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CIVIL DISCOVERY IN OKLAHOMA: THE DISCOVERY TOOLS*

Charles W. Adams**

I. INTRODUCTION

The success of an attorney at trial will turn on his ability to ascertain the facts of his case so that they can be presented effectively to the trier of fact. An attorney can uncover much information through informal investigation by interviewing clients and friendly witnesses, and inspecting documents and records kept by clients, friendly witnesses, and the government.¹ Informal investigation is sometimes overlooked, perhaps because a number of attorneys may be reluctant to leave their law offices except to appear in court;² nevertheless, where feasible, informal investigation can be the most desirable means to gather information for trial since it can be done without giving notice to adverse parties.³ Generally, however, formal discovery procedures are essential to trial preparation, since they are needed to obtain information from adverse parties and unfriendly or uncooperative witnesses. After performing an informal investigation, an attorney should formulate a discovery plan to develop the additional information needed for trial with a minimum expenditure of time and money.⁴ The various discovery

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1. See generally Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1315-20 (1978); Crebs, *Investigatory Groundwork for Trial of Health and Life Cases*, 14 FORUM 142, 146 (1978); Levine, *Using the Freedom of Information Act as a Discovery Device*, 36 BUS. LAW. 45 (Nov. 1980); Levy, *A Defense of Meaningful Pre-Trial Discovery*, 14 FORUM 781, 787 (1979); Vaughn, *Discovery and Government Information: What Uncle Sam Has to Offer*, 1 LITIGATION 32 (Spring 1975).

2. Crebs, *supra* note 1, at 146.

3. *Id.*; Levy, *supra* note 1, at 787.

4. Dunagan & Ricketts, *An Overview of Pre-Trial Preparation for Business Related Litigation*, 16 TULSA L.J. 139, 144 (1980); Ehrenbard, *Cutting Discovery Costs Through Interrogatories*

procedures available in Oklahoma are designed to elicit different kinds of information through different mechanisms, and an attorney must be able to select the particular discovery procedure that is best suited for his requirements. Frequently one or more discovery tools must be employed to lay the groundwork for the use of another discovery tool.⁵ In addition, if discovery is opposed, an attorney may need to use several alternative discovery techniques in order to obtain the information he seeks.⁶ Finally, even in the many cases where attorneys will find it expedient to cooperate and handle discovery informally, their knowledge of the ground rules for using the formal discovery tools in the Oklahoma Statutes will assist them in agreeing on the extent of discovery to which each is entitled.⁷

This is the second in a series of three articles to be published in this journal dealing with civil discovery in Oklahoma. The first article⁸ examined the general principles applicable to all discovery procedures in Oklahoma. It addressed such matters as the purposes of discovery, the types of proceedings in which discovery may be used, the relevance standard which determines the permissible scope of discovery, privileges and other defenses to discovery, and the extent of appellate review of discovery orders. This article focuses on the following discovery tools available in civil actions in Oklahoma: (1) interrogatories; (2) requests for admission; (3) discovery procedures to obtain production of documents and tangible things; and (4) medical examinations. Depositions, the most important of the discovery tools, will be discussed in the third article which will appear in a subsequent issue of this journal.

and Document Requests, 1 LITIGATION 17, 17 (Spring 1975); Fox, *Planning and Conducting a Discovery Program*, 7 LITIGATION 13 (Summer 1981). Levy, *supra* note 1, at 787-88; Thompson, *How to Use Written Interrogatories Effectively*, 16 PRAC. LAW. 81, 81 (Feb. 1970). Since August 1, 1980 FED. R. CIV. P. 26(f) has provided for the scheduling of a discovery conference in a federal court action upon motion of any party who desires assistance from the court in establishing a discovery plan. Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 526-27 (1980).

5. For example, interrogatories are often used to ascertain: (1) the identities of witnesses, whose testimony is later obtained through depositions; and (2) the location of documents, whose production is later obtained with a motion to produce or subpoena duces tecum. And the medical records and medical history of a plaintiff in a personal injury action are often obtained before a physical examination of the plaintiff is sought. See text accompanying notes 11, 19-23, 103 and 162 *infra*.

6. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUNDATION RESEARCH J. 219, 230-31.

7. See Crebs, *supra* note 1, at 149.

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

II. INTERROGATORIES

A. *Use and Limitations*

The service of interrogatories, or written questions, upon any adverse party in a civil action is authorized by section 549 of title 12 of the Oklahoma Statutes.⁹ Although often used for harassment,¹⁰ interroga-

9. OKLA. STAT. tit. 12, § 549 (1971).

(a) Any party to a civil action or proceeding may serve written interrogatories upon any adverse party, to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, upon any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that a plaintiff may not serve interrogatories until after the service of summons without leave of court granted with or without notice. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within a period designated in the interrogatories, which period shall not be less than twenty (20) days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time or the parties extend the time by written stipulation. Within the time to answer, the party on whom the interrogatories have been served may serve on the party submitting the interrogatories written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined. Interrogatories may relate to any matters which can be inquired into by deposition, and the answers may be used to the same extent as answers in depositions. Interrogatories may be served after a deposition has been taken and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require.

(b) The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. Whenever a party is represented by an attorney, service may be made on the party or his attorney. Such service may be made by mailing a copy of the interrogatories or the answers thereto to the opposing party or his attorney by registered or certified mail. A copy of the interrogatories and the answers or objections thereto shall be filed in the cause.

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

Id.

10. Interrogatories are perceived by many to result in more abuse than any other discovery tool. *E.g.*, W. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 149 (1968); Brazil, *supra* note 1, at 1320; Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUNDATION RESEARCH J. 787, 829; Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation*, 48 *FORDHAM L. REV.* 907, 955 (1980); Lundquist & Schechter, *The New Relevancy: An End to Trial by Ordeal*, 64 *A.B.A.J.* 59, 61 (1978); Pollack, *Discovery—Its Abuse and Correction*, 80 *F.R.D.* 219, 224 (1978):

Interrogatories have become a prime offender in abusive, burdensome, unjustified, limitless, wasteful discovery.

Interrogatories as commonly utilized today in nearly every instance are a device to

ories do have many legitimate functions as discovery tools. Interrogatories are particularly useful for obtaining such basic facts as the identification of potential witnesses and relevant documents as well as the nature of the opposing party's claims or defenses.¹¹ Since a party has at least twenty days to respond to interrogatories in Oklahoma,¹² more complete answers can reasonably be expected to interrogatories than to questions at a deposition. Thus, interrogatories are very effective for obtaining information requiring the compilation of data from many sources, or details such as dates, times, addresses, telephone numbers and measurements that witnesses are unlikely to remember at depositions. In addition, interrogatories can be very useful for gathering technical data and information stored in computers. If the party served with interrogatories is a corporation, partnership or association, then the officer or agent who responds must furnish such information as is available to the party.¹³ Accordingly, interrogatories are an extremely effective way to obtain the collective knowledge of a party and its agents and attorneys.¹⁴ Also, follow-up interrogatories should be used to gather any after-acquired information that an adversary has obtained since responding to earlier discovery.¹⁵ Finally, interro-

shirk preparation of a case—they are more often than not “a lazy lawyer’s way to obtain evasive answers.” The use of the product of interrogatories at trial is virtually nil.

Id.

Interrogatory abuse by parties propounding interrogatories involves their serving voluminous sets of canned interrogatories which are prepared on an electronic typewriter for use in many different lawsuits. Canned interrogatories are frequently tools of harassment since they can be prepared with relatively little effort and yet can require an inordinate amount of time for response. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUNDATION RESEARCH J. 787, 830; Levy, *supra* note 1, at 784, 788; McElroy, *Federal Pre-Trial Procedure in an Antitrust Suit*, 31 Sw. L.J. 649, 682-83 (1977) (describing a 176 page set of interrogatories containing 155 numbered interrogatories subdivided into 1800 separate parts). Interrogatory abuse by parties responding to interrogatories involves their raising spurious objections, giving evasive answers and failing to serve responses on time. W. GLASER, *supra* note 10, at 149; Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUNDATION RESEARCH J. 787, 829-30.

11. Ehrenbard, *supra* note 4, at 17-18; Figg, McCullough & Underwood, *Uses and Limitations of Some Discovery Devices*, 20 PRAC. LAW 65, 70 (April 1974); Kaminsky, *supra* note 10, at 955-56; Schoone & Miner, *The Effective Use of Written Interrogatories*, 60 MARQ. L. REV. 29, 29 (1976); Thompson, *supra* note 4, at 82.

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

13. *Id.*

14. Ehrenbard, *supra* note 4, at 18; Schoone & Miner, *supra* note 11, at 29-30. The collective knowledge of a party that is an organization can also be obtained by taking the deposition of a person designated by the organization to testify on its behalf. OKLA. STAT. tit. 12, § 390.1(C) (Supp. 1980). The recently adopted procedure for arranging for the deposition of a party to a civil action will be discussed in the next article in this series of articles on civil discovery in Oklahoma that will appear in a subsequent issue of this journal.

15. Adams, *supra* note 8, at 204. Follow-up interrogatories must be used to obtain after-acquired information in Oklahoma because a party has no obligation to furnish after-acquired

atories can be cheaper than oral depositions since they do not involve the expense of a court reporter.¹⁶

On the other hand, interrogatories have many limitations. Under the express terms of section 549 interrogatories can be served only upon an adverse¹⁷ party to the action.¹⁸ In addition, interrogatories are limited to the asking of questions and thus cannot, by themselves, be used to compel production of documents.¹⁹ The appropriate procedure to compel production of documents is first to seek proper identification of the documents through interrogatories or depositions. Once documents have been properly identified, their production can be compelled either by motion²⁰ or by demand for production in connection with a deposition either by means of a subpoena duces tecum²¹ under section 387 of title 12 of the Oklahoma Statutes or by designation²² of the documents sought in the notice to take a deposition.²³ Interrogatories also lack the

information to supplement responses to earlier discovery unless specifically required by the court. OKLA. CT. R. 14(b).

16. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2163, at 486 (1970); Figg, McCullough & Underwood, *supra* note 11, at 71. In addition, the expenses of arranging for a deposition and then either travelling to a distant location to depose a witness or hiring local counsel to take the deposition can sometimes be avoided by serving a set of interrogatories by mail. *Id.* For these reasons interrogatories have been called the "poor man's deposition." Annot., 86 A.L.R.3d 1089, 1091-92 (1978). *But see* note 27 *infra* and accompanying text.

17. Compare OKLA. STAT. tit. 12, § 549 (1971) with FED. R. CIV. P. 33, which was amended in 1970 to eliminate the restriction that the party served with a set of interrogatories must be adverse. Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 523 (1970) [hereinafter cited as Advisory Notes to the 1970 Amendments].

18. Council on Judicial Complaints v. Maley, 607 P.2d 1180, 1182 (Okla. 1980). *But see* OKLA. CT. R. 14 which appears to contemplate service of interrogatories on an adverse party's expert.

