

Electronic EVIDENCE

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E. MODEL DISCOVERY

§ 16:16 Audio Recordings Discovery, Generally

Preliminary interrogatories should be drafted broadly enough to ascertain the existence of any and all audio recordings that an adversary possesses, has access to, or of which he or she is otherwise aware. Thus, for example, "In every criminal case. . . defense counsel should include in his [or her] discovery motion a demand for all tapes in the possession of the police or prosecutor on which the defendant's voice is recorded—consensual or ex parte. Failure to include such a demand may result in the unexpected production of a consensually recorded conversation at trial. . . ." ⁵⁰ If any such audio recordings are admitted to exist, then further discovery may be directed as to the particulars of such evidence, usually in the form of a supplemental discovery

⁴⁷. The proper preservation of the recording was one of the seven criteria in the traditional "seven-pronged" predicate for the admissibility of audio recordings as evidence, as described in Chapter 6.

⁴⁸. See § 6:43 as to chain of custody. ⁴⁹. See § 6:23.

⁵⁰. C. Fishman, *Wiretapping and Eavesdropping*, § 242 (Lawyers Cooperative Publishing, 1978, 1991 Supp.), also providing information concerning discovery in criminal cases involving eavesdropping, wiretapping, or other forms of electronic surveillance.

motion. In some situations, especially in criminal cases, it may be tactically advantageous not to seek discovery of some information.⁵¹

When discovery is directed towards a known audio recording, information should be sought with respect to anything that might bear on the relevance, authenticity, or possible incompetency of the audio evidence in question. For each item of audio evidence, topics to be covered should include at least the following: When and how the audio recording(s) was (were) produced; whether the opposing party was in control of its production or, alternatively, when and how it came into their possession, or when and how they otherwise gained access to it or became aware of it; the identity of the equipment operator and anyone else who played a role in the creation of the recording; who the authenticating witness or witnesses will be; details as to the chain of custody; whether the recording (and the audio storage unit on which it exists) is the actual, original, contemporaneous recording (and storage unit) or a copy or re-recording of some sort; whether any editing has been done or other changes have been made to the actual, original, contemporaneous recording; and the identity of anyone who participated in the subsequent editing or re-recording of the evidence. As with a video recording,⁵² the opposing party may also be entitled to the discovery deposition of the authenticating witness or witnesses. With regard to transcripts, there is some authority suggesting that, at least in criminal cases, the prosecution is required to give the defense copies of all transcripts it plans to introduce during trial.⁶³ It has also been suggested that the prosecution should be required to provide copies of all transcripts of relevant conversations that have already been transcribed, including transcripts of conversations that the prosecutor does not intend to introduce into evidence.⁵⁴

Certain advantages will accrue to the proponent of an audio re-

⁵¹. See *Id.*

⁵². Cf. *Cisarik v Palos Community Hosp.* (1989, 1st Dist) 193 Ill App 3d 41, 140 m Dec 189, 549 NE2d 840, 842, app gr 131 m 2d 558, 142 m Dec 880, 553 NE2d 394 and *affd* in part and *revd* in part on other grounds 144 Ill 2d 339, 162 m Dec 59, 579 NE2d 873.

⁵³. See C. Fishman, *Wiretapping and Eavesdropping*, § 242.2 (Lawyers

Cooperative Publishing, 1978, 1991 Supp.). See also Cal Penal Code § 629.20. But see *United States v Gee* (1983, CA9 Alaska) 695 F2d 1165, 12 Fed Rules Evid Serv 419 (failure to provide transcript not grounds for exclusion unless prejudice can be demonstrated).

⁵⁴. See C. Fishman, *Wiretapping and Eavesdropping*, § 242.2 (Lawyers

ording by cooperating fully during the discovery process. By making full disclosure as to the existence of the audio recording(s) and its (their) intended use in trial, and by providing either the original, contemporaneous recording or a completely unaltered high-quality copy for review. By cooperating in this manner, any claims of surprise or unfairness will be undercut, any notice requirements will be met, and the trial court will typically take a more favorable predisposition toward the recorded evidence. If, despite a proper and timely request, an opponent's audio evidence has not been produced in a timely fashion, this should be brought to the court's attention as soon as is practicable during pretrial conference, through a pretrial motion or motion in limine, or, if necessary, during the trial.

§ 16:17 Model Interrogatories for Party Opposing Admission of Audio Recording as Evidence

The interrogatories in this section are designed to elicit information⁵⁵ about a relevant audio recording that an adverse party has possession of or access to. These interrogatories are general in nature, with no particular fact pattern being contemplated by them (although they do arbitrarily deem the proponent of the audio evidence the "plaintiff"). They refer to the content of what has been recorded on the audio recording only insofar as that content bears on the admission or exclusion of the audio recording as evidence. Counsel should check these interrogatories carefully for both form and content before applying them to a particular case.

Counsel should note that local practice concerning the number and composition of interrogatories in Federal District Courts may be controlled by court rules and policy memoranda.⁵⁸ Also, in some state courts, there are limits on the number of interrogato-

Cooperative Publishing, 1978, 1991 Supp.).

^{55.} A party may propound interrogatories regarding any matter, not privileged, which is relevant to the subject matter of the action, including the existence and location of any books, documents, or other tangible things, and the identity and location of witnesses and persons having

knowledge of any discoverable matter. Information that would be inadmissible at trial is nonetheless discoverable if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. See FRCP 26(b)(1).

^{56.} In federal courts, interrogatories are covered by Federal Rules of Civil Procedure 26(a) and 33.

ries that may be propounded as a matter of right to an opposing party,⁵⁷ as well as restrictions on the style and format of the interrogatories themselves.⁵⁸

It is generally permissible to specially define a term that is repeated several times in a set of interrogatories. However, special format requirements may apply to definitions. For example, some jurisdictions require that each time the defined term is thereafter used in any individual interrogatory, it must be printed in capital letters to remind the other party of that special definition. These sample interrogatories will adopt that convention.⁵⁹ Moreover, audio recording, playback, and storage technology has been broadly defined in the definition section to account for the likely expansion of storage media beyond magnetic audio "tape" and into optical storage devices and nontape magnetic media.⁶⁰

DEFINITIONS

- A. PLAINTIFF means [name].
- B. DEFENDANT means [name].
- C. YOU and YOUR refer to PLAINTIFF. The words YOU and YOUR shall be taken to include all agents, employees, attorneys, accountants, investigators, consultants, insurance companies, and anyone else acting on YOUR or their behalf.
- D. OCCUR~NCE [or OCCURRENCE # __] means the event(s) described in paragraph __ of the Complaint in the above-captioned action.
- E. PERSON includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.
- F. IDENTIFY a PERSON means to state his or her full name, ad

57. See, for example, California Code of Civil Procedure § 2030(c) (initially a party may not propound more than 35 interrogatories).

58. See California Code of Civil Procedure § 2030(c)(5) (for example, no specially prepared interrogatory shall contain subparts, or a compound, conjunctive, or disjunctive question).

59. For a general discussion of the use of interrogatories, see *Discovery-Written Interrogatories*, 4 Am Jur Trials 1. For a general treatment of discovery in civil litigation, including interrogatories, see Danner, *Pattern Discovery: Tort Actions* 2d ed (Bancroft Whitney Company, 1986).

