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COMMENTS

EXCLUSION OF DEPOSITIONS FROM THE JURY ROOM: AN ANACHRONISM IN TEXAS RULE 281

GEORGE H. SPENCER, JR.

In every trial which reaches the point of jury deliberation, the court must decide which exhibits may be taken to the jury room. In Texas, that decision is primarily controlled by Rule 281 of the Rules of Civil Procedure, which provides that all written evidence, except depositions, may be taken to the jury room.[1] Although basically sound, that rule is nonetheless subject to criticism in that it perpetuates an exception, the exclusion of depositions, despite the fact that the justification for the exception has been rendered illogical by subsequent developments in trial practice.

Depositions were originally excluded from the jury room to prevent their over-emphasis relative to in-court oral testimony, but that justification is anachronistic.[2] It assumes that oral evidence—depositions and in-court

1. TEX. R. CIV. P. 281 states:

> The jury may take with them in their retirement the charges and instructions, general or special, which were given and read to them, and any written evidence, except the depositions of witnesses, but shall not take with them any special charges which have been refused. Where only a part of a paper has been read in evidence, the jury shall not take the same with them, unless the part so read to them is detached from that which was excluded.

The provisions of rule 281 have been interpreted as being mandatory; written evidence must go to the jury room on the written motion of either party. Texas Employers Ins. Ass'n v. Applegate, 205 S.W.2d 412, 413 (Tex. Civ. App.—Texarkana 1947, writ ref'd n.r.e.); *see* Trinity & B.V. Ry. v. Lunsford, 183 S.W. 112, 113 (Tex. Civ. App.—Austin 1915, no writ); Baird & Scales v. Tyler Bldg. & Loan Ass'n, 147 S.W. 1168, 1173 (Tex. Civ. App.—Dallas 1912, no writ). Since each party has a right to have the written evidence before the jury during deliberations, a refusal to allow such evidence to go to the jury room on the ground that the jurors have not specifically requested it is error. Dallas Ry. & Terminal Co. v. Orr, 147 Tex. 383, 391, 215 S.W.2d 862, 866-67 (1948); Dallas Ry. & Terminal Co. v. Durkee, 193 S.W.2d 222, 226 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.); Banker's Life Co. v. Butler, 122 S.W.2d 1077, 1079 (Tex. Civ. App.—Galveston 1938, no writ).

2. It was said that allowing depositions to go to the jury room would permit the jurors to read and re-read them, thereby emphasizing that evidence at the expense of in-court testimony which the jurors were forced to remember. English v. American & Foreign Ins. Co., 529 S.W.2d 810, 813 (Tex. Civ. App.—Texarkana 1975, no writ); Butler v. Abilene Mut. Life Ins. Ass'n, 108 S.W.2d 972, 974 (Tex. Civ. App.—Eastland 1937, writ dism'd); England v. Pitts, 56 S.W.2d 493, 497 (Tex. Civ. App.—Dallas 1932, writ dism'd); *see* Harris v. Levy, 217 S.W.2d 154, 158 (Tex. Civ. App.—El Paso 1948, no writ); Trinity & B.V. Ry. v. Lunsford, 183 S.W. 112, 114 (Tex. Civ. App.—Austin 1915, no writ). This rationale is reflected in the appellate courts' treatment of the issue of error in this area. To constitute reversible error, it should be shown not only that a deposition was taken back, but that it was used by the jury during its deliberations, and

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testimony—is the only important form of evidence given during a trial, and that it would be unfair to favor one class of such evidence over the other. While at one time this reasoning may have been true, it is not so today; other non-oral forms of evidence, most notably photographs, are used extensively in modern trials.[3] These other forms of evidence are allowed to go to the jury room and are, therefore, emphasized relative to both classes of oral testimony.[4] Consequently, rule 281's exclusion of depositions, although designed to protect oral evidence, has the opposite effect; it renders it inferior to non-oral forms of evidence.

