South Carolina Law Review

Volume 26 | Issue 5 Article 4

Spring 3-1-1975

Comments

COMMENTS

FEDERAL CIVIL PROCEDURE—RULE 30(b)(4)—TRIAL JUDGE MAY DENY MOTION FOR NON-STENOGRAPHIC DEPOSITION ONLY WHEN PARTICULARS OF REQUEST DO NOT REASONABLY ENSURE ACCURACY EQUIVALENT TO STENOGRAPHIC DEPOSITION. *Colonial Times, Inc. v. Gasch*, 509 F.2d 517 (D.C. Cir. 1975).

Colonial Times, Inc., publisher of the "underground" newspaper, "The Daily Rag," sought injunctive relief against interference by the United States Postal Service in the regular mail processing of the newspaper. The publishers alleged that Postal Service agents, believing an edition of the newspaper to be obscene, advised or coerced subscribers not to accept delivery. Colonial Times further alleged that the Postal Service intended to monitor future editions of the paper and that the Service had submitted the edition in question to the Department of Justice for appropriate action. Pursuant to Federal Rule of Civil Procedure 30(b)(4),[1] Colonial Times moved to depose certain Postal Service employees by non-stenographic means. Following objection by the government, the district court denied the motion on the ground that the moving party had not demonstrated that manifest injustice would result from the expense of stenographic transcription.[2] In *Colonial Times, Inc. v. Gasch*,[3] the Court of Appeals for the District of Columbia reversed the denial by granting a petition for mandamus, holding that the range of a trial judge's discretion under rule 30(b)(4) is limited to those actions necessary to promote accuracy and trustworthiness and that a trial judge may deny a 30(b)(4) motion only when he is convinced that the particulars of the request do not reasonably ensure accuracy equivalent to stenographic depositions.[4]

Prior to 1970, the Federal Rules of Civil Procedure allowed

1. FED. R. CIV. P. 30(b)(4) (1970).

2. Colonial Times, Inc. v. United States Postal Serv., Civil No. 1633-73 (D.D.C. filed Dec. 10, 1973), *cited in* Colonial Times, Inc. v. Gasch, 509 F.2d 517, 520 (D.C. Cir. 1975).

3. Colonial Times, Inc. v. Gasch, 509 F.2d 517 (D.C. Cir. 1975).

4. The *Colonial Times* opinion is noteworthy not only for its analysis of rule 30(b)(4) motions, but also for its treatment of the mandamus issue and the issue of whether the operator of the non-stenographic recorder must be independent of the parties. This comment, however, deals primarily with the threshold issue of the proper scope of judicial discretion in consideration of a 30(b)(4) motion. The independent operator issue is briefly treated in note 33 *infra*.

only stenographic depositions unless the parties otherwise stipulated in writing.[5] In 1970, the federal rules were amended to permit a trial court judge to order the recording of depositions by non-stenographic means. Rule 30(b)(4) reads:

> The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.[6]

Because the rule itself fails to specify the conditions under which to grant a motion for the use of non-stenographic recording devices, the most obvious source of specific guidelines for judicial discretion in considering a rule 30(b)(4) motion would seem to be the Advisory Committee's Note to the rule.[7] The Committee's note, however, is itself vague;[7.1] it explicitly acknowledges only

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5. Stipulation is allowed by Federal Rule 29 which states, in pertinent part:

> Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery . . . .

A sample stipulation form for video taping a deposition is printed in Miller, *Video Taping the Oral Deposition*, 18 PRAC. LAW., Feb. 1972, 45, 57-58 [hereinafter cited as Miller].

In Galley v. Pennsylvania R.R., 30 F.R.D. 556 (S.D.N.Y. 1962), the court held that audiotape-recorded depositions could not substitute for stenographically recorded depositions. The court in United States Steel Corp. v. United States, 43 F.R.D. 447 (S.D.N.Y. 1968) stated that video tape depositions could not supplement the standard stenographic deposition since the then-current federal rules authorized only written depositions.

State procedural rules determine availability of non-stenographic deposition methods in state courts. South Carolina requires stenographic recording. S.C. CIR. CT. R. 87 H(3) provides, in pertinent part: "The testimony shall be taken stenographically and transcribed."

6. FED. R. CIV. P. 30(b)(4) (1970).

7. The note states:

> In order to facilitate less expensive procedures, provision is made for the recording of testimony by other than stenographic means—*e.g.*, by mechanical, electronic, or photographic means. Because these methods give rise to problems of accuracy and trustworthiness, the party taking the deposition is required to apply for a court order. The order is to specify how the testimony is to be recorded, preserved, and filed, and it may contain whatever additional safeguards the court deems necessary.

7.1. The court in *Colonial Times*, for example, referred to the Advisory Committee's Note as "a cryptic commentary." 509 F.2d at 520.

two concerns: 1) facilitating less expensive recording procedures and 2) maintaining the accuracy and trustworthiness of depositions.[8]

8. The note's failure to supply guidelines for judicial discretion in ruling on rule 30(b)(4) motions has evoked varied comments from the judiciary. *See, e.g.*, Marlboro Prods. Corp. v. North Am. Phillips Corp., 55 F.R.D. 487, 488 (S.D.N.Y. 1972), in which the court stated: "The Committee avoided any foolish effort to specify the details of the orders thus envisioned." *See also* Perry v. Mohawk Rubber Co., 63 F.R.D. 603, 605 (D.S.C. 1974) in which the court commented that the note "unfortunately" failed to state the basis on which discretion should be exercised in the consideration of 30(b)(4) motions.

It will be beneficial to understand what recording devices appear to be authorized by the rule. The Advisory Committee Note provides for "mechanical, electronic, or photographic means." Conceivably, motion pictures could be used, although movies have disadvantages not inherent in other possibilities. Costs, film development delays, special "set" problems inherent in movie production and problems of viewing the deposition make film an undesirable method for recording the deposition. *See* Stewart, *Videotape: Use in Demonstrative Evidence*, 21 DEFENSE L.J. 253, 255 (1972). Further, movie film cannot later be erased and reused. Perhaps for these reasons, no reported case has involved a motion for a movie deposition.