60. See, generally, Chapter 4.

dress, and telephone number; his or her occupation; the name, address, and telephone number of his or her employer, if known; and any family, social, recreational, professional, employment, or other relationship to YOU. The term IDENTITY means essentially the same as IDENTIFY.

G. DOCUMENT means a writing, and includes the original or a copy of handwriting, typewriting, printing, photocopying, photography, and every other means of recording on any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them. An AUDIO RECORDING or a video recording is considered a document.

H. IDENTIFY a DOCUMENT means to describe briefly the form of the document; describe generally the subject of its contents; state the date and place of preparation or mailing; and IDENTIFY the PERSON that prepared the DOCUMENT, the PERSON that received it, and the PERSON that has possession or control of the original copy of the DOCUMENT.

I. AUDIO RECORDING means any mechanical or electronic recording of audio information (that is, sound information in the human hearing range) that resides on an AUDIO STORAGE UNIT and can be played back on an appropriate audio playback device to approximately recreate the actual sounds that originally gave rise to the recording.

J. AUDIO RECORDING EQUIPMENT means any mechanical or electronic equipment (and accessories), whether analog or digital, capable of recording and storing an AUDIO RECORDING on an AUDIO STORAGE UNIT. The "original AUDIO RECORDING EQUIPMENT" is the AUDIO RECORDING EQUIPMENT that was used to make the ORIGINAL AUDIO RECORDING.

K. AUDIO STORAGE UNIT refers to the particular physical object on which the information comprising a particular AUDIO RECORDING is stored. An AUDIO STORAGE UNIT can include

a microcassette, a standard cassette, a reel-to-reel tape, an optical laser disk (such as a CD or mini-disc), a floppy or other type of

magnetic disk, a Winchester hard disk, or any other device, unit, or particularized example of any medium capable of storing such information. The "original AUDIO STORAGE UNIT" is the AUDIO STORAGE UNIT onto which the ORIGINAL AUDIO RECORDING was originally recorded.

L. ORIGINAL AUDIO RECORDING refers to the original contemporaneous recording, that is, the actual, contemporaneous, on-the-spot AUDIO RECORDING of the sounds or audio information in question, on the very same original AUDIO STORAGE UNIT on which the recording was originally made.

M. EDIT means to change, alter, tamper with, add to, delete from, electronically enhance; add, delete, or alter timecode or any other electronic or manual indexing or encryption system; add, delete, or alter any record of date or time; or in any other way make any change, physical or electronic, to the audio portions of an AUDIO RECORDING, or any other information embedded within an AUDIO RECORDING or on the surface of an AUDIO STORAGE UNIT.

N. COPY, as a noun, means a reasonably accurate and not purposefully altered or falsified re-recording made from an AUDIO RECORDING and (unless otherwise specified) placed on a different AUDIO STORAGE UNIT;⁶¹ as a verb, COPY refers to the process by which a Copy (noun) is created.

O. To IDENTIFY an AUDIO RECORDING, an AUDIO STORAGE UNIT, an ORIGINAL AUDIO RECORDING, or a Copy means to list: (1) the item's location; (2) the IDENTITY of the custodian or possessor of the item; (3) the approximate physical and electronic condition of the item; (4) the audio format (digital vs. analog, type of storage medium, any proprietary systems that are used, etc.) of the item; (5) the approximate running time of the item or each relevant portion of the item; (6) a general description of the subject matter of the item's contents, including auditory and (if applicable) visual information.

P. To IDENTIFY an item of AUDIO RECORDING EQUIPMENT means to list: (1) the item's manufacturer, model number, and serial number or other unique identifying information; (2) the item's location; (3) the IDENTITY of the custodian or possessor of the item; (4) the approximate physical and electronic condition of the item; (5) the audio format (digital or analog, type of storage medium, any proprietary systems that are used, etc.) used by the item; (6) the approximate cost of the item when new; (7) any

61. With multi-track tape systems or systems based on computer memory, it is possible to make a copy of an AUDIO RECORDING on the same

AUDIO STORAGE UNIT on which the ORIGINAL AUDIO RECORDING exists.

timecode, indexing, or encryption capabilities of the item; (8) in the case of a recording made with a computer, any software and the operating system and general computing platform that was used; and (9) any special or idiosyncratic features or attributes of the item that may have affected its recording, storage, or playback abilities.

Q. LISTEN means to "make an effort to hear something" or to otherwise hear the contents of an audio recording.

INTERROGATORIES

1. Whether or not in YOUR possession and control, do any AUDIO RECORDINGS (including any that are part of a video recording, multimedia recording, or film motion picture) exist that are relevant to, related to, or that otherwise bear in any way on this legal matter or controversy, or on any other related legal matter or controversy?

2. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY each and every such AUDIO RECORDING (including every version thereof), IDENTIFY each and every AUDIO STORAGE UNIT on which each such AUDIO RECORDING resides, and set out the relationship between each such AUDIO RECORDING and its associated AUDIO STORAGE UNIT.

3. If YOUR answer to Interrogatory 1 is yes, then IDENTIFY any DOCUMENTS that in any way refer to, relate to, mention, or describe the AUDIO RECORDING(S) or AUDIO STORAGE UNIT(S) IDENTIFIED in Interrogatory 2.

4. IDENTIFY each and every PERSON who may or does have any knowledge or information relating to the existence, production, or contents of any AUDIO RECORDING(S) or any AUDIO STORAGE UNIT(S) IDENTIFIED in Interrogatory 2, or any DOCUMENT(S) IDENTIFIED in Interrogatory 3.

5. Describe in detail (including the IDENTITY of speakers where known, and the length in minutes and seconds of each relevant segment) the exact audio contents of each AUDIO RECORDING on each AUDIO STORAGE UNIT in YOUR possession, under YOUR control, or to which YOU have access, that was IDENTIFIED in Interrogatory 2.

6. IDENTIFY and describe the individual roles, duties, and contributions of each and every PERSON who was involved in

physically operating, installing, or maintaining the original AUDIO RECORDING EQUIPMENT, or who was otherwise involved in the physical creation and production of each AUDIO RECORDING and AUDIO STORAGE UNIT IDENTIFIED in Interrogatory 2.

7. IDENTIFY and describe the individual roles, duties, and contributions of each and every PERSON who originally organized, ordered, commissioned, created, approved, requested, or was otherwise responsible for the genesis of each AUDIO RECORDING and each AUDIO STORAGE UNIT IDENTIFIED in Interrogatory 2, including COPIES and EDITED AUDIO RECORDINGS.

8. State whether each AUDIO RECORDING IDENTIFIED in Interrogatory 2 is an ORIGINAL AUDIO RECORDING, a COPY, or an EDITED or otherwise altered or falsified AUDIO RECORDING.

9. For each AUDIO RECORDING IDENTIFIED in Interrogatory 2 and described in Interrogatory 8 as other than an ORIGINAL AUDIO RECORDING, IDENTIFY the ORIGINAL AUDIO RECORDING (whether or not currently in existence) from which the AUDIO RECORDING is derived, and state the number of generations of recordings between the ORIGINAL AUDIO RECORDING and the item, and the IDENTITY of each AUDIO RECORDING (and its associated AUDIO STORAGE UNIT) that represents an intermediate link from the ORIGINAL AUDIO RECORDING.

