HOW TO PLAN FOR, TAKE AND USE DEPOSITIONS IN A FAMILY COURT CASE

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I. Introduction

This topic is too broad and complex to present in a 45-minute talk at a seminar, but I have tried to include information and materials which I hope will be of assistance with regard to planning for, taking and using depositions in Family Court cases.

Issues which come before the Family Court relating to discovery are governed by the South Carolina Rules of Civil Procedure (SCRCP). Rule 2 of the South Carolina Rules for the Family Court (SCRFC) states that the South Carolina Rules of Civil Procedure shall be applicable in domestic relations actions except those which are specifically designated as inapplicable. All of the discovery rules (Rules 26 through 37, SCRCP) are therefore applicable to the Family Court. Rule 25, SCRFC addresses discovery but only restates the general law. Thus, the Family Court looks to the South Carolina Rules of Civil Procedure to determine the issues before it.

South Carolina has adopted, for the most part, the Federal Rules of Civil Procedure. South Carolina's rules as to discovery are therefore similar to the Federal Rules as were the

former Circuit Court rules.[1] The South Carolina Supreme Court has held that the trial court should look to the federal decisions for the interpretation of our Rules of Civil Procedure. See, *Gardiner v. Newsome Chevrolet-Buick, Inc.*, 340 S.C. 328, 404 S.E.2d 200 (S.C. 1991), citing Lightsey & J. Flanagan, *South Carolina Civil Procedure*, (2d ed. 1985)(As our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure); *Hodge v. Myers*, 255 S.C. 542, 180 S.E.2d 203, 206 (1971), in which the Court held that "litigants and attorneys should be allowed liberal discovery" and that the requested discovery "would help the parties in their quest of the whole truth"; and *Dunbar v. Vandermore*, 295 S.C. 493, 369 S.E.2d 150 (Ct.App. 1988)(federal case law should be persuasive in interpreting the rules.)

These generalizations apply across the board, but our Rules of Civil Procedure are not always the current version of the Federal Rules.

II. The Court and Discovery Depositions

A. Regulating Depositions

The two uses of depositions are for discovery and for use as testimony at the trial. Judges occasionally become involved in squabbles about depositions in the discovery phase. These are the key issues in disagreements about depositions which may arise prior to the trial:

(1) Depositions are burdensome on witnesses, but it is a burden which our course believes to be necessary within the Rules of Civil Procedure. Nevertheless, if a lawyer does not follow the Rules or abuses the Rules, the Court has a duty to intervene. The Court has authority to regulate a deposition, change the location, determine who can be present, the length of the

[1] / Lightsey and Flanagan, in *South Carolina Civil Procedure*, point out that South Carolina adopted the federal discovery rules in 1969 not 1985 and that the scope of discovery has always been based on federal law. See pages 17-8. The scope of discovery is therefore "quite broad." (p. 299)

deposition and regulate anything else to do with depositions. Rule 26(a), SCRCP gives the Family Court sweeping powers:

> The frequency or intent of use of discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c) of this Rule.

(2) A deponent can only be deposed in the county in which he resides, is employed, "transacts his business in person" or as fixed by court order. Rule 30(a)(2). Thus if a lawyer notices a deposition in Charleston County for a witness in Columbia or even Summerville (Dorchester County), the Court should grant a protective order pursuant to Rule 26(c) and quash the subpoena under Rule 45. If the witness is to be deposed in a county other than the one where the action is pending, the subpoena must issue from the county where the witness resides, is employed, transacts business and that Family Court (not the county of the action) has authority to regulate the deposition.

(3) A deposition of a party or witness can only be taken one time, unless by agreement or if the Court so orders. Rule 30(a)(2). The witness is entitled to a fee of $25.00 plus mileage. If this fee is not paid when the witness is served with the Deposition Notice, the witness is not required to attend.

(4) Protective Orders

a. In General

Protective orders protect witnesses and parties. If a deposition is noticed on a date which is not convenient and deposing counsel will not postpone, opposing counsel must file a motion for a protective order. Sometimes a protective order is needed to prevent a certain line of questioning or even the taking of the deposition itself.

Rule 26(c) addresses protective orders:

> (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden [or] expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by the order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. (Emphasis added.)

The matter is also governed by Rule 26(a) which states as follows:

> The frequency or intent of use of discovery methods ... shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in that action to obtain the information sought; or (iii) the discovery is unreasonably burdensome or expensive taking into account the

needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

As can be seen from the plain meaning of Rule 26, the Court has broad discretion to regulate discovery. However, all of the cases hold that there is a heavy burden on the party seeking to prevent discovery to convince the Court that this should be done. Discovery must be unreasonably burdensome or expensive "taking into account the importance of the issues at stake and the limitations on the parties' resources." For example, almost all custody cases of necessity are embarrassing to the parties, and indeed all litigation is annoying. The cases make it clear that the party seeking a protective order bears a heavy burden of proof and that the party objecting must make a specific showing of harm in his or her case. The Courts have held that a motion for a protective order is not favored. 10 Fed.Proc., L.Ed § 26:141, p. 383.

b. The Burden of Proof is on the Moving Party

Although it has been phrased in various ways, all of the authorities are in agreement that the party seeking to prevent discovery has a very heavy burden. "All motions under these paragraphs of the Rule must be supported by good cause and a strong showing is required before a party will be denied entirely the right to take a deposition." 4 N. Moore, Federal Practice, par. 26.69, pp. 26-494 through 26-495 (2d ed. 1974). The Ninth Circuit Court of Appeals held in *Blankenship v. Hearst Corp.*, 519 F.2d 418 (9th Cir. 1975) that "[u]nder the liberal discovery principles of the federal rules defendants were required to carry a heavy burden of showing why discovery was denied." The Third Circuit held in *Cipollone v. Liggett Group,* Inc., 785 F.2d 1108, 1121 (3rd Cir. 1986):

> ...Rule 26(c) places the burden of proof of persuasion on the party seeking a protective order. To overcome the presumption, the party seeking the protective order must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated

> reasoning, do not satisfy the test... Moreover, the harm must be significant, not a mere trifle.

Many federal courts have held that in order to obtain a protective order the party seeking protection must show "very serious injury." *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F.Supp. 866, 890 (E.D.Pa. 1981); 10 Fed.Proc., L.Ed. §26:141, at 382, citing *Lucido v. Cravath, Swaine & Moore*, 25 Fed. R. Serv.2d (Callaghan) 1050 (S.D.N.Y. 1978); and *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335 (3rd Cir. 1987).

In short, as one federal judge held:

> Preliminarily, courts do not generally grant protective orders without a strong showing of 'good cause.' *Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir.1982). And the burden of establishing 'good cause' lies with the party seeking the protective order. 8 C. Wright and A. Miller, *Federal Practice and Procedure* §2035, at 264-65 (1970).

Howard v. Galesi, 107 F.R.D. 348, 350 (1985).

The Moving Party has not shown any particular need for protection if all she has shown is that she will be prejudiced if evidence harmful to her is allowed to be discovered. Attorneys may contend that the discovery is too expensive but the expense of discovery is something which the Court can adjust at any stage of the litigation.

c. <u>The Standard is Good Cause as well as a Balancing of Interests</u>

The cases hold that the party seeking to prevent discovery must show good cause for the request. If such good cause is shown, then the Court balances the interests of the litigant seeking discovery against the cost of providing it or the inconvenience to the party seeking to prevent it. 10 Fed.Proc., L.Ed. §26:141, at 383, citing *Ross v. Bolton* 106 F.R.D. 22 (S.D.N.Y. 1985), 17 Fed. R. Evid. Serv. (Callaghan) 1270, 40 Fed. R. Serv.2d (Callaghan) 1412; *Farnsworth v.*

Procter & Gamble Co., 758 F.2d 1545 (11th Cir. 1985). The Eleventh Circuit Court of Appeals held in *Farnsworth v. Procter & Gamble Co.* that:

> While Rule 26(c) articulates a single standard for ruling on a protective order motion, that of "good cause," the federal courts have superimposed a somewhat more demanding balancing of interests approach to the Rule.

Id. at 1547.

d. Inconvenience, Expense, Embarrassment and Harassment

Rule 26(c) also protects a party from "annoyance, embarrassment, oppression or undue burden or expense." The cases hold that a showing that discovery may involve some inconvenience and expense "does not suffice to establish good cause for issuance of a protective order." 10 Fed.Proc., L.Ed. §26:142, at 385, citing *Lehnert v. Ferris Faculty Association-MEA-NEA*, 556 F.Supp 316 (W.D.Mich., 1983), later proceeding 643 F. Supp. 1306 (W.D.Mich.)(emphasis added).

With regard to a protective order to prevent embarrassment, the moving party must demonstrate that the embarrassment will be particularly serious. 10 Fed.Proc., L.Ed. 385, citing *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3rd Cir. 1986), 81 A.L.R. Fed. 443, on remand 113 F.R.D. 86 (D.C.N.J.), 7 F.R.Serv. 3d 982, later proceeding 649 F.Supp. 664 (D.C.N.J.), and mand. den. 822 F.2d 335 (3rd Cir.), 7 F.R.Serv.3d 1438. Because release of information "not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious." *Cipollone v. Liggett Corp., Inc.*, 785 F.2d 1108, 1121 (3rd Cir. 1986).

A showing that the likelihood of harassment is "more probable than not" is insufficient without a concomitant showing that the information sought is fully irrelevant and can have no

possible bearing on the issues. *Grinnell Corp v. Hackett*, 70 F.R.D. 326 (D.C.R.I. 1976); 8 C. Wright & A. Miller, *Federal Practice and Procedure*, §2037, at 275 (1970).

B. The Scope of Discovery

It is elementary that under the Rules of Civil Procedure parties are granted broad freedom to conduct discovery. Rule 26, SCRCP, is very clear that the scope of discovery is quite broad. It states as follows:

> **(b) Scope of Discovery**. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added.)

The South Carolina Supreme Court has interpreted the rule liberally in favor of discovery. In *Bailey v. Owen Elec. Steel Co. of South Carolina, Inc.*, 301 S.C. 399, 392 S.E.2d 186, 187 (S.C. 1990), the Supreme Court of South Carolina reversed a trial court ruling denying a motion to compel discovery. The Court held:

> Like its counterpart in the Federal Rules of Civil Procedure, Rule 26(b)(1), SCRCP, defines the general scope of discovery as embracing "any matter, not privileged, which is relevant to the subject matter involved in the pending action..." Broadly construed, it extends discovery to factual issues unrelated to the merits of the case, such as those involving jurisdiction. Id. at 187, n. 1, citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 & n. 13, 98 S.Ct. 2380, 2389 & n. 13, 57 L.Ed.2d 253, 265 & n. 13 (1978)(emphasis added).

All that is required is that the facts sought tend to establish, or make more or less probable, some matter in issue, and to bear directly or indirectly thereon. *Francis v. Mauldin*,

215 S.C. 374, 55 S.E.2d 337 (1949); *Drayton v. Industrial Life & Health Ins. Co.*, 205 S.C. 98, 31 S.E.2d 148 (1944); and *Entzminger v. Seigler*, 186 S.C. 194, 195 S.E. 244 (1938).

In *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317, 319 (Ct.App. 1987), the Court of Appeals held as follows:

> The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required.

Of course, the Federal Rules of Civil Procedure have been interpreted by the United States Supreme Court to provide for broad discovery. In *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947), the Supreme Court held:

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. 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. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. Id. at 392.

