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DISCOVERY AGAINST MANUFACTURERS IN AIR CRASH LITIGATION

DONALD W. MADOLE*

DISCOVERY against a manufacturer requires careful analysis of accident causation and the use of all available discovery tools. Under federal law, the National Transportation Safety Board (NTSB) is vested with exclusive jurisdiction over investigation of aircraft accidents.¹ A thorough knowledge of the Board's accident investigation procedures is essential.

Data collected from federal accident investigations may be obtained pursuant to regulations found in 14 C.F.R. § 435 (Disclosure of Aircraft Accident Investigation Information). A "major" catastrophic accident will usually be the subject of a public hearing conducted in accordance with 14 C.F.R. § 431. Following the hearing, copies of the transcript and exhibits may be obtained from the NTSB (the cost usually runs about \$1000-\$2000). The public hearing does not occur until weeks and sometimes months after the accident. Counsel should conduct sufficient prehearing investigation to get the most out of the testimony and exhibits which can be reviewed in the public docket. Generally, if a manufacturing or design defect is suspected, the exhibit documents, which are those produced by the Structures Group, the Power Plants Group and the Systems Group, should receive early and careful attention. The group chairman's factual reports and underlying exhibits give a

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¹ 49 U.S.C. § 1654 (1971), with incorporation by reference of Title VII of the Federal Aviation Act of 1958, 49 U.S.C. § 1441 *et seq.* (1971).

clue to involvement of the manufacturer if they contain detailed records of the aircraft and its component parts, particularly any "pre-impact failure." There will be documentation of the various tests conducted on the components and photographs of the physical condition and location of the wreckage following the accident.

The location and distribution of the wreckage can be important evidence of whether an aircraft came apart in flight, the manner in which it came apart, and the direction of flight. If the wreckage is concentrated into one small area, it can sometimes be determined that a complete aircraft struck the ground. Plaintiff's counsel will seldom have an opportunity to view the wreckage at the site because they are not retained until weeks after the occurrence. Even if retained, the aircraft wreckage is under the exclusive custody of the National Transportation Safety Board investigators who generally preclude counsel from participating in or observing the investigation firsthand. The authority of the National Transportation Safety Board is spelled out in the Department of Transportation (DOT) Act of 1966.²

Reports of tests and analyses are also found in NTSB documents which may describe:

- (a) Physical and chemical analysis of portions of the wreckage;
- (b) Metallurgical analysis in the form of spectograph, x-ray or metalograph data;
- (c) Photographs or descriptions of metal fractures either due to tension, compression, fatigue, torsion or shearing.

Every aircraft manufacturer will collect and retain information about the following:

1. Initial design;
2. Specifications of material;
3. Certification data relating to government approval;
4. Service Letters sent out by the manufacturer to the customers;
5. Service Bulletins sent out to owners and maintenance organizations;
6. Airworthiness Directives of the Federal Aviation Administration;

² 49 U.S.C. § 1654 (1971).

7. Engineering reports;
8. Flight test reports;
9. Malfunction and defect reports which are furnished to the manufacturer; and
10. Customer complaints.

This brief checklist is just the beginning. The best checklist is found among the data in the Federal Regulations which are discussed immediately below.

FEDERAL AIR REGULATIONS SET THE STANDARDS REQUIRED
BY AIRCRAFT MANUFACTURERS IN THE PRODUCTION
OF U.S. CIVIL AIRCRAFT

The Supreme Court has held that under the Interstate Commerce Clause³ the Constitution gives Congress the power to regulate all navigable airspace and they can delegate that power to an appropriate agency.⁴ In response to that power, the Congress has passed various items of legislation culminating in the Department of Transportation Act of 1966.⁵ The DOT Act incorporates most of the provisions of the Federal Aviation Act of 1958,⁶ which gives the Federal Aviation Administrator the power to promulgate certain rules, regulations or minimum standards to further air commerce and safety.⁷

Before a manufacturer can place an aircraft on the market, he is required to have his aircraft certified by the FAA and receive a "type" certificate. There is an entire section of the DOT Act devoted to the certification of aircraft and the requirements for the issuance of a "type" certificate.

