Research Memorandum #81: Discovery

1. Privileges

Bottom Corp. v. Major, 271 Maj. 3d 100 (20XX-3): "This case addresses important questions concerning the scope of the attorney-client privilege and the applicability of the work product doctrine in proceedings to enforce tax summonses.

"Bottom Corporation sells widgets. In January 20XX-3, the corporation discovered that its subsidiary made payments to foreign government officials in order to secure government business. General counsel conducted an internal investigation, sending questionnaires and interviewing corporate officers and employees. In March 20XX-3, the Major Tax Department demanded production of:

> all files relative to the investigation conducted under the supervision of counsel to identify payments to employees of foreign governments and any political contributions made by the company or any of its affiliates since January 1, 20XX-17.
>
> The records should include but not be limited to written questionnaires sent to managers of the Company's foreign affiliates, and memoranda or notes of the interviews conducted with officers and employees of the company and its subsidiaries.

"The company declined to produce the documents specified, claiming they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, the Major Tax Department filed a petition seeking enforcement of its summons. The trial court ordered the corporation to produce the documents. The Court of Appeals affirmed. We reverse.

"Federal Rule of Evidence 501 provides:

> the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by courts in light of reason and experience.

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients, thereby promoting broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.

"We hold that the communications by Bottom Corporation employees to counsel are covered by the attorney-client privilege as to the responses to the questionnaires and any notes reflecting responses to interview questions.

"The summons reaches further, however, to notes and memoranda of interviews, which go beyond recording responses to questions. This raises the work product privilege. The Tax Department asserts that it has made a sufficient showing of necessity to overcome the work product doctrine protections. The Tax Department relies on the following language in the leading case, *Sickman v. Sayler*, 198 Maj. 2d 503 (20XX-28):

> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. And production might be justified where the witnesses are no longer available or may be reached only with difficulty.

"The above-quoted language from *Sickman*, however, did not apply to oral statements made by witnesses whether presently in the form of the attorney's mental impressions or memoranda. As to such material, the *Sickman* court did 'not believe that any showing of necessity can be made under the circumstances of this case so to justify production.' Forcing an attorney to disclose notes and memoranda of a witness's oral statements is particularly disfavored because it tends to reveal the attorney's mental processes.

"Rule 26 accords special protection to work product revealing the attorney's mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. Rule 26 goes on to state:

> [I]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative concerning the litigation.

Although this language does not specifically refer to memoranda based on oral statements of witnesses, the *Sickman* court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes. Some courts have concluded that *no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses.

"We do not decide the issue at this time. It is clear that the wrong standard was applied by the trial court when it concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work product doctrine, articulated by the first part of 26(b)(3). The notes and memoranda sought by the Government here are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and *Sickman* make clear, such work product cannot be disclosed simply on the showing of substantial need and inability to obtain the equivalent without undue hardship.

"While we are not prepared at this juncture to say that such material is always protected by the work product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the trial judge in this case would be necessary to compel disclosure."

Jude v. Harvey, 284 Maj. 3d 500 (20XX-2): "This lawsuit arose from a car collision on a state highway near Judith Lake, Major, on March 15, 20XX-6. Ms. Jude was traveling west when suddenly her car was surrounded by a dense cloud of smoke, causing her to collide with the car ahead. Ms. Jude claims the cloud of smoke and the ensuing collision were caused by Mr. Harvey's negligence in burning grain stubble in an adjacent field.

"At the time of the incident, Mr. Harvey had a liability insurance policy issued by Michael Insurance Company. Under the terms of this policy, Michael was obligated to defend Mr. Harvey against all insured claims. This contractual duty allowed Michael to select and retain an attorney to represent the insured and required the insured to cooperate in his defense.

"Two days after the accident, an investigator and adjuster for Michael contacted Mr. Harvey and tape-recorded his statement relating to the accident. The tape was subsequently transcribed. Several months later Ms. Jude filed a personal injury action against Harvey. Thereafter Mr. Harvey's deposition was taken, at which time he testified about the existence of the statement.