Relevance is not measured by the precise or narrow issues in the pleadings, but by the broader scope of general relevance to the subject matter. *United States v. IBM Corp.*, 66 F.R.D. 180, 182 (S.D.N.Y. 1974); *Foremost Promotions, Inc. v. Pabst Brewing Co.*, 15 F.R.D. 128 (D.C.Ill. 1953). Discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that is not related to the merits.

Discovery requests should be considered relevant if there is any possibility that the

information sought may be relevant to the subject matter of the action.[2] *Mallinckrodt Chem. Works v. Goldman, Sachs & Co.*, 58 F.R.D. 348 (S.D.N.Y. 1973); *Cox v. E.I. Du Pont de Nemours & Co.*, 38 F.R.D. 396, 398 (D.C.S.C. 1965). The universal rule is that all information is discoverable so long as it is reasonably calculated to lead to the discovery of admissible evidence. *Dunbar v. United States*, 502 F.2d 506 (5th Cir. 1974). Wright and Miller, in their highly regarded treatise, *Federal Practice and Procedure*, quote the advisory committee statement of 1948 that, "[t]he purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case ... In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice ..." 8 Wright & Miller, *Federal Practice and Procedure*, § 2007 at 40 (1970). Wright and Miller state flatly that the cases show "an explicit recognition that the question of relevancy is to be more loosely construed at the discovery stage than at the trial. Indeed in many cases, the issues will not be clearly defined at the time discovery is sought, and one of the purposes of discovery is to identify and narrow the issues." Most Courts have read the rule as it is intended and have recognized that relevancy to the subject matter is all that is required.

The rule on broad discovery is even stronger in custody cases than it is in ordinary civil litigation. While the South Carolina Supreme Court has not spoken directly to this issue, many courts around the country have. In *Burgel v. Burgel*, 141 A.D.2d 215, 533 N.Y.S.2d 735 (1988), a case involving forensic testing of hair samples, the Court recognized the importance of

[2] / To quote Wright & Miller, "But it is not too strong to say that a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action." § 2008, pp. 46-7.

affording a broad discovery, particularly in custody suits. The Court held as follows: "As the welfare of the children is at stake, and the best interest of these children the paramount concern ... the broadest possible latitude would be accorded to a reasonable discovery request." *Burgel* at 738. *Burgel* has not only been followed in other New York decisions, such as *Garvin v. Garvin*, 162 A.D.2d 497, 556 N.Y.S.2d 699 (1990), but also in other states as well. The Court of Appeals of Illinois followed *Burgel's* broad interpretation of the scope of discovery in the case of *In Re Marriage of Fahy*, 208 Ill. App. 3d 677, 567 N.E.2d 552 (1991), a custody suit which addressed a discovery request for handwriting exemplars.

III. Taking Depositions

A. For Discovery

1. To Depose or Not to Depose.

Depositions are expensive. In addition, asking a party or a witness a series of questions in a deposition educates the other party about the issues and may better prepare them for the trial. The lawyer must determine, therefore, whether or not a deposition should be taken.

In a case of any complexity, the taking of the deposition of a party is almost always useful, if only to find out what she or he has to say about your client and his or her view of the case. Clients have been known to fail to tell their attorneys the complete truth about what happened in the break-up of a marriage or financial matters, and sometimes the deposition alerts both the deposing attorney and the defending attorney to problems in his or her case. In alimony and equitable apportionment cases, counsel would want to know what the opposing party has to say about the thirteen alimony factors and the fifteen equitable apportionment factors. Indeed, the factors set forth in Section 20-3-130, S. C. Code and in Section 20-7-472, S. C. Code make a good checklist of questions.

Depositions are sometimes essential to establish facts relating to adultery which the other party may have denied. The true income of a party, the true expenses of a spouse seeking alimony, the value of a business, all sorts of issues relating to the well-being of children, medical issues, facts relating to the break-up of the marriage, visitation and a myriad of other issues can be explored in a deposition. Other witnesses who ordinarily should be deposed (where finances allow) include alleged paramours or witnesses to any adulterous conduct when there is a genuine dispute about the adultery; certified public accountants and financial witnesses as to assets, liabilities and income; expert witnesses of all kind, including accountants, business valuation experts, psychologists, medical doctors, and appraisers; girlfriends on money available from husband; banks which have financial statements the husband has not produced[3]: partners who will not talk except under oath. On the other hand, there are experts who do not need to be deposed. If a real estate, accounting, or business valuation expert has given detailed written appraisals, reports or summaries, it may not be necessary to depose them in order to effectively cross-examine that witness at trial. In fact, sometimes especially when there is an error in these documents, the cross-examination may be more effective without a deposition to alert the witness to the substance of the cross-examination. If there is any doubt about the substance of the witness's testimony and the issue is important to the case, the better practice is to take the deposition.

On the other hand, if you have the report, summary and trial exhibits of a credible and experienced expert, you may not need to depose the witness. A real estate appraisal ordinarily tells you all you need in order to question an expert on comparable sales, provided your expert

[3] / This can, of course, be accomplished by a subpoena *duces tecum* if the bank cooperates and if they actually look for the records. If the bank's records are critical, a 30(b)(6) Deposition Notice requires the bank to name the person knowledgeable and produce him or her. (Tab 1)

has educated you.

2. Determining the Goal of the Deposition

Aristotle once said that "No wind is a fair wind if you do not know to which port you are sailing." The same is true of a deposition. The purpose of a deposition is not to harass, intimidate or embarrass a witness or satisfy your angry client. The purpose is to ascertain facts and learn the testimony of the witness. Therefore, when you decide to take a deposition, you should have a clear purpose in mind. If you are deposing an expert, the purposes include learning the expert's opinion, the basis of his or her opinions, the documents he or she examined, the method or theories upon which the expert opinion is based, the body of knowledge on which the expert is relying, the facts which have been told to the expert, the expert's qualifications, biases, and other limitations. If, for example, a medical doctor is going to testify that a wife is unable to work, you want to have a checklist of questions on that subject including all medical and other records examined, the doctor's notes, the diagnosis, the basis of the diagnosis, the prognosis, the reason why the spouse cannot work, and the qualifications of the doctor allowing him or her to give such an opinion. If the expert is credible, you may need your own expert to refute his or her testimony. You may learn that the expert has relied on incomplete medical information or statements given by the patient / spouse which are demonstratively false. If the case is going to trial, there is no need to point out to the expert the mistakes he or she has made because you can demonstrate that at the trial. Educating the expert about his or her shortcomings is only useful if it will help in settlement negotiations. If, based on your brilliant examination, opposing counsel realizes he has picked a bad expert, he can find another expert and start over. Or, as a result of your educating opposing counsel at the deposition, the expert can rehabilitate his testimony before the trial.

In deposing lay witnesses connected with a business, one wants to develop a checklist and a subpoena which will require the witness to bring to the deposition all of the documents, files, letters, emails and other electronic material, which may help you prove your case. In custody cases, witnesses who have particularly unfavorable things to say about your client should be deposed so that you can evaluate their credibility and determine the source of their information and opinions so that you can prepare to refute it at the trial.

It is worth pondering what Christopher T. Lutz, a partner with Steptoe and Johnson, in Washington, DC, wrote in a handbook on depositions for the ABA Litigation Section: "Depositions of parties and key witnesses can be a good time to show that litigation is not a tea party...it is important to be careful here. We now live with litigation reform and civility codes....but in some quarters, merely aggressive or even merely thorough advocacy is disdained. The notion is not just that we must be civil, but that we should be kind, pleasant, and nice. The truth is that some unpleasantness is inherent in litigation. A lawsuit is, after all, a disagreement that could not be resolved more sensibly...conflict, division and unhappiness are inescapable. It is not necessarily wrong to make a deposition witness confront the jagged, painful edges of a lawsuit."

3. Preparation for a Deposition

There is no substitute for preparation. Numerous checklists abound in numerous places. The internet, for example, contains many checklists which are useful in preparing for a deposition. Some sample checklists are attached as Tab 2. There are innumerable treatises on discovery and depositions which also contain checklists. However, the best checklist comes from your own notes about the case, a good chronology prepared by the client, the experts, and your staff, questions from your client, and questions prepared for the expert by your own expert.

Sometimes we tend to forget the old saying: K.I.S.S. – "Keep It Simple, Stupid." The checklists for depositions in Family Court are basic: (1) the pleadings; (2) all affidavits filed at temporary hearings; (3) the Financial Declarations, both parties' sets of Interrogatories and Interrogatory Answers, both parties; sets of Requests to Produce, and other depositions; (4) the factors in the alimony and equitable apportionment statutes; (5) the Child Support Guidelines; (6) factors set forth in important child custody cases; and (7) key points from your paralegal or secretary, the client, the client's friends, experts, etc. Professor Roy T. Stuckey's treatise, *Marital Litigation in South Carolina*, is useful. A checklist for an expert's deposition needs to come from your expert.

Ideally, all exhibits will be premarked and copies made for the witness and opposing counsel. See Rule 30(j)(8).

You may want to organize the documents chronologically or by subject or to surprise the witness. Remember not to write on the "original" and use clean copies for the witnesses. (Use numbers not letters for exhibits as numbers are easy and letters are confusing.)

Sometimes, documents are produced by the Deponent late or at the deposition itself. The examiner must review these documents and may delay or even continue the deposition. If copies are provided, the examiner is entitled to "a fair opportunity to verify the copies by comparison with the originals." Rule 30(f).

All forms of discovery are useful. Prior to taking a deposition, interrogatories are useful to discover basic facts and obtain answers to factual questions such as the names of witnesses, the substance of their testimony, identifying bank accounts and credit cards, life insurance policies, email addresses, and other basic facts. Interrogatories are almost useless when it comes to obtaining admissions from parties because it is human nature to give out as little information

as possible when one is not forced to do so. A Request for Production of Documents is also useful because it requires the opposing party to produce records relevant to the case. In a domestic case, records relating to income, identification and valuation of assets, liabilities, medical conditions, custody issues, among a myriad of other issues are necessary. Occasionally, a Request to Admit is a useful device. This is true particularly where the other party will have to admit facts which might be expensive or difficult to prove, such as adultery, the value of property or the marital or non-martial nature of property. It is worth noting, however, that this rule is honored more in the breach than in the observance. Rule 37(c) states that if a party denies a Request to Admit and the truth of the matter is later proven, the party denying or refusing to admit may be required to pay legal fees. Judges need to enforce this rule which generally goes unenforced.

But of all the discovery techniques, depositions are, by far, the most useful because witnesses have far less opportunity to be evasive and must directly answer questions as the questions are put to them in a deposition. If the wrong question has been asked in an Interrogatory or the wrong document requested in the Request to Produce, the answers and documents can be ferreted out by examination of a witness in a deposition.

It is best to take a deposition after all Interrogatories have been answered and all documents have been produced, but sometimes litigants simply do not cooperate and a subpoena to a witness is like a magic wand. Most witnesses – especially CPAs, partners in a business, employees, banks, doctors, experts – want to cooperate and comply with a subpoena.

4. Electronic Discovery

Unfortunately for those of use who are technologically challenged, electronic discovery is critical in today's domestic cases. We are all aware that computers should be seized in some

cases to prove adultery, but the contents of the computer include information which, in the past, existed only on paper. Bank records, credit card records, emails, Quicken, Quickbooks, financial files all must be discovered. The common practice today is sending a "spoliation letter" which puts the other side on notice that the contents of a computer should not be destroyed. There are legal consequences resulting from missing information after this letter is sent. See Tab 3.