THE JUSTIFICATION FOR EXCLUDING DEPOSITIONS

Common Law Background

In order to fully understand the purpose of rule 281, it is worthwhile to consider its common law background. Although the common law left to the trial court's discretion the question of whether or not non-documentary evidence should be permitted in the jury room,[5] the rule governing documentary evidence was strict: absent the consent of both parties, only sealed writings could properly be taken to the jury room for use during deliberation.[6] Since matters stated under seal were conclusive and self-proving,[7] the

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that such use was actually prejudicial to the complaining party. *See* Willis v. Goodrum, 360 S.W.2d 182, 184 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.); *cf.* Texas Elec. Serv. Co. v. Linebery, 327 S.W.2d 657, 667 (Tex. Civ. App.—El Paso 1959, writ dism'd) (party complaining of error in jury receiving written materials not introduced in evidence must prove both that error occurred and injury probably resulted). It should be noted that a failure to object to a deposition being used during jury deliberations probably waives the error. *See* Beeks v. Odom, 70 Tex. 183, 189, 7 S.W. 702, 705 (1888); Texas Elec. Serv. Co. v. Linebery, 327 S.W.2d 657, 667 (Tex. Civ. App.—El Paso 1959, writ dism'd).

3. *See generally* Belli, *Demonstrative Evidence and the Adequate Award*, 22 MISS. L.J. 284 (1951); Knepper, *Exhibits and Demonstrative Evidence*, 30 INS. COUNSEL J. 133 (1963); Ladd, *Demonstrative Evidence and Expert Opinion*, 1956 WASH. U.L.Q. 1.

4. Photographs constitute "written evidence" under rule 281 and are properly sent to the jury room. Texas Employers Ins. Ass'n v. Crow, 148 Tex. 113, 114, 221 S.W.2d 235, 236 (1949). No specific rule of civil procedure governs the taking of real, non-documentary, evidence to the jury room; it is a matter for trial court discretion. *See* Linch v. Paris Lumber & Grain Elev. Co., 80 Tex. 23, 35, 15 S.W. 208, 212 (1891) (in action for breach of building contract, within trial court discretion to allow piece of broken cast iron column, in evidence, to be taken to jury room); Medrano v. City of El Paso, 231 S.W.2d 514, 516 (Tex. Civ. App.—El Paso 1950, no writ); Davis v. Callen, 250 S.W. 305, 307 (Tex. Civ. App.—Beaumont 1923, no writ) (proper to allow mechanical model of shaker bar to go to jury room in suit by railroad fireman for injuries caused by defective shaker bar on engine). *See generally* 3 R. MCDONALD, TEXAS CIVIL PRACTICE § 14.08.2, at 556 (rev. ed. 1970).

5. Wilson v. People, 84 P.2d 463, 467 (Colo. 1938).

6. *E.g.*, Higgins v. Los Angeles Gas & Elec. Co., 115 P. 313, 314-15 (Cal. 1911); Wilson v. People, 84 P.2d 463, 467 (Colo. 1938); People v. Bartone, 172 N.Y.S.2d 976, 980 (Westchester County Ct. 1958).

7. IX W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 154-55 (3d ed. 1944).

clear purpose in allowing the sealed papers to go to the jury room was to permit the jurors to verify, from their own knowledge, the genuineness of the seal, and not to give them an opportunity to read the papers.[8] In any event, it was unlikely that the papers could have been read since the jurors were almost exclusively illiterate.[9] This also seems to be the reason why unsealed papers were excluded from the jury room—apart from verifying a seal, the jurors had no possible use for a document. Apparently the early courts were not concerned about evidence, as such, in the jury room or they would not have permitted the use of real evidence, sealed papers, and even unsealed papers, when both parties consented. Nevertheless, an elaborate justification for the sealed paper rule was propounded in the eighteenth century by Lord Gilbert. He argued first, that since sealed papers were inherently more valuable and important, it was proper that they should make the final impression on the jury; second, that sealed papers often contained complicated matters and were of little value if merely read to the jury; and finally, that since only sealed writings had a "credit," or value, apart from the credit given by a court, only they had "credit" when physically removed from a court.[10]

This argument has, as Professor Wigmore notes, the ring of artificiality and contrivance.[11] Apparently Lord Gilbert found the rule and then merely sought to support it, without considering whether it continued to be desirable. In fact, it no longer was so. Many jurors could read by the eighteenth century and consequently, the reason for the rule's existence had disappeared.

Of course, the sealed papers rule is no longer the law, but the same unquestioning spirit which prompted Lord Gilbert to defend the rule after its purpose had vanished remains and is currently responsible for the perpetuation of the exclusion of depositions from the jury room. Whatever utility that exclusion once had is now past, and the argument normally introduced in defense of it—protection against over-emphasis—is no longer tenable.