The other types of equipment presently available for taking depositions are video tape and audiotape recorder-players. Each is available in many degrees of quality, sophistication and expense. Proponents of expanded use of video tape have written articles advocating various uses for video including depositions, lawyer self-evaluations and tapings of entire trials. *See, e.g.*, Kennelly, *The Practical Uses of Trialvision and Depovision*, 16 TRIAL LAWYERS GUIDE 183 (1972); McCrystal, *The Videotape Trial Comes of Age*, 57 J. AM. JUD. SOC'Y 446 (1974); Merlo & Sorenson, *Video Tape: The Coming Courtroom Tool*, TRIAL, Nov./Dec. 1971, at 55. These articles have focused on advantages to be gained by the video tape method, types of equipment best suited for a particular purpose, and filming and staging techniques to achieve the desired effect. *Compare* Miller, *supra* note 5, at 54, which advises that during the taping both the witness and examining attorney should appear in the picture (to assure that the viewers will fully perceive the attorney's questions) *with* Kornblum, *Videotape in Civil Cases*, 24 HASTINGS L.J. 9, 25 (1972) [hereinafter cited as Kornblum], suggesting possible detrimental effects from filming both. The suspicion that these "techniques" may be only "tricks" may partially explain the courts' reluctance to accept too hastily the unbridled use of video-recorded depositions. Audiotape has had a much less vocal advocacy, although its potential "to facilitate less expensive procedures" in taking depositions is greater.

What effect video tape ("television") will have on the trier-of-fact merely because it is television presents an interesting question. We are told that the "medium is the message." M. MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1965). McLuhan's theory is explained in Dresnick, *Uses of the Videotape Recorder in Legal Education*, 25 U. MIAMI L. REV. 543 (1971):

> McLuhan makes it clear that the *consequences* are a result of the medium and not the content of a medium, which is another medium, *i.e.*, the content of writing is speech. This becomes clear when one thinks of the electric light. It is pure information and contains no message content, unless, of course a series of lights were arranged in sequence so as to spell out a word. Yet the consequences of the electric light or "the message of any 'medium' or technology is the change of scale or pace or pattern it introduces into human affairs . . . ."
>
> McLuhan defines all media as either hot or cool. To cool media he attributes the characteristics of wholeness, tactileness, inclusiveness, involvement of

Few federal district courts have had occasion to issue orders granting non-stenographic depositions under rule 30(b)(4),[9] and in only one reported case prior to *Colonial Times* has a court refused to grant such an order.[10] The discretion of the individual judge was certainly critical in each of the reported orders before *Colonial Times*, and thus those orders reflect not only all of the apparent requirements of each situation, but also, to some extent, the particular judge's acceptance of the innovation and the skillfulness of counsel in framing a motion that will satisfy the judge's standard of acceptable safeguards. The courts which have considered rule 30(b)(4) motions have emphasized the two interests delineated in the Advisory Note. For example, in *Lucas v. Curran*,[11] a civil rights action in which the plaintiff was a prisoner in a state penal institution, the court granted plaintiff's motion to audiotape depositions and stated:

> The manifest purpose of the Rule is to facilitate the effective participation of the economically disadvantaged in the federal courts, through the lowering of costs as a result of the use

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the reader or viewer, low definition, etc. Hot media are highly defined making them one-way communication, from the packager to the consumer. Their high definition and sharp features make audience participation impossible. Media, which McLuhan labels as hot, includes print, radio, film, lecture, and photograph. Cool media includes manuscript, television, and speech (conversational).

Id. at 545 nn. 8 & 9 (emphasis in original).

In 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2115 (1970) the authors opine that photographic means are advantageous

> . . . in that the finder of fact at trial often will gain greater insight from the manner in which an answer is delivered and recorded by audio-visual devices. Moreover, a recording, a video tape, or a motion picture of a deposition will avoid the tedium that is produced when counsel read lengthy depositions into evidence at trial.

But see Perry v. Mohawk Rubber Co., 63 F.R.D. 603 (D.S.C. 1974) which concluded: "Depositions have been utilized by courts throughout the country for years and this court is unaware of any criticism leveled at this practice." *Id.* at 607. In *Perry*, the moving party had referred to the Wright and Miller suggestion that non-stenographic recordings can help to "avoid tedium" when played for the jury but had given no reason "for the suggestion that any deposition will be published during the trial of this case so as to require recordation by other [than stenographic] means." *Id.*

9. Lucas v. Curran, 62 F.R.D. 336 (E.D. Pa. 1974); Jarosiewicz v. Conlisk, 60 F.R.D. 121 (N.D. Ill. 1973); Buck v. Board of Educ., 16 Fed. R. Serv. 2d 112 (E.D.N.Y. 1972); Marlboro Prods. Corp. v. North Am. Phillips Corp., 55 F.R.D. 487 (S.D.N.Y. 1972); Wescott v. Neeman, 55 F.R.D. 257 (D. Neb. 1972); Kallen v. Nexus Corp., 54 F.R.D. 610 (N.D. Ill. 1972); Carson v. Burlington Northern Inc., 52 F.R.D. 492 (D. Neb. 1971).

10. Perry v. Mohawk Rubber Co., 63 F.R.D. 603 (D.S.C. 1974). For an elaboration on the holding in *Perry*, see text accompanying note 36 *infra*.

11. 62 F.R.D. 336 (E.D. Pa. 1974).

> of modern technology. . . . Rule 30(b)(4) should be read in an attempt to render the ability to bring a suit in federal courts meaningful.[12]

The order issued by the court in *Lucas* is the least confining of those issued under 30(b)(4).[13] At the other end of the line of decisions granting motions for non-stenographic depositions are *Kallen v. Nexus Corp.*[14] and *Wescott v. Neeman.*[15] While recognizing the merits of a more equally open forum, the court in *Kallen* cautioned:

> [J]ust as the potential is great, so too this . . . is an area which is not without pitfalls. Of particular concern to the court which seeks to chart a course in this area, is the preservation of that level of accuracy and integrity which we have come to associate with an independent stenographic record . . . .
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> . . . Reduced costs will not alone justify a significant reduction in the quality of the recording produced.[16]

Perceiving its task to be the creation of appropriate safeguards to ensure accuracy, integrity and utility, the *Kallen* court thus fashioned very demanding guidelines for the requested audio-recording of the depositions.[17]

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12. *Id.* at 337-38.

