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# CIVIL DISCOVERY IN OKLAHOMA: GENERAL PRINCIPLES\*

Charles W. Adams\*\*

## I. INTRODUCTION

Thirty years ago Professor Vliet noted that a surprisingly large number of lawyers in Oklahoma did not seem to understand what was meant by the term "discovery procedure."<sup>1</sup> This is certainly no longer the case, as is indicated by the Foreward to a recent issue of *Litigation* which proclaimed, "In an important sense modern American litigation *is* discovery."<sup>2</sup> The past thirty years have seen the development and increasing use of discovery procedures so that today these procedures are the primary means attorneys utilize to ascertain the facts which are presented at trial. In fact, through skillful use of discovery procedures, lawyers can in most cases avoid the time and expense of trial and resolve their lawsuits through settlement.<sup>3</sup>

This article is the first in a series of three articles dealing with civil discovery in Oklahoma to be published in this journal. This article addresses the general principles that are applicable to all discovery procedures in Oklahoma. The purposes of discovery procedures and the types of proceedings where discovery is available are examined. The relevance standard which determines the scope of discovery is ana-

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1. Vliet, *Oklahoma Discovery Procedures*, 2 OKLA. L. REV. 294, 297 (1949). Another writer stated in Note, *Procedure: Pre-Trial Discovery*, 2 OKLA. L. REV. 100 (1949): "Members of the bar have either been unaware of [pre-trial discovery] procedures or have been reluctant to make use thereof to any great extent." *Id.* at 100.

2. *Discovery*, 4 LITIGATION 7 (Fall 1977) (emphasis in original).

3. *Id.*

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lyzed, and the defenses to discovery, such as privilege and attorney work product, are discussed in detail. The uses of discovery products other than at trial as well as the discretionary role of the trial court in permitting or restricting discovery and the extent of appellate review of discovery orders are examined.

The remaining two articles in this series will appear in subsequent issues of this journal and will survey the numerous discovery devices available in Oklahoma including interrogatories, requests for admission, requests for production and inspection of documents and other tangible property, medical examinations, and depositions upon oral examination. These articles will compare the advantages and limitations of the discovery devices that are available in Oklahoma and will examine techniques for utilizing them effectively. In addition, the innovations in discovery procedures that have been made in federal courts during the past decade<sup>4</sup> will be discussed to illustrate possible future developments in Oklahoma state court discovery procedures.

## II. PURPOSES OF DISCOVERY

Nearly forty years ago the Oklahoma Supreme Court examined the purposes of discovery in *State ex rel. Westerheide v. Shilling*.<sup>5</sup> The plaintiffs in *Westerheide* sought to take the deposition of the defendant in accordance with the Oklahoma Statutes.<sup>6</sup> The defendant objected on the grounds that the plaintiffs were not seeking to take the defendant's deposition for the purpose of preserving his testimony for trial, but were instead attempting to ascertain, in advance, the evidence the defendant would introduce at trial. The trial court sustained the defendant's objection and ruled that "there is no right to take a deposition unless there is a right to use it."<sup>7</sup> The Oklahoma Supreme Court reversed the trial court and held that a deposition could properly be used, not only to preserve the testimony of a witness for trial, but also to ascertain the facts at issue in a lawsuit and enable the discovering party to better prepare for trial. The court concluded:

[T]he purpose of the parties to an action in court should be to

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4. These innovations are set out and discussed in Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487 (1970) [hereinafter cited as Advisory Notes to the 1970 Amendments]; Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521 (1980).

5. 190 Okla. 305, 123 P.2d 674 (1942).

6. OKLA. STAT. tit. 12, § 434 (1971).

7. 190 Okla. at 306, 123 P.2d at 676.

ascertain the truth and see that justice is done and that the right party prevails. This purpose will best be served by giving a liberal construction to the provisions of the Code as we are directed to do . . . . No doubt one purpose in permitting either party to commence taking depositions as soon as summons is served on the defendant is to make the depositions available for use in joining issues and in preparing for trial as well as for use at the trial. If it had been intended that they be taken only for use at the trial, the Legislature would probably have provided that they could be taken only after the issues are made up. It has been well said that "a suit at law is neither a surprise party nor a guessing contest, but an attempt to further justice." . . . And it would ordinarily clarify the issues and shorten the trial if each party knew in advance what his adversary is going to testify to, and as Justice Brewer said, "justice will not be apt to suffer" if each party has such knowledge.

We conclude that . . . . [t]he right to *take* the deposition is not limited by the restrictions on its *use*. The result is that each party may, after summons is served on the defendant, take the deposition of the opposite party without first establishing his motive in taking it, or agreeing to be bound by his testimony or to use it at the trial, and it is not material whether the opposite party resides in the county, is in good health, does not intend to leave the county or state, or intends to be present at the trial. The fact that relators may have had a threefold purpose in taking the deposition of [the defendant] (to aid in further pleading, to aid in preparing for trial, and to use at the trial if favorable) does not detract from their right to take the deposition.<sup>8</sup>

The *Westerheide* court thus explicitly sanctioned the use of the deposition for pretrial discovery in Oklahoma.<sup>9</sup> Since *Westerheide* was decided in 1942, discovery procedures have been increasingly utilized in Oklahoma as numerous statutes have been adopted to broaden the availability of discovery. There are now approximately sixty sections of title 12 of the Oklahoma Statutes which deal with discovery, and the Oklahoma Supreme Court has written an increasing number of opinions interpreting these discovery statutes. For the most part, Oklahoma courts have followed the teaching of *Westerheide* to interpret discovery

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8. *Id.* at 308-09, 123 P.2d at 678 (citations omitted).

9. *Westerheide* is discussed with approval in Vliet, *supra* note 1, at 295-99; Note, *supra* note 1; Note, *Evaluation of Judicial Administration in Oklahoma*, 4 OKLA. L. REV. 369, 371-73 (1951).

statutes liberally<sup>10</sup> so that the parties to a lawsuit can use discovery tools to obtain as much information as possible concerning the issues prior to trial. If all parties to a lawsuit are given free access to pertinent information through use of discovery tools, they will then be in a better position to present this information to the trier of fact, and the decision-making process of the trier of fact will thereby be furthered.<sup>11</sup> Moreover, affording parties maximum access to information pertaining to the lawsuit enhances the likelihood of settlement prior to trial,<sup>12</sup> and hence promotes judicial economy.

### III. PROCEEDINGS IN WHICH DISCOVERY IS AVAILABLE

The discovery procedures found in title 12 of the Oklahoma Statutes are generally available in all civil actions. It has been determined, for example, that interrogatories may be used in probate proceedings<sup>13</sup> and depositions may be taken in paternity proceedings.<sup>14</sup> In addition, specific statutory provisions permit the use of discovery procedures in various special proceedings and in proceedings before administrative agencies. For example, parties before the Workers' Compensation Court may use the procedures for taking depositions, serving interroga-

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10. OKLA. CT. R. 14. "Discovery rules and statutes shall be liberally construed . . ." *Id.*

11. In 1976, the Oklahoma Supreme Court discussed the policy behind civil discovery in Oklahoma courts.

The purposes of the discovery statute are to facilitate and simplify identification of the issues by limiting the matters in controversy, avoid unnecessary testimony, promote justice, provide a more efficient and speedy disposition of cases, eliminate secrets and surprise, prevent the trial of a lawsuit from becoming a guessing game, and lead to fair and just settlements without the necessity of trial. Discovery statutes permit obtaining of evidence in the sole possession of one party which is unavailable to opposing counsel through the utilization of independent means. For these reasons, the rules dealing with discovery, production, and inspection are to be liberally construed. The intent of the Oklahoma discovery statutes is to attempt to provide procedures which promote accurate information in advance of trial concerning the actual facts and circumstances of a controversy, rather than to aid in its concealment. The utilization of discovery enables attorneys to better prepare and evaluate their cases. Ascertainment of truth and the ultimate disposition of lawsuit [*sic*] is better accomplished when parties are well educated through discovery as to their respective claims in advance of trial. Pretrial discovery procedures are intended to enhance truth-seeking process, and good faith compliance with such procedures is both desirable and necessary.

State *ex rel.* Remington Arms Co. v. Powers, 552 P.2d 1150, 1152 (Okla. 1976) (footnotes omitted).

12. *Discovery*, *supra* note 2.

13. *Stone v. Hodges*, 435 P.2d 165 (Okla. 1967). *See also In re Abbott*, 7 Okla. 78, 54 P. 319 (1898) (holding that a probate judge was authorized to take depositions and could punish for contempt a witness who refused to testify at his deposition). In addition, OKLA. STAT. tit. 58, § 43 (1971), specifically provides in contested or noncontested will cases for the taking of depositions of nonresident witnesses whose testimony pertains to the execution of the will. *See In re Estate of Hardesty*, 545 P.2d 823 (Okla. Ct. App. 1975).

14. 4 OKLA. OP. ATT'Y GEN. 452 (1972).

tories and requesting the production of documents that are applicable in civil actions.<sup>15</sup> Depositions may also be taken in a proceeding before an administrative agency governed by the Oklahoma Administrative Procedures Act by either the agency or any party to the proceeding.<sup>16</sup> Specific statutory provisions give the Oklahoma Human Rights Commission the power to compel answers to its interrogatories, require production of documents, and compel attendance of witnesses at depositions, in connection with its hearings and investigations.<sup>17</sup> And although the issue has not yet been settled, it appears that depositions also will be permitted in connection with hearings under Oklahoma's Tenured Teacher Statute.<sup>18</sup>

The civil discovery procedures discussed in this article, however, are not available in criminal actions.<sup>19</sup> Moreover, although Oklahoma's Uniform Arbitration Act<sup>20</sup> gives arbitrators the power to subpoena witnesses and documents for arbitration hearings as well as the power to authorize the taking of depositions of witnesses who are unable to attend arbitration hearings,<sup>21</sup> it appears that these provisions do not permit the use of depositions or requests for document production for pre-hearing discovery,<sup>22</sup> unless the parties so stipulate.

Generally, discovery is available only in connection with a pending civil action or proceeding.<sup>23</sup> Prior to 1969 a plaintiff apparently had

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15. *O.K. Iron & Metal Co. v. Sandoval*, 434 P.2d 247, 249 (Okla. 1967); OKLA. WORK. COMP. CT. R. 2, 8. *See also* *Lewis Drilling Co. v. Brooks*, 451 P.2d 956, 960 (Okla. 1969). In addition, a court may order an employee claiming compensation under the Workers' Compensation Act to submit to a medical examination. OKLA. STAT. tit. 85, § 25 (Supp. 1980).

16. OKLA. STAT. tit. 75, § 315(1) (1971). One commentator has suggested recently that interrogatories and requests for production of documents may be used in any proceedings governed by Oklahoma's Administrative Procedures Act. Cox, *The Oklahoma Administrative Procedures Act: Fifteen Years of Interpretation*, 31 OKLA. L. REV. 886, 912-13 (1978).

17. *Oklahoma Human Rights Comm'n v. Wilson Certified Foods, Inc.*, 536 P.2d 349 (Okla. 1975); OKLA. STAT. tit. 25, § 1501(6) (Supp. 1980); *id.* §§ 1507(a), 1508 (1971).

18. *See* OKLA. STAT. tit. 70, § 6-103.7(2) (Supp. 1980). Whether depositions are allowed in connection with hearings under Oklahoma's Tenured Teacher Statute is discussed in Note, *Discovery: An Examination of Oklahoma's Tenured Teacher Statute*, 32 OKLA. L. REV. 205 (1979).

19. *Parmenter v. State*, 377 P.2d 842 (Okla. Crim. App. 1963).

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

21. *Id.* § 807.

22. *See* *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 117, 597 P.2d 290, 302, *cert. denied*, 444 U.S. 911 (1979); M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* § 27.01 (1968 & Supp. 1979). *But see* Willenken, *Discovery in Aid of Arbitration*, 6 LITIGATION 16 (Winter 1980).

23. Nonetheless, the Uniform Perpetuation of Testimony Act, OKLA. STAT. tit. 12, §§ 538.1-.13 (1971 & Supp. 1980), provides that a person who may be a party to a future action that he is presently unable to bring or defend may petition the court for authorization to perpetuate the testimony of other persons by taking their depositions. The Uniform Perpetuation of Testimony Act will be noted in a subsequent article in this series.

no right to conduct discovery if his petition did not state facts sufficient to constitute a cause of action.<sup>24</sup> But section 434 of title 12 of the Oklahoma Statutes was amended in 1969 to provide that the pendency of a challenge to the validity of service, the jurisdiction of the court or venue, or a demurrer to the sufficiency of the petition does not affect the right of the parties to take depositions.<sup>25</sup> Since this amendment, section 434 has been construed by the Oklahoma Supreme Court to permit a plaintiff in a class action to conduct discovery using depositions and interrogatories even after the defendants had filed motions to challenge the plaintiff's standing to bring the action.<sup>26</sup> Accordingly, the parties should be allowed to conduct discovery until judgment is actually rendered in an action,<sup>27</sup> despite whatever challenges may be made to the bringing of the action.

#### IV. THE SCOPE OF DISCOVERY—THE RELEVANCE STANDARD

Rule 14 of the Rules for District Courts for Oklahoma provides that discovery rules and statutes are to be liberally construed.<sup>28</sup> In keeping with this principle of liberal construction, the Oklahoma Supreme Court has held that information is discoverable even though it would not be admissible as evidence at trial, so long as it might reasonably lead to the discovery of other evidence which could be admitted at trial.<sup>29</sup> When ruling on the admissibility of evidence at trial, the court must balance the probative value of the evidence against the dangers of unfair prejudice, issue confusion, misleading of the jury, undue delay and needless presentation of cumulative evidence.<sup>30</sup> These factors are much less important during discovery than they are at trial. Accordingly, the standard of relevance for discovery should be considerably broader than the standard of relevance applied by a trial court

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24. *Holt v. Jones*, 208 Okla. 30, 34, 252 P.2d 460, 464 (1952).

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

26. *Independent School Dist. v. Sarkeys, Inc.*, 569 P.2d 1000 (Okla. 1977).

27. *Central Sur. & Ins. Corp. v. Kelley*, 327 P.2d 643 (Okla. 1958), decided before 1969, is an interesting example of a situation where a party might forego entry of judgment in his favor in order to conduct discovery. The defendant in *Kelley* elected to stand on its overruled motion to dismiss in an attempt to perfect an appeal from the trial court's order. However, the plaintiffs refused to have judgment entered in their favor because they wanted to take further depositions before the defendant's appeal, and the Oklahoma Supreme Court held that they had the right to do so. *Id.* at 644.

28. Note 10 *supra*.

29. *Unit Rig & Equip. Co. v. East*, 514 P.2d 396 (Okla. 1973); *Carman v. Fishel*, 418 P.2d 963, 973-74 (Okla. 1966); *Stone v. Coleman*, 557 P.2d 904, 905-06 (Okla. 1976) (dictum).

30. OKLA. STAT. tit. 12, § 2403 (Supp. 1980).

when ruling on the admissibility of evidence at trial.<sup>31</sup>

Even though liberally construed in Oklahoma, the relevance standard does limit the scope of discovery. In contrast to the practice in federal courts,<sup>32</sup> Oklahoma state courts have applied the relevance standard to bar discovery of the existence and amount of liability insurance coverage of a party, absent a showing of special circumstances.<sup>33</sup> Although such information might be helpful to a plaintiff in negotiating a settlement, it generally is not discoverable because it has no bearing on the determination of the case on its merits and would not lead to the discovery of admissible evidence.<sup>34</sup> Discovery may be permitted though, if special circumstances make the information relevant to the issues in the action. Examples are where the ownership of a vehicle is in issue and the defendant's liability insurance policy is used to prove the defendant's ownership of the vehicle,<sup>35</sup> or where the existence and amount of liability insurance coverage of a governmental entity determine the extent of waiver of governmental immunity.<sup>36</sup> The Oklahoma Supreme Court has also held that evidence of a party's financial worth is not a proper subject of pre-trial discovery where it is not relevant to the issues in an action.<sup>37</sup> Even in cases where a plaintiff seeks punitive damages and evidence of the defendant's financial worth would be admissible at trial on the issue of the amount of punitive damages that should properly be awarded, evidence of the defendant's financial worth is not discoverable without a prima facie factual showing that the plaintiff is entitled to an award of punitive damages.<sup>38</sup>

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31. Unfortunately, it has been suggested that the scope of document production in response to a subpoena for the taking of a deposition is restricted to documents that would be admissible in evidence at trial. *Stone v. Coleman*, 557 P.2d 904, 906 (Okla. 1976) (dictum); *Carman v. Fishel*, 418 P.2d 963, 972-73 (Okla. 1966) (dictum); *Vliet*, *supra* note 1, at 305. The various procedures available in Oklahoma state courts to obtain document production will be discussed in the next article in this series.

32. FED. R. CIV. P. 26(b)(2).

33. *Hall v. Paul*, 549 P.2d 343, 344 (Okla. 1976); *Carman v. Fishel*, 418 P.2d 963, 973-75 (Okla. 1966); *Peters v. Webb*, 316 P.2d 170, 174 (Okla. 1957).

34. *Carman v. Fishel*, 418 P.2d 963, 974-75 (Okla. 1966).

35. *Id.* at 973 (dictum).

36. *Lamont Indep. School Dist. v. Swanson*, 548 P.2d 215 (Okla. 1976). For other examples of such special circumstances, see Note, *Discovery: Oklahoma's New Statutes on Production and Written Interrogatories*, 20 OKLA. L. REV. 435, 438 (1967).

37. *Cox v. Theus*, 569 P.2d 447, 450 (Okla. 1977).

38. *Id.* Cases from other jurisdictions dealing with pretrial discovery of a party's financial worth are collected in Annot., 27 A.L.R. 3d 1375 (1969 & Supp. 1980).



## V. DEFENSES TO DISCOVERY

Even though discovery may be sought in an appropriate proceeding, and the information sought may be reasonably calculated to lead to admissible evidence, discovery will not be permitted if the information sought is privileged,<sup>39</sup> or if other defenses to discovery exist.<sup>40</sup> While much of the Oklahoma law regarding privileges has been codified in article V of the recently adopted Oklahoma Evidence Code,<sup>41</sup> additional privileges and defenses to discovery may be found in the Oklahoma Constitution,<sup>42</sup> statutes other than the Evidence Code,<sup>43</sup> court rules,<sup>44</sup> and case law.<sup>45</sup> This section discusses the privileges as well as other defenses to discovery with which the Oklahoma Supreme Court has dealt in the context of discovery.<sup>46</sup>

A. *Self-Incrimination*

Both the United States and the Oklahoma Constitutions provide that no person shall be compelled to give evidence that would tend to incriminate him.<sup>47</sup> Oklahoma courts have consistently held that the privilege against self-incrimination is not limited to criminal prosecutions, but instead extends to all types of proceedings including discovery proceedings in connection with civil actions.<sup>48</sup>

In order for the privilege against self-incrimination to be applicable, the evidence sought must be testimonial. Thus it has been held in

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39. OKLA. CT. R. 14.

Discovery rules and statutes shall be liberally construed, provided, however, that all matters that are privileged against disclosure at the trial, including, but not limited to, privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure, and provided, further, that material which contains or discloses the theories, mental impressions, or litigation plans of a party's attorney may not be disclosed through any discovery procedure.

*Id.*

40. See text accompanying notes 64-94 & 127-29 *infra*.

41. OKLA. STAT. tit. 12, §§ 2501-2513 (Supp. 1980).

42. OKLA. CONST. art. 2, §§ 21, 27 (privilege against self-incrimination).

43. *E.g.*, OKLA. STAT. tit. 63, § 1-1709 (1971) (medical reports prepared in connection with studies to reduce morbidity or mortality are privileged). For other examples see notes 114-23 *infra*.

44. OKLA. CT. R. 14.

45. *Carman v. Fishel*, 418 P.2d 963 (Okla. 1966).

46. For general discussions of the law of privileges found in the Oklahoma Evidence Code see Blakey, *An Introduction to the Oklahoma Evidence Code: Relevancy, Competency, Privileges, Witnesses, Opinion and Expert Witnesses*, 14 TULSA L.J. 227, 279-95 (1978); McKinney, *Commentary: Privileges*, 32 OKLA. L. REV. 307 (1979).

47. U.S. CONST. amend. V; OKLA. CONST. art. 2, §§ 21, 27.

48. *Rey v. Means*, 575 P.2d 116, 118 (Okla. 1978); *Giles v. Doggett*, 500 P.2d 574, 575 (Okla. 1972).

Oklahoma that requiring the defendant in a forgery prosecution to give a handwriting exemplar did not violate his privilege against self-incrimination because the exemplar was not testimonial but was instead physical evidence used for identification purposes.<sup>49</sup> On the other hand, the Oklahoma Supreme Court has held that the privilege against self-incrimination may apply not only to oral testimony in court or at a deposition, but also to the production of documents in response to a subpoena duces tecum in connection with a deposition<sup>50</sup> or a request for the production of documents under section 548 of title 12 of the Oklahoma Statutes.<sup>51</sup> The production of documents may, in fact, be testimonial because compelling a witness to produce documents which are in his possession requires him to admit to the existence and custody of the documents as well as impliedly to authenticate them.<sup>52</sup>

Before the self-incrimination privilege can be invoked successfully, the court must also find that there is reasonable cause from the circumstances of the case to indicate that the information sought might tend to incriminate the person attempting to invoke it. The mere assertion of the privilege is not sufficient.<sup>53</sup> To determine the validity of an assertion of the privilege the court may conduct an *in camera* hearing at which the court can hear the testimony or examine the documents or other evidence as to which the privilege is asserted.<sup>54</sup>

### B. *The Attorney-Client Privilege*

The attorney-client privilege is frequently invoked in discovery and is one of the most important defenses to discovery. This privilege has been extensively discussed by others,<sup>55</sup> however, and therefore, it will be noted here only briefly.

The attorney-client privilege is now codified in section 2502 of title 12 of the Oklahoma Statutes.<sup>56</sup> The purpose of this privilege is to facil-

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49. *State v. Thomason*, 538 P.2d 1080 (Okla. Crim. App. 1975). For examples of other types of physical evidence that have been held not to be protected by the privilege against self-incrimination see MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 124 (2d ed. E. Cleary 1972 & Supp. 1978) [hereinafter cited as MCCORMICK]; *United States v. Wade*, 388 U.S. 218 (1967) (voice identification at lineup); *Schmerber v. California*, 384 U.S. 757 (1966) (blood test).

50. *Rey v. Means*, 575 P.2d 116 (Okla. 1978).

51. *Giles v. Doggett*, 500 P.2d 574 (Okla. 1972). See OKLA. STAT. tit. 12, § 548 (1971).

52. 575 P.2d at 119. For further discussion see MCCORMICK, *supra* note 49, § 126.

53. 575 P.2d at 120. For further discussion see MCCORMICK, *supra* note 49, § 123.

54. 575 P.2d at 121.

55. The attorney-client privilege in Oklahoma is examined in Blakey, *supra* note 46, at 284-87; McKinney, *supra* note 46, at 311-16. MCCORMICK, *supra* note 49, §§ 87-97, includes a very thorough general discussion of the attorney-client privilege.

56. OKLA. STAT. tit. 12, § 2502 (Supp. 1980).

itate full disclosure between an attorney and his client so that the attorney can better represent his client's interests.<sup>57</sup> The privilege extends to all communications which are not intended to be disclosed to third persons<sup>58</sup> and which are made between an attorney and his client or any of their representatives for the purpose of the attorney's rendering legal services.<sup>59</sup> The client holds the privilege and he may prevent any other person from disclosing information protected by the privilege.<sup>60</sup> An attorney may also claim the privilege on behalf of his present or former client,<sup>61</sup> and he is under an ethical obligation to assert the privilege where it is appropriate to do so.<sup>62</sup> The attorney-client privilege is not applicable if the attorney's services are sought to aid the client in committing a crime or fraud, and in various other circumstances.<sup>63</sup>

### C. *Protection of Work Product of Attorneys and Experts*

The protection afforded to the work product of attorneys and experts is an important restriction on the scope of discovery. The Oklahoma Supreme Court has not only placed slightly different limits on the scope of this protection than have the drafters of the Federal Rules of Civil Procedure, but it has also not yet addressed a number of problems involving protection of work product that have arisen in federal courts. This section examines the protection from disclosure during pretrial discovery which is given to the work product of attorneys and experts prepared in anticipation of litigation as well as the special protection given to the theories, mental impressions and litigation plans of attorneys.

#### 1. Protection of Attorney Work Product

The Oklahoma Supreme Court has stated that the purpose of giving special protection to attorney work product is to maintain the integrity of the adversary system.<sup>64</sup> If a party to a lawsuit could discover evidence gathered by his opponent's attorney through investiga-

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57. *Upjohn Co. v. United States*, 101 S. Ct. 677, 682 (1981); *McCORMICK*, *supra* note 49, § 87; *McKinney*, *supra* note 46, at 311.

58. *See Marcus v. Harris*, 496 P.2d 1177 (Okla. 1972) (holding that an attorney may testify at a deposition concerning communications with his client which were not intended to be confidential).

59. OKLA. STAT. tit. 12, § 2502 (Supp. 1980).

60. *Id.* § 2502(B)-(C) (Supp. 1980).

61. *Id.*

62. *Id.* tit. 5, ch. 1, app. 3, Canon 4, DR 4-101 (1971).

63. *Id.* tit. 12, § 2502(D) (Supp. 1980).

64. *Carman v. Fishel*, 418 P.2d 963, 969 (Okla. 1966).

tion, that party might rely on his adversary's investigation instead of performing his own.<sup>65</sup> Inevitably the adversary's attorney would then be forced to limit his own investigation so that the fruits of his investigation would not be exposed through discovery. In the end none of the attorneys representing the parties to a lawsuit would thoroughly investigate the case, and consequently both the clients and the interests of justice would suffer.<sup>66</sup> It is necessary, therefore, to balance the needs of attorneys for privacy in investigating and preparing their cases against the policy of permitting liberal use of discovery to aid in the fact-finding process.

*Carman v. Fishel*,<sup>67</sup> the earliest Oklahoma appellate decision dealing with attorney work product, arose out of an automobile accident. The plaintiff in *Carman* sought to obtain through discovery, *inter alia*, the production of statements of witnesses to the accident, including the plaintiff's statement, which the defendants had taken. The defendants objected to the production of these statements on the grounds that they were protected from discovery because they were the work product of the defendants' attorneys and because the plaintiff had not shown good cause for their production as required by statute.<sup>68</sup> The Oklahoma Supreme Court held that the witness statements were not protected from discovery as attorney work product because the defendants failed to make any showing in support of their attorney work product objection that the defendants' "attorneys personally took the statements."<sup>69</sup> The court, however, denied the plaintiff discovery of the witness statements because she had not shown good cause for their production.<sup>70</sup> Thus, the *Carman* court limited the protection afforded attorney work product in Oklahoma to those materials personally prepared by attorneys in anticipation of litigation and held that the protection of attorney work product did not extend to materials prepared in anticipation of litigation by other persons, such as clients or insurance adjusters.<sup>71</sup> In contrast, under the 1970 amendments to the Federal Rules of Civil Procedure, the protection given to attorney work product is much

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65. *Hickman v. Taylor*, 329 U.S. 495, 516-18 (1947) (Jackson, J., concurring); *Carman v. Fishel*, 418 P.2d 963, 969 (Okla. 1966).

66. 329 U.S. at 510-11.

67. 418 P.2d 963 (Okla. 1966).

68. OKLA. STAT. tit. 12, § 548 (1971) provides for the production of documents and other tangible things "[u]pon motion of any party showing good cause . . ." *Id.*

69. 418 P.2d at 969.

70. *Id.* at 973.

71. *Id.* at 969.

broader and extends to materials "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer or agent)."<sup>72</sup>

The *Carman* case was followed in *Lisle v. Owens*,<sup>73</sup> a case in which the plaintiff alleged that the defendant car dealer had rolled back the odometer on a car which the plaintiff had purchased from him. After first obtaining the car dealer's records through discovery, the plaintiff's attorney then sent written questionnaires to approximately 250 of the car dealer's customers. The trial court granted the defendant's motion to inspect the responses to the questionnaires. The Oklahoma Supreme Court, however, issued a writ of prohibition against the enforcement of the trial court's order on the grounds that the defendant had not shown good cause for the production of the questionnaires and that they were protected from discovery as attorney work product.<sup>74</sup> The *Lisle* court thus held that protection of attorney work product extended not only to materials personally prepared by an attorney in anticipation of litigation, but also to an attorney's correspondence with third parties.<sup>75</sup>

The *Lisle* court also noted that the protection of attorney work product was not absolute, but instead could be overcome by a showing of special circumstances which would prove that discovery of attorney work product was essential to trial preparation, or that a denial of discovery would result in injustice.<sup>76</sup> The court did not enumerate the special circumstances that must be shown where the attorney work product sought through discovery consists of witness statements obtained by an attorney in anticipation of litigation. The *Carman* court did state, however, that the showing of special circumstances required for discovery of witness statements obtained by counsel in preparation for trial is greater than the showing of good cause required for discovery of witness statements obtained by a layman.<sup>77</sup> It is likely that Oklahoma courts would find federal authority<sup>78</sup> persuasive and allow discovery of witness statements obtained by an attorney if the party

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

73. 521 P.2d 1375 (Okla. 1974).

74. *Id.* at 1378.

75. *Id.*

76. *Id.*

77. 418 P.2d at 969.

78. Advisory Notes to the 1970 Amendments, *supra* note 4, at 501. The showing required in federal courts for discovery of attorney work product is thoroughly examined in 4 MOORE'S FEDERAL PRACTICE ¶ 26.64[3] (2d ed. 1979 & Supp. 1980-81); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2025.

seeking discovery could show that he could not obtain the substantial equivalent of this information through other means. This showing could be satisfied if the party is seeking discovery of the witness statements for the purpose of impeaching the credibility of the witness with a prior inconsistent statement;<sup>79</sup> if the witness is no longer available at the time discovery is sought,<sup>80</sup> or is hostile or reluctant to testify;<sup>81</sup> or if the witness statements which are sought were taken while the memory of the witness was fresh.<sup>82</sup> In determining whether to allow discovery of witness statements taken by an attorney in preparation for trial, an Oklahoma court should also consider the discovering party's diligence, and whether that party could have obtained the information at an earlier time, such as when the witness' memory was fresh.<sup>83</sup>

In summary, the Oklahoma Supreme Court held in the *Carman* and *Lisle* cases that attorney work product is protected from disclosure during pre-trial discovery. The protection given to attorney work product extends to documents personally prepared by an attorney in anticipation of litigation as well as correspondence between an attorney and third parties in connection with litigation. This protection is qualified, however, and may be overcome by a showing of special circumstances.

## 2. Special Protection for Attorney Mental Impressions

Because of the strong interest in allowing an attorney privacy in preparing his case,<sup>84</sup> special protection is given to materials containing the theories, mental impressions, and litigation plans of a party's attorney. Rule 14 of the Rules for the District Courts of Oklahoma

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79. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (dictum); *Rackers v. Siegfried*, 54 F.R.D. 24, 26 (W.D. Mo. 1971); Advisory Notes to the 1970 Amendments, *supra* note 4, at 501; 4 MOORE'S FEDERAL PRACTICE ¶ 26.64[3] at 26-427 to -432 (2d ed. 1979); 8 C. WRIGHT & A. MILLER, *supra* note 78, § 2025 at 226. See also *In re Grand Jury Investigation*, 599 F.2d 1224, 1233 (3d Cir. 1979) (distinguishing questionnaires completed by witnesses from memoranda of interviews with witnesses prepared by attorneys).

80. 329 U.S. at 511 (dictum); 4 MOORE'S FEDERAL PRACTICE ¶ 26.64[3] at 26-426 to -427 (2d ed. 1979); 8 C. WRIGHT & A. MILLER, *supra* note 78, § 2025 at 216.

81. Advisory Notes to the 1970 Amendments, *supra* note 4, at 501; 4 MOORE'S FEDERAL PRACTICE ¶ 26.64[3] at 26-427 to -432 (2d ed. 1979); 8 C. WRIGHT & A. MILLER, *supra* note 78, § 2025 at 218.

82. *Clower v. Walters*, 51 F.R.D. 288 (S.D. Ala. 1970); Advisory Notes to the 1970 Amendments, *supra* note 4, at 501; 4 MOORE'S FEDERAL PRACTICE ¶ 26.64[3] at 26-427 to -432 (2d ed. 1979); 8 C. WRIGHT & A. MILLER, *supra* note 78, § 2025 at 220-24.

83. *Guilford Nat'l Bank v. Southern Ry.*, 297 F.2d 921, 926 (4th Cir. 1962); *Almaguer v. Chicago, R.I. & Pac. R.R.*, 55 F.R.D. 147, 150 (D. Neb. 1972); *Stamatakos v. Hunter Shipping Co.*, 49 F.R.D. 23, 25 (E.D. Pa. 1969), *aff'd*, 491 F.2d 751 (3d Cir. 1974); 4 MOORE'S FEDERAL PRACTICE ¶ 26.64[3] at 26-435 to -438 (2d ed. 1979); 8 C. WRIGHT & A. MILLER, *supra* note 78, § 2025.

84. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

provides that such materials may not be disclosed through any discovery procedure.<sup>85</sup> The Oklahoma Supreme Court has not yet addressed the issue of whether Rule 14 provides absolute protection from discovery for attorney mental impressions, or whether some showing of necessity could overcome the protection. When this issue does arise, it is probable that the Oklahoma Supreme Court will look for guidance to persuasive federal precedent construing analogous language in the Federal Rules of Civil Procedure.<sup>86</sup>

### 3. Work Product of Experts

The work product of experts is also given limited protection from discovery in Oklahoma state courts. Rule 14 of the Rules for the District Courts of Oklahoma empowers the trial court to require a party requesting information which involves the facts or opinions of an adverse party's expert, from either the adverse party's expert or the adverse party himself, to pay a fair proportion of the expenses incurred

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85. OKLA. CT. R. 14. "[M]aterial which contains or discloses the theories, mental impressions or litigation plans of a party's attorney may not be disclosed through any discovery procedure." *Id.*

86. FED. R. CIV. P. 26(b)(3). "[T]he court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.* Recently the United States Supreme Court refused to decide whether attorney mental impressions were absolutely protected from discovery in federal court. The Court did hold though that at least a far stronger showing of necessity was required to obtain discovery of attorney mental impressions than would be required for discovery of attorney work product that did not contain attorney mental impressions. *Upjohn Co. v. United States*, 101 S. Ct. 677, 688-89 (1981). Other courts and commentators have taken the position that attorney mental impressions are absolutely protected from discovery and that no showing of necessity could overcome the absolute protection given to an attorney's mental impressions. *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734 (4th Cir. 1974)("[N]o showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions or legal theories."), *cert. denied*, 420 U.S. 997 (1975); Advisory Notes to the 1970 Amendments, *supra* note 4, at 502; 8 C. WRIGHT & A. MILLER, *supra* note 78, § 2026. *But see* *EEOC v. Anchor Continental, Inc.*, 74 F.R.D. 523 (D.S.C. 1977) (disclosure of government attorneys' opinions compelled where an in camera inspection revealed that the action lacked merit and was brought for purposes of harassment); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 933 (N.D. Cal. 1976) (holding that "an attorney's opinion work product is discoverable where such information is directly at issue and the need for production is compelling"); *Truck Ins. Exch. v. St. Paul Fire & Marine Ins. Co.*, 66 F.R.D. 129 (E.D. Pa. 1975) (discovery of attorney's opinions compelled where they were directly at issue in the litigation); *Bird v. Penn Cent. Co.*, 61 F.R.D. 43, 47 (E.D. Pa. 1973) (discovery of attorneys' legal theories ordered where they were directly at issue and the need for production was compelling); 4 MOORE'S FEDERAL PRACTICE ¶ 26.64[4] at 26-447 (2d ed. 1979). In addition, an attorney's theories and litigation plans may be subject to disclosure to some extent through the use of interrogatories and requests for admission seeking a party's contentions. Advisory Notes to the 1970 Amendments, *supra* note 4, at 502; 8 C. WRIGHT & A. MILLER, *supra* note 78, § 2026 at 232. The use of contention interrogatories and requests for admission will be explored in the next article in this series.

to obtain the requested information.<sup>87</sup> Rule 14 cannot, by itself, be used as a defense to prevent discovery of an expert's work product; it only permits a court to allocate the cost of the expert between the parties. Furthermore, neither rule 14 nor Oklahoma case law provides answers to a number of questions concerning the discovery of expert work product in Oklahoma state courts.<sup>88</sup> For example, although rule 14 contemplates discovery of expert work product, it is not clear from rule 14 whether a party can discover the identities and anticipated testimony of an adversary's expert witnesses prior to the pretrial conference.<sup>89</sup> Assuming that discovery of this information is permitted in Oklahoma prior to the pretrial conference, there are no guidelines for the procedures to be followed to obtain it.<sup>90</sup> It is also unclear in

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87. OKLA. CT. R. 14.

When a party discovers the facts or opinions of an expert from either the expert or the adverse party, the court, in its discretion, may require the party requesting the information to pay the adverse party a fair proportion of the fees and expenses incurred by the adverse party in obtaining the facts and opinions of the expert. If a party takes the deposition of, or submits interrogatories to, an adverse party's expert, the court, in its discretion, may require the party taking the deposition or submitting the interrogatory to pay the expert a reasonable fee for the time that he expended in preparing for and giving his deposition or in answering the interrogatory.

*Id.*

88. The discovery of expert work product has been noted only briefly in a single Oklahoma appellate decision, *Unit Rig & Equip. Co. v. East*, 514 P.2d 396 (Okla. 1973). For an exhaustive discussion of many of the problems involving discovery of expert work product, see Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, an Analytical Study*, 1976 U. ILL. L. F. 895; Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, an Empirical Study and a Proposal*, 1977 U. ILL. L. F. 169.

89. OKLA. CT. R. 5(c)(3), (d).

90. Under FED. R. CIV. P. 26(b)(4) a party may obtain through interrogatories the identity of each expert that any other party expects to call as an expert witness at trial, as well as the subject matter and substance of the facts and opinions to which the expert is expected to testify. This discovery is allowed only after both parties know who their expert witnesses will be. Advisory Notes to the 1970 Amendments, *supra* note 4, at 504; Leval, *Discovery of Experts Under the Federal Rules*, 3 LITIGATION 16, 18 (Fall 1976). In addition, the court may order further discovery from an expert as it deems appropriate and may allocate the cost of the expert between the party expecting to use his testimony at trial and the party seeking discovery from him. FED. R. CIV. P. 26(b)(4) also states that a party may obtain discovery from an expert who has been retained by another party but is not expected to be called as a witness at trial, only upon a showing of exceptional circumstances, such as that the party seeking discovery cannot practically obtain the information through other means.

California has recently adopted a procedure at CAL. CIV. PROC. CODE §§ 2037-2037.9 (West Supp. 1981), whereby a party may demand an exchange of lists of expert witnesses from any other party either within 10 days after the setting of a trial date or 70 days before trial, whichever is later. The lists of expert witnesses are to contain the name and address of each expert the parties expect to testify at trial, either through live testimony or deposition testimony, as well as a statement of the qualifications of each expert and the general substance of his expected testimony. *Id.* § 2037.3. A party who has properly served his list of expert witnesses on an adversary may prevent that adversary from calling any expert not found on the list of expert witnesses served by the adversary. *Id.* § 2037.5. However, the court may permit an expert to testify despite the fact that



Oklahoma whether a party may discover the identities and anticipated testimony of only those experts that his adversary expects to call as expert witnesses at trial,<sup>91</sup> or whether a party may also discover the identities of experts retained by the adversary party, but not expected to be called as expert witnesses at trial.<sup>92</sup> Nor is it clear whether a party may discover the identities of experts who have been only informally consulted by the adversary party, and who have not been retained and are not expected to be called as expert witnesses at trial.<sup>93</sup> There is no statutory or case law in Oklahoma dealing with the situation where a witness expected to be called at trial is not only an expert, but is also a party or an employee of a party. The problem in this situation is whether, and to what extent, such a witness should be considered an expert witness.<sup>94</sup> Thus many issues regarding the scope of the protection afforded expert work product remain to be addressed by the Oklahoma courts and legislature.

#### D. *Income Tax Returns*

When a person's earnings are at issue in a lawsuit, a party will often attempt to verify the correct amount by seeking production of income tax returns. A person's income tax returns have traditionally been considered confidential.<sup>95</sup> Nevertheless, the Oklahoma Supreme Court, in line with most other state and federal courts which have considered this question,<sup>96</sup> has held that production of a party's income tax returns may be compelled if that party has placed the amount of his income in issue in a lawsuit.<sup>97</sup> Income tax returns are afforded some

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he is not included on a party's list, if that party made a good faith effort to include all his experts on the list, he gave prompt notice to the other parties when he decided to call the expert not on the list, and certain other conditions are satisfied. *Id.* § 2037.6.

91. OKLA. CT. R. 5(c)(3), (d), provides for disclosure at the pretrial conference of the identities and testimony of witnesses that the parties expect to call at trial.

92. FED. R. CIV. P. 26(b)(4)(B) permits discovery from an expert who has been retained by a party but who is not expected to be called to testify as an expert witness at trial only upon a showing of exceptional circumstances. CAL. CIV. PROC. CODE §§ 2037-2037.9 (West Supp. 1981) does not provide for discovery from such experts. *See* note 90 *supra*.

93. The discovery of the identities and testimony of informally consulted experts is precluded under FED. R. CIV. P. 26(b)(4)(B). *Ager v. Jane C. Stormont Hosp.*, 622 F.2d 496, 501 (10th Cir. 1980); Advisory Notes to the 1970 Amendments, *supra* note 4, at 504. No provision is made in CAL. CIV. PROC. CODE §§ 2037-2037.9 (West Supp. 1981) for discovery from such experts.

94. This problem is discussed in the context of federal discovery practice in *Leval*, *supra* note 90, at 16.

95. I.R.C. § 6103(a) (information in income tax returns is confidential and should not be disclosed by government officials except in the specific situations listed in § 6103).

96. Annot., 70 A.L.R.2d 240 (1960 & Supp. 1980).

97. *Matchen v. McGahey*, 455 P.2d 52, 55-57 (Okla. 1969); *accord*, *Biliske v. American Live Stock Ins. Co.*, 73 F.R.D. 124 (W.D. Okla. 1977).

protection in Oklahoma, however, since production of a person's tax returns may not be compelled unless that person has waived his privilege by placing his income in issue.<sup>98</sup> Thus, the income tax returns of a person who is not a party to the lawsuit are privileged and their production may not be compelled. Moreover, a court, in ordering production of an income tax return, should impose whatever restrictions it deems appropriate, such as ordering the parties not to disclose the contents of the return to others or limiting inspection to those portions with respect to which the privilege has been waived.<sup>99</sup>

### E. *Physician-Patient Privilege*

Prior to the adoption of the Oklahoma Evidence Code in 1978, section 385(6) of title 12 of the Oklahoma Statutes provided that a physician was incompetent to testify concerning communications from a patient regarding any disease of the patient or any knowledge the physician acquired by examining the patient.<sup>100</sup> However, section 385(6) also provided for a waiver of the physician-patient privilege if the patient offered himself as a witness at trial.<sup>101</sup> The waiver provision was construed narrowly by the Oklahoma Supreme Court which held, in a line of cases, that the physician-patient privilege was not waived by a party's placing his physical condition in issue,<sup>102</sup> or even by a patient's testifying about his physical condition and disclosing communications to his physician in response to cross-examination at a deposition.<sup>103</sup> Since the physician-patient privilege was not waived under section 385(6) until the patient actually testified at trial, the physician-patient privilege could greatly restrict discovery. The plaintiff's invoking the physician-patient privilege in a typical personal injury case prevented the defendant from obtaining any discovery from the plaintiff's doctor prior to trial. Once the plaintiff testified at trial concerning his injury and treatment, however, he thereby waived the physician-patient privilege, and the defendant could then obtain a continuance in order to take the deposition of the plaintiff's doctor, whom he was precluded

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98. *Id.* at 56 (dictum); Application of Umbach, 350 P.2d 299 (Okla. 1960).

99. 455 P.2d at 56.

100. OKLA. STAT. tit. 12, § 385(6) (1971) (repealed 1977).

101. Robinson v. Lane, 480 P.2d 620 (Okla. 1971). In addition, Oklahoma courts have enforced written waivers of the physician-patient privilege, as in applications for life insurance, e.g., Templeton v. Mutual Life Ins. Co., 177 Okla. 94, 57 P.2d 841 (1936).

102. Gulf Oil Co. v. Woodson, 505 P.2d 484, 487 (Okla. 1972); Avery v. Nelson, 455 P.2d 75, 79 (Okla. 1969); St. Louis-S.F. Ry. v. Kilgore, 366 P.2d 936, 940 (Okla. 1961).

103. Avery v. Nelson, 455 P.2d 75, 77 (Okla. 1969).

from deposing prior to trial.<sup>104</sup>

It is no longer necessary for a defendant in a personal injury action in an Oklahoma court to follow such a circuitous procedure to investigate the extent of a plaintiff's injuries. Since 1978, a defendant in a typical Oklahoma personal injury action has been able to obtain pre-trial discovery regarding a plaintiff's physical condition under section 2503(D)(3)<sup>105</sup> of the Oklahoma Evidence Code from the plaintiff's own doctors as long as the plaintiff has placed his physical condition in issue.<sup>106</sup>

#### F. *Dead Man's Statute*

Formerly, Oklahoma's Dead Man's Statute precluded a party from testifying with respect to a communication or transaction with a deceased person in actions where the adverse party was a successor in interest to the deceased person or a representative of his estate.<sup>107</sup> Early cases held that the taking of the deposition of a party who was incompetent to testify under the Oklahoma Dead Man's Statute was a waiver of the statute by the party taking the deposition, and thereafter the party whose deposition had been taken could testify with respect to communications or transactions with the deceased person.<sup>108</sup> These early decisions were overruled by the Oklahoma Supreme Court in 1975 because they penalized a party for taking the deposition of an opposing party and hence were contrary to the modern policy of promoting discovery.<sup>109</sup> The court held that a waiver of the Dead Man's Statute would result, however, if an incompetent party's deposition were offered into evidence either at trial or on a motion for summary

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104. *Herbert v. Chicago, R.I. & Pac. R.R.*, 544 P.2d 898 (Okla. 1975).

105. OKLA. STAT. tit. 12, § 2503(D)(3) (Supp. 1980) now provides:

The privilege under this Code as to a communication relevant to the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon that condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense, is qualified to the extent that an adverse party in said proceeding may obtain relevant information regarding said condition by statutory discovery.

*Id.* For an earlier version of this provision, see OKLA. STAT. tit. 12, § 2503(D)(3) (Supp. 1979).

106. For further discussions of the physician-patient privilege under the Oklahoma Evidence Code see Blakey, *supra* note 46, at 288-91; 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, 28-34 (1980); McKinney, *supra* note 46, at 316-24.

107. OKLA. STAT. tit. 12, § 384 (1971) (repealed 1978).

108. *Dean v. Jelsma*, 316 P.2d 599 (Okla. 1957), *cert. denied*, 355 U.S. 954 (1958); *Cox v. Gettys*, 53 Okla. 58, 156 P. 892 (1916).

109. *Davis v. Davis*, 536 P.2d 915, 918 (Okla. 1975).

judgment.<sup>110</sup>

Oklahoma's Dead Man's Statute was abolished in 1978 with the adoption of the Oklahoma Evidence Code.<sup>111</sup> Hence the difficulties in interpreting the Dead Man's Statute have been eliminated.

### G. *Miscellaneous Privileges*

In addition to the privileges discussed above, a large number of specialized privileges created by statute also exist.<sup>112</sup> For example, medical information obtained by a hospital for use in mortality studies,<sup>113</sup> records of child care facilities,<sup>114</sup> records of facilities for drug dependent persons,<sup>115</sup> records relating to private trusts kept by banks or trust companies,<sup>116</sup> annual reports of employees required by the Commissioner of Labor,<sup>117</sup> complaints filed with the State Ethics Commission<sup>118</sup> or the Council on Judicial Complaints,<sup>119</sup> and proceedings before grand juries<sup>120</sup> or the Council on Judicial Complaints<sup>121</sup> are protected from disclosure by specific statutes. Moreover, materials such as customer records kept by financial institutions<sup>122</sup> and records of autopsies by medical examiners<sup>123</sup> are made confidential by statute and they are not subject to discovery unless special procedures are followed.

### H. *Effect at Trial of a Claim of Privilege During Discovery*

Even though a party may have the right to claim a privilege and refuse to divulge confidential material, he may for tactical reasons wish to divulge the material or it may be necessary for him to do so in order

110. *Id.* at 919.

111. Subcommittee on Evidence of the Code Procedure—Civil Committee of the Oklahoma Bar Association, *Proposed Oklahoma Code of Evidence*, 47 OKLA. B.A.J. 2605, 2634 (1976).

112. These special statutory privileges are scattered throughout the Oklahoma Statutes, making it difficult for the practitioner to gain access to them. It would be helpful if these privileges could be consolidated into a single section in the Oklahoma Evidence Code, or if a comprehensive index listing them could be devised.

113. *Edmond v. Parr*, 587 P.2d 56 (Okla. 1978); OKLA. STAT. tit. 63, § 1-1709 (1971).

114. OKLA. STAT. tit. 10, § 406 (1971).

115. *Id.* tit. 43A, § 657.

116. *Id.* tit. 6, § 1013.

117. *Id.* tit. 40, § 417.

118. *Id.* tit. 74, § 1408 (Supp. 1980).

119. *Council on Judicial Complaints v. Maley*, 607 P.2d 1180, 1183-87 (Okla. 1980) (dictum).

120. OKLA. STAT. tit. 22, §§ 341-343 (1971).

121. *Id.* tit. 20, § 1658 (Supp. 1980).

122. *Nichols v. Council on Judicial Complaints*, 615 P.2d 280 (Okla. 1980); OKLA. STAT. tit. 6, §§ 2201-2206 (Supp. 1980).

123. OKLA. STAT. tit. 63, § 949 (Supp. 1980).

to establish his claim or defense at trial. Section 2511<sup>124</sup> of the Oklahoma Evidence Code provides that a person who is the holder of a privilege may waive it by voluntary disclosure of the privileged material. Thus, a person who has the right to claim a privilege is generally not required to do so, but instead may elect to waive the privilege and divulge privileged material at trial.

An exception to the general rule permitting waiver of a privilege at trial should be recognized where a party seeking waiver at trial has claimed the privilege during discovery and has thus prevented his adversary from obtaining disclosure of the privileged material before trial. Even though a claim of privilege made during discovery may be justified, a party should not be permitted to circumvent the policy of liberal discovery and unfairly surprise his adversary by waiving the privilege at trial after claiming it during discovery. The Oklahoma decisions which allowed a party to waive the physician-patient privilege at trial after it was asserted during discovery<sup>125</sup> should be repudiated. Instead, Oklahoma courts should follow precedent from other jurisdictions where a party is precluded from introducing evidence at trial after waiving a privilege claimed during discovery, unless that party disclosed the evidence to his adversary within a reasonable period before trial.<sup>126</sup>

### I. *After-Acquired Information*

Rule 14(b) of the Rules for the District Courts of Oklahoma provides that a party who has responded to a request for discovery has no duty to furnish after-acquired information unless the court otherwise requires.<sup>127</sup> This rule can be contrasted with Federal Rule of Civil Procedure 26(e) which requires a party in federal court to supplement responses to requests for discovery under certain specified circum-

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124. *Id.* tit. 12, § 2511. "A person upon whom this Code confers a privilege against disclosure waives the privilege if he or his predecessor voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This section does not apply if the disclosure itself is privileged." *Id.*

125. *Herbert v. Chicago, R. I. & Pac. R.R.*, 544 P.2d 898 (Okla. 1975); *St. Louis-S.F. Ry. v. Kilgore*, 366 P.2d 936 (Okla. 1961).

126. *Duffy v. Currier*, 291 F. Supp. 810, 815 (D. Minn. 1968) (dictum); *James Talcott, Inc. v. Short*, 100 Cal. App. 3d 504, 161 Cal. Rptr. 63 (1979); *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 566-67, 142 Cal. Rptr. 390, 397-98 (1977), *appeal dismissed, cert. denied*, 436 U.S. 952 (1978); *Christenson v. Christenson*, 281 Minn. 507, 162 N.W.2d 194 (1968); *Meyer v. Second Judicial Dist. Court*, 95 Nev. 176, 591 P.2d 259 (1979). *But see* *Hunter v. Kenney*, 77 N.M. 336, 422 P.2d 623 (1967); *Annot.*, 36 A.L.R.3d 1367 (1971 & Supp. 1980).

127. OKLA. CT. R. 14(b). "A party who has responded to a request for discovery is under no duty to furnish after-acquired information unless specifically required by the court." *Id.*

stances.<sup>128</sup> Imposing a duty to furnish after-acquired information may be onerous because the parties must continually recheck their previous discovery responses against any new information they receive and determine whether this new information would materially alter any of their responses. Not imposing such a duty, however, forces parties to serve additional sets of follow-up interrogatories in order to avoid unfair surprise at trial.<sup>129</sup>

Because there is no duty in Oklahoma state courts to provide after-acquired information, follow-up interrogatories should be served shortly before trial seeking any facts found by a party that would alter or are necessary to supplement his earlier responses to discovery.<sup>130</sup> Follow-up interrogatories seeking after-acquired information should be freely allowed in Oklahoma, since the number of sets of interrogatories that may be served in an Oklahoma state court action is not limited except as is required by justice.<sup>131</sup>

## VI. USE OF DISCOVERY PRODUCTS OTHER THAN AT TRIAL

Despite the conclusion of an early commentator,<sup>132</sup> products of discovery can be used in hearings on motions, such as summary judgment motions, where the oral testimony of witnesses is not required. Rule 13<sup>133</sup> of the Rules for the District Courts of Oklahoma provides that a court should consider discovery products, including depositions,<sup>134</sup> interrogatories, and admissions, as well as affidavits submitted

128. FED. R. CIV. P. 26(e).

129. Advisory Notes to the 1970 Amendments, *supra* note 4, at 507.

130. See CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL DISCOVERY PRACTICE 343 (1975).

131. Oklahoma County Sheriff v. Hunter, 615 P.2d 1007 (Okla. 1980); OKLA. STAT. tit. 12, § 549(b) (1971).

132. Note, *Hearsay Evidence*, 5 OKLA. L. REV. 345, 358 (1952).

133. OKLA. CT. R. 13.

A party may move for judgment in his favor on the ground that the depositions, admissions, answers to interrogatories, and affidavits on file, filed with his motion or subsequently filed with leave of court show that there is no substantial controversy as to any material fact. The adverse party may file affidavits and other materials in opposition to the motion. The affidavits which are filed by either party shall be made on personal knowledge, shall show that the affiant is competent to testify as to the matters stated therein, and shall set forth facts that would be admissible in evidence. The court shall render judgment if it appears that there is no substantial controversy as to any material fact and that any party is entitled to judgment as a matter of law. If the court finds that there is no substantial controversy as to certain facts or issues, it shall make an order specifying the facts or issues which are not in controversy and direct that the action proceed for a determination of the facts or issues.

*Id.*

134. In *St. Francis Hosp. Inc. v. Group Hosp. Serv.*, 598 P.2d 238 (Okla. 1979), the Oklahoma Supreme Court held that rule 13 did not contemplate the use of "oral" depositions consisting of

by the parties, in ruling on a motion for summary judgment.<sup>135</sup>

Although there are not yet any Oklahoma appellate court decisions dealing with the issue, it is suggested that Oklahoma courts should follow persuasive precedent<sup>136</sup> from other jurisdictions which gives the products of discovery greater weight than the often self-serving affidavits submitted by the parties in connection with summary judgment motions. Frequently, discovery may reveal that certain issues are without substantial controversy or that a party is entitled to summary judgment because no issues of fact exist in the action. However, when a party moves for an order that certain issues are without substantial controversy or for summary judgment, he may find his adversary opposing the motion with self-serving affidavits contradicting admissions made during discovery. Some courts, when faced with such a situation, have decided that the admissions of a party established in pretrial discovery "should receive a kind of deference not normally accorded evidentiary allegations in affidavits,"<sup>137</sup> at least where it is not asserted that the party's admissions in pretrial discovery were based on clerical error, error in transcription, or the party's misunderstanding of the questions asked him.<sup>138</sup> A court should grant a motion for summary judgment despite the presence of affidavits contradicting admissions made during discovery on the grounds that an admission produced through discovery is a kind of informal judicial admission which binds the party making the admission and precludes him from

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live testimony taken in open court at an evidentiary hearing on a motion for summary judgment. The trial court in *St. Francis* heard the testimony of several witnesses who had previously given their depositions in order to save the time of reading their lengthy depositions. Finding that the use of such "oral" depositions was not appropriate on a motion for summary judgment, the Oklahoma Supreme Court reversed the trial court's granting of a summary judgment motion. *Id.* at 241.

135. *Hogue v. A.B. Chance Co.*, 592 P.2d 973 (Okla. 1978); *Weeks v. Wedgewood Village, Inc.*, 554 P.2d 780 (Okla. 1976); *Beck v. Bacone College*, 604 P.2d 876 (Okla. Ct. App. 1979).

136. *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540 (9th Cir. 1975); *D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 20-22, 520 P.2d 10, 24-25, 112 Cal. Rptr. 786, 800-01 (1974); *Mikialian v. Los Angeles*, 79 Cal. App. 3d 150, 159-63, 144 Cal. Rptr. 794, 799-802 (1978); *Gray v. Reeves*, 76 Cal. App. 3d 567, 571-74, 142 Cal. Rptr. 716, 718-21 (1978); *Leasman v. Beech Aircraft Corp.*, 48 Cal. App. 3d 376, 121 Cal. Rptr. 768 (1975); *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 249 S.E.2d 727 (1978). *Contra*, *Gaines v. Hamman*, 163 Tex. 618, 358 S.W.2d 557 (1962); *Sifford v. Santa Rosa Medical Center*, 524 S.W.2d 559 (Tex. Civ. App. 1975, *no writ*).

137. *D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 22, 520 P.2d 10, 25, 112 Cal. Rptr. 786, 801 (1974); *Mikialian v. Los Angeles*, 79 Cal. App. 3d 150, 161, 144 Cal. Rptr. 794, 801 (1978).

138. *Mikialian v. Los Angeles*, 79 Cal. App. 3d 150, 162, 144 Cal. Rptr. 794, 801 (1978); *Gray v. Reeves*, 76 Cal. App. 3d 567, 574, 142 Cal. Rptr. 716, 720 (1978).

contradicting it later in the action.<sup>139</sup> In short, a party should not be able to avoid a summary judgment motion based on admissions he made during discovery merely by filing an affidavit contradicting the admissions that were made before he became aware of their significance. If a party were able to avoid summary judgment in this manner, the usefulness and importance of both pretrial discovery and the summary judgment motion would be greatly reduced.

## VII. THE ROLE OF TRIAL COURT DISCRETION AND THE EXTENT OF APPELLATE REVIEW OF DISCOVERY ORDERS

A discovery order usually is not appealable under the Oklahoma Statutes,<sup>140</sup> either as a judgment or as an appealable order.<sup>141</sup> Generally, the only routes available to obtain appellate review of a discovery order are through the extraordinary writs of mandamus and prohibition<sup>142</sup> or appeal from the final judgment in the action.<sup>143</sup> Because neither of these routes to appellate review is very effective,<sup>144</sup> and because a discovery order generally provides the prevailing party with only a minor tactical advantage, the role of the trial court's discretion in granting or limiting discovery is necessarily great.

The Oklahoma Supreme Court expressed its general attitude toward providing appellate review of discovery orders in *Carman v. Fishel*.

[W]e are also mindful of the fact that the statute on discov-

139. *Mikialian v. Los Angeles*, 79 Cal. App. 3d 150, 162-63, 144 Cal. Rptr. 794, 801-02 (1978).

140. OKLA. STAT. tit. 12, § 952 (1971).

141. *Lisle v. Owens*, 521 P.2d 1375, 1377 (Okla. 1974); *Carman v. Fishel*, 418 P.2d 963, 968 (Okla. 1966). However, where the only proceeding pending is the application for a discovery order, the discovery order should be appealable. Thus it has been held that a court order denying an application brought under the Oklahoma Administrative Procedures Act, OKLA. STAT. tit. 75, § 315(3) (1971), for the enforcement of an agency's power to compel answers to interrogatories is a final and appealable order. *Oklahoma Human Rights Comm'n v. Wilson Certified Foods, Inc.*, 536 P.2d 349 (Okla. 1975). In addition, a discovery order should be appealable as a final order under OKLA. STAT. tit. 12, § 953 (1971): where a party brings a proceeding under the Uniform Perpetuation of Testimony Act, *id.* §§ 538.1-13 (1971 & Supp. 1980); where a party seeks the taking of a deposition or the production of documents in Oklahoma for use in an action outside of Oklahoma under the Uniform Foreign Depositions Act, *id.* §§ 461-463 (1971), or under *id.* § 1703.02; or where a person is found guilty of criminal contempt for failure to comply with a discovery order. For discussions of appellate review of discovery orders in federal courts see 4 MOORE'S FEDERAL PRACTICE ¶ 26.37 (2d ed. 1979); 8 C. WRIGHT & A. MILLER, *supra* note 78, § 2006.

142. *Warren v. Myers*, 554 P.2d 1171, 1173-74 (Okla. 1976); *Cowen v. Hughes*, 509 P.2d 461, 462 (Okla. 1973).

143. *Oklahoma Gas & Elec. Co. v. Chez*, 527 P.2d 165, 167 (Okla. 1974); *Norman Plumb Supply Co. v. Gilles*, 512 P.2d 1177 (Okla. 1973).

144. *Carman v. Fishel*, 418 P.2d 963, 968 (Okla. 1966).



ery necessarily invests the trial court with a wide discretion in determining when and to what extent such act shall be applicable in a particular proceeding. If the trial court were not clothed with discretion in such matters, the obvious purpose of the statute to afford to litigants more precise and certain justice would be defeated. We are therefore in this cause, and will be in future cases, reluctant to interfere in the action of the trial courts and will not do so except in those instances when it may be shown that the trial court clearly exceeded its authority.<sup>145</sup>

Despite the *Carman* court's expressed reluctance to interfere with the discretion of trial courts, the Oklahoma Supreme Court has, in fact, granted writs of prohibition and mandamus to overturn discovery orders of trial courts in a number of cases decided since *Carman*.<sup>146</sup> The issuance of writs of prohibition and mandamus is at the discretion of the Oklahoma Supreme Court, and these writs can be obtained only on a showing that the trial court acted outside the scope of its authority or clearly abused its discretion in making the discovery order for which appellate review is sought.<sup>147</sup>

The availability of appellate review of a discovery order through appeal from the final judgment is greatly restricted by the difficulty of showing prejudice resulting from an erroneous discovery order. The party seeking reversal of a final judgment on account of a discovery order has the burden of showing not only that the order was erroneous, but also that the error was prejudicial.<sup>148</sup> No Oklahoma case has been reported in which a party has sustained this burden with respect to a discovery order. Reversal because of an erroneous grant of discovery would be ineffective since there is no way to correct such an order once discovery has been had.<sup>149</sup> On the other hand, reversal due to an erroneous denial of discovery is possible, but only if the required showing of prejudice can be made.<sup>150</sup>

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145. *Id.*, accord, *Warren v. Myers*, 554 P.2d 1171, 1174 (Okla. 1976).

146. *E.g.*, *Exxon Co., U.S.A. v. District Court*, 571 P.2d 1228 (Okla. 1977); *Wilson v. Naifeh*, 539 P.2d 390 (Okla. 1975); *Lisle v. Owens*, 521 P.2d 1375 (Okla. 1974); *Jones Packing Co. v. Caldwell*, 510 P.2d 683 (Okla. 1973); *Cowen v. Hughes*, 509 P.2d 461 (Okla. 1973).

147. *Warren v. Myers*, 554 P.2d 1171, 1173-74 (Okla. 1976).

148. *Oklahoma Gas & Elec. Co. v. Chez*, 527 P.2d 165, 167 (Okla. 1974); *Norman Plumb Supply Co. v. Gilles*, 512 P.2d 1177, 1178 (Okla. 1973).

149. 4 MOORE'S FEDERAL PRACTICE ¶ 26.83 [10] (2d ed. 1979); 8 C. WRIGHT & A. MILLER, *supra* note 78, § 2006 at 34-36.

150. *Id.* See also *Voegeli v. Lewis*, 568 F.2d 89 (8th Cir. 1977); *Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499 (6th Cir. 1970).

## VIII. CONCLUSION

This article has dealt with the basic principles that apply to all forms of discovery. In order to use discovery procedures effectively an attorney must not only understand these basic principles but also must have a thorough knowledge of the individual characteristics of the various discovery devices that are available in Oklahoma state courts. An attorney with an appreciation of the respective strengths and weaknesses of the tools of discovery can use his knowledge to fashion a discovery plan for each lawsuit so that he can obtain the information he needs to prepare for trial in an efficient and cost-effective manner.<sup>151</sup> The next two articles in this series, which are to be published in subsequent issues of this journal, will be devoted to a detailed examination of written interrogatories, requests for admission, the discovery procedures for the production of documents and tangible things, the procedure to obtain medical examinations of parties, and oral depositions. The advantages of each of these discovery devices will be compared, and suggestions will be made for their effective use.

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151. See Ehrenbard, *Cutting Discovery Costs Through Interrogatories and Document Requests*, 1 LITIGATION 17 (Spring 1975); Figg, McCullough & Underwood, *Uses and Limitations of Some Discovery Devices*, 20 PRAC. LAW. 65 (April 1974); Thompson, *How to Use Written Interrogatories Effectively*, 16 PRAC. LAW. 81 (Feb. 1970).