

Litigation News



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Special Edition: Discovery

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Recent Legislative Activity in Washington State

by Robert R. Siderius, Jr.

The Washington Legislature's regular session ended this year on April 22, 2011. While this edition of Litigation News focuses on discovery, we thought our readers would be interested in hearing about legislation affecting, or potentially affecting, litigation practitioners

The session was interesting as much for the proposals that failed as for those that passed. Not surprisingly, many proposed bills involved efforts to limit the State's liability on a variety of claims. Also not surprisingly, most of the proposals suffered quick and painless deaths.

Two bills did pass this legislative session that will impact litigation practitioners: Engrossed Substitute House Bill 1026 (ESHB 1026), dealing with adverse possession claims, and Substitute House Bill 1719 (SHB 1719), dealing with unauthorized automobile passengers.

ESHB 1026 changed, in a rather dramatic way, the manner in which adverse possession claims will likely be brought and resolved. Under this new legislation, which will go into effect in July 2012, a prevailing adverse possession claimant will be liable for all taxes or assessments levied on the property during the time that the prevailing party was in possession of the property. This seemed a common sense proposal and one undoubtedly intended to reduce the sting felt by property owners who lose land on adverse possession claims. In addition, and most

importantly, the prevailing party in any action to recover property by adverse possession will be entitled to recovery of his or her costs and attorney's fees. The original proposal provided only the defendant in an adverse possession claim would recover fees, but after opposition to that provision (including from our Executive Committee) the fee shifting provision was revised to be reciprocal. Again a common-sense proposal that should help resolve these claims early in the process.

One proposal was not so subtle in revealing the drafter's opinion of our State Supreme Court's recent decision in *Rahman v. State*. SHB 1719, apparently not drafted by anyone who appears in front of the State Supreme Court, addresses the state's or a private employer's liability for unauthorized passengers in vehicles. In its original form this proposal stated, "The legislature intends to restore common sense to the law by overruling the Court's holding in *Rahman v. State* that a government or a private employer may be held liable for injuries to unauthorized occupants of an employer's vehicle."

The bill limiting liability for unauthorized passengers was ultimately passed without the commentary, and included a limitation on liability for unauthorized passengers in both state-owned vehicles and also in private employer vehicles

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when the authorized employee had “explicitly acknowledged in writing the employer’s policy on use of vehicles.” It is unclear how this will affect unauthorized passengers in vehicles not owned by the state or by an employer. I can foresee a clever, and maybe cynical, parent employing their children in some manner to avoid liability for injuries to the twelve unauthorized passengers being driven around by their newly licensed 16-year-old.

Other notable bills include Substitute Senate Bill 5023 (SSB 5023), effective October 22, 2011, a bill passed at the request of the Attorney General to address the problems surrounding the unauthorized practice of law with respect to immigration-related legal services. There have apparently been serious problems with non-attorneys providing immigration-related services that included actions constituting the practice of law. SSB 5023 creates civil and criminal penalties for non-attorneys who attempt to provide those immigration-related services that require the assistance or supervision of an attorney. The bill also asks the Supreme Court’s Practice of Law Board to evaluate certain issues, including the specific services non-attorneys may provide to immigrants. The Board has been asked to submit its report to the Legislature by December 1, 2011.

No fewer than seven proposals were introduced attempting to modify the provisions of the Public Records Act, most of which dealt with limiting or controlling governmental liability for incomplete disclosures. One proposal sought to allow public records reproduction in electronic format only (SB 5693). Another attempted to limit a governmental entity’s obligation to fund records requests to five hours per month for each requestor, and further required the requestor pay the personnel costs for any time in excess of five hours per month, per requestor (HB 1300). In still another, a proposal was made to establish an independent Office of Open Public Records within the Office of Administrative Hearings (HB 1044). This bill was apparently intended to centralize

the public records request functions of municipal entities throughout the state, and provide administrative procedures for dealing with records requests.

Ultimately, only one bill relating to the Public Records Act passed out of the legislature, HB 1899. This bill, very limited in scope, simply eliminates the court’s obligation to impose a penalty of \$5.00 minimum, leaving it within the court’s discretion to award no damages.