13. The order prescribed procedures in lieu of Federal Rule 30 requirements of transcription, signing, certification and filing. The order provided for two tape recorders to produce two originals of sufficient quality to provide an accurate and trustworthy record. The operator was not to participate in the actual interrogation process. If the tape was to be used at trial, the oath was to be administered by a person authorized by law. Speakers were to identify themselves when necessary. Plaintiff was to transcribe any testimony that plaintiff or defendant desired, and the original was to be filed with the court. Ten days were provided for objections, and the court was to compare the original tape in its custody to the transcript. The transcript was to become the official record. 62 F.R.D. at 339.

14. 54 F.R.D. 610 (N.D. Ill. 1972).

15. 55 F.R.D. 257 (D. Neb. 1972). For purposes of clarity the court adopted the definitions for "original" and "duplicate" of rule 1001, Proposed Rules of Evidence for United States Courts and Magistrates (Revised draft 1971). The court provided:

> Two Originals will be made, each on a separate machine, and each receiving its signal from the microphones. Specifically, one is not to be the re-recording of the other, for such . . . would produce a mere "Duplicate."

55 F.R.D. at 258.

16. 54 F.R.D. at 613-14.

17. The guidelines include the traditional allocation of responsibility and costs for the deposition to the moving party. The recording quality must be high, but as the courts become more experienced, standards may be lowered, although never below that produced by stenographic means. The court's demands for technical safeguards included: individual lavalier microphones, a mike mixer, and a duplicate original tape for each party and one

The court of appeals in *Colonial Times* concluded that the district court's construction of rule 30(b)(4), as manifested in its order denying the motion, was "not consonant with the purposes of the Rule."[18] In the view of the court of appeals, the district court's denial of the 30(b)(4) motion was based on a general finding that the dangers to accuracy posed by non-stenographic depositions required a restricted approach to the use of such alternative methods.[19] The court of appeals rejected this reasoning and its underlying "notion that the dangers to accuracy are in the abstract sufficient reasons for a denial."[20] Instead, the court of appeals adopted a liberal view of the use of 30(b)(4) premised on the idea that " 'experimentation . . . should be encouraged rather than blocked. . . .' "[21]

The point of contention between the two courts arose from their varying interpretations of the rule and the accompanying Advisory Committee Note. This variance resulted from the language of the rule, which states that the trial judge "may" issue an order permitting non-stenographic depositions. So framed, the rule requires the trial judge's discretion, yet fails to specify the extent to which the discretion is to be exercised. The court of appeals read the note as indicating that such discretion is limited to ordering adequate safeguards to ensure accuracy and trustworthiness. This interpretation necessarily rejects the argument that the rule, when compared to an earlier draft, implies broad discretion. Under the preliminary draft of rule 30(b)(4), no court order was required and the party seeking the deposition simply designated the desired non-stenographic deposition method, which was subject only to court order protecting the accuracy of the product.[22] The resulting argument is that, because the rule

for the court. An additional recorder was to serve as a monitor. All recorders were to be equipped with synchronized digital counters. The operator was to be independent, and was to make a detailed log/index of the proceedings including subject matter, the exhibits, the attorneys and the witnesses. *Id.* at 613-15.

18. 509 F.2d at 520.

19. *Id.*

20. *Id.*

21. *Id.* at 521, *quoting* Marlboro Prods. Corp. v. North Am. Phillips Corp., 55 F.R.D. 487, 489 (S.D.N.Y. 1972).

22. The preliminary draft of rule 30(b)(4) provided:

> If a party taking a deposition wishes to have the testimony recorded by other than stenographic means, the notice shall specify the manner of recording, preserving, and filing the deposition. The court may require stenographic taking or make any other order to assure that the recorded testimony will be accurate and trustworthy.

as adopted seems to place the entire process under the judge's discretion, the order is subject to the trial judge's perception of the need for non-stenographic depositions. The court of appeals in *Colonial Times* denied the significance of any differences in the language of the two drafts and concluded, in a footnote, that the two forms of the rule are "sufficiently similar" to support its liberal interpretation.[23]

The holding of the court of appeals logically follows from its construction of the rule. Essentially, the district court had viewed the non-stenographic means as an exception to the general requirement of stenographic deposition, and consequently available only when certain conditions, such as financial hardship to the moving party, were present. In the view of the court of appeals, non-stenographic deposition is intended to be available as a co-equal alternative to stenographic deposition, and, accordingly, is subject only to those restrictions imposed on stenographic deposition. Absent a protective order, each party to a civil suit has a right to depose the other party; the court of appeals reasoned that the framers of 30(b)(4), by allowing non-stenographic depositions, could not have intended to alter that right without explicit expression.[24] This interpretation correlates rule 26(c) protective order considerations, such as annoyance, oppression and undue burdening, with the 30(b)(4) motion.[25] Under this view, the mere objection of an opposing party to a non-stenographic form of recording a deposition does not require the stenographic form. The

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Proposed Amendments to Civil Rules, 43 F.R.D. 211, 239 (1967). The accompanying note stated, in pertinent part:

> [T]he party taking the deposition is required to specify how the testimony is to be recorded, preserved, and filed, and the court has broad discretion to issue orders as needed.

Id at 244.

23. 509 F.2d at 521 n.5.

24. *Id.* at 521. Two points should be noted concerning this discussion by the court. First, the holding in *Colonial Times* is fully sustained by careful analysis of the actual language of rule 30(b)(4) and the Advisory Committee Note; it therefore is entirely supportable even without further argument. Second, it appears that there may be some logical inconsistency in this additional justification for the court's holding. The court argues, in effect, that the traditional general rule for taking and recording depositions—*i.e.*, a right to depose and record stenographically qualified only by considerations that would justify a rule 26(c) protective order—applies unless specifically altered to all deposition methods acceptable under the rules. This argument, however, appears to assume the very holding which it is intended to support—that general acceptance of non-stenographic deposition (as a co-equal alternative to stenographic deposition) is conferred by rule 30(b)(4) and does not rest in the discretion of the trial judge.