I have added to my Interrogatories the following:

1. State with particularity any and all Instant Messenger Services to which you have subscribed since January 1, 2004. For each such service, additionally state any and all usernames by you.
2. State with particularity whether you have subscribed to any online dating or match-making services since January 1, 2004. Examples of such services include, but are not limited to, match.com, eharmony.com, adultfriendfinder.com, or itsjustlunch.com. For any such service to which you have subscribed, state your login or username.
3. State with particularity any and all computer software installed by you on your behalf, which monitors activity or keystrokes on any computer utilized by the Plaintiff or Defendant.

And I have added to my Requests for Production of Documents the following:

1. Any and all printouts, documentation, or computer files evidencing electronic mails (e-mails) between Defendant and Plaintiff and Defendant and any third party, whether sent or received, from January, 2006 to present.
2. Any and all documentation from January 2006 to the present with regard to any cell phone, Blackberry, or other mobile communication device, including an itemization of any incoming and outgoing calls, text messages, emails, or picture files as well as an indication of the sender and/or recipient.
3. Any and all printouts, documentation, archives, or computer files evidencing the use of any "instant messenger service" between Defendant and any third party, whether sent or received, from January 2006 to present. An "instant messenger service" is defined as an online provider permitting parties to communicate by sending messages through the provider. Examples include, but are not limited to, Yahoo Instant Messenger, MSN Messenger, AOL Instant Messenger, or Windows Messenger Service.
4. Any and all electronic recording devices and all tapes or digital storage associated with such device that Defendant uses or has used or authorized the use of from January 2006 to the present.

5. Any and all computer files from any business or personal financial management computer program that Defendant uses or has used, such as Quicken, Microsoft Money, or Turbo Tax, from January 2002 to the present.

6. Any and all computer files that contain electronic copies of monthly statements and canceled checks for all checking accounts, savings accounts, or money market accounts from any such account you may have with any bank or financial institution or for any accounts in which Defendant may have had an interest, or signatory authority, whether personal, corporate, business or trust account from January 2002 to present.

7. Any and all computer files that contain electronic copies of monthly statements for any credit cards or installment accounts in Defendant's name or on which Defendant has signing authority from January 2002 to the present.

8. Any and all computer files that contain electronic copies of any annual financial and/or profit-and-loss statements prepared by you or someone on your behalf, whether audited or unaudited for yourself personally, and for any corporation or partnership in which you have an interest for the past five calendar years.

5. Stipulations and Objections:

The reason we have stipulations in depositions is because the Rules, read literally, are quite oppressive and impractical. For example, very few lawyers realize that Rule 30(e) states that when the testimony is fully transcribed, the deposition "shall be submitted to the witness for examination and shall be read to or by him unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer [i.e., the court reporter] with a statement of the reasons given by the witness for making them. The depositions shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign."

What this means is that the rules envision a deposition being taken by a court reporter, and after the deposition is typed, the parties will get back together or at least the court reporter and the witness will meet so that the witness can either read the deposition or have someone read

it to him. At that time, he can make any change in the form or substance of the deposition which he desires. He is supposed to instruct the court reporter to do so. Rule 30(e) requires that the court reporter shall then make the changes in the deposition with a statement of the reasons given by the witness for making the changes. The witness, having satisfied himself or herself that the deposition is now complete and accurate, then signs the deposition. That is why we have the stipulation that the reading and signing are waived.

Most attorneys begin the deposition with the "usual stipulations," but this is not necessarily a good practice because the "usual stipulations" might vary from court reporter to court reporter or from county to county. The best stipulation is "this deposition is being conducted pursuant to a Notice of Deposition entered on _____, 20___ in accordance with the South Carolina Rules of Civil Procedures and may be used for all purposes permitted by those rules. All objections, except to the form of the question, are reserved until the time of trial" (unless you are taking the deposition for use at trial).

Rule 30(d)(1) anticipates that a lawyer can and will make objections. It is important to note that Rule 32(b) ("objections to admissibility") begins with "subject to the provisions of Rule 28(b) and subdivisions (d)(3) of this rule..." Rule 28(b) concerns foreign depositions, so that usually does not come into play; but Rule 32(d)(3)(A) reads as follows: "Objections to the competency of a witness or the competency, relevancy, or materiality of testimony are not waived by failure to make them before and during the taking of the deposition unless the ground of the objection is one which might have been obviated or removed if presented at that time." (Emphasis added.) In other words, if there is a question which counsel needs to object to (not just the form of the question) which could be obviated or cured at the deposition, you had better object. Rule 32 does not limit obviation to form of the question. The point of the Rule is that an

objection which would allow the questioner to correct the form of the question and move on with the deposition should be made. Obviously if you are in doubt about whether or not you should make an objection then you should go ahead and make it. Clearly objections can be made to matters which are privileged or totally irrelevant to the proceedings.

According to some authors, an objection to a question which is argumentative might have to be made at a deposition since the question which is argumentative really goes to the form of the question and can be obviated at the deposition. The same could be argued for questions which call for a conclusion, questions which are leading, multiple or compound or repetitive.

6. Interrupting the deposition, coaching the witness and relevance

Thirty years ago, lawyers had the pleasure of being able to object to a question in such a way as to coach the witness, interfere with the other counsel's efforts to depose the witness, and, in short, employ many tactics which were designed to insure that the deposing counsel could not take an effective deposition. Those days are over. Rule 30(j)(3) now provides as follows:

> Counsel shall not direct or request that a witness not answer a question unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court or unless that counsel intends to present a motion under Rule 30(d), SCRCP. In addition, counsel shall have an affirmative duty to inform the witness that unless such an objection is made the question must be answered. Counsel directing that a witness not answer a question on those grounds or allowing a witness to refuse to answer a question on those grounds shall move the court for a protective order under Rule 26(c), SCRCP, or Rule 30(d), SCRCP, within five business days of the suspension or termination of the deposition. Failure to timely file such a motion shall constitute a waiver of the objection and the deposition may reconvene.

Thus counsel who direct witnesses not to answer questions have an affirmative duty to follow this rule, and the Court has a duty to enforce it.

The new "potted plant" revisions to the rules also state at Rule 30(j)(4):

> Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel's objection shall be stated concisely and in a non-argumentative and non-suggestive manner, stating the basis of the objection and nothing more.

To the extent that lawyers violate this rule, other attorneys have the right to adjourn the deposition or call the court and seek an appropriate restraining order.

Lawyers are no longer able to coach their witnesses once the deposition begins. Rule 30(j)(5) provides:

> Counsel and a witness shall not engage in private, off the record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.

It is no longer proper for a lawyer to discuss the subject matter of the deposition with the witness or his own client during the taking of the deposition. To the extent such conferences are held, the deposing counsel has the right to ask about them. Rule 30(j)(6).

Many lawyers are not aware and the Family Court should be aware that Rule 30(j)(8) requires that, in the taking of a deposition, deposing counsel "shall provide to opposing counsel a copy of all documents shown to the witness during the deposition either before the deposition begins or contemporaneous with the showing of each document to the witness. If the documents are provided (or otherwise identified) at least two business days before the deposition, then the witness and the witness's counsel do not have the right to discuss the documents privately before the witness answers questions about them. If the documents have not been so provided or identified, then counsel and the witness may have a reasonable amount of time privately to discuss the documents before the witness answers questions concerning the documents."

Defending counsel, except when it comes to matters of privilege, protecting the witness from abuse or insisting that the witness be allowed to answer the question really is reduced to the

status of the proverbial "potted plant." Obnoxious behavior in a deposition can lead to serious sanctions. Abusive questioning can also lead to disciplinary actions. Therefore, no matter how obnoxious the witness may be and indeed no matter how obnoxious opposing counsel may be, deposing counsel is restrained from responding in kind.

An examination of a deposition conducted in bad faith or which is oppressive may lead to a motion by the defending attorney to terminate the deposition. See Rule 30(d).

7. The Witness Who Disobeys a Subpoena

Experts normally provide all of their documentation and notes at a deposition. But a subpoena should be issued to all witnesses (except perhaps a party)[4] so that the witness is under a compulsion to bring everything. Witnesses, particularly those connected to a business, medical doctors and psychologists, many times dislike subpoenas intensely and threaten not to comply with them. Business partners, for example, sometimes refuse to produce evidence on the grounds that the partnership business is confidential and insist they will only bring records pertaining to your client. A doctor might not obey a subpoena if a HIPPA form is not included. Psychologists generally refuse to obey subpoenas because they are under the impression that their records are confidential and they do not have to be produced.

Here are some tips on handling this situation: First and most importantly, never argue with or threaten a witness.[5] The best approach is to mark the Notice of Deposition and the subpoena as an Exhibit to the deposition and go over each item carefully and in detail asking the witness whether he or she has brought the item set forth in the subpoena. If the subpoena is

[4] / A Request to Produce can be made a part of a Notice of Deposition to a party. Rule 30(b)(5) reads: "The notice to a party deponent may be accomplished by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request." But Rule 45 on subpoenas also applies.

comprehensive, the witness is obliged to bring those items to the deposition unless they have moved for a protective order or filed a motion to quash. If the witness has deliberately or negligently failed to produce the item, one should point out to the witness that the subpoena is a court order requiring him to bring the documents and that you would like to work out an arrangement whereby the documents will be produced expeditiously. If the documents are not voluminous, you should ask the witness to have her office fax the documents to the office where the deposition is being taken. If that is not possible, one can adjourn the deposition at the end of the deposition (not conclude it so that it can continue at a later date), and instruct the witness (politely) to send the documents and inform her that you will reconvene the deposition at a later time if that proves to be necessary.

There is no harm in explaining the Rules of Civil Procedure to the witness on the record so they are put on notice that they have disobeyed the subpoena and that, if they do not obey it, the next step will be to file a motion to compel or to ask the court to issue a Rule to Show Cause to hold the witness in contempt. If they then fail to comply, the court may sanction them and award attorneys fees. See Rule 45(c).

With regard to psychologists in particular, it is best to work out an arrangement ahead of time to deal with the Patient-Provider Act. Obviously the first step in deposing a counselor, psychologist, social worker and others protected by the Act is to have the other party sign a HIPPA form or a consent or authorization. If the party refuses, one can make a motion before the family court to have them sign such an authorization. There are situations in which a psychologist does not have to testify even in the face of all that, but these are extremely limited situations. In the end, in my opinion, all psychologists and counselors or other providers can be

[5] / The Good Old Days are over.

required to testify and produce their files if there is good cause. See Tab 4 for a portion of a memorandum of law.

8. You Must Comply with All Procedural Requirements in Order to Require a Witness to Attend a Deposition

Rule 26 requires that, in order to take a deposition of a non-party, you must issue a notice of the taking of a deposition, together with a subpoena. The person must be properly served pursuant to Rule 5 and Rule 45 and the notice and the subpoena must be accompanied by a check in the amount of $25.00 plus mileage.

Rule 30(a)(2) and Rule 45(b)(1) provide that the subpoena for a deposition must be accompanied by a check for $25.00 and the mileage allowed by law for official travel of state officers and employees. It must issue from the court for the county in which the witness resides or is employed or regularly transacts business in person and be served in that county. Rule 45(b)(2).

While videotaped depositions are not common in family court as yet, they will become more common as costs decline and technology becomes more common. In cases which warrant it, the use of videotape depositions is very effective. A videotaped deposition of a spouse in a custody case (where the cross-examination of a party is recorded visually) could be important to the outcome. Clearly videotaped depositions of witnesses out of state will be more effective than merely reading a deposition.