Many of the proposals that do not survive one particular legislative session may come back to life the next year. The legislative proposals, even the ones that die, provide valuable insight into the thought processes of those elected officials engaged in the legislative process in Olympia, and also provide us with a clue as to what issues appear to be important to their constituents. Following are revealing proposals that did not become law:

Engrossed Substitute Senate Bill 5605 provided that “no governmental entity or its officers, agents, employees and volunteers, shall be criminally or civilly liable for performing duties pursuant to Chapter 26.44 RCW with regard to investigating allegations of child abuse or neglect if such duties were performed without gross negligence.”

House Bill 1580 provided that law enforcement agencies, officers and employees “shall not be liable for injuries to persons or property resulting from any act or omission of the agency, officer, agent, or employee, while acting in the course and scope of official duties, unless the act or omission constitutes intentional, willful and wanton misconduct.” House Bill 1679 attempted to limit the liability for law enforcement officers engaged in supervision of offenders. The proposed legislation provided immunity for local governmental agencies and their employees when an offender under supervision engages in misconduct that does not relate to the original criminal act for which the offender was being supervised. Finally, Senate Bill 5079 attempted to limit the state’s liability for

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Discovery Abuse: Our Supreme Court Holds the Line

by Ken Masters & Shelby Frost Lemmel

By now, few Washington litigators can be unaware of the shift in discovery practice wrought almost 20 years ago in *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993). Our Supreme Court there drew the line at gamesmanship in withholding discovery, imposing the least severe sanctions that will deter wrongdoers, educate the bar and the public, punish the wrongdoing, and compensate the wronged. With its most recent decisions – *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 220 P.3d 191 (2009), and *Blair v. TA-Seattle E. No. 176, d/b/a TravelCenters of Am.*, ___ Wn.2d ___, ___ P.3d ___, 2011 WL 1499902 (April 21, 2011) – the Court signals no retreat from *Fisons*.

Following *Fisons*, three key Supreme Court decisions refined its doctrine: *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997); *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002); and *Mayer v. Sto Indus. Inc.*, 156 Wn.2d 677, 132 P.3d 115 (2006). In *Burnet*, a party failed to comply with CR 26(f), governing discovery conferences. *Burnet*, 131 Wn.2d at 493-95. The discovery sanction – dismissing a claim – was levied under CR 37(b)(2), which is triggered by CR 26(f). *Id.* at 493-94. In reversing the sanction, *Burnet* required trial courts to consider on the record (1) whether the discovery violation was willful or deliberate; (2) whether the opposing party was substantially prejudiced

in preparing for trial; and (3) whether a lesser sanction would have sufficed. *Id.* at 494.

The issue in *Rivers* was whether dismissal was an appropriate sanction for multiple failures to comply with case scheduling deadlines under the King County Local Rules. 145 Wn.2d at 677. While the trial court considered the *Burnet* factors, it did not explicitly state on the record that the opponent was prejudiced or explain why lesser sanctions would not suffice. *Id.* at 693-97. The Court held that before “resorting to the sanction of dismissal, the trial court must clearly indicate on the record that it has considered less harsh sanctions under CR 37. Its failure to do so constitutes an abuse of discretion.” *Id.* at 696.

Mayer involved monetary sanctions awarded under CR 26(g), requiring an attorney to sign all discovery requests, responses, and objections. 156 Wn.2d at 682, 686. The Court refused to apply the three *Burnet* factors, limiting the *Burnet* test to the harshest sanctions under CR 37(b), dismissal or striking a witness. *Id.* at 688-89. The Court thus upheld the monetary sanctions.

Magaña v. Hyundai

Magaña brought a true test of *Fisons* and its progeny. During an accident, Jesse Magaña was thrown out the rear hatch of a Hyundai when the back of his passenger seat collapsed. He was rendered paraplegic. A jury returned an \$8 million verdict against Hyundai, but the appellate court reversed and remanded for re-trial on liability due to an evidentiary error, leaving the damages verdict intact. Confident of achieving another liability verdict, Magaña chose to go back to trial rather than seek discretionary review in the Supreme Court.

During the remand proceedings, Magaña’s trial team¹ discovered that Hyundai might be withholding crucial evidence of other similar incidents (OSI). They demanded updated re-

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attorney’s fees in a failed application of the Consumer Protection Act to those instances where the state’s action is determined to be frivolous.

