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Twisting the Purposes of Discovery: Expert Witnesses and the Deposition Dilemma

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I. INTRODUCTION

The Federal Rules of Civil Procedure (hereinafter the "Federal Rules") permit parties to civil actions in federal courts to discover the opinions and conclusions of any expert witness that a party-opponent expects to call as a witness at trial.[1] Federal rule 26 governs discovery of these experts and provides several different but integrated techniques for compelling disclosure of information,[2] including written interrogatories[3] and court ordered depositions.[4]

The provisions of rule 26(b)(4) resulted from a protracted debate by courts and commentators over the merits of permitting discovery of expert witnesses.[5] Federal rule 26(b)(4) strongly affirms the idea that adequate discovery of expert witnesses is essential to their effective cross-examination in today's complex and highly technical civil cases.[6]

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1. FED. R. CIV. P. 26(b)(4).
2. C. WRIGHT, LAW OF FEDERAL COURTS § 81, at 543 (4th ed. 1983).
3. *See* FED. R. CIV. P. 26(a) & 33.
4. *See id.* at 26(a) & 27-32. A 1941 study of pretrial discovery revealed that parties used oral depositions more than any other discovery device. *See* A. Stockman, Some Statistical Observations on the Operation of Discovery and Related Provisions of the Federal Rules of Civil Procedure 21 (1942) (unpublished study, Administrative Office of the U.S. Courts), *cited in* Note, *Dead Men Tell No Tales: Admissibility of Civil Depositions upon Failure of Cross-examination*, 65 VA. L. REV. 153, 154 n.11 (1979).
5. *See infra* notes 14-27 and accompanying text.
6. "Effective cross-examination of an expert witness requires advance preparation.

Parties to civil actions enjoy an absolute right to cross-examine witnesses at trial.[7] A party seeking discovery of a party-opponent's expert witness in preparation for cross-examination and rebuttal of the expert at trial, however, lacks sufficient preparation to cross-examine or rebut the expert's responses to discovery questions. An expert's testimony during a discovery deposition,[8] therefore, is not subject to true cross-examination but, nevertheless, still is potentially admissible at trial against the discovering party. This anomaly arises because rule 32(a)(3) permits any party to use the deposition of a witness "for any purpose" if the witness becomes unavailable[9] to testify at trial.[10] Thus, if a party to a civil action deposed an expert witness pursuant to rule 26(b)(4), and the expert subsequently became unavailable to testify at trial within the meaning of rule 32(a)(3), a federal district court judge, under the Federal Rules as they presently exist, probably would permit introduction of the deposition into evidence against the deposing party.[11] A party who desires to depose a party-opponent's expert witness in such cases faces the quandary of deposing the opponent's expert witness to prepare effectively for cross-examination and thereby risking that opposing counsel will use the deposition against him at trial.[12]

The system of discovery that the Federal Rules establish theoretically entitles all parties in civil actions, prior to commencement of trial, to disclosure of all relevant nonprivileged information in

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The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand." FED. R. CIV. P. 26(b)(4) advisory committee note.

7. *See, e.g.*, Alford v. United States, 282 U.S. 687, 691-92 (1931); United States v. Stoehr, 196 F.2d 276, 280 (3d Cir.), *cert. denied*, 344 U.S. 826 (1952); 4 B. JONES, JONES ON EVIDENCE § 25:1, at 106 (6th ed. 1972); 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (J. Chadbourn ed. 1974).

8. Although the Federal Rules do not distinguish between discovery and evidentiary depositions, recognizable practical differences distingnish them. *See infra* notes 125-28 and accompanying text.

9. See *infra* notes 44-86 and accompanying text for a discussion of the unavailability requirement in rule 32(a)(3).

10. FED. R. CIV. P. 32(a).

11. The problem of using discovery deposition testimony against a discovering party exists with depositions of all witnesses, but the arguments against permitting this technique are most compelling in the context of expert witness depositions.

12. A 1976 survey revealed that counsel deposes the opponent's expert in approximately 60% of the cases in which opposing counsel expects the expert to testify at trial. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, an Empirical Study and a Proposal*, 1977 U. ILL. L.F. 169, 175 (1977) [hereinafter cited as Graham, *Part Two*].

the possession of any person.[13] Thus, federal discovery rules should not force litigants to choose between failing to depose a party-opponent's expert witness and thereby preparing inadequately for trial, and deposing the expert witness and consequently risking that opposing counsel will use the deposition against him at trial without the benefit of cross-examination. Part II of this Note reviews common law disagreement over the appropriateness of expert witness discovery and the acceptance of the principle under the Federal Rules. Part III discusses the procedural mechanics of discovering an expert witness and demonstrates the potential for use of such a deposition against the discovering party. Part IV reviews the judicial history of the expert witness deposition problem and demonstrates that courts have ignored the policy reasons that favor remedying this procedural problem. Part V discusses the inequities that the expert witness deposition problem causes. It concludes that courts, by admitting discovery depositions of expert witnesses against the deposing party, not only have controverted the basic purposes of pretrial discovery, but also erroneously have eliminated the process of deposing the witness of a party-opponent as a pretrial discovery technique by effectively recharacterizing it as an extension of formal trial proceedings that presume the deposing party engaged in full pretrial preparation. Part V then explores several possible methods courts and rulemakers could employ to solve this problem, including an amendment to rule 26.

II. LEGAL HISTORY CONCERNING DISCOVERY OF EXPERT WITNESSES

A. *Common Law Disagreement Over the Appropriateness of Discovering Expert Witnesses*

Before adoption of the 1970 amendments to the Federal Rules, most courts did not permit parties to discover information from

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13. C. WRIGHT, *supra* note 2, at 540. Professor Charles Wright described the scope of discovery that Federal Rule 26 authorizes as follows:

> The scope of discovery contemplated by Rule 26 is extremely broad. "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." Discovery may extend to matters relating to the claim or defense of any party, unlike the former equity practice that limited discovery to matters in support of the proponent's case. It is no objection that the examining party already knows the facts as to which he seeks discovery, since one of the purposes of discovery is to ascertain the position of the adverse party on the controverted issues.

Id. at 543-44 & nn.27-30 (quoting Hickman v. Taylor, 329 U.S. 495, 507 (1947)) (footnotes omitted).

experts whom party-opponents hired as witnesses or consultants.[14] These courts characterized expert information as privileged and articulated several reasons for this characterization. First, some courts stated that an expert's status as an expert rendered the information in his possession privileged.[15] Second, some courts reasoned that expert information fell within the scope of the attorney-client privilege.[16] Third, some courts felt that expert information constituted attorney work product and protected it with a qualified privilege.[17] Last, some courts prohibited discovery simply because they felt that allowing a party to obtain free access to information for which a party-opponent had paid by hiring an expert was unfair.[18] Courts that did allow discovery of expert witnesses frequently restricted it to certain circumstances or limited the amount or type of disclosure a discovering party could obtain. Some courts, for example, permitted parties to discover the information that formed the basis of an expert's conclusions, but not the conclusions themselves.[19] Other courts allowed parties to discover only expert employees of a party-opponent.[20] Although

14. *See* Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962); Long, *Discovery and Experts Under the Federal Rules of Civil Procedure*, 38 F.R.D. 111, 116-119 (1966).

15. *See* American Oil Co. v. Pennsylvania Petroleum Prod. Co., 23 F.R.D. 680, 685 (D.R.I. 1959); Walsh v. Reynolds Metals Co., 15 F.R.D. 376, 378-79 (D.N.J. 1954); Lewis v. United Air Lines Corp., 32 F. Supp. 21, 23 (W.D. Pa. 1940).

16. Some courts have applied the attorney-client privilege not only to communications between expert witnesses and attorneys, but also to the expert's knowledge. *See* Friedenthal, *supra* note 14, at 462-69. One line of decisions based this application of the attorney-client privilege on the theory that the expert was acting as a mere "conduit," relaying and interpreting the client's information to the attorney. *Id.; see* City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951); Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532 (1931); Rust v. Roherts, 171 Cal. App. 2d 772, 341 P.2d 46 (3d Dist. Ct. App. 1959). Another court characterized an expert as an assistant to an attorney and, therefore, held that the attorney-client privilege protected the expert from being subject to questioning at a deposition. Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 684, 686 (D. Mass. 1947).

17. The attorney work product privilege prohibits litigants from discovering tbe "written statements and mental impressions of opposing counsel" absent a showing of necessity. *See* Hickman v. Taylor, 329 U.S. 495, 509 (1947). Some courts have extended this privilege to information that an attorney obtains from an expert, reasoning that this information becomes protected once it reaches the hands of an attorney. *See, e.g.*, United Air Lines, Inc. v. United States, 26 F.R.D. 213, 218 (D. Del. 1960); United States v. Certain Parcels of Land, 25 F.R.D. 192, 193 (N.D. Cal. 1959); White Pine Copper Co. v. Continental Ins. Co., 166 F. Supp. 148, 162-63 (W.D. Micb. 1958).