25. *Id.*

opposing party must make "specific objections to the proposed method of deposition taking and may not simply argue that every proposed method is insufficient."[26]

Under the holding of the court of appeals, the trial judge is to ensure that the means of deposition is approximately as accurate as stenographic deposition and that the objecting party's interests are not prejudiced.[27] Summarizing its view of the nature of the trial judge's discretion in considering a 30(b)(4) motion, the court of appeals stated:

> The judge may deny a movant's request under Rule 30(b)(4) only when he is convinced, after thorough examination of the movant's proposal and on the basis of the other party's specific objections and the judge's experience with the differing forms of deposition procedure, that the particulars of the request do not reasonably ensure accuracy equivalent to stenographic depositions.[28]

The opinion of the court of appeals, requiring both definiteness in objection and thoroughness in review of the movant's proposed method of deposition, should prevent any out-of-hand rejections of 30(b)(4) motions. It should, that is, if the judge's experience is never given greater weight than it deserves. Indeed, such experience properly appears to be significant only as a tertiary consideration. For example, an individual judge's lack of exposure to non-stenographic methods of recording should not be a basis for denying a proposal which accurately preserves the deponent's testimony.

The opinion of the court of appeals also opened new ground in regard to consideration of movant's financial ability. The plaintiff in *Colonial Times* stressed its financial inability to pay for stenographic depositions. The district court found that manifest injustice would not be imposed on the plaintiff by the cost of stenographic deposition. It is not surprising that plaintiff argued financial "need;" almost all previous cases have cited the necessity of reducing costs in the deposition process. Somewhat surprisingly, however, the court of appeals stated:

> The ability of the movant to pay for stenographic depositions should, as a general matter,[29] be irrelevant to the grant of an

26. *Id.*
27. *Id.* at 522.
28. *Id.*
29. At this point, the court of appeals inserted a qualifying footnote which stated:

> order to take depositions by other than stenographic means. The Rule is designed to decrease everyone's stenographic costs whenever that can be accomplished with no loss of accuracy and integrity.[30]

This treatment of the financial issue is not only consistent with the court's liberal interpretation of the rule but also is logical and persuasive. The opening words of the Advisory Committee's Note ("In order to facilitate less expensive procedure . . .") are most logically read as stating an underlying policy reason for the rule, and not as prescribing a condition of its applicability; although it might have done so, the note did not provide "If the movant can demonstrate his need to reduce litigation expenses." With the liberal admission of non-stenographic depositions, the wealthy may profit as much as the poor from the advantages of non-stenographic depositions.[31]

Nevertheless, the vagueness of the court's footnote caveat, concerning the consideration of a moving party's ability to pay for stenographic depositions in "marginal cases of need,"[32] may weaken the dictum to the effect that the ability to pay for stenographic records generally should be "irrelevant" in considering a rule 30(b)(4) motion. Although the footnote needs clarification, courts should not interpret it as permitting a blanket denial such as that issued by the district court in *Colonial Times*. To interpret it in that way would be to permit the movant's financial

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"We, of course, do not mean to hold that ability to pay may never be relevant in marginal cases of need, when the trial judge is not satisfied with the movant's proposed deposition method." *Id.* at 521 n.8.

30. *Id.* at 521.

31. One such advantage is illustrated by Carson v. Burlington Northern Inc., 52 F.R.D. 492 (D. Neb. 1971), the first case involving a 30(b)(4) motion. *Carson* was a personal injury action in which the defendant railroad sought to video tape a deposition in the blacksmith shop where plaintiff's accident had occurred. The court in *Carson* stated: "The purpose of the deposition of the plaintiff by stenographic and photographic means is to demonstrate the manner in which the plaintiff operated the said machine at the time of and immediately prior to the accident." *Id.* at 492. Plaintiff objected to the video taping on the ground that, rather than producing a "natural" recreation of events, the video tape result would appear "staged" so as to make the plaintiff appear contributorily negligent. While admitting the possibility of prejudice if satisfactory safeguards were not devised, the court said the rules were amended "so as to allow just such a procedure" [as video tape]. *Id.* In granting the defendant's motion, the court provided certain safeguards to ensure the accuracy and trustworthiness of the recording process and the tape. One such safeguard was the requirement that the plaintiff not touch or operate the machine, and that instead he use only a suitable pointer or other means acceptable to counsel. *Id.* at 493.

32. The text of the court's footnote is quoted in note 29 *supra*.

capabilities to become once again a "relevant" factor in ruling on a 30(b)(4) motion. Ordinarily, a judge should first evaluate the motion in light of the moving party's suggested safeguards and the opposing party's specific objections to determine whether the proposed method of deposition poses any danger to accuracy. Only then should a court consider the issue of financial need; moreover, even if the trial judge is not completely satisfied with the requested method of recording depositions, he should consider financial need itself only as a factor *permitting* a 30(b)(4) motion and *not* as a factor denying it. It is of course possible to interpret the footnote as a suggestion that a judge, dissatisfied with a proposed recording method, might deny the motion of a party who does not have the ability to pay for stenographic recording; such a reading, however, appears inconsistent with the court's later holding that limits judicial discretion. In no case should a court base a total denial of a rule 30(b)(4) motion upon the movant's ability to afford a stenographic deposition. If a real danger to accuracy and trustworthiness exists, and if stenographic costs do not place a particular burden on the moving party, then it would seem most reasonable to condition the *granting* of the motion on the willingness of the movant to vary his proposal by adding or substituting a safeguard which may entail additional costs, such as an independent operator's fees.[33] If, on the other hand, the

33. An issue which has caused considerable problems for the courts dealing with 30(b)(4) motions is whether the operator of the tape recorder or other non-stenographic device must be independent of the parties. *See, e.g.*, Marlboro Prods. Corp. v. North Am. Phillips Corp., 55 F.R.D. 487 (S.D.N.Y. 1972). The defendant in *Marlboro Products* opposed plaintiff's 30(b)(4) motion primarily on the ground that Federal Rules 28(a), 28(c) and 30(f) required an independent recorder operator. Rule 28(a) provides in pertinent part:

> [D]epositions shall be taken before an officer authorized to administer oaths . . . or before a person appointed by the court . . . .

Rule 28(c) states:

> No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

Although it recognized the defendant's argument as substantial, the court in *Marlboro Products* concluded that it was not always necessary that an independent person operate the recorder:

> The employment of such a person serves to impair *pro tanto* the purpose of economy. It is not a technological necessity . . . . The supposed need for neutrality in the operator seems likely to prove illusory in the actual circumstances of the deposition proceeding . . . . Opposing counsel and others who may attend will serve to guard against mistakes or misbehavior.

