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Developing the Plaintiff's Discovery Plan in Mid-Air Collision Litigation

John Howie

DEVELOPING THE PLAINTIFF'S DISCOVERY PLAN IN MID-AIR COLLISION LITIGATION

JOHN HOWIE*

"Would you tell me, please, which way I ought to go from here?"
"That depends a good deal on where you want to get to."
"I don't much care where."
"Then it doesn't matter which way you go."
"—So long as I get somewhere."
"Oh, you're sure to do that if you only walk long enough."

Carroll, "Alice and the Cheshire Cat,"
Alice's Adventures in Wonderland.

ALL TOO OFTEN, attorneys enter the discovery phase of a case with a general idea that certain discovery needs to be completed, but with no specific plan for accomplishing this goal. We may establish priorities and direction for our cases or we may follow the path of Alice. If we do not care where we are going, and if we do not establish a pretrial discovery plan, pretrial preparation may become a wonderland of confusion, filled with mazes of paper and unnecessary expense. The goal of the plaintiff's lawyer must be to get to trial in the most economical, efficient, and expeditious manner possible, within

* John Howie practices law in Dallas, Texas with The Law Offices of Windle Turley, P.C. He is a graduate of Southern Methodist University School of Law, Dallas, Texas. He is Secretary, Aviation Section, of the Association of Trial Lawyers of America; an Associate Director of the Texas Trial Lawyers Association; and serves as editor of the *Verdict*, a quarterly publication of the Texas Trial Lawyers Association. He is a member of the American Trial Lawyers, Texas Trial Lawyers and Dallas Trial Lawyers associations. Mr. Howie is a former Naval Aviator who currently holds a commercial pilot's license with multi-engine land and instrument ratings.

the constraints of the existing system. Accomplishing this goal requires a plan. A discovery plan, prepared during pretrial investigation before discovery actually commences, and updated throughout the course of pretrial discovery, will contribute to a speedier resolution of cases.

This paper does not purport to advance new and revolutionary discovery techniques. It does offer practical suggestions and procedures, that can be combined with existing skills, to help refine and perfect a discovery plan.[1] The discovery plan should be formulated in terms of *planning, execution,* and *follow-up* phases. These progressive steps will be analyzed as they appear chronologically in the pretrial discovery phase of a case.

I. PRE-DISCOVERY PLANNING

A. *General Considerations*

The discovery rules, with few exceptions, relate to a phase of the case that commences after the filing of plaintiff's original complaint, yet a discovery plan should be operational well in advance of that date. Today's trial dockets are plagued with delays, resets and numerous other obstacles to the timely disposition of cases. High interest rates, escalating expenses, and double digit inflation combine to underscore the importance of pressing forward. Time is money and efficient utiliza-

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[1] For the ins and outs of aviation discovery, *see* David, *Defense Tactics and Strategies During the Discovery Process in Aviation Litigation,* 13 FORUM 132 (1977); Davidson, *Unique Sources of Discovery in Aircraft Accident Litigation,* 13 FORUM 119 (1977); Finn and Martin, *Discovery in a Military Aircraft Crash—Defendant's Viewpoint,* 41 J. AIR L. & COM. 295 (1975); Harmon, *Use of Experts in Investigation,* 40 J. AIR L. & COM. 441 (1974); Hull, *Weather Data and Aviation Litigation,* 41 J. AIR L. & COM. 271 (1975); Kreindler, *Unique Aspects of Discovery in Aviation Cases Involving the Federal Tort Claims Act,* 13 FORUM 154 (1977); Loggans, *Aviation Discovery: The Herculean Task,* 14 TRIAL 40 (1978); MADOLE, *Discovery Against Manufacturers in Air Crash Litigation,* 40 J. AIR L. & COM. 481 (1974); Packer & Morin, *Analysis of Wreckage,* 40 J. AIR L. & COM. 447 (1974); Pangia, *Unique Aspects of Discovery in Aviation Cases Under the Federal Tort Claims Act,* 13 FORUM 169 (1977) [hereinafter cited as Pangia]; Reid, *Practical Aspects of General Aviation Litigation,* 40 J. AIR L. & COM. 661 (1974); Sales, *Discovery Problems in Aviation Litigation,* 38 J. AIR L. & COM. 297 (1972); Speiser, *Dynamics of Airline Crash Litigation: What Makes the Cases Move?,* 43 J. AIR L. & COM. 565 (1977); Taft, *Availability and Use of Weather Data,* 40 J. AIR L. & COM. 459 (1974).

tion of this time demands effective planning and timely execution of a discovery plan.

Discovery in aviation cases has its own peculiar characteristics. One writer has suggested that most of the discovery that takes place in these cases appears to be overly costly to all parties and largely ineffective.[2] To avoid inefficiency and waste, the plaintiff's lawyer must identify the issues that he intends to prove and devise a definite plan of action to accomplish this goal.