Videotaped depositions are governed by Rule 30(h). The Notice is simple. Important Tip: Use a court reporter who knows the rules. As in a regular deposition, you can waive a lot of the technical requirements.

If the witness does not receive a proper notice, subpoena or check, he is not required to

attend the deposition. You can only depose a witness in the county in which he resides or primarily conducts business. Therefore, if you are in Charleston County and the witness is across the county line in Summerville in Dorchester County, technically, unless the witness and the opposing counsel agree, you must depose that witness in Dorchester County. Obviously, it is in everyone's best interest that the ground rules for the deposition be laid out ahead of time and that the witness be consulted as to the date, time and location of the deposition so that there will not be a conflict. You do not want to be in court having noticed a witness's deposition, who is not a party, at a time that is extremely inconvenient for him or her.

While it may appear obvious, you must have a qualified court reporter take the deposition because if the officer taking the deposition is not qualified to do so, the deposition cannot be used at trial. See Rule 28.

9. Some Tips about Taking an Effective Deposition

1. Be nice. At first. Witnesses at depositions are naturally suspicious, nervous, hostile or, at a minimum, wary of opposing counsel. The truth is that, except for parties and truly hostile witnesses, most witnesses want to tell the truth and be done with it and being friendly and nice to the witness is actually the best way to illicit the most information. I usually start out a deposition by asking the witness all the questions I feel he or she will be forthcoming about if I am non-confrontational and non-adversarial. If you know you are going to have to ask the witness questions which will make them angry, upset or defensive, save those questions until the end, unless it is your purpose to upset the witness from the beginning.

2. Be prepared. Take your time. Remind the witness, if necessary, that you are asking the questions and she is answering the questions. Allow the witness to finish her answers but interrupt a non-responsive answer.

3. Be sure you describe each document so that it can be identified by reading the deposition, i.e., "we have marked Exhibit 15, a four-page memorandum dated January 15, 2006."

4. Authenticate each document by showing that it is what it purports to be. Ask opposing counsel to stipulate to authenticity.

5. If necessary, identify "business records" as defined and described by Rule 803(6), SCRE.

6. If you are defending a witness, protect your witness by not allowing the witness to be misled. Insist your witness be shown complete documents, not parts.

7. If the witness is shown a document he has not seen, you may discuss it with him off the record.

8. Many lawyers advise clients and witnesses to waive reading and signing. But there are solid reasons not to waive those rights in important depositions. Contrary to popular belief, a witness can make changes in his testimony. He can change his answer from "yes" to "no." He can explain his answers better. Of course, the Court can be shown the original answers. Rule 30(c) states: "Any changes in form or substance which the witness desires to make shall be entered upon the deposition" and the reasons therefore.

10. Who Can Attend the Deposition

Rule 26(c)(5) provides that the court may make an order "that discovery be conducted with no one present except person designated by the court." Witnesses, parties and counsel have a right to be present. Indeed, anyone can be present. If deposing counsel does not want others in the room, the better practice is to reach an agreement with opposing counsel beforehand or counsel must apply to the court for a protective order limiting the people who can attend.

IV. Depositions Taken for Use at Trial

A. Using the Deposition as Evidence

Where the deposition is to be introduced into evidence, the better procedure is to have someone, a paralegal for example, take the witness stand and read the answers while deposing counsel asks the questions from the deposition. This allows the court to hear the testimony as it was meant to be heard. It also allows the opposing party to object in a timely fashion at the appropriate point. Choose the person to play the part of the witness carefully. Voice intonation may matter. In the family court, of course, as there is no jury, and the parties can stipulate that the deposition or parts thereof will come into evidence, and the court can read the deposition at its leisure. If one agrees to this procedure, one waives all objections noted in the deposition or which could have been raised at the time. All of the testimony in the deposition will come into evidence.

Frankly, I believe Family Court judges should allow and even require attorneys to place the deposition in the record by reading it into the record as Rule 30 intended. Deposition testimony loses much of its effectiveness by just having it read by the court and not read aloud at the trial. Properly handled by counsel and reading only the truly relevant important and parts, it is not a waste of time and gives the parties a much fairer trial. Note to Judges: The party who took the deposition will feel the trial was fairer. The lawyer who defended the deposition will encourage you to "save the court's time" because she hopes you will not pay much attention to a mere deposition.

Any deposition, even a deposition which the parties considered was taken purely for "discovery" can be used at the trial. Rule 32 provides that "any part or all of the deposition, so far as admissible under the rules of evidence applied as though the witness were then present and

testifying, may be used against any party who was present or represented at the taking of the deposition or who has reasonable notice thereof" provided that certain conditions are met. Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

The deposition of a party (which would include the managing agent or the person designated under Rule 30(b)(6) or 31(a)) may be used by an adverse party for any purpose. Thus, the deposition of a party is evidence at the trial and can be read into the record as part of a party's case in chief.

The deposition of a witness can be used at the trial if the witness is dead or if the witness is more than one hundred miles from the place of trial or is out of state "unless it appears that the absence of the witness was procured by the party offering the deposition." Thus a key witness whom you are expecting to cross-examine may be going on a vacation or may be having surgery in New York. That witness's deposition can legitimately be used at the trial. This is one of those situations where you intended to save all of your questions for the witness at the trial, but due to unforeseen circumstances, the witness may not be at the trial. These are judgment calls which lawyers just have to make.

There is a special rule with regard to licensed physicians, psychologists, chiropractors, osteopathic psychiatrists and dentists "who provided actual medial treatment to a party." Notwithstanding Rule 32(a)(3) regarding the location of the witness, these depositions may be used at trial. Rule 30(i).

The deposition of a witness who is unable to attend or testify because of age, illness, infirmity or imprisonment can be used at trial. Once again and when one is deposing a person who is sick and may actually not be able to attend the trial or one is defending such a deposition,

it may be necessary to cross-examine the witness if there is any likelihood that the witness will not be available at the trial. The deposition of a witness who cannot be made to appear by a subpoena can be used at the trial. In other words, counsel can use the deposition at trial of a paramour or an adverse witness or a business partner who is dodging service of a trial subpoena.

Rule 32 also has a catch-all provision that there may be other reasons where a deposition could be used in "exceptional circumstances" where the interest of justice requires that the deposition be used. Counsel must make an application to the court and notify opposing counsel. Rule 32(a)(3)(E).

Because the use of depositions and responding to the use of depositions at trial can be time-consuming, Rule 32 requires that at least one day prior to offering excerpts from a deposition in the case in chief, counsel "shall furnish to the trial judge and, at the same time and by the same means, furnish to all opposing counsel the excerpts from the depositions (by page and line number) and a list of deposition exhibits which counsel expects to introduce in the case in chief at trial." The adverse party is then required to furnish the trial judge and opposing counsel any objections (by page and line number) to opposing counsel's deposition excerpts and any additional excerpts from the depositions (by page and line number) which counsel expects to read pursuant to Rule 32(a)(4) as well as a list of deposition exhibits.

The use of deposition testimony is the same as testimony from the witness stand. The question is read. If there is an objection, the objection must be made, and the court must pass on it. Rule 32(b).

Once the parties have taken depositions and are preparing for trial, Rule 32 envisions that errors and irregularities in depositions have been waived. Thus counsel should not object to the use of depositions based on a defect in the notice, the disqualification of the court reporter,

competency of the witness, or any other errors or irregularities unless some objection was made at the appropriate time. Rule 32(d). The theory of the Rule is that any problems or errors at the deposition which have been obviated or cured at the time of the deposition should be done at the deposition and not at the trial. Rule 32(d)(3)(B).

If the deposition is being taken for use at the trial and not for discovery, you are examining or cross-examining the witness as if you were in court. Thus, the usual stipulation that "all objections are reserved until the time of trial" does not apply. If you are deposing your own witness for use at the trial, you are conducting a direct examination of that witness just as if the person were on the stand in the courtroom.

If the witness is an expert, you need to identify the witness; qualify him or her as an expert, attach a CV or resume to the deposition as an exhibit and offer it into evidence; ask the expert what he or she has done; the records or documents he or she has examined; and ask the expert to tell the court what his or her opinion is and the basis of that opinion; identify whatever exhibits the expert intends to rely upon; and introduce them into evidence at the deposition.

Opposing counsel is obliged to make his or her objections at that time. If opposing counsel objects to the qualifications of an expert witness, he or she has the right to "voir dire" the expert, that is cross-examine the expert on the issue of his or her qualifications immediately after you have conducted a direct examination on the issue of the expert's qualifications. As there is no judge present to decide the question, even though opposing counsel contends that the expert is not qualified to give an opinion, deposing counsel should proceed to elicit the expert's testimony. It is best to stipulate to medical records and other documents on which the expert may be relying so that their admissibility is not contested. If that is not possible, you need to offer each document into evidence, have the witness identify the exhibit just as if you were in court.

B. Use in Cross-Examination

1. Preparation

One has to study each deposition prior to the commencement of the trial. If they are important depositions, outlines should be made. The cross-examination should be planned with the deposition in mind, knowing what the witness has testified to or failed to testify to. When cross-examining a witness, it is perfectly proper to ask the question: "But did you not say something different in your deposition, namely that you thought the value of the business was $1 million, not the $250,000.00 you are testifying to today?" If the witness says he cannot recall or denies having said it, counsel is required to impeach the witness, which is done as follows: Attorney: "I direct your attention to page 25 of the deposition of John Smith taken on January 1, 2007. This is the original deposition which I am now handing you. Please read lines 3 through 12," these being the lines where you asked the question and he answered it. You want the witness to read into the record the question which was asked and the answer he gave at that time. Attorney (after the witness has read the pages): "Was that your testimony on January 1, 2007?" Rule 32(a)(1).

In cross-examining the witness, the lawyer should be familiar with the questions and answers which may impinge on this particular subject. For example, if later in the deposition, the witness said he thought the business might be worth $275,000.00, the better practice would be to ask the witness to read that part as well so that the court has all of the relevant testimony on the subject at the same time. Otherwise, it appears the attorney is trying to mislead the witness or hide something from the court. Rule 32(a)(4) allows opposing counsel to bring out other parts of the deposition which "ought in fairness to be considered."

Opposing counsel, of course, has the right to have the witness read other parts of the

deposition which bear on the question. Rule 32(a)(4) provides as follows: "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other party which ought in fairness to be considered with the part introduced, and any party may introduce any other parts." Where the case is of sufficient complexity, it is useful also to use PowerPoint to project the deposition on a screen because, as all trial attorneys know, one picture is worth a thousand words. At a minimum, the court should be handed a copy of the deposition while the witness reads the original.

V. DEPOSITIONS OF EXPERT WITNESSES

A. In General

As a practical matter, depositions of experts in South Carolina, are fairly routine, except perhaps in custody cases and in rare valuation cases. Typical experts in domestic cases are certified public accountants, economists, business valuation experts, vocational experts, real estate appraisers, medical doctors, and a whole bevy of psychologists, counselors and social workers in custody and DSS cases. Obviously there are plenty of unusual situations where another type of expert may be involved.

With regard to all experts, it is important once again to remember the K.I.S.S. rule which is that the whole purpose of the deposition is to learn about the qualifications of the expert, everything the expert reviewed or relied upon, his or her opinion, and the basis of that opinion and hopefully to lead the witness to say things which can furnish ammunition on cross-examination.