The Over-emphasis Argument

Depositions are an exception to the traditional notion that testimony should be given in open court, in the presence of the parties, their counsel, the court, the jury, and the public.[12] Because they are in derogation of the

8. Higgins v. Los Angeles Gas & Elec. Co., 115 P. 313, 315 (Cal. 1911).
9. *Id.* at 315.
10. J. GILBERT, EVIDENCE 17 (1726), *quoted in* VI J. WIGMORE, EVIDENCE § 1913, at 608 (3d ed. 1940).
11. VI J. WIGMORE, EVIDENCE § 1913, at 608 (3d ed. 1940).
12. *See* Clegg v. Gulf, C. & S.F. Ry., 104 Tex. 280, 283, 137 S.W. 109, 110 (1911) (written interrogatories); Rice v. Ward, 93 Tex. 532, 536, 56 S.W. 747, 749 (1900).

common law, their use in Texas is controlled entirely by rules and statutes.[13] Among these is the exclusionary provision of rule 281. A similar rule, although not always statutory, is followed in most other jurisdictions,[14] and may have been the practice at common law.[15] The justification given by the Texas courts for this exclusion is that to do otherwise would overemphasize the testimony contained in the deposition.[16]

Under the current rule, both the testimony of a witness who appears in open court and the testimony contained in a deposition which is merely read in the courtroom are taken to the jury room preserved in the same medium—the memories of the jurors.[17] If, however, the deposition itself were allowed in the jury room, the jurors, having it constantly before them, could read and re-read it. Since the testimony contained in the deposition would be present during their deliberations, it would make a stronger impression on them and be emphasized relative to the in-court testimony. They could "read, discuss, dissect and, if disposed, torture the words [of the deposition] from their true meaning."[18] Indeed, the Utah Supreme Court has stated that to permit a deposition in the jury room is equivalent to allowing the deposing witness to attend the jury deliberations.[19]

Despite the clear logic of this position, it has not proven to be compelling in other jurisdictions. Several courts, most notably those in Alabama, have simply relied on the trial judge's discretion in determining whether depositions should go to the jury room.[20] In addition, some courts, in explaining

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13. Reilly v. Buster, 125 Tex. 323, 328, 82 S.W.2d 931, 933 (1935); Garner's Adm'r v. Cutler's Adm'r, 28 Tex. 175, 183 (1866) (statutes must be "fully and fairly" complied with); Johnson v. State, 27 Tex. 758, 765 (1865).

14. *E.g.*, Higgins v. Los Angeles Gas & Elec. Co., 115 P. 313, 315 (Cal. 1911); Gills v. Angelis, 312 So. 2d 536, 537 (Fla. Dist. Ct. App. 1975); Whitehead v. Seymour, 169 S.E.2d 369, 371 (Ga. Ct. App. 1969); Rawson v. Curtiss, 19 Ill. 455, 480 (1858); Skinner v. Neubauer, 74 N.W.2d 656, 660 (Minn. 1956). *See generally* Annot., 57 A.L.R.2d 1011 (1958).

15. *See* Hillord v. Hall, 81 Eng. Rep. 787 (K.B. 1676) (improper to give depositions to jury during their deliberations, and is ground for new trial if verdict is in favor of party who did so).

16. Butler v. Abilene Mut. Life Ins. Ass'n, 108 S.W.2d 972, 974 (Tex. Civ. App.—Eastland 1937, writ dism'd); England v. Pitts, 56 S.W.2d 493, 497 (Tex. Civ. App.—Dallas 1932, writ dism'd); *see* Harris v. Levy, 217 S.W.2d 154, 158 (Tex. Civ. App.—El Paso 1948, no writ); Trinity & B.V. Ry. v. Lunsford, 183 S.W. 112, 114 (Tex. Civ. App.—Austin 1915, no writ).

17. It should be noted, however, that under TEX. R. CIV. P. 287, if the jurors disagree as to the statement made by a witness, they may have that portion of his testimony read to them from the court reporter's notes.

