court noted that Fed.R.Civ.P. 32(a)(3)(B) & (C) "permit a party to introduce at trial the deposition of a witness if the witness is more than 100 miles from

the place of trial *or* is unable to appear because of imprisonment."⁵ If not for Fed.R.Civ.P. 30(a)'s requirement to seek leave of court prior to taking the deposition of a prisoner, the deposing party would have been "automatically entitled" to take the deposition.⁶

In reaching its holding, the Fifth Circuit reasoned that:

Although the discovery period had indeed closed at the time appellant made his motion, the requested deposition would not have been taken for purposes of discovery but as the testimony of a witness unavailable for trial. Appellant's motion underscored this distinction by informing the court that the deposition would 'not be taken for discovery purposes, but in lieu of [deponent's] live testimony at trial.' *The distinction is a valid one.* Appellant was not seeking to discover [deponent's] testimony -- appellant knew what [he] had to say -- but was seeking a means of introducing [deponent's] testimony at trial. A party to a lawsuit obviously is entitled to present his witnesses. The fact that the discovery period had closed had no bearing on appellant's need, or his right, to have the jury hear [deponent's] testimony.⁷

At least two district courts have refused to distinguish between the two types of depositions. In *Henkel v. XIM Products, Inc.*,⁸ the United States District Court for the District of Minnesota granted a protective order prohibiting a party from taking the deposition of its own out-of-state witness two months after the period for discovery had ended. The court rejected the party's arguments that the pretrial schedule did not govern the taking of such a deposition when the purpose of the deposition was to preserve testimony at trial.⁹ The court reasoned that neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence distinguish between trial and discovery depositions.

Significantly, the court distinguished *Wade* on its facts, noting that unlike the situation in *Wade*, the deposing attorney in *Henkel* had previously defended a deposition of this witness prior to the discovery cutoff and could have preserved the witness' testimony at that time.¹⁰ Further, the court characterized the precedential value of the *Wade* decision as "dicta," noted the lack of precedent cited by the Fifth Circuit, and supported its position by citing two district court

decisions holding that a deposition taken for purposes of discovery may be admitted at trial on the merits because there was no distinction between the two types of depositions.¹¹ From a policy perspective, the court opined that its ability to manage litigation would be extremely difficult were parties permitted to depose at will their own witnesses for trial after the end of the discovery period.¹²

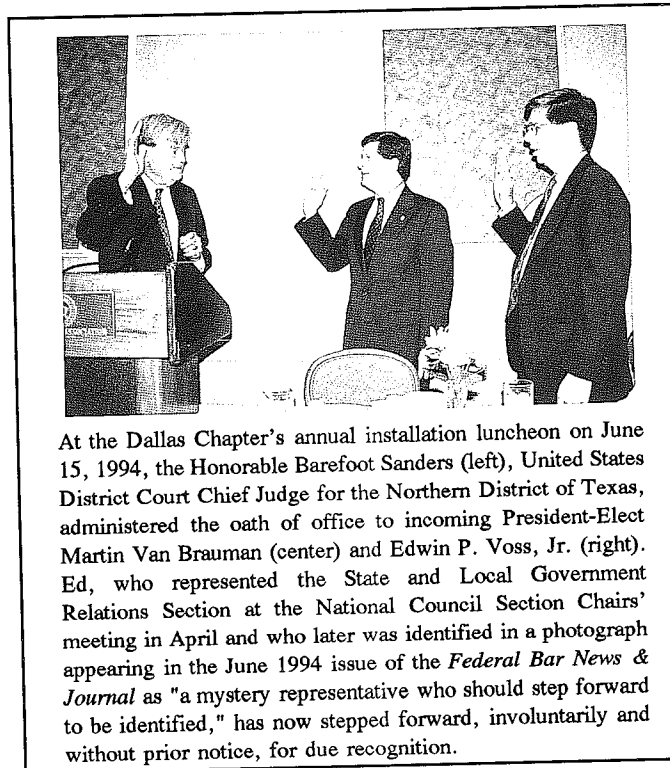
In *Lee v. Knutson*,¹³ the United States District Court for the Northern District of Mississippi denied a motion for leave to take "evidentiary" depositions of the moving party's witnesses after the end of the discovery period. In denying leave to depose the witnesses, the court emphasized the unfair burden that opposing counsel would bear by forcing them, a month before trial, to suspend trial preparation and set aside their other obligations in order to participate in the depositions.¹⁴