"Counsel for Jude requested a copy of the transcript of Mr. Harvey's statement. Defense counsel objected, claiming attorney-client privilege and work product. Jude requested an order compelling production. The trial court denied the order. The Court of Appeals reversed. The specific issue at hand is whether an insured's statement to his insurance carrier is protected from discovery by State of Major Rule of Civil Procedure 26(b)(3).

"Many federal and state courts have struggled over the proper interpretation of 26(b)(3), commonly referred to as the work product rule. The test for determining whether such work product is discoverable is whether the documents are prepared in anticipation of litigation, and, if so, whether the party seeking discovery can show substantial need and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

"It is difficult in this context to determine whether a document was prepared in anticipation of litigation since an insurance company's ordinary course of business entails litigation. The requirement of having an attorney involved in the case before documents prepared by an insurance carrier are protected is a conclusory determination of the issue and is contrary to the plain language of the rule. On the other hand, broad protection for all investigations conducted by an insurer is likewise an unsatisfactory answer to the problem. Should such a general rule be adopted, it is not hard to imagine insurers mechanically forming their practices so as to make all documents appear to be prepared in 'anticipation of litigation.' We believe the better approach to the problem is to look to those specific parties involved and the expectations of those parties.

"This case involves statements by a defendant. An insured is contractually obligated to cooperate with the insurance company. Such an obligation clearly creates a reasonable expectation that the content of statements made by the insured will not be revealed to the opposing party.

"The insurer on the other hand has a contractual obligation to act as the insured's agent

and secure an attorney. The insured cannot choose the attorney but can expect the agent to transmit the statement to the attorney selected. Without an expectation of confidentiality, an insured may be hesitant to disclose everything known. Such nondisclosure could hinder representation by the selected attorney and the expectation is that statements made by the insured will be held in confidence. Without such protection, the insured would bear many of the burdens of the insurance contract without reaping the benefits. The contractual obligation between insured and insurer mandates extension of this protection to statements made by an insured to his insurance company. Such an extension comports with the policy of maintaining certain restraints on bad faith, irrelevant and privileged inquiries and helps to ensure the just and fair resolution of disputes. Therefore, we hold that a statement made by an insured to an insurer following an automobile accident is protected from discovery under Civil Rule 26(b)(3).

"The question then remains whether respondents have shown substantial need. The determination of this issue is vested in the sound discretion of the trial judge, who should look at the facts and circumstances of each case in arriving at the ultimate conclusion. To justify disclosure, a party must show the importance of the information to the preparation of his case and the difficulty the party will face in obtaining substantially equivalent information from other sources if production is denied.

"The clearest case for ordering production is when crucial information is in the exclusive control of the opposing party. The substantial need standard is not met if the discovering party merely wants to be sure nothing has been overlooked or hopes to unearth damaging admissions. Several courts have held that statements contemporaneous with the occurrence may in some instances be unique and cannot be duplicated by later interviews or depositions, *Douglas v. Dunn*, 269 Maj. 3d 117 (20XX-5). In general there is no justification for discovery of the statement of a person contained in work product materials, when the person is available for deposition. Whether a statement is contemporaneous and unique is a question of fact.

"In light of all these considerations, we are unable to see any error in the trial court's determination that Jude had 'substantial need' of Harvey's statement. Although the statement was taken two days after the accident, the passage of time alone is insufficient to allow discovery. Ms. Jude has failed to show any other extenuating circumstances justifying disclosure. The more important fact is that the statement in question is that of the defendant. The defendant is not unavailable; it was in his deposition that the conflict arose. There is no claim that he has no present recollection of the events in question. The primary reason for Ms. Jude wanting the statement in this instance, as we see it, is impeachment. General impeachment, alone, is insufficient to show substantial need. Since Jude made no other argument as to her substantial needs, we hold that Jude has failed to show a substantial need for the statement. We reverse the Court of Appeals and reinstate the ruling of the trial court upholding the work product privilege."

Dissent. Figment, J.: "I would affirm the Court of Appeals decision finding the statement of the insured to his insurance company is not protected by either the attorney-client privilege, or the work product immunity rule, Civil Rule 26(b)(3).

"I believe it is incorrect to hold that the initial inquiry or involvement by an insurance company regarding the possibility of a potential claim involving one of its insureds is made in anticipation of litigation. The initial inquiry is a gathering of facts from which the insurance company determines whether there may be a claim and if so whether the claim is covered by the insurance contract. I would hold the initial inquiry is always made in the ordinary course of the insured's business. Only after the initial discussion of the claim can the insured and the insurance company determine whether the incident is covered and whether litigation can be anticipated. If litigation is anticipated, subsequent statements made by the insured would be protected. This determination accords broad and liberal treatment to the discovery rules and achieves the goal of ensuring mutual knowledge of all relevant facts, *Sickman v. Saylor*, 198 Maj. 2d 503 (20XX-28)."

2. Fifth Amendment Privilege in a Civil Case

Skelly v. Sham, 260 Maj. 3d 777 (20XX-6): "This is an appeal of the trial court ruling granting defendant a default judgment. We reverse and remand.

"Plaintiff Skelly brought a libel proceeding alleging that defendant Sham libeled her in a newspaper article which asserted that 'Darcy Skelly didn't write her last book; she relied on a ghost writer. She is a fraud.' Sham denied the libel. Plaintiff Skelly, when served with interrogatories, refused to answer those interrogatories inquiring whether she had sexual intercourse with a married man other than her husband. State of Major statutes declare that adultery and fornication are misdemeanors. Skelly claimed the Fifth Amendment. Defendant Sham convinced the trial court that the inquiry was relevant to the issues [discussion of relevancy omitted]. The trial court, after plaintiff's invocation of privilege, struck her answer and allowed default judgment against her.

"Generally, the threat of incrimination must be a genuine and present one and is usually used in civil actions where conduct or testimony giving rise to civil liability also makes up an element of a crime. The general American rule is that the Fifth Amendment privilege may be invoked as long as a mere 'possibility' of prosecution for the crimes suggested by the response exists. A response or document 'tends to incriminate' as long as it might help discover facts that could tie together circumstantial evidence proving the invoker's criminal conduct.:

"If a criminal threat is not pending, a sufficient 'penalty' or 'forfeiture' in a civil case may warrant invocation of the privilege. A 'sufficient penalty' however, is not clearly defined in civil cases. But proceeding instituted for the purpose of declaring the forfeiture of a person's property because of offenses committed by him, although they may be in civil form, are in their nature criminal for Fifth Amendment purposes. However, this concept of 'penalty' should be 'strictly construed' so as to protect the non-invoking party from abuse of the privilege.

"The privilege protects against real dangers and not speculative possibilities. A party or witness must satisfy the court at trial that the claim of privilege is justified and not an abuse of the right.

"The use of the privilege may be asserted at the pretrial or trial state by a civil litigant. We recognize that pretrial discovery may be deterred by the invocation of the privilege that important information necessary for the presentation of a prima facie case or a defense may be at the center of the discovery attempt which might be obstructed by the exercise of the privilege. But the importance of the privilege to our freedoms is too important to draw a restrictive line between criminal and civil actions. But the exercise of the privilege in a civil case is not absolute. No criminal sanctions can be used, such as contempt, and the usual sanctions for failing to grant discovery are not applicable when discovery is resisted by a good faith claim of the privilege. (The courts have generally declined to strike a civil lawsuit or responsive answer or permit a default judgment.) Courts, however, have been willing to impose lesser sanctions since pretrial discovery is essential for a private civil litigant to develop a case.

"In the instant case, we are convinced that plaintiff really acted in good faith fearing a criminal prosecution. Although the trial court correctly ordered Skelly to comply with the court order to respond to defendant's interrogatories, the sanction imposed for refusal was improper. Imposition of lesser sanctions would have been proper. A default judgment was unduly harsh. We suggest the trial court consider the availability of broad choices of sanctions when dealing with good-faith exercises of the privilege in civil litigation. Reversed and remanded."