House Bill 1779, which was probably DOA, was introduced in an effort to eliminate joint and several liability in its entirety. House Bill 1360 was introduced in another effort to limit liability of health care providers. While both of these bills died, it is likely that these issues, particularly the reform of our joint and several liability statutes, will be the subject of ongoing legislative discussion and proposals.

An interesting policy change was proposed in House Bill 1827. This bill provided that a person who has been convicted of driving without insurance would not be allowed to recover non-economic damages in any accident in which they receive an injury. The apparent intent of this proposal was to both encourage the maintenance of insurance and to penalize those persons who have been convicted of driving offenses involving the lack of insurance.

The Litigation Section Executive Committee provided comment on but

did not sponsor any proposed legislation in 2011. However, many statutes affecting our practices are in need of review and possible modification, including the methods for reproduction of records and costs relating to reproduction of records, both in the Public Records Act arena and in medical records production, modifications to the limits for recovery of attorney’s fees on small claims, and the laws dealing with joint and several liability.

The process of enacting laws in our state is both complicated and fascinating. The hard work of the WSBA staff is evident in the fact that of the Bar Association’s proposed ten bills, eight were enacted, a stunning success rate in comparison to the typical success rate of most bills proposed.

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sponses, and after quite a bit of wrangling, Hyundai finally produced boxes of OSI evidence responsive to discovery requests propounded many years earlier. But by this point trial was imminent, and OSI evidence can take years to properly develop. Worse, Magaña discovered that evidence had been lost, destroyed or purged in the interim. He was left with little choice but to seek a default judgment for these egregious discovery violations.

The trial court held a three-day evidentiary hearing, complete with testimony from Hyundai that it still had not disclosed all of the responsive documents. The court entered detailed findings and conclusions delineating – over 28 pages – numerous willful and deliberate discovery violations that substantially prejudiced Magaña’s preparation for trial. The court expressly considered and rejected lesser sanctions as inadequate under *Fisons*. Hyundai appealed, and Division II reversed in a 2-1 decision, holding that Magaña had not sufficiently established prejudice.

In a 7-2 decision, our Supreme Court reversed. The Court began with a caution from the United States Supreme Court: “There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order.” 167 Wn.2d at 583 (quoting *Nat’l Hockey League v. Metro Hockey Club, Inc.* 427 U.S. 639, 642 (1976)). But “since the trial court is in the best position to decide an issue, deference should normally be given to the trial court’s decision.” *Id.* (citing *Fisons*, 122 Wn.2d at 339). Therefore, an “appellate court can disturb a trial court’s sanction only if it is clearly unsupported by the record.” *Id.* (citation omitted).

Turning to the Court Rules, the Supreme Court noted that under CR 37(d), if a party refuses to produce, then the party “must seek a protective order under CR 26(c).” 167 Wn.2d at 584. “If the party does not seek a protective

order, then the party must respond to the discovery request.” *Id.* These simple affirmations of the Court Rules reiterated the lynchpin of the trial court’s rulings.

The Supreme Court then essentially held that the record amply supported the trial court’s findings on the *Burnet* factors. Simply put, the “Court of Appeals substituted its own discretion for the trial court’s, which is inconsistent with the abuse of discretion standard.” 167 Wn.2d at 590. The appellate court majority had accepted Hyundai’s attack on the trial court’s reasoning, which largely ignored the detailed record established in the three-day fact-finding hearing. In this respect, the Supreme Court’s opinion is little more than a straightforward application of the abuse of discretion standard of review to well-founded trial court rulings.

Blair v. TravelCenters

Our Supreme Court most recently revisited this area in *Blair*. Maureen Blair was a long-haul trucker. In 2003, she slipped and fell on a gasoline spill in a TravelCenters truck stop parking lot. The fall aggravated preexisting degenerative arthritis in her hips, culminating in a total hip replacement in 2005. She could no longer work as a trucker.

Blair and her husband sued TravelCenters. Due to a series of misfortunes in his law office, trial counsel missed several witness-disclosure deadlines under the King County Local Rules. The trial court imposed a series of sanctions, culminating in striking the Blairs’ key medical-causation witnesses. It then dismissed their case on summary judgment for lack of that evidence.