10. With respect to each AUDIO RECORDING IDENTIFIED in Interrogatory 2, describe in detail the protocol by which the recording was made (which, in the case of AUDIO RECORDINGS, which, according to Interrogatory 8, are not ORIGINAL AUDIO RECORDINGS, will also include the protocol applicable to the ORIGINAL AUDIO RECORDING from which the AUDIO RECORDING in question derives, as described in Interrogatory 10), including the location in which it was made, the AUDIO RECORDING EQUIPMENT that was used, and the particulars with respect to the operation of the AUDIO RECORDING EQUIPMENT, including, but not limited to, detailed information as to: (1) when, how, why, and by whom the recording function of the AUDIO RECORDING EQUIPMENT was initially engaged, paused or stopped for any reason, or de-paused or re-engaged for

any reason; (2) when, how, why, and by whom any erasure function was engaged or stopped for any reason; and (3) any other events, anomalies, or irregularities of significance that may have occurred during the making of the recording.

11. IDENTIFY each and every PERSON who[m] YOU know, or believe was or may have been, physically present, or who was otherwise (for example, through electronic monitoring or closed circuit television) capable of hearing the events or sounds in questions as they occurred, during the creation of each ORIGINAL AUDIO RECORDING IDENTIFIED in Interrogatory 2 or Interrogatory 9.

12. Do YOU contend that the auditory contents of all or any part of any AUDIO RECORDING IDENTIFIED in Interrogatory 2 tends to prove that DEFENDANT is [liable, negligent, guilty, at fault, performed a certain act with a certain state of mind, etc.]?

13. If YOUR answer to Interrogatory 12 is yes, then IDENTIFY and describe each and every auditory fact, and the segment of each AUDIO RECORDING, with respect to the AUDIO STORAGE UNIT on which it resides, that supports YOUR contention.

14. If YOUR answer to Interrogatory 12 is yes, IDENTIFY each and every PERSON having knowledge of any facts IDENTIFIED in Interrogatory 13.

15. If YOUR ANSWER TO Interrogatory 12 is yes, IDENTIFY every DOCUMENT that is relevant to or bears in any way on any facts IDENTIFIED in Interrogatory 13.

16. IDENTIFY the PERSON(s) through whom YOU first learned of the existence of each AUDIO RECORDING and each AUDIO STORAGE UNIT IDENTIFIED in Interrogatory 2, including when, where, and how YOU first learned of this.

17. Have YOU ever LISTENED to any AUDIO RECORDING IDENTIFIED in Interrogatory 2?

18. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY each AUDIO RECORDING that you have LISTENED to and the AUDIO STORAGE UNIT on which it resides, and state when and where you first LISTENED to it and IDENTIFY each PERSON who also was present, however briefly, at that time.

19. IDENTIFY each PERSON who, to YOUR knowledge, has LISTENED to any AUDIO RECORDING IDENTIFIED in Interrogatory 2, and IDENTIFY the AUDIO RECORDINGS (or segments thereof) that they have LISTENED to and the AUDIO STORAGE UNIT(S) on which such AUDIO RECORDING(S) reside.

20. If YOU have ever been or are currently in possession or control, or know of the whereabouts, of any ORIGINAL AUDIO RECORDING IDENTIFIED in Interrogatory 2, then IDENTIFY it and IDENTIFY the PERSON through whom YOU first came into possession or control of it, or otherwise learned about it, and state when and where this occurred.

21. If YOU have ever been or are currently in possession or control, or know of the whereabouts, of any COPY of any ORIGINAL AUDIO RECORDING IDENTIFIED in Interrogatory 2, then IDENTIFY it and IDENTIFY the PERSON through whom YOU first came into possession or control of it, or otherwise learned about it, and state when and where this occurred.

22. If YOU have ever been in possession or control, or know of the whereabouts, of any AUDIO STORAGE UNIT IDENTIFIED in Interrogatory 2 containing a version of the AUDIO RECORDING that to YOUR knowledge is an EDITED, altered, or falsified version, then IDENTIFY each such AUDIO RECORDING and associated AUDIO STORAGE UNIT and IDENTIFY the PERSON through whom YOU first came into possession or control of each such item, or otherwise learned about each such item, and state when and where this occurred.

23. To your knowledge, has any AUDIO RECORDING or any AUDIO STORAGE UNIT IDENTIFIED in Interrogatory 2 been subject to EDITING, alteration, tampering, or falsification of any kind?

24. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY each such AUDIO RECORDING and the AUDIO STORAGE UNIT on which it resides, and state exactly what type of EDITING, alteration, tampering, or falsification was done to it, the PERSON(s) who performed any such actions, and whether these actions were done at YOUR request, with YOUR consent, or with YOUR knowledge.

25. Was any ORIGINAL AUDIO RECORDING IDENTIFIED

in Interrogatory 2 recorded with timecode or any other electronic or manual indexing or encryption device embedded in the information constituting the AUDIO RECORDING or otherwise present in or on the AUDIO STORAGE UNIT?

26. If YOUR answer to the preceding interrogatory is yes, then describe the type of time code or other electronic or manual indexing or encryption device that was used, including, if applicable, the exact starting and stopping points, where applicable, of the AUDIO RECORDING of the OCCURRENCE according to the time code or indexing device's measurement system.

27. Do YOU contend that any AUDIO STORAGE UNIT IDENTIFIED in Interrogatory 2 contains an AUDIO RECORDING of the OCCURRENCE that is an authentic, accurate, and fair acoustic portrayal of that OCCURRENCE as it actually happened?

28. If YOUR answer to the preceding interrogatory is yes, then describe each such OCCURRENCE, IDENTIFY the AUDIO RECORDING and associated AUDIO STORAGE UNIT on which it resides, and IDENTIFY and describe every fact that supports YOUR contention.

29. If YOUR answer to interrogatory 27 is yes, then IDENTIFY each PERSON having knowledge of any facts IDENTIFIED in Interrogatory 28.

30. If YOUR answer to Interrogatory 27 is yes, then IDENTIFY every DOCUMENT having any facts that are relevant to or bear in any way on any facts IDENTIFIED in Interrogatory 28

31. Do YOU contend that any AUDIO RECORDING IDENTIFIED in Interrogatory 2, whether or not under YOUR possession and control, can be proven by any PERSON or expert to be an ORIGINAL AUDIO RECORDING in its original, genuine, and authentic condition?

32. If YOUR answer to the preceding interrogatory is yes, then state and describe every fact that supports YOUR contention.

33. If YOUR answer to Interrogatory 31 is yes, IDENTIFY each PERSON having knowledge of any facts identified in Interrogatory 32.

34. If YOUR answer to Interrogatory 31 is yes, IDENTIFY

every DOCUMENT having any facts that are relevant to or bear in any way on any facts identified in Interrogatory 32.

35. IDENTIFY the first PERSON or PERSONS to LISTEN to each ORIGINAL AUDIO RECORDING IDENTIFIED in Interrogatory 2 after its initial recording, and when and where this occurred.

36. Describe and IDENTIFY the sequence of PERSONS who have had custody and control over the AUDIO RECORDING EQUIPMENT with which each AUDIO RECORDING and associated AUDIO STORAGE UNIT IDENTIFIED in Interrogatory 2 was recorded, subsequent to the use of the AUDIO RECORDING EQUIPMENT to make each such AUDIO RECORDING.

37. Describe and IDENTIFY the sequence of PERSONS who have had custody and control over each AUDIO RECORDING and associated AUDIO STORAGE UNIT IDENTIFIED in Interrogatory 2, subsequent to its being recorded.