18. Rawson v. Curtiss, 19 Ill. 455, 480 (1858).

19. State v. Solomon, 87 P.2d 807, 811 (Utah 1939).

20. Western Ry. v. Brown, 196 So. 2d 392, 405-406 (Ala. 1967) (trial court discretion); Newport News & M.V.R. v. Mendell, 34 S.W. 1081 (Ky. Ct. App. 1896); Indianapolis & S.E. Trailways, Inc. v. Cincinnati St. Ry., 142 N.E.2d 515, 521 (Ohio 1957) (depositions are properly taken to jury room in exceptional and unusual circumstances).

why depositions are excluded either ignored or placed less reliance on the over-emphasis argument.[21]

Significantly, Texas has been cautious in extending the deposition exclusion to other items, even in the face of the argument that the policy against over-emphasizing certain testimony demands such an extension. Admittedly, the use of certain exhibits which were not truly depositions has been banned during deliberations on the ground that they were sufficiently similar to depositions, and that it would be error to allow them into a jury room.[22] Two Texas Court of Civil Appeals cases are exemplary. In *Green v. Gresham*,[23] the court held it to be error to permit an affidavit, read in evidence as the testimony of one witness, to be in the jury room since the affidavit was a deposition within the meaning of the then current statute which excluded depositions. In the second case, *Hall v. Cook*,[24] the paper in question contained statements of the testimony two witnesses would give if present at the trial. Only one of the two witnesses eventually testified. The court held that it was certain that the paper could not go to the jury room while it contained both statements, and said that the use of the paper would be questionable even if the statement of the witness who testified had been detached.[25] It should be noted that in both of these cases the item excluded was exceptionally close to being a deposition; it was a written statement, read as the testimony of a witness.

In other cases, where the exhibit was less similar, Texas courts have rejected the argument. For example, in *Houston, E. & W.T. Ry. v. Wilson*,[26] the Texas Court of Civil Appeals held that a verified written statement of the plaintiff's claim in an action against the railroad for killing stock was not a deposition and could properly be admitted into a jury room.[27] Similarly, in *Trinity & B.V. Ry. v. Lunsford*,[28] the Austin Court of Civil Appeals held that a brief written statement made by the plaintiff shortly after an accident, which conflicted with his testimony in court, was not a deposition and should have been allowed to go to the jury room.[29] In these two cases, the statement in question had not been introduced for the

21. Higgins v. Los Angeles Gas & Elec. Co., 115 P. 313, 315 (Cal. 1911); Indianapolis & S.E. Trailways, Inc. v. Cincinnati St. Ry., 142 N.E.2d 515, 521 (Ohio 1957) (mentions both arguments); *see* Western Ry. v. Brown, 196 So. 2d 392, 405-406 (Ala. 1967) (within trial court's discretion to permit depositions unaffected by inadmissible matter to go to jury room).

22. Bonds v. Lloyd, 218 S.W.2d 334, 336 (Tex. Civ. App.—El Paso 1948, writ dism'd); Hall v. Cook, 117 S.W. 449, 451 (Tex. Civ. App. 1909, no writ); Green v. Gresham, 53 S.W. 382, 383 (Tex. Civ. App. 1899, no writ).

23. 53 S.W. 382 (Tex. Civ. App. 1899, no writ).

24. 117 S.W. 449 (Tex. Civ. App. 1909, no writ).

25. *Id.* at 451.

26. 84 S.W. 274 (Tex. Civ. App. 1904, no writ).

27. *Id.* at 275.

28. 183 S.W. 112 (Tex. Civ. App.—Austin 1915, no writ).

29. *Id.* at 113.

purpose of furnishing the testimony of an absent witness, but rather to establish the making of a claim[30] or to impeach,[31] and the similarity to a deposition was, therefore, considerably lessened.

One case does, however, extend the scope of the deposition exclusion to include a written statement introduced purely for impeachment purposes and not as testimony. In *Bonds v. Lloyd*[32] excerpts from the transcript of a court reporter's notes of the testimony of the defendant in another trial had been put in evidence to impeach him. The El Paso Court of Civil Appeals held that the exhibit was not "written evidence" within the meaning of rule 281, but was, instead, a deposition, and that it was error to allow the jury to use it in their deliberations.[33] This decision represents the furthest extension of the rule 281 "deposition" exclusion.