55 F.R.D. at 489.

The court of appeals in *Colonial Times* reasoned that, since the purpose of rule

movant is an indigent, or if there is a need for cost reduction to a non-indigent, and the danger to accuracy appears slight, then the court should interpret the footnote to allow the motion. Moreover, the court of appeals in *Colonial Times* indicated an intent to promote generous granting of rule 30(b)(4) motions: "A liberal view of Rule 30(b)(4), designed to encourage experimentation to

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30(b)(4) is to reduce expenses and since the independent operator would be perhaps the most significant expense in a deposition proceeding, "the operator should be eliminated unless no alternatives exist to guarantee trustworthiness." 509 F.2d at 522. The court then suggested several alternatives to the independent operator to be considered "in light of the over-all spirit of experimentation that animates Rule 30(b)(4)." *Id.* at 523. The court, at 522-23, said:

> Several safeguards which might provide an alternative to the independent operator have been suggested. First, the testimony may be recorded on two recorders and the opposing party may retain the tape from the second record. Second, the original tape once made should be deposited with the Court directly after the deposition to serve as a check on the accuracy of a transcript made subsequent to the deposition. Third, the witness must read a transcript of the recording made by the moving party and sign it under oath before the transcript may be admitted in evidence. The District Court should carefully consider whether these safeguards are sufficient to dispense with the independent operator. . . . We, of course, do not mean by this opinion to foreclose any conclusion based upon experience in the use of depositions in which the operator is not independent of the parties. *Id.* at 522-23.

One danger observed in the commentary on denial of 30(b)(4) motions, (*See* text following note 28 *supra*), is also present in the consideration of the need for independent operators. The court's reference to the individual judge's experience may be interpreted as license for judges inexperienced with non-stenographic recording to disregard the other factors the court in *Colonial Times* deemed important. Here the court's caveat shows an understanding that this is still a relatively unexplored area. Future trial courts may find as a practical matter that certain alternatives do not work and that accuracy and trustworthiness can only be maintained by an independent operator. At that point, after some period of experimentation with non-stenographic devices, experience may show the necessity for an operator independent of the parties.

The court of appeals appears to have handled correctly the independent operator issue. Although it did not expressly consider the question of the interrelationship of 30(b)(4) and the other deposition rules, the *Colonial Times* decision reasoned from the purposes of the 30(b)(4) amendment. The language of the rule also supports the result. The statement in rule 30(b)(4) that "the order shall designate the manner of recording, preserving, and filing the deposition" would be unnecessary if the court's duty were simply to copy provisions from other rules. The drafters, realizing that they could not properly provide for the varying demands of different situations, wisely left this aspect to the discretion of the individual judge. That discretion should, of course, be directed to the same ends which the procedures set out in other rules attempt to achieve—preservation of accurate and trustworthy testimony.

In large measure, an order which closely tracks the certification and filing requirements for stenographic depositions will naturally ensue from the determination by the court that accuracy and integrity demand an independent operator for the recording device. It would not appear, however, that such a result is required. *See* Kallen v. Nexus Corp., 54 F.R.D. 610, 615 (N.D. Ill. 1972), in which the court stated: "The operator shall

reduce costs, surely is an important step towards a more economic system of justice."[34]

To support its interpretation of the rule, the court of appeals in *Colonial Times* cited prior cases granting 30(b)(4) motions[35] and attempted to distinguish *Perry v. Mohawk Rubber Company*,[36] the only reported case in which such a motion was denied. In *Perry*, an action based on tortious conspiracy to interfere intentionally with plaintiff's business, the plaintiff filed a motion to record depositions by video tape in addition to stenographic transcription. The South Carolina District Court denied the motion on two grounds: (1) plaintiff failed to show that the use of videotape would reduce the costs of taking depositions, and (2) plaintiff failed to show that a need existed for videotaping.[37]

certify the correctness and completeness of the recordings in the manner that a stenographic reporter certifies the typed record of a deposition." *See* Wescott v. Neeman, 55 F.R.D. 257 (D. Neb. 1972), which used basically the same language but prefaced it with the statement that "[a]t the close of the deposition the independent third party shall vocally record his certification." *Id.* at 258. Whether this vocal certification was meant as an additional requirement is not entirely clear. Nevertheless, to make the 30(b)(4) motion and its proposed safeguards appear as "familiar" as possible, the attorney framing the motion may wish to follow the standard procedures for stenographic depositions. In any case in which an independent third party will record the deposition, no problem should be presented. FED. R. CIV. P. 30(f)(1) requires the officer to certify that the witness was duly sworn and that the testimony is a true record. This formality could be easily video taped or vocally recorded. *See* Miller, *supra* note 5, at 48, and *Westcott v. Neeman*, *supra*, at 258. Alternatively, a "sticker" with this typed information could be affixed to the tape or reel. The duty of the officer to seal the deposition in an envelope and file it can be followed as easily with the tape record as with a stenographic transcription. *See* Miller, *supra* note 5, at 49. The requirement of FED. R. CIV. P. 30(f)(2) that the officer furnish a copy of the deposition to the deponent or any party is no obstacle. Either a video or sound recording could be made depending upon the party's need; audio tape and equipment are common and copies are easily made. If video tape is the medium and if only one side has video equipment, the witness and the opposing party should have the right to view the video tape prior to trial. *See* Kornblum, *supra* note 8, at 25. FED. R. CIV. P. 30(e) provides the witness with the opportunity to examine his deposition unless he and the parties waive that right. The deposition is to be signed unless there is a written stipulation to the contrary by the parties. The choice of the words "transcribe" and "read" may mean to exempt 30(b)(4) recordings since the court's supervisory powers are an adequate assurance of accuracy. *See* Kornblum, *supra* note 8, at 24; Miller, *supra* note 5, at 48-49. Nevertheless, it would be no problem to arrange a viewing or hearing of the tape at which time a vocal "signature" or any requested changes could be recorded. Alternatively, a signed label could be attached. *See* Marlboro Prods. Corp. v. North Am. Phillips Corp., 55 F.R.D., 487, 489 (S.D.N.Y. 1972).