While the mid-air collision may involve combinations of general aviation aircraft, airliners, and military aircraft, statistics clearly show that the vast majority of mid-air collision litigation involves general aviation aircraft.[3] Nonetheless, the basic discovery rules and techniques apply to all cases, notwithstanding the different combinations of aircraft and parties involved. Experience has shown that the surest way to dispose of the aviation catastrophe case, regardless of the parties involved or the type of incident, is to assign the case a speedy trial date and to set an uncompromising discovery schedule. The plaintiff's lawyer must insure that this schedule is met.

Effective pretrial discovery, by necessity, must be premised upon a thorough investigation of the mid-air collision. Prior to filing the complaint, the plaintiff's attorney must do his own investigation. He should not blindly accept the conclusions and findings of the National Transportation Safety Board (NTSB), the Federal Aviation Administration, the Military Investigation Board, or an insurance company. All too often, these investigations are conducted with representatives of potential defendants actively participating. Unfortunately, the plaintiff seldom, if ever, has a representative on the investigation team.

Prior to actually commencing discovery, the plaintiff's at-

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[2] Pangia, *A Clear Approach to Aviation Cases*, 17 TRIAL 30 (1981).

[3] *NTSB Special Study on Mid-Air Collision Accidents* (1978). For the 20-year period ending in 1978, there were 537 mid-air collision accidents, 473 of which involved general aviation aircraft, 39 involved general aviation/military aircraft, 5 involved air carrier/military, 18 involved air carrier/general aviation, 2 involved air carrier/air carrier aircraft.

torney must decide which of two commonly used approaches to a case that he will adopt in the discovery process. He can make a full and frank disclosure of all the facts relating to the case by aggressively exploring the case during discovery; or he may do a thorough investigation, and then wait for the adversary to tip his hand on the position to be assumed in the litigation. The attorney for the plaintiff-passenger generally prefers the former approach, but the attorney for the plaintiff-pilot, who may be either a plaintiff and/or a defendant, may prefer the latter.

B. *Trial Notebook Utilization*

At the outset of any mid-air collision case, a system of trial notebooks should be developed. A properly organized notebook is an essential organizational tool for the attorney/legal assistant/secretary team.[4] The notebook provides a central location for the orderly recording of facts, ideas, "to do" lists, authorities, and areas of inquiry for pursuit with particular witnesses.

One or more three-ring binders, with sections set aside for discovery from specific classes of parties (i.e. pilots, air traffic controllers, meteorologists, designers, visibility experts, fact witnesses, eye witnesses, medical personnel, and any other witness relating to the case), should be utilized. The trial notebook provides the attorney with an organized record of his thoughts relating to each aspect of the case, instead of the Mount Everest of disorganized paper that results from the inevitable and numerous "notes to the file." The trial notebook becomes the foundation for discovery and preparation of the remainder of the case.

C. *Prepare Demonstrative Aids for Use in Discovery*

The most important consideration for the plaintiff in a mid-air collision case is to make something happen in a timely fashion. While the particulars of each case will determine the

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[4] *See generally*, Luvera, *The Trial Notebook*, 19; No. 7 THE PRAC. LAW. 37 (1973); Goldstein, *Your Trial Book*, 58 TRIAL LAW. GUIDE 505 (1958).

precise plan of action, the following general considerations must be addressed in all cases.

The attorney must determine which demonstrative aids will be most helpful. In all mid-air collision cases, the plaintiff's attorney should obtain scale models which utilize the paint scheme of the accident aircraft. If precise scale models cannot be obtained prior to commencing discovery, representative models should be used in depositions and meetings with eyewitnesses and experts. While not always possible, the plaintiff's lawyer should attempt to obtain stipulations relating to the authenticity of the models, to avoid challenges at a later date. Absent these stipulations, the model maker must eventually be called as a witness to authenticate the models.

Along with the models, the attorney should obtain drawings, maps and charts, artists' depictions, and photographs of the crash site or air traffic control facility for use during depositions and meetings with witnesses. Additionally, visual aids depicting witness location, aircraft orientation, and wreckage distribution, and pieces of the actual wreckage should be used during deposition discovery. Models and poster-size blowups of charts, photographs, and artists' depictions should be obtained for use during all videotape depositions, while the trial lawyer should prepare a master composite of witness statements and locations for use in analyzing all of the witness observations and reports. Finally, if an air traffic control tape, a telemetry data, a flight data recording, or a cockpit voice recording of the events leading up to the crash exists, the plaintiff's attorney should get both a transcript to accompany the recording and a stipulation as to its validity. This stipulation should be obtained at an early date if possible, so that the transcript can be used during all discovery. If the parties cannot agree upon such a stipulation early in the discovery process, the plaintiff's lawyer should utilize traditional methods of proving the transcript's validity to ensure its accuracy, because it will be the basis of his subsequent discovery.

D. *Jury Instructions and Special Interrogatories*

When the complaint is filed, the plaintiff's lawyer should

have in mind the jury instructions and special interrogatories that he plans to submit. While he may not yet know all of the precise facts, the issues in mid-air crash cases generally focus upon the pilot's duty to "see and avoid," Federal Aviation Regulation violations, air traffic control acts or omissions, and possible products liability claims. Just as the factual investigation must precede pretrial discovery, a thorough investigation of the law of the particular jurisdiction concerning negligence per se, evidence of negligence, comparative fault, and pilot/controller duties should be made before beginning the discovery process.