38. With respect to each AUDIO RECORDING and associated AUDIO STORAGE UNIT IDENTIFIED in Interrogatory 2, do YOU contend that YOU can establish a continuous chain of possession or custody from the time of the AUDIO RECORDING's initial creation, or from the time that it originally became known to YOU, until the present time?

39. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY and describe every fact that supports YOUR contention with respect to each AUDIO RECORDING and its associated AUDIO STORAGE UNIT, as IDENTIFIED in Interrogatory 2.

40. If YOUR answer to Interrogatory 38 is yes, then IDENTIFY each PERSON having knowledge of any facts identified in Interrogatory 39.

41. If YOUR answer to Interrogatory 38 is yes, IDENTIFY every DOCUMENT that is relevant to or bears in any way on any facts identified in Interrogatory 39.

42. Do any transcriptions of any AUDIO RECORDING or AUDIO STORAGE UNIT IDENTIFIED in Interrogatory 2 exist?

43. If YOUR answer to the previous interrogatory is yes, then please describe each such transcription, including its length, the IDENTITY of the transcriber, any EDITING, enhancement, or

other procedures done to the AUDIO RECORDING as part of the transcription process, and any special conventions or techniques that were followed in the production of each transcription or that are otherwise part of or embedded in the finished product.

[Depending on the stage of discovery, the controlling law of the jurisdiction, the inclination of the trial judge, and the results of any status conferences, the following questions may prove useful. Counsel should note, however, that it might not be necessary or useful to elicit some of the detailed information the following questions are designed to produce if the specific audio recording, or a copy of it, is produced by the proponent sufficiently ahead of time, since personally listening to the audio recording will often yield more information. Most jurisdictions will provide that the exhibit be produced to opposing counsel at some point before trial]

44. Do YOU plan to introduce into evidence a specific AUDIO STORAGE UNIT containing a relevant AUDIO RECORDING?

45. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY that specific AUDIO STORAGE UNIT and the content of the relevant AUDIO RECORDING(S).

46. If YOUR answer to Interrogatory 44 is yes, IDENTIFY the PERSON or PERSONS who you plan to have serve as your authenticating witness(es).

47. If YOUR answer to Interrogatory 44 is yes, do YOU contend that the specific AUDIO STORAGE UNIT that YOU plan to introduce into evidence contains an AUDIO RECORDING of some OCCURRENCE or fact in question that is an authentic, accurate, fair, and correct portrayal of the OCCURRENCE or fact as it actually happened?

48. If YOUR answer to the preceding interrogatory is yes, then state and describe every fact that supports YOUR contention.

49. If YOUR answer to interrogatory 47 is yes, then IDENTIFY each PERSON having knowledge of any facts stated in Interrogatory 48.

50. If YOUR answer to Interrogatory 47 is yes, then IDENTIFY every DOCUMENT having any facts that are relevant to or bear in any way on any facts stated in Interrogatory 47.

51. Do YOU contend that any specific AUDIO STORAGE UNIT

that YOU plan to introduce into evidence contains an AUDIO RECORDING of the OCCURRENCE or fact in question that can be proven by any PERSON or expert to be the ORIGINAL RECORDING, or a copy of the ORIGINAL RECORDING, in its original, authentic, untampered with, and accurate condition?

52. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY the AUDIO RECORDING and its associated AUDIO STORAGE UNIT, and state and describe every fact that supports YOUR contention.

53. If YOUR answer to Interrogatory 51 is yes, then IDENTIFY each PERSON having knowledge of any facts stated in Interrogatory 52.

54. If YOUR answer to Interrogatory 51 is yes, then IDENTIFY every DOCUMENT having any facts that are relevant to or bear in any way on any facts stated in Interrogatory 52.

§ 16:18 Video Recordings Discovery, Generally

Federal Rule of Evidence 1001(2), which specifically defines "photographs" as including "video tapes," in conjunction with Federal Rule of Civil Procedure 34, which lays out the guidelines for the production of "documents" (defined as including "photographs"), set the broad outline for the discovery of video evidence.⁶² Moreover, the larger body of discovery law applicable to photographs and film motion pictures will often provide applicable discovery precedents.⁶³ The rise in the use of video evidence does present unique problems, however, and courts have noted the need for organized discovery procedures for videotapes.⁶⁴

The degree to which video recordings, generally, and videotapes, in particular, are discoverable will depend on their contents and how they were prepared. In other words, while most video evidence will be discoverable under the same rules as

62. FRCP 1001(2).

63. See, generally, K. Hughes and B. Cantor, *Photographs In Civil Litigation*, 103-132 (The Bobbs-Merrill Company, Inc., 1973).

64. *Cisarik v Palos Community Hosp.* (1989, 1st Dist) 193 m App 3d

41, 140 m Dee 189, 549 NE2d 840, 842, app gr 131 m 2d 558, 142 m Dee 880, 553 NE2d 394 and affd in part and revd in part on other grounds 144 m 2d 339, 162 m Dee 59, 579 NE2d 873 , 842 (referring to Chernow, *Video in the Courtroom: More than a Talking Head*, Vol. 15, No.1 *Litigation* 3, 6).

photographs, videotapes used to record statements during the course of an investigation will be covered by the rules regarding disclosure of statements, and different rules will apply if a videotape can be legitimately classified as work product or is protected by a privilege.⁶⁵ Most attempts to keep video recordings from opposing counsel on the grounds of the work product doctrine or claims that they are trial preparation materials have failed, with courts reasoning that disclosure is warranted by the opposing party's inability to replicate the exhibit or adequately prepare without access to it.

Preliminary interrogatories should be drafted broadly enough to ascertain the existence of video recordings that an adversary may wish to introduce into evidence, and if such video recordings are admitted to exist, then further discovery should be directed as to the particulars of such video evidence. Matters addressed should include anything that might bear on the relevance, authenticity, or possible incompetency of the video evidence, including when and how it was produced; whether the opposing party was in control of its production or, alternatively, when and how it came into their possession; who the videographer was; who the authenticating witness or witnesses will be; whether any editing or post-production work has been done on the video recording; or whether the opposing party plans to use it for substantive or illustrative purposes. The opposing party may also be entitled to the discovery deposition of the authenticating witness or witnesses, and perhaps even the videographer.⁶⁶

Perhaps the most critical pretrial consideration is counsel's right and ability to review the video evidence itself. The right of an opposing attorney to review an item of video evidence before trial is broadly agreed upon,⁶⁷ both because it would be unfair to expect counsel to instantly assess and respond to such a persuasive and important piece of evidence without prior direct knowledge of it, and because of the prohibition in Federal Rule of

65. Kornblum and Short, *The Use of Videotape in Civil Trial Preparation and Discovery*, 23 *Am Jur Trials* 95, 185 (1976).

66. *Cisarik v Palos Community Hosp.* (1989, 1st Dist) 193 III App 3d 41, 140 III Dec 189, 549 NE2d 840, 842, app gr 131 III 2d 558, 142 III Dec 880,

553 NE2d 394 and affd in part and revd in part on other grounds 144 III 2d 339, 162 III Dec 59, 579 NE2d 873.

67. See, *Crews v State* (1983, Fla App D5) 442 So 2d 432; *United States v Moran* (1952, CA2 NY) 194 F2d 623, cert den 343 US 965, 96 L Ed 1362, 72 S Ct 1058.