34. 509 F.2d at 525.

35. *See* cases cited in note 9 *supra*.

36. 63 F.R.D. 603 (D.S.C. 1974).

37. *Id.* at 607.

The *Perry* court summarized its view of the nature of the trial judge's discretion under 30(b)(4) as follows:

> When a request for non-stenographic recording is motivated by genuine economic considerations and is consistent with insuring adequate discovery and preventing possible suffocation of the truth, the rules provide federal trial courts with the flexibility to accede; but when such a request demands a concession for no better reason than the personal preference of a single party, Rule 30(b)(4) also invests the courts with the discretion to refuse it.[38]

The court of appeals in *Colonial Times* dealt with *Perry* in a footnote:

> [*Perry*] may be distinguished as involving a frivolous request for a video tape deposition and the denial thereof analogized to a Rule 26(c) protective order. And we might be inclined to agree that where deposition by non-stenographic means is burdensome on the parties, the movant must show more than "personal preference" . . . to obtain a court order. However, it appears that *Perry* is not fully consistent with the liberal view of Rule 30(b)(4) outlined herein.[39]

The court's method of distinguishing *Perry* is curious. Presumably, under the holding in *Colonial Times*, there is no such thing as a "frivolous request" for a 30(b)(4) deposition, and the movant is not required to demonstrate a "need" for non-stenographic transcription. Unfortunately, the language used to distinguish *Perry* does not indicate the extent to which such considerations of a movant's motives should enter into the trial judge's exercise of discretion. As a result, the court of appeals may have created an exception otherwise not apparent on the face of its holding.

Despite the need for clarification of its theoretical caveats, however, the opinion of the court of appeals in *Colonial Times* firmly underwrites a viable and liberalized implementation of rule 30(b)(4). The opinion emphasizes the opportunity for experimentation with new procedural techniques occasioned by the adoption of rule 30(b)(4). Additionally, by removing the requirement that a movant show financial need, the court of appeals provides a means of reducing litigation costs for all parties.

38. *Id.*
39. 509 F.2d at 521 n.10 (citation omitted).

EVIDENCE—POLYGRAPH TESTS—THE RESULTS OF A POLYGRAPH TEST ARE ADMISSIBLE IF THE DEFENDANT AGREES IN ADVANCE TO THE ADMISSION OF THE RESULTS REGARDLESS OF THE OUTCOME. *Commonwealth v. A Juvenile (No. 1)*, 313 N.E.2d 120 (Mass. 1974).

In *Commonwealth v. A Juvenile (No. 1)*,[1] the defendant was charged with delinquency by reason of manslaughter and moved for the admission into evidence of the results of a polygraph examination administered to him by two polygraph experts of his own choosing. Defendant offered testimony concerning the scientific reliability and scientific acceptability of the polygraph, the manner in which the test was administered to the defendant, and the opinion of the examiner regarding the truthfulness of defendant's answers to questions relevant to the case. Defendant also requested that the court order an additional test by a court-appointed expert or by an expert of the state's choosing. The trial judge denied the motions.[2] On appeal, the Massachusetts Supreme Court reversed and remanded in a 4-3 decision, holding that the results of a polygraph test were admissible in evidence at the discretion of the trial judge provided the defendant agrees in advance to the admission of the results regardless of the test's outcome.[3]

The generally accepted rule regarding the admissibility of polygraph test results was first enunciated in *Frye v. United States*: for the results to be admissible, the scientific test "from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[5] While some recent decisions criticize current applications of *Frye* for being too restrictive,[6] the great majority of

1. 313 N.E.2d 120 (Mass. 1974).
2. *Id.* at 122-23.
3. *Id.* at 124.
4. 293 F. 1013 (D.C. Cir. 1923).
5. *Id.* at 1014.
6. *See* United States v. DeBetham, 348 F. Supp. 1377 (S.D. Cal.), *aff'd per curiam*, 470 F.2d 1367 (9th Cir. 1972), *cert. denied*, 412 U.S. 907 (1973). The district court noted that the majority interpretation of *Frye* places greater restrictions on polygraph results than on other scientific evidence. Although following the *Frye* rule because of precedent, the court appeared to prefer the test recommended by Professor McCormick which distinguishes between taking judicial notice and admissibility and concludes that any relevant conclusions supported by a qualified expert should be admitted providing the probative value is greater than the dangers of misleading the jury or the risk of consuming an undue amount of time. 348 F. Supp. at 1382-84. *See* C. MCCORMICK, EVIDENCE § 203, at 491 (2d ed. 1972) [hereinafter cited as MCCORMICK].

jurisdictions still adhere closely to its test of general scientific acceptance.[7] As a result, these courts generally hold that polygraph results are not admissible evidence for either substantive or impeachment purposes.[8]

The most significant recent development in the polygraph area has occurred in the growing number of jurisdictions which recognize the admissibility of polygraph results pursuant to a stipulation by the parties.[9] California is often credited with beginning this trend in *People v. Houser*,[10] but it is the Arizona decision of *State v. Valdez*[11] that is considered the leading case on admissibility pursuant to a stipulation.[12] In *Valdez*, the defendant objected to the admission of testimony concerning the results of his polygraph test although he had stipulated before trial that the examiner's testimony would be admissible.[13] The court noted that "although polygraph interrogation has not attained that degree of scientific acceptance . . . to be admissible at the first instance of either the state or defendant, . . . it has been considerably improved [since *Frye*]."[14] The court in *Valdez* held that polygraphic testing had improved to such an extent that the results were sufficiently probative to be admitted upon stipulation. Four qualifications for admissibility were imposed: (1) the county attorney, defendant and his counsel must all sign a written stipulation providing for defendant's submission to the test and for admission at the trial of the graphs and of the examiner's opinion; (2) the non-offering party has the right to cross-examine the testifying examiner; (3) the trial judge retains discretion as to the examiner's qualifications, proper test conditions, and other fac-

7. *See, e.g.*, People v. Leone, 25 N.Y. 2d 511, 255 N.E.2d 696, 307 N.Y.S.2d 430 (1969); State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959); Lee v. Commonwealth, 200 Va. 233, 105 S.E.2d 152 (1958). *See also* cases collected in 29 AM. JUR. 2d *Evidence* § 831 (1967).