Rather than waiting until immediately before trial, the plaintiff's lawyer should prepare the first draft of the jury issues and instructions early in the case and tailor the discovery accordingly. A wealth of information is available in pretrial discovery which could be beneficial in other cases or in furthering general aviation knowledge. However, to represent clients effectively, counsel must limit discovery to the proof of the issues that the jury will be asked to decide in the particular case.

E. *Order of Witnesses and Discovery*

Discovery in a mid-air collision case should proceed along many fronts contemporaneously. A combination of interrogatories, requests for production, requests for admission, and oral depositions should be utilized. Before conducting *any* discovery, the trial attorney must think about the information to be obtained from each witness. Then he must utilize the discovery devices that will facilitate obtaining that information most efficiently, in a form that can be used effectively at trial.

It is imperative that the facts be well documented before proceeding with expert discovery and analysis. Fact witness testimony may vary depending upon the witness' perception, experience, viewpoint, and background. Disparities in eyewitness accounts can be minimized by obtaining discovery early, before memories fade and witnesses drift to the four winds. Developing fact witness and eyewitness testimony, while interrogatories are being answered and paper wars are being

conducted on other fronts, aids the trial attorney in effectively planning and preparing for the depositions of investigators, experts, and other technical witnesses.

II. Execution of the Discovery Plan — Round I

A. *Depositions to Perpetuate Testimony*

Rule 27[5] provides that depositions may be taken before an action is commenced, or pending appeal in certain cases. Prior to filing the complaint, the attorney should consider the possibility of discovery in certain cases. In cases involving allegations of negligence against employees of the United States, claims must be made under the Federal Tort Claims Act, which stays any action against the government for a minimum of six months. Considering further, that any action commenced against the government will not be answered for an additional sixty days, a *minimum* of eight months can elapse before any meaningful discovery can be conducted in a case against the United States. While the Freedom of Information Act is partially effective in obtaining documentary and tangible evidence, there is no effective method of obtaining sworn testimony from persons involved in the incident, unless a collateral action not involving the United States is available through which depositions may be taken.

Upon filing a verified petition in the United States District Court in the district of residence of the expected adverse party, an attorney may take depositions pursuant to Rule 27, if he can show that perpetuation of the sought-after discovery *may* prevent a failure or delay of justice.[6] This deposition can

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[5] Fed. R. Civ. P. 27.

[6] It is common knowledge that the lapse of time is replete with hazards and unexpected events. This is so regardless of the age, health, or general status of an individual, and an allegation thereof, although helpful to the court in deciding the problem presented, is not fatal. *See* In re Ernst, 2 F.R.D. 447 (D.C. Cal. 1942). *See also* Dresser Indus., Inc. v. United States, 596 F.2d 1231, 1238 (5th Cir. 1979). *But see* In re Boland, 79 F.R.D. 665 (D.D.C. 1978) (motion denied where no showing that potential deponents were aged, had grave illness, or were preparing to leave the country, and thus plaintiff had not established a substantial danger that the testimony sought to be preserved by deposition would become unavailable before a complaint could be filed).

be used at trial just as any other deposition can.[7]

B. *Paper Wars*

It has been suggested that widespread discovery abuse is the second most serious problem facing the legal profession. The most serious problem is the veritable flood of speeches, papers, articles, and other writings about widespread discovery abuse.[8] While an all out paper war is not necessary in every case, a certain amount of paper discovery is essential in the mid-air collision case, and should be one of the first discovery devices relied upon by the plaintiff's attorney.

Mid-air collision cases are seldom resolved without filing a lawsuit and initiating discovery. Long delays before trial, low interest rates on judgments, the unavailability of pre-judgment interest, comparative fault, contribution and indemnity, and hourly fees for lawyers generally stand in the way of an expeditious resolution of a mid-air collision case. Because of these complications, the complaint should be filed immediately upon determining the proper venue and completing some basic investigation. As part of an attorney's discovery plan, an in-house statute of limitations should be set no later than thirty days after receiving the file, and the case should be filed during this period.

Initial pretrial paper discovery should always accompany the service of the original complaint.[9] A request for production, a basic set of interrogatories, and a request for admissions tailored precisely to the facts of the case should always accompany any complaint filed in a mid-air collision case. At a minimum, the attorney can learn the names of witnesses, and the locations and identities of documents obtained by the adversaries in their initial investigation. More often than not, the defendant will have had investigators working on the case since immediately following the crash. The plaintiff must obtain the fruits of the defendant's investigation as soon as

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[7] FED. R. CIV. P. 32.

[8] Buchmeyer, "et cetera," 5 *Dallas Bar Headnotes* 1 (Dec. 1981).

[9] For example, interrogatories, requests for production of documents, and requests for admissions may be served with the complaint. FED. R. CIV. P. 33, 34, 36.

possible.