The key difference between *Magaña* and *Blair* is that the trial court’s several sanctions orders in *Blair* contained no findings supporting the *Burnet* factors – willfulness, prejudice, and no lesser sanctions. Moreover, there had been no hearings at which the trial court could expressly consider these factors on the record. Without any record that the trial court had expressly considered *Burnet* before entering the harsh sanction of strik-

ing key witnesses – requiring dismissal – the Court reversed and remanded for full discovery, motions, and a trial.

Lessons

Plainly, our Supreme Court is holding the *Fisons* line: gamesmanship in discovery will not be tolerated, but only the least severe sanctions that will effectively deter, educate, punish and compensate should be imposed. In severe cases where crucial discovery is withheld until shortly before trial, the severest sanctions may be warranted. *Accord Smith v. Behr Process Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002) (affirming default judgment as sanction for withholding crucial discovery in multi-million-dollar class action). But trial courts must explain on the record why the violations were willful, why they prejudiced the opponents’ ability to prepare for trial, and why no lesser sanctions will suffice.

“On the record” does not, however, mean that written findings and conclusions are required. Although such a ruling was requested in *Blair*, and although the results in *Magaña* and *Behr* rest on the sound foundation of detailed findings and conclusions, the Supreme Court has not required them. No doubt the Court is anticipating instances in which formal findings and conclusions would be impractical. For example, imagine a party raising a surprise witness in the heat of trial: the court might well strike the witness without making written factual findings. So long as the trial court considered willfulness, prejudice and lesser sanctions on the record, such from-the-hip rulings should stand.

Another way to harmonize *Fisons* with *Magaña* and *Behr* (affirming the severest sanctions) on the one hand, and *Rivers* and *Blair* (reversing the severest sanctions) on the other, is to look at the parties’ respective conduct. The trial courts in *Magaña* and *Behr* termed “egregious” withholding crucial documents directly responsive to specific discovery requests. But in *Rivers* and *Blair*, the trial courts excluded evidence that was cru-

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Short & Sweet: Tips for Effective Discovery Motions Practice

by David W. Howenstine

Discovery practice is a messy business. All too often, discovery motions simply delay the case, depict counsel in a bad light, and waste the clients' money. If you find yourself filing discovery motions on a regular basis, ask yourself: what could I be doing differently? Yet, even for the most conscientious counsel, discovery motions are necessary on occasion. How then can you draft a discovery motion in a manner that guarantees an expeditious answer, improves your image with the court, and minimizes expense? The following are suggestions to consider before bringing your next discovery dispute before a judge.

Simplify Your Motion

First and foremost, get to the point and make it simple. Judges take great

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cial to the offending parties' cases (*e.g.*, the Blairs' own treating physicians, who offered crucial causation evidence that the Blairs plainly wanted and needed to disclose). While the *Magaña/Behr* situation reeks of gamesmanship, the *Rivers/Blair* situation reflects counsels' occasional difficulties in meeting Local Rules deadlines.

Under *Fisons*, the severest sanctions must be reserved for the worst conduct. Indeed, *Mayer* makes clear that the *Burnet* factors do not even apply to lesser sanctions. The *Fisons* line is strong.

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pains to resolve discovery motions expeditiously to avoid the cascading delays caused by discovery disputes. Each judge, however, is inundated with a steady stream of complex motions, and your motion will be noted for consideration behind a queue of earlier-filed motions. Your task is to convince the judge that your motion is low-hanging fruit—an easy motion presenting a straightforward question to be decided without extensive legal research or factual analysis, and thus one that the judge should resolve out-of-order.

To achieve this goal, an effective discovery motion presents no more than the necessary facts, law, and analysis. Most discovery issues call for the judge to exercise a substantial amount of discretion. When the judge reads your motion, she should be able to understand the relevant facts and law immediately, without the need to wade through extraneous facts. Though additional facts may show context, they often impede the court's ability to quickly focus on the key facts and may distract from the core issue. Likewise, extensive case law analysis is rarely helpful. Judges already know the discovery standards, and thus the application of those standards in other cases holds only modest persuasive value when viewed against the particular equities of the subject case.