State of Major Bar v. Hawk, 268 Maj. 3d 244 (20XX-5): "The State of Major Bar brought disciplinary charges for professional misconduct against attorney George Hawk, a member of the Bar. Hawk refused to produce demanded financial records and to testify at an administrative hearing on the grounds that the records and/or testimony would incriminate him. The judge correctly balanced the prejudice to the defendant against the probative need for the particular information sought in order to make a fair determination.

"We hold that the self-incrimination clause of the Fifth Amendment applies to lawyers. Exercising one's Fifth Amendment privilege should not be diluted nor penalized by imposing the dishonor of disbarment or the deprivation of livelihood as a penalty for asserting it. But consequences may follow failure to produce information."

3. Discovery of Expert Witness

Sarah v. Davidel, 283 Maj. 3d 144 (20XX-2): "The question on appeal is whether plaintiff must identify each and every doctor, physician, or medical expert plaintiff's counsel retain or specially employ during pretrial investigation and preparation. The courts have been divided on the issue. Civil Rule 26(b)(4) governs the scope of discovery concerning experts.

"First we will explore whether discovery of experts informally consulted, but not retained or specially employed, is required by the rule. No provision in Civil Rule 26(b)(4) expressly deals with nonwitness experts who are informally consulted by a party in preparation for trial, but not retained or specially employed in anticipation of litigation.

"In our view, the status of each expert must be determined on an ad hoc basis. Several factors should be considered: (1) the manner in which the consultation was initiated; (2) the nature, type, and extent of information or material provided to, or determined by, the expert in connection with his review; (3) the duration and intensity of the consultation relationship; and (4) the terms of the consultation, if any (e.g., payment, confidential data or opinions, etc.). Of course, additional factors bearing on this determination may be examined if relevant.

"The determination of the status of the expert rests, in the first instance, with the party resisting discovery. Should the expert be considered informally consulted, that categorization should be provided in response. The propounding party should then be provided the opportunity of requesting a determination of the expert's status based on an in camera review by the court. Inasmuch as the District Court failed to express its views on this question, we deem it appropriate to remand rather than attempt to deal with the merits of this issue on appeal. If the expert is considered to have been only informally consulted in anticipation of litigation, discovery is barred.

"Second, we need to determine if plaintiff needs to give defendant discovery of the identities of experts retained or specially employed. Subdivision (b)(4)(B) of Rule 26 specifically deals with nonwitness experts who have been retained or specially employed by a party in anticipation of litigation. Facts or opinions of nonwitness experts retained or specially employed may only be discovered upon a showing of 'exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.' Discovery of the identities of the experts, absent a showing of exceptional circumstances, was not expressly precluded by the text of subdivision (b)(4)(B); the District Court found the general provisions of Rule 26(b)(1) controlling. Subdivision (b)(1) provides:

> (b) *Scope of Discovery*. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
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> (1) *In General*. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, . . . including the . . . identity and location of persons having knowledge of any discoverable matter.

"The advisory committee notes to the rule indicate that the structure of Rule 26 was largely developed around the doctrine of unfairness, designed to prevent a party from rebuilding a case by means of his opponent's financial resources, superior diligence, and more aggressive preparation.

"There are several reasons for overruling the District Court. Once the identities of retained or specially employed experts are disclosed, the protective provisions of the rule concerning facts known or opinions held by such experts are subverted. The expert may be contacted or his records obtained and information normally nondiscoverable, under Rule 26(b)(4)(B), is revealed. Similarly, although perhaps rarer, the opponent may compel an expert retained or specially employed by an adverse party who does not intend to call that expert, to testify at trial. The possibility also exists that a party may call his opponent to the stand and ask if certain experts were retained in anticipation of trial, but not called as a witness, thereby leaving with the jury an inference that the retaining party is attempting to suppress adverse facts or opinions. We also agree with plaintiff's view that disclosure of the identities of medical consultative experts would inevitably lessen the number of candid opinions available as well as the number of consultants willing to even discuss a potential medical malpractice claim with counsel. . . .

"Lastly, we affirm that the identity, and other collateral information, concerning an expert who is retained or specially employed in anticipation of litigation, but not expected to be called as a

witness at trial, is not discoverable except as 'provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.' Civil Rule 26(b)(4)(B). The party seeking disclosure under Rule 26(b)(4)(B) carries a heavy burden in demonstrating the existence of exceptional circumstances.

"The order of the District Court is vacated and remanded. On remand, the status of the nonwitness experts against whom discovery is sought should be undertaken as a two-step process. First, was the expert informally consulted in anticipation of litigation but not retained or specially employed? If so, no discovery may be had as to the identity or opinions of the expert. Second, if the expert was not informally consulted, but retained or specially employed in anticipation of litigation, but not expected to testify at trial, do exceptional circumstances exist justifying disclosure of the expert's identity, opinions or other collateral information?

"Vacated and remanded."

4. Discovery of Expert's Report and Notes

Old City v. Bond, 281 Maj. 3d 77 (20XX-2): "Plaintiff brought suit against defendant aircraft manufacturer for personal injuries as a result of an aircraft crash. Plaintiff requested discovery of three reports compiled by defendant's expert witnesses. Plaintiff delivered allegedly defective aircraft parts to defendant for analysis. Defendant's three experts each compiled a report based on examination of the aircraft parts. Defendant supplied plaintiff with one of the three reports.

"Generally, reports and notes of an expert are not discoverable by the opposing party absent a showing of exceptional circumstances demonstrating an undue hardship. Written 'reports compiled by expert employees of defendant manufacturer are not discoverable where the reports were prepared in anticipation of litigation. Plaintiff did not assert that the reports were necessary to build plaintiff's own case-in-chief. While plaintiff asserted that the reports were necessary for cross-examination, this was not a sufficient showing of exceptional circumstances. We conclude that plaintiffs can obtain the substantial equivalent of the reports by other means without undue hardship."

Williams v. Oakes, 283 Maj. 3d 111 (20XX-1): "This case involves a contract action for damages stemming from the collapse of a giant ore excavating machine. The third party defendant filed a motion to compel production of certain documents compiled by the plaintiff's auditors. The auditors had prepared a settlement proposal for plaintiff, estimating the amount of damages due from the collapse. The proposal was advanced as an alternative claim for damages. Defendant sought discovery of all materials used in formulating assumptions and alternate assumptions.

"Defendant may discover all materials used in arriving at assumptions and alternate assumptions, since the settlement offer had become a formal alternative claim for damages. Since the auditors will testify as to why they have selected the particular proposal, defendant should have access to materials which are relevant to the decisions."

5. Discoverability of Income Tax Records

Neddleman v. Knowles, 274 Maj. 3d 112 (20XX-4): "Plaintiff brought an action for wrongful death asserting that defendant acted willfully and maliciously, claiming punitive damages. Plaintiffs requested copies of defendant's income tax returns for the prior two years.

"It is discretionary with a court in which a civil action is pending to require one party to produce a copy of a federal or state tax return for inspection by the adverse party in a discovery proceeding. Absent unusual circumstances, income tax records are not subject to discovery. Where punitive damages are alleged, the wealth of the defendant is pertinent and material to the issue of the case. Pretrial discovery of a defendant's financial condition is not available to a plaintiff who merely seeks compensatory damages. Plaintiff need only allege punitive damages and need not establish a prima facie case to discover tax records."

6. Discovery of Medical Records

Branson v. Superior Court of Jamner County, 269 Maj. 3d 43 (20XX-5): "Plaintiffs filed a petition seeking extraordinary relief

challenging the superior court order requiring plaintiffs to respond to defendant's interrogatories. Plaintiffs seek damages for diminution of property value, personal injuries, and emotional disturbance allegedly caused by Jamner County's operation of an airport. They complain of noise, vibrations, air pollution, and smoke, caused by the international airport. Defendants in interrogatories requested complete disclosure of each plaintiff's entire lifetime medical histories.