When discovery is filed with the original complaint, experience has shown that the plaintiff's lawyer will usually receive a call from a defense lawyer or an insurance adjuster requesting additional time within which to respond to the discovery. The plaintiff's attorney should generally deny this request, not in the spirit of recalcitrance, but in the interest of furthering the plaintiff's rights. If the plaintiff's lawyer goes to the trouble of preparing the discovery and serving it to take advantage of the Federal Rules, he should insist upon obtaining, at a minimum, partial information at the outset, to be supplemented by more complete information as the defendant obtains it.

It has been suggested that this is a dangerous approach for the plaintiff, in that it may allow the defendant to obtain discovery from the plaintiff in advance of plaintiff's receipt of answers to discovery served with the complaint.[10] Specifically, if an aggressive defense lawyer gets the complaint, immediately files an answer, and serves discovery upon the plaintiff, the thirty day period within which plaintiff must answer defendant's discovery will expire prior to the forty-five day period running against the defendant, who has received the discovery along with the complaint.

Experience has shown that few, if any, defendants will receive the complaint in sufficient time to serve this discovery in advance of the date on which plaintiff's discovery will be due. Aggressive, effective and efficient representation of the plaintiff's rights dictates that initial discovery should always be served along with the original complaint, and that the defendant's request for additional time to respond to such discovery should be denied.

C. *Court Reporter Coordination*

At the outset of a mid-air collision case, all the attorneys involved should seriously consider the utilization of a single

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[10] David, *Defense Tactics and Strategies in Aviation Litigation*, 13 FORUM 132 (1977).

court reporting service. The use of the same reporter ensures familiarity with the terminology, provides continuity in the marking of exhibits, and also may lead to a negotiated rate for depositions taken in the case. Because of the significant expenditure involved in the stenographic recording of testimony, this latter consideration becomes very important in attorneys' efforts to minimize expenses in the discovery process.

D. *Fact Witness Depositions*

All eyewitnesses and fact witnesses with information about the events leading up to the collision must be deposed as one of the threshold steps in the discovery process. Taking fact witness depositions early will hopefully prevent surprises or serious erosion of expert theories by eyewitness testimony. No substitute exists for extensive investigation, detailed statements, and memorializing the testimony by deposition, including videotape deposition for eyewitnesses, so that the experts will have a complete record upon which to build their technical reconstruction of the crash.

E. *Investigator Depositions*

Early in the discovery process, the National Transportation Safety Board (NTSB) investigator should be deposed. His findings should not be adopted blindly, nor should any of his conclusions be taken for granted. Because of the NTSB's personnel and time limitations, the experience and background of its investigators, and its nonlitigious purpose, the plaintiff's lawyer must thoroughly investigate the factual information and conclusions included in the report. This information should be regarded only as the initial step in the pretrial process.[11] Since the NTSB investigator is prohibited by agency regulations from giving live testimony at trial,[12] serious consideration should be given to videotaping his testimony for presentation to the jury.

In almost all fatal and serious injury cases, an on-site inves-

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[11] Pangia, *supra* note 1, at 34.
[12] 49 C.F.R. § 835.5(a) (1980).

tigation is conducted by the airframe manufacturer, and frequently by the manufacturer of the powerplant. These investigators are generally on the scene within twenty-four hours of the crash and obtain first-hand observations of the wreckage and interviews with witnesses. Frequently, this investigation occurs in advance of, or contemporaneously with, investigation by the NTSB. The detailed and comprehensive investigative reports prepared by these persons should be obtained in all mid-air collision cases. Even if the manufacturer is joined ultimately as a party defendant, it can be compelled to produce these investigative reports.[13] As with the NTSB report, the conclusions in the manufacturers' investigative reports must be viewed with a cautious eye, as a means to an end rather than as an end itself.

In mid-air collisions involving military aircraft, investigations will be conducted by the military service involved.[14] A Freedom of Information Act request should be lodged with the appropriate agency for disclosure of the entire investigative report. The technical expertise of the military investigators is sometimes questionable, however, and these reports should be viewed with the same caution as the reports of the NTSB or the manufacturer.

It is important to obtain the plaintiff's *and* the defendant's copies of the investigative report, and to obtain any other copies released by the investigating authority. Experience shows that reviewing officers may differ on what is releasable and what is not releasable under the Freedom of Information Act. Findings, conclusions and recommendations may be deleted from one report and contained in their entirety in the report released to a different party.

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[13] *See* Soeder v. Gen. Dynamics Corp., 90 F.R.D. 253 (D. Nev. 1980); Miles v. Bell Helicopter Co., 385 F. Supp. 1029 (N.D. Ga. 1974). *But see* Almaguer v. Chicago, Rock Island & Pac. R.R. Co., 55 F.R.D. 147 (D. Neb. 1972).

[14] Regulations concerning military reports for the Air Force, the Army, and the Navy are at 32 C.F.R. § 806.5 (1980), 32 C.F.R. § 518 (1981), and 32 C.F.R. § 701 (1980), respectively. *See generally* Levy, *Military Aircraft Accidents Representing the Injured Serviceman*, 8 WAKE FOREST L. REV. 507 (1972); Burton, *Military Investigations & Reports of Aircraft Accidents*, 36 J. AIR L. & COM. 409 (1970).

F. *Expert Witnesses*

Experts should be deposed no later than sixty days prior to trial. If no agreement on a suitable deposition schedule can be reached, a motion should be filed to set a cutoff date for expert discovery. Models, drawings, and other demonstrative aids should be used during the depositions of the expert and fact witnesses. A self-developing camera and/or videotape should always be used to record specific observations and conclusions expressed by the expert witness.

Always depose the defendant's expert. It is dangerous for the plaintiff to proceed to trial on the basis of interrogatory answers and/or a written report, in lieu of the oral deposition of the expert. A thorough understanding of the expert's opinions and their factual bases must be explored during the oral deposition.

The plaintiff's lawyer should always obtain copies of deposition testimony given by the defendant's expert on prior occasions. This testimony should be abstracted and summarized for use in the deposition and at trial. The plaintiff must obtain this information, because the defendants, through their insurance company and/or coordinating law firm, generally will have developed "the book" on many of the independent experts relied upon by the plaintiff. The plaintiff's bar should unite in a special effort to assist other plaintiffs' lawyers in responding to the collective efforts of the defense bar in this area.[15]

The deposition of the defendant's expert should be scheduled to allow him sufficient time to review all the fact witnesses' testimony, the wreckage, air traffic control tapes, telemetry data, and any other information necessary for him to reach his final opinions. The scheduling of the deposition of

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[15] The plaintiff's lawyer must also be prepared, as a part of his overall discovery plan, to resist the growing tendency of manufacturers to seek protective orders on essentially everything they produce in discovery. Under the trade secret guise, manufacturers are attempting to frustrate the efforts of plaintiff's attorneys to share information obtained in other cases. *See* United States v. Hooker Chem. & Plastics Corp., 90 F.R.D. 421 (W.D.N.Y. 1981); Parsons v. General Motors Corp., 85 F.R.D. 724 (N.D. Ga. 1980); Patterson v. Ford Motor Co., 85 F.R.D. 152 (W.D. Tex. 1980); United States v. IBM, 67 F.R.D. 40 (S.D.N.Y. 1975).

the defendant's expert should not, however, be contingent upon explaining to defense counsel the plaintiff's expert's "theory."

Arguments are frequently made that the defendant has a right to "hear the plaintiff's theory" before producing its experts. These arguments have no reasonable basis nor authority. The plaintiff's lawyer need not produce his expert simply because the defendant wants to hear the plaintiff's theory, so that an expert can then be employed to rebut it. After a thorough factual investigation, defendant's expert should be able to independently reconstruct the crash or evaluate the performance of pilots or air traffic controllers.

By necessity, preparation for the expert's deposition will involve a review of Federal Aviation Administration publications including the Federal Aviation Regulations, Parts 61 and 91, Advisory Circulars, especially Advisory Circular 90-48A, and the *Airman's Information Manual* in effect on the day of the crash. Additionally, air traffic control manuals, company operations manuals and/or military operations manuals may provide evidence of the standard of care that must be established.[16]

In establishing the standard of care in a mid-air case, the plaintiff's lawyer must not rely solely upon "professional expert witnesses." Local experts, including flight instructors of the defendant, designated flight examiners, chief pilots of defendant companies, or operations officers of the defendant should always be considered for this purpose. The plaintiff can always rely upon defendant's chief pilot or defendant's instructor pilot to state that the pilot was well aware of the collision avoidance procedures and the provisions in the company operations manuals, Federal Aviation Regulations, Advisory Circulars and *Airman's Information Manual.* A trainee pilot must demonstrate such awareness in order to obtain a private or commercial pilot rating.[17] In affirming the

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[16] Care must be exercised in discovery in this area. Discovery of peripheral items of questionable relevance must be avoided. *See generally* Pangia, *supra* note 1, at 30.

[17] *Pilots Role in Collision Avoidance,* Advisory Circular 90-48A (1979); *Private Pilot Flight Test Guide,* Advisory Circular 61-54A, pp. 16, 17 (1975); 14 C.F.R. §§ 61.65,

competence of that pilot, the instructor pilot or chief pilot has vouched for the trainee's knowledge of the regulations and his ability to apply them. This verification, in and of itself, will set the standard of care, independent of that established through "professional experts."

G. *Videotape Deposition Testimony*

The testimony of all critical witnesses who may not be within the subpoena range of the court at the time of trial should be preserved by color videotape to ensure that the testimony can be effectively presented at trial. While the rules relating to the right or option to use videotape may vary from jurisdiction to jurisdiction, almost all provide for this method of recording testimony.[18] The advantages of videotape depositions over the traditional reading of the transcript are well documented.[19]

Since the videotape deposition is an actual part of the trial testimony to be presented to the jury, the plaintiff's lawyer should plan and prepare for the deposition with the intensity and thoroughness given to pretrial preparation of a "live" witness. Witness interviews and "woodshedding" should be conducted, questions should be outlined, and exhibits and demonstrative aids should be marked in advance of the deposition. The plaintiff's lawyer must plan for the use of demonstrative aids, and should familiarize the witness with both documentary evidence and demonstrative aids, to ensure that no problems or delays are encountered during the videotape deposition.