Cooperate with Opposing Counsel

Next, make sure to cooperate with your opposing counsel. Judges expect lawyers to act professionally and to avoid unnecessary motions. All too often, however, discovery motions depict the lawyers involved as immature and inflexible. This impression can decrease your likelihood of success on the motion, and diminish your long-term reputation with the court. To steer clear of this problem, it is important that you take seriously your obligation to confer in good faith. This is not only a minimum prerequisite for a discovery motion, but also an opportunity to show the court that, as a

professional, you would not have brought the motion unless it had merit.

First, you should make clear that you made an honest attempt to resolve the dispute with opposing counsel before filing the motion. For example, a single unreturned e-mail or telephone call does not demonstrate a good faith effort to confer. Second, the language and tone of your motion should reflect your professionalism. This means that your motion should never include caustic remarks about opposing counsel. These remarks simply boomerang. Opposing counsel may have been nothing less than a complete nightmare during the discovery process, but by sinking to his level you become no better in the eyes of the judge.

Expedited Procedures in Federal Court

In the United States District Court for the Western District of Washington, the best way to obtain a swift ruling and demonstrate your professionalism is to take advantage of the Court's expedited procedure for discovery disputes. Local Rules W.D. Wash. CR 37(a)(1)(B) authorizes parties to file a "CR 37 Joint Submission" as an expedited method to resolve discovery disputes. Via this procedure, the parties prepare a joint submission that outlines the dispute, sets forth the parties' respective positions, and notes the submission for the date it is filed. This procedure should be your default. By using it, you will demonstrate that you cooperated with opposing counsel and are seeking to make the court's task easier. Judges generally appreciate such consideration and may resolve the dispute even sooner to encourage this behavior.

Some judges also welcome the opportunity to resolve discovery disputes via a telephone hearing. In the Western District, several judges expressly note this option on their websites, and other judges may be open to telephone hear-

¹ Derrick J. Vanderwood of Lane & Marshall in Vancouver; Paul Whelan of Stritmatter Kessler Whalen & Coluccio in Seattle; Peter O'Neil; Alisa Brodtkowitz; and Mike Withey.

Preparing Corporate Representatives for Depositions

by Kristin Ferrera

In a recent construction contract dispute, opposing counsel raised an issue regarding their responsibility to designate CR 30(b)(6) corporate representatives. The opposing party, the plaintiff in this case, alleged 20 claims against the defendant and on defendant's behalf we had requested that the plaintiff designate a CR 30(b)(6) representative to depose the corporation on a few of these claims. Initially, they refused to designate a CR 30(b)(6) representative, but, after some pressure from the court, they provided a list of approximately 20 individuals, four or five for each sub-part of the claims specified in the notice. Unfortunately, Washington law has yet to address the issue of whether a party must limit of the number of corporate representatives it designates under CR 30(b)(6). Federal case law likewise provides little guidance, but for different reasons. Following is a brief summary of what the law does require regarding a corporate party's duties under CR 30(b)(6).

What are the duties of a 30(b)(6) corporate designee?

CR 30(b)(6) governs depositions of a party if that party is a corporation. The Rule requires the corporation to produce one or more officers to testify with respect to the matters set out in the deposition notice. Whereas a fact witness testifies as to his personal opinions and individual knowledge, a 30(b)(6) corporate representative testifies to the knowledge of the corporation, including the corporation's subjective beliefs and opinions and the corporation's interpretation of documents and events. *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 40, 111 P.3d 1192 (2005). The corporation must prepare its deposition designees so they will provide full, complete and non-evasive answers, testifying to matters known or reasonably available to the corporation. *Casper v. Esteb Enterprises*, 119 Wn. App. 759, 757, 82 P.3d 1223 (2004).

Although CR 30(b)(6) deposition testimony does not absolutely bind a corporate deponent (further discussion below), if a corporation fails to completely prepare a 30(b)(6) designee for the deposition, the court may impose sanctions under CR 37(b)(2). In *Casper v. Esteb Enterprises*, the corporate designee for Esteb Enterprises did not extensively prepare for his deposition, claiming that he had not seen the deposition notices, and therefore could not testify to specific information designated for inquiry in those notices. Plaintiff Casper moved to exclude testimony at trial contradicting Defendant Esteb's "don't know" responses in its CR 30(b)(6) deposition, providing Esteb a grace period to supplement his answers, which he failed to do. Division II of the Washington State Court of Appeals upheld the trial court's decision to bind Esteb Enterprises to its 30(b)(6) representative's testimony because,

producing an unprepared 30(b)(6) witness is tantamount to failing to appear and is sanctionable under [Rule] 37(d)...[and] inadequate preparation of a 30(b)(6) designee can be sanctioned, "based on the lack of good faith, prejudice to the opposing side, and disruption of the proceedings."