"The patient/litigant exception to the physician/patient privilege allows only a limited inquiry into the confidences of the physician/patient relationship, compelling disclosure of only those matters directly relevant to the nature of the specific condition the patient has disclosed or tendered in the pleading or answer to discovery inquiries. It is a limited waiver concomitant with the purpose of the exception.

"In this case, the trial court's order requiring unlimited disclosure is impermissibly overbroad. Plaintiffs are not obligated to sacrifice all privacy to seek redress for a specific physical, mental, or emotional injury. Plaintiffs are entitled to retain the confidentiality of all unrelated medical or psychotherapeutic treatment they may have undergone in the past. Plaintiffs may not, however, withhold information which relates to any physical or mental lawsuit. For example, if plaintiff claims that airport operations have damaged his respiratory system, he would be obliged to disclose all medical information relating to his respiratory condition and could not limit discovery simply to those airport-related incidents which have allegedly injured his condition."

Roberts v. Superior Court, 268 Maj. 3d 42 (20XX-5): "We affirm the Superior Court order compelling plaintiff to respond to defendant's interrogatories.

"Plaintiff brought a personal injury action against defendant for personal injuries allegedly caused by an automobile collision. Plaintiff claimed that as a result of the collision she was rendered 'sick, distressed, lame, and disabled.' Defendant requested plaintiff's lifetime medical and psychological history and requested a description of the injuries she claimed to have suffered in the collision. Plaintiff refused to disclose any information about her physical or psychiatric history.

"Since plaintiff alleged vague, *unspecified* injuries, i.e., emotional disturbances, personal injuries, defendant should be able to discover a larger scope of records in order to narrow down *specific injuries* allegedly caused by the accident. Where plaintiff is not specific in identifying the injuries, defendant should not be liable for wholesale injuries without regard to whether injuries were caused by defendant. Plaintiff should not be able to claim damages for unspecified injuries and deny defendant access to information relevant in identifying specific injuries."

7. Use of Witness Deposition

Towndale v. Hefty, 276 Maj. 3d 144 (20XX-3): "Defendant contended that plaintiff's deposition was not admissible because plaintiff was mentally incompetent to testify. At the time of the taking of the deposition, the plaintiff was undergoing hip treatment and had a progressive disease involving the hardening of her arteries.

"The trial court ruled the deposition admissible even though at the time of trial the court excluded plaintiff's oral testimony after examining her competency.

"Generally, a deposition is not admissible into evidence if the presence of the deponent nonparty witness can be attained at the trial, see Civil Rule 32. Nevertheless, a deposition can be admissible into evidence at trial if the absence of the deponent at the time of the trial is based upon sufficient grounds. If a deponent is within the jurisdiction and a prescribed distance from the place of the trial but cannot offer competent proof of his inability to attend trial, his deposition is rendered inadmissible. Old age and infirmity, illness, or some other reasonable excuse for his absence are generally sufficient. The general rule, however, is that the deposition of a witness will not be admitted when he has been called and examined at trial or can be examined absent an agreement or waiver.

"Under Major law, a person is competent to testify if, at the time, he understands the oath and can give a correct account of what he has seen and heard. Plaintiff was not competent to testify at trial, but was competent at the time the deposition was taken. The general rule is that a subsequent change in the deponent's competency may render the deposition admissible if, at the taking of the deposition, the competency of the deponent was adequately determined. In this case, the deposition was properly admitted at trial since the competency of the deponent was established in

the record of the deposition and by the trial judge at the time it was used."

Lauren v. Michaels, 284 Maj. 3d 164 (20XX-1): "The trial court properly ruled that the deposition of witness Rose was inadmissible.

"A deposition will not be admitted into evidence if the deponent's attendance could have been attained at trial. Proof which raises a reasonable presumption that the witness is outside the jurisdiction or proof of death is all that is needed. When any uncertainty as to the deponent's location exists, however, mere statements by the offeree or a returned subpoena is not enough to allow the deposition to be admitted. Plaintiffs in this case failed to provide objective evidence that witness Rose had left the jurisdiction. Affirmed."