8. *See* MCCORMICK § 207, at 506.

9. *See* State v. McNamara, 252 Iowa 19, 104 N.W.2d 568 (1960); State v. Fields, 434 S.W.2d 507 (Mo. 1968); State v. McDavitt, 62 N.J. 36, 297 A.2d 849 (1972); State v. Stanislawski, 62 Wis. 2d 730, 216 N.W.2d 8 (1974); State v. Towns, 35 Ohio App. 2d 237, 301 N.E.2d 700 (Ct. App. 1973); State v. Bennett, 521 P.2d 31 (Ore. Ct. App. 1974); State v. Ross, 7 Wash. App. 62, 497 P.2d 1343 (Ct. App. 1972). For a discussion of the desirability of the exception and of the admissibility of polygraph tests generally, see Note, *The Polygraph Revisited: An Argument for Admissibility*, 4 SUFFOLK L. REV. 111 (1969) [hereinafter cited as Suffolk Note].

10. 85 Cal. App. 2d 686, 193 P.2d 937 (Ct. App. 1948). *See* MCCORMICK § 207, at 507.

11. 91 Ariz. 274, 371 P.2d 894 (1962).

12. Annot., 53 A.L.R. 3d 1005, 1008 (1973).

13. 91 Ariz. at 275-76, 371 P.2d at 895.

14. *Id.* at 282, 371 P.2d at 900.

tors relevant to the admissibility of the test results; and (4) the judge should instruct the jury that the examiner's testimony is not conclusive proof but at most indicates only that the defendant was or was not telling the truth at the time the test was administered, and the jury is to determine the weight that such testimony should be given.[15]

The *Valdez* rationale recognizes that polygraphic test results have some probative value, and it seeks to balance the limitations of polygraph reliability with the requirement that both parties stipulate to admissibility and thus assume any probative risks.[16] Because of the condition that both parties stipulate, the prosecution retains a significant negotiating and tactical advantage.[17] Under the *Valdez* rule, the prosecutor may simply refuse to stipulate in a case which he considers "open and shut."[18] Should the prosecutor agree to stipulation, however, he would have some input in the selection of the examiner.

Prior to *Commonwealth v. A Juvenile (No. 1)*, the *Frye* test of general scientific acceptance had been the criterion for admissibility in all circumstances in Massachusetts. In *Commonwealth v. Fatalo*,[19] the Massachusetts Supreme Court observed in 1963 that scientific tests such as blood tests, ballistics, fingerprints, and alcohol content of the blood had been accepted by the courts but noted that their acceptance followed scientific recognition which had not been accorded the polygraph. The court stated,

15. *Id.* at 283-84, 371 P.2d at 900-01.

16. *Cf.* Suffolk Note, *supra* note 9, at 124-25; Comment, *Criminal Law—Pre-Trial Immunity Agreement—Binding Both Sides to Results of Polygraph Tests Upheld as a Pledge of Public Faith*, 16 N.Y.L.F. 646, 652-53 (1970).

17. In State v. Forgan, 104 Ariz. 497, 455 P.2d 975 (1969), the Arizona Supreme Court applied the *Valdez* rule and denied admission of polygraph test results when the county attorney refused to stipulate admissibility. Referring to the first qualification of *Valdez* (that the county attorney, the defendant and his counsel all sign the stipulation), the court held that the county attorney's refusal to stipulate could be justified for the same reasons usually advanced by proponents of general inadmissibility of polygraph results. *Id* at 498, 455 P.2d at 976. Apparently the court in *Forgan* was referring to such problems as untestable persons, lack of acceptance by scientists, tendency of judges and juries to treat test results as conclusive evidence, lack of standardization of test procedure and examiner qualifications. *See* State v. Valdez, 91 Ariz. at 278-80, 371 P.2d at 897-98.

In State v. Freeland, 255 Iowa 334, 125 N.W.2d 825 (1964), the Iowa Supreme Court, which had first admitted polygraph testimony pursuant to a stipulation in State v. McNamara, 252 Iowa 19, 104 N.W.2d 568 (1960), ruled that the trial court correctly rejected defendant's motion to require the state to give him a polygraph test. The court reasoned that without the prosecutor's consent the results would be inadmissible and therefore sustaining defendant's motion would be futile.

18. *See* State v. Boodry, 96 Ariz. 259, 394 P.2d 196 (1964).

19. 346 Mass. 266, 191 N.E.2d 479 (1963).

"We do not hold that such recognition must be universal or that the test must be proven infallible, but rather that the substantial doubts which presently revolve about the polygraph test must be removed."[20]

Although it stated that the *Fatalo* test of scientific acceptance had not been met,[21] the court in *Commonwealth v. A Juvenile (No. 1)* justified its decision to allow limited admissibility of the polygraph test results by relying heavily on the "substantial advances . . . made in the field of polygraphy" since *Fatalo*.[22] The court cited the increased sophistication and professionalism of the examiners, the refinement of the machine, and the growing use of the polygraph in governmental, scientific, legal and private circles. The court in *Juvenile* noted that "polygraph testing has advanced to the point where it could prove to be of significant value to the criminal trial process if its admissibility initially is limited to carefully defined circumstances designed to protect the proper and effective administration of criminal justice."[23] The court in *Juvenile* adopted a rule identifying four situations in which a trial judge may, in his discretion, admit results of a polygraph test: (1) when the defendant moves that he be allowed to submit to an examination by an examiner of his own choosing; (2) when the defendant moves that an examination be given by an expert chosen by the state; (3) when the defendant moves that the court appoint an examiner; or (4) when the defendant moves that a test be given by an examiner selected by the defendant *and* an examiner selected by the state. In all four instances the defendant must agree in advance that the results will be admissible regardless of the outcome of the test. After the court makes written findings that the defendant's consent was voluntary and knowing, the test may be conducted. The prosecutor receives a copy of the results which are admissible upon introduction by either the prosecution or the defense; any request for admission, however, is subject to the trial judge's discretion following *voir dire* inquiry into the examiner's qualifications.[24]

20. *Id.* at 270, 191 N.E.2d at 481.

21. 313 N.E.2d at 123-24. Of greatest concern to the court was the fact that polygraphy had not achieved a predictable level of consistency among examiners and was still challenged on theoretical grounds by some scientists. *Id.* at 125.