18. *See* Friedenthal, *supra* note 14, at 479-88. *See also* United States v. 23.76 Acres of Land, 32 F.R.D. 593, 596-97 (D. Md. 1963) (suggesting that the court can alleviate any unfairness in discovery costs by ordering the discovering party to pay).

19. Long, *supra* note 14, at 118.

20. *Id.* at 119.

courts treated discovery of expert witnesses inconsistently,[21] courts that followed the predominant judicial trend either completely restricted discovery of experts or placed severe limitations upon it.[22]

The primary factor that motivated courts to prohibit or restrict discovery of expert witnesses was the fear that it would promote lazy advocacy by allowing attorneys to rely on the work of opposing counsel to help them prepare their cases.[23] By imposing stringent limitations on discovery of expert witnesses, courts left attorneys inadequately prepared to face modern cases that concern complex, highly technical matters, and to counter the increased use of expert testimony that these cases often demand.[24] Attorneys, therefore, increasingly faced the prospect of cross-examining expert witnesses at trial without previously obtaining the information necessary to develop an effective strategy of rebuttal.[25] This situation totally subverted one of the main purposes of discovery: to "make a trial less a game of blind man's buff [sic] and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[26]

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21. *See id.* at 117-19.

22. Smith v. Ford Motor Co., 626 F.2d 784, 792 (10th Cir. 1980), *cert. denied*, 450 U.S. 918 (1981).

23. Friedenthal, *supra* note 14, at 488. The Advisory Committee for the Federal Rules, recognizing that this concern was the basis for the restrictions on discovery of expert witnesses, stated that "[p]ast judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation." FED. R. CIV. P. 26(b)(4) advisory committee note.

24. Cases that concern complex subject matter often create a "battle of the experts" scenario. *See* Friedenthal, *supra* note 14; Getzoff, *Direct and Cross-examination of an Expert—Some Suggestions Concerning "How to Do It"*, 22 TRIAL LAW. GUIDE 267, 267 (1978). In these cases, expert testimony often determines which party ultimately will prevail. FED. R. CIV. P. 26(b)(4) advisory committee note; *see* United States v. Nysco Laboratories, Inc., 26 F.R.D. 159, 162 (E.D.N.Y. 1960).

25. In United States v. 23.76 Acres of Land, 32 F.R.D. 593 (D. Md. 1963), the court stated "that an expert is the most difficult witness to cross-examine, particularly if one is unaware until trial of the substance of his testimony." *Id.* at 596.

26. United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958). In light of this disturbing trend, Professor Jack Friedenthal, *see* Friedenthal, *supra* note 14, and others, *see* Long, *supra* note 14, posed vehement arguments for reform of laws governing discovery of expert witnesses. In addition, some courts became more receptive to the idea of discovering expert witnesses, and several opinions revealed greater judicial awareness of the relationship between pretrial discovery and effective cross-examination and rebuttal at trial. *See* United States v. Meyer, 398 F.2d 66 (9th Cir. 1968); Franks v. National Dairy Prod. Corp., 41 F.R.D. 234 (W.D. Texas 1966); United States v. 23.76 Acres of Land, 32 F.R.D. 593 (D. Md. 1963). The increasing judicial awareness of the positive need for expert discovery, however, failed to rectify inconsistent treatment of the expert witness issue among jurisdictions. *See infra* notes 87-114 and accompanying text.

B. *Enactment of Federal Rule 26(b)(4): Discovery of Expert Witnesses Permitted in Federal Courts*

Congress responded to increasing judicial awareness of the need for discovery of expert witnesses by adopting rule 26(b)(4) as part of the 1970 amendment to the Federal Rules.[27] In addition to liberalizing discovery of expert witnesses, rule 26(b)(4) also contains provisions that prevent discovering parties from enjoying unfair benefits in the discovery process. For example, rule 26(b)(4) grants courts discretion to impose limited restrictions on the scope of discovery[28] and to order the discovering party to pay the party-opponent "a fair portion of the fees and expenses" that the party-opponent reasonably incurs "in obtaining facts and opinions from the expert."[29] The rule also limits discovery, except in special circumstances,[30] to expert witnesses the party-opponent expects to call at trial.[31] Moreover, discovering parties may depose expert witnesses only by securing a court order.[32] Thus, rule 26(b)(4)'s time limitations, which allow depositions of expert witnesses only after the party-opponent designates such witnesses for trial, coupled with the power it gives judges to limit the scope of disclosure and to require the discovering party to share in paying the expert witness' fees, effectively eliminates the danger of discovering parties benefiting unfairly from a party-opponent's trial preparation.

III. Deposing Expert Witnesses: Hidden Danger For Deposing Parties in Federal Rule 32(a)(3)

Although rulemakers drafted rule 26(b)(4) to keep parties who sought discovery of expert witnesses from henefiting unfairly, they ironically overlooked the possibility that courts, pursuant to rule 32(a)(3), would bestow inequitable rewards upon discovered parties. Rule 32(a)(3) provides that the "deposition of a witness . . . may be used by any party for any purpose . . . " if certain conditions arise—primarily unavailability of a witness to testify at

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27. Fed. R. Civ. P. 26(b)(4) advisory committee note.

28. Fed. R. Civ. P. 26(b)(4)(A).

29. *Id.* at 26(b)(4)(C).

30. Rule 26(b)(4)(B) permits discovery of experts that a party-opponent does not expect to call at trial 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." *Id.* at 26(b)(4)(B).

31. *Id.* at 26(b)(4).

32. *Id.* at 26(b)(4)(A).

trial.[33] Rule 32(a)(3) does not "evince a distinction as to admissibility at trial between a deposition taken solely for purposes of discovery and one taken for use at trial . . . ";[34] nor does a review of its legislative history reveal such a distinction.[35] If a party deposes a party-opponent's expert witness solely for discovery purposes in preparation for trial, therefore, the party-opponent can submit the deposition into evidence against the deposing party under rule 32(a) if the expert witness becomes unavailable to testify.[36] Consequently, the deposed party could admit into evidence the deposition of his unavailable expert's opinions and conclusions without subjecting them to in-court cross-examination by the deposing party.[37]

A. The Process of Discovering Expert Witnesses and the Deposition Problem

A party who anticipates that a party-opponent plans to use an expert witness at trial typically submits an interrogatory to that party requiring him to identify any experts which he expects to call at trial and to state the subject matter and summarize the substance of the expert's anticipated testimony.[38] The responses to the interrogatories typically are not adequate to help the requesting party prepare an effective cross-examination.[39] Thus, the requesting party, by order[40] or by agreement with the party-opponent, usually deposes the expert identified in the party-opponent's interrogatory responses. Although the parties may specify whether the deposition is for discovery purposes only, for use at trial, or for unlimited purposes,[41] these designations do not seem to affect the operation of rule 32.[42] The Federal Rules do not require absolutely that a party who identified an expert as a trial witness produce the witness at trial because uncontrollable circumstances often prevent

33. *Id.* at 32(a)(3).

34. Rosenthal v. Peoples Cab Co., 26 F.R.D. 116, 117 (W.D. Pa. 1960).

35. *See* United States v. International Business Machs. Corp., 90 F.R.D. 377, 381 n.7 (S.D.N.Y. 1981); 4A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 30.50, at 30-38 (2d ed. 1981).

36. *See infra* notes 39-86 and accompanying text.

37. *See supra* notes 7-8 and accompanying text.

38. *See* FED. R. CIV. P. 26(b)(4)(A)(i).

39. Professor Graham's survey suggests that most practitioners find the interrogatory an unsatisfactory method of providing trial preparation. Graham, *Part Two, supra* note 12, at 172.

40. *See* FED. R. CIV. P. 26(b)(4)(A)(ii).

41. *See, e.g.*, Inland Bonding Co. v. Mainland Nat'l Bank, 3 F.R.D. 438 (D.N.J. 1944).

42. *See infra* notes 87-114 and accompanying text.

the expert's attendance.[43] When such circumstances arise, therefore, the party who hired the expert can invoke rule 32(a)(3) and introduce into evidence the deposition that opposing counsel took for discovery purposes.

B. The Unavailability Requirement of Rule 32(a)(3)

The essential requirement under rule 32(a)(3) for admitting the deposition of a witness into evidence is unavailability of the deposed witness for testimony at trial. The unavailability requirements of rule 32(a)(3) reflect the traditional judical preference for live testimony over recorded testimony[44] by permitting the admission of deposition evidence only when appearance of the witness is impossible or impractical, or when "exceptional circumstances" render admission of the deposition desirable.[45] The unavailability provisions of rule 32(a)(3) provide insight into the degree that the rule emphasizes the preference for live testimony, and illustrate the ways an expert deposition can become admissible at trial.