In addition to efforts to classify other written statements as "depositions" within the meaning of rule 281, another extension has been suggested. It has been argued that the policy of avoiding over-emphasis ought to preclude sending back exhibits which are but the tangible embodiment of oral testimony.[34] This argument proved persuasive to an Arizona Court of Appeals in *Gallagher v. Viking Supply Co.*[35] There, the court held that a chart showing the plaintiff's alleged damages was duplicative of his oral testimony, and that to allow it to go to the jury room would have unduly emphasized it.[36]

This argument has had only limited success in Texas. In *Harris v. Levy*,[37] a sketch of the scene of a car and truck collision, made by a witness and attached to his deposition, was said to be properly kept from the jury. The El Paso Court of Civil Appeals reasoned that the sketch was only the witness' verbal testimony reduced to "lines and symbols."[38] The sketch lacked any value as proof apart from the testimony which it sought to explain, and the court feared that allowing its use during deliberations would only have given "undue prominence" to the evidence contained in the deposition.[39]

An opposite result was reached, however, by the Fort Worth Court of Civil Appeals in *City of Denton v. Hunt*.[40] There, in a highway condemna-

30. Houston, E. & W.T. Ry. v. Wilson, 84 S.W. 274 (Tex. Civ. App. 1904, no writ).
31. Trinity & B.V. Ry. v. Lunsford, 183 S.W. 112 (Tex. Civ. App.—Austin 1915, no writ).
32. 218 S.W.2d 334 (Tex. Civ. App.—El Paso 1948, writ dism'd).
33. *Id.* at 336.
34. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 217, at 540 n.30 (2d ed. 1972).
35. 411 P.2d 814 (Ariz. Ct. App. 1966).
36. *Id.* at 819.
37. 217 S.W.2d 154 (Tex. Civ. App.—El Paso 1948, no writ).
38. *Id.* at 158.
39. *Id.* at 158.
40. 235 S.W.2d 212 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).

tion suit, a printed chart of the oral testimony of the defendant on direct examination was prepared. The chart itemized the individual lots, gave the respective market values of the part of each lot which was to be taken, the claimed market value of the remainder of such lots before and after condemnation, and summarized the respective totals thereof. It was held that the chart was a "memorandum to which [the witness] referred in refreshing his memory while on the witness stand," that it was not "in the form of a deposition of a witness," and that there was no error in permitting it to go to the jury room.[41]

In each of these two cases, the evidence in question was a pictorial rendition of a witness' oral testimony—a sketch and a chart—and yet, though the decisions are almost contemporaneous, the results are conflicting. This lack of uniformity is susceptible to several explanations. One explanation is that it indicates a reluctance by the Fort Worth court to expand the exclusion to an area where it was quite logically applied by the El Paso court. That reluctance, in turn, may well suggest an undercurrent of dissatisfaction with the exclusion itself.

EVIDENCE APPEALS TO MANY SENSES

The reluctance of the Texas courts to extend the policy of avoiding overemphasis significantly beyond the exclusion of actual depositions probably results from a realization that despite a certain syllogistic logic, the overemphasis argument is valid only when a narrow view of trial court procedure is adopted. The argument implicitly assumes that the only evidence against which the depositions are competing is other oral evidence. This, of course, is not the case. Although never completely true, it has ceased to be even remotely so. While submission of non-oral evidence dates back to the common law,[42] it has become even more important and widespread as society has become increasingly visually oriented, and as ideas are more frequently committed to writing.[43] Often, therefore, evidence which ap-

41. *Id.* at 213.

42. J. THAYER, CASES ON EVIDENCE 720 (2d ed. 1900) states:

> Nothing is older or commoner in the administration of law, in all countries, than the submission to the senses of the tribunal itself, whether judge or jury, of objects which furnish evidence. The viewing of the land by the jury, in real actions, of a wound by the judge where mayhem was alleged, and of the person of one alleged to be an infant, in order to fix his age, the inspection and comparison of seals, the examination of writings to determine whether they were "blemished," the inspection of the implements with which a crime was committed, or of a person alleged, in a bastardy proceeding, to be the child of another, are a few illustrations of what may be found abundantly in our own legal records and textbooks, for seven centuries past.

43. Knepper, *Exhibits and Demonstrative Evidence*, 30 INS. COUNSEL J. 133 (1963) ("especially since the advent of television, the public has become pictoral minded"); Ladd, *Demonstrative Evidence and Expert Opinion*, 1956 WASH. U.L.Q. 1 ("People are pictoral-minded today").

peals to the jurors' aural senses will be controverted not by other oral testimony, but by evidence which appeals to their visual senses. Photographs, charts, and maps are in constant use in modern trials, and all have a purely visual appeal.