B. Qualifications

Rule 26 governs discovery of facts known and opinions held by experts. If an expert has been retained or especially employed in anticipation of litigation but is not expected to be called

as a witness at the trial, the expert cannot be deposed and discovery cannot be had from the expert unless there is "a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means." This hardly comes into play in family court.

A party who retains an expert who is subject to deposition is required to produce the expert in South Carolina for the purpose of taking his deposition in South Carolina if he is from out of state. The party seeking discovery must pay the expert's fees and travel expense.

With regard to qualifications, South Carolina's law is very liberal on this issue. There is a big national debate over *Daubert v. Merrel Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993) in which the court held that expert testimony must be based on scientific knowledge which is generally accepted or otherwise credible. But *Daubert* is not the law in South Carolina. The test for whether or not an expert is qualified to give an opinion is set forth by Danny R. Collins in *South Carolina Evidence*: "a person offered as an expert must be qualified to give an opinion. Generally, a person is competent as an expert when he or she has acquired knowledge or skill in a business, profession or science by reason of study, experience or both so that he or she is better able than the jury to form an opinion on the particular matter...Generally, defects in the amount or quality of education or experience go to the weight of the expert's testimony and not its admissibility." (215-6)

In general, the benchmark for being an expert is not particularly high. Counselors can give opinions that, in some states, only a psychiatrist or licensed clinical psychologist can give. See *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979); *State v. Myers*, 301 S.C. 251, 391 S.E.2d 551 (1990).

In a typical case, the qualifications of the expert is not disputed. And making a fuss

about a witness's qualifications is basically a waste of time unless he is truly unqualified to give an opinion or unless he is inexperienced in the specific specialty he is opining about. While an expert may qualify as an expert witness, he still can be cross-examined about his knowledge of the particular subject. For example, a CPA may be knowledgeable in basic accounting, but in attempting to place a value on an automobile dealership or a highly unusual business may be completely out of his or her depth. The proper way to handle such an expert is to demonstrate his inexperience and lack of qualifications on cross-examination at the trial, not at the deposition.

The best way to prepare for a deposition of an expert is to rely on your own expert. Ideally, the lawyer should educate himself or herself so that they are competent enough to understand the area of expertise. Your expert should prepare a list of questions and provide you with exhibits. It is your expert real estate appraiser who should point out how and why the comparables relied on by the real estate expert being deposed are invalid comparables.

The qualifications of an expert are more likely to be an issue in custody cases than in economic cases, although there are accountants and economists who have far out ideas or methods in order to increase or decrease the value of an asset.

The main area where qualifications of experts are in contention are custody cases, where experts on such controversial topics as parental alienation syndrome, battered wife syndrome, post-traumatic stress disorder, etc., could be challenged under South Carolina law.

C. Preparation for Expert Deposition

Many experts are quite well known and have given many depositions. If the case warrants it and if the expert's testimony is crucial to the outcome of the case, counsel ought to consider conducting an investigation into the expert's prior testimony. The first place to go would be a search of the appellate cases in South Carolina. Many experts have been mentioned

in opinions of the Supreme Court and the Court of Appeals. The internet offers an unbelievable opportunity to research the backgrounds of experts in previous cases they have been involved in. A call to other attorneys who may have deposed the expert may also be warranted.

It is entirely proper in deposing an expert to ask the expert whether or not he or she has given opinions in similar cases over the years and to ask them the names of the clients and the cases. It may very well that the expert has given an opinion about the value of an automobile dealership or a medical practice and used a different method of valuation in the other case. If the witness has testified in a case and there is a transcript of the testimony or a deposition or a report, these crucial documents can be tracked down.

When addressing this issue in the Family Court, one has to size up the expert. If the expert is a well-respected accountant, economist or business valuator and one whom the Family Court judges respect, it is a waste of time to try and convince the judge that a lawyer for the adverse has dictated what the expert has to say. Judges were lawyers before they were judges, and they know, as everyone in the courtroom knows, that lawyers try to influence the opinion of experts and indeed that is part of their job description. But judges also have heard the testimony of many experts, particularly on economic matters, and have formed an opinion about the integrity and the ability of the expert. Therefore, in many cases, it is much more important to meet the substance of the testimony than it is to discredit the expert.

The same considerations, however, may not be true with regard to experts who are not generally recognized by the courts as honest and competent. There certainly are charlatans in every field, and accounting and business valuations are not exempt from the occasional renegade. Therefore, if one is deposing an expert who has reached an outlandish opinion, discovery may be important in pressing the issue about where his or her opinions came from.

The same is frequently true in custody cases where emotions run high and there are few experts in the state who are universally regarded as competent and fair. Indeed, in the area of child sexual abuse, the qualifications of the expert are certainly fair game. An expert may have few qualifications, little training and discovery into his or her background may be important to the case. (I had a case where a "psychologist" was not rally a psychologist.) Even experts who have excellent qualifications may not be particularly qualified on the specific question before the court and even qualified experts make mistakes or fashion their testimony to suit the lawyer who has hired them.

D. Work Product Exception / Protection

Deposing counsel has the right to depose the expert witness about any and all documents or things which the expert relied upon in reaching his or her opinion. If the expert is going to be used at trial, he is fair game for anything in his file whether that file is paper or electronic.

Rule 26(b)(4) in conjunction with Rule 612 of the South Carolina Rules of Evidence provide that everything which the expert reviewed or on which he based his opinion must be produced in discovery. For example, the attorney may have sent the expert articles about the subject or case law. The expert may have made notes about conversations with various people including the adverse party. Emails to and from the expert and the electronic transmission of documents are discoverable.

The Work Product Protection of the Rules of Civil Procedure arises from the assumption that an attorney cannot provide proper representation unless certain matters are kept beyond the knowledge of adversaries. It was announced in *Hickman v. Taylor*, 329 U.S. 495 (1947). The Work Product doctrine makes the work product of the lawyer privileged from disclosure under the discovery rules. The doctrine is recognized in Rule 26(b)(3), SCRCP, which provides that

the party may obtain the discovery of documents prepared in anticipation of litigation and for trial by or for another party or by or for that other party's representative including the other party's attorney, consultant, etc. only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Even if the court orders the discovery of such materials, the court "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation." Rule 26(b)(4) provides a special rule for trial preparation materials for experts.

The Work Product doctrine is extremely complicated.[6] Obviously an attorney would not have to turn over his own notes in discovery. The more the discovery discloses the attorney's thought processes, the more protection it will be given.

Work Product issues frequently arise in depositions of experts. The expert may have seen materials constituting opinion work-product, such as an attorney's memorandum describing the case. For some courts (maybe ours), the issue is relatively easy, even when an expert has reviewed opinion work-product. Following the view that opinion work-product is absolutely privileged, they hold that neither Rule 26(b)(4) nor Rule 612 of the Rules of Evidence require production.

The majority of federal courts, however, have reached a different conclusion. Rule 612, SCRE, states as follows: "If a witness uses a writing to refresh memory for the purpose of testifying, either – (1) while testifying, or (2) before testifying if the court in its discretion

[6] / See, for example, Edna Selan Epstein, *The Attorney-Client Privilege and The Work Product Doctrine* published by the Section of Litigation of the American Bar Association and Sidney I. Schenkier, "The Limits of Privilege in Communications with Experts," "Litigation," Winter, 2007, pp. 16-23.

determines it is necessary in the interest of justice an adverse party is entitled to have the writing produced at the hearing, to inspect it, the cross-examine the witness thereon, and introduce in evidence those portions which relate to the testimony of the witness." This Rule may give the court the discretion to order the production of a writing used to refresh recollection before testifying if the court finds it to be in the interest of justice. Most courts balance the interest and the need for disclosure in order to examine the witness against the need to protect the attorney's work-product. Cases reach different conclusions. A lawyer may not aid a witness with items of work product and then prevent access to records that might reveal and counteract the effects of such assistance.

Epstein concludes that "the integration of 1993 changes to the Rule 26 discovery rules should have, but apparently have not, definitively answered the question of whether everything shown to a testifying expert, including work-product materials and even 'core' work-product materials, such as an attorney's legal opinions and legal theories thereby become discoverable."

The majority of the federal courts now hold that Federal Rule 26(a)(2) adopted in 1993 mandates disclosure and may require the expert to turn over everything the expert "considered" in reaching his opinion. See *Berkey Photo, Inc. v. Eastman Kodak Company*, 74 F.R.D. 613 (S.D.N.Y., 1977).

South Carolina, however, has not adopted the 1993 changes to Rule 26 and, while our courts would normally look to the federal decisions, at the moment we do not have the same rule. South Carolina courts may or may not rely on pre-1993 Federal cases.[7]

The wisest course of action is to be very careful what you show or give to an expert because the courts in South Carolina will have to determine this issue on a case-by-case basis.

[7] / If we are to rely on pre-1993 Federal cases, see *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384 (N.D. Cal., 1991).

Judge Goolsby writing for the Court of Appeals in *Johnston v. Ward*, 288 S.C. 603, 344, S.E.2d 166 (Ct.App., 1986) held that a trial court's ruling in matters involving discovery will not be disturbed absent "a clear showing of an abuse of discretion." The Court denied a motion to compel disclosure of investigative reports compiled by an insurance adjuster and submitted to an expert witness. The judge conducted an *in camera* hearing and reviewed the documents and held that none of the undisclosed information contained in the reports was relevant to the formulation of the expert's opinion and thus were not discoverable.

It is, however, entirely proper to ask, and an attorney should ask every witness and every expert "What did you do to prepare for this deposition? What documents did you review?" At that point, it is also proper to address opposing counsel and insist that she give you a copy of every document reviewed by the witness in preparation for the deposition. The defending attorney may object on the ground of attorney-client privilege or work-product privilege, but Rule 612 of the South Carolina Rules of Evidence arguably gives the lawyer the right to see any writing the witness used to refresh his memory during or before his testimony. Rule 612 governs the admissibility of evidence at trial. A deposition is discovery. But one could waive any protection one has by using a writing in preparing a witness.

The First Circuit Court of Appeals held in *Sporck v. Peil*, 759 F.2d 312 (1985) that documents shown to the witness can only be disclosed when (1) the actual use of the specific document was used to refresh memory; (2) the witness's use of the document for the purpose of testifying; and (3) that disclosure would be in the interest of justice. The court relied on the advisory committee's notes to Rule 612 which state that the Rule cannot be a "pretext for wholesale exploration of an opposing party's files and should be applied so as to "insure that access is limited only to those writings which may fairly be said in fact to have an impact upon

the testimony of the witness." But, lawyers should avoid the use of privileged materials, memoranda of law or any other documents they do not want to disclose to the other side. Special care should be taken to minimize the risk of disclosure of lawyer insights and advice to experts or other witnesses. For example, a chronology is helpful and can be used by the witness and prepared by the lawyer, but it is probably discoverable.

VI. Defending the Deposition

Once again, the rule to operate under is K.I.S.S. The most important advice to your client or witness who is being deposed is obviously to tell the truth. Being prepared for a deposition means going over the chronology of events, the important issues in the case (the witness's observation of your client as a parent, for example), advising the witness to admit when they do not know the answer to a question and not to speculate. Most lawyers advise witnesses to answer the question as simply and as briefly as possible. I sometimes tell a witness that the more you are talking the worse you are doing. It is important to advise the witness to be polite and deferential to deposing counsel as their testimony can be read to the court. I usually tell witnesses that their testimony in a deposition is exactly like speaking to the judge. Most witnesses only have a few important things to testify about and it is important for the attorney to go over those points and discuss with the witness why these issues are important. Remember that, in the case of a witness, there is no attorney-client privilege and deposing counsel has the right and often will ask the witness if he met with you (defending counsel) and what you had to say. That is why it is always important to tell the witness to tell the truth.