19. Oklahoma Human Rights Comm'n v. Wilson Certified Foods, Inc., 536 P.2d 349, 351-52 (Okla. 1975); Norman Plumb. Supply Co. v. Gilles, 512 P.2d 1177, 1179-80 (Okla. 1973) ("The procedure set forth in 12 O.S.1971 § 549, refers to written interrogatories and is limited to the asking of questions. The proper procedure for requiring production of documents is set forth in 12 O.S.1971 § 548, which provides for the discovery and production of documents and requires a showing of good cause.").

20. A motion for production of documents should be made under OKLA. STAT. tit. 12, § 548 (1971) if the documents are in the possession of a party, and under OKLA. CT. R. 12 if the documents are in the possession of a nonparty. *See* notes 110-34 *infra* and accompanying text.

21. OKLA. STAT. tit. 12, §§ 387, 388 (1971) authorize use of a subpoena in connection with a deposition to require the production of documents. Vliet, *Oklahoma Discovery Procedures*, 2 OKLA. L. REV. 294, 305 (1949). *See generally* Rey v. Means, 575 P.2d 116, 117, 121 (Okla. 1978) (trial court directed to hold an in camera hearing to rule on a claim that the documents sought through a subpoena duces tecum in connection with a deposition were privileged); Brightmire v. District Court, 424 P.2d 425, 427 (Okla. Crim. App. 1967) (attorney found in contempt for failure to testify after being served with a subpoena duces tecum directing him to testify and produce documents in connection with a deposition). *See also* notes 135-42 *infra* and accompanying text.

22. OKLA. STAT. tit. 12, § 390.1(B) (Supp. 1980) requires a party to produce at his deposition the documents that are described in the notice to take the deposition. *See* notes 143-44 *infra* and accompanying text.

23. In actual practice interrogatories sometimes contain a request that the responding party

flexibility of oral depositions which allow the examiner to frame questions in response to previous answers and, thus, prevent the party being examined from evading the questions.²⁴ Unlike oral depositions, interrogatories provide no opportunity for the examiner to observe the demeanor of the answering party. Moreover, because answers to interrogatories are often drafted by attorneys intent on making sure that no information damaging to their clients is disclosed, the answers are frequently evasive, nonresponsive, unintelligible or laden with objections.²⁵ Also, service of interrogatories may even be counterproductive as it may force opposing counsel to prepare his case better. Frequently, opposing counsel's carefully drafted interrogatory answers will serve as convenient summaries of opposing counsel's version of the facts which he can use later in preparing his witnesses for depositions.²⁶ Finally, interrogatories are not necessarily cheaper than other forms of discovery, such as oral depositions. All too often the costs of going to court to compel answers to interrogatories and serving additional sets of interrogatories to clarify ambiguous or nonresponsive answers or to obviate objections will make interrogatories a very expensive means to gather information.²⁷

B. *Permitted Scope of Interrogatories*

Section 549 provides that interrogatories can relate to any matter that can be inquired into on deposition.²⁸ The Oklahoma Supreme Court has construed this to mean that interrogatories can relate to any matter that is not privileged and is either relevant to the subject matter of the action or might reasonably lead to the discovery of admissible evidence.²⁹ It has not addressed, however, the issue whether a party

attach copies of specified documents to his responses; and it is not unusual for a responding party to cooperate by complying with the request. Kaminsky, *supra* note 10, at 973 n.319. Even though the propounding party could not compel the responding party to attach the copies to his responses, the propounding party could compel production of the documents readily through the procedures specified in notes 20-22 *supra*.

24. 8 C. WRIGHT & A. MILLER, *supra* note 16, § 2163 at 486-87; Figg, McCullough & Underwood, *supra* note 11, at 70; Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 875-76 (1933).

25. Schoone & Miner, *supra* note 11, at 31; Thompson, *supra* note 4, at 82-83. A federal judge is reputed to have stated that "interrogatories are useless because any lawyer who can't answer interrogatories without giving [an] opponent useful information is not worth his salt." Brazil, *supra* note 6, at 233.

26. Ehrenbard, *supra* note 4, at 18; Schoone & Miner, *supra* note 11, at 30.

27. Figg, McCullough & Underwood, *supra* note 11, at 71; Schoone & Miner, *supra* note 11, at 31; Thompson, *supra* note 4, at 83.

28. OKLA. STAT. tit. 12, § 549(a) (1971).

29. Warren v. Myers, 554 P.2d 1171, 1173 (Okla. 1976).

can use interrogatories to determine if his adversary is making specific legal contentions, and, if so, what the factual basis for them may be. A question asked at a deposition seeking a party's legal contentions and the factual basis supporting them would probably be objectionable as calling for legal conclusions which the party is not competent to give.³⁰ A party served with interrogatories, however, has time to analyze them carefully and consult his attorney before answering them. Accordingly, interrogatories are a particularly effective means to obtain a party's contentions and the facts supporting them.³¹ Prior to the 1970 amendment of Federal Rule of Civil Procedure 33(b), a number of federal courts had held that interrogatories directed to a party's contentions were improper because they called for opinions.³² Rule 33(b) was amended to provide expressly for the use of contention interrogatories because it was believed that they would be helpful in narrowing and sharpening the issues in controversy—a major purpose of discovery.³³ The liberal use of contention interrogatories should be allowed and even encouraged in Oklahoma state courts, as it is in federal and many other courts,³⁴ so that the parties can ascertain precisely the issues in controversy and determine the location of documents and the identity of witnesses supporting their respective positions.³⁵

Another discovery technique which the Oklahoma Supreme Court has not yet approved and which is neither expressly provided for nor prohibited by the Oklahoma Statutes is combining requests for admission with interrogatories. A request for admission should be permitted to be followed by an interrogatory seeking the facts on which the answering party bases any response to the request for admission other

30. *Pember v. Superior Court*, 66 Cal. 2d 601, 604, 427 P.2d 167, 169-70, 58 Cal. Rptr. 567, 569-70 (1967) (dictum); CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL DISCOVERY PRACTICE 167 (1975); Schoone & Miner, *supra* note 11, at 47-48.

31. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 30, at 338; Schoone & Miner, *supra* note 11, at 48; Comment, *Civil Procedure - Opinion Interrogatories After the 1970 Amendment to Federal Rule 33(b)*, 53 N.C. L. REV. 695, 699 & n.33 (1975).

32. Advisory Notes to the 1970 Amendments, *supra* note 17, at 523; 4A MOORE'S FEDERAL PRACTICE ¶ 33.17 at 33-72 to -77 (2d ed. 1981); 8 C. WRIGHT & A. MILLER, *supra* note 16, § 2167 at 497-99; Comment, *supra* note 31, at 695-97.

33. Advisory Notes to the 1970 Amendments, *supra* note 17, at 524. See also 4A MOORE'S FEDERAL PRACTICE ¶ 33.17[2] (2d ed. 1981); 8 C. WRIGHT & A. MILLER, *supra* note 16, § 2167 at 512-15; Comment, *supra* note 31, at 698-99.

34. *Burke v. Superior Court*, 71 Cal. 2d 276, 281, 455 P.2d 409, 415, 78 Cal. Rptr. 481, 487 (1969); 4A MOORE'S FEDERAL PRACTICE ¶ 33.17[2] at 33-90 to -91 (2d ed. 1981); Advisory Notes to the 1970 Amendments, *supra* note 17, at 524.

35. Examples of forms for contention interrogatories can be found at Doelle, *Discovery-Written Interrogatories*, in 4 AM. JUR. TRIALS, 1, 22-25 (1966); CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 30, at 347.

than an unqualified admission, and additional interrogatories seeking the location of documents and the identity of witnesses that he contends support such facts.³⁶ Combining requests for admission and interrogatories in this manner effectively removes issues that are not in controversy from the action, and clarifies the factual basis for an adversary's contentions with respect to those issues that actually are in controversy.³⁷ Moreover, following a request for admission with detailed interrogatories directed to the factual basis for any denial may encourage an adversary to make an admission in order to avoid having to conjure up a nonexistent factual basis for a denial.³⁸

C. *Service of Interrogatories*

Section 549 of title 12 of the Oklahoma Statutes states that interrogatories can be served at any time after commencement of the action. No leave of court is required for service of interrogatories unless the plaintiff desires to serve interrogatories on a defendant before service of summons.³⁹ Personal service of interrogatories is not required, and service can be accomplished by sending a copy of the interrogatories by registered or certified mail to the opposing party, or if he is represented by counsel, to opposing counsel. There is no limit to the number of interrogatories or separate sets of interrogatories that may be served in an action,⁴⁰ and a party is free under the statute to use other forms of discovery along with interrogatories. The court, however, may issue a protective order as justice requires to protect a party served with inter-

36. An example of the way in which requests for admission might be combined with interrogatories is set forth below.

Request for Admission No. 1

On or about January 1, 1981 the plaintiff was employed by the defendant.

Interrogatory No. 1

If your response to Request for Admission No. 1 was other than an unqualified admission, state all facts which you contend support your response.

Interrogatory No. 2

State the name and business and residence address and telephone number of each person who has knowledge of any of the facts set forth in your response to Interrogatory No. 1.

Interrogatory No. 3

State with the particularity you would require in a subpoena duces tecum or motion to produce the description, nature, custody and location of each document that reflects or relates to any of the facts set forth in your response to Interrogatory No. 1.

37. See CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 30, at 387.

38. Epstein, *Rule 36: In Praise of Requests to Admit*, 7 LITIGATION 30, 31 (Spring 1981).

39. OKLA. STAT. tit. 12, § 549(a) (1971).

40. Oklahoma County Sheriff v. Hunter, 615 P.2d 1007, 1008 (Okla. 1980); OKLA. STAT. tit. 12, § 549(b) (1971).

rogatories from annoyance, expense, embarrassment or oppression.⁴¹ In most cases, it is advisable to use several short sets of interrogatories rather than one long set. Not only is it easier to compel answers to a short set of interrogatories, but also a party serving several sets of interrogatories may use follow-up interrogatories to obtain further information. If multiple sets of interrogatories are used, they should be numbered consecutively throughout the litigation to avoid confusion. Interrogatories should specify when they are to be answered and should designate the party to whom they are directed. Unlike the Federal Rules of Civil Procedure,⁴² the Oklahoma discovery statute does not require a party who serves interrogatories or responses on an opposing party to send copies to other parties to the action. Nevertheless, it is a good practice to send copies of interrogatories and responses to all parties to the action so that all parties will have notice of the discovery being conducted.⁴³ In addition, copies of interrogatories and responses must be filed with the court.⁴⁴

D. *Responding to Interrogatories*

When an attorney receives a set of interrogatories directed to his client, he should review the interrogatories carefully to determine if any are objectionable. If any objections to interrogatories are found, it is often advisable to telephone the attorney who prepared them, and negotiate with him in an attempt to avoid having to go to court to resolve the objections.⁴⁵ After reviewing the interrogatories, the responding attorney should ask his client to obtain the factual information necessary to answer those interrogatories that are not objectionable at least several days before the answers are due. Generally the responding attorney should draft interrogatory answers using the factual information supplied by his client so that he can make sure that the answers are responsive and do not contain privileged information. It is often desirable for the responding attorney to discuss the interrogatory answers with his client not only to assure their accuracy but also to make sure that the client is committed to them. In addition, the responding attorney can often learn significant facts concerning the lawsuit by discussing interrogatory answers with his client. Finally, in preparing the answers, the attorney should bear in mind that neither he nor his client

41. OKLA. STAT. tit. 12, § 549 (1971). For the text of § 549, see note 9 *supra*.

42. FED. R. CIV. P. 5(a).

43. The service of interrogatories and responses on all parties is required in actions in Oklahoma County District Court. OKLA. COUNTY DIST. CT. R. 41(1).