It must not be assumed, however, that only the senses of sight and sound may be invoked. Exhibits may be introduced which require the jurors to use their sense of touch. For example, in *Woodward & Lothrop v. Heed*,[44] the plaintiff sought to establish a breach of an implied warranty in the sale of a fur coat. It was her contention that despite normal use and care of the coat, its fur had worn off. The defendants introduced two expert witnesses who testified that the coat showed no more than natural wear, and that the fur had not worn off, but rather was "matted down" and could be restored by a process of heavy brushing. Noting that the "physical facts speak louder than the testimony of experts," the court held that it was proper for the coat to be put in evidence and inspected and examined by the jurors to determine if the fur had worn off or was merely matted down.[45] Such a process would necessarily involve the tactile senses of the jurors.

Similarly, that evidentiary exhibits can be designed to appeal to the jurors' olfactory and gustatory senses is made clear by cases in other jurisdictions. In *State v. Mercier*,[46] for example, the jurors were asked to smell certain cans alleged to have contained liquor. In *People v. Kinney*,[47] the jurors were allowed to taste some cider to determine whether it was hard or soft.

Undeniably, to allow depositions into the jury room would emphasize them relative to the purely oral testimony given during the trial; to allow other forms of tangible evidence, however, such as the furcoat in *Woodward & Lothrop v. Heed*, into the jury room would undoubtedly emphasize them relative to the purely oral testimony. The truth of this assertion is found in tht same argument that is used against depositions: the presence of any exhibit in the jury room allows the jurors to examine and inspect it, and allows its whole weight and force to be constantly before them. The jurors are not required to merely remember what the fur coat felt like, or what a photograph showed; they are allowed to take such evidence into deliberations. Clearly, this emphasizes it, yet it is entirely proper under current Texas practice.[48]

Depositions Compared to Photographs

The fallacy of excluding depositions from the jury room is best demonstrated by comparison to the practice of allowing photographs. That photo-

44. 44 A.2d 369 (D.C. Mun. Ct. App. 1945).
45. *Id.* at 370, *quoting* Reid v. Ehr, 174 N.W. 71, 72 (N.D. 1919).
46. 127 A. 715 (Vt. 1925).
47. 83 N.W. 147 (Mich. 1900).
48. Cases cited note 4 *supra*.

graphs are valuable evidence is undisputed; because of this, they are routinely admitted into evidence, and, at least since 1949, it has been permissible to send them to the jury room.[49]

While two theories of the evidentiary nature of photographs and x-rays exist,[50] a resolution of that argument is unnecessary here, since the point sought to be made is equally well supported by both theories. According to Professor Wigmore, a photograph is no more than the non-verbal expression of the witness upon whose foundation testimony its authenticity rests.[51] It is merely that witness' testimony in illustrated form: a "pictoral communication of a qualified witness who uses this method of communication instead of or in addition to some other method."[52] Other authorities disagree, and urge that once a proper foundation has been established as to the accuracy and authenticity of a photograph, "it speaks with a certain probative force in itself."[53] Not only may photographs be used to illustrate a witness' testimony, they may be independent "photographic" or "silent" witnesses themselves.[54]

Irrespective of whether the photograph is considered to be merely the illustrated testimony of a human witness, or an independent, silent witness itself, to allow it to be used by the jurors during their deliberations is to allow testimony into the jury room. Whether the testimony is that of the human witness or of the camera is unimportant. Under the over-emphasis argument, it should be improper, and yet the Texas Supreme Court has expressly held that photographs constitute "written evidence" within the meaning of rule 281 and may be taken to the jury room.[55] Such a holding indicates that Texas is not truly committed to the over-emphasis argument. "Written evidence" *must* be sent back;[56] non-documentary evidence *may* be sent back.[57] This practice undoubtedly emphasizes both relative to oral evi-

49. Texas Emp. Ins. Ass'n v. Crow, 148 Tex. 113, 114, 221 S.W.2d 235, 236 (1949); Dallas Ry. & Terminal Co. v. Durkee, 193 S.W.2d 222, 227 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.); Younger Bros. v. Ross, 151 S.W.2d 621, 626 (Tex. Civ. App.—Galveston 1941, writ dism'd); *see* Dallas Ry. & Terminal Co. v. Orr, 147 Tex. 383, 391, 215 S.W.2d 862, 866-67 (1948). *But see* Houdaille Indus., Inc. v. Cunningham, 502 S.W.2d 544, 549 (Tex. 1973) (photographs are not written communications under TEX. R. CIV. P. 167).

50. People v. Bowley, 31 Cal. Rptr. 471, 474 (1963).

51. III J. WIGMORE, EVIDENCE § 791, at 219 (Chadbourn rev. ed. 1970).

52. *Id.* § 793, at 239.