It is also important as defending counsel to go over your client's or witness's affidavits, lists, and answers to your Interrogatories and responses to document requests. If you and defending counsel have no answers to Interrogatories or responses to document requests and they

are outstanding, I would insist on receiving the answers prior to the deposition. In some cases, it may be wise to depose adverse witnesses prior to your witness being deposed in order to learn all of the facts. It is essential that your client, if a party, not be deposed until all discovery is completed and the testimony of all witnesses known, at least to the extent possible.

When preparing a party for a deposition, one should go over the same checklist you would use if you were deposing the witness.

A common problem in defending a witness or a party is the decision to admit criminal activities or invoke the Fifth Amendment. Obviously if your client or a witness has committed a serious crime for which he or she is likely to be prosecuted, you have a real problem. You need to settle the case. If it involves a serious criminal matter, a criminal attorney should be brought in to separately advise the witness or the party. Violations of the law if he or she is a professional such as a doctor or a lawyer to be disciplined by their board.

HOW TO PLAN FOR, TAKE AND USE DEPOSITIONS IN A FAMILY COURT CASE

I. Introduction

II. The Court and Discovery Depositions

- a. Regulating Depositions / Protective Orders
- b. Scope of Discovery

III. Taking Depositions

- a. For Discovery
  - i. To Depose or Not to Depose
  - ii. Determining the Goal of the Deposition
  - iii. Preparation for a Deposition
  - iv. Interrupting the Deposition, Coaching the Witness and Relevance
  - v. The Witness Who Disobeys a Subpoena
  - vi. Procedural Requirements
  - vii. Tips
  - viii. Who Can Attend the Deposition

IV. Depositions Taken For Use at Trial

- a. Depositions as Evidence
- b. Use in Cross-Examination

V. Depositions of Expert Witnesses

- a. In General
- b. Qualifications
- c. Preparation for Expert Deposition
- d. Work Product Exception / Protection

VI. Defending the Deposition

TAB 1

STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT
	)	SOME JUDICIAL CIRCUIT
COUNTY OF WHEREVER	)	CASE NO. 2005-DR-00-0000
	)	
MONEY-GRUBBING WIFE,	)	
Plaintiff,	)	
	)	NOTICE OF 30(B)(6) DEPOSITION (*duces tecum*)
vs.	)	of DESIGNATED AGENT FOR BANK OF AMERICA
	)	
SOME POOR SUCKER,	)	
Defendant.	)	

PLEASE TAKE NOTICE THAT pursuant to Rule 30(b)(6) of the South Carolina Rules of Civil Procedure, on November 14, 2006, commencing at 9:30 a.m., at the offices of the Rosen Law Firm, LLC, 18 Broad Street, Suite 201, Charleston, South Carolina, 29401, the attorney for Plaintiff will take the deposition of Bank of America, through its designated agent or agents by stenographic means by oral examination before a Notary Public or some other officer authorized by law to take depositions. Examination of the designated agent or agents will be directed to, but not limited to, the financial assets of the Defendant and Defendant's businesses and entitles as outlined in Exhibit A.

The designated(s) agent of Bank of America is directed to produce at deposition all documents as requested in Exhibit A, and any other documents and/or records of whatsoever nature in your possession pertaining to the Defendant and Defendant's businesses and entities.

PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 30(j)(8), SCRCP, counsel for the Defendant hereby identifies and reserves the right to use any and all documents produced or made available in discovery by either party during these depositions.

These depositions will be taken before a Notary Public or some other officer authorized by law to take depositions, said depositions are to continue from day to day, until completed.

These depositions will be taken for discovery purposes or for evidence at the trial of the above case, or both. You are invited to attend and take such part as is fit and proper.

ROSEN LAW FIRM, LLC

By:_____

Robert N. Rosen
18 Broad Street, Suite 201
Charleston, SC 29401
(843) 377-1700
Rnrosen@rosen-lawfirm.com
Attorney for Plaintiff

Charleston, SC
October 4, 2006

TAB 2

Checklist of Assets

- ☐ Furniture and furnishings
- ☐ Antiques/heirlooms
- ☐ China, silver, crystal
- ☐ Jewelry/precious metals
- ☐ Furs
- ☐ Artworks/pictures
- ☐ Electronics and appliances
  - o Stereo and video equipment
  - o CDs
  - o Records
  - o Televisions
- ☐ Vehicles
  - o Automobiles
  - o Snowmobiles
  - o Planes
  - o Boats
  - o Campers and trailers
  - o Motorcycles
  - o Trucks
  - o Other recreational vehicles
- ☐ Valuable animals
  - o Pets
  - o Livestock
- ☐ Sporting equipment
  - o Guns
  - o Fishing equipment
  - o Golfing equipment
  - o Hobby equipment
  - o Photographic equipment
  - o Tools
  - o Other
- ☐ Personal collections / collectibles
  - o Coins
  - o Stamps
  - o Books
  - o Art
  - o Wine
  - o Other
- ☐ Treasury bills or notes
  - o Government bonds and securities
- ☐ Brokerage accounts
  - o Stocks
  - o Bonds
  - o Margin accounts
  - o Including options
- ☐ Debentures

- ☐ Cash and deposit accounts, such as
  - o Cash on hand or in a safe deposit boxes
  - o Checking accounts
  - o Savings accounts
  - o Money market accounts
  - o Christmas club accounts
  - o Certificates of deposit
  - o Security deposits held by utilities or landlords
- ☐ Life Insurance (cash surrender value)
- ☐ Capital Accumulation
  - o Deferred salary plan
  - o Cash bonus plans
  - o Deferred profit sharing
  - o Short-term deferred income
  - o Stock bonus plans
  - o Stock purchase plans
  - o Share unit plans
  - o Stock appreciation rights
  - o Stock options
  - o Phantom stock
  - o Incentive growth funds
- ☐ Retirement interests
  - o IRA
  - o SEPs
  - o 401(k)s
  - o Defined benefit plan
  - o Defined contribution plan
  - o Annuity
  - o Keogh plan
  - o Interest in pension or profit sharing plans
  - o Other
- ☐ Real estate
  - o Residence
  - o Rental property (owned by the parties)
  - o Vacant land
  - o Vacation property
  - o Time share interest
  - o Burial plots
  - o Other
- ☐ Business interests
  - o Interest in a closely held corporation
  - o Joint ventures
  - o Partnership interest
  - o Stocks and interest in unincorporated business
  - o Other
- ☐ Beneficial interest in an estate/trust
- ☐ Prepaid obligation, such as
  - o Prepayment on tax liability
  - o Prepayment on funeral expenses
- ☐ Anticipated tax refund
- ☐ Money owed you

- ☐ Other assets, such as
  - o Tax-sheltered investments
  - o The right to a cause of action such as personal injury or breach of contract claim
  - o Patents
  - o Trademarks
  - o Copyrights
  - o Other investments or valuable property

Checklist of Expenses

- ☐ Home mortgage payments (specify whether the amount includes taxes and insurance)
- ☐ Second mortgage and/or home equity loan
- ☐ Real property insurance
- ☐ Real property taxes
- ☐ Homeowner's association fees
- ☐ Condominium fees
- ☐ Regime fees
- ☐ Routine home maintenance costs
    - o Lawn care (including spring/fall cleanup and tree trimming)
    - o Snow removal
    - o Window cleaning
    - o Garbage collection
    - o Exterminator costs
- ☐ Periodic major home maintenance costs
    - o Painting
    - o Roof and sidewalk repairs
    - o Appliance repair/replacement
    - o Furniture replacement
- ☐ Water softener costs
- ☐ Rent
- ☐ Furniture rental
- ☐ Renter's insurance
- ☐ Maintenance to rented property
- ☐ Food (not restaurant meals) and household supplies
- ☐ Utilities
    - o Gas
    - o Oil
    - o Electricity
    - o Water
- ☐ Telephone
    - o Car
    - o Home
- ☐ Dry cleaning
- ☐ Housekeeping/cleaning service (how often?)
- ☐ Clothing
- ☐ Uninsured medical and dental fees (indicate deductible and copayment percentage)
    - o Prescription costs
    - o Counseling
- ☐ Insurance
    - o Life
    - o Disability
- ☐ Child care expenses
    - o Day-care costs
    - o Baby-sitter costs
- ☐ Visitation expenses
    - o Long-distance telephone calls
    - o Transportation costs
    - o Entertainment costs
    - o Meal costs

- Other

- ☐ Support payments required by prior decree
- ☐ School expenses for client and/or children
  - Tuition
  - Books and supplies
  - Transportation
  - Parking
  - Lab fees
  - Activity fees
  - Meal costs
  - Field trips
  - Uniforms
  - Other
- ☐ Entertainment
  - Movies and videotapes
  - Cable television access
  - Concerts and plays
  - Dining out
  - In-home entertaining
  - Tickets to sporting events
  - Participation in sports
- ☐ Children's summer activities (camp, etc.)
- ☐ Children's lessons
  - Dance, music, sports, etc.
  - Religious school
- ☐ Children's allowances
- ☐ Children's tutoring
- ☐ Automobile
  - Gas
  - Maintenance and repairs
  - Auto club dues
  - Tolls and parking fees
  - Registration fees
  - Depreciation
  - Installment/lease payments
  - South Carolina property tax
- ☐ Other transportation costs (train pass, bus pass, etc.)
- ☐ Gifts (birthdays, holidays, etc.)
- ☐ Donations
  - Personal donations
  - Donations related to employment
  - Church contributions
- ☐ Installment payments due (name of each creditor, balance owed, payment amount, and due date)
- ☐ Incidentals
  - Grooming/hair care
  - Newspapers, magazines, books
  - Hobbies
  - Tobacco products
  - Batteries
  - Stamps

- Late payment charges
- Income tax
- Interest on charge accounts

☐ Pet care
☐ Vacations
☐ Membership dues
- Professional
- Civic
- Social
- Fitness
- Lessons

☐ Retirement fund
- IRA contribution
- Other

☐ Professional services
- Accounting
- Tax preparation
- Legal

☐ Other expenses

Checklist of Debts and Liabilities

- ☐ Mortgage or home equity loans
- ☐ Mortgage on other real estate
- ☐ Loans for items, such as
  - o Vehicles
  - o Home improvements
  - o Education
  - o Consolidation of other bills
  - o Business
  - o Other
- ☐ Loans from
  - o Retirement plan
  - o Insurance policy
  - o Relative or friend
  - o Other
- ☐ Medical/dental bills
- ☐ Charge accounts
- ☐ Credit card accounts
- ☐ Lease payments
- ☐ Land contract payments
- ☐ Money judgments
- ☐ Tax liability
  - o Real estate taxes due
  - o Past due income taxes
  - o Other past due taxes
  - o Estimated tax payments
- ☐ Contingent liabilities/judgments against you

TAB 3

ROBERT N. ROSEN
rnrosen@rosen-lawfirm.com

DEMAND FOR PRESERVATION OF EVIDENCE, DOCUMENTS AND ELECTRONICALLY STORED INFORMATION

November 6, 2007

NAME OF COUNSEL OR OPPOSING PARTY IF NOT REPRESENTED
ADDRESS
CITY STATE ZIP

RE: CASE NAME
CASE NO.