The court rejected the distinction between trial and discovery depositions, specifically pointing out that "[u]nder the Federal Rules . . . there is no such creature as an 'evidentiary deposition.'"¹⁵

III. THE FEDERAL RULES OF CIVIL PROCEDURE

Although not a model of clarity on the issue, the Federal Rules of Civil Procedure do not undercut the Fifth Circuit's position in *Wade*. The 1970 amendments to the Rules eliminated the distinction between depositions for trial and for discovery with respect to admissibility; both types of depositions are admissible at trial.¹⁶ The first sentence of Fed.R.Civ.P. 30(a) merely clarified the permissible use of the two types of depositions to eliminate any confusion given the clear distinction made by the Rules in other areas between what may be obtained through discovery and what may be used at trial.¹⁷

Further, the 1970 Rules revisions abolished the distinction with regard to the mechanics of taking the two types of depositions. Rule 30(a) was designed "to authorize depositions under the same circumstances and by the same methods, whether they are taken to obtain evidence for use at trial or to obtain discovery . . . [T]he Federal Rules establish a legal machinery that serves the two purposes of discovery and use at trial with a minimum of mechanical difficulty."¹⁸



At the Dallas Chapter's annual installation luncheon on June 15, 1994, the Honorable Barefoot Sanders (left), United States District Court Chief Judge for the Northern District of Texas, administered the oath of office to incoming President-Elect Martin Van Brauman (center) and Edwin P. Voss, Jr. (right). Ed, who represented the State and Local Government Relations Section at the National Council Section Chairs' meeting in April and who later was identified in a photograph appearing in the June 1994 issue of the *Federal Bar News & Journal* as "a mystery representative who should step forward to be identified," has now stepped forward, involuntarily and without prior notice, for due recognition.

Following the 1970 Rules revision, it was unnecessary to specifically note the distinction between the two types of depositions. Because Fed.R.Civ.P. 26(a) provided that "discovery may be had by any of the methods provided for in the rules, it was unnecessary to state that depositions may be taken for discovery purposes, and since the introduction of depositions in evidence is treated in Rule 32, it was unnecessary to provide in Rule 30 that depositions may be taken for evidence."¹⁹

Although the Rules eliminate the distinction between trial and discovery depositions for some purposes, they do not specifically abolish all distinctions between the two devices. The Rules simply do not address this narrow question of law with any specificity.

IV. POLICY CONSIDERATIONS

As noted in *Henkel*, maintaining a distinction between trial and discovery depositions would interfere with the court's ability to control litigation because an attorney would be able to circumvent the pretrial scheduling order and take trial depositions of its own witnesses any time after the close of discovery. Further, opposing counsel would be required to set aside other obligations and trial preparations to prepare for such depositions or risk an unopposed deposition being admitted into evidence.

The Fifth Circuit interpretation would countenance the deposing attorney's procrastination and delay in taking the deposition, which Rule 16 was designed to prevent at least with regard to discovery.²⁰ Although the literal language of Fed.R.Civ.P. 16 embraces only discovery depositions, to effectuate the Rule's purpose, its authority should include trial depositions.

In contrast, the *Wade* approach permits the otherwise diligent attorney to preserve the testimony for trial of a witness who becomes unavailable unexpectedly after the discovery period has ended. A contrary rule would encourage a litigant to bear the additional expense of deposing all of its potential out-of-state witnesses during the discovery period. Absent such precautions, the litigant runs the risk of having a trial judge refuse permission to take the post-discovery deposition and/or quash any attempt to subpoena the out-of-state witness.²¹