In re Fife, 276 Maj. 3d 222 (20XX-3): "The State Bar found petitioner guilty of violating certain rules governing attorney conduct. Petitioner made a motion to exclude three witness depositions because they were not signed. Petitioner's motion was denied and the depositions were admitted. We reverse. There is no evidence that the witnesses waived signature. The depositions were therefore inadmissible."

8. Sanctions

Straight v. Ike, 280 Maj. 3d 8 (20XX-2): "Appellant appeals the trial court's order granting default judgment against him.

"Respondent Ike sent interrogatories to appellant Straight on September 1, 20XX-5, which Straight represented would be answered by December 1, 20XX-5. Between January 3, 20XX-3 and March 20XX-3 appellant made numerous representations that the interrogatories would be answered. In response to respondent's motion to compel filed in April 20XX-3, the trial court issued an order compelling appellant Straight to answer the interrogatories. Appellant ignored the order. Civil Rule 37 enumerates sanctions that are not exclusive but are flexible which may be applied in many varied forms at the court's discretion. The appropriate sanction is determined through analysis of the particular facts of the case grounded in the sound discretion of the trial court.

"A court should consider not only the prejudice to the discovering party but also the necessity to maintain the power of a court order and the deterrent effect of the sanction.

"Sanctions imposed by a court are only somewhat affected by a party's willingness or good faith attempt to comply with the discovery order. These are relevant in mitigating the sanction imposed but will not forgo application of a sanction altogether (unless the party cannot be culpable because of circumstances out of his control).

"Under Civil Rule 37 a court may deem established facts which a plaintiff cannot fairly prove because of the defendant's refusal to comply with the court's discovery order. Use of this sanction enables a court to carefully use its order to confront the specific information sought and wrongfully withheld so as to give the responding party due process. Consequently, a party may be deprived of at least one issue. The sanction is not limited, however, to one issue and so the court may find facts dispositive of an entire action and enter summary judgment.

"A court may use Civil Rule 37(b)(2)(B) to stop a party from presenting material into evidence that it did not bring in during discovery, or from presenting evidence backing up certain claims or defenses. A court also may issue an order striking out all or any part of a party's pleading if the party (or counsel) refuses to obey a discovery order or willfully fails to appear for the taking of his deposition upon proper notice. This sanction is warranted in such cases as where the defendant fails to answer interrogatories, fails to seek a protective order, or moves for an extension of time after the deadline is reached.

"A court may use preclusion of testimony as a sanction. This sanction can be used when a defendant refuses to answer deposition questions by asserting the self-incrimination privilege. Barring testimony is also appropriate where a party does not disclose a witness in response to a discovery request.

"A court has discretion to dismiss an action for failure to comply with a discovery order. Since this sanction is of last resort, it should be strictly construed by the court and a less drastic but as equally effective remedy should be possibly used. A dismissal is appropriate for deliberate, repeated, or persistent failures to answer interrogatories, for filing incomplete or evasive answers, or for intending to disregard further discovery orders.

"The sanction of default judgment is much the same as a dismissal and since it is an extreme

measure, it should be used only as a last resort.

This sanction is generally appropriate where a party (or counsel) has acted in bad faith in failing to comply with discovery rules or with court orders enforcing the rules.

"In this instance, the trial court did not abuse its discretion when it struck appellant Straight's answer and granted default judgment for amounts owing. Appellant unreasonably delayed responding and showed a calculated disregard of the Court Rules."

Rudolph v. Fibb, 281 Maj. 3d 53 (20XX-2): "Plaintiff is the surviving spouse, bringing this wrongful death action. She refused to be deposed prior to trial so as not to incriminate herself. Trial court held that it would prohibit plaintiff from testifying if she continued in her refusal to be deposed. The trial court's sanction is proper, even though plaintiff acted in good faith."