Dear _____:

As you know, our clients are in the midst of marital litigation. As your client claims an interest in the marital estate and contends she is entitled to support and that your client has committed adultery, this letter is a demand that you and your client preserve all documents, tangible things, and electronically stored information potentially relevant to the issues in the above referenced matter. As used in this letter the terms "you" and "your" refers to your client, all businesses and entities controlled or operated by in which s/he has any interest, and any predecessors, successors, parents, subsidiaries, divisions, or affiliates, and its respective officers, directors, agents, attorneys, accountants, employees, partners or other persons occupying similar positions or performing similar functions.

This demand includes the preservation and retention of all documents, records, and data relating to: the marital estate, all business interests, etc., You should anticipate that much of the information subject to disclosure or responsive to discovery in this matter is stored on your current and former computer systems, online repositories and cell phones.

Electronically stored information (hereafter "ESI") should be afforded the broadest possible definition and includes (by way of example and not as an exclusive list) potentially relevant information electronically, magnetically or optically stored as:

1. Digital communications (e-mail, voicemail, instant messaging);
2. Word processing documents (Word or WordPerfect documents and drafts);
3. Spreadsheets and Tables (Excel or Lotus 123 worksheets);
4. Accounting Application Data (Quickbooks, Money, Peachtree Data Files);
5. Image and Facsimile Files (.PDF, .TIFF, .JPG, .GIF images);
6. Sound Recordings (.WAV and .MP3 files);
7. Video and Animation (.AVI, .MOV files);

8. Databases (Access, Oracle, SQL Server data, SAP);
9. Contact and Relationship management Data (Outlook and ACT!);
10. Presentations (Powerpoint, Corel Presentations);
11. Network Access and Server Activity Logs;
12. Project Management Application Data;
13. Computer Aided Design/Drawing Files; and,
14. Back up and Archival Files (Zip, .GHO).

ESI resides not only in areas of electronic, magnetic and optical storage media reasonably accessible to you, but also in areas you may deem not reasonably accessible. You are obligated to preserve potentially relevant evidence from both these sources of ESI, even if you do not anticipate producing such ESI.

The demand that you preserve both accessible and inaccessible ESI is reasonable and necessary. Please be aware that even ESI that you deem reasonably inaccessible must be preserved in the interim so as not to deprive my client of her right to secure evidence or the Court of its right to adjudicate the issue if this matter is filed with the Court.

Preservation Requires Immediate Intervention

You must act immediately to preserve potentially relevant ESI in any way relating to my client's claim. You must maintain the vehicle, the tractor trailer, and any of its component parts.

Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. You must also intervene to prevent loss due to routine operations and employ proper techniques and protocols suited to protection of ESI. Be advised that sources of ESI are altered and erased by continued use of your computers and other devices. Booting a drive, examining its contents or running any application will irretrievably alter the evidence it contains and may constitute unlawful spollation of evidence. Consequently, alteration and erasure may result from your failure to act diligently and responsibly to prevent loss or corruption of ESI.

Nothing in this demand for preservation for ESI should be understood to diminish your concurrent obligation to preserve documents, tangible things, and other potentially relevant evidence.

Suspension of Routine Destruction

You are directed to immediately initiate a litigation hold for potentially relevant ESI, documents and tangible things, and to act diligently and in good faith to secure and audit compliance with such litigation hold. You are further directed to immediately identify and modify or suspend features of your information systems and devices that, in routine operation, operate to cause the loss of potentially relevant ESI. Examples of such features and operations include:

1. Purging the contents of e-mail repositories by age, capacity or other criteria;
2. Using data or media wiping, disposal, erasure or encryption utilities or devices;

3. Overwriting, erasing, destroying or discarding back up media;
4. Re-assigning, re-imaging or disposing of systems, servers, devices and media;
5. Running antivirus or other programs effecting wholesale metadata alteration;
6. Releasing or purging online storage repositories;
7. Using metadata stripper utilities;
8. Disabling server or IM logging; and
9. Executing drive or file defragmentation or compression programs.

Guard Against Deletion

You should anticipate that your employees, officers, or others may seek to hide, destroy or alter ESI and act to prevent or guard against such actions. Especially where company machines have been used for internet access or personal communications, you should anticipate that users may seek to delete or destroy information that they regard as personal, confidential or embarrassing and, in so doing, may also delete or destroy potentially relevant ESI. This concern is not one unique to you or your employees and officers. It is simply an event that occurs with such regularity in electronic discovery efforts that any custodian of ESI and their counsel are obliged to anticipate and guard against its occurrence.

Servers

With respect to servers like those used to manage electronic mail (e.g., Microsoft Exchange Lotus Domino) or network storage (often called a user's "network share"), the complete contents of each user's network share and e-mail account should be preserved. There are several ways to preserve the contents of a server depending upon, its RAID configuration and whether it can be downed or must be online 24/7. If you question whether the preservation method you pursue is one that we will accept as sufficient, please call to discuss it.

Home Systems, Laptops, Online Accounts and Other ESI Venues

Although we expect that you will act swiftly to preserve data on office workstations and servers, you should also determine if any home or portable systems may contain potentially relevant data. To the extent that officers, board members, employees, accountants or attorneys have sent or received potentially relevant e-mail or created or reviewed potentially relevant documents away from the office, you must preserve the contents of systems, devices, and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from portable thumb drives, CD-R disks and the user's PDA, smart phone, voice mailbox or other form of ESI storage). Similarly, if employees, officers, accountants, attorneys or board members used online or browser-based-e-mail accounts and services (such as AOL, Gmail, Yahoo or the like) to send or receive potentially relevant messages and attachments, the contents of these account mailboxes (including Sent, Deleted, and Archived Message folders) should be preserved.

Ancillary Preservation

You must preserve the documents and other tangible items that may be required to access, interpret, or search potentially relevant ESI including, logs control sheets, specification, indices, naming protocols, file lists, network diagrams, flow charts, instruction sheets, data entry forms, abbreviation keys, user ID and password rosters or the like.

You must preserve any passwords, keys, or other authenticators required to access encrypted files or standard CD or DVD optical disk drive if needed to access the encrypted files or run applications, along with installation disks, user manuals and license keys for applications required to access the ESI.

You must preserve any cabling, drivers and hardware, other than a standard 3.5" floppy disk drive or standard CD or DVD optical disk drive, if needed to access or interpret medical on which ESI is stored. This included tape drives, bar code readers, Zip drives and other legacy or proprietary devices.

Preservation Protocols

We are desirous of working with you to agree upon an acceptable protocol for forensically sound preservation and can supply a suitable protocol, if you wish to furnish an inventory of the systems preservation and media to be preserved. If you will promptly disclose the preservation protocol you intend to employ, perhaps we can identify any points of disagreement and resolve them. A successful and compliant ESI preservation effort requires expertise. If you do not currently have such expertise at your disposal, we urge you to engage the services of an expert in electronic evidence and computer forensics.

Do Not Delay Preservation

Should your failure to preserve potentially relevant evidence result in the corruption, loss, or delay in production of evidence to which we are entitled, such failure would constitute spoliation of evidence, and we will not hesitate to seek sanctions.

Confirmation of Compliance

Please confirm that you have taken the steps outlined in this form to preserve ESI and tangible documents potentially relevant to this action. If you have not undertaken the steps outlined above or have taken other actions, please describe what you have done to preserve potentially relevant evidence.

Thank you for your attention to this matter.

Sincerely,

Robert N. Rosen

RNR:____
xc: COPY OUR CLIENT

TAB 4

II. Legal Analysis

1. The Requested Records are not Privileged or Protected from Discovery Under the Patient-Provider Records Act.

1. The Patient-Provider Records Act Does Not Apply to Doctor.

The Patient-Provider Records Act, S.C. CODE ANN. § 19-11-95 (Law. Co-op. Supp. 1993), relied upon by the Plaintiff in her Motion, sets forth a general rule prohibiting a "provider" from revealing the "confidences" of a patient "who consults or is interviewed by [the] provider to diagnose, counsel, or treat a mental illness or emotional condition." Id. § 19-11-95(A)-(B). The term "provider" is expressly defined in the Act to include any "person licensed under the provisions of any of the following" specific statutory sections: (1) S.C. CODE ANN. §§ 40-55-20 to -180 (Law. Co-op. 1986 & Supp. 1993), which licenses and regulates psychologists; (2) S.C. CODE ANN. §§ 40-75-10 to -230 (Law. Co-op. 1986 & Supp. 1993), which licenses and regulates professional counselors, associate counselors, and marital and family therapists; (3) S.C. CODE ANN. § 40-63-70 (Law. Co-op. Supp. 1993), which licenses and regulates master social workers; and (4) S.C. CODE ANN. § 40-63-70 (Law. Co-op. Supp. 1993), which licenses and regulates registered nurses who work in the field of mental health. See S.C. CODE ANN. § 19-11-95(A)(1)(a)-(d) (Law. Co-op. Supp. 1993).

Significantly, the individuals set out in the preceding paragraph--psychologists, professional counselors, therapists, social workers, and registered nurses--are not "physicians" or "doctors of medicine." The Patient-Provider Records Act does not apply to physicians or medical doctors. See WALTER A. REISER, JR., A COMPARISON OF THE FEDERAL RULES OF EVIDENCE WITH SOUTH CAROLINA EVIDENCE LAW 28 (4th ed. 1990) (Observing that the privilege against nondisclosure established by section 19-11-95 "does not on its face apply to physicians, who are licensed under Chapter 47 of Title 40 of the South Carolina Code."). Physicians and medical doctors are licensed and regulated by S.C. CODE ANN. §§ 40-47-5 to -660 (Law. Co-op. 1986 & Supp. 1993).

As applied to facts of this case, the records requested from Doctor are not protected from disclosure by section 19-11-95 because that section does not govern Doctor. Doctor is a licensed psychiatrist. Psychiatrists are medical doctors and are licensed and regulated by sections 40-47-5 to -660, not any of the sections listed in section 19-11-95. Cf. Gale v. Board of Medical Examiners, 320 S.E.2d 35 (S.C. Ct. App. 1984); 35 WORDS & PHRASES Psychiatrist 6 (Supp. 1994) (defining a "psychiatrist" as a medical doctor who has completed at least three years of post graduate training in psychiatry at a recognized training hospital). In short, Doctor is not a "provider" as defined in the Patient-Provider Records Act. Because § 19-11-95 by its express terms does not apply to psychiatrists, Doctor's records are not protected from disclosure under that section.[1]

2. Even if the Plaintiff Held a Privilege in the Subpoenaed Documents By Virtue of Statute, That Privilege Has Been Waived by the Plaintiff.

Relation-based privileges, such as the psychotherapist patient privilege, can be waived both expressly and by implication. In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988) (subsequent history omitted). As established above, there is no privilege at issue here. However, even if there were, Plaintiff has waived any privilege by naming Doctor as a witness and asserting claims for relief in which her mental and emotional condition are at issue.

In determining whether a party has impliedly waived a privilege, many courts use the test set forth in Paramount Communications, Inc. v. Donaghy, 858 F.Supp. 391 (S.D.N.Y. 1994). The factors set forth in Paramount are 1) whether the assertion of the privilege was a result of some affirmative act by the asserting party; 2) whether through this affirmative act the asserting party put the protected information at issue by making it relevant to the case; and 3) whether application of the privilege would deny the opposing party access to information vital to the party's

---

[1]In the absence of a specific statutory provision protecting physician-patient records from disclosure, they are otherwise discoverable because South Carolina follows the common-law rule rejecting the existence of a general physician-patient privilege. See Peagler v. Atlantic Coast Line R.R., 101 S.E.2d 821, 825-26 (S.C. 1958); Aakjer v. Spagnoli, 352 S.E.2d 503 (S.C. Ct. App. 1987); Felder v. Wyman, 139 F.R.D. 85, 87 (D.S.C. 1991).

defense. Id. at 395. The following analysis of this test establishes that Plaintiff has indeed waived any privilege in Doctor's records.