44. OKLA. STAT. tit. 12, § 549(b) (1971).

45. Ehrenbard, *supra* note 4, at 19; Thompson, *supra* note 4, at 85.

is likely to know everything about the lawsuit, and that sarcastic, absolute or unqualified answers to interrogatories may prove embarrassing later in the litigation.⁴⁶

Section 549 requires answers to interrogatories to be sent by registered or certified mail to the propounding party within the time designated in the interrogatories. The time designated for response must be at least twenty days, unless the parties stipulate to a different time or, for good cause shown, the court orders otherwise. Answers to interrogatories must be in writing and signed under oath by the party served, or in the case of a party that is a corporation, partnership or association, by an officer or agent of the party. Since section 549 requires each interrogatory to be answered separately, so-called chain letter answers which merely incorporate the answers to preceding interrogatories should not be used.⁴⁷ For the sake of clarity answers or objections to interrogatories should set forth in full each interrogatory immediately before the statement of the answer or objection.⁴⁸ The requirement in section 549 that a party answering an interrogatory must furnish such information as is available to him implies that the responding party has a duty to make a reasonable investigation for the information sought in the interrogatory. Accordingly, a response to an interrogatory that the responding party does not know the answer is permissible only if the answer is not reasonably available to the responding party and is insufficient without a statement of the efforts he made to find the answer.⁴⁹

Objections to interrogatories must be served within the time designated in the interrogatories for service of answers;⁵⁰ otherwise they will be deemed waived.⁵¹ In contrast to the practice in federal courts,⁵² the

46. Ehrenbard, *supra* note 4, at 19. See also David, *Defense Tactics and Strategies During the Discovery Process in Aviation Litigation*, 13 FORUM 132, 135 (1977).

47. See *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 784 n.10, 149 Cal. Rptr. 499, 510 n.10 (1978) (dictum); Figg, McCullough & Underwood, *supra* note 11, at 75.

48. Thompson, *supra* note 4, at 85. Local district court rules in Oklahoma County and Tulsa County require answers to interrogatories to include a statement of the interrogatories. OKLA. COUNTY DIST. CT. R. 41(1); TULSA COUNTY DIST. CT. R. 10A.

49. See *Miller v. Doctor's Gen. Hosp.*, 76 F.R.D. 136, 140 (W.D. Okla. 1977); *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 782, 149 Cal. Rptr. 499, 509 (1978) (dictum); 4A MOORE'S FEDERAL PRACTICE ¶ 33.26 (2d ed. 1981). See also *Oklahoma Human Rights Comm'n v. Wilson Certified Foods, Inc.*, 536 P.2d 349, 352 (Okla. 1975).

50. OKLA. STAT. tit. 12, § 549(a) (1971).

51. See *id.* § 2104(A) (Supp. 1980). For authority from other jurisdictions see 8 C. WRIGHT & A. MILLER, *supra* note 16, § 2173 at 544-45 & n.68; Advisory Notes to the 1970 Amendments, *supra* note 17, at 522; *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 785 & n.12, 149 Cal. Rptr. 499, 510-11 & n.12 (1978) (dictum); CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 30, at 352.

52. FED. R. CIV. P. 33(a); Advisory Notes to the 1970 Amendments, *supra* note 17, at 523.

party who raises objections to interrogatories in an Oklahoma state court has the burden of setting a prompt hearing at which the court may rule on the objections.⁵³ Answers to interrogatories to which objection is made are not due until after the court has ruled on the objections.⁵⁴

E. *Sanctions*

In order to secure proper compliance with discovery requests the trial court is given broad discretion to impose sanctions for a party's failure to serve answers to interrogatories or to answer them fully.⁵⁵ Section 549 of title 12 of the Oklahoma Statutes authorizes the trial court to order an offending party to answer or more fully answer interrogatories and, in the alternative, the trial court may strike out all or any part of that party's pleadings, impose the costs of proving specific facts at trial on the offending party, dismiss the action,⁵⁶ or enter judgment by default.⁵⁷ Moreover, the trial court is authorized to proceed against a party who fails to serve answers to interrogatories or to answer interrogatories fully for indirect contempt of court.⁵⁸

F. *Use of Interrogatories at Trial*

Answers to interrogatories may be used to the same extent at trial as answers given at depositions.⁵⁹ Thus, answers to interrogatories are admissible at trial as admissions of a party opponent;⁶⁰ however, a party cannot introduce his own answers to interrogatories into evi-

53. OKLA. STAT. tit. 12, § 549 (1971). For the text of § 549, see note 9 *supra*.

54. *Id.*

55. *Westside Golf & Country Club, Inc. v. City of Lawton*, 580 P.2d 166, 167 n.2 (Okla. Ct. App. 1978) (Released for Publication by Order of Court of Appeals); OKLA. STAT. tit. 12, § 549(c) (1971). Evidently it is not necessary to show that a party's failure to answer interrogatories was willful or intentional in order for sanctions to be imposed; such a showing would probably affect a trial court's discretion in imposing sanctions, however. *Westside Golf & Country Club, Inc. v. City of Lawton*, 580 P.2d 166, 167 (Okla. Ct. App. 1978) (Released for Publication by Order of Court of Appeals).

56. *Westside Golf & Country Club, Inc. v. City of Lawton*, 580 P.2d 166, 167 (Okla. Ct. App. 1978) (Released for Publication by Order of Court of Appeals); OKLA. STAT. tit. 12, § 549(c) (1971).

57. *Nu-Pro, Inc. v. G.L. Bartlett & Co.*, 575 P.2d 618, 619 (Okla. 1977); OKLA. STAT. tit. 12, § 549(c) (1971).

58. OKLA. STAT. tit. 12, § 549(c) (1971). *See also id.* tit. 21, §§ 565-568.

59. OKLA. STAT. tit. 12, § 549(a) (1971). The uses of depositions at trial will be discussed in the next article in this series which will appear in a subsequent issue of this journal.

60. *Guinn v. Kansas City S. Ry.*, 547 P.2d 1310, 1314 (Okla. Ct. App. 1975) (Released for

dence, even if he is not available for trial,⁶¹ since this would violate the hearsay exclusionary rule.⁶² Answers to interrogatories should not be treated as pleadings and normally should not be used to limit a party's proof at trial,⁶³ unless this is necessary to prevent his adversary from being unfairly surprised.⁶⁴

III. REQUESTS FOR ADMISSION

A. Introduction

Separate statutes provide for two types of requests for admission in Oklahoma. Section 481⁶⁵ of title 12 of the Oklahoma Statutes provides for requests for admission of the genuineness of documents as a means for laying the foundation for the admissibility of the documents into evidence at trial. Section 3010⁶⁶ of title 12 of the Oklahoma Statutes

Publication by Order of Court of Appeals). See OKLA. STAT. tit. 12, § 447 (1971); *id.* § 2801(4)(b) (Supp. 1980).

61. See generally OKLA. STAT. tit. 12, § 433 (Supp. 1980); *id.* § 447 (1971).

62. See OKLA. STAT. tit. 12, §§ 2801, 2802 (Supp. 1980); Haskell Plumb. & Heating Co. v. Weeks, 237 F.2d 263, 266-67 (9th Cir. 1956); Giesler v. Berman, 6 Cal. App. 3d 919, 929, 86 Cal. Rptr. 205, 211 (1970); Estate of Horman, 265 Cal. App. 2d 796, 805, 71 Cal. Rptr. 780, 786 (1968); Annot., 13 A.L.R.3d 1312, 1323-37 (1967 & Supp. 1980); Marchiano, *Use and Abuse of Interrogatories at Trial*, 15 CAL. TRIAL L. J. 347, 347-49 (1976). In contrast, a party who is unavailable for trial can introduce his own deposition into evidence at trial if the parties against whom the deposition testimony is offered had an opportunity to cross-examine him at his deposition. Smart v. Cain, 493 P.2d 821, 823-24 (Okla. 1972); OKLA. STAT. tit. 12, § 2804(B)(1) (Supp. 1980).

63. See Advisory Notes to the 1970 Amendments, *supra* note 17, at 524; 8 C. WRIGHT & A. MILLER, *supra* note 16, § 2181; 4A MOORE'S FEDERAL PRACTICE ¶ 33.29[2] (2d ed. 1981); CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 30, at 374-77; Annot., 86 A.L.R.3d 1089 (1978). Cf. RST Service Mfg., Inc. v. Musselwhite, 628 P.2d 366, 367-68 (Okla. 1981) (answers to interrogatories were not sufficient to 'place in issue an affirmative defense that was not raised in defendant's answer).

64. See Campaign v. Safeway Stores, Inc., 29 Cal. App. 3d 362, 366, 104 Cal. Rptr. 752, 754 (1972); Thoren v. Johnston & Washer, 29 Cal. App. 3d 270, 273-76, 105 Cal. Rptr. 276, 278-79 (1972); Marchiano, *supra* note 62, at 350-53. See also Smith v. Ford Motor Co., 626 F.2d 784 (10th Cir. 1980).

65. OKLA. STAT. tit. 12, § 481 (1971).

Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper or document material to the action, and request an admission, in writing, of its genuineness. If the adverse party, or his attorney, fail to give the admission in writing within four days after the request, and if the party exhibiting the paper or document be afterward put to any costs or expense to prove its genuineness, and the same be finally proved or admitted on the trial, such costs and expenses, to be ascertained at the trial, shall be paid by the party refusing to make the admission, unless it shall appear to the satisfaction of the court that there were good reasons for the refusal.

Id.

66. *Id.* § 3010 (Supp. 1980).