53. C. SCOTT, PHOTOGRAPHIC EVIDENCE § 601, at 476 (1942).

54. Gardner, *The Camera Goes to Court*, 24 N.C.L. REV. 233, 245 (1946).

55. Texas Employers' Ins. Ass'n v. Crow, 148 Tex. 113, 114, 221 S.W.2d 235, 236 (1949).

56. Cases cited note 1 *supra.*

57. *See* Linch v. Paris Lumber & Grain Elev. Co., 80 Tex. 23, 35, 15 S.W. 208, 212 (1891); Medrano v. City of El Paso, 231 S.W.2d 514, 516 (Tex. Civ. App.—El Paso 1950, no writ); Davis v. Callen, 250 S.W. 305, 307 (Tex. Civ. App.—Beaumont 1923, no writ).

dence, whether as in-court testimony or as depositions. If unfairness were the actual concern of the courts, they would not allow this action.[58]

OTHER ARGUMENTS AGAINST DEPOSITIONS IN THE JURY ROOM

The over-emphasis argument is untenable since other forms of evidence which are subject to the same objection are regularly given to a deliberating jury. It is possible, of course, that other, unexpressed reasons lie behind the exclusion. Although never suggested by Texas courts, it has been said that depositions are kept out of the jury room because they contain incompetent and irrelevant material.[59] This rationale, however, presents no problem since under current Texas practice, without exception, an item must be in evidence before it can properly go back.[60] If only part of an item is in evidence, that part must be segregated from the rest of the item before it may go to the jury room.[61] It is suggested that this practice could be extended to depositions; the objectionable portion could simply be deleted from the copy of the deposition which would go back. Such treatment would be analogous to the present Texas practice of detaching independent evidence from depositions and allowing that evidence into the jury room.[62]

One reason remains for excluding depositions. It could be argued that to allow depositions to go to the jury room, with its attendant benefit, would encourage attorneys to offer a deposition as a witness' testimony when they might otherwise have produced the live witness at trial, thereby frustrating a public policy which favored in-court testimony. Such a policy, however, simply is not applicable in Texas. Although historically a deposition could not be used if the deponent was available as a witness, and though that rule

58. An alternative to the current situation would be a totally exclusionary rule. Such a rule has been used. *See* Eden v. Lingenfelter, 39 Ind. 19, 22-23 (1872) ("better practice" is "not to send the evidence out with the jury, except as they carry it in their memory"); Watson v. Davis, 52 N.C. 138, 140-41 (1859); Outlaw v. Hurdle, 46 N.C. 147, 159-60 (1853).

59. Cases cited note 21 *supra.*

60. Triangle Cab Co. v. Taylor, 190 S.W.2d 755, 760 (Tex. Civ. App.—El Paso 1945), *aff'd*, 144 Tex. 568, 192 S.W.2d 143 (1946); Faver v. Bowers, 33 S.W. 131, 133 (Tex. Civ. App. 1895, no writ); *see* Texas & N.O. Ry. v. Lopez, 359 S.W.2d 221, 222 (Tex. Civ. App.—San Antonio 1962, no writ). *But see* Hilker v. Agricultural Bd. & Credit Corp., 96 S.W.2d 544 (Tex. Civ. App.—Amarillo 1936, writ dism'd). A memorandum, not marked for identification or formally introduced in evidence, was properly taken to the jury room; since the memo was read to jury and "exhibited" to them, it was in evidence for all practical purposes, and objection was held hypercritical. *Id.* at 546.

61. Texas Gen. Indem. Co. v. Ellis, 421 S.W.2d 467, 472 (Tex. Civ. App.—Tyler 1967, no writ); Price v. White Line Cab & Baggage Co., 87 S.W.2d 1103, 1105 (Tex. Civ. App.—Waco 1935, writ dism'd); *see* South Texas Mort. Co. v. Dozier, 158 S.W. 1051, 1052 (Tex. Civ. App.—Austin 1913, no writ); Sargent v. Lawrence, 40 S.W. 1075, 1077 (Tex. Civ. App. 1897, no writ).