1. Rule 32(a)(3)(A): Death of the Deposed Witness

Rule 32(a)(3)(A) permits parties to use depositions for any purpose if the court finds that the deposed witness is dead. Admission of depositions under this provision has provoked very little controversy[46] because unavailability due to death is easy to demon-

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43. *See* FED. R. CIV. P. 32(a)(3).

44. *See, e.g.*, Lamb v. Globe Seaways, Inc., 516 F.2d 1352 (2d Cir. 1975); Salsman v. Witt, 466 F.2d 76 (10th Cir. 1972). The traditional judicial preference for live testimony derives from the desire of courts to afford factfinders the opportunity to observe the demeanor of witnesses during testimony. *See* Arnstein v. Porter, 154 F.2d 464, 470 (2d Cir. 1946) (stating that "the demeanor of witnesses is recognized as a highly useful, even if not an infallible, method of ascertaining the truth and accuracy of their narratives."); Napier v. Bossard, 102 F.2d 467, 468-69 (2d Cir. 1939) (in which Judge Learned Hand stated that "[t]he deposition has always been, and still is, treated as a substitute, . . . not to be used when the original is at hand" because the party against whom the deposition is used is denied the advantage of having the witness appear in front of the jury.). Federal Rules 32(a)(3)(E) and 43(a) expressly recognize the importance of allowing factfinders to observe the demeanor of witnesses. Rule 32(a)(3)(E), which governs the use of depositions in trial proceedings, emphasizes "the importance of presenting the testimony of witnesses orally in open court." Rule 43(a), which concerns the form and admissibility of evidence at trial, provides that "[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided . . . by these rules."

45. FED. R. CIV. P. 32(a)(3)(E).

46. Cases in which the deposed witnesses died before the deposition was complete, however, present a problem analogous to the principle issue in this Note. *See* cases cited *infra* note 87. For a full discussion of these cases, see Note, *supra* note 4.

strate and seldom is subject to abuse.[47] As with all other forms of unavailability under rule 32(a)(3), the party seeking to admit the deposition into evidence bears the burden of proving that the witness is dead.[48]

2. Rule 32(a)(3)(B): Absence of the Deposed Witness

Rule 32(a)(3)(B), which permits parties to introduce a deposition into evidence when the witness is more than one hundred miles from the place of trial or hearing, has spawned more litigation than any other unavailability provision and probably is the most frequently abused criteria in the area of expert testimony. Many courts have interpreted the 100 mile rule, and most have construed it liberally.[49] The party offering the deposition into evidence bears the burden of establishing that the deponent meets the distance requirements for unavailability.[50] This burden of proof, however, is not difficult to overcome. In *Ikerd v Lapworth*,[51] for example, the United States Court of Appeals for the Seventh Circuit held that the trial court could judicially notice that the witness' place of residence was more than 100 miles from the place of trial for purposes of admitting his deposition.[52] More recently in *SCM Corp. v. Xerox Corp.*,[53] however, the Federal District Court of Connecticut adopted a narrower view of the 100 mile rule. The court held that it would not admit a deposition into evidence if the deposed witness either resided or regularly worked within 100 miles of the place of trial "when the deposition [was] offered [in evidence], or at a time during the proponent's case when a trial subpoena could have been served" upon the deposed witness.[54]

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47. The death of deposed witness provision in rule 32(a)(3) is not subject to abuse presumably because few parties would procure the death of a witness so that they could use a deposition instead of live testimony.

48. *See, e.g.*, National Screw & Mfg. Co. v. Voi-Shan Indus., Inc., 347 F.2d 1 (9th Cir. 1965) (holding that the lower court properly excluded a deposition from evidence when a party offered it pursuant to former rule 26 without showing the existence of circumstances making the rule applicable).

49. *See infra* notes 51-54 and accompanying text.

50. *See, e.g.*, Transcontinental Energy Corp. v. Pacific Energy Resources, 683 F.2d 326, 330 (9th Cir. 1982).

51. 435 F.2d 197 (7th Cir. 1970).

52. *Id.* at 205. *See also* Frederick v. Yellow Cab Co., 200 F.2d 483 (3d Cir. 1952) (court admitted deposition upon plaintiff's representation that the witness was out of town).

53. 77 F.R.D. 16 (D. Conn. 1977).

54. *Id.* at 18. *See* Hartman v. United States, 538 F.2d 1336, 1345 (8th Cir. 1976); Ikerd v. Lapworth, 435 F.2d at 205. *But see* United States v. International Business Machs. Corp., 90 F.R.D. 377, 383 (S.D.N.Y. 1981).

The 100 mile requirement in rule 32(a)(3)(B) contains, as the sole means of controlling abuse, the qualification that a deposition is inadmissible when the party offering the deposition into evidence procures the witness' absence.[55] Courts, however, have been very reluctant to find that a party procured the absence of a deposed witness. Courts carefully have distinguished a party's act of procuring a witness' absence from the failure to facilitate his presence.[56] To exclude a deposition under this provision, a party apparently must meet the difficult burden of showing that the party who sought admission of the deposition actively tried to keep the deposed witness out of the courtroom.[57]

Courts arguably should scrutinize attempted admissions of expert witness depositions more closely under the 100 mile requirement of rule 32(a)(3)(B) than attempted admissions of depositions of nonexpert witnesses. Today, parties frequently hire expert witnesses who live and work more than 100 miles from the place of trial.[58] These experts typically receive substantial compensation for consulting, testifying, and travel expenses.[59] Ordinary witnesses, however, usually receive only nominal statutory compensation because they accidently observed a particular event, not because they possess any valuable expertise.[60] Thus, because experts are very costly and often live outside the 100 mile zone, parties who hire them are more likely to abuse the 100 mile requirement by not paying the expert to return for trial than parties who seek attendance of nonexpert witnesses.[61] Nevertheless, most authorities treat expert and nonexpert witnesses identically under the 100 mile requirement for purposes of determining their unavailability and whether their depositions are admissible.[62]

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55. FED. R. CIV. P. 32(a)(3)(B).

56. *See* Houser v. Snap-On Tools Corp., 202 F. Supp. 181, 189 (D. Md. 1962); *see also* United States v. International Business Machs. Corp., 90 F.R.D. at 383 n.10 (*citing Houser* 202 F. Supp. at 189); Richmond v. Brooks, 227 F.2d 490, 493 (2d Cir. 1955) (court held that party did not procure his own absence); M.S.D. Inc. v. United States, 434 F. Supp. 85, 91 n.16 (N.D. Ohio 1977).

57. Houser v. Snap-On Tools Corp., 202 F. Supp. at 189.

58. For a nationwide list of expert witness sources, see Kirk, *Locating Scientific and Technical Experts*, in 2 AM. JUR. TRIALS 293 (1964).

59. *See* Strodel, *The Expert Witness: The Cornerstone of the Medical Negligence Case*, TRIAL No. 6, June 1982, at 37, 38.

60. Carter-Wallace, Inc. v. Otte, 474 F.2d 529, 536 (2d Cir. 1972), *cert. denied*, 412 U.S. 929 (1973).

61. *See supra* notes 58 & 59 and accompanying text.

62. *See infra* notes 97-113 and accompanying text.

3. Rule 32(a)(3)(C): Age, Illness, Infirmity, and Imprisonment of the Deposed Witness

Rule 32(a)(3)(C) permits courts to admit a witness' deposition if "the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment."[63] Again, the party seeking admission of the deposition bears a relatively light burden of proving that one of these factors prevents the witness' attendance at trial.[64] If a party can use this unavailability provision to admit a witness' deposition into evidence, other unavailability provisions such as the 100 mile and exceptional circumstances exceptions also may be available to the party.[65] If a witness is in prison, a party may seek to exclude the deposition by moving the court to use its discretion[66] to issue a writ of habeas corpus ad testificandum, which compels the prisoner to appear and testify at trial.[67]

4. Rule 32(a)(3)(D): Inability to Procure Attendance of the Deposed Witness by Subpoena

If a party is unable to compel a deposed witness' attendance at trial by subpoena, the witness' deposition is admissible into evidence under rule 32(a)(3)(D).[68] This provision, together with the 100 mile provision in rule 32(a)(3)(B), presents uncertainty about whether a party who shows that a deposed witness is outside the 100 mile zone also must prove that he unsuccessfully tried to subpoena the witness. Rule 45(e)[69] suggests that witnesses who are more than 100 miles from the place of trial are not subject to subpoena. This simple answer, however, overlooks at least two situations that possibly could arise under the Federal Rules. First, rule 45(e) subjects witnesses to service of a subpoena at any place within the judicial district. Some judicial districts, because of their

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63. FED. R. CIV. P. 32(a)(3)(C).