A. After commencement of an action a party may serve upon any adverse party a written request for the admission by the latter of the truth of any relevant matters or facts set forth in the request. The plaintiff may not serve a request until after the service of summons without leave of court granted, with or without notice. Each of the matters of which an admission is requested shall be deemed admitted, unless, within a period desig-

provides for requests for admission of facts and other relevant matters⁶⁷ and is substantially the same as Federal Rule of Civil Procedure 36, as rule 36 existed prior to its amendment in 1970.⁶⁸ By serving requests for admission a party seeks to eliminate specific issues from a lawsuit by requesting his adversary to concede that there is no dispute as to them. Many functions of requests for admission can also be accomplished at the pretrial conference with stipulations to facts and to the authenticity of documents. Nevertheless, requests for admission are often useful for resolving these matters before the pretrial confer-

nated in the request, which period shall be not less than twenty (20) days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested, or setting forth in detail the reasons why he cannot truthfully admit or deny those matters, or (2) written objections on the grounds that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. The time designated in the request may be extended by the court on motion and notice and for good cause shown or by written stipulation of the parties. If written objections to a part of the request are made, the remainder of the request shall be deemed admitted unless a statement is filed as provided above. Answers to requests to which objection is made shall be deferred until the objection is determined. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested he shall specify so much of it as is true and deny only the remainder.

B. All service required herein may be made by registered mail, certified mail or by receipted delivery upon the party or his attorney of record. Any controversy arising hereunder shall be determined by the court having jurisdiction of the action, upon proper application of either party. A copy of the request and any response or objection thereto shall be filed in the cause.

C. Any admission made by a party pursuant to such request shall not be used in any proceeding except the litigation arising out of that particular cause of action only, and shall not constitute an admission for any other purpose.

D. If a party, after being served with a request for an admission under this section, denies the truth of any matter as requested, or files a statement in which he neither admits nor denies those matters, and if the party requesting the admission proves the truth of the matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof. Unless the court finds there was good reason for the denial, or the statement neither admitting nor denying those matters was of no substantial importance, or the admission requested and refused was of no substantial importance, or that the request was objectionable, the order assessing reasonable expenses shall be made.

Id.

67. Prior to 1978 Oklahoma's statute authorizing requests for admission of facts was found at OKLA. STAT. tit. 12, § 504 (1971), close to most of the other Oklahoma statutes relating to discovery. In 1978 § 504 was repealed along with a number of other statutes in connection with the enactment of the Oklahoma Evidence Code. *Id.* § 3102 (Supp. 1980). The repeal of § 504 was evidently inadvertent since § 504 was reenacted with only minor changes by emergency legislation in 1979. 1979 Okla. Sess. Laws, ch. 51. Although the act adopting the new request for admission statute specified that it would be codified in the Oklahoma Statutes as § 3009 of title 12, it was renumbered as § 3010 in order to avoid a duplication because § 3009 had already been assigned. See notes following OKLA. STAT. tit. 12, § 3010 (Supp. 1980).

68. For the text of rule 36 both before and after its 1970 amendment, see Advisory Notes to the 1970 Amendments, *supra* note 17, at 530-31.

ence so that it can be devoted to other matters.⁶⁹

Because a party who serves requests for admission must already know the information contained in the requests in order to have drafted them, requests for admission are not really discovery devices in a literal sense.⁷⁰ Nevertheless, they are generally classified along with the devices used in litigation to discover new information, since requests for admission can be used productively in conjunction with the other discovery devices, and since they can be effective in clarifying issues. The principal advantage of requests for admission is that responses to them are limited. A party responding to interrogatories or deposition questions may attempt to give an ambiguous or equivocal answer. In contrast, a party responding to a request for admission that he knows is true must provide either an admission or a response that is patently false, as opposed to a response that is merely evasive.⁷¹

As yet no Oklahoma appellate decisions have dealt with requests for admission. Accordingly, Oklahoma courts should give substantial weight to persuasive authority from federal courts construing analogous provisions in Federal Rule of Civil Procedure 36. In particular, Oklahoma courts should note the 1970 amendments to rule 36 which resolved a number of ambiguities that arose in the operation of requests for admission in federal courts. Although the 1970 amendments to rule 36 were not incorporated into Oklahoma's request for admission statutes,⁷² these clarifying amendments and the accompanying Advisory Committee's Notes⁷³ shed light on how Oklahoma courts should construe Oklahoma's request for admission statutes to enhance their effectiveness as discovery tools.

B. *Service of Requests for Admission Under Section 3010*

The procedure for using requests for admission under section 3010 is very similar to the procedure for interrogatories.⁷⁴ Like interrogatories, requests for admission of facts and other relevant matters can be served only on adverse parties and can be served at any time after com-

69. Bradford, *Request for Admissions by Defendant*, in 4 AM. JUR. TRIALS 215, 218 (1966).

70. 8 C. WRIGHT & A. MILLER, *supra* note 16, § 2253 at 706; Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055, 1078 (1979).

71. 8 C. WRIGHT & A. MILLER, *supra* note 16, § 2253 at 707; Finman, *The Request for Admissions in Federal Civil Procedure*, 71 YALE L. J. 371, 378-79 (1962); Shapiro, *supra* note 70, at 1078-79.

72. See OKLA. STAT. tit. 12, §§ 481, 3010 (1971 & Supp. 1980).

73. Advisory Notes to the 1970 Amendments, *supra* note 17, at 530-34.

74. See text accompanying notes 39-44 *supra*.

mencement of the action. Leave of court is not required for service, except when a plaintiff seeks to serve requests before service of summons on a defendant. Service of requests for admission, or responses to requests, can be accomplished by registered or certified mail or by receipted delivery upon the opposing party or his attorney of record. The time for response to a set of requests for admission must be designated in the requests, and it cannot be less than twenty days after service, unless extended by order of court for good cause shown, or by written stipulation of the parties. Although not required by statute, it is advisable to mail copies of requests for admission, and responses and objections to requests, to all parties to the action so that they can be informed of the discovery taking place in the litigation. Copies of requests for admission and any responses or objections to requests must be filed with the court.⁷⁵

Requests for admission should be drafted carefully to prevent the responding party from avoiding admissions by construing the requests so that they can truthfully be denied or by claiming they are ambiguous and objecting to them for that reason. Thus they should be simple and direct to enable the responding party either to admit them, deny them or explain why he can do neither in a few words.⁷⁶ Moreover, requests for admission should be drafted narrowly so that each request deals with a single factual issue; breaking a request on a complicated issue into its component parts forces the responding party to admit those component parts which are true, and thus helps bring the disputed issues into focus.⁷⁷ In addition, requests for admission which incorporate other documents by reference should be avoided because the responding party should not have to decide what portions of the incorporated documents are relevant and need to be admitted or denied.⁷⁸ Although not explicitly permitted by statute,⁷⁹ requests for admission relating to a party's contentions and statements or opinions of fact as well as the application of law to fact should be permitted in Oklahoma

75. OKLA. STAT. tit. 12, § 3010 (Supp. 1980). The text of § 3010 is set forth at note 66, *supra*.

76. *Developments in the Law - Discovery*, 74 HARV. L. REV. 940, 970 (1961).

77. See *SEC v. Micro-Moisture Controls, Inc.*, 21 F.R.D. 164, 166 (S.D.N.Y. 1957); Greenstone, *Request for Admissions by Plaintiff*, in 4 AM. JUR. TRIALS 185, 200 (1966); Figg, McCullough & Underwood, *supra* note 11, at 87; Finman, *supra* note 71, at 403-04.

78. *SEC v. Micro-Moisture Controls, Inc.*, 21 F.R.D. 164, 166 (S.D.N.Y. 1975); Figg, McCullough & Underwood, *supra* note 11, at 87.

79. OKLA. STAT. tit. 12, § 3010(A) (Supp. 1980), authorizes requests for admission "of the truth of any relevant matters or facts." *Id.* The expression "any relevant matters" could be construed to include a party's contentions and opinions and the application of law to fact. See generally Dunagan & Ricketts, *supra* note 4, at 165.

state courts as they are in federal and many state courts.⁸⁰ Requests for admission relating to a party's contentions could be very useful for ascertaining the areas of actual controversy in a lawsuit and, if used in combination with interrogatories,⁸¹ for determining the factual basis for each area of actual controversy.

C. *Responding to Requests for Admission Under Section 3010*

Matters contained in requests for admission are deemed admitted unless the party served responds in one of two ways within the period designated in the requests. He can avoid an admission by serving either 1) a sworn statement specifically denying the matters in the requests or stating in detail the reasons he cannot truthfully admit or deny those matters, or 2) written objections to the requests together with a notice of a prompt hearing at which the court may rule on the objections. Answers to requests to which objection is made are not due until after the court has ruled on the objections.⁸²

Responses to requests for admission warrant careful consideration since they can result in admissions that will be binding on the responding party, unless the court permits them to be amended or withdrawn.⁸³ A party who propounds requests for admission and obtains admissions ought to be able to depend on their being binding at trial so that he can avoid the expense of preparing to prove the very matters which had been admitted. Accordingly, admissions should bind the responding party so that the principal purpose of requests for admission, the narrowing of issues for trial, can be achieved.⁸⁴ While admissions are binding in the action in which they are served, their use is limited to that action and they cannot be used for other purposes.⁸⁵ A denial to a request for admission should be specific and unequivocal, or else the court may treat the denial as an admission;⁸⁶ in addition, if only part of

80. E.g., *Lumpkin v. Meskill*, 64 F.R.D. 673, 676-77 (D. Conn. 1974); *Steadham v. United States Leasing Corp.*, 382 So. 2d 563, 565, writ denied, 382 So. 2d 565 (Ala. 1980); *Burke v. Superior Court*, 71 Cal. 2d 276, 282, 455 P.2d 409, 416, 78 Cal. Rptr. 481, 488 (1969); *Salazar v. Valle*, 360 So. 2d 132, 134 (Fla. Dist. Ct. App. 1978); FED. R. CIV. P. 36(a); Advisory Notes to the 1970 Amendments, *supra* note 17, at 532.

81. See text accompanying notes 36-37 *supra*.

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

83. See Advisory Notes to the 1970 Amendments, *supra* note 17, at 534; *Greenstone*, *supra* note 77, at 195-96; *Figg, McCullough & Underwood*, *supra* note 11, at 84-85.

84. E.g., Advisory Notes to the 1970 Amendments, *supra* note 17, at 534; *Finman*, *supra* note 71, at 418-26; *Developments in the Law - Discovery*, *supra* note 76, at 969-70.

85. OKLA. STAT. tit. 12, § 3010(C) (Supp. 1980).

86. See generally Advisory Notes to the 1970 Amendments, *supra* note 17, at 534; 8 C.

a request for admission is denied or objected to, the remainder is deemed admitted.⁸⁷ If a responding party is unable to admit or deny a request for admission, section 3010(A) requires him to set forth in detail the reasons why he cannot do so. This requirement implies that a party has a duty to make a reasonable investigation before responding to requests for admission;⁸⁸ in addition, if the responding party cannot truthfully admit or deny a request, his response should detail the extent of his investigation.⁸⁹

D. *Requests for Admission Under Section 481*

Oklahoma's procedure for requesting admission of the genuineness of documents is found at section 481 of title 12 of the Oklahoma Statutes.⁹⁰ Section 481 authorizes any party to exhibit any relevant document to another party or his attorney at any time before trial and make a written request for admission of its genuineness. If an admission is not made in writing within four days of the request and genuineness is later proved at trial, the court must order the party who refused to make the admission to pay the other party any costs or expenses incurred in proving genuineness, unless the court finds that there were good reasons for the refusal.⁹¹

E. *Sanctions*

The principal disadvantage to the use of requests for admission is that the sanctions imposed by statute for wrongful failure to make an admission are often ineffective.⁹² If a request for admission is not admitted, and the party serving the request later proves its truth at trial, he can apply to the court for the reasonable expenses incurred in making the proof. The application for reasonable expenses will be denied, however, if the court finds there was good reason for the denial, or the

WRIGHT & A. MILLER, *supra* note 16, § 2260 at 729-30; Figg, McCullough & Underwood, *supra* note 11, at 89; Finman, *supra* note 71, at 430-33.

87. See OKLA. STAT. tit. 12, § 3010(A) (Supp. 1980).

88. See Advisory Notes to the 1970 Amendments, *supra* note 17, at 533; Annot., 20 A.L.R.3d 756 (1968).

89. Cf. text accompanying note 49 *supra* (if a party is unable to answer an interrogatory he should specify the investigation made to find the answer).

90. OKLA. STAT. tit. 12, § 481 (1971). § 481 is set forth at note 65 *supra*.

91. *Id.*

92. See Holtzoff, *A Judge Looks at the Rules After Fifteen Years of Use*, 15 F.R.D. 155, 165 (1954); Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 222 (1942); *Developments in the Law - Discovery*, *supra* note 76, at 968. But see Finman, *supra* note 71, at 426 & n.214.

request was of no substantial importance or was objectionable. The possibility that the application for expenses will be denied for these reasons, the fact that the application cannot be made until after trial,⁹³ and the difficulty of establishing the amount of the reasonable expenses incurred in proving the improperly denied matter at trial all operate to weaken the deterrent effect of this sanction.

IV. PRODUCTION OF DOCUMENTS AND TANGIBLE THINGS

A. Introduction

Obtaining all documents and other tangible things relevant to the issues in the action is generally an essential part of trial preparation,⁹⁴ especially in commercial litigation where business records may be critical.⁹⁵ An attorney seeking production of documents and other tangible things from opposing parties should first attempt to obtain production with a stipulation that specifies the items to be produced and acknowledges their authenticity.⁹⁶ Where stipulation is possible, it is generally the most efficient means to obtain production. Unfortunately, stipulation is not always feasible, and when it is not, the various methods for compelling production of documents and tangible things discussed below must be utilized.⁹⁷

A party to a lawsuit in Oklahoma has a number of distinct methods available to compel production of documents or other tangible things in preparation for trial. Section 548 of title 12 of the Oklahoma Statutes provides that, upon motion of a party showing good cause, a court may order any other party to produce documents or other tangible things in his possession, custody or control, or permit entry upon land for purposes of inspection. Rule 12 of the Rules for the District Courts of Oklahoma extends the provisions of section 548 to nonparties, so that a court can make any order regarding property in the possession or control of a nonparty that it could make under section 548

93. See generally Brazil, *supra* note 6, at 248.

94. Ehrenbard, *supra* note 4, at 20.

95. Wesely, *Pretrial Development in Major Corporate Litigation*, 1 LITIGATION 8, 10 (Spring 1975) ("In most major corporate lawsuits, documents are the bedrock of the litigation."). Similarly in products liability litigation obtaining the particular product involved will often be extremely important. Kennelly, *Discovery as to Products, Premises, Documents and Persons-Part I*, 20 TRIAL LAW GUIDE 152, 171 (1976) ("[T]he first and most important aspect of discovery in [products liability] litigation generally consists of acquiring, storing and preserving the involved product . . .").

96. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 30, at 410-12. See also Ehrenbard, *supra* note 4, at 20.

97. Parris v. McCallay, 424 P.2d 62, 66 (Okla. 1967).

regarding property in the possession or control of a party to an action. Sections 387 and 388 authorize use of a subpoena duces tecum to compel a witness to produce books, writings or other things at his deposition, and section 390.1 requires a party to bring to his deposition any books, documents or other things under his control that are designated in the notice of the taking of the deposition. Section 482 requires a party upon written demand to permit the inspection and copying of any book, paper or document in his possession or control that contains evidence relevant to the action. Also, section 483 requires a party to deliver to an adverse party upon demand a copy of any deed, instrument or other writing on which the action or defense is founded, or which he intends to offer in evidence at trial. Rule 5 of the Rules for the District Courts of Oklahoma provides for the exchange at the pretrial conference of all documents, exhibits and other material that the parties expect to introduce into evidence at trial. Finally, section 425 requires the furnishing upon demand of a report of a medical examination to any person who has been requested or required by the court or an adverse party to submit to a physical or mental examination in connection with a civil action.

Any of these methods to compel production must comply with the guarantees in the United States Constitution⁹⁸ and the Oklahoma Constitution⁹⁹ which protect persons from unreasonable searches and seizures.¹⁰⁰ The items to be produced must be at least relevant to the subject matter of the action and must be described with sufficient particularity to enable the producing party to identify the specific items sought.¹⁰¹ Moreover, the party seeking production must prove that the person from whom discovery is sought has the items in his possession or control.¹⁰² In many cases the party seeking production of documents or other tangible things will need to use other discovery devices, such as interrogatories or depositions, to learn what items are available, who has possession, custody or control of them, and how to describe them with sufficient specificity to enable the person from whom production is

98. U.S. CONST. amend. IV.

99. OKLA. CONST. art. 2, § 30.

100. *Nichols v. Council on Judicial Complaints*, 615 P.2d 280, 285-86 (Okla. 1980) (dictum); *State v. Chickasha Milling Co.*, 180 Okla. 611, 614, 71 P.2d 981, 985 (1937).

101. *State v. Chickasha Milling Co.*, 180 Okla. 611, 613-14, 71 P.2d 981, 985 (1937); *Vliet*, *supra* note 21, at 304.

102. *State v. Chickasha Milling Co.*, 180 Okla. 611, 613, 71 P.2d 981, 984 (1937); *Jones v. Webb*, 180 Okla. 6, 6-7, 67 P.2d 801, 802 (1936). *Landon v. Morehead*, 34 Okla. 701, 710-12, 126 P. 1027, 1031-32 (1912); *Vliet*, *supra* note 21, at 303-04.

sought to identify them.¹⁰³

Whenever production is sought through a requested stipulation or any of the discovery devices available in Oklahoma, the producing attorney should examine carefully the list of items sought to make sure that they are described with the required specificity, that they meet the appropriate relevance standard, and that no defenses to production, such as privilege, exist. If any defects in the discovery demand are found, they should generally be remedied by an agreement with opposing counsel that either limits or clarifies the scope of the items sought; otherwise, it will be necessary to make a timely objection to the discovery demand, make a motion to quash the subpoena duces tecum or oppose a motion for production, as is appropriate. After any problems with the discovery demand have been resolved, the attorney should ask his client to gather the requested items and send them to him for review before they are delivered to opposing counsel. The producing attorney should always examine the items gathered by his client before they are delivered to opposing counsel so that he will be able to raise any necessary objections to their production. Before objecting to production of a requested item, however, the producing attorney should consider whether he might desire to introduce the item at trial. If an attorney objects to production during discovery, he might be precluded from waiving the objection later when he seeks to introduce the item into evidence at trial.¹⁰⁴ Although the Oklahoma Statutes do not require an attorney to arrange items he is producing in any particular order,¹⁰⁵ he should not abuse the discovery process by attempting to hide important items by producing them out of order or mixing them with other less important items.¹⁰⁶ Finally, the producing attorney should make a complete record for his own use not only of those items he is producing

103. Ehrenbard, *supra* note 4, at 20; Note, *Discovery: Oklahoma's New Statutes on Production and Written Interrogatories*, 20 OKLA. L. REV. 435, 436-37 (1967). See also the authorities cited in note 19 *supra*. It is often desirable to lay the foundation for obtaining production from a corporation by taking the deposition of the corporation's custodian of records to ascertain what types of records the corporation maintains, where the records are located, and how its files are organized. Wesely, *supra* note 95, at 10.

104. See Adams, *supra* note 8, at 203.

105. The court has discretion under OKLA. STAT. tit. 12, § 548 (1971) and OKLA. CT. R. 12 to require documents or other tangible things to be produced in a particular order, though.

106. See FED. R. CIV. P. 34 ("A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.") This provision was added to rule 34 in 1980 in response to reports that it was "apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring their significance." Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 532 (1980).

but also of the items which are sought that he is not producing together with the reasons why he is not.¹⁰⁷

After receiving documents or other tangible things from a witness or another party, the attorney who requested their production should review them thoroughly to make sure that all the items sought have been produced. The requesting attorney should cross-check the documents which have been produced against documents he has received from his own client and other sources, and should look for references in the documents which have been produced to other documents that have not been produced.¹⁰⁸ If he suspects that some items have been withheld, the attorney should attempt to determine how the items were maintained, the identities of the persons who assembled the items, and the means these persons used to locate and assemble the items. It is often exceedingly difficult to determine whether a witness or another party has complied fully with a demand for production; but where documents or other tangible things are important in a lawsuit, an attorney should make every effort to obtain them.¹⁰⁹

The various discovery devices available in Oklahoma to obtain production of documents and other tangible things will now be discussed in greater detail.

B. *Production Under Section 548 and Rule 12*

Section 548¹¹⁰ of title 12 of the Oklahoma Statutes is the principal discovery statute in Oklahoma dealing with production of documents

107. See Ehrenbard, *supra* note 4, at 21.

108. *Id.*; Wesely, *supra* note 95, at 10.

109. See generally Brazil, *supra* note 1, at 1326-27; Kiechel, *The Strange Case of Kodak's Lawyers*, FORTUNE, May 8, 1978, at 188-94.

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

Upon motion of any party showing good cause and upon notice to all other parties, and subject to the equitable power of the court to protect any party or witness from annoyance, embarrassment, or oppression, the court in which an action is pending may (1) order any such party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, motion picture film or negatives thereof, developed or undeveloped photographic film, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of examination permitted by deposition and which are in such parties' possession, custody or control, or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of which examination is now permitted by deposition. This order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Id.

and other tangible things. It provides that upon motion of any party the court may order another party to produce and permit the inspection and copying or photographing of designated documents or other tangible things (including papers, books, accounts, letters, photographs or photographic film). The documents or things must be in the other party's possession, custody or control, must constitute or contain evidence relating to any matters within the scope of examination permitted at a deposition, and must not be privileged. Section 548 also provides that upon motion of any party the court may order another party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting or photographing the property or any designated object or operation on it, provided that the discovery sought is within the scope of examination permitted by deposition. The court can issue the discovery order only upon a showing of good cause and after notice to all other parties, and the court has power to protect any party or witness from annoyance, embarrassment or oppression in connection with the order. The court order must specify the time, place and manner of the inspection, and it also may specify other terms and conditions that the court deems just.

Section 548 is very similar to Federal Rule of Civil Procedure 34,¹¹¹ as rule 34 existed before its 1970 amendment. Unfortunately, significant improvements in rule 34 made by the 1970 amendment¹¹² have not been incorporated into section 548. Thus section 548 requires a party to seek a court order to obtain production of documents or other tangible things. Rule 34, on the other hand, was amended to enable a party to obtain production without taking up valuable court time to seek an order which often would be uncontested.¹¹³ More significantly, the 1970 amendment to rule 34 eliminated the requirement that a party show good cause in order to obtain production of documents or other tangible things. The good cause requirement in rule 34 was severely criticized by commentators,¹¹⁴ and was eliminated from rule 34

111. *Matchen v. McGahey*, 455 P.2d 52, 56 (Okla. 1969); *Carman v. Fishel*, 418 P.2d 963, 967-68 (Okla. 1966); Note, *supra* note 103, at 437.

112. For the text of FED. R. CIV. P. 34 as it existed before and after its 1970 amendment, see Advisory Notes to the 1970 Amendments, *supra* note 17, at 525-26.

113. Advisory Notes to the 1970 Amendments, *supra* note 17, at 527.

114. 8 C. WRIGHT & A. MILLER, *supra* note 16, § 2205 at 594 ("[The good cause requirement] was . . . a wholly undesirable limitation, for three reasons: (1) no one knew what it meant; (2) it led to confusion between trial preparation materials and other classes of documents and things; and (3) except for trial preparation materials it had little effect in actual practice."); *Developments in the Law - Discovery*, *supra* note 76, at 967-68.

because of its often confusing, uncertain and erratic application.¹¹⁵ In practice, the good cause requirement frequently was confused with the protection given attorney work product, and, in fact, the bulk of the cases where the good cause requirement was applied to preclude discovery of documents involved attorney work product.¹¹⁶

Like the federal courts before 1970, Oklahoma courts have had difficulty dealing with the good cause requirement for production. The Oklahoma Supreme Court in its first decision dealing with good cause, *Carman v. Fishel*,¹¹⁷ stated:

The question of what facts constitute a sufficient "showing of cause" has caused considerable difficulty. To attempt to say that certain facts, if established, will satisfy the "good cause" requirements of the statute and anything less will not is to unduly restrict the operation of such statute. Each case must be determined by its own circumstances within, of course, certain general limitations.¹¹⁸

Later in *Cowen v. Hughes*,¹¹⁹ the Oklahoma Supreme Court again refused to define a standard for the good cause requirement: "We do not intend to establish any fixed criteria or standard by which courts are to decide if 'good cause' has been shown when production of documents and evidence is sought under our discovery rules. The facts of each situation must remain the determinant consideration."¹²⁰ Even though the good cause requirement has not been susceptible to definition by the Oklahoma Supreme Court, the court continues to require a showing of good cause,¹²¹ and has held that it is an abuse of discretion for a trial court to order production without a distinct factual showing of good cause based on competent evidence rather than mere conclusion-

115. Advisory Notes to the 1970 Amendments, *supra* note 17, at 526.

Good cause is eliminated because it has furnished an uncertain and erratic protection to the parties from whom production is sought and is now rendered unnecessary by virtue of the more specific provisions added to Rule 26(b) relating to materials assembled in preparation for trial and to experts retained or consulted by parties.

Id.

116. "[T]he overwhelming proportion of the cases in which the formula of good cause has been applied to require a special showing are those involving trial preparation. In practice, the courts have not treated documents as having a special immunity to discovery simply because of their being documents." *Id.*

117. 418 P.2d 963 (Okla. 1966). Other aspects of the *Carman* case besides the good cause requirement are discussed in Adams, *supra* note 8, at 194-96.

118. 418 P.2d at 971.

119. 509 P.2d 461 (Okla. 1973).

120. *Id.* at 463.

121. *Amoco Prod. Co. v. Lindley*, 609 P.2d 733, 737-38 (Okla. 1980); *Carman v. Fishel*, 418 P.2d 963, 971 (Okla. 1966).

ary statements.¹²² Requiring litigants to make an evidentiary showing of good cause to obtain production of documents or other tangible things when the Oklahoma Supreme Court is unwilling to articulate a standard for applying the good cause requirement¹²³ can only lead to uncertainty and inequity. Unless the Oklahoma Supreme Court provides a workable standard for the good cause requirement soon, the Oklahoma Legislature should remove this unnecessary requirement from the statute for production of documents and other tangible things, as the United States Congress did when it amended rule 34 in 1970.

In contrast to its problems with interpreting the good cause requirement, the Oklahoma Supreme Court apparently has had little difficulty construing section 548 broadly to permit the testing and examination of tangible things.¹²⁴ The court has stated that a party also may be allowed under section 548 to remove tangible things from Oklahoma in order to test and examine them if he can show that there are no adequate testing facilities in Oklahoma.¹²⁵ The person from whom production is sought generally will be allowed to observe any tests done, and the court should make appropriate protective arrangements if it appears that the tests might destroy or alter the tangible things.¹²⁶

122. *Amoco Prod. Co. v. Lindley*, 609 P.2d 733, 737-39 (Okla. 1980); *Lisle v. Owens*, 521 P.2d 1375, 1377 (Okla. 1974); *Jones Packing Co. v. Caldwell*, 510 P.2d 683, 684 (Okla. 1973); *Carman v. Fishel*, 418 P.2d 963, 971-73 (Okla. 1966).

123. The Oklahoma Supreme Court has stated, however, what is *not* a showing of good cause:

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

Carman v. Fishel, 418 P.2d 963, 972 (Okla. 1966). This language is quoted in *Lisle v. Owens*, 521 P.2d 1375, 1377 (Okla. 1974); *Cowen v. Hughes*, 509 P.2d 461, 462 (Okla. 1973), as the standard for determining good cause set forth in *Carman*. In addition, the Oklahoma Supreme Court stated in *Carman* that a showing "will usually be required" that the information sought through document production would be difficult to obtain through other means. 418 P.2d at 971. On the other hand, in *Jones Packing Co. v. Caldwell*, 510 P.2d 683 (Okla. 1973), the court stated that document production "might have been appropriate under the holding of *Carman v. Fishel*" if the party seeking document production had shown that it needed the document production "to prove or disprove some specific issue relevant to the case, or lead to some evidence which might tend to do so." *Id.* at 684. Such conflicting statements from the Oklahoma Supreme Court do not offer guidance for trial courts or practicing lawyers in determining what satisfies the requirement of good cause for production of documents and other tangible things under § 548.

124. *State ex rel. Remington Arms Co. v. Powers*, 552 P.2d 1150, 1152-53 (Okla. 1976) (dictum). This broad construction of § 548 is consistent with the 1970 amendments to FED. R. CIV. P. 34 that explicitly permit testing and sampling of objects. See Advisory Notes to the 1970 Amendments, *supra* note 17, at 527.

125. *State ex rel. Remington Arms Co. v. Powers*, 552 P.2d 1150, 1153 (Okla. 1976) (dictum).

126. *Id.* (dictum). See generally *Wilson v. Naifeh*, 539 P.2d 390 (Okla. 1975); Note, *Discovery*:

The major shortcoming of section 548 is that it contains no provision for sanctions against a party who fails to produce documents or tangible things after being ordered to do so by a court. Despite the lack of sanctions in section 548, the Oklahoma Supreme Court has indicated in recent opinions that a trial court does have authority to enter a default judgment or dismiss an action if a party fails to produce documents or other tangible things in response to an order for production under section 548.¹²⁷ Nevertheless, it is an abuse of discretion for a trial court to enter a default judgment or dismiss an action where a party's failure to produce is not willful or done in bad faith.¹²⁸ These recent opinions appear to conflict with an earlier decision¹²⁹ which held that absent statutory authorization, a trial court lacked power to enter a default judgment because of a defendant's failure to appear at his deposition. The Oklahoma Legislature ought to clarify matters by amending section 548 to provide that a party who did not comply with an order to produce documents or other tangible things would be exposed to the same sanctions that a party who fails to answer interrogatories faces under section 549(c).¹³⁰

Rule 12¹³¹ of the Rules for the District Courts of Oklahoma

Equitable Power of the Court to Order Production of Tangibles, 29 OKLA. L. REV. 141 (1976). For a discussion of problems that may be encountered when the testing of products or other tangible things is sought, see Kennelly, *supra* note 95, at 190-205; Kennelly, *Discovery as to Products, Premises, Documents and Persons-Part II*, 20 TRIAL LAW. GUIDE 336, 336-48 (1976).

127. *Amoco Prod. Co. v. Lindley*, 609 P.2d 733, 738 (Okla. 1980). ("[I]t is not a question of the power of the Court to impose the sanction because the power is there.") (dictum); *Moor v. Babbitt Prods., Inc.*, 575 P.2d 969, 971 (Okla. 1978) (dictum).

128. *Amoco Prod. Co. v. Lindley*, 609 P.2d 733, 738 (Okla. 1980); *Moor v. Babbitt Prods., Inc.*, 575 P.2d 969, 971 (Okla. 1978). In contrast, it does not appear to be necessary for a trial court to find that a party's failure to answer interrogatories was willful or intentional to warrant the court's entering a default judgment or dismissing an action. *Westside Golf & Country Club, Inc. v. City of Lawton*, 580 P.2d 166, 167 (Okla. Ct. App. 1978) (Released for Publication by Order of Court of Appeals).

129. *Uffen v. Wilshire Motels, Inc.*, 436 P.2d 644, 645 (Okla. 1968).

130. See FED. R. CIV. P. 37 which imposes the same sanctions for failure to respond to a request for inspection under FED. R. CIV. P. 34 as it does for failure to answer interrogatories under FED. R. CIV. P. 33.

131. OKLA. CT. R. 12.

Upon motion of any party showing good cause therefor and upon notice to the other parties to the action and to the person in possession or control of the property involved, a court may make any order in regard to property in the possession or control of a person who is not a party to the action that it could make under 12 O.S. 1971 § 548 in regard to property in the possession or control of a party to the action. Adverse parties have a right to be present at any inspection of the property and to perform any act that the requesting party could have performed after the requesting party has completed his inspection. The reasonable expense of making the property available shall be paid by the requesting party, and at the time of the taxing of costs in the case, the court may tax such expenses as costs, or it may apportion such expenses between the parties, or it may provide that they are an expense of the requesting party.

authorizes a party to a civil action in Oklahoma to obtain discovery of property in the possession or control of persons who are not parties to the action in which discovery is sought.¹³² In effect, rule 12 extends the operation of section 548 to nonparties.¹³³ Under rule 12 the party seeking discovery must proceed by motion showing good cause and give notice to the person in possession or control of the property involved as well as to the other parties to the action. If inspection is ordered, the other parties to the action have the right to be present while the property is being inspected and to perform any tests that the party requesting discovery is authorized to perform. The party requesting discovery is required initially to pay the reasonable expenses that may be incurred to obtain access to the property, but the trial court is given authority under rule 12 to tax these expenses as costs at the conclusion of the action, or otherwise allocate them between the parties.¹³⁴

C. *Production of Documents in Connection with the Taking of a Deposition*

Section 388 of title 12 of the Oklahoma Statutes provides that an officer authorized to take depositions¹³⁵ may issue a subpoena to require the attendance of a witness. Section 387 provides that such a subpoena can also direct "the witness to bring with him any book, writing or other thing, under his control, which he is bound by law to produce as evidence."¹³⁶ Unfortunately, section 387 has been construed narrowly by the Oklahoma Supreme Court to include only materials

Id.

132. Although OKLA. CT. R. 12 does not explicitly provide for production of documents held by nonparties, its broad language would appear to authorize document production from nonparties in addition to production of other tangible things and entry upon land.

133. FED. R. CIV. P. 34 applies only to parties. In 1970 the Advisory Committee considered amending rule 34 to permit entry on land or inspection of large tangible things in the possession of nonparties after receiving comments from the bar favoring such an amendment. The Advisory Committee decided against extending the rule to nonparties because it felt certain complex jurisdictional and procedural problems existed. Instead rule 34 was amended to state explicitly that it did not preclude an independent action against a nonparty to obtain production of documents and things and permission to enter upon land. Advisory Notes to the 1970 Amendments, *supra* note 17, at 527. States other than Oklahoma that allow production and inspection against nonparties include Illinois and New York. 8 C. WRIGHT & A. MILLER, *supra* note 16, § 2209 at 619-20 & n.50.

134. OKLA. CT. R. 12. For a brief note on the legislative history of OKLA. CT. R. 12, see Fraser, *The New Rules for the District Courts of Oklahoma*, 44 OKLA. B.A.J. 2665, 2667-68 (1973).

135. OKLA. STAT. tit. 12, § 435 (1971) states that depositions may be taken in Oklahoma before a judge, court clerk, county clerk, justice of the peace, notary public, master commissioner or a person given authority by a special commission.

136. OKLA. STAT. tit. 12, § 387 (1971); *see also* Application of Umbach, 350 P.2d 299, 299-300 (Okla. 1960).

that are admissible as evidence at trial.¹³⁷ The standard of relevance for discovery is generally broader than the standard of relevance applied by a trial court in ruling on the admissibility of evidence at trial, and encompasses information which might reasonably lead to the discovery of evidence that could be admitted at trial.¹³⁸ The narrow construction given to section 387 as regards production of documents at a deposition is inconsistent with the purposes of modern discovery. It makes no sense to apply a narrow standard of relevance to document production in connection with the taking of a deposition when a much broader standard of relevance is applied not only to the scope of examination at a deposition,¹³⁹ but also to motions for production of documents or other tangible things under section 548 of title 12 of the Oklahoma Statutes. The Oklahoma Legislature should amend section 387 so that the broader standard of relevance determines the scope of document production in connection with the taking of a deposition in Oklahoma courts as it does in federal courts.¹⁴⁰ Obtaining document production in connection with the taking of a deposition has much potential as a discovery device. Frequently it is easier and more convenient to arrange for the taking of a deposition than to make a motion for the production of documents. Furthermore, having a witness produce documents at his deposition enables the attorney taking the deposition to examine the witness in order to verify that all of the documents within the scope of the subpoena duces tecum or notice of deposition have been produced.¹⁴¹ Additionally, examination concerning the authenticity of documents, their meaning and their relationship to the issues in the lawsuit, is more effective if the documents themselves are produced at the deposition.¹⁴²

Section 390.1 was added recently to title 12 of the Oklahoma Statutes to authorize the taking of a deposition of a party upon only three days notice to the party or his attorney and without the necessity of service of a subpoena or payment of witness fees.¹⁴³ This section also requires a party to produce at his deposition any books, writings or

137. *Stone v. Coleman*, 557 P.2d 904, 905-06 (Okla. 1976) (dictum); *Carman v. Fishel*, 418 P.2d 963, 972-73 (Okla. 1966) (dictum). See *Vliet*, *supra* note 21, at 305.

138. *Adams*, *supra* note 8, at 189-90.

139. *Unit Rig & Equip. Co. v. East*, 514 P.2d 396, 397 (Okla. 1973); *Carman v. Fishel*, 418 P.2d 963, 974 (Okla. 1966).

140. See FED. R. Civ. P. 45(d)(1).

141. See *Ehrenbard*, *supra* note 4, at 21.

142. Techniques for examining witnesses at depositions will be examined in the next article in this series.

143. OKLA. STAT. tit. 12, § 390.1(A) (Supp. 1980).

other things in his control that are designated in the notice to take the deposition.¹⁴⁴ In effect, the notice to take the deposition is used in lieu of a subpoena duces tecum to obtain the attendance of a party and the production of documents by a party at a deposition.

The sanction that can be imposed for failure of a witness to produce documents in connection with the taking of a deposition is punishment for contempt of the court or officer who issued the subpoena.¹⁴⁵ The punishment authorized for contempt includes fines, imprisonment and liability for damages to the party injured by the failure of the witness to obey the subpoena.¹⁴⁶

D. *Miscellaneous Procedures for Document Production*

The Oklahoma statutes also provide for several other procedures to compel document production. These may be useful occasionally.

Section 482¹⁴⁷ of title 12 of the Oklahoma Statutes provides that a party, or his attorney, may demand that an adverse party¹⁴⁸ allow him to inspect and copy any book, paper or document in the adverse party's possession or control that contains evidence relating to the merits or defenses to the action. The demand must be written and must specify the materials sought with sufficient particularity to enable the party

144. *Id.* § 390.1(B).

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

Id.

145. *Id.* § 392 (Supp. 1980).

146. *Id.* §§ 393, 394 (1971 & Supp. 1980). *See also* Brightmire v. District Court, 424 P.2d 425, 429 (Okla. Crim. App. 1967).

147. OKLA. STAT. tit. 12, § 482 (1971).

Either party, or his attorney, may demand of the adverse party an inspection and copy, or permission to take a copy of a book, paper or document in his possession or under his control, containing evidence relating to the merits of the action or defense therein. Such demand shall be in writing, specifying the book, paper or document with sufficient particularity to enable the other party to distinguish it, and if compliance with the demand, within four days, be refused, the court or judge, on motion and notice to the adverse party, may, in their [*sic*] discretion, order the adverse party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of such book, paper or document; and on failure to comply with such order, the court may exclude the paper or document from being given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party, by affidavit, alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper or document when he is examined as a witness.

Id.

148. Document production under OKLA. STAT. tit. 12, § 482 (1971) may be obtained only from adverse parties. *See* Carraco Oil Co. v. Roberts, 397 P.2d 126, 131 (Okla. 1964).

from whom they are sought to identify them. If the materials are not produced within four days of the demand, the court, upon motion and notice to the recalcitrant party, may order him to produce the materials within a specified time. A showing of facts that the party from whom discovery is sought has the materials in his possession or control is required for the court to order their production under section 482.¹⁴⁹ Although no showing of good cause appears to be required under section 482,¹⁵⁰ the documents sought must be material to the issues in the action,¹⁵¹ and hence must be more than merely relevant to the subject matter of the action or reasonably calculated to lead to the discovery of admissible evidence.¹⁵² Finally, if a party refuses to obey a court order under section 482 to produce a document, the court may exclude the document from evidence at trial or instruct the jury to presume the document to be whatever the party who sought the document's production alleges it to be by affidavit.¹⁵³

Section 483¹⁵⁴ of title 12 of the Oklahoma Statutes provides that a party, or his attorney, may request another party, or his attorney, to deliver a copy of any deed, instrument or other writing upon which the action or defense is founded or which the other party intends to offer in evidence at trial. If a party refuses to provide a copy of a writing requested under section 483, he will not be permitted to introduce the original of the writing into evidence at trial. Section 483, however, does not apply to writings, copies of which are attached to the pleadings in the action, or to public records that are accessible to both parties.¹⁵⁵ An attorney can also obtain copies of all the documents and exhibits that his adversary intends to introduce into evidence at trial at the pretrial conference.¹⁵⁶ Nevertheless, section 483 may be useful as a

149. *Jones v. Webb*, 180 Okla. 6, 6-7, 67 P.2d 801, 802 (1937); *Landon v. Morehead*, 34 Okla. 701, 710-12, 126 P. 1027, 1031-32 (1912); *Vliet*, *supra* note 21, at 303-04.

150. *See Carman v. Fishel*, 418 P.2d 963, 972-73 (Okla. 1966) (dictum).

151. *State v. Chickasha Milling Co.*, 180 Okla. 611, 613, 71 P.2d 981, 984 (1937).

152. *See Carman v. Fishel*, 418 P.2d 963, 972-73 (Okla. 1966) (dictum).

153. OKLA. STAT. tit. 12, § 482 (1971); *Vliet*, *supra* note 21, at 303.

154. OKLA. STAT. tit. 12, § 483 (1971).

Either party, or his attorney, if required, shall deliver to the other party or his attorney, a copy of any deed, instrument or other writing whereon the action or defense is founded, or which he intends to offer in evidence at the trial. If the plaintiff or defendant shall refuse to furnish the copy or copies required, the party so refusing shall not be permitted to give in evidence, at the trial the original of which a copy has been refused.

This section shall not apply to any paper, a copy of which is filed with a pleading.

Id.

155. *Incorporated Town of Sallisaw v. Chappelle*, 67 Okla. 307, 308-09, 171 P. 22, 23 (1918); *Vliet*, *supra* note 21, at 305.

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

discovery tool because it enables a party to obtain production of these documents before the pretrial conference.

Finally, section 425¹⁵⁷ of title 12 of the Oklahoma Statutes provides that any person who has been authorized, requested or required by the court or an adverse party to submit to a physical or mental examination in connection with a civil action at common law or under the Workers' Compensation Act¹⁵⁸ is entitled to a copy of the report of the examining physician within a reasonable time.¹⁵⁹ If a copy of the report is not furnished within a reasonable time after it has been requested, the trial court may exclude all or any part of the testimony of the examining physician from evidence.¹⁶⁰

V. MEDICAL EXAMINATIONS

The physical and mental condition of a party is commonly a major issue in personal injury litigation. Much information about an opposing party's physical and mental condition can be obtained through interrogatories, depositions of the party and his physicians, and the

At the pretrial conference counsel shall be prepared to admit undisputed facts and indicate the facts they expect to prove or to controvert by proof; indicate the theory of their claim or defense with their authorities; disclose the identity and addresses of witnesses who they expect to call to testify and the subject matter of their testimony; disclose and, unless unavailable at that time, submit all documents, exhibits and other material which they expect to introduce in evidence and stipulate in regard to the identification of the documents, exhibits and other material which the adverse party plans to introduce in evidence.