Casper, 110 Wash. App. at 768 (citations omitted).

The trial court found, and the Court of Appeals affirmed, that Esteb was "avoiding the question" which made discovery "useless." *Id.* at 770.

Casper makes clear that a corporate party must make a good faith effort to designate a representative who, although not necessarily possessing personal knowledge of the topics specified in the deposition notice, must be prepared to answer fully, completely, and unequivocally all of the questions regarding the subject matters listed in the deposition notice.

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ings on a case-by-case basis. Some judges may also invite each party to submit a short letter describing their position rather than filing full briefing. A telephone hearing will avoid undue cost and secure a quick decision, but will require you to further distill your motion into a concise oral presentation.

File Early

You should plan to file any discovery motions well in advance of the discovery cutoff. If you delay until the final days for discovery, you will eat into your time to file dispositive motions and prepare for trial. Additionally, if your discovery motion is time-sensitive, you should consider contacting the court to advise the law clerk handling the case of the relevant deadline. If done respectfully, you are helping the court manage the case effectively.

Overall, discovery motions can be effective when drafted with care. Be aware, however, that a judge may use a hatchet to resolve the dispute whereas the parties themselves could have used a scalpel. The best solution is thus always an agreement between the parties.

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Is there a limit to how many corporate representatives a party can designate under 30(b)(6)?

CR 30(b)(6) does not specify how many corporate designees are permitted under the rule. Generally, Washington courts have looked to federal case law interpreting the similar federal rule as persuasive authority in discovery disputes. *Casper*, 119 Wn. App. at 767. However, the federal rule differs from the Washington rule and limits depositions for each individual to one day of seven hours. In federal court, it is in the corporation's best interest to designate the least number of representatives as possible, in order to limit the time the opposing party can spend deposing the corporation. The Washington Civil Rules provide no such restriction and, therefore, federal case law is less helpful on this subject.

Although no hard and fast rule exists, arguably, since Washington courts clearly require corporate designees fully prepare for the deposition, if a corporation provides several designees, any one of which could say "I don't know – ask someone else," it severely impacts the efficiency of the process and the opposing party's ability to prepare its case. Such a situation violates the spirit of CR 26-37. Thus, designating several CR 30(b)(6) representatives can create a situation where discovery becomes useless and sanctionable (or at least prohibited), just as in *Casper*.

Because it is not necessary for the corporate designee to have personal knowledge of the events at issue, courts should limit the number of corporate designees under this rule. Without such a limit, parties can engage in a frustrating, time-consuming and expensive game of hide-the-ball, which does nothing for either party except drive up the cost of litigation.

Where should the deposition take place?

Another issue that occasionally arises is where the deponent is required to attend a deposition. Under 30(b)(1), a party desiring to take the deposition

of any person (including a corporation) provides at least five court days' notice to all parties and the deponent, implicitly allowing the attorney taking the deposition to specify the time and place for the deposition in the notice. See 3(a) Wash. Prac., CR 30.

If a party objects to the location, it must seek a protective order under CR 26(c). In determining whether to grant a protective order, the court may consider whether the deponent is the plaintiff or defendant. One Washington Supreme Court case stated *in dicta* that a non-resident defendant may not be compelled to appear in Washington for a deposition. *Allen v. Am. Land Research*, 25 Wn. App. 914, 611 P.2d 420 (1980), *rev'd on other grounds* 95 Wash.2d 841, 631 P.2d 930 (1981). However, some argue this statement was later rejected by Division I of the Court of Appeals where the court held that a non-resident party may be required to attend a trial in Washington. *Campbell v. A.H. Robins Co., Inc.*, 32 Wn. App. 98, 645 P.2d 138 (1982). In so holding, the *Campbell* court cited to CR 30 and CR 43. Although that decision was based upon appearance at trial, rather than deposition, CR 43 clearly states that such a rule applies to deponents as well as witnesses at trial.