64. *See supra* notes 48 & 50 and accompanying text.

65. *See* Scarfarotti v. Bache & Co., 438 F. Supp. 199, 202 n.3 (S.D.N.Y. 1977) (witness was ill at time of trial, and court admitted deposition, citing 32(a)(3)(B) and (E)).

66. *See* Murray v. United States, 138 F.2d 94, 97 (8th Cir. 1943).

67. On the other hand, a court need not let an imprisoned plaintiff come to trial when his deposition is available. *See* Ball v. Woods, 402 F. Supp. 803 (N.D. Ala. 1975), *aff'd without op.*, Ball v. Shamblin, 529 F.2d 520 (5th Cir.), *cert. denied*, 426 U.S. 940 (1976), *aff'd without op.*, Ball v. Dwyer, 538 F.2d 897 (5th Cir. 1976), *modified*, Ball v. Woods, 541 F.2d 279 (5th Cir. 1976).

68. FED. R. CIV. P. 32(a)(3)(D).

69. Rule 45(e) provides in pertiment part: "A subpoena . . . may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing . . . ." *Id.* at 45(e).

geographical size, require witnesses to travel more than 100 miles from their place of residence to testify.[70] Second, in certain statutory causes of action, federal courts have nationwide subpoena power under rule 45(e)(1).[71] In cases in which either of these two situations has arisen parties unsuccessfully have argued that the 100 mile provision which permits admissibility of depositions is inapplicable when the deposed witness is subject to a court's subpoena power.[72] Federal courts, however, currently hold that parties may admit depositions of witnesses into evidence under the 100 mile requirement without demonstrating that they attempted to subpoena the witness.[73] Thus, the significance of the subpoena requirement in determining whether a deposed witness is unavailable is questionable, and very few cases construing the subpoena requirement have arisen.

The question whether a party can subpoena an expert witness to testify when his only connection with the case is that he consulted with one of the parties has gained considerable attention. If a party cannot compel such testimony, then any time he wishes to introduce the deposition of an expert witness the party simply must motion the court to issue a subpoena and, if the witness fails to respond, offer the deposition into evidence under rule 32(a)(3)(D). The United States Supreme Court stated in *Branzburg v. Hayes*[74] that " 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitu-

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70. SCM Corp. v. Xerox Corp., 76 F.R.D. 214, 215 (D. Conn. 1977).

71. *See, e.g.*, 15 U.S.C. § 23 (1976) (nationwide subpoena power in antitrust suits when the United States is plaintiff). The note on amendments to rule 45(e)(1), which discusses justifications for giving federal courts nationwide subpoena power, states the following:

> The last clause of the second sentence in Rule 45(e)(1) was added in 1980. Previously a person could not be subject to a subpoena served on him more than 100 miles from the place of the hearing even though the place of service and the site of the hearing were within the same state. It was felt, however, that state rules of service would adequately reflect the degree of hardship in travelling more than 100 miles within the state, and, therefore, there was no justification for greater federal restrictions.

72. United States v. International Business Machs. Corp., 90 F.R.D. 377, 379-80 (S.D.N.Y. 1981); SCM Corp. v. Xerox Corp., 77 F.R.D. 16, 17 n.2 (D. Conn. 1977); Houser v. Snap-On Tools, Inc., 202 F. Supp. 181, 189 (D. Md. 1962). *But see* United States v. Empire Gas Corp., 393 F. Supp. 903 (W.D. Mo. 1975), *aff'd*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977). In *Empire Gas* the court, in a federal antitrust action, refused to admit into evidence depositions that the government offered because the government did not attempt to show unavailability of deposed witnesses. *Id.* at 912. The court remarked that the government acted "in the face of its nationwide subpoena power," and, thus, suggested that the government should have attempted to subpoena the witnesses. *Id.*

73. *See supra* authorities cited in note 72.

74. 408 U.S. 665 (1972).

tional, common-law, or statutory privilege."[75] Experts under subpoena, however, do not enjoy a general privilege to refuse to testify concerning their expert knowledge.[76] Rather, courts generally will subpoena and compel an expert witness to testify concerning any previously formed expert opinions.[77] Most courts, however, probably would not force experts to testify against their will and, considering the value of an expert's time, would not subpoena an expert unless circumstances warranted otherwise.[78]

5. Rule 32(a)(3)(E): Admissibility under Exceptional Circumstances

Rule 32(a)(3)(E) is a catch-all provision that permits courts to admit the deposition of a witness because of "exceptional circumstances."[79] Unlike other unavailability provisions of rule 32(a)(3) which require the deposed witness to be physically unavailable to testify at trial, the exceptional circumstances provision only requires the party offering the deposition into evidence to show the court that forcing a witness to testify at trial would be unfair. This burden seems more difficult because proving unfairness necessitates that parties satisfy more than simply factual tests which the other provisions in rule 32(a)(3)(A)-(D) establish.[80]

In *United States v. Rollins*,[81] for example, the federal government charged the appellee with selling heroin to an undercover agent. The government tried to avoid producing the undercover agent as a witness at trial. The government alleged "exceptional circumstances" for introducing the agent's deposition into evidence because the agent himself was under investigation, in an unrelated case, for permitting an informant to take some heroin that the agent had purchased.[82] The government was unwilling to risk the serious danger that cross-examination of the agent unduly would have focused the investigation on the agent and caused harm to

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75. *Id.* at 688 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

76. Kaufman v. Edelstein, 539 F.2d 811, 820 (2d Cir. 1976).

77. *See* Carter-Wallace, Inc. v. Otte, 474 F.2d 529, 536 (2d Cir. 1972), *cert. denied*, 412 U.S. 929 (1973).

78. *See* Kaufman v. Edelstein, 539 F.2d at 821. Parties that face the problem of having their discovery deposition of an expert witness used against them at trial should try to compel the expert to testify by moving the court to subpoena the expert.

79. FED. R. CIV. P. 32(a)(3)(E).

80. *See infra* notes 81-85 and accompanying text.

81. 487 F.2d 409 (2d Cir. 1973).

82. *Id.* at 411.

the agent's reputation.[83] The Second Circuit held that the agent was not unavailable within the meaning of rule 32(a)(3)(E)'s exceptional circumstances provision and thus, refused to admit the deposition.[84] The Second Circuit stated that a party could not argue "that a deposition would be usable if the witness were alive and well within the jurisdiction and subject to subpoena, simply because the party calling him wanted to preserve his identity or wished not to expose him to unfair cross-examination."[85] The *Rollins* decision suggests that the exceptional circumstances provision in rule 32(a)(3)(E) seldom will provide an avenue for parties to admit depositions of expert witnesses into evidence against the deposing party. Moreover, the language of rule 32(a)(3)(E), which contains the only statement in rule 32 that articulates a clear preference for live testimony over deposition evidence,[86] supports this suggested proposition. Thus, parties who wish to introduce depositions of witnesses into evidence probably will have to rely primarily on the provisions in rule 32(a)(3)(A)-(D) to achieve this objective.

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83. *Id.*

84. *Id.* at 412.

85. *Id. See also* Congoleum Industries, Inc. v. Armstrong Cork Co., 319 F. Supp. 714, 716 (E.D. Pa. 1970), a patent infringement suit, in which the court denied defendant's request to use at trial depositions of experts and other witnesses who would have observed the defendant conducting *inter partes* tests on certain commercial material it produced if the court had granted the defendant permission to conduct the tests. The defendant argued, under the exceptional circumstances provision of rule 32(a)(3)(E), that because its commercial equipment was too large to bring into and test in court, it could only give the court a present sense impression of the test procedures by taking depositions of the test witnesses while conducting the tests and introducing the depositions into evidence at trial. *Id.* In denying the defendant's request to use the depositions at trial, the court reasoned as follows:

> Witnesses frequently, in fact almost always, testify to impressions and observations of events which take place outside the courtroom. The court must regularly make its decision from testimony concerning technical matters based on observations of events occurring outside of the courtroom. This is hardly an "exceptional circumstance". There is therefore no need to reduce defendant's experts' testimony to depositions before trial.

Id. But see SCM Corp. v. Xerox Corp., 76 F.R.D. 214, 216 n.2 (D. Conn. 1977) (in which the court stated that the length of an antitrust suit was an exceptional circumstance that justified using the deposition of a witness at trial rather than compelling the witness to testify in court about "relatively non-controversial matters as to which the opportunity to assess credibility by observing the witness is not important.")

86. Rule 32(a)(3)(E) requires courts to give "due regard to the importance of presenting the testimony of witnesses orally in open court . . . ." FED. R. CIV. P. 32(a)(3)(E).