Evidence 103(c) with respect to keeping (potentially) inadmissible evidence from being suggested to the jury by any means.⁶⁸ There is, however, some older authority that a case will not be reversed because the opponent was not given an opportunity to review a motion picture before it was shown to the jury, if there is no valid objection that could have been made anyway.⁶⁹

Notwithstanding broad agreement as to counsel's right to inspect any video exhibit that opposing counsel plans to introduce at trial, disagreement exists as to whether "outtakes" are subject to discovery. In the film motion picture industry, an "outtake" is film "left on the editing-room floor," that is, material that did not become part of the finished product. Although videotape is very rarely physically cut or spliced (except in emergencies), material is "left behind" on the original, actual videotape (called the "camera master") as segments that are desired are recorded onto another tape called the "edit master."⁷⁰ Typically, then, if a copy of an item of video evidence is requested during discovery, a duplicate will be made from the edit master. Although it would seem that counsel should have the right to view any outtakes to determine whether what will be proffered is a fair and accurate portrayal,⁷¹ most jurisdictions presently do not provide for the review of outtakes.⁷² If a jurisdiction does permit the discovery of outtakes, counsel should be provided with a duplicate of the camera master. There is also some question as to whether the original camera master might be discoverable under the best evidence rule in cases where a serious doubt has been raised as to the authenticity or accuracy of the video evidence.

Counsel's right to be present during the making of an opponent's video recording is limited. While there is some authority that notice must be given with respect to a reconstruction or ex

68. See Joseph, *Demonstrative Videotape Evidence*, June 1986 Trial, 60, 65.; see also *State v Newman* (1971) 4 Wash App 588, 484 P2d 473, review den 79 Wash 2d 1004.

69. See C. Scott, *Photographic Evidence* § 1491 (2d ed. Supp. 1969, West Publishing Co.) (citing *United States v Moran* (1952, CA2 NY) 194 F2d 623, cert den 343 US 965, 96 L Ed 1362, 72 S Ct 1058). 954

70. Heller, *Day-In-The-Life Video*, 40 Am Jur Trials 308-09 (1990).

71. See Joseph, *Demonstrative Videotape Evidence*, June 1986 Trial, 60, 65; see also *Mercantile Bank v Phillips* (1976) 260 Ark 129, 538 SW2d 277.

72. Heller, *Day-In-The-Life Video*, 40 Am Jur Trials 309 (1990).

perimental evidence video recording,⁷³ a "day-in-the-life" video recording can be made without the presence of any representatives of the opposing side.⁷⁴ This is, of course, a moot question in the growing number of cases where video evidence was recorded before any particular litigation was envisioned (as in the case of a surveillance camera) or where video evidence comes into the proponent's possession after having been recorded by a disinterested outside party (as in the case of a camcorder-equipped bystander recording the scene of an accident or a hate crime).

As with audio recordings, certain advantages will accrue to the proponent of video evidence who cooperates fully during the discovery process; that is, who makes full disclosure of the video evidence's existence and its intended use in trial, and by providing a copy of the intended exhibit and outtakes for review. By cooperating in this manner, any claims of surprise or unfairness will be undercut, the notice requirement to the catchall exception to the hearsay rule will be satisfied (necessary in the case of narration), and the trial court will typically take on a more favorable predisposition toward the video evidence.⁷⁵ If, despite proper request, an opponent's video evidence or outtakes have not been produced in a timely fashion before the trial, this should be brought to the court's attention during a pretrial conference, on a motion in limine, or as early in the trial as is otherwise practicable, at which point the exhibit as it will be shown and any outtakes should be requested.⁷⁶

§ 16:19 Model Interrogatories for Party Opposing Admission of Video Evidence

The interrogatories in this section are designed to elicit information about a relevant item of video evidence in the possession of an adverse party. These interrogatories are general in nature, with no particular fact pattern being contemplated by them (although they do arbitrarily deem the proponent of the video evi

73. See *Balian v General Motors* (1972) 121 NJ Super 118,296 A2d 317, certif den 62 NJ 195, 299 A2d 729.

74. See *Cisarik v Palos Community Hosp.* (1989, 1st Dist) 193 III App 3d 41, 140 III Dec 189, 549 NE2d 840, app gr 131 III 2d 558, 142 III Dec 880, 553 NE2d 394 and affd in part and revd in

part on other grounds 144 III 2d 339, 162 III Dec 59, 579 NE2d 873.

75. See *Joseph, Demonstrative Videotape Evidence*, June 1986 Trial, 60, 65.

76. *Joseph, Demonstrative Video tape Evidence*, June 1986 Trial, 60, 65.

dence the "plaintiff"), and they refer to the content of what has been recorded on the video recording only insofar as that content bears on the admission or exclusion of the video evidence. Counsel should check these interrogatories carefully for both form and content before applying them to a particular case. Video technology has been broadly defined in the definition section to account for the likely expansion of storage media beyond video "tape" and into optical storage discs and magnetic disks.

General comments made in § 16:17, with respect to propounding interrogatories as to audio recordings, are applicable here as well.

DEFINITIONS

A. PLAINTIFF means [name].

B. DEFENDANT means [name].

C. YOU and YOUR refer to PLAINTIFF. The words YOU and YOUR shall be taken to include all agents, employees, attorneys, accountants, investigators, consultants, insurance companies, and anyone else acting on YOUR or their behalf.

D. OCCURRENCE means the event(s) described in paragraph _ of the Complaint in the above-captioned action.

E. PERSON includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.

F. IDENTIFY a PERSON means to state his or her full name, address, and telephone number; his or her occupation; the name, address, and telephone number of his or her employer, if known; and any family, social, recreational, professional, employment, or other relationship to YOU. The term IDENTITY means essentially the same as IDENTIFY.

G. DOCUMENT means a writing, and includes the original or a copy of handwriting, typewriting, printing, Photostatting, photography, and every other means of recording on any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them.

H. IDENTIFY a DOCUMENT means to describe briefly the form of the document; describe generally the subject of its contents;

state the date and place of preparation or mailing; and IDENTIFY the PERSON that prepared the DOCUMENT, the PERSON that received it, and the PERSON that has possession or control of the original copy of the DOCUMENT.

I. PHOTOGRAPH refers to any still photographic representation, whether produced through chemical or electronic means, and whether produced by directly recording an object or scene or by indirectly recording an object or scene from another medium.

J. VIDEO RECORDING means any electronic recording of motion pictures, with or without sounds, recorded on magnetic, optical, or any other storage medium, that can be played back on a television, video monitor, or other audio-visual device, such that a reasonable representation of the sights and sounds of the actual occurrence are reproduced.

K. VIDEO RECORDING EQUIPMENT means a separate video camera plus video recorder, or an integrated camcorder, capable of imaging, recording, and storing a VIDEO RECORDING on a VIDEO STORAGE UNIT.

L. VIDEO STORAGE UNIT refers to the particular physical object on which the information comprising a VIDEO RECORDING is stored, and can include a videotape cartridge or cassette, a magnetic floppy disk, a computer hard drive, an optical disc (including CD media), or any other device for storing such information.

M. CAMERA MASTER refers to the particular VIDEO STORAGE UNIT onto which the original unedited VIDEO RECORDING was first recorded and stored.