Federal law sheds further light on requirements of deponents attending depositions in the county where suit is brought. The general rule is that plaintiffs usually will be required to attend their depositions, regardless of inconvenience. This is because it is "the plaintiffs who bring the lawsuit and who exercise the first choice as to the forum. The defendants, on the other hand, are not before the court by choice. Thus, courts have held that plaintiffs normally cannot complain if they are required to take discovery at great distances from the forum." *Farquhar v. Sheldon*, 116 FRD 70, 72 (E.D. Mich. 1997).

While courts take into consideration the location of the parties as a primary factor, the location of their attorneys is also a relevant factor in determining the reasonableness of the location for the deposition. *Id.* However, a court often will

grant a protective order for the defendant to change the deposition location to the county of the defendant's residence or place of business. *Continental Fed. Savings & Loan Assoc. v. Delta Corp. of Am.*, 71 FRD 697, 699 (W.D. Okl. 1976) (citing *IV Moore, Federal Practice*, ¶30.07(1-3)). *Wright and Moore's Federal Practice & Procedure: Civil Section 2112 (3d ed.)* reiterates these rules:

Ordinarily, plaintiff will be required to make himself or herself available for examination in the district in which suit was brought. Since plaintiff has selected the forum, he or she will not be heard to complain about having to appear there for a deposition. But this is at best a general rule, and is not adhered to if plaintiff can show good cause for not being required to come to the district where the action is pending. For example, the examination has been ordered held elsewhere when plaintiff was physically and financially unable to come to the forum, when to do so would cause hardship to the plaintiff, and when it would be simpler and fairer to take his or her deposition at his or her place of residence. The court may order the deposition taken on written interrogatories, when the circumstances are such that this would provide adequate discovery.

The deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business. This customary treatment is subject to modification, however, when justice requires.

An important question in determining where to hold the examination is the matter of expense...Rule 26(c) now provides protection from "undue burden or expense" as a ground for a protective order...

continues ... next page

Preparing Corporate Representatives for Depositions from previous page

In each case in which a motion is made the court considers the facts, selects the place of examination, and determines what justice requires with regard to payment of expenses and attorneys' fees...(footnotes omitted)

How do you prepare a client for a 30(b)(6) deposition?

As stated above, a CR 30(b)(6) designee must have enough time and preparation to fully answer questions on the topics set forth in the deposition notice. It is extremely important that the corporate deponent be fully apprised of all of the information within the corporation's knowledge and understand the position that the corporation is taking in the case, even if this information needs to come from multiple resources. If, for example, a corporation is required to provide its profit and losses in the last

year, it cannot refer opposing counsel to speak with its accountant regarding these issues, but must be able to answer this fully and completely, having already discussed the issue with the accountant. The corporate representative is the mouthpiece of the corporation and, therefore, not only can, but often must, testify to matters outside of his or her individual or personal knowledge.

Are the answers in 30(b)(6) depositions absolutely binding on the corporation?

Although, as in any other deposition, a deponent can supplement his or her answers within 30 days of receiving the transcript of the deposition, a failure to do so may bind the corporation to the "I don't know" answer even at trial. As stated above, in *Casper v. Esteb Enterprises*, Division II held Esteb to its "I don't

know" answers in deposition. However, the answers to deposition questions are not absolutely binding on a corporation at the later date so long as the corporation provides an explanation why the answer has changed. Corporations that already have been deposed through their CR 30(b)(6) representative cannot provide affidavits in opposition to a summary judgment motions contradicting the deposition testimony without explanation. *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989). In *Marshall*, the court stated "When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Id.* Therefore, situations may arise where discovery has brought new facts to light and only with an explanation as to why the corporation has changed its position can it change the answers given in its deposition testimony. With no such explanation, the corporation is bound to such testimony.

Above all else, counsel for parties should work together to resolve discovery disputes without getting the court involved, if at all possible. Courts generally do not want to hear about these disputes and should hold parties to their responsibilities under CR 26-37 to provide honest and straightforward answers to discovery requests.