22. *Id.* at 122.

23. *Id.* at 124.

24. *Id.* at 126-27. The court declined to establish minimum qualifications for all examiners but stated that the qualifications of the defendant's examiner were adequate. *Id.* at 126.

The decision in *Juvenile* was based largely upon increased confidence in the reliability of polygraphy, but the court obviously was also influenced by the defendant's own request for the test and his stipulation prior to its administration that the results would be admissible. The court observed that a defendant who has agreed "to abide by the results of a yet to be taken polygraph examination," may be "highly motivated to assure that the examiner is well qualified and that the test is conducted under proper conditions."[25] Thus, in *Juvenile*, the defendant's assumption of the risk and his resulting motivation to choose the examiner carefully appear to have been the factors which overcame the court's remaining doubts about the reliability of the tests.

Juvenile does not overrule *Fatalo*; general scientific acceptance remains the underlying test for general admissibility of polygraph evidence in Massachusetts. The court, however, did attempt to relax the *Frye/Fatalo* standards by embracing and extending the stipulation rationale of *Valdez*. The significant break with the stipulation cases, however, is that *Juvenile* does not require a prosecutor to stipulate to either the qualifications of the examiner or the admissibility of the test.

Because the *Juvenile* court failed to resolve the issue of polygraph reliability, it may have acted prematurely in eliminating the prosecutor's power to exclude polygraph evidence solely by his refusal to stipulate. Under two options of the new Massachusetts rule—when either the defendant or the court selects the examiner—the prosecutor would have no voice in the selection process. As the court in *Juvenile* recognized, the competence of the examiner is vital to the reliability of the test and the profession has yet to achieve a uniform level of competence.[26] As a result of the new rule, the trial judge will determine the competency of the examiner without the acquiescence of the prosecutor. Such a procedure is at odds with the assumed risk rationale of the *Valdez* line of cases.

The impact of excluding the prosecutor from the examiner selection process would be lessened if the prosecutor could subject the defendant to a second test administered by the state's experts; this option is presently available whenever blood tests or psychiatric evaluations are involved. But the court in *Juvenile*, citing *Schmerber v. California*,[27] stated that a polygraph test is

25. *Id.* at 126.

26. *Id.* at 124-25. *See also* Suffolk Note, *supra* note 9, 112-13.

27. 384 U.S. 757 (1966). In *Schmerber*, the Court stated that "[the fifth amend-

essentially testimonial in nature and that a defendant could not be compelled "initially" to submit to such a test.[28] This reasoning implies that the prosecutor would be precluded from testing the defendant and prevented from producing as his own witness any expert who had personally tested the defendant.[29]

Although the *Juvenile* rule eliminates the requirement of prosecutor consent to admissibility and may preclude the state's retesting of the defendant, the prosecutor may still be able to exclude or to reduce the impact of unfavorable polygraph test results. The prosecutor may be able to prevent the defendant's expert from testifying by objecting to the examiner's qualifications or to the conditions under which the test was given. Should the testimony be admitted over the prosecutor's objection, the prosecutor would have the right to cross-examine the expert on his qualifications, the method of conducting the test, the operation of the machine and the theoretical soundness of the assumptions upon which polygraphy is based.[30] The prosecutor further could attempt to limit the effectiveness of the examiner's testimony by calling his own expert witnesses on the reliability of polygraphic testing in general as well as the test described by the examiner in particular.[31] Finally, the prosecutor can request that the judge charge the jury, in accordance with the court's language in *Juvenile*, that the results of the polygraph test are to be considered not as binding or conclusive evidence but are to be considered together with all other evidence as to guilt or innocence.[32]

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ment] privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate [the privilege]." *Id.* at 764.

28. 313 N.E.2d at 127.

29. The dissenters in *Juvenile* suggested that it might not be desirable or possible to preclude the state from retesting a defendant who offers polygraph testimony. *Id.* at 137. While not conclusively answering this question, the majority stated that, although no defendant can be compelled "initially" to submit to a polygraph examination, a defendant who does agree to take a test waives his fifth amendment rights "to that extent." *Id.* at 127. The import of this language, however, is problematic; it could mean that when the defendant in *Juvenile* submitted to the original test he waived any right he had to refuse to submit to a polygraph test given by the state. But the language logically appears to refer to the original test taken at the request of the defendant; if so, only "to that extent" had defendant waived his rights, and the prosecutor was thus precluded from forcing the defendant to submit to a second test by the state's experts.

30. The court provides for a broad cross-examination of an examiner who is an opposing witness regardless of who originally selected the expert. *Id.* at 127.

31. The dissent suggests that the *Juvenile* rule has the potential for turning the trial into a battle of experts. *Id.* at 136.

32. *Id.* at 124. Some courts submit that juries will consider the machine infallible and

While significantly increasing the defendant's options, the decision also raises problems when viewed from the defendant's perspective. The *Juvenile* rule forces the defendant to gamble that the tests will be favorable and to bear the risk of having the prosecutor introduce the results if they are unfavorable to defendant.[33] Thus, it could be argued that the court, in its desire to open up a potentially valuable area of evidence, has adopted a rule which borders on trial by ordeal.

The *Juvenile* rule is a commendable attempt at compromise. The court has taken a significant new stance in the continuing debate over the polygraph by promulgating what appears to be the broadest rule of admissibility yet adopted by a state supreme court. The court recognized the polygraph as a viable evidentiary tool to be used in certain defined circumstances, and the decision surely must be viewed as an advancement by advocates of the polygraph. Yet, since the court was not prepared to find that the polygraph is on a par with accepted scientific tests, the result is a rule which poses problems for both prosecutors and defendants in the context of an adversary system.

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that the polygraph therefore should be infallible before the testimony of the examiner is admitted. *See* cases cited in MCCORMICK, § 207, at 507, § 203, at 490 n.32. Apparently, the *Juvenile* court disagreed.

33. The requirement that a copy of the results be given to the prosecution raises serious fifth amendment questions. *See* United States v. Wright, 489 F.2d 1181, 1195 (D.C. Cir. 1973) in which the court states that a defendant has a right to compel the state to investigate its own case, find its own evidence and prove its own facts.