Careful thought must be given to the manner in which the videotape will be used. The techniques, by necessity, will vary from those the attorney uses in taking an ordinary oral deposition. The attorney must consider the physical appearance of

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61.105, 61.107, 91.5, 91.9, 91.65, 91.67 (1981). *See* Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178 (5th Cir. 1975) (on admissibility of the advisory circulars).

[18] *See* FED. R. CIV. P. 30, which requires court approval or a stipulation between counsel. *Cf.* TEX. R. CIV. P. 215c, which expressly provides for the taking of videotape testimony without prior court approval.

[19] *See* Smiley, *Use of Videotape in Aviation Accident Liability Trials*, 13 FORUM 191 (1977); Annot., 66 A.L.R. 3d 637 (1975).

the witnesses and the lawyers, the physical setting for the deposition, and the effect of long pauses on the impact of the tape. These matters go unnoticed in the traditional stenographic deposition, but are major considerations in the videotape deposition.

A discussion of procedures which maximize the effectiveness of the oral deposition is outside the scope of this presentation.[20] It is important, however, to remember that the videotape deposition must be crisp, succinct, and well-planned, if it is to be effective. The trial lawyer should conduct the deposition in the same manner used to examine the witness at trial.

Stipulations should be reduced to writing in advance of the videotape deposition, so that any objections relating to the form of the deposition may be resolved prior to its recording. The Federal Rules of Civil Procedure should be complied with for all videotape depositions. After the deposition, all objections should be submitted to the court in writing, to obtain a preliminary ruling in advance of trial. The testimony may then be presented in its "pure" form at the trial, through the use of an edited version of the deposition. The master, of course, will be available for appellate purposes.

The plaintiff's lawyer should not overlook the use of the video-telephone service available in many cities across the country. This medium will greatly reduce travel delay and expenses, and will enable the lawyers not only to communicate visually with and confront the witness during examination, but also to videotape the deposition.[21]

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[20] Murray, *Use of Videotape in the Preparation and Trial of Lawsuits*, 11 FORUM 1152 (1976) (discussing the "McCrystal Method" of editing videotape based on motion argument prior to presentation to the jury, named for the Honorable James L. McCrystal, an Ohio judge who has actively encouraged the use of videotape in litigation); Smiley, *Use of Videotape in Aviation Accident Liability Trials*, 13 FORUM 191 (1977); Thornton, *Expanding Videotape Techniques in Pretrial and Trial Advocacy*, 9 FORUM 105 (1973).

[21] The video telephonic service is provided by the Bell System. The service will be available in 1982 in New York, San Francisco, Washington, D.C., Atlanta, Dallas, Houston, Philadelphia, Chicago, Detroit, Pittsburgh, Cleveland, Columbus, and Buffalo. Charges are approximately $300/hr. Facilities are available for videotelephonic conference depositions.

H. *Judicial Intervention in Discovery*

Plaintiffs in a mid-air collision case frequently find themselves stymied by the defendant's apparent efforts to delay the trial through the discovery process. Discovery agreements that accommodate counsel should always be explored. While it is not desirable to engage in "notice wars," they may become a practical necessity in the mid-air collision case in which numerous counsel represent multiple parties. While court intervention in discovery is not desirable, it is a reality in today's litigation environment. The parties should not hesitate to seek protective orders and orders to compel, in the event of delays or expenses that impair discovery.

Delays frequently occur when discovery disputes develop in cities away from where the case is pending. If confronted with such a situation, the lawyers should seriously consider the use of telephone conferences with the court where the case is pending, for an immediate resolution of the question. The plaintiff's lawyer should approach the court early in the case and determine its willingness to participate in these "telephone conference call" hearings. The trend appears to be in favor of such proceedings.

I. *Damages Discovery*

All too often in the preparation of the case, damages discovery is given a back seat to liability discovery. Early in the case, the plaintiff must take the lead in helping the defendant discover the damages suffered. The plaintiff's lawyer must keep the defendant continually aware of the substantial losses that the plaintiff has suffered. Damages discovery must proceed contemporaneously with liability discovery and analysis, if fair recoveries for clients are to be obtained.

In death cases, the plaintiff should tender the decedent's survivors for their depositions shortly after filing suit, so that the defendants will be aware of the substantial losses suffered. In injury cases, the testimony of attending physicians, and health care personnel should be obtained contemporaneously with liability discovery.

The passage of time inures to the benefit of the defendant

only. A deceased wage earner's contemporaries and supervisors remember him best immediately following the accident. Likewise, for the physician there is no time better than that immediately following the completion of treatment for recollection of the individual patient and the medical difficulties that he encountered. To effectively communicate the damages suffered by the plaintiff, his lawyer must obtain this testimony at the optimum time.

When deposing the doctor, "hero" witnesses, fellow workers, contemporaries, and business associates who might not be available to testify live at the trial, it is imperative that the deposition testimony be recorded on color videotape. Recording the witnesses' testimony in advance will ensure their availability and will avoid last minute logistical problems during the trial.