62. Pridgen v. Hill, 12 Tex. 187, 190 (1854); Kaminski v. Kaminczak, 86 S.W.2d 883, 884 (Tex. Civ. App.—Beaumont 1935, no writ); Frugia v. Trueheart, 106 S.W. 736, 740 (Tex. Civ. App. 1907, writ ref'd); Texas & P. Ry. v. Robertson, 35 S.W. 505 (Tex. Civ. App. 1896, writ ref'd).

is still applied in some jurisdictions, it is not the law in Texas.[63] The fact that a witness is present at the trial does not bar the use of his deposition.[64]

In any event, the concern would be needless. The argument ignores the fact that a witness present at the trial has the opportunity to impress the jury with his credibility, rendering his testimony more effective than any deposition.[65] Moreover, a witness can prepare a chart illustrating the principal points of his testimony and, if the court consents, that chart may go to the jury room, thereby securing the very benefit claimed to have been lost by not reducing the testimony to a deposition.[66] Finally, the argument ignores the different, yet equally important, policy that jurors should make an enlightened, careful decision. To that end, it should be proper to allow any evidence to be used which will legitimately aid the jurors in reaching their conclusion.[67]

Such an approach has been suggested in several Texas cases. In 1854, in *Pridgen v. Hill*,[68] the Texas Supreme Court held that statements of accounts, attached to a deposition, should not have been read aloud, but rather should have been sent back to the jury room since to merely read them would "have been of very little service in order to [*sic*] their due understanding and computation."[69] A similar reason was offered for allowing copies of an "account sale" to go back to the jury room in *Texas & P. Ry. v. Robertson*.[70] There, the Texas Court of Civil Appeals held that they were "useful memoranda in aid of the recollection of the jury as to the exact figures, to avoid mistakes in assessing the amount of the damage."[71] These cases suggest that the test which should govern the taking of items to the jury room is whether the items will be of legitimate assistance in deciding

63. Masterson, *Adversary Depositions and Admissions Under Texas Practice*, 10 Sw. L.J. 107, 108 (1956).

64. O'Connor v. Andrews, 81 Tex. 28, 37, 16 S.W. 628, 631 (1891); Rogers v. Yarbrough Const. Co., 291 S.W.2d 459, 463 (Tex. Civ. App.—Austin 1956, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Pillow, 268 S.W.2d 716, 720 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

65. TEX. R. CIV. P. 215(c), authorizing video-taped depositions, may dramatically reduce this difference. The enactment of the rule should not, however, prevent the amendment of rule 281 to allow depositions in the jury room. There is no theoretical reason why video-taped depositions should not be used during deliberations. If, however, it proves impractical for the jury to operate the equipment, provision could be made for reducing the deposition to a transcript.

66. City of Denton v. Hunt, 235 S.W.2d 212, 213 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).

67. Most evidence will be properly sent to the jury room. Any objections which might argue against a particular exhibit going back are, moreover, most correctly made to the introduction of the item into evidence. *See* Texas Employers' Ins. Ass'n v. Crow, 148 Tex. 113, 116, 221 S.W.2d 235, 237 (1949); Tanner v. Texas Employers' Ins. Ass'n, 438 S.W.2d 395, 399 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.).

68. 12 Tex. 187 (1854).

69. *Id.* at 190.

70. 35 S.W. 505 (Tex. Civ. App. 1896, writ ref'd).

71. *Id.*

the case. Most items in evidence, including depositions, would assist, but some would not. A rule of trial court discretion, with its obvious flexibility, is the best solution.[72]

CONCLUSION

Under rule 281, depositions are the sole exception to the rule that written evidence should be permitted in the jury room for use during deliberations. This exclusion has been explained as a means of avoiding over-emphasis, but this is only partially correct. Only over-emphasis relative to the other class of oral evidence, in-court testimony, is prevented; evidence which appeals to the jurors' other senses is regularly emphasized at the expense of both by allowing it to go back.

Rule 281 indicates that Texas generally favors the taking of evidence to the jury room. The exclusion of depositions from this general rule has been the result of inadequately considered arguments and a reluctance to break with the past. This situation should be remedied. If the evidence contained in a deposition would be of help to the jury in determining the issues of a case, it should be sent back. To suggest that allowing such use will distort the jurors' judgment through over-emphasis is to argue against permitting any evidence to enter the jury room. Such an absolute exclusionary rule is conceivable, but unlikely to be adopted. In any event, since Texas has not adopted such a rule it is time rule 281 was amended to delete the exclusion of depositions.

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72. This is the position taken by the MODEL CODE OF EVIDENCE rule 105(m) (1942).