Id. For a good discussion of the operation of pretrial conferences in Oklahoma state courts, see Vliet, *Pretrials and Discovery*, 34 OKLA. B.A.J. 1894 (1963).

157. OKLA. STAT. tit. 12, § 425 (1971).

Any person authorized, requested, or required by any court or adverse party to submit to a physical or mental examination by any practitioner of any of the healing arts in connection with any claim made or to be made at common law, under the Workmen's Compensation Law, or otherwise, upon his written demand therefor served on all attorneys of record, shall be entitled to have all medical reports of such practitioner with respect to such examination or treatment reduced to writing within a reasonable time after such examination or treatment, and a full, true, and correct copy of such report furnished free of charge to such examinee, or his attorney, before or simultaneously with the transmission of such written report or the contents thereof to any other person, corporation, or court, irrespective of who may be obligated to pay for such examination or treatment. For failure to comply with the provisions hereof the trial court shall enter its order to exclude all or any part of the testimony of such practitioner, or make such other order as justice requires.

Id.

158. Oklahoma's Workers' Compensation Act is found at OKLA. STAT. tit. 85, §§ 1-180 (1971 & Supp. 1980).

159. *City of Tulsa v. State Indus. Court*, 595 P.2d 1226, 1228 (Okla. Ct. App. 1979) (Released for Publication by Order of Court of Appeals); *Unit Rig & Equip. Co. v. East*, 514 P.2d 396, 397 (Okla. 1973) (dictum); OKLA. STAT. tit. 12, § 425 (1971).

160. *City of Tulsa v. State Indus. Court*, 595 P.2d 1226, 1229 (Okla. Ct. App. 1979) (Released for Publication by Order of Court of Appeals); OKLA. STAT. tit. 12, § 425 (1971).

production of documents (such as medical records) pertaining to his physical and mental condition. In addition, an attorney defending a personal injury action frequently will have his own expert examine the opposing party to gain as much information as possible about that party's medical condition. The timing of a medical examination often deserves careful consideration.¹⁶¹ On the one hand, an early examination can enhance the possibility of settlement. On the other hand, where the plaintiff is alleging that his injuries are permanent it is often desirable to wait until his condition has stabilized before scheduling the examination. In any event an attorney defending a personal injury action should generally gather background information and obtain complete medical records of the opposing party to give to his expert before the examination, so that the expert will be fully prepared.¹⁶²

There is no express statutory authorization for medical examinations in Oklahoma, except in connection with proceedings before the Workers' Compensation Court.¹⁶³ Prior to 1962 the Oklahoma Supreme Court had consistently held that an Oklahoma trial court had no inherent power to order the medical examination of a party¹⁶⁴ and that absent statutory authorization a party could not be compelled to submit to a medical examination unless he waived his objection by exhibiting his body to the trier of fact at trial.¹⁶⁵ This line of authority was finally overruled by the Oklahoma Supreme Court when it held in *Witte v. Fullerton*¹⁶⁶ that trial courts have discretionary power to order plaintiffs in personal injury actions to submit to medical examina-

161. See Bucholtz, *The Defendant's Medical Case - Preparation, Presentation and Strategy*, 16 PRAC. LAW. 50, 55-56 (Feb. 1970).

162. For discussions of tactical considerations involved in the taking of medical examinations, see R. KEETON, TRIAL TACTICS AND METHODS 426-31 (1973); Bucholtz, *supra* note 161, at 55-56; Morris, *Strategy of Discovery for the Defendant Physician and Hospital in Medical Malpractice Actions*, 1978 MED. TRIAL TECH. Q. 139, 154-55.

163. See OKLA. STAT. tit. 85, § 25 (Supp. 1980).

164. *Transport Ins. Co. v. McAlister*, 355 P.2d 576, 579-80 (Okla. 1960); *Law v. Corsin*, 206 Okla. 462, 463, 244 P.2d 831, 832 (1952); *Phillips Petroleum Co. v. Myers*, 202 Okla. 151, 155-56, 210 P.2d 944, 948-49 (1949) (alternative holding); *Atchison, T. & S.F. Ry. v. Melson*, 40 Okla. 1, 5-7, 134 P. 388, 390-91 (1913); *City of Kingfisher v. Altizer*, 13 Okla. 121, 123-25, 74 P. 107, 108-09 (1903) (alternative holding). See generally *Mock v. Stricklin*, 315 P.2d 247, 252 (Okla. 1957); *Oklahoma Transp. Co. v. Stine*, 280 P.2d 1020, 1024-25 (Okla. 1955) (holding that a trial court did not abuse its discretion by refusing to order a party to submit to a medical examination). Several of these decisions were criticized in Note, *Torts: Personal Injury: Right to Demand Physical Examination of Person Injured*, 3 OKLA. L. REV. 118 (1950).

165. *Jewel Tea Co. v. Ransdell*, 180 Okla. 203, 204-05, 69 P.2d 69, 70-71 (1937). See also *Oklahoma Ry. v. Thomas*, 63 Okla. 219, 224-25, 164 P. 120, 125-26 (1917).

166. 376 P.2d 244 (Okla. 1962). This case is noted with approval in Bailey, *A Plea for Procedural Reform in Oklahoma*, 34 OKLA. B.A.J. 1883, 1887 (1963); Note, *Trial Practice: Power of Trial Court to Order a Party to Submit to a Mental Examination*, 17 OKLA. L. REV. 350 (1964).

tions.¹⁶⁷ The *Witte* court noted its general agreement with certain statements in *Jones' Commentaries on Evidence*,¹⁶⁸ which may furnish guidelines for Oklahoma trial courts in ordering medical examinations. According to *Jones' Commentaries on Evidence*, as quoted in the *Witte* opinion, whether to order a medical examination rests in the sound discretion of the trial court,¹⁶⁹ and is subject to appellate review in cases where the trial court abuses its discretion.¹⁷⁰ An application for a medical examination should be made before trial and should show that the examination is needed to ascertain facts that are important to the action.¹⁷¹ The examination is subject to the direction and control of the court,¹⁷² and should not be dangerous or cause serious pain.¹⁷³ If a plaintiff refuses to obey a court order to submit to a physical examination, the appropriate sanction to be imposed is the staying or dismissing of the action, rather than punishment for contempt of court.¹⁷⁴ Finally, although the *Witte* decision discussed only physical examinations, its reasoning applies equally well to mental examinations and other types of examinations conducted by experts before trial.¹⁷⁵

After *Witte* was decided, the Oklahoma Legislature adopted sec-

167. 376 P.2d at 248.

168. "1. Trial courts have the power to order a medical examination by experts of the person of the plaintiff seeking a recovery for personal injuries. 2. A defendant has no absolute right to demand the enforcement of such an order, the motion therefor being addressed to the sound discretion of the trial court. 3. The exercise of such discretion is reviewable by an appellate court, and may be corrected in case of abuse. 4. The examination should be applied for and made before entering upon the trial, and should be ordered and had under the direction and control of the court whenever it fairly appears that the ends of justice require the disclosure or ascertainment of important facts which can only be disclosed, ascertained and fully elucidated by such an examination, and when the examination may be made without injury to plaintiff's life or health or the infliction of serious pain. 5. Refusal of the motion, where the circumstances appearing in the record present a reasonably clear case for examination under the rule stated, is such an abuse of the discretion lodged in the trial court as to warrant reversal of a judgment in plaintiff's favor. Such an order, it is said, may be enforced, not by punishment as for a contempt, but by staying or dismissing the action."

Id. at 247-48.

169. *Ellsworth v. Brown*, 387 P.2d 634, 635, 638 (Okla. 1963); 376 P.2d at 247. *See also Henryetta Constr. Co. v. Harris*, 408 P.2d 522, 528-29 (Okla. 1965).

170. *Farr v. VanMeter*, 478 P.2d 896, 898 (Okla. 1970); 376 P.2d at 247.

171. 376 P.2d at 247. In contrast FED. R. Civ. P. 35 requires a motion for physical examination to show good cause.

172. *Ellsworth v. Brown*, 387 P.2d 634, 638 (Okla. 1963) (holding that a trial court's selection of a physician to examine the plaintiff was proper, after the parties could not agree on a physician to perform the examination); 376 P.2d at 247. Most courts permit the party requesting the medical examination to select the physician to conduct the examination unless the party being examined shows that the physician is prejudiced against him. *Bucholtz, supra* note 161, at 55. *See generally Vliet, supra* note 156, at 1901; Annot., 33 A.L.R.3d 1012 (1970 & Supp. 1980).

173. 376 P.2d at 247.

174. *Id.* at 248.

175. *Bailey, supra* note 166, at 1887; Note, *supra* note 166.

tion 425 of title 12 of the Oklahoma Statutes,¹⁷⁶ which gives a person who has been authorized, requested or required by the court or an adverse party to submit to a medical examination in connection with a tort action or a Workers' Compensation proceeding, the right to a copy of the report of the examination. By adopting section 425, which refers to court ordered examinations, the Oklahoma Legislature implicitly approved the exercise by Oklahoma state courts of their inherent power to order medical examinations.

VI. CONCLUSION

This article has examined the following discovery tools that are used in civil litigation in Oklahoma: (1) written interrogatories, (2) requests for admission, (3) procedures to obtain production of documents and tangible things, and (4) medical examinations. Through skillful use of these discovery tools an attorney can obtain much of the information he requires for trial preparation. In most cases, however, trial preparation is not complete without depositions from at least some of the important witnesses.¹⁷⁷ By taking the deposition of a witness, an attorney has the opportunity to meet the witness, evaluate his demeanor and estimate the impact his testimony will have on the trier of fact.¹⁷⁸ Also, depositions are a powerful tool for gathering information because an attorney taking a deposition may follow up with additional questions that are suggested by the responses of the witness to preceding questions.¹⁷⁹ In addition, depositions may be used to preserve the testimony of a witness for trial.¹⁸⁰ The many uses of depositions in Oklahoma civil litigation will be explored in the next article in this series.

176. OKLA. STAT. tit. 12, § 425 (1971). For the text of § 425, see note 157 *supra*.

177. See Facher, *Taking Depositions*, 4 LITIGATION 27, 27 (Fall 1977); Smith, *Form Interrogatories in Personal Injury Actions*, 32 INS. COUNSEL J. 453, 456 (1965).

178. CALIFORNIA CONTINUING EDUCATION OF THE BAR, *supra* note 30, at 168; Facher, *supra* note 177, at 27.

179. Sunderland, *supra* note 24, at 875.

180. See *Smart v. Cain*, 493 P.2d 821, 823-24 (Okla. 1972); OKLA. STAT. tit. 12, §§ 433, 443, 447 (1971 & Supp. 1980).