First, the Act requires the Secretary of Transportation, through the Administrator of the FAA, to specify in regulations the appliances for which the issuance of a "type" certificate is reasonably required in the interest of safety. The Act further directs the Administrator to require the applicant for a "type" certificate to make such tests during the manufacture and upon completion as are deemed necessary in the interest of public safety. This includes

³ U.S. CONST. art. I, § 8, cl. 3.

⁴ *United States v. Causby*, 328 U.S. 256 (1946).

⁵ 49 U.S.C. § 1651 *et seq.* (1971).

⁶ 49 U.S.C. § 1301 *et seq.* (1971).

⁷ 49 U.S.C. § 1301 *et seq.* (1971).

flight tests, tests of raw materials or any part of the aircraft, engine, propeller or appliance.⁸ Then, if the Administrator finds that the aircraft is of the proper design, material specification, construction, and performance for safe operation, and meets the minimum standards, rules and regulations prescribed, the Act directs him to issue a "type" certificate.⁹ Then, the manufacturer is required to comply with the Federal Air Regulations (FAR's) in the design of United States civil aircraft.

An additional requirement imposed by the Act is the necessity for obtaining a "production" certificate.¹⁰ The "production" certificate must be in conformity with the "type" certificate.¹¹

Next, before the aircraft may be flown, the Act requires that it have an "airworthiness" certificate which attests to its fitness for flight after inspection by the FAA.¹²

Armed with this statutory authority, the Federal Aviation Administrator has issued the Federal Air Regulations (FAR's) in Title 14 of the Code of Federal Regulations. These FAR's provide a universal standard of minimum conduct within the aircraft manufacturing community. An outline of the duties a manufacturer must fulfill prior to sale of the aircraft are found in 14 C.F.R. Parts 21, 23 and 25. The FAR's contain one set of requirements for "normal," *i.e.*, general aviation aircraft and another, more stringent, regulatory specification for "transport," *i.e.*, airline aircraft. For "normal" category aircraft, regulations cover everything from longitudinal stability characteristics to fire extinguishers.¹³ There are well over 1000 sections in Part 23, so you can get some idea of the detail in this part of the regulations. Should your litigation involve transport aircraft, you will be concerned with additional testing and operating limitations, flight characteristics and system requirements.¹⁴ Counsel can use the Federal Air Regulations as a guide to documentary evidence that is kept by the manufacturer in the normal course of his business. If the manufacturer denies the existence of such material, you can introduce the Federal Aviation

⁸ 49 U.S.C. § 1423(a)(1) (1971).

⁹ 49 U.S.C. § 1423(a)(2) (1971).

¹⁰ 49 U.S.C. § 1423(b) (1971).

¹¹ 49 U.S.C. § 1423(b) (1971).

¹² 49 U.S.C. § 1423(c) (1971).

¹³ 14 C.F.R. § 23 (1974).

¹⁴ 14 C.F.R. § 25 (1974).

Regulations to show failure of the defendant manufacturer to comply with discovery. In *Lilly v. Grand Trunk & Western Railroad*,¹⁵ the Supreme Court held that the rules, regulations and orders of administrative agencies of the United States Government, promulgated pursuant to statutory authority, are appropriate subjects of judicial notice.

If you are dealing with a foreign manufactured aircraft, look for the "bilateral airworthiness agreement" which will be a treaty between the United States and the nation where the aircraft was certificated and manufactured. The United States Government usually requires special conditions or limitation on foreign manufactured aircraft which are operated in the United States. If the aircraft is manufactured outside of the United States and operated under other than United States registry, then you can look to the standards and recommended practices in the annex to International Civil Aviation Organization (ICAO).¹⁶

REQUEST FOR PRODUCTION OF DOCUMENTS—FEDERAL RULE 34

After analysis of the NTSB material and review of the FAR's indicate what is relevant, the next item of business is to decide on the most efficient method of obtaining the information. Rule 34 of the Federal Rules of Civil Procedure was amended effective July 1, 1970 by deleting the requirement for a showing of "good cause" for the production of documents. Today's criteria for discovery is relevancy. Federal Rule 26(b) allows a party to discover any matter "not privileged, which is relevant to the subject matter involved in the pending action," and inadmissibility at trial is not a basis for objection so long as the information sought "appears reasonably calculated to lead to the discovery of admissible evidence."¹⁷ The Federal Rules permit parties the greatest latitude in their discovery and in their preparation for trial. The rules are liberally construed to effect these purposes.¹⁸

DOCUMENT DEPOSITORIES

Mass disaster litigation resulting from the crash of a commercial

¹⁵ 317 U.S. 481 (1943).

¹⁶ Convention on International Civil Aviation, 61 Stat. 1180 (1947).

¹⁷ Fed. R. Civ. P. 26(b)(1).

¹⁸ *Hickman v. Taylor*, 329 U.S. 495 (1947).

airliner usually is subject to jurisdiction of the Judicial Panel on Multidistrict Litigation.¹⁹ Thousands of pages of documents will be required for proper discovery against a manufacturer in such a case. The *Manual for Complex Litigation* of the Judicial Conference of the United States (January 1, 1973) calls for the use of document depositories. The following section of the Manual is particularly useful when proceeding against a manufacturer, who probably will have accumulated voluminous documents on a particular aircraft: "When voluminous documents may be inspected and copied by many parties the development of centralized depositories is a major step forward in the orderly, efficient and economical processing of the complex case."²⁰

It is appropriate for plaintiff's counsel to seek an order relating to all defendants, which specifies the manner in which documents are to be produced, copied and retained. It is the defendant manufacturer who has the best knowledge of the contents, location and description of the various documents that contain the information about the design and manufacture of the aircraft. Therefore, the efficient administration of justice is consistent with an order which requires that:

Any party who has produced or does produce any document or thing shall as to all such documents or things give a complete and detailed index setting forth a sufficiently detailed identification and pagination of each document or thing and the precipient witness concerning said document together with a reference to the request to produce by item number, and the identifying language of the request to produce pursuant to which the document is produced.²¹

A central depository is useful and economical and saves the expense of making copies of each and every document produced in discovery. A depository which generally contains hundreds of thousands of pages allows counsel to inspect the documents in an orderly manner and then determine whether or not copies of particular pages are required for use in discovery and trial of the case. A federal judge, wise to unnecessary delay due to "gamesmanship," has ordered that: "Production of such documents constitutes

¹⁹ 28 U.S.C. § 1407 (Supp. 1974).

²⁰ MANUAL FOR COMPLEX LITIGATION § 2.50, at 38 (C.C.H. 1973).

²¹ *In re* Air Crash Disaster at Juneau, Alas., on Sept. 4, 1971, No. — (C.D. Cal., order dated Feb. 11, 1973).

admission of authenticity of the documents so produced provided, however, that this does not constitute a waiver of defendant's right to object to the use of the documents with regard to materiality, relevancy or hearsay."²²

Each document should be produced in the presence of a court reporter, marked for identification at the time, and a transcript retained of the production session.

REQUESTS FOR PRODUCTION BY CATEGORIES

There was a time when the courts construed rule 34 to require the moving party to list with specificity the documents he required to examine. As society becomes more complex, new technological data appears daily and even the exercise of due diligence does not always allow the advocate to list documents with the required specificity. Therefore, later cases have enlarged the rule to permit discovery where the documents were listed by category. Moore, in his treatise on federal practice, states: "Designation by category is sufficient, then, and the categories themselves need be defined only with reasonable particularity. The question is whether a reasonable man would know what documents or things are called for."²³

In *Houdry Process Corp. v. Commonwealth Oil Refining Co.*,²⁴ a description of all documents, memoranda, correspondence and other writings written on or before June 15, 1958 and relating directly or indirectly to a licensing agreement in dispute was proper.²⁵

DISCOVERY OF POST ACCIDENT TESTS, REPORTS, AND EVEN ACCIDENT REPORTS ARE ALLOWED

Often defendants object to discovery of post accident matter but it has been generally concluded that it is proper to discover post accident documents.²⁶ The recent cases require the discovery of

²² *In re Air Crash Disaster at Juneau, Alas.*, on Sept. 4, 1971, No. — (C.D. Cal., order dated Feb. 23, 1972).

²³ 4A J. MOORE, FEDERAL PRACTICE § 34.07, at 34-57 (2d ed. 1974), cited in *Houdry Process Corp. v. Commonwealth Oil Ref. Co.*, 24 F.R.D. 58, 63 (S.D.N.Y. 1959), discussed *infra*.

²⁴ 24 F.R.D. 58 (S.D.N.Y. 1959).

²⁵ *Id.*

²⁶ See 4 J. MOORE, FEDERAL PRACTICE § 26.56(1), at 26-137 (2d ed. 1974); *Caulk v. Baltimore & O.R.R.*, 306 F. Supp. 1171 (D. Md. 1969); *Baker v. Proctor & Gamble Co.*, 17 FED. RULES SERV. 30b.352 (S.D.N.Y. 1952).

items which are relevant to the subject matter regardless of admissibility. Even a post accident report of an air crash is discoverable. In fact, such reports have been found admissible in air crash litigation. Post accident admissions and safety modification have been used to prove breach of warranty of a manufacturer. Such evidence is admissible as proof of breach of warranty because it discloses a defect. Whether or not the manufacturer was or was not negligent is of no consequence if the defect was a proximate, contributing cause.²⁷ Certainly, if they are admissible in evidence, *a fortiori* discovery should be available without argument. Thus, in *Pekelis v. Transcontinental & Western Air Inc.*,²⁸ the Court of Appeals for the Second Circuit expressly ruled that a post accident report on an air crash was admissible in evidence. Decisions in other cases have reached similar results.²⁹

EVEN THOUGH DOCUMENTS CONTAIN OPINIONS OF THE
DEFENDANT MANUFACTURERS' EXPERTS, THEY ARE
STILL DISCOVERABLE UNDER THE FEDERAL RULES

Much confusion has arisen due to the change in rule 26(b)(4) of the Federal Rules which relates to the opinions of experts which are not to be called at trial. The views of the Advisory Committee are helpful in determining what they meant in the drafting of the revised words in rule 26(b)(4) where they said:

It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.³⁰

Thus, in resolving the issue of the opinions of expert employees of the defendant manufacturer, the court is governed by the provisions

²⁷ *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

²⁸ 187 F.2d 122 (2d Cir. 1951), *cert. denied*, 341 U.S. 951 (1951).

²⁹ See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 349 (D. Mass. 1943); *Scarborough v. Aeroservice, Inc.*, 155 Neb. 749, 53 N.W.2d 902 (1952); *Northwest Airlines, Inc. v. Rowe*, 226 F.2d 365 (8th Cir. 1955).

³⁰ Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 503.

of rule 26(b)(1). As one would expect, this issue has received past judicial attention by federal and state courts.³¹ The court said in *United Air Lines v. United States*: "Discovery is not automatically precluded because the sought after material contains expert opinions or conclusions."³²

Most specifically, in *Kendall v. United Air Lines* it was stated: "An interrogatory is not objectionable because it calls for an expert opinion, especially where the expert is an engineer in the regular employ of the defendant."³³

In *United States v. Meyer*³⁴ the court allowed appraisers who had been specifically employed by the United States for purposes of the instant condemnation action, to testify about their opinions. In *Wilmington Country Club v. Horwath & Horwath*,³⁵ the court ordered defendants to answer interrogatories calling for opinions derived from its investigation of the circumstances. The court stated: "The fact that plaintiff seeks what may be characterized as an opinion, moreover is not fatal to this interrogatory."³⁶

*Meese v. Eaton Manufacturing Co.*³⁷ is most explicit on this point. Noting the old and discarded rule restricting discovery to "facts," the court observed that the better view "permits interrogatories addressed to matters of opinion."³⁸ Hence, plaintiffs were ordered to answer interrogatories regarding opinions about their patents. In his treatise on federal practice, Professor Moore supports this position:

The question should be, not whether as a theoretical matter the inquiry calls for an expression of opinion, but rather whether it is practicable and feasible to answer the inquiry and if so, whether an answer might expedite the litigation by either narrowing the area

³¹ *United States v. Meyer*, 398 F.2d 66, 73 (9th Cir. 1968); *Wilmington Country Club v. Horwath & Horwath*, 46 F.R.D. 65, 66 (E.D. Pa. 1969); *Meese v. Eaton Mfg. Co.*, 35 F.R.D. 162 (N.D. Ohio 1964); *Broadway & 96th St. Realty Co. v. Loews Inc.*, 21 F.R.D. 347, 359-60 (S.D.N.Y. 1958); *Russo v. Merck & Co.*, 21 F.R.D. 237 (D.R.I. 1957); *Kendall v. United Airlines, Inc.*, 9 F.R.D. 702, 703 (S.D.N.Y. 1949); *Moran v. Pittsburgh-Des Moines Steel Co.*, 6 F.R.D. 594 (W.D. Pa. 1947), *cert. denied*, 334 U.S. 846 (1948).

³² 26 F.R.D. 213, 217 (D. Del. 1960).

³³ 9 F.R.D. at 703.

³⁴ 398 F.2d 66 (9th Cir. 1968).

³⁵ 46 F.R.D. 65 (E.D. Pa. 1969).

³⁶ *Id.* at 66.

³⁷ 35 F.R.D. 162 (N.D. Ohio 1964).

³⁸ *Id.* at 165-66.

of controversy or avoiding unnecessary testimony or providing a lead to evidence.³⁹

Since such post accident reports are admissible, they certainly are discoverable. Courts distinguish between persons who are regular employees and those specifically retained in regard to the litigation. In the former, there is less concern that the party will be unfairly treated if opinion testimony is allowed. There is no economic unfairness where the witness is merely testifying about opinions and conclusions previously reached during the course of the witness' employment. One learned scholar has commented that: "Most courts hold that as to knowledge already acquired whether it be by observation or by expert conclusion the expert should be treated as any other person having information vital to the determination of a legal controversy."⁴⁰

He concluded that: "The most satisfactory way to solve the problems of discovery in this area is by a free exchange of all relevant expert data."⁴¹

Obviously, there is no logical or reasonable basis to distinguish between opinions and conclusions committed to paper by a party's employees and those in less concrete form in the minds of the employees. Further, a factitious corporate entity can only speak through the mouths of its directors, officers and employees. The law must rely on what the individuals say and do. The Honorable Fred M. Winner, United States District Judge for the District of Colorado, pointed out that:

The test for discovery purposes, of course, is a far different test than that applied should the report or opinions therein voiced be offered at the time of trial. Opinions expressed in the report might or might not be received in evidence. But that is a matter to be determined at time of trial. But, the reports may well lead to the discovery of admissible evidence and that's what a modern-day lawsuit is all about.⁴²

³⁹ 4 J. MOORE, *supra* note 23, at § 26.56(3). See also *Hawkins v. Gorea Motor Express, Inc.*, 360 F.2d 933 (2d Cir. 1966); *Taylor v. Baltimore & O.R.R.*, 344 F.2d 281 (2d Cir. 1965); Friedenthal, *Discovery and Use of an Adversary Party's Expert Information*, 14 STAN. L. REV. 455 (1962).

⁴⁰ Friedenthal, *supra* note 39, at 479.

⁴¹ *Id.* at 488.

⁴² *Deweese v. United States*, No. — (D. Colo., order dated July 10, 1972).

**DEPOSITIONS UPON ORAL EXAMINATION OF OFFICERS, DIRECTORS,
MANAGING AGENTS AND OTHER PERSONS—FEDERAL RULE 30**

A deposition is the sworn statement of a witness recognized under appropriate circumstances as equivalent to testimony at the trial.⁴³ The federal rules relating to depositions are designed to effect discovery to the end of a just, speedy and inexpensive determination of every action.⁴⁴ The discovery rules were designed to grant the widest latitude in ascertaining, before trial, facts concerning the real issues in dispute, to eliminate the difficulty and expense of producing facts and documents at the trial and to simplify the issues.⁴⁵ It is well recognized that many states retain substantive and procedural distinctions between "evidence" and "discovery" depositions; but, the law is clear that restrictions in state rules of procedure upon the scope of discovery are not binding in actions brought in federal court.⁴⁶

In the sequence of discovery against an aircraft manufacturer, it has been our experience that the production, inspection and copying of documents should be completed first, to be followed thereafter by the deposition phase of the discovery. The 1970 amendments to rule 26, allow concurrent discovery, which means that counsel may serve request for admissions during the depositions. This tactic tends to shorten the total time required during the deposition phase because the requests for admissions, if properly drafted, are effective tools in limiting the issues of fact. Even before the amendment of rule 26 a court held that a party could simultaneously examine his adversary before trial and, also, require him to respond to a request for admissions concerning the same matter.⁴⁷

WHOM DO YOU NOTICE FOR DEPOSITIONS?

It is generally true that United States civil aircraft are manufactured by large corporations. As such, some planning is required in the selection of the specific individuals to be deposed. A corpor-

⁴³ *Kierce v. Central Vermont Ry., Inc.*, 79 F.2d 198 (2d Cir. 1935).

⁴⁴ *United States ex rel. Weston & Brooker Co. v. Continental Cas. Co.*, 303 F.2d 91 (4th Cir. 1962).

⁴⁵ *Nichols v. Sanborn Co.*, 24 F. Supp. 908 (D. Mass. 1938).

⁴⁶ *Keller v. Orion Ins. Co.*, 285 F. Supp. 906 (D. Minn. 1968).

⁴⁷ *Nekrasoff v. United States Rubber Co.*, 27 F. Supp. 953 (S.D.N.Y. 1939).

ation, whether a party or not, is not bound by a notice of taking of depositions to produce its employees at such taking, with the exception of officers, directors or managing agents of the party or other persons "who consent to testify in its behalf."⁴⁸ Cases have held that courts do not have the authority to direct a party to produce mere "employees" for examination.⁴⁹ Therefore, it is most advisable to request production of organization charts, personnel manuals, and job descriptions. There are also various industry reference sources that list the corporate management and organizational structure of aircraft manufacturers. Not everyone agrees with this writer's view of the matter, but I prefer to initiate depositions with the highest corporate officer in the corporate unit that designed, tested, manufactured and sold the aircraft involved in the accident.

There has been a very broad determination as to manufacturers and what constitutes a "managing agent."⁵⁰ In that instance, two project engineers whose position was so insignificant as to fail to be mentioned in the engineering organization charts were deemed to be "managing agents" for the purpose of rule 30 and the noticing of their deposition.

It is important to develop a theory of liability before noticing depositions. There are literally dozens of organizations in any major aircraft manufacturing corporation, and as a general rule, the courts limit the number of persons that any party is allowed to depose. There are cases that hold that the notice must designate the specific directors, officers or managing agents of the corporation to be examined.⁵¹ In fact, the corporate officer or agent must be named in his official representative capacity to be properly noticed. Merely naming him as an individual is insufficient.⁵² There are holdings that a notice to take the deposition of a corporate party through one of its officers does not give the examining party the right to take such deposition through a different officer without

⁴⁸ FED. R. CIV. P. 30(b)(6).

⁴⁹ *Mulligan v. Eastern S. S. Lines, Inc.*, 6 F.R.D. 601 (S.D.N.Y. 1946).

⁵⁰ *Tomingas v. Douglas Aircraft Co.*, 45 F.R.D. 94 (S.D.N.Y. 1968).

⁵¹ *Kuerschner & Rauchwarenfabrik, A.G. v. New York Trust Co.*, 126 F. Supp. 684 (S.D.N.Y. 1954).

⁵² *Gillam v. A. Shyman, Inc.*, 22 F.R.D. 475 (D. Alas. 1958). *See also* *Commander-Larabee Milling Co. v. Manufacturers & Traders Trust Co.*, 7 F.R.D. 168 (W.D.N.Y. 1945).

previously serving notice to that effect.⁵³ However, it has been held that a notice to take the deposition of a corporation through the designation by title of employment, even though the individual's name is not known, is sufficient.⁵⁴ Consistent with this view, it has been ruled that a notice to take the depositions of a corporate party by its vice presidents, treasurers, secretaries and managing agents, and by persons performing under any other title the functions corresponding thereto is a proper description and that the corporation party will be required to submit the names of such persons.⁵⁵

Modern management organizations have turned to the project or task concept in personnel structure. Usually a corporate officer or managing agent is designated as a "project manager" for a specific aircraft. The project manager should be named as a deponent early in the sequence because he can reveal the structure of the manufacturing organization that was responsible for the manufacture of that particular model and type of aircraft. This is essential because project organizations often are temporary corporate creatures with a life limited to the design, certification and early manufacture of the aircraft. The personnel involved may be drawn from various segments of the corporate structure running the gamut from engineering to purchasing and finance.

Aircraft manufacturers usually have a separate department for engineering flight tests. Company test pilots are designated by the FAA to perform the various tests to prove that the aircraft meets the performance requirements of the Federal Air Regulations. Where there is a flight performance question involved in the litigation, and generally there is in every air crash case, it is always advisable to designate in the notice the specific engineering test pilot who flew the test flights on the model aircraft involved in the accident. Sometimes it is rather difficult to obtain the name of that individual. A deposition of the chief pilot is appropriate to elicit an overview of the standard required in that department for the test of all aircraft, including the hazards discovered in previous flight test work. Of course, the chief pilot will know the identity of

⁵³ *Harry von Tilzer Music Publishing Co. v. Leo Feist, Inc.*, 2 F.R.D. 96 (S.D.N.Y. 1941).

⁵⁴ *Freeman v. Hotel Waldorf-Astoria Corp.*, 27 F. Supp. 303 (S.D.N.Y. 1939).

⁵⁵ *V. O. Machinoimport v. Clark Equip. Co.*, 15 FED. RULES SERV. 30b.341, Case 1 (S.D.N.Y. 1951).

the engineering test pilot who performed the flight tests on the model aircraft which is your matter of interest.

Depending on the causal factors involved in the occurrence, you may need one or more engineers to discuss aerodynamics, avionics systems or flight controls. Almost every aircraft is made up of components that are manufactured by other companies and sold to the aircraft manufacturer for inclusion in the model aircraft. As such, you should inspect the equipment data as you may need to depose personnel from the purchasing department to establish whether or not the decisions founded on economy resulted in an aircraft that failed to meet the state of the aircraft manufacturers' art in the field of safety.

If it is a major catastrophic accident, you will know from the NTSB records the identity of the manufacturer's personnel who participated in the investigation groups. It is generally wise to depose those individuals because they were selected because of extensive knowledge of the aircraft, which provides the dual advantage of pre-accident evidence along with eyewitness descriptions of the observations at the scene of the accident.

CONSIDERATIONS FOR DETERMINING THE PLACE OF DISCOVERY

In aircraft litigation, the location of discovery often becomes a matter of some contention amongst the parties. The very nature of civil aviation very often results in litigation that is hundreds or even thousands of miles away from the place where the aircraft was manufactured. Therefore, the place of discovery, both as to discovery of documents and the taking of depositions, is a matter which requires a great deal of consideration. There is no question that the court has the power to alter the place of discovery.⁵⁶ Rule 26 provides that upon motion by party, or by the person from whom discovery is sought, and for good cause shown, the court may order that the discovery may be had only on specified terms and conditions, including the designation of the place. It is expensive for the manufacturer to provide transportation and per diem to its officers and employees for depositions to be taken thousands of miles away. Although there are numerous cases on this point, suffice it to say in some situations courts have ordered the deposi-

⁵⁶ *Stephens v. Minder Constr. Corp.*, 3 F.R.D. 498 (S.D.N.Y. 1943).

tions to be taken at the situs of the litigation, where in other cases the location of the manufacturing company has been chosen by the court.⁵⁷ As a practical matter, it is often less expensive and more efficient ultimately for counsel to travel to the manufacturer's plant for the taking of depositions. There, a deponent cannot excuse his "loss of memory" by the simple statement that "the records relating to that matter are back in my office," as the parties can take a short recess to await those records and complete the matter expeditiously.

The advantage of the situs of the manufacturing plant is often counter-balanced by the fact that a recalcitrant witness or, as is more normally the case, an over-zealous counsel for the aircraft manufacturer's insurance company sometimes does not hesitate to instruct a witness not to answer, or refuses production when he knows that he is five thousand miles away from the courthouse. When such a tactic is taken, very careful records must be maintained and the party taking the deposition should exercise care to see that all of the provisions relating to sanctions in rule 37 are complied with in order to provide for assessment of costs against the party that has refused to comply with discovery.

There is some confusion that arises by the limitations as to distance set out on the subpoena powers of rule 45(d)(2), but the general consensus is that such limitations do not apply to parties. Although the Rule does not make a distinction between parties and non-parties, the subpoena is not necessary to enforce attendance of a party, and the court having jurisdiction of the person of the parties would seem to have power to make reasonable orders for their attendance in the district in which the action is pending or elsewhere.

Some of these problems are compounded as to location when the matter involves a foreign manufactured aircraft. Generally, the provisions relating to the taking of depositions through letters rogatory (rule 31) found in the rules are both cumbersome and time-consuming and it is by far more desirable to get stipulation

⁵⁷ *Fairwater Transport Co. v. Chris-Craft Corp.*, 1 F.R.D. 509 (S.D.N.Y. 1940) (situs of manufacturer); *Moore v. George A. Hormel & Co.*, 4 F.R.D. 15 (S.D.N.Y. 1942) (situs of litigation); *Jewish Consumptive Relief Soc'y v. Rothfeld*, 9 F.R.D. 64 (S.D.N.Y. 1949) (situs of litigation); *Hyam v. American Export Lines, Inc.*, 213 F.2d 221 (2d Cir. 1954) (no right in every case for deposition at situs of forum).

between the parties waiving the various objections as to the qualification of the "officer" before whom the deposition is taken. Certainly, the failure of the party representing the foreign manufacturer, who fails to stipulate to the authority to take depositions before an otherwise nonqualified individual, might have second thoughts should the court order the employees of the foreign corporate defendant be required to travel to the place where the litigation is pending in the United States. Rule 29 FRCP gives specific authority to stipulate before whom depositions shall be taken, and a stipulation that a deposition shall be taken before a person otherwise disqualified under rule 28(c) operates as a waiver of such disqualification.⁵⁸

There is an interesting federal ruling on discovery of foreign manufacturers. It has been held that a witness cannot refuse to answer a question on the ground of a privilege given him under foreign law regardless of where the discovery occurs.⁵⁹

WHAT ABOUT A MASTER?

Rule 28(a), as amended, provides that a deposition may be taken before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. A master may be appointed to supervise the taking of a deposition, but the compensation should be paid by the party requesting the appointment.⁶⁰ There is considerable discussion, in the *Manual for Complex Litigation* beginning at section 320, of the relative merits and disadvantages of the appointment of a special master in pre-trial discovery. In fact, the *Manual* quotes the Supreme Court of the United States to the effect that in one case the referral to a master "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."⁶¹

A matter of great interest to all parties is that masters are very costly and expect to be compensated on a "pay as you go" basis.

⁵⁸ *Laverett v. Continental Briar Pipe Co.*, 25 F. Supp. 790 (E.D.N.Y. 1938).

⁵⁹ *Societe Internationale Pour Participations Industrielles Et Commerciales S.A. v. McGrath*, 9 F.R.D. 680 (D.D.C. 1950).

⁶⁰ *Hirsch v. Glidden Co.*, 79 F. Supp. 729 (S.D.N.Y. 1948).

⁶¹ *MANUAL FOR COMPLEX LITIGATION* § 3.20, at 55 (C.C.H. 1973); *Labuy v. Howes Leather Co.*, 352 U.S. 249 (1957).

There is authority in the federal courts to appoint full-time United States Magistrates as masters to serve without compensation by any party or parties. This writer has argued successfully in at least one instance that the costs of the masters cannot be taxed as court costs against the plaintiffs in multidistrict air crash litigation unless the plaintiffs had requested the master and agreed to make such payment, which they had not.⁶²

GENERAL PROCEDURAL RULES AS TO DISCOVERY

There are certain practical decisions that are well established and the context of which is so broad as to perhaps be classified as a legal theory, but I list them for reference. First, there is no prohibition to conducting simultaneous discovery in a federal and a state court action on identical issues.⁶³ Second, the scope of examination is only limited by relevancy and, as a practical matter, no matter is irrelevant until it can clearly be shown that it has no possible bearing on the subject matter.⁶⁴ Third, when delay in discovery is proposed because of a claim of a requirement for protection of trade secrets or confidential information (which is made from time-to-time in aircraft cases), the simple procedure is to follow the process of limiting persons present at the discovery and to protect the product of the discovery by sealing it. Both of these security precautions are available through an order of the court in accordance with rule 26(c). Fourth, with the 1970 amendment there is no longer any fixed priority in the order of taking depositions, they simply make clear the power of the court to establish priority. It has been our experience since the amendment of the priority rule that the federal courts give priority to the first notice filed. However, an intemperate race to the courthouse, which omits essential witnesses from the notice of depositions or required documents from the request for production, could well be "good cause" for a determination by the court that the sequence of discovery should be altered.

⁶² *In re* Air Crash Disaster at Juneau, Alas., on Sept. 4, 1971, MDL-107.

⁶³ *Bloomer v. Sirian Lamp Co.*, 4 F.R.D. 167 (D. Del. 1944).

⁶⁴ *Application of Zenith Radio Corp.*, 1 F.R.D. 627, 630 (E.D. Pa. 1941).