Certain witnesses may be able to communicate more effectively when deposed in familiar surroundings, rather than in the rigid, foreign setting of the courthouse. The client's recovery should not be compromised simply because some witnesses cannot communicate effectively from the witness stand. The use of videotape to record the testimony in the environment where the deceased worked, lived and played, is restricted only by the limits of an attorney's imagination. In the role of the plaintiff's representative, the attorney must utilize the various combinations of discovery procedures available, to communicate most effectively with the trier of fact.

Early on, the attorney should provide economists with earnings and disability data so they can begin evaluation of the economic losses. The economist, like the plaintiff, should be tendered for his oral deposition early in the case. The plaintiff's attorney should strongly encourage defendants to take the economist's deposition rather than providing the defendant with a written report that is certain to find its way into the file and the stack of other papers that will be generated in these cases. As with the other significant witnesses, the economist's testimony should be recorded on color videotape, even if the defendant takes the deposition.

When damages testimony is thus recorded, the plaintiff

eventually may elect to prepare a videotape settlement brochure for the damages analysis of his case. Excerpts from the videotape testimony can be combined with the testimony of other witnesses whose informal interviews can be obtained, summarized, and presented to the representatives of defendant at the appropriate time in brochure form. This recording can be used in a settlement conference with the court, so that the true impact of the economic losses can be communicated in an effective, summarized form.[22]

III. DISCOVERY — ROUND II

A. *Follow-Up and Debriefing/Regrouping*

After the initial interrogatories have been answered, documents have been produced, and depositions have been taken, the initial phase of the discovery process is only half complete. Immediately after finishing any phase of the discovery process, follow-up should be initiated. At this time the lawyer is most familiar with the facts. Counsel should not simply put the interrogatories and documents in a file or binder; nor should he return from a deposition without debriefing his staff. This debriefing should by done by telephone if the attorney is away from the office for extended periods of time.

After any progress in discovery, the lawyer should immediately set aside time

(1) to meet with his staff and analyze the information recently obtained;

(2) to make new assignments;

(3) to schedule follow-up investigation and discovery; and

(4) to review the discovery plan for progress and possible modification.

The new information will always point out additional discovery that must be undertaken. The lawyer should make arrangements immediately to schedule the next phase of discov-

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[22] Misko, *The Video Tape Settlement Brochure*, 15, No. 1 TRIAL LAW. FORUM 19 (July-Sept. 1980); Turley, *The Video Documentary: A Powerful Settlement Tool*, 18 TRIAL 88 (July, 1982).

ery. Requests for production of documents and interrogatories should be served and depositions should be scheduled promptly, because of the minimum thirty day lead time on the paper discovery.[23] In all probability, longer lead time for depositions will be needed.

Immediately after depositions are received from the court reporter, they should be summarized and/or abstracted. A copy of the deposition, along with the abstract with exhibits attached, should be sent to the experts for their analysis. The attorney should obtain follow-up from the experts, along with their analyses, before beginning the next phase of discovery. If a computer is utilized for information management, the data must be entered into the system.[24] If the deposition has been videotaped, it is essential to correlate the tape counter to the transcript to facilitate pretrial editing and use at trial. A copy of the videotape should be provided to the expert for his viewing.

Detailed follow-up procedures ensure that discovery is tailored to each specific case. A series of short requests for production and/or interrogatories are more effective than an oppressive set of form book interrogatories, and will be looked upon much more favorably by the court, if a motion to compel discovery is required. Once this follow-up is complete, the lawyer is ready to proceed to the next phase of interrogatories, requests for production, requests for admissions, and depositions.

B. *Request for Admissions*

Near the end of discovery, while attempting to narrow the issues in the case, the lawyer should not overlook Rule 36 and its state court counterparts relating to requests for admissions.[25] Requests for admissions are essentially useless for discovering the unknown, but they are extremely valuable in nar-

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[23] FED. R. CIV. P. 33, 34, 36.

[24] *See generally* Fetterly, *Use of a Computer as an Evidence Management Tool in Products Liability Litigation*, 29 FED'N INS. COUNSEL Q. 231 (1979).

[25] *See generally* Epstein, *Rule 36: In Praise of Requests to Admit*, 7 LITIGATION 30 (1981).

rowing the issues and the scope of matters that must otherwise be proven at trial. As is so often the case, during the harried days immediately preceding the submission of the pretrial order, the parties will be unable to get together and work out meaningful stipulations. Requests for admissions can provide the basis for stipulated facts and also, in some cases, may provide the basis for a directed verdict or summary judgment on the issue of liability. In every case they should be used to refine the issues that will be submitted to the trier of fact.

C. *Often Overlooked Defendants and Theories*

While the mid-air collision case is traditionally viewed as a simple negligence case, the attorney should not overlook the potential for products liability theories of recovery. If one of the pilots claims that his vision was obstructed by the design of the aircraft, the attorney should investigate the possibility of a design defect as a producing cause of the crash.

The possibility of design defect is especially important in states that recognize Restatement (Second) of Torts §402B as a basis for recovery.[26] For example, certain manufacturers make broad representations about the added safety of their aircraft based on 360 degree visibility from the cockpit, yet pilots can describe numerous blindspots that exist, contrary to the representations of the manufacturer defendant. The defense attorney representing the pilot of one of these planes may paint a picture of the pilot's restricted visibility, thereby supporting the plaintiff's claim based on the manufacturer's misrepresentation or the design defect.

The human factors/human engineering element of the mid-air collision case is an important area for examination in certain cases. Prior to undertaking the design and construction of a product, a manufacturer must study and accurately analyze

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[26] *See generally* Hoffman v. A.B. Chance Co., 346 F. Supp. 991 (M.D. Pa. 1972); Winkler v. American Safety Equip. Corp., 604 P. 2d 693 (Colo. App. 1979); Klages v. General Ordnance Equip. Corp., 240 Pa. Super. 356, 367 A.2d 304 (1976); Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966); Crocker v. Winthrop Laboratories, 514 S.W.2d 429 (Tex. 1974).

the conditions under which his product will be used.[27] Design engineers will generally agree, contrary to the narrow view taken by the defense lawyers, that in actual use their product faces forseeably tough and demanding circumstances. Designers will testify to their awareness of this demanding environment, and their consideration of it throughout the design process. This type of testimony is essential to successfully respond to defenses of unforeseeable misuse.[28]

Collision avoidance systems, both airborne and land based should be evaluated for human factor considerations that may have contributed to the mid-air collision. Procedural errors that increase the fallibility of the human operator should be evaluated. Pilot workload during critical phases of flight operations such as takeoff and landing, where the mid-air collision threat is the greatest, should also be evaluated.

Conflict alerts, designed to notify air traffic controllers when aircraft proximity violates standards, may be disregarded due to the conditioned response of the controller. The alarms may be triggered so often in normal operations, that the controllers dismiss them without realizing the danger in their actions. Conflict alert displays on some controllers' radar scopes closely resemble aircraft in a "handoff" status. The intensity and flash rate of the data block of an aircraft in a "handoff" status may be the same as the data block showing a conflict alert on the same scope. Since the "handoff" status flash signal is a routine occurrence, there may be little visual distinction between the potentially catastrophic condition of a conflict alert and the routine "handoff" status. The human factors engineer must be consulted to properly analyze the design of this type of equipment and its role in a mid-air collision.

D. *Ensure All Parties Are Joined at an Early Date*

After completing the initial investigation and discovery, counsel should know the identity of all potential defendants.

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[27] Huff v. White Motor Co., 565 F.2d 104 (7th Cir. 1977); Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979).

[28] Hare, *Discovery in the Products Liability Case*, 16 TRIAL 42 (1980).

Any additional parties should be joined immediately at this point, to avoid the risk of delay and duplication of discovery procedures which occurs with the joinder of parties after discovery has been completed. It is advisable to get all potential defendants into the case at once, rather than run the risk of joining an additional defendant or third-party defendant late in the case and thereby suffering one or more resets as a result of this late joinder.

If the defendant even *suggests* that the joinder of additional defendants will be necessary, a motion to require the immediate joinder of any third-party should be made by the plaintiff. This action will force the defendant to join any additional third-party defendants at that time, and will avoid the joinder of third-party defendants shortly before trial, so as to frustrate and effectively vacate the trial setting. After all new parties have been joined in the action, the lawyer and his staff should set new goals and check them against the original long-range plan that has provided guidance for the case to date.

E. *Budget*

The keynote to discovery in an aviation case is thoroughness.[29] Thoroughness in discovery, however, must be tempered by the practical consideration of the fiscal and manpower demands of a mid-air collision case. It is not unusual for up to 100 depositions to be taken in a mid-air collision case. Experts are not inexpensive. Extensive travel and its associated cost and time delay, can be expected. When the traditional negligence case is compounded with products liability theories, the expenses escalate even further.

The range of potential recovery should be bracketed at the beginning of the case, and a budget should be established and reviewed regularly to avoid overspending during the discovery phase and thereby restricting flexibilty during trial. Counsel should be prepared, in a mid-air collision case, to spend a *minimum* of $25,000 during pretrial discovery. The lawyer must continually monitor his expenditures, during discovery

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[29] Loggans, *Aviation Discovery: The Herculean Task*, 14 TRIAL 40 (1978).

to ensure that he will have sufficient funds to complete the remaining part of the contest.

IV. CONCLUSION

"Forewarned—Forearmed—to be prepared is half the victory."[30]

Simplicity and efficiency should be the guiding principles for the trial lawyer during discovery. Exhaustive and overly expensive discovery impresses the uninformed and those who are uninitiated in aviation cases. To those reasonably well-versed on the subject the lawyer who engages in overly expensive discovery is really an Alice in Wonderland, not knowing which way to go.

Careful strategy and aggressive pursuit of a discovery plan that "takes us where we want to get" will remove one more case from those labeled "abusive" and will preserve the free and relatively unrestricted discovery now enjoyed.

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[30] Cervantes, *Don Quixote*, Part 2, ch. 17.

Current Literature