The "affirmative act" in prong one of the test refers to the claim or defense asserted by the party holding the privilege. For example, in Orco Bank, N.V. v. Proteinas Del Pacifico, S.A., 577 N.Y.S.2d 841 (N.Y. App. Div. 1992), the affirmative act was the assertion of the plaintiff that it relied on the advice of its attorneys in determining if it had good security for a loan. The issue of plaintiff's reasonable reliance was an important part of its claim. Thus the affirmative act of asserting a claim in which reliance on advice of counsel was important resulted in the plaintiff's subsequent assertion of privilege in response to the defendant's inquiries. In this case, the affirmative act of the Plaintiff is her assertion of claims for child custody and alimony that necessarily place her mental and emotional state at issue, and her naming of Doctor as a witness. The Plaintiff's affirmative act resulted in her subsequent assertion of the privilege.

The second prong of the test requires that the affirmative act of the party puts the protected information at issue by making it relevant to the case. The actions of the Plaintiff in asserting claims for alimony and sole custody, and her naming of Doctor as a witness, put Doctor's records at issue. These records are relevant to a determination of whether the Plaintiff is entitled to permanent alimony, what amount of alimony she is entitled, and whether she is a fit and proper sole custodial parent for the parties' children.

Lastly, application of the privilege will deny the Defendant access to vital information. There is no other source for the Defendant to obtain the information that Doctor has in her possession. His wife's psychological history will tell a great deal about her ability to work and care for the parties' children. This information is very important to the Defendant's case.

Several cases have held that where a witness is named or called to testify, the party calling that witness has impliedly waived any privilege in the testimony or records of the witness. In Feeser v. Wahl, 689 P.2d 98 (Wash. Ct. App. 1984), the plaintiff listed as witnesses several

physicians who had treated him for injuries resulting from a motorcycle accident. When the defendant subpoenaed the records custodian at the hospital where the plaintiff was treated, the plaintiff responded by asserting the statutory physician-patient privilege. The court found that the plaintiff had impliedly waived his privilege when he named his treating physicians as witnesses with a clear intent to call them at trial. Moreover, the court found that "accelerated waiver" had occurred, allowing the defendant to proceed with pre-trial discovery without being hampered by objections based on the physician patient privilege. The Feeser court quoted with approval from the Phipps v. Sasser, 445 P.2d 624 (Wash. 1968) opinion, wherein the court stated

> Certainly, at some stage in the pretrial proceedings, the plaintiff must decide whether he is going to call his treating physician or physicians, and, if he is, then the defendant is entitled to know it in time to take the deposition of such physician or physicians an prepare to meet their testimony.
>
> . . . .
>
> We can see no reason why our trial courts . . . should not treat a plaintiff's inclusion of his treating physician among his list of intended witnesses at trial as indicating his intent to waive his privilege. Such an apparent accelerated waiver could then enable the defense to utilize the full range of pretrial discovery procedures as to the treating physicians named and to the same extent and subject to the same controls as would govern discovery after waiver at trial.

Feeser v. Wahl, 689 P.2d at 100.

The Feeser/Phipps approach was taken in Garrett v. Jeep Corporation, 602 N.E.2d 691 (Ohio Ct. App. 1991). In Garrett, the court found that, not only did the plaintiff waive the physician-patient privilege as to communications when he called his physician to the stand, but the defendant was entitled to depose the physician prior to trial on the ground that the privilege was reasonably certain to be waived at trial. In order to protect the holder of the privilege, the court held that the privileged information acquired during discovery should not actually be used until waiver occurred; i.e., when the witness was called at trial. Nevertheless, discovery was allowed to go forward. In a third case, Clark v. City of Munster, 115 F.R.D. 609 (N.D. Ind. 1987), the court first determined that statements made by the plaintiff to private investigators hired by the plaintiff's

attorney were protected by the attorney-client privilege. The court went on to say

> The plaintiffs have listed the [private investigators] as prospective witnesses at trial. If the plaintiffs in fact call the [private investigators] as witnesses, the attorney-client privilege will be waived. However, the plaintiffs will not be permitted to frustrate discovery by claiming a privilege at trial. If the plaintiffs do not produce the [private investigators'] file for examination within the time period allotted for completing discovery, any testimony by the [private investigators] concerning their investigation may be excluded at trial.

Id. at 614 (internal citations omitted).

The foregoing cases reflect intuitive notions of fairness. A party who names a witness to be used at trial should not then be able to invoke a privilege to prevent the adverse party from conducting basic trial preparation. The adverse party cannot help but be prejudiced if he or she is unable to discover what the witness will testify to and the basis of that testimony. A privilege cannot be used both as a sword and a shield. A party may not use a privilege to prejudice the opponent's case or to disclose some selected communications for self-serving purposes. United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991). Of primary importance in determining whether waiver of a privilege has occurred is the concept of fairness. A privilege may not be manipulated to the advantage of the party asserting the privilege. McLaughlin v. Lunde Truck Sales, Inc., 714 F.Supp. 916 (N.D.Ill. 1989). Wife named Physician as a witness, presumably to give testimony favorable to her case. She should not be allowed to prevent the Defendant from using the same witness to elicit testimony or evidence that may be unfavorable to her. Privileges are intended to foster communication between certain parties such as physicians and patients. Privileges are not tactical tools to be wielded in litigation. In this case, the Plaintiff is attempting to thwart the deposition of a witness whom she herself has named. Since the Plaintiff named Doctor in support of her case, then surely Husband is entitled to find out what Doctor knows.

3. Even if the Patient-Provider Records Act Does Apply to the Requested Records, the Records are Still Discoverable Because Wife's Mental Health and Emotional Condition are at Issue in this Case.

Even if the Patient-Provider Records Act applies to Doctor's records, the privilege

established by the Act is not absolute. The Act specifically states that a "provider shall reveal confidences when required by statutory law or court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding." S.C. CODE ANN. § 19-11-95(D)(1) (Law. Co-op. Supp. 1993) (emphasis added). Other jurisdictions have held that a patient waives any physician-patient privilege against nondisclosure of medical records when he or she brings a personal injury suit raising the issue of his or her medical condition. See Rea v. Pardo, 522 N.Y.S.2d 393 (App. Div. 1987); Vincent v. Connaught Laboratories, 13 F.R.D. 156 (E.D. Mo. 1990). Even more important, other jurisdictions have also held that medical and psychological records are admissible in child custody suits where the issue of a parent's medical and psychological condition is raised. See Richard v. Tarzetti, 510 So.2d 1361 (La. Ct. App. 1987); Chitty v. Fitzgerald, 244 N.Y.S.2d 441 (1963).

Wife's care and treatment and the nature and extent of her mental illness or emotional condition are squarely at issue in this proceeding. Wife alleges in her Complaint that she is a fit and proper custodial parent and that she is not able to work and is therefore entitled to permanent alimony as well as an equitable apportionment of the marital estate. Both the alimony statute, § 20-3-130 (Supp. 1995), and the Equitable Apportionment of Marital Property Act, § 20-7-472 (Supp. 1995) list criteria to determine alimony and property division and both list the physical and emotional condition of each spouse as criteria to be considered by the court. See §§ 20-3-130(C)(2) and 20-7-472((5). By making these claims, Wife has placed her emotional and mental condition at issue in this case. This case involves the welfare of two young children. It also involves a substantial claim for permanent alimony. The Plaintiff's mental and emotional state undoubtedly has significant bearing on both of these issues. The Plaintiff should not be able to dodge these serious issues with her self-serving invocation of § 19-11-95. Husband is entitled to learn from Doctor's records whether his wife is mentally and emotionally capable of supporting

herself and taking care of the parties' two children. Moreover, it is patently unjust and contradicts our adversarial system of justice to allow a plaintiff to allege that she is entitled to lifetime support and that she is a fit and proper custodial parent, while simultaneously permitting her to protect from discovery the very facts which might prove otherwise.

4. No Other State or Federal Statute Prohibits Disclosure of Wife's Psychiatric Records:

1. Section 44-22-100 Does Not Apply

Plaintiff may argue that S.C. Code Ann. § 44-22-90 and -100 (Law. Co-op. Supp. 1995) are applicable. Any such assertion by the Plaintiff would be frivolous. While § 44-22-90 and -100 do prevent disclosure of certain mental health records and communications, they applies only to records of the Department of Mental Health and state mental health facilities. By their terms, these provisions apply to "patients", who are defined in the definitions section of Chapter 22 as "individual[s] undergoing treatment in the department." Id. at § 44-22-10(11). "Department" is defined as "the State Department of Mental Health." Id. at § 44-22-10(4). Thus, all of the confidentiality provisions in Chapter 22 apply only to patients at State Department of Mental Health facilities. Doctor is a private physician and is not governed by this Chapter.

2. Federal Regulations are Not Applicable and Do Not Prevent Disclosure

The Plaintiff may also rely on federal law in her attempt to prevent discovery. 42 U.S.C. §§ 290dd-2 (formerly 290dd-3 and ee-3) prevents disclosure of certain records concerning alcohol and drug treatment. Because this section only applies to treatment facilities receiving federal funds, it could not and does not apply to Doctor.

3. Section 44-115-60 Does Not Prevent Disclosure of Wife's Medical Records

S.C. Code Ann. § 44-115-60 (Law. Co-op. Supp. 19__) applies to physicians. It states

> [A] physician may refuse to release a copy of the entire medical record and may furnish instead a summary or portion of the record when he has a reasonable belief that release of the information contained in the entire record would cause harm to

> the patient's emotional or physical well-being, the emotional or physical we-being of another person who has given information about the patient to the physician, or where release of the information is otherwise prohibited by law. An unreasonable refusal to release the entire medical record constitutes unprofessional conduct and subjects the physician to disciplinary action of the South Carolina State Board of Medical Examiners.

The Plaintiff has not cited this statute nor has she asserted that her emotional or physical well-being would be harmed by the release of Doctor's records. Moreover, § 44-115-60 does not create a privilege that can be asserted by a patient. Rather, it allows a doctor limited discretion in choosing what medical records to release. Because Doctor herself has not refused to produce records under § 44-115-60, the Plaintiff may not use this statute in support of her Motion.

Even if the Plaintiff could rely on § 44-115-60, this statute does not prevent the disclosure of medical records. Instead, it allows a physician to delete or summarize those portions of a medical report that the physician feels may harm the patient if disclosed. The statute does not delineate the type of harm, nor is there any case law interpreting the statute. However, it seems certain that the Plaintiff would be unable to point to any harm emotional or physical harm she would suffer would these records to be produced. There is no contention that Wife is verging on the brink of insanity and that the release of her records would push her over the edge. While Wife may be embarrassed or upset if the records were released, being embarrassed or upset cannot possibly rise to the level of emotional harm contemplated by the statute. Were that the case, this statute would be invoked every time any kind of medical record were requested for any reason. Furthermore, it should not be forgotten that it is Wife herself who listed Doctor as a witness. If Doctor's testimony will not cause the Plaintiff physical or emotional harm, how could her records? Of course, the answer is that release of these records will not cause the Plaintiff harm, and § 44-115-60 is not applicable here.