Previously, under the *Wade* approach, if a de bene esse type deposition had not gone well, a party could theoretically re-depose his own witness after the discovery period had ended and introduce the improved deposition at trial via Fed.R.Civ.P. 32(a)(3). Under the language of Fed.R.Civ.P. 30(a) & (b)(2) no leave of court was required. The 1993 amendment to Fed.R.Civ.P. 30(a) prevents such tactics, requiring leave of court to depose any person who has previously been deposed in the case.²²

V. CONCLUSION

The Federal Rules of Civil Procedure fail to address this specific area of the law. Depending upon their particular positions, counsel may find support for either argument in the Rules, relying upon either the omission of language prohibiting trial depositions or the Rules' intent to provide a means to control litigation. However, if a district court is to effectively control its docket then Rule 16's authority must extend to both trial and discovery depositions. ■

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ENDNOTES

¹Fed.R.Civ.P. 16(b).

²665 F.2d 661 (5th Cir.), *cert. denied*, 460 U.S. 1036 (1982).

³665 F.2d 661 (5th Cir.), *cert. denied*, 460 U.S. 1036 (1982).

⁴*Id.*

⁵*Id.* (emphasis added) (citing Fed.R.Civ.P. 32(a)(3)(B) & (C)). The deponent in *Wade* satisfied both conditions. *Wade*, 665 F.2d at 664.

⁶*Wade*, 665 F.2d at 664.

⁷*Id.* (emphasis added). In addition to the Fifth Circuit, other courts distinguish between trial and discovery depositions. *Cf. Ellenberg v. Tuffy's Div. of Starkist Foods, Inc.*, 2 Fed. Rules Serv. 3d 927, 929-30 n.1 (D. Minn. 1985) (magistrate permitted moving party to depose witness, over objection that discovery period had passed, when deposition was not for discovery but was designed to preserve witness' testimony for trial and to provide a record to protect him because of alleged threats); *Frank v. Capital Cities Communication*, 49 Fed. Empl. Practice Cases (BNA) 1050 (S.D.N.Y. 1988) (distinguishing between discovery deposition and deposition to preserve testimony for trial).

⁸133 F.R.D. 556 (D. Minn. 1991).

⁹*Id.* at 557.

¹⁰*Id.* at 558.

¹¹*Id.* (citing *United States v. I.B.M. Corp.*, 90 F.R.D. 377, 381 (S.D.N.Y. 1981); *Rosenthal v. Peoples Cab Co.*, 26 F.R.D. 116, 117 (W.D. Pa. 1960)).

¹²*Id.*

¹³112 F.R.D. 105 (N.D. Miss. 1986).

¹⁴*Id.* at 107.

¹⁵*Id.*

¹⁶*United States v. IBM Corp.*, 90 F.R.D. 377, 381 (S.D.N.Y. 1981) (Rule 32).

¹⁷Wright & Miller, 8 *Federal Practice And Procedure* § 2102, at 367 (citing § 2007 n.1) (1970 & Supp. 1993). A party may obtain discovery of any relevant information, unless privileged, even if inadmissible at trial, as long as that information will lead reasonably to the discovery of admissible evidence. Fed.R.Civ.P. 26(b)(1).

¹⁸A *Moore's Federal Practice* ¶ 30.50, at 30-45 & 46 (2d ed. 1994).

¹⁹A *Moore's Federal Practice* ¶ 30.50, 30-46 (2d ed. 1994).

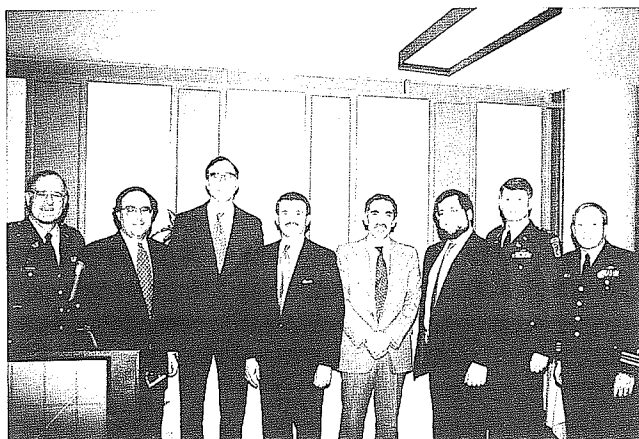
²⁰Fed.R.Civ.P. 16(b) advisory committee's note (1983 Amendment).

²¹See Fed.R.Civ.P. 45(c)(3)(A)(ii) (shall quash).

²²Fed.R.Civ.P. 30(a)(2)(B). The amendments also deleted subdivision (b)(2). Fed.R.Civ.P. 30(b) advisory committee's note (1993 Amendments).

AROUND THE CIRCUITS

Section Secretary and Nevada Chapter President-Elect Pat Flanagan recently was named Chairman of Nevada's Continuing Legal Education Committee by the State Bar of Nevada. Pat has been active in legal education as a lecturer, faculty coordinator and a member of the State's CLE Committee for more than ten years. According to Pat, Carol Fitzgerald, United States District Clerk for the District of Nevada, reports that Nevada federal judges now carry the highest weighted caseload in the country. While the normal weighted caseload for United States District Court judges consists of fewer than 400 cases, Nevada's four active district judges each carry more than 700 weighted caseloads.



The Federal Litigation Section's Military Law Committee joined forces with the Judge Advocates Association to host a recent reception honoring the general counsels of the Department of Defense. Pictured above, from left to right, are LTC Greg Huckabee, President of the Judge Advocates Association; Steven Raplow, General Counsel, Department of Transportation; Peter Murphy, Counsel to the Commandant of the Marine Corps; Gilbert F. Cassellas, General Counsel, Department of the Air Force; Laurence Baskir Netin, General Counsel, Department of the Army; Stephen Honigman, General Counsel, Department of the Navy; LTC Rob Minor, Chair, Military Law Committee, Federal Litigation Section; and LCDR Charles Bennardini, President, Pentagon Chapter.

COMMITTEE CHAIR SIDNEY POWELL CO-AUTHOR OF NEW APPELLATE PRACTICE GUIDE

Appellate Law and Trial Practice Committee Chair Sidney Powell has joined Loyola University Law Professor Henry D. Gabriel in authoring a comprehensive new guide entitled *Federal Appellate Practice Guide: Fifth Circuit*, published by Lawyers Cooperative Publishing. The guide, which contains an in-depth discussion of the Fifth Circuit's latest rules and general orders affecting Fifth Circuit practice, has been hailed by the Honorable Henry A. Politz, Chief Judge of the United States Court of Appeals for the Fifth Circuit and an advisory member to the Federal Litigation Section's Governing Board, as "an invaluable addition to the library of every lawyer who does, or aspires to, practice before . . . the Fifth Circuit."

Sidney is a practicing lawyer in Dallas whose work focuses on federal appeals. She has been lead counsel in more than 400 appeals to the U.S. Court of Appeals for the Fifth Circuit, and has been editor of the Fifth Circuit Reporter since 1986. If you are interested in purchasing a copy of *Federal Appellate Practice Guide: Fifth Circuit*, call 1 (800) 254-5274.

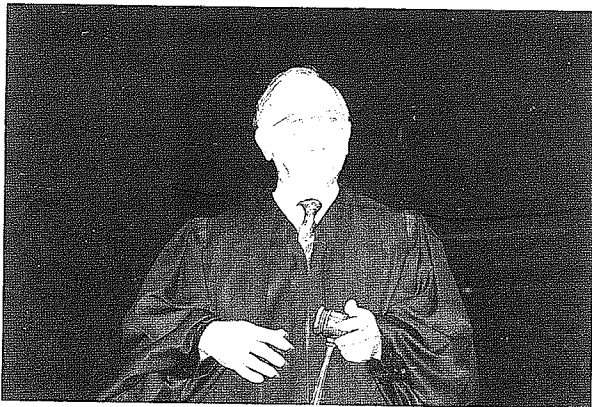
AUTHOR! AUTHOR!

The editorial board of *Sidebar* invites all FBA members, and particularly members of the Federal Litigation Section, to submit manuscripts to be considered for publication. If you or someone you know is interested, please let the board hear from you. The next issue will be Summer 1994, and the submission deadline for that newsletter is July 8. Subsequent submission deadlines are October 10, 1994 and January 9, 1995 for the Fall 1994 and Winter 1995 issues, respectively.

When submitting articles for consideration, please (1) submit a typed copy, double spaced on 8 1/2" by 11" paper (or preferably in either WordPerfect 5.1 or ASCII format on a 3 1/2" diskette); (2) limit the length to 25 pages; (3) include appropriate endnote citations; (4) enclose a resume and/or a brief biography as you would like it to appear; and (5) provide your name, business address and daytime telephone and fax numbers. All materials should be submitted to the Editor-in-Chief, Kent S. Hofmeister, Vial, Hamilton, Koch & Knox, 1717 Main Street, Suite 4400, Dallas, Texas 75201, telecopier: (214) 712-4402.

SERIOUS ABOUT OUR HUMOR

In recent years, bar associations around the country have begun gathering some of their most talented and slightly demented lawyers to present an evening or two of good natured fun, a little music and a whole lot of irreverence. This past June in Texas, the Dallas Bar Association presented its ninth annual Bar None show, entitled *Mrs. Reasonable Doubtfire*. John Horany (pictured at right), of the Law Offices of Windle Turley, played the lead character in the opening number, backed by a cast of dozens. The Dallas Chapter of the Federal Bar Association, as it has done repeatedly over the years, contributed generously to this event, which benefits the Southern Methodist University School of Law's Sarah T. Hughes Diversity Law Fellowship. The Fellowship is named in honor of the late United States District Court Judge from Dallas, and provides scholarship funds to minority law students, many of whom now have graduated and are active Bar None cast members. Martha J. Hardwick, a trial lawyer with Bauer, Rentzel, Millard & Hardwick and the only director Bar None has ever had, reports that *Mrs. Reasonable Doubtfire*, which played to capacity crowds at the newly opened Greer Garson Theater on the SMU campus, raised approximately \$50,000 for this worthy cause.



Pictured at left is the Honorable Jerry Buchmeyer, United States District Court Judge in Dallas, who has been a member of the cast and a contributing script writer since Bar None's inception, and who is depicted here in the role of another local federal judge in "The New To Tell The Truth." Amazingly, the guest panelists failed to correctly choose Judge Buchmeyer as the judge in question, to their everlasting regret.

So, now that you have been reminded that there truly is a lighter side to practicing law, even in the *federal courts*, *Sidebar* asks you to submit to the Editor-in-Chief any humorous anecdotes, deposition excerpts or the like for publication in the next or future issues.

**PROFILING THE FBA'S
FEDERAL LITIGATION SECTION**

The Federal Litigation Section is the largest practice section in the Federal Bar Association, with a total of 2,453 members as of April 1994. The circuits with the three largest memberships are the Fifth Circuit (559 members), Ninth Circuit (420 members) and Sixth Circuit (332 members), which collectively comprise more than half of the total Section membership. Included on this page is a complete breakdown of the membership by circuit, as well as a membership application for the FBA and/or the Federal Litigation Section, which we ask you to pass on to any FBA member who might be interested in joining our ranks.

First Circuit	181
Second Circuit	45
Third Circuit	82
Fourth Circuit	146
Fifth Circuit	559
Sixth Circuit	332
Seventh Circuit	122
Eighth Circuit	91
Ninth Circuit	420
Tenth Circuit	58
Eleventh Circuit	250
District of Columbia Circuit	165
Overseas	2
TOTAL	2,453

APPLICATION FOR MEMBERSHIP IN THE FEDERAL BAR ASSOCIATION

Return completed application to: Federal Bar Association, 1815 H Street, NW • Suite 408 • Washington, D.C. 20006-3697

For additional information, call (202) 638-0252, Fax (202) 775-0295

<p>_____ Name</p> <p>_____ Title</p> <p>_____ Agency/Firm Suite No.</p> <p>_____ Street Address</p> <p>_____ City State Zip</p> <p>_____ Daytime Phone Fax Number</p> <p>Date of Birth: _____</p> <p>Gender: <input type="checkbox"/> Male <input type="checkbox"/> Female</p> <p>Current FBA member? <input type="checkbox"/> Yes <input type="checkbox"/> No (Note: If yes, only check box below for Federal Litigation Section membership. If no, please complete entire application)</p> <p><input type="checkbox"/> \$10 Federal Litigation Section Membership</p> <p>ABA member? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Type of Practice: <input type="checkbox"/> Private <input type="checkbox"/> Government <input type="checkbox"/> Military <input type="checkbox"/> Corporate <input type="checkbox"/> Retired</p> <p>Other: _____</p>	<p>_____ First Bar Admission (list state, court, date)</p> <p>_____ Current/Former Federal Employee or Office of (list agency)</p> <p><input type="checkbox"/> \$79 - Senior Membership (applicant has been admitted to bar 5 years or more)</p> <p><input type="checkbox"/> \$40 - Junior Membership (applicant has been admitted to bar fewer than 5 years)</p> <p><input type="checkbox"/> \$40 - Retired Membership (applicant is fully retired)</p> <p><input type="checkbox"/> \$50 - Optional Sustaining Membership (in addition to regular dues for support of CLE programs and publications)</p> <p>Federal Litigation Section: \$10.00 FBA Membership: _____</p> <p>TOTAL: _____</p> <p><input type="checkbox"/> Please bill me</p> <p><input type="checkbox"/> My check, made payable to FBA, is enclosed</p> <p>Charge my dues to: <input type="checkbox"/> Visa <input type="checkbox"/> MasterCard <input type="checkbox"/> Diners Club</p> <p>Can we bill your membership dues in subsequent years to this card? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>_____ Card No. Exp. Date</p> <p>_____ Signature of Applicant</p>
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UPCOMING FBA SEMINARS AND EVENTS

September 8, 1994

Reinventing the Government Law Office
Embassy Row Hotel
Washington, D.C.

Contact: Ms. Catharine McSwegin
(202) 638-0252

October 13-14, 1994

The FBA/CCH's 35th Western Briefing Conference
on Government Contracts
San Francisco, California

Contact: Ms. Carol Hausner
(202) 638-0252

October 5-8, 1994

FBA National Convention
Swissôtel
Atlanta, Georgia

Contact: Ms. Catharine McSwegin
(202) 638-0252

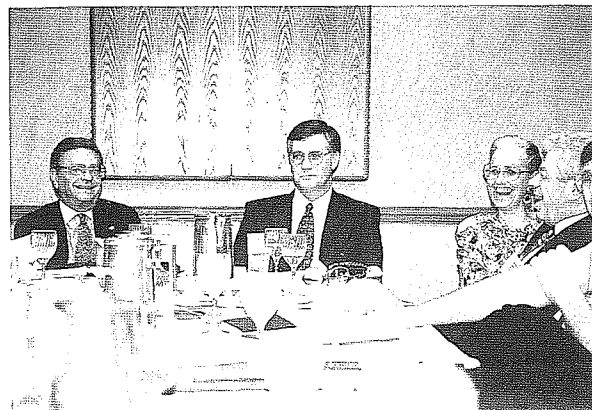
November 1, 1994

Judiciary Division
Third Annual Reception at the Supreme Court

Contact: Ms. Catharine McSwegin
(202) 638-0252

PAPARAZZI! PAPARAZZI!

If you have any photographs reflecting FBA/FLS-sponsored events that you would like to see published in *Sidebar*, please send them to the Editor-in-Chief.



On April 30, 1994, the National Council convened in Washington, D.C. Sharing a few lighter moments at the Circuit Officers' meeting were (above left, from left to right) Ninth Circuit Officer Owen Schmidt, Eleventh Circuit Officers Joyce Kitchens and Lynn Cole, and Younger Lawyers Division Chair David Maldonado. Also in attendance were (above right, from left to right) FBA Vice-President Marvin Morse, FBA President-Elect Alan Harnisch, Deputy Secretary Adrienne Berry, First Circuit Officer Melvin Norris and Fourth Circuit Officer Paul Kramer.

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