N. EDIT means to change; alter; tamper with; add to; delete from; electronically enhance; copy selected portions of; add, delete, or alter titles or narration; add, delete, or alter "timecode" or any other electronic or manual indexing system; add, delete, or alter any record of date or time; or in any other way make any change to either the auditory or visual portions of a VIDEO RECORDING or any other information embedded within a VIDEO RECORDING.

O. DUPLICATE, as a noun, means an exact, accurate, copy of a VIDEO STORAGE UNIT produced by electronic re-recording or any other method; DUPLICATE, as a verb, refers to the process by which a DUPLICATE (noun) is created.

P. EDIT MASTER means a VIDEO STORAGE UNIT that is created by copying selected portions of a VIDEO RECORDING from a CAMERA MASTER or DUPLICATE of a CAMERA MASTER onto another VIDEO STORAGE UNIT.

Q. IDENTIFY an item, including a VIDEO STORAGE UNIT, CAMERA MASTER, EDIT MASTER, DUPLICATE of a CAMERA MASTER, DUPLICATE of an EDIT MASTER, film motion picture, or PHOTOGRAPH, includes: (1) the item's location; (2) the IDENTITY of the custodian or possessor of the item; (3) the video format (VHS, 8 millimeter, etc.) of the item (if applicable); (4) the approximate running time of the relevant portion of the item (if applicable); (5) a general description of the subject matter of the item's contents, including both visual and auditory information (if applicable); (6) whether it is a CAMERA MASTER, EDIT MASTER, DUPLICATE of a CAMERA MASTER, DUPLICATE of an EDIT MASTER, or some further copy of the VIDEO RECORDING of the OCCURRENCE; (7) the number of generations (re-recordings, with or without editing) between the CAMERA MASTER and the item, and the IDENTITY of each VIDEO STORAGE UNIT that is an in-between link (if applicable); and (8) the IDENTITY of the PERSON(S) who originally created or prepared the item.

R. OUTTAKES mean any information, either visual or auditory, that was present on the CAMERA MASTER but was not rerecorded onto the EDIT MASTER.

S. WATCH means both to see and listen to a VIDEO RECORDING as it is being played back.

INTERROGATORIES [Ascertaining Existence of Relevant VIDEO RECORDING (to be included with other, general interrogatories)]

1. Do any VIDEO RECORDINGS, film motion pictures, or PHOTOGRAPHS of the OCCURRENCE itself, or related to, relevant to, or bearing in any way on the OCCURRENCE, or on any matter in controversy related to the OCCURRENCE, exist?

2. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY any and all such VIDEO RECORDINGS, film motion pictures, and PHOTOGRAPHS.

3. If YOUR answer to Interrogatory 1 is yes, then IDENTIFY

any DOCUMENTS that in any way refer to, relate to, mention, or describe the VIDEO RECORDINGS, film motion pictures, or PHOTOGRAPHS described in Interrogatory 1.

4. IDENTIFY any and all PERSONS who may or do have any knowledge or information relating to the existence, production, or contents of any and all VIDEO RECORDINGS, film motion pictures, or PHOTOGRAPHS IDENTIFIED in Interrogatory 2, or DOCUMENTS IDENTIFIED in Interrogatory 3. [After ascertaining existence of particular VIDEO RECORDING of OCCURRENCE]

5. Describe in detail the exact contents, visual and auditory, including titles and narration and the exact running time, of each VIDEO STORAGE UNIT in YOUR possession or under YOUR control that contains a VIDEO RECORDING of the OCCURRENCE.

6. IDENTIFY all persons who[m] YOU know or believe were physically present during the original recording of the VIDEO RECORDING of the OCCURRENCE.

7. IDENTIFY all persons who were involved in operating the VIDEO RECORDING EQUIPMENT or who were otherwise involved in the production of the CAMERA MASTER containing the VIDEO RECORDING of the OCCURRENCE, including the installers and maintainers of any surveillance VIDEO RECORDING EQUIPMENT, and describe each such PERSON'S individual role, duties, and contributions.

8. Do YOU contend that the visual or auditory contents of all 'or any part of any VIDEO RECORDING of the OCCURRENCE tends to prove that DEFENDANT is [liable, negligent, guilty, at fault, performed a certain act with a certain state of mind, etc.].

9. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY each VIDEO STORAGE UNIT that tends to prove this.

10. If YOUR answer to Interrogatory 8 is yes, then IDENTIFY and describe every fact, visual or auditory, and the segment of any VIDEO RECORDING of the OCCURRENCE in which it occurs, that supports YOUR contention.

11. If YOUR ANSWER TO Interrogatory 8 is yes, IDENTIFY

each PERSON having knowledge of any facts IDENTIFIED in Interrogatory 10.

12. If YOUR ANSWER TO Interrogatory 8 is yes, IDENTIFY every DOCUMENT that is relevant to or bears in any way on any facts IDENTIFIED in Interrogatory 10.

13. IDENTIFY the PERSON(s) through whom YOU first learned of the existence of any VIDEO STORAGE UNIT containing a VIDEO RECORDING of the OCCURRENCE, including when and where YOU first learned of this.

14. Have YOU ever WATCHED any VIDEO RECORDING of the OCCURRENCE?

15. If YOUR answer to the preceding interrogatory is yes, then when and where did YOU first WATCH it, and IDENTIFY the VIDEO STORAGE UNIT that YOU first WATCHED and each PERSON who also was present at that time.

16. IDENTIFY each PERSON who to YOUR knowledge has WATCHED any version of the VIDEO RECORDING of the OCCURRENCE, and IDENTIFY the VIDEO STORAGE UNIT(S) that they have WATCHED.

17. If YOU have ever been or are currently in possession or control, or know of the whereabouts, of the CAMERA MASTER of the VIDEO RECORDING of the OCCURRENCE, then IDENTIFY it and IDENTIFY the PERSON through whom YOU first came into possession or control of it, or otherwise learned about it, and state when and where this occurred.

18. If YOU have ever been or are currently in possession or control, or know of the whereabouts, of any DUPLICATE of the CAMERA MASTER of the VIDEO RECORDING of the OCCURRENCE, then IDENTIFY it and IDENTIFY the PERSON through whom YOU first came into possession or control of it, or otherwise learned about it, and state when and where this occurred.

19. If YOU have ever been or are currently in possession or control, or know of the whereabouts, of any EDIT MASTER of the VIDEO RECORDING of the OCCURRENCE, then IDENTIFY it and IDENTIFY the PERSON through whom YOU first came into possession or control of it, or otherwise learned about it, and state when and where this occurred.

20. If YOU have ever been or are currently in possession or

control, or know of the whereabouts, of any DUPLICATE of an EDIT MASTER of the VIDEO RECORDING of the OCCURRENCE, then IDENTIFY it and IDENTIFY the PERSON through whom YOU first came into possession or control of it, or otherwise learned about it, and state when and where this occurred.

21. If YOU have ever been in possession or control, or know of the whereabouts, of any VIDEO STORAGE UNIT containing a version of the VIDEO RECORDING of the OCCURRENCE that to YOUR knowledge is not a CAMERA MASTER, EDIT MASTER, or DUPLICATE of a CAMERA MASTER or EDIT MASTER, then IDENTIFY it and IDENTIFY the PERSON through whom YOU first came into possession or control of it, or otherwise learned about it, and state when and where this occurred.

22. Has any EDITING been done to any VIDEO STORAGE UNIT upon which any version of the VIDEO RECORDING of the OCCURRENCE is recorded?