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Requests for Admission

by Janis White

Requests for admissions are the discovery device that is often overlooked. Perhaps that is because requests for admission are really not a discovery device. Although CR 36, the court rule governing requests for admission, is grouped with discovery rules, a request for admission does not seek the discovery of information, but instead seeks concessions that can be used as evidence at trial. Well-drafted requests for admissions can be used to narrow the issues for discovery and trial, and can be a useful tool to reduce the cost of litigation.

CR 36 allows requests for admission "that relate to statements or opinions of fact or of the application of law to fact." The rule does not permit requests for concessions as to pure questions of law. Courts have struggled to define when a request is objectionable because it seeks a pure legal conclusion and when a request is permissible because it calls for the application of law to fact.

In 2005, the Washington Supreme Court addressed the issue of the proper scope for requests for admission in a 5-4 decision, and held that five requests, "phrased arguably to characterize them as relating to the application of law to fact," were in fact requests for defendant to admit "legal conclusions." *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 474, 105 P.3d 378 (2005). The requests asked defendant to admit (i) that it had negligently stored its hay in plaintiffs' barn; (ii) that its negligence was a proximate cause of the fire that burned plaintiffs' barn; (iii) that there was no contributory negligence by plaintiffs; and (iv) that defendant's negligence was the sole proximate cause of the fire. *Thompson*, 153 Wn.2d at 473. The four dissenters thought the requests properly asked defendant "to apply the law to the facts concerning negligence, proximate cause, and contributory negligence." *Id.* at 463.

Since 2005, there have been three decisions applying *Thompson*. In chronological order, the first was *Byers v. Warner*, 129 Wn. App. 1023, 2005 WL 2212315 (Sept. 13, 2005). In *Byers*, plaintiff served requests for admission regarding her medical treatment following an accident and the reasonableness of her medical expenses. Citing *Thompson*, the court found that the requests did not seek legal conclusions: "[T]hese are factual matters that should have been eliminated from controversy." *Byers*, 2005 WL 22123515, at *2.

The next case decided was *Walter v. Bauer*, 141 Wn. App. 1024, 2007 WL 3261648 (Nov. 6, 2007). There, requests for admission were served and not answered within the 30-day statutory period. The trial court then deemed the matters set forth in the requests as admitted. On appeal, Alice Bauer, the appellant, argued that was an abuse of discretion because the requests went "to the heart of the dispute" *Walter*, 2007 WL 3261648, at *3. The court noted the general principle that "[r]equests for admission as to central facts in dispute are beyond the proper scope of CR 36 because they, in effect, request an adversary to admit the truth of the assertion that he should lose the lawsuit." *Id.* Alice Bauer argued that, even though on its face, one of the requests for admissions did not seek a legal conclusion, the request required "her to admit that she lose the lawsuit by deeming her to have admitted that she is in fact the owner of the Wholesale Tool Outlet." *Id.* The request called for her to admit that she was the owner of Wholesale Tool Outlet, the name on the lease of a business she claimed was owned by her son, not her. The court found Alice Bauer's argument "goes to the propriety of the summary judgment disposition of the case, and not to the propriety of request for admission no. 2" *Id.*

The third and final case is *Haynes v. Russell*, 143 Wn. App. 1021, 2008 WL 517384 (Feb. 26, 2008). There, plaintiff sought sanctions for defendant's alleged improper failure to admit certain requests for admission. The requests asked defendant to admit that his operation of a vehicle in excess of the speed limit, his intoxication, his crossing the center line and his tortious conduct were proximate causes of the collision that was the subject of the lawsuit. The court, citing *Thompson*, held that while the requests "could possibly be characterized as relating to 'the application of law to fact,' CR 36 (a), they undoubtedly requested Mr. Russell to admit legal conclusions including negligence." *Haynes*, 2008 WL 517384, at *4.

What do these cases tell us as practitioners? CR 36(a)'s allowance of requests for admission that relate to "the application of law to fact" will be narrowly construed by the courts. Many requests that are phrased to call for "the application of law to fact" will not pass muster under *Thompson* and its progeny. However, at the same time, the courts will not allow litigants to use *Thompson* to object to requests that, on their face, seek only factual admissions. Since the best use of requests for admission is to narrow fact issues, counsel would be well advised to draft requests narrowly and avoid motion practice on whether or not a request that arguably calls for the application of law to fact will be construed by Washington courts as seeking a legal conclusion.

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