IV. JUDICIAL PERCEPTIONS OF THE WITNESS DEPOSITION PROBLEM

Courts have expressed varying degrees of sensitivity for the arguments of parties who challenge the propriety of admitting depositions of witnesses into evidence against a deposing party. In several cases parties argued that allowing party-opponents to use depositions at trial denied them their right to cross-examine the unavailable witness.[87] Despite such arguments, courts universally have admitted these depositions into evidence while offering aggrieved deposing parties little or no protection from the inequities that resulted from these decisions.[88]

In *Rosenthal v. Peoples Cab Co.*,[89] the Federal District Court for the Western District of Pennsylvania recognized the potential unfairness of admitting depositions of witnesses into evidence. The plaintiff in *Rosenthal* deposed the driver of defendant's taxicab solely for purposes of discovery.[90] The witness later died and defendant offered the deposition into evidence at the trial under rule 26(d), the predecessor to rule 32.[91] Plaintiff moved to exclude the deposition, arguing that he deposed the taxicab driver only for discovery and that his counsel had no opportunity to cross-examine the driver with leading questions because the witness was not "hostile or recalcitrant."[92] The court admitted the deposition despite plaintiff's arguments by reasoning that it did not have the power to read a nonexistent restriction into rule 26(d).[93] In recognition of defendant's inability to cross-examine the taxicab driver, however, the court admitted the deposition subject to "cautionary

87. *See infra* notes 89-113. A similar problem occurs concerning the admissibility of a deposition of a witness at trial when the witness dies before the deposition is complete. In these cases, parties have argued that the lack of an opportunity to cross-examine the witness before he died should foreclose admission of the deposition. *See, e.g.*, Derewecki v. Pennsylvania R.R. Co., 353 F.2d 436, 440 (3d Cir. 1965); Continental Can Co. v. Crown Cork & Seal, Inc., 39 F.R.D. 354, 356 (E.D. Pa. 1965); Inland Bonding Co. v. Mainland National Bank, 3 F.R.D. 438, 439 (D.N.J. 1944). In each case, the court admitted the deposition by finding either that the objecting party consented to the omission of cross-examination or by holding that the value of the evidence outweighed the value of cross-examination. *See* Note, *supra* note 4, at 159-71.

88. *See infra* notes 89-114 and accompanying text.

89. 26 F.R.D. 116 (W.D. Pa. 1960).

90. *Id.* at 117.

91. As part of a general restructuring of discovery rules in 1970, the Federal Rules Advisory Committee moved the portions of 26(d)(3) concerning use of depositions at trial to rule 32(a)(3)(A). Note, *supra* note 4, at 155 n.17.

92. *Rosenthal*, 26 F.R.D. at 117. Ordinarily, counsel may not employ leading questions on direct examination except when witness appears hostile. *See, e.g.*, W. RICHARDSON, RICHARDSON ON EVIDENCE § 483 (J. Prince ed. 1973).

93. *Rosenthal*, 26 F.R.D. at 117.

instructions . . . and such observations as the circumstance may require . . . ."[94] Thus, the *Rosenthal* court recognized the unfairness inherent in admitting discovery depositions of witnesses who have not undergone true cross-examination.[95] The court, however, felt that the silence of the Federal Rules on this issue constrained it and implicitly held that cautionary instructions were an adequate protection against any unfairness to the discovering party.[96]

In *Wright Root Beer Co. v. Dr. Pepper Co.*,[97] however, the United States Court of Appeals for the Fifth Circuit expressed little concern for the plaintiff's argument that the court should not admit the deposition of an inadequately cross-examined witness. Defendant Dr. Pepper, upon notice to plaintiff Wright, had taken the deposition of a witness whose testimony was crucial to Dr. Pepper's case.[98] The witness died prior to trial and Dr. Pepper offered the deposition in evidence.[99] Plaintiff argued that although it had cross-examined the witness during the deposition, it had not done so vigorously because it felt that the deposition was to serve only discovery purposes.[100] The trial court admitted the deposition, but on several occasions told the jury that it could give less weight to the deposition than to live testimony which a party would have subjected to in-depth cross-examination.[101] On appeal, the Fifth Circuit held that giving such instructions was reversible error.[102] The court stated that under rule 26(d)(3),[103] "as a matter of right, a party may introduce the deposition of a deceased witness with no

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94. *Id.* at 118.

95. *See infra* notes 115-23 and accompanying text.

96. *Rosenthal*, 26 F.R.D. at 118.

97. 414 F.2d 887 (5th Cir. 1969).

98. *Id.* at 889.

99. *Id.*

100. *Id.*

101. *Id.* at 889-90. When Dr. Pepper objected to the court's cautionary instructions, the trial judge said:

> I think it was proper to point out to the jury all of the circumstances that might be attended at the taking of a deposition for discovery purposes, versus a deposition for perpetuation of testimony. *Even with the presence of opposing counsel*, so forth, certainly at a deposition for discovery, it's not unusual that you would not go into an in depth cross-examination that you would, where you are going to perpetuate the testimony. I think the jury was sufficiently charged on the point. I may not have mentioned specifically, I cannot remember, now, that definitely counsel for both parties were present.

Id. at 889-90 (emphasis added).

102. *Id.* at 890-91.

103. Old rule 26(d)(3) was the predecessor to rule 32(a)(3). *See supra* note 91.

strings attached."[104] The court reasoned that Wright's counsel purposefully chose to limit his cross-examination of the witness at the deposition and should have anticipated unexpected occurrences, "including the necessity for using depositions when the deponent has met an untimely death before trial."[105] The court noted that Wright failed to show that its failure to cross-examine the witness during the deposition, as it had a right to do, prejudiced it at trial.[106] In addition, the court stated that Wright did not prove that it could have obtained any evidence during cross-examination that would have impeached the witness' testimony.[107] Thus, unlike the district court in *Rosenthal*, the Fifth Circuit held that a party who fails to cross-examine a witness completely during a discovery deposition has no right to cautionary instructions when a party-opponent seeks to admit the deposition at trial.[108]

The District Court for the Southern District of New York rendered the most recent decision on the expert witness deposition problem in *United States v. International Business Machines Corp. (IBM)*.[109] In *IBM* the government argued that it deposed several prospective IBM witnesses purely for discovery purposes to prepare for cross-examination.[110] Moreover, the government argued that the court should not permit IBM to use the depositions against it at trial because rule 32(a)(3)(B) did not contemplate admission of discovery depositions.[111] The court, however, stated that rule 32 does not distinguish between depositions for discovery purposes and those for use at trial.[112] The court admitted the government's deposition into evidence, reasoning that "admission of un-

104. Wright Root Beer Co. v. Dr. Pepper Co., 414 F.2d at 890.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 890-91. Eleven years later, the Fifth Circuit in Savoie v. LaFourche Boat Rentals, Inc., 627 F.2d 722 (5th Cir. 1980), again demonstrated its unwillingness to go beyond the express language of rule 32(a)(3) by admitting the deposition of a witness against the deposing party. In *Savoie* the defendant had deposed a witness who was outside the United States during the trial and argued that admission of the deposition against it would act as a disincentive for parties in future litigation to prepare properly for trial by taking discovery depositions. *Id.* at 724. The Fifth Circuit, in a per curiam opinion, held that the language of rule 32(a)(3) foreclosed this type of argument, *id.*, and admitted the deposition under the relevant provision of rule 32(a)(3)(B). *Id.*

109. 90 F.R.D. 377 (S.D.N.Y. 1981).

110. *Id.* at 381.

111. *Id.*

112. *Id.* at 381. The court noted that the 1970 revisions to the Federal Rules removed language from the Rules that distinguished between depositions purely for discovery purposes and those for use at trial. The court perceived that this revision extinguished any

favorable deposition records was a risk the government assumed when it chose to limit its questioning."[113]

The courts that have addressed the witness deposition problem increasingly have been unwilling to consider seriously the potential prejudice to the party against whom the court admits the deposition. These courts apparently have embraced the idea that parties who fail to conduct full cross-examinations during depositions assume the risk of having depositions of subsequently unavailable witnesses used against them at trial. This theory fails to recognize the distinction between discovery and preparation of evidence that exists in practice although rule 32(a)(3) fails to reflect it.[114] The practical difference between these two procedures makes use of expert witness depositions at trial unfair when the parties intended to use them only for discovery.

V. ANALYSIS

A. The Expert Witness Deposition Problem: The Degree of Unfairness

1. Absence of Proper Opportunity for Cross-Examination

Parties in the American judicial system enjoy an absolute right to cross-examine opposing witnesses.[115] The purpose of cross-examination is to give factfinders an opportunity to evaluate the reliability of a witness' testimony by allowing the cross-examining party to impeach the witness and elicit facts favorable to the cross-examiner's case.[116] The prior opportunity for cross-examination of a witness, therefore, is the primary factor underlying the admission of hearsay under the prior testimony exception.[117] Similarly, this opportunity also justifies the provisions of rule 32(a)(3) that allow courts to admit depositions as substantive evidence when the deponent subsequently becomes unavailable to testify at trial.[118] Ad-

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argument for a distinction between discovery and evidentiary depositions. *Id.* at 381 n.7. *See* Rosenthal v. Peoples Cab Co., 26 F.R.D. at 117.

113. United States v. International Business Machs. Corp., 90 F.R.D. at 381.

114. *See infra* notes 125-29 and accompanying text.

115. *See supra* note 7.

116. 4 B. JONES, *supra* note 7, at § 25:1.

117. *See infra* note 122 and accompanying text. "According to Dean McCormick, 'the premise that the opportunity of cross-examination is an essential safeguard has been the principle justification for the exclusion generally of hearsay statements, and for the admission as an exception to the hearsay rule of reported testimony taken at a former hearing.'" Note, *supra* note 4, at 156 n.19 (citing C. MCCORMICK, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 19, at 43 (2d ed. E. Cleary 1972)).

118. *See* Note, *supra* note 4, at 156 n.19.

mission of discovery depositions into evidence against deposing parties who only directly examine the deponent, therefore, infringes upon the deposing parties' right of cross-examination.

(a) Dependence of Admissibility on Prior Cross-Examination

Rule 32(a)(3) does not contain an express requirement that cross-examination occur as a prerequisite to admissibility of a deposition. The rule, however, does permit use of depositions at trial against only parties who were "present or represented . . . or who had reasonable notice" of the taking of the deposition.[119] This language implies that the party against whom a party-opponent seeks to offer the deposition into evidence must have had an opportunity to temper the deposition's impact through cross-examination.

Depositions, however, basically remain a form of hearsay,[120] and courts and commentators have agreed that the total absence of cross-examination precludes admission of a deposition.[121] The Federal Rules of Evidence recognize the fundamental hearsay nature of depositions and allow their admission only against a party who previously "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[122] Because courts and commentators have read an opportunity to cross-examine requirement into rule 32(a),[123] courts should admit depositions into evidence only against parties who had the opportunity to "develop the testimony" through cross-examination. This requirement will ensure a deposition's reliability as evidence, and thus, its admissibility as an exception to the hearsay rule.[124]

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119. FED. R. CIV. P. 32(a).

120. 3 B. JONES, *supra* note 7, § 18:26 at 498.

121. *See* 4A, J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 30.58, at 30-133 (2d ed. 1983); Bobb v. Modern Products, Inc., 648 F.2d 1051, 1055 (5th Cir. 1981). For example, in DuBeau v. Smither & Mayton, Inc., 203 F.2d 395, 396-97 (D.C. Cir. 1953), the court excluded the deposition of a witness from evidence because the witness refused to disclose his residence or occupation when cross-examined at the deposition proceedings. The court reasoned that the deponent's refusal to reveal his place of abode or occupation substantially deprived plaintiff of ber right of cross-examination. *Id.* at 397.

122. FED. R. EVID. 804(b)(1). "Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact." *Id.* advisory committee note.

123. *See supra* note 121 and accompanying text.

124. Dean McCormick contends that lack of any opportunity to cross-examine an absent declarant is one of the main justifications for the hearsay exclusion of evidence:

> It would be generally agreed today that the third factor is tbe main justification for the exclusion of hearsay. This is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is reported by the witness. Thus as early as 1668 we find a court rejecting hearsay because "the other party could

(b) Adequacy of Opportunity for Cross-Examination

The evaluation of whether a discovering party had an adequate opportunity to cross-examine a deposed witness requires an understanding of the practical difference between taking a deposition for discovery purposes and taking one for evidentiary purposes. In choosing to depose a party-opponent's expert witness, a party obviously does not desire to preserve the contents of the deposition as evidence for use at trial because the expert's opinion probably is harmful to the discovering party's position.[125] Rather, a party's primary purpose for deposing an expert witness is to ascertain the crux of the expert's future testimony, which often exceeds the scope of the deposing party's expertise, and to prepare an effective cross-examination strategy that rebuts the expert's testimony.[126] When taking evidentiary depositions, however, the deposing party's counsel invariably seeks to preserve the contents of the deposition for use at trial in the light most favorable to his client—a task that is very difficult when examining an adverse expert

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not cross-examine the party sworn." Judicial expressions stress this as a principal reason for the hearsay rule. Cross-examination, as Bentham pointed out, was a distinctive feature of the English trial system, and the one which most contributed to the prestige of the institution of jury trial. He called it "a security for the correctness and completeness of testimony." The nature of this safeguard which hearsay lacks is indicated by Chancellor Kent: "Hearsay testimony is from the very nature of it attended with . . . doubts and difficulties and it cannot clear them up. 'A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.' . . . The plaintiff by means of this species of evidence would be taken by surprise and be precluded from the benefit of a cross-examination of S. as to all those material points which have been suggested as necessary to throw full light on his information." Similarly, a Georgia judge has said that cross-examination "is the most efficacious test which the law has devised for the discovery of truth." Morgan analyzed the protective function of cross-examination and concluded (1) that while the fear of exposure of falsehoods on cross-examination is a stimulus to truth-telling by the witness, actual exposure of wilful falsehood is rarely accomplished in actual practice and (2) that the most important service of cross-examination in present day conditions is in affording the opportunity to expose faults in the perception and memory of the witness.

C. McCORMICK, *supra* note 116, at 583 (footnotes omitted).

125. The opponent would not hire an expert to testify at trial unless the expert's testimony is favorable to his case.

126. *See, e.g.*, Kerr v. United States Dist. Court, 511 F.2d 192, 196-97 (9th Cir. 1975), *aff'd*, 426 U.S. 929 (1976); United States v. Meyer, 398 F.2d 66, 72 (9th Cir. 1968); *see also* Hoover v. United States Dept. of Interior, 611 F.2d 1132, 1141-42 (5th Cir. 1980) (discussing the "entitlement of right" to discover substance of the expert's anticipated testimony under rule 26(b)(4)(A)).

whose area of expertise is foreign to the deposing attorney.[127]

Strategic concerns also may play an important role in defining the scope of questioning an expert receives during a deposition.[128] Because attorneys sometimes are unknowledgeable in an expert's specialty, they may choose not to question or challenge the expert on certain matters until they can familiarize themselves with the expert's ideas through further research or consultation with their own experts. Similarly, counsel also may limit cross-examination of an expert to avoid revealing information that he has gathered while preparing his case,[129] thereby forcing the opponent to elicit this information through its own discovery measures.

By asserting that parties have an adequate opportunity to cross-examine and rebut an expert's testimony while deposing him, courts completely ignore the reasons that compel parties to depose expert witnesses and the realities of the deposition process. The judicial theory that parties waive their right to cross-examine a deposed expert witness who later becomes unavailable by not cross-examining the expert with full vigor during the deposition is even more untenable.[130] Parties often lack sufficient preparation while taking depositions before trial to cross-examine party-opponents' expert witnesses effectively. In fact, the desire to prepare for cross-examination often is the key factor that motivates a party to depose a witness. By admitting discovery depositions of expert witnesses against discovering parties under rule 32(a)(3), therefore, courts not only have controverted the essential information-gathering and surprise-squelching purposes of pretrial discovery, but also effectively and erroneously have eliminated the process of deposing the witnesses of a party-opponent as a pretrial discovery technique. Instead, the courts effectively have recharacterized deposing of witnesses as an extension of formal trial proceedings which presume that the deposing party has engaged in full pretrial preparation. This ill-founded scenario is particularly egregious when the deposed witness is an expert whose testimony encompasses knowledge of which the deposing party is ignorant.

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127. An expert, by definition, is well-versed in the particular matters of his testimony. Opposing counsel, even after availing himself of self-education, usually lacks sufficient preparation to discredit the expert's testimony.

128. *See* Kennelly, *Pretrial Discovery—The Courts and Trial Lawyers Are Finally Discovering That Too Much of It Can Be Counterproductive*, 21 TRIAL LAW. GUIDE 458, 474-89 (1977).

129. "Pretrial interrogation may serve only to educate the witness so that cross-examination becomes ineffectual at trial." *Id.* at 480.

130. *See supra* notes 97-113 and accompanying text; Note, *supra* note 4, at 159-66.

2. Practical Implications of the Expert Witness Deposition Problem

(a) Potential for Abuse

In most cases concerning the expert witness deposition problem under rule 32(a)(3), the parties either did not expect the deposed witness to become unavailable or they anticipated the unavailability and took the expert's deposition to preserve the evidence.[131] Rule 32(a)(3), however, allows a party to permit opponents to depose his witness for discovery purposes while he never intends to compel the witness' presence at trial. Similarly, a party could choose this strategy after a party-opponent completes the deposition. A decision to submit the deposition into evidence and not to produce the witness to testify, especially in the context of expert witnesses, abuses the equitable purposes of discovery under the Federal Rules, particularly when the party who seeks admission of the deposition has identified the expert as a trial witness.[132] In this situation the deposed party effectively has placed the discovering party in a trial-type situation that erroneously presumes the discovering party has prepared fully for cross-examination of the expert, and depositions occurring under these circumstances generally favor the deposed party.[133]

(b) Inhibition of Discovery

As the appellant argued in *Savoie v. LaFourche Boat Rentals, Inc.*,[134] courts discourage parties from deposing the expert witnesses of party-opponents by admitting these depositions into evidence if the witnesses later become unavailable to testify at trial.[135] Courts in such cases clearly have stated that parties who depose an opponent's expert witness must anticipate the possibility of the witness subsequently becoming unavailable, thereby necessitating admission of the deposition against them.[136] These courts, however, ironically are forcing discovering parties to be fully prepared to cross-examine the party-opponent's expert witness at a stage in

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131. *See supra* notes 128-29 and accompanying text.

132. *See supra* text accompanying note 30.

133. Questioning that attempts to record the expert's opinion and the basis for it often does not elicit any significant discrediting testimony. *See, e.g.*, United States v. International Business Mach., 90 F.R.D. 377, 381 (S.D.N.Y. 1981).

134. 627 F.2d 722 (5th Cir. 1980).

135. *See supra* note 108.

136. *See* Wright Root Beer Co. v. Dr. Pepper Co., 414 F.2d 887, 890 (5th Cir. 1969); United States v. International Business Mach., 90 F.R.D. 377, 381 n.6 (S.D.N.Y. 1981).

pretrial discovery that should be producing the information necessary to prepare for such cross-examination. Because parties usually lack sufficient information to engage in meaningful cross-examination of expert witnesses before deposing them, courts in this situation effectively are discouraging parties from deposing an opponent's expert witnesses.

B. Potential Solutions to the Expert Witness Deposition Problem

Future courts, parties, and rulemakers could employ several strategies to reduce the chances of parties using discovery depositions of expert witnesses against discovering parties at trial and to reduce the degree of unfairness that stems from such use. These strategies include the following: (1) court orders limiting the use of depositions at trial; (2) stipulation by the parties that limits the use of depositions to discovery; (3) cautionary instructions by the trial judge warning jurors to scrutinize deposition evidence carefully; (4) a stricter judicial test for determining unavailability of expert witnesses; (5) local court rules that mitigate unfair use of expert witness depositions; and (6) amendment to the Federal Rules addressing the expert witness deposition problem. Courts, legislators, and rulemakers who currently are considering the problems with and potential reforms of the discovery process should consider adopting one or more of these approaches to protect parties who wish to depose a party-opponent's expert witness against unfairness. Similarly, trial counsel operating under the Federal Rules or similar state rules should recognize the limited protections that already exist.

1. Court Orders Limiting Use of Depositions

District courts possess broad discretionary powers to make discovery and evidentiary rulings in the interest of conducting fair and orderly trials.[137] This discretion includes "the power to exclude or admit expert testimony . . . and to exclude testimony of witnesses whose use at trial is in bad faith or would unfairly prejudice an opposing party."[138] This Note advocates that the unfairness inherent in using the discovery deposition of an expert witness against the deposing party constitutes a colorable claim of

137. *See* United Air Lines, Inc. v. United States, 26 F.R.D. 213, 217-18 (D. Del. 1960); Dipson Theatres, Inc. v. Buffalo Theatres, Inc., 8 F.R.D. 313, 314 (W.D.N.Y. 1948).

138. *See* cases cited *supra* note 137.

prejudice against which a judge could exercise his discretionary powers by excluding the deposition from evidence. Procedurally, parties may seek such a court order pursuant to the "protective order" provision of rule 26(c) before deposing the expert witness.[139] The moving party simply should show the court that it lacks sufficient preparation to conduct extensive cross-examination and accordingly, that the court should limit the deposition's use to discovery purposes.

Although the judicial power to issue protective orders is discretionary, at least two reasons make it unlikely that courts will issue such orders against the use of expert witness depositions at trial. First, past judicial treatment of expert witness discovery depositions indicates an unwillingness to recognize any distinction between discovery and evidentiary depositions.[140] Because courts traditionally have not distingnished these types of depositions and have not acknowledged the prejudice that results from using discovery depositions against deposing parties, courts probably would refuse to order any limitations on the use of depositions. Second, some courts might construe explicit unavailability provisions in rule 32(a) to prohibit this type of protective order.[141] Nevertheless, discovering parties still should seek protective orders because, even if a court denies the party's motion, the mere attempt to restrict use of the deposition bolsters any subsequent argument of prejudice that the discovering party can make if his opponent later tries to offer the deposition into evidence. A discovering party could argue that he had not waived his right to cross-examine the unavailable witness because he had notified the court prior to taking the deposition that he was limiting his questioning to discovery. A court, however, could argue that its denial of the motion put counsel on notice of the deposition's potential use at trial and that the party therefore had waived his opportunity to cross-examine the expert witness. Thus, because courts issue protective orders in only limited circumstances, they do not protect discovering parties adequately.[142]

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139. Rule 26(c) provides in pertinent part: "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." FED. R. CIV. P. 26(c).

140. *See supra* note 34 and accompanying text.

141. *See supra* note 44-86 and accompanying text.

142. Another argument in favor of protective orders is that courts increasingly have exercised control over the discovery phase of litigation. *See* Sherman & Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 245, 247, 269 (1979). This

2. Stipulation by the Parties

Another strategic option currently available to discovering parties is stipulation with party-opponents limiting the use of expert witness depositions to discovery.[143] To make such a stipulation, discovering parties should request that party-opponents join them in submitting a written stipulation which states that neither party intends to introduce the deposition into evidence. The obvious problem with stipulations is that an opponent simply may refuse to enter into the agreement. As a practical matter, the party who hired the deposed expert witness should try to preserve the right to use the deposition at trial if the expert witness subsequently becomes unavailable. Thus, stipulations essentially are almost perfect[144] protective devices that parties seldom agree to use. If both parties seek to depose their opponents' expert witnesses, however, the likelihood that they will reach a stipulation agreement is substantially higher than if only one party deposes an expert because both parties may wish to prevent the other's use of the deposition at trial.

3. Cautionary Instructions

Judges can use cautionary instructions to warn juries to scrutinize evidence from expert witness depositions more carefully than live trial testimony because proper cross-examination of the deponents was impossible. Courts theoretically can prevent any prejudice resulting from admission of an expert witness deposition by issuing such instructions.[145] Two problems, however, make cautionary instructions an inadequate protection against prejudice. First, courts probably will not issue cautionary instructions concerning the reliability of deposition evidence because of the hold-

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development, however, does not portend necessarily increased judicial sympathy for parties facing the expert witness deposition problem.

143. Very little authority exists concerning availability of this type of stipulation. If parties stipulated that they would use a certain deposition only for discovery purposes, however, the court apparently would have to exclude it from evidence. *See* Stevens v. Illinois Cent. R.R., 157 Ky. 561, 570, 163 S.W. 747, 751 (1914). Rule 29 of the Federal Rules of Civil Procedure permits stipulations waiving the procedural requirements of depositions. FED. R. CIV. P. 29. Parties frequently use rule 29 to make a deposition admissible despite noncompliance with procedural formalities. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2091 (1970).

144. Courts have a discretionary power to set aside stipulations. *See* FED. R. CIV. P. 29.

145. *See* Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264, 264 (1966).

ing in *Wright Root Beer*[146] that such cautionary instructions constitute reversible error.[147] Although the Fifth Circuit cited no authority in *Wright Root Beer* for the proposition that the trial court may not issue cautionary instructions concerning admission of an unavailable witness' deposition,[148] no subsequent decisions have limited the *Wright Root Beer* holding. Second, empirical studies cast substantial doubt on the effectiveness of cautionary instructions. Typically, cautionary instructions limit the jury's consideration of evidence to the use for which the evidence is competent.[149] Various studies, however, have suggested that cautionary instructions do not influence juries significantly to limit their consideration of questioned evidence.[150] In fact, one study suggests that a judge's cautionary instructions to a jury actually sensitize the jury to the evidence.[151] Furthermore, many "learned jurists" have concluded that limiting instructions are useless because jurors cannot distinguish proper and improper uses of evidence, even if they remember and fully understand the limiting instructions.[152] Thus, parties should not rely on cautionary instructions as the sole protection against use of discovery depositions at trial. Rather, parties probably should request cautionary instructions only as a last resort when they believe a court will not exclude the deposition.