23. If YOUR answer to the preceding interrogatory is yes, was this EDITING done at YOUR request or with YOUR consent?

24. If YOUR answer to the preceding interrogatory is yes, then identify the VIDEO STORAGE UNIT that was EDITED at YOUR request or with YOUR knowledge, identify the PERSON responsible for this EDITING, and describe all EDITING that was done.

25. If YOUR answer to interrogatory 23 is no, then IDENTIFY the VIDEO STORAGE UNIT that was EDITED, IDENTIFY the PERSON responsible for this EDITING, and describe all EDITING that was done.

26. To YOUR knowledge, did the CAMERA MASTER of the VIDEO RECORDING of the OCCURRENCE contain any titles?

27. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY and describe those titles and the general content of the visual and auditory information that followed them.

28. To YOUR knowledge, did the CAMERA MASTER of the VIDEO RECORDING of the OCCURRENCE contain any narration?

29. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY the PERSON who was the narrator, describe the exact content of that narration, and describe the general content of the visual and auditory information that followed it.

30. To YOUR knowledge, was the CAMERA MASTER recorded with "timecode" or any other electronic or manual indexing device embedded in the VIDEO RECORDING of the OCCURRENCE capable of tracking the individual frames comprising the VIDEO RECORDING?

31. If YOUR answer to the preceding interrogatory is yes, then describe the type of timecode or other electronic or manual indexing device that was used, including the exact starting and stopping points of the VIDEO RECORDING of the OCCURRENCE according to the timecode or indexing device's measurement system.

32. To YOUR knowledge, was the CAMERA MASTER recorded with a time/date "window" superimposing either the time or date over part of the picture of the VIDEO RECORDING of the OCCURRENCE?

33. If YOUR answer to the preceding interrogatory is yes, IDENTIFY and describe the type of time/date information that was superimposed on the visual portion of the VIDEO RECORDING on the CAMERA MASTER, including whether it was intermittently or continuously superimposed, when it began or ended, and the exact time and date information that it contained.

34. Does any VIDEO STORAGE UNIT containing a copy of the VIDEO RECORDING of the OCCURRENCE that is in YOUR possession or under YOUR control, but is not the CAMERA MASTER, contain any titles?

35. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY the VIDEO STORAGE UNIT, and describe the exact wording of each title and the general content of the visual and auditory information that follows it.

36. Does any VIDEO STORAGE UNIT containing a copy of the VIDEO RECORDING of the OCCURRENCE that is in YOUR possession or under YOUR control, but is not the CAMERA MASTER, contain any narration?

37. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY the VIDEO STORAGE UNIT, IDENTIFY the PERSON who was the narrator, describe the exact content of that narration, and describe the general content of the visual and auditory information that followed it.

38. Was any VIDEO STORAGE UNIT containing a copy of the VIDEO RECORDING of the OCCURRENCE that is in YOUR possession or under YOUR control, but is not the CAMERA MASTER, recorded with time code or any other electronic or manual indexing device embedded in and capable of tracking the individual frames comprising the VIDEO RECORDING of the OCCURRENCE?

39. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY the VIDEO STORAGE UNIT, and describe the type of timecode or other electronic or manual indexing device that was used, including the exact starting and stopping points of the VIDEO RECORDING of the OCCURRENCE according to the timecode or indexing device's measurement system.

40. Was any VIDEO STORAGE UNIT containing a copy of the VIDEO RECORDING of the OCCURRENCE that is in YOUR possession or under YOUR control, but is not the CAMERA MASTER, recorded with a time/date "window" superimposing either the time or date over part of the picture of the VIDEO RECORDING of the OCCURRENCE?

41. IF YOUR answer to the preceding interrogatory is yes, then IDENTIFY the VIDEO STORAGE UNIT, and describe the type of time/date information that was superimposed on the visual portion of the VIDEO RECORDING, including whether it was intermittently or continuously superimposed, when it began or ended, and the exact time and date information that it contained.

42. Do YOU contend that any VIDEO STORAGE UNIT of which YOU are aware contains a VIDEO RECORDING of the OCCURRENCE that is a fair and accurate portrayal of the OCCURRENCE as it actually happened?

43. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY the VIDEO STORAGE UNIT that contains such a fair and accurate portrayal, and IDENTIFY and describe every fact that supports YOUR contention.

44. If YOUR answer to interrogatory 42 is yes, then IDENTIFY each PERSON having knowledge of any facts IDENTIFIED in Interrogatory 43.

45. If YOUR answer to Interrogatory 42 is yes, then IDENTIFY

every DOCUMENT having any facts that are relevant to or bear in any way on any facts IDENTIFIED in Interrogatory 43.

46. Have YOU asked any PERSON with special or expert knowledge concerning VIDEO RECORDINGS whether they or any PERSON known to them can prove that any VIDEO STORAGE UNIT contains an authentic, genuine, and untampered with VIDEO RECORDING of the actual OCCURRENCE?

47. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY all PERSONS who have been so contacted or who have any knowledge of such proof.

48. Do YOU contend that there exists a VIDEO STORAGE UNIT containing a VIDEO RECORDING of the OCCURRENCE, whether or not under YOUR possession and control, that can be proven by any PERSON or expert to be an untampered with, authentic, accurate copy of the CAMERA MASTER?

49. If YOUR answer to the preceding interrogatory is yes, then identify and describe every fact that supports YOUR contention.

50. If YOUR answer to Interrogatory 48 is yes, IDENTIFY each PERSON having knowledge of any facts IDENTIFIED in Interrogatory 49.

51. If YOUR answer to Interrogatory 48 is yes, IDENTIFY every DOCUMENT having any facts that are relevant to or bear in any way on any facts IDENTIFIED in Interrogatory 49.

52. Do YOU know of, or are YOU in possession or control of, any OUTTAKES?

53. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY and describe the contents of any and all such OUT TAKES and IDENTIFY each PERSON in possession or control of them.

54. To YOUR knowledge, IDENTIFY the first PERSON or PERSONS to watch the CAMERA MASTER after its initial recording, and when and where this occurred.

55. To YOUR knowledge, IDENTIFY the first PERSON or PERSONS to handle or take possession of the VIDEO RECORDING EQUIPMENT with which the CAMERA MASTER was recorded subsequent to its being recorded.

56. To your knowledge, IDENTIFY the first PERSON or PERSONS to handle or take possession of the VIDEO STORAGE

UNIT on which the CAMERA MASTER was recorded subsequent to its being recorded.

57. Describe the sequence of PERSONS who have had custody and control over the CAMERA MASTER and every DUPLICATE of the CAMERA MASTER that contains a VIDEO RECORDING of the OCCURRENCE.

58. Do YOU contend that YOU can establish a continuous chain of possession and custody for the CAMERA MASTER or any DUPLICATE of the CAMERA MASTER from its initial recording until the present time?

59. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY and describe every fact that supports YOUR contention.

60. If YOUR answer to Interrogatory 58 is yes, then IDENTIFY each PERSON having knowledge of any facts IDENTIFY in Interrogatory 59.

61. If YOUR answer to Interrogatory 58 is yes, IDENTIFY every DOCUMENT that is relevant to or bears in any way on any facts IDENTIFIED in Interrogatory 59.

[Depending on the stage of discovery, the controlling law of the jurisdiction, the inclination of the trial judge, and the results of any status conferences, the following direct questions may prove useful.]