4. A Stricter Test for Unavailability of Expert Witnesses

The ease with which a party can show unavailability of a deposed witness under rule 32(a)(3) and then use the deposition at trial against the deposing party is the primary cause of the expert witness deposition problem.[153] In *Carter-Wallace, Inc. v. Otte*[154] the United States Court of Appeals for the Second Circuit sug-

146. 414 F.2d 887 (5th Cir. 1969).

147. For a discussion of the *Wright Root Beer* decision see notes 97-108 and accompanying text.

148. *Wright Root Beer*, 414 F.2d at 890-91. *See* E. DEVITT & C. BLACKMAR, 2 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 72.02 (2d ed. 1970). *Contra* Treharne v. Callahan, 426 F.2d 58, 64 (3d Cir. 1970); Rosenthal v. Peoples Cab Co., 26 F.R.D. at 117-18.

149. For example, a court may admit a hearsay statement if the party offers it for a purpose other than proving the truth of the statement itself. *See* FED. R. EVID. 801(c) advisory committee note.

150. *See, e.g.*, Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959); Note, *supra* note 145, at 265-69.

151. Broeder, *supra* note 150, at 754.

152. *See* Note, *supra* note 145, at 267 n.18 and accompanying text.

153. *See supra* notes 44-86 and accompanying text.

154. 474 F.2d 529 (2d Cir. 1972), *cert. denied*, 412 U.S. 929 (1973).

gested that "there is something unusual about the use of the prior testimony of an expert witness that calls for further scrutiny of his unavailability."[155] The court recognized that when a party previously has hired an expert witness for various purposes, the court should not label that expert "unavailable" because the party chose not to arrange for the expert's presence at trial.[156] The Second Circuit, therefore, was advocating implicitly a stricter test for determining unavailability of an expert witness under rule 32(a)(3).

A stricter unavilability test is sensible for two reasons. First, a stricter test would place a heavier burden of proving unavailability on parties seeking to use an expert witness deposition at trial and, consequently, would reduce the chance of parties abusing the unavailability rule.[157] Under a stricter unavailability test for expert witnesses, courts could require parties to give more compelling reasons than mere distance to justify a witness' absence. Second, by adopting a stricter unavailability test in civil cases, courts would not be dealing with an unfamiliar requirement because a strict unavailability test already is operative for all witnesses in criminal cases.[158]

Despite the potential benefits of a stricter unavailability requirement, however, courts are unlikely to adopt this standard because the *Carter-Wallace* decision has had only a limited impact in this area.[159] An amendment to the Federal Rules probably would be a prerequisite to the widespread adoption of a stricter unavailability test for expert witnesses.

5. Local Court Rules

Federal district court judges may adopt by majority action rules governing local practice that are consistent with the Federal Rules of Civil Procedure.[160] Thus, district courts potentially could frame local rules that mitigate in a variety of ways unfair use of

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155. *Id.* at 536. The special qualities of expert testimony augment the argument that use of discovery deposition testimony of experts is unfair.

156. *Id.*

157. *See supra* notes 131-33 and accompanying text.

158. *See, e.g.*, Ohio v. Roberts, 448 U.S. 56 (1980); United States v. Sindona, 636 F.2d 792, 803-04 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981); United States v. Mann, 590 F.2d 361, 365-68 (1st Cir. 1978); FED. R. CRIM. P. 15(a).

159. No courts have adopted the stricter standard of unavailability that *Carter-Wallace* unplies, perhaps because that court held that the lower court's failure to impose such a standard was harmless error. *See* Arrow-Hart, Inc. v. Covert Hills, Inc., 71 F.R.D. 346, 348 (E.D. Ky. 1976).

160. FED. R. CIV. P. 83.

expert witness discovery depositions. A rule that required parties to designate the purpose of all expert depositions and that prohibited parties from introducing "discovery" depositions into evidence certainly would curtail the expert witness deposition problem. Similarly, a rule requiring parties to make binding designations at a time before completion of discovery concerning which depositions they would introduce into evidence at least would offer the discovering party a chance to conduct a second deposition with full cross-examination. The district courts also could adopt other strategies for addressing this problem with local rules, such as cautionary instructions or a stricter unavailability standard.

The principle difficulty in solving the expert witness deposition problem with local rules is that they must be consistent with the Federal Rules.[161] Arguably, any locally imposed limitation on the operation of rule 32(a) would be invalid as inconsistent with the Federal Rules.[162] District courts could avoid this problem by making enforcement of the local rule discretionary.[163] A discretionary local rule, however, would provide no more protection than already is available under a protective order.[164] The doubtful success of local rules solving the expert witness deposition problem and the lack of uniformity among local rules that probably would occur throughout the district courts make local rule changes an unsatisfactory solution to this problem.

6. Amendment to the Federal Rules of Civil Procedure

An amendment to the Federal Rules offers the most uniform and effective approach for resolving the expert witness deposition problem. Again, several possible approaches might work. The Advisory Committee could recommend an amendment to rule 32 that required courts to distinguish between discovery and evidentiary depositions. The amendment could exclude from the current admissibility provisions of rule 32 any deposition that a party takes expressly for discovery purposes. Alternatively, a revised rule 32 could require courts to treat admissibility of expert witness and nonexpert witness depositions differently, perhaps by providing that courts never can consider expert witnesses unavailable for

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161. *Id.*

162. The language of rule 32 does not imply a limitation concerning the type of deposition admissible under its provisions. *See supra* notes 44-86.

163. *Cf.* Sherman & Kinnard, *supra* note 142, at 264 n.76 and accompanying text (discussing the validity of local rules limiting the total number of interrogatories).

164. *See supra* notes 137-42 and accompanying text.

trial under rule 32(a). This amendment effectively would allow parties to introduce expert witness depositions only by agreement.

The best solution to the expert witness deposition problem is to amend rule 26(b)(4), which already governs discovery of expert witnesses. Rule 26(b)(4) recognizes that parties need an adequate opportunity for discovery of expert witnesses before trial to cross-examine and rebut their testimony at trial.[165] To achieve this end, rule 26(b)(4)(A) permits parties to discover any expert witness that a party-opponent expects to call as a witness at trial. An amendment to rule 26(b)(4) could make the deposition process fair for deposing and deposed parties by specifying that if a deposed expert whom a party had designated to be a trial witness subsequently became unavailable to testify at trial, any deposition which a party-opponent previously took of the expert would be inadmissible upon motion pursuant to rule 26(b)(4)(A)(ii) or by agreement with the other party. This amendment simply would make binding the designation of an expert as a trial witness and would prevent deposed parties from using the discovery efforts of deposing parties as evidence. An amendment of this type would not prejudice parties who want to call expert witnesses to testify at trial because they still would retain the option of preserving the expert's testimony through direct examination during depositions as protection against subsequent unavailability of the witness. If a party should choose to preserve expert testimony in this manner, the opponent would at least be on notice of the deposition's intended use and would have an opportunity to prepare for cross-examination of the expert through discovery.

This proposed change in rule 26 would reorder priorities by allowing the risk of an expert witness' becoming unavailable to fall upon the proponent of the expert's testimony. Under the current Federal Rules, an expert's absence probably is more harmful to the opponent of the expert's testimony, who inadvertently may have created unfavorable evidence by deposing the expert in preparation for trial.

VI. CONCLUSION

The degree to which courts inhibit discovery and prejudice parties by admitting expert witness depositions into evidence under rule 32(a)(3) when the expert becomes unavailable to testify at trial is difficult to measure. Because the subject matter of con-

165. *See supra* note 6.

temporary civil litigation has become highly technical and complex, parties increasingly have used expert witnesses at trial for a variety of purposes. This phenomenon suggests that the expert witness deposition problem should be a common problem in civil cases in federal courts. Although only a few cases have addressed this problem, their holdings probably discourage parties from arguing against admission of expert witness depositions regardless of how much the circumstances of a case favor inadmissibility.

The expert witness deposition problem presents a strong possibility of denying discovering parties an adequate opportunity to cross-examine unavailable expert witnesses. During expert witness depositions, parties usually seek information that will help them prepare an effective strategy for cross-examining the expert at trial. Thus, requiring deposing parties to cross-examine experts during depositions, before they have acquired the information necessary to conduct effective cross-examination, inevitably discourages parties from deposing expert witnesses. The expert witness deposition problem controverts one of the basic purposes underlying the liberal system of discovery in federal courts—to "make a trial less a game of blind man's buff [sic] and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[166] In addition, courts, by perpetuating this problem, erroneously have eliminated the process of deposing a party-opponent's designated trial witnesses as a pretrial discovery technique by effectively treating the process as an extension of formal trial proceedings that presume the deposing party has prepared fully to cross-examine the expert. Thus, courts and rulemakers should take active steps to remedy the expert witness deposition problem because it threatens to undermine the process of deposing witnesses before trial, one of the most important pretrial discovery techniques available to parties in federal courts.

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166. United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958).