[Note, however, that it might not be necessary or useful to elicit some of the detailed information the following questions -are designed to elicit if the specific video recording, or a duplicate of it, is produced by the proponent sufficiently ahead of time, since personally viewing the video will often yield more information. Most jurisdictions will provide that the exhibit be produced to opposing counsel at some point before trial.]

62. Do YOU plan to introduce a specific VIDEO STORAGE UNIT containing a VIDEO RECORDING of the OCCURRENCE into evidence?

63. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY that specific VIDEO STORAGE UNIT.

64. If YOUR answer to the preceding interrogatory is yes, do YOU plan to introduce it as illustrative evidence, or, in the alternative, as substantive evidence?

65. If YOUR answer to Interrogatory 62 is yes, IDENTIFY the PERSON or PERSONS who YOU plan to have serve as your authenticating witness(es).

66. If YOUR answer to Interrogatory 62 is yes, and the specific VIDEO STORAGE UNIT that YOU plan to introduce into evidence contains any titles, then IDENTIFY and describe those titles and the general content of the visual and auditory information that followed them.

67. If YOUR answer to Interrogatory 62 is yes, and the specific VIDEO STORAGE UNIT that YOU plan to introduce into evidence contains any narration, then IDENTIFY the PERSON who was the narrator, describe the exact content of that narration, and describe the general content of the visual and auditory information that followed it.

68. If YOUR answer to Interrogatory 62 is yes, and the specific VIDEO STORAGE UNIT that YOU plan to introduce into evidence was recorded with timecode or any other electronic or manual indexing device embedded in the VIDEO RECORDING of the OCCURRENCE capable of tracking the individual frames comprising the VIDEO RECORDING, then describe the type of timecode or other electronic or manual indexing device that was used, including the exact starting and stopping points according to the timecode or indexing device's measurement system.

69. If YOUR answer to Interrogatory 62 is yes, and the specific VIDEO STORAGE UNIT that YOU plan to introduce into evidence was recorded with a time/date "window" superimposing either the time or date over part of the picture of the VIDEO RECORDING of the OCCURRENCE, then IDENTIFY and describe the type of time/date information that was so superimposed, including whether it was intermittently or continuously superimposed, when it began or ended, and the exact time and date information that it contained.

70. If YOUR answer to Interrogatory 62 is yes, do YOU contend that the specific VIDEO STORAGE UNIT that YOU plan to introduce into evidence contains a VIDEO RECORDING of the OCCURRENCE that is a fair and accurate portrayal of the OCCURRENCE as it actually happened?

71. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY and describe every fact that supports YOUR contention.

72. If YOUR answer to Interrogatory 70 is yes, then IDENTIFY each PERSON having knowledge of any facts identified in Interrogatory 71.

73. If YOUR answer to Interrogatory 70 is yes, then IDENTIFY every DOCUMENT having any facts that are relevant to or bear in any way on any facts IDENTIFIED in Interrogatory 71.

74. Have YOU asked any PERSON with special or expert knowledge concerning VIDEO RECORDINGS whether they or any PERSON known to them can prove that the specific VIDEO STORAGE UNIT that YOU plan to introduce into evidence contains an authentic, genuine, and untampered with VIDEO RECORDING of the actual OCCURRENCE?

75. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY all PERSONS who have been so contacted or who have any knowledge of such proof.

76. Do YOU contend that the specific VIDEO STORAGE UNIT that YOU plan to introduce into evidence contains a VIDEO RECORDING of the OCCURRENCE that can be proven by any PERSON or expert to be an untampered with, authentic, accurate copy of the CAMERA MASTER?

77. If YOUR answer to the preceding interrogatory is yes, then IDENTIFY and describe every fact that supports YOUR contention.

78. If YOUR answer to Interrogatory 76 is yes, then IDENTIFY each PERSON having knowledge of any facts IDENTIFIED in Interrogatory 77.

79. If YOUR answer to Interrogatory 76 is yes, then IDENTIFY every DOCUMENT having any facts that are relevant to or bear in any way on any facts IDENTIFIED in Interrogatory 77.

§ 16:20 Model Request for Audio Evidence Recordings⁷⁷

In the _____ Court of _____ County,

State of _____)

County of _____)

Expert affidavit of _____ [examiner's name]

77. Tom Owen, of Owl Investigations, Inc., New York City, graciously provided the template for this model request. This request can easily be adapted to requests for video recordings.

BE IT KNOWN, that on this the _____ day of _____, in the year Nineteen Hundred Ninety

BEFORE ME, a duly sworn and competent authority in and for the County of _____, NOTARY PUBLIC, and the undersigned affiant and competent witness appearing herein below,

DID PERSONALLY APPEAR: _____, [examiner's name] a person of the full age of majority, residing and domiciled in the State of _____, County of _____

WHO AFTER BEING DULY SWORN BY ME, did depose and state:

1. I am the _____ [position] of _____ [forensic consulting company]. I have been retained by _____ [attorney's name] to provide said Attorney with the preparation and production of reports, memoranda, and internal defense documents. I have been retained as an expert on matters relating to audio recordings, video recordings, and voice identification, and to assist said Attorney with regard to evidence produced by the State of _____ through the use of highly technical electronic surveillance equipment and reproduction equipment of which said Attorney has a very limited understanding. My vitae, which sets forth my qualifications, is attached and incorporated herein.

2. I am requesting that the original evidence recorders on which the original evidence tapes were made and all of the original evidence tapes be supplied in order that a proper analysis and technical authentication be conducted in my laboratory at _____ [address of forensic lab].

3. I am further requesting that the original electronic surveillance equipment and any and all telephone(s) associated with the original tape recording(s) described in the preceding paragraph be made available for my inspection in my laboratory and also be made available for inspection by _____ [attorney's name], Attorney at Law.

4. The tests that may be necessary to perform, including, but not limited to, Critical Listening, Spectrographic Analysis and Comparison, Magnetic Development, Waveform Analysis, Tape Enhancement, Spectrum Analysis, Phase Continuity, Speed Fluctuation, Voice Identification, etc., are explained in detail in _____ [name of article(s)], which articles are attached.

5. It is imperative that these tests be performed on the original tapes and tape recorders. It is further imperative that the electronic eavesdropping equipment and telephones be made available for inspection and be identified with each and every recording made.

6. The equipment required to perform these tests is laboratory equipment valued in excess of [cost], and is not transportable. One means commonly used to satisfy chain of custody and evidence requirements, which in my experience has been very satisfactory, is [name of express delivery service]. Stipulation by all parties to the use of a true and accurate copy in event of the loss of the original recording(s) serves as a protection for all concerned.

7. The evidence recorder would be returned ten (10) working days from receipt of same, and my report would be available within 21 working days from that date.

8. I have successfully used the above procedures with the following individuals who can verify their satisfaction:

- [Name] [Organization]
[Address] [phone number]
- [Name] [Organization]
[Address] [phone number]
- [Name] [Organization]
[Address] [phone number]

THIS DONE AND PASSED, before me, NOTARY PUBLIC, and the undersigned affiant and competent witnesses, after due reading of the whole, on the date and in the place aforesaid. Further the affiant sayeth naught.

AFFIANT:

[Examiner's name]

STATE OF)
COUNTY OF NEW YORK)

Subscribed and sworn to before me by
day of , 199_.

this the

NOTARY PUBLIC

State at Large

My Commission Expires: