# Chapter 3

# PREPARING TO TAKE A DEPOSITION

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### Scope Note

This chapter explains how to prepare to take a deposition. It begins with a discussion of witness investigation and a number of types of in-house preparations. It then addresses preparations to be undertaken specifically by the examiner, including the assembly of checklists and other materials for use during the deposition session. The chapter concludes with a number of procedural issues that should be addressed in connection with the deposition.


## § 3.1 INTRODUCTION

Deciding to take a deposition other than for learning about the case is usually motivated by the need to do the following:

- accumulate evidence;
- "freeze" testimony, to "box" a witness so that when that witness appears at trial he or she cannot deviate from the truth (or at least the first version of his or her story); or
- preserve testimony from witnesses who are or will be unavailable for reasons of health, distance, or death.

It may also be important to your case to display your leverage through taking a deposition. If a witness is particularly important, his or her testimony may greatly bear on the major issues of the case. That witness's performance, preserved on the record, may be very important. Also, a thorough deposition that provides evidence that is extremely favorable to one side creates substantial leverage. By confidently and aggressively pursuing a tough deposition early in the case, you can convey another message about your strategy. Such tactics create an impact on the other side that cannot be ignored.

As you prepare to take a deposition, you should remember that the objective of any deposition is to prepare for trial and set up a climate for settlement. Because a deposition that is skillfully taken can certainly help to do this, you should carefully structure the taking of the deposition to make it as effective as possible.

## § 3.2 INVESTIGATING THE DEPOSITION WITNESS

Often, a lawyer will be forced to take a deposition "blind" because there is either no time or no information available about the witness, and circumstances dictate that the deposition must be taken then or not at all. It may do more harm than good to go through with the deposition as scheduled in such circumstances. However, if the deposition must proceed, you should use neutral questions and watch for dangerous areas of testimony. In contrast, if there is time and opportunity for preparation before taking a deposition, such preparation should begin with an investigation of the witness.

### § 3.2.1 Documents

In conducting your investigation, the intelligent use of paralegals and other attorneys will save time and effort for you, as well as expense for the client. The first places to start an investigation of a witness are your own files, your client's files and the files of parties who are friendly to you. Files that belong to friendly parties and to your own client are called "open files."

A second source of witness information is document production conducted under Rule 34 of the Federal or Massachusetts Rules of Civil Procedure. If there has been Rule 34 document production, these documents should be combed for any references to the witness or to the subject matter of which the witness may have knowledge.

Another source of witness information that is sometimes useful is relevant documentation belonging to third parties who are not necessarily friendly to your side. If these documents can be obtained by informal oral or written request, not only will it be easier and save time, but also the witness will not necessarily be aware that you have documents from third parties that bear on his or her deposition testimony. Letter requests for documents from third parties are invaluable because they can be used to develop facts and evidence, they force organization on your own part, and they may yield information for cross-examination at trial. If these documents cannot be obtained voluntarily by a letter request or phone call, then you should serve a notice of deposition and a subpoena pursuant to Rule 45 of the Federal or Massachusetts Rules of Civil Procedure. A Rule 45 subpoena (which includes a subpoena duces tecum) requires time and advance planning of key depositions and may take several months. Therefore, third-party production may not be worthwhile in smaller cases, but in large cases, there usually is time to do it right.

## § 3.2.2 Prior Testimony or Publications

Other sources of information about the witness are prior pleadings in your case or other cases in which the witness has been involved. The witness may have given affidavits in support of motions for preliminary injunctions, or you may locate deposition excerpts mentioned in memoranda or in filings with the court, or information in the complaint that will lead to other documents to examine. Clearly, answers to interrogatories and requests to admit already filed in your case also are important sources.

Additional sources of information include previous depositions of the witness and other public or sworn statements (e.g., if the witness gave grand jury testimony, was deposed pursuant to a civil investigative demand, appeared before a regulatory board, or was subpoenaed to appear before a congressional committee or any municipal or state body). An FBI 302 document, which is a memorandum of a witness interview, is another potential source of information about a particular witness. You may also search deposition banks held by national organizations, such as the Association of Trial Lawyers of America or the Defense Research Institute, or by specialty groups, such as in the asbestos or agent orange class action litigations, where a great deal of intelligence has been gathered and may already have been digested as to a witness's name and issue.

Publications written by the witness may also prove useful. When dealing with experts, check the index of legal periodicals or periodicals in the field of expertise of the witness to locate prior statements made and books or publications he or she may have written. In addition, LEXIS-NEXIS, WESTLAW, and other online sources may provide quick and valuable information, particularly in the area of experts or well-known figures.

A basic Internet search may also lead you to useful information about the witness. The popular press has recently reported on cases in which a witness was effectively impeached with his or her own prior blog entries.

## § 3.2.3 Investigative Interviews

While completing your document and testimony search on the witness, you should also conduct interviews to assist you in investigating the witness. The first and most obvious interviewee is your client, whom you should interview not once, but many times. Most clients continue to remember more and more each time they are interviewed; as you learn more, you are able to ask questions that stimulate recollections that did not emerge at the initial interview.

Industry experts who are available to you and who are not likely to talk to the other side are another source in preparing your investigation of the witness. Interviews of other witnesses, beginning with "friendly" witnesses similarly situated, may also provide you with useful information. However, note that conversations with such witnesses are normally not privileged and, therefore, are discoverable by the other side through deposition or at trial. Many times you may not wish to reveal to opposing counsel how much you know at the discovery stage in your case. Consider putting questions to such witnesses through their counsel, thereby retaining protection of the communication under the attorney-client privilege or work product doctrine.

## § 3.2.4 Contacts with Current and Former Employees of Opposing Party

Rule 4.2 of the Massachusetts Rules of Professional Conduct governs communications with persons represented by counsel. A number of recent developments have helped to clarify the circumstances under which this rule will prohibit ex parte contacts with a company's current or former employees.

> **Practice Note**
>
> Practitioners should familiarize themselves with these standards and monitor this area of the law for further developments.

In *Messing, Rudavsky & Weliky, P.C. v. President of Harvard College*, 436 Mass. 347 (2002), a law firm representing a plaintiff in an employment discrimination case conducted informal ex parte interviews with five of the defendant's employees. *Messing, Rudavsky & Weliky, P.C. v. President of Harvard Coll.*, 436 Mass. at 350. The defendant brought a motion for sanctions, which was granted by the superior court based in part on language in Comment [4] indicating that Rule 4.2 applied to any person "whose statement may constitute an admission on the part of the organization." On appeal, the Supreme Judicial Court vacated the court's order, noting that the comment was merely a "guide to interpretation" and held that Rule 4.2 prohibits ex parte contact with only those employees who

- exercise managerial responsibility in the matter,
- are alleged to have committed the wrongful acts at issue in the litigation, or
- have authority on behalf of the corporation to make decisions about the course of the litigation.

*Messing, Rudavsky & Weliky, P.C. v. President of Harvard Coll.*, 436 Mass. at 357.

On June 5, 2002, the Supreme Judicial Court amended Comment [4] to Mass.R.Prof.C. 4.2. In addition to incorporating the three categories discussed above and deleting the reference to whether employees' statements may constitute admissions, the revised comment refers to the potential interview subject as "agent or employee" rather than "person." Comment [4] now reads as follows:

> In the case of an organization, [Rule 4.2] prohibits communications by a lawyer for another person or entity concerning the matter in representation only with those agents or employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the organization to make decisions about the course of the litigation. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

*See also* MBA Ethics Op. 2002-3 (June 26, 2002) (relying on new wording of Comment [4] in considering propriety of contacts with former employees).

The Supreme Judicial Court addressed the application of Rule 4.2 to former employees directly in *Clark v. Beverly Health & Rehabilitation Services, Inc.*, 440 Mass. 270 (2003). *See also Patriarca v. Ctr. for Living & Working, Inc.*, 438 Mass. 132 (2002) (finding that former employees sought for interviews in that case could have been contacted even if they had been current employees). The court in *Clark* concluded that, "[w]hile the rule prohibits a lawyer from making ex parte contact with a former employee whom counsel knows to be represented, it neither prohibits, nor purports to regulate, private contacts between an adverse attorney and the organization's former employees as such." *Clark v. Beverly Health & Rehab. Servs., Inc.*, 440 Mass. at 274 (citation omitted).

**Practice Note**

The court noted that applicable privileges and ethical requirements beyond those set forth in Rule 4.2 must be observed during the conduct of an ex parte interview, including Mass. R. Prof. C. 4.1 (duty of truthfulness to third parties), Mass. R. Prof. C. 4.3 (dealings with unrepresented persons), Mass. R. Prof. C. 4.4 (duty to refrain from unfair or illegal means of obtaining evidence).

## § 3.3 IN-HOUSE PREPARATION

With all of the aforementioned information gathered by paralegals, other lawyers and your own efforts, it may be useful to sit down and brainstorm with your staff about what a particular witness might know. What information could the witness have that would either be valuable to you, or damaging to him or her, or both? A little time spent trying to figure out where the witness will want to go in his or her testimony and what he or she will wish to avoid can be extremely helpful. Analysis by your staff, and also by your client (or, if your client is a business, your client's employee who is closest to the situation) as to what the witness is expected to know may help a great deal as well.

For example, in business litigation, pertinent areas of inquiry might include the following:

- What exactly does this witness do, to the extent that your client knows?
- What is the normal work day for the witness?
- What responsibility does he or she have?
- Who does he or she regularly talk to?
- What committees is he or she a member of within the industry?
- Is he or she a leader?
- What is known about the witness from his or her activities in the business community and elsewhere?

### § 3.3.1 Fact Memorandum

Earlier we mentioned interviewing the client to uncover facts, witnesses and other resources; interviewing in-house and independent experts, and using associates and paralegals to conduct these interviews and compile information. Another important task that can be done up-front by an attorney is compiling a fact memorandum. This memorandum should contain a chronology of the events, tie in documents to the extent known, and provide a dramatis personae of the players and how they fit into the known facts. This fact memorandum is a very important device and should be updated on a regular basis as you learn more from subsequent depositions and documents that are produced.

## § 3.3.2 Staff Conference

Once the supporting materials have been gathered, a staff conference should be called to plan and rehearse the deposition. You should decide who will attend the deposition. The proposed outline that will come from the lawyers and paralegals should be in a three-ringed binder, with the exhibits keyed into your outline and readily available in separate folders. Be sure to have enough copies of all documents for everyone, and if you prefer, everything should be premarked. The examiner's copy should contain highlighted passages to assist in formulating questions, red warning notations to flag sensitive areas, and all of the notes the examiner needs to proceed smoothly and relentlessly. Flagging deposition exhibits with yellow stickers that contain questions or points you wish to examine the deponent upon is invaluable.

> **Practice Note**
> Do not remove the yellow stickers from the examination outline or exhibit until you are absolutely certain that you are through with it. If the recording device is not functioning or the court reporter is out of the room when the examiner has resumed the deposition, entire sections of the examination may be lost and you may have to retake the deposition. If you leave the yellow stickers on as you proceed, it will be far easier to reproduce the same testimony.

## § 3.3.3 Inspection

Before the deposition outline is complete, you should, if possible and appropriate, "walk the property." That is, visit the site of the accident or the use of the device, visit the plant, see the machine in operation, or go to the manufacturer's assembly line if you can. Gain as much of a physical familiarity as possible with the fact situation about which the witness is going to testify. There is nothing so effective as having a witness realize that you have been exactly where he or she is describing, be it the eighth level up in an oil refinery cracking tower or several thousand feet beneath the earth in a mine. It never fails to impress the witness—

and sometimes his or her lawyer—that you have taken the time to go where the events took place.

Other sources of information include photographs, blueprints, plans, schematics, instruction manuals and any documents bearing on the subject matter that are at least outwardly neutral, but that provide perspective on the witness's subjective answers. If you are already familiar with the established procedure, and a witness departs from the norm, you should be able to catch the deviation and use it smoothly in your questioning without having to wait for a break in the testimony to discuss it with your accompanying expert.

## § 3.3.4 Preparation and Use of Exhibits

In certain situations—particularly in complex cases—you should bring to the deposition any plans, schematics or exhibits you want the witness to identify. Secure from the witness a positive authentication of all deposition exhibits in case they turn out to be useful evidence at trial. You should first go through these materials with your own expert and set them up in a manner that will lead to their intelligent use at trial. A common mistake is not to consider before the deposition how the exhibit will be used at trial. This can result in exhibits that are small and illegible but part of the deposition and that the other side can force you to use at trial. If you want to have a newspaper-size exhibit or an even larger one and you know full well that at some point you will want to use it at trial, use it as a deposition exhibit and have the witness authenticate and identify it.

The impact of being well prepared cannot be overstated. For example, you may decide to use marks (sometimes also called "chalks") during the deposition. Marks are representations that are not entered into evidence, but may be used to illustrate other evidence to the jury at trial. Marks need not be scientifically accurate or to scale, but the witness should state that, in his or her opinion, it is generally a fair and accurate representation of the particular object or scene. For these special exhibits you may need easels, blank paper, colored markers, transparent overlays and utensils of that nature at the deposition that are easily portable. Your directions on how to mark the diagram, chart or object should be well-thought-out so the presentation goes smoothly. You should instruct the witness to be very specific as to the significance of the marks by asking him or her to indicate a legend for each mark somewhere on the special exhibit itself. Another tool that can be used at depositions is a camera, which can record in color when a witness makes a diagram of his or her own. These photos can then be blown up and used as trial exhibits. Some practitioners prefer to use a Polaroid or similar "instant" camera to verify that the exhibit has been accurately recorded.

## § 3.3.5 Preparing Documents for Deposition

Each document to be used in a deposition should have an evidentiary checklist to be sure it meets the criteria for admissibility. This list includes

- authenticity;
- reliability;
- relevance;
- identity of all handwriting—this is particularly important because you do not want to leave yourself open to a dispute as to what the handwriting means; if it is the witness's handwriting, have him or her read it aloud into the record; and
- legibility.

In our day of xerographic and even digital copies, documents often cannot be read. You should make a request on the record or a request well in advance of the deposition for production of the original or a better copy. The best practice is to subpoena the original to the deposition; at that point, you can compare the originals with the deposition copies and sign off on them if they are fair copies. If there are no fair copies, you can arrange for the original to be available or introduced into the deposition.

One of the ways to prepare documents for deposition is to have a checklist assigned to each document to ensure that the document is sufficiently identified and authenticated (if the witness can do it). Every document should be examined as to whether it has any privilege or confidentiality, and you as the examiner should be prepared for any objections along those lines.

## § 3.3.6 Final Procedural Preparation

The last phase of the procedural preparation is the week or ten days before the deposition. There should be a phone call to opposing counsel stating that you expect to be at the deposition location on the date and time fixed. If there are documents to be produced, ask opposing counsel at this time if he or she would be willing to produce the documents in advance. Opposing counsel may not be willing, which will require alternate handling, but in either case, you have confirmed the deposition is to go forward on the intended date. At the deposition, you should have with you any correspondence requesting any documents or special needs assistance.

On the final preparation, you should have the return of service on the deposition subpoena to introduce as an exhibit if it becomes an issue. You or one of your associates should have the responsibility on the day before the deposition of checking with the interpreter, the court reporter, opposing counsel and anyone else who is key or crucial to the deposition. For instance, if your client is going to attend the deposition, remind him or her that the deposition is going forward. You will also want to impress upon your client that even though a party generally has the right to attend a deposition when he or she is not the one being deposed, he or she may not participate on the record during the deposition. This also will allow you to take care of providing logistic support such as lunch and a place for your witness to relax between sessions or to prepare for the next day.

Special depositions, such as video depositions, depositions using interpreters, or depositions of people who have special physical needs, can also be handled expeditiously if you prepare well in advance. One of the mistakes that many lawyers make is not talking to opposing counsel in advance of the deposition to resolve issues that may obstruct the proceedings and that can be dealt with in advance of the deposition. Most of the time it is better to be honest regarding your intentions and determine if opposing counsel intends to oppose. If there will be opposition, then take the matter to court or to a magistrate. This is particularly important early in the case when you are establishing the ground rules. It is most important that this be done courteously, but it should be done firmly and consistently as well.

It is sometimes helpful to have the client, a key employee, or a key witness present at a deposition. Some witnesses will testify more carefully if a potential impeachment witness is there in front of them. If you do have a person present as an observer for your assistance, be ready to justify his or her presence in case of an objection. Be sure to instruct the observer not to say anything on the record and to communicate with you only under secure conditions. If your client will be present at the deposition, it may also help to explain the purpose of the deposition and even point out some highlights for him to look for. An involved client can be very helpful if under control.

## § 3.4 PREPARATION FOR THE EXAMINER

There are several areas where paralegals and other attorneys can assist you, the examiner, thus allowing you to spend more time preparing for the deposition.

## § 3.4.1 Checklists

An issue checklist is a good organizational tool. You should have a standard introductory deposition outline for each witness that includes

- name, home address and business address;
- present employment and title;
- educational background;
- employment history (relate each segment of employment history to the present dispute or determine that it cannot be related);
- an authenticated curriculum vitae, if available;
- prior writings or testimony;
- a detailed examination of the witness's role in the present dispute; and
- document verification:
  - Authenticate all documents, their authors, knowledge of events, relevance, distribution, related documents, and any action taken as a result of the documents.
  - Determine each document's admissibility. Never forget that the deposition is potential trial testimony—each document should be fully authenticated as if in open court so that if you wish to introduce the document in open court with the witness not present, the deposition will suffice.

If you are trying to prove fraud, then fraud issues should be outlined, or if you are trying to prove a conspiracy, the elements of the conspiracy should be outlined. A sample issue checklist to prove conspiracy would enable the examiner to

- identify all coconspirators—who else was at each meeting, and who received letters, phone calls or other communications;
- identify all inception evidence—initial contacts, conversations, letters and fact situations that set the conspiracy in motion;

- provide documentation of any events or correspondence that indicates the conspiracy or from which inferences may be drawn;
- box the witness into testifying in all fact situations that no other event took place or no other people were involved on the particular date or particular meeting;
- establish the basic chronology of the dispute as the witness sees it;
- refresh recollection or not, as strategy dictates; and
- block out the witness from changing his or her testimony: "Have you told us everything you can now remember about the meeting that took place on such day at such place?" "Have we covered every conversation with everyone at the X company concerning the subject of Y?" "Have you told us of every person who attended the meeting on such date?"

The following issue outline would cover fraud and misrepresentation:

- Who made the misrepresentations? To whom? When?
- What did the witness know of the truth or falsity at the time?
- Did he or she ever learn that the facts were different? What did he or she do to verify the facts? What are the facts surrounding the misrepresentation? What has he or she done, if anything, to correct the misrepresentations?
- Who else was aware of the fraud or the misrepresentation? With whom did he or she converse about it?
- What documents were made that concern it? Who keeps the documents, and where are they located?

On your checklist, you would also have subjective points to make. For instance, if your client was the victim of fraud, you would want to have your witness be sure to know what to say when asked, "What did you rely on? What damage did it cause you?" The client should know the answers to those questions. By the same token, if you are defending the person who is alleged to have committed the fraud, he or she should be aware that he or she will be asked about representations which he or she is alleged to have made. Or, in the case of an accused coconspirator, "What did the witness agree to, if anything?" Your client should be aware that these are danger points and should know how to handle them.

You should think carefully about the order in which you organize your checklist or outline. Lawyers will commonly begin the deposition by asking the standard, introductory information and then proceed chronologically through the topics to be covered. However, keep in mind that the witness was likely coached to answer questions in this chronological way. Once in a while, consider varying the order in which you will approach the witness on the issues. For example, sometimes it is very valuable when the witness is not warmed up to "go for the throat" right after asking the name of the witness. This strategy may jar the witness from his or her comfort zone, shake his or her confidence at an early stage and allow for a very effective, successful deposition on your part.

## § 3.4.2 Other Materials

If appropriate, calendars, telephone books, maps, diagrams, and other materials should be available at the deposition for the witness to use.

## § 3.4.3 Uncooperative Witnesses or Counsel

### (a) *Appointment of Special Master*

Another avenue of preparation in a very difficult and bitter case is moving to have a special master appointed to oversee discovery. This situation occurs when the witness or his or her counsel, or both, are so uncooperative and obstructive that nothing else can be done. Open your deposition, set up the other side by asking reasonable questions, and invite them to explain their positions. When you have built into your record that they are absolutely totally obstinate without reason, you can suspend the deposition and go to court to seek appointment of a special master. Many times the mere fact that you are prepared to request judicial intervention will bring the other side around to being reasonable and allow the deposition to proceed. It should never, however, be an empty threat. If you are going to do it, you should prepare the documents and start for the courthouse unless the opposing side comes around. If they do come around, put on the record what has been agreed to, and if the opposing side strays from the agreed terms, head off to court again.

**Practice Note**

Be mindful that judges often have little time, enthusiasm, or patience for dealing with discovery disputes. You should seek judicial relief only when the behavior of the witness or opposing attorney has genuinely prejudiced your ability to represent your client's interests.

When these types of problems arise, local counsel are invaluable. They will know which judge is available in an emergency situation, which magistrate to seek, or which clerk to speak with to obtain the special help you need.

In these situations, it is certainly wise to consider alerting the clerk or the magistrate or emergency judge that you might require a hearing and to find out the most convenient time for such a hearing. Advance warning will save time and decrease the inconvenience to the court of an emergency hearing. Again, the motion to appoint a special master must be in hand, having been prepared in advance so that all you have to do is fill in the names and dates and proceed to court. You also would have to alert the court stenographer of a need for attendance or "instant copy" if the judge says, "No, I will not see you today, but I will see you tomorrow." That means you can get the deposition transcript typed up overnight.

**Practice Note**

If you anticipate that the witness or opposing attorney will be uncooperative at a given deposition, and if your own client's litigation budget will support it, you should consider videotaping the deposition. (See § 3.5.5 below.) Often, witnesses and counsel will be less apt to "misbehave" when there will be a video record of the proceedings in addition to the usual stenographic transcript.

## (b) *Building a Record for Impeachment*

The examiner should prepare for the uncooperative witness. In situations where a witness cannot answer a question due to forgetfulness, some examiners will attempt to use documents to refresh the memory of the witness. This practice seems to be of limited value, in that refreshed memory is for trial. If the witness is not interested in remembering, then introduce as exhibits the documents you intend to put in evidence at trial and ask the witness what comment, if any, he or she can make about them. If the witness takes himself or herself out of the case by saying that he or she does not remember or does not know, so be it; attempting to get the witness to refresh his or her memory when he or she is clearly not going to do so is a waste of time. Therefore, the "refresh memory" documents are more properly "impeachment" documents or documents to take the witness out of the case. If the witness cannot say anything about the document, you are free to use it at trial.

Often, the witness will stoutly declare that he or she knows nothing about a document, but will not have the courage to lie that he or she has never seen it or that it is not authentic. You can often get a document authenticated in a deposition, even though the witness will claim that he or she has no memory of the events that are the subject of the documents.

Where you wish to set up impeachment or an admission from the witness, it is advisable to write out the questions on the vital points to set up either a solid, clear impeachment or a basis for a motion to compel further answers. The examiner should warn the court reporter in advance that an "instant" copy may be necessary in the case of a recalcitrant witness or of a dispute where you want to take it to the court or to the magistrate at once. Do not be afraid to bring the court reporter with you and have him or her read from the deposition transcript directly to the court in an instant hearing to compel answers.

If you plan to use impeachment questions, it is wise to write them out in advance to avoid confusion or error. Some questions are so clear that the other side will be fully aware that you are impeaching. In contrast, the "sleeper" impeachment locks the witness into documents that appear innocuous or not very damaging to the witness, or it locks the witness into prior testimony that impeaches him or her without warning that you intend to use it later at trial. An example of this is the witness's opinion, particularly if it is favorable, of a treatise or text that you intend to use to impeach his or her conclusion. This can be devastating when used at trial. Or you might ask the witness about his or her knowledge of other experts that you intend to use or to rely on and have him or her endorse these other experts or their philosophy generally. Many times, the witness will be eager to show that he or she is intelligent and knowledgeable in the field and will say something like "Oh, yes, I know Dr. X and respect her scholarship and expertise very highly."

### (c) *Motion to Compel Answer*

A witness's refusal to answer that is based on an instruction of counsel is also a matter for which the examiner should be prepared. According to authority in the U.S. District Court for the District of Massachusetts, there is no such thing as a proper instruction not to answer, unless the question is aimed at divulging a trade secret or privileged communication. *American Hangar, Inc. v. Basic Line, Inc.*, 105 F.R.D. 173, 177 (D.Mass. 1985). This view has essentially been codified in Fed. R. Civ. P. 30(c)(2) and Mass. R. Civ. P. 30(c).

The witness's counsel has the burden of moving for an immediate order protecting his or her client pursuant to Fed. R. Civ. P. 30(d). Most of the time, this is not done. In the situation where you are taking the deposition, the better practice is to deal with the situation in the short term, to finish all of the deposition that you can and then go to the court for an order to compel the witness to answer. In an actual situation of a witness being instructed not to answer, if your outline is complete, you can continue briefly. It is reasonable under these circumstances to ask the questions that you wish to be answered so as to build a record even though the witness is instructed not to answer. The court reporter should mark the transcript at this point so there can be an instant transcription or, at least, overnight transcription so you can move immediately for an order from the court. You should also consider confronting opposing counsel with *American Hangar* and the applicable rule of civil procedure to change his or her view about instructing the client not to answer.

## (d) *Special Needs Witnesses*

### Provision for Medical Disability

Occasionally you run into a special needs witness who, for example, has medical problems. If you believe that opposing counsel is attempting to obstruct a proper examination by improperly claiming medical problems, you must deal with the situation. The examiner should discuss with opposing counsel in advance what the demands of the particular witness are. If the demands are so stringent that no real progress can be made in the deposition, then a proposed order or stipulation should be drafted as to how the deposition will be taken. This, along with the proposed stipulation of terms and conditions of the deposition, should be filed in advance of the deposition as a sort of motion in limine. Even if the court declines to act on this motion in advance, it will serve to restrain most counsel, no matter how difficult. In this instance, a judge for all purposes or a magistrate who is running the discovery in your case is far better qualified to handle the dispute than a local magistrate a thousand miles away whose docket is already filled with other matters.

The following are possible suggestions for the stipulation:

- that there be a physician in attendance,
- that the hours be restricted but be set well in advance,
- that regimented rest periods be set well in advance, and
- that it is agreed that you will consult with the magistrate or special master or the judge by telephone and that he or she will be alerted and available on the dates set for the deposition.

There should also be a dedicated location: simple ones, of course, are the court-house, the doctor's office, the office of the witness or sometimes the residence of the witness. The residence or the office of the witness can sometimes be difficult because of phone calls, distractions and so forth. However, you can have a dis-cussion in your stipulation about what interruptions will be allowed. If you have a witness who does have real medical problems, you have an obligation to protect the witness. The first thing is to obtain a comprehensive affidavit from the attending physician with the understanding that he or she may be the subject of a deposition on that affidavit. Often, physicians' affidavits are so outlandish that if they were challenged they would be embarrassing. You must look ahead and understand that, perhaps, your physician is going to be hauled into court by the judge and asked just exactly what he or she means and what is going on. Assuming the witness has a bona fide medical condition, it should be easy enough for the attending physician to give you enough facts to draft a comprehensive affidavit that states what the client can stand by way of examination in the deposition.

## Provision for Interpreter

Other special needs witnesses require an interpreter. This involves far more than just having someone who is qualified in the language of the witness and English available the day of the deposition. The witness should be prepared for an interpreter, and role-playing drills should be performed during this preparation time so that the witness and the interpreter learn how to deal with each other. Although interpreters are not always available for such preparation, you should make an effort to prepare as much as possible. Ordinarily, the interpreter should be interviewed well in advance. Have the interpreter meet the witness to establish the relationship. Prepare a glossary of relevant terms. If exhibits or devices are to be used in the deposition, try to have the interpreter view them in advance so that he or she may determine the proper terminology to translate the item into the deponent's language. If there are any documents that are key, you should arrange for translation in advance if you wish the examination to go smoothly.

The translation should be done by a qualified expert and signed as an affidavit. This sometimes can save hours of arguing over whether the translation was proper because opposing counsel's interpretation differs. You can establish that this is your deposition record, put in the translation, have it authenticated by your witness and by the interpreter, and then leave it for the court to decide whether that is sufficient.

You should also prepare your witness for translation requests from the other side. Depending on the witness's ability generally, and his or her language ability, you may wish to acquiesce in this request or refuse it and have the interpreter translate the documents. You can also have the interpreter take English documents and interpret them in the deponent's language. You may also insist that a neutral interpreter be there to translate but have your own interpreter and witness serve as a check. It is always easier if you have a stipulation on the opposition's use of the interpreter. It is also wise to determine the availability of the interpreter in case the deposition is going to run long. If the deposition lasts longer than the days the interpreter is available, it will be extremely difficult, although not impossible, to switch interpreters and certainly not advantageous if you have been working with a good interpreter. You should remember as part of your checklist that the interpreter should be sworn in at the start of any deposition. Finally, interpreters, just like all other service people, should be paid promptly and consideration should be given to their needs, such as arranging for a cab to take them home if the deposition runs late, and other creature comforts that make it easier on everyone.

**Practice Note**

Interpreter services are available through the Office of Court Interpreter Services (OCIS) of the Administrative Office of the Trial Court. The standards applicable to the OCIS may be found at http://mass.gov/courts/admin/interpreters/finalstanproc.pdf.

# § 3.5 STRATEGIC CONSIDERATIONS

## § 3.5.1 Stipulations

According to Mass. R. Civ. P. 30(e),

> [w]hen the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing . . . .

Such stipulations in the depositions can be extremely important later on. They may seem routine and there is a tendency to play "good sport" by agreeing to them at the beginning of the deposition, but they are extremely important depending on how you see the deposition. If you think that you may use the deposition in the future, you should insist on having the witness read and sign it or build a record that the witness had the opportunity to read and sign it. You do not wish the witness to be able to say at trial that he or she did not sign the deposition and does not remember his or her deposition testimony. While the witness cannot completely escape from the deposition once it is taken under oath, it is far more difficult for the evasive witness and makes the witness look bad to the jury if asked to identify his or her signature and admit that he or she had the opportunity to read the deposition and make any corrections before signing it. Obviously, deposition testimony that is signed and sworn to is also useful as the basis for a motion for summary judgment, or absolutely necessary when seeking the extraordinary powers of the court for a preliminary injunction. Reserving the witness's right to read and sign the deposition transcript also allows the witness to correct inaccurate testimony. Mass. R. Civ. P. 30(e).

But what if changes in the errata sheets materially alter the substance of the deponent's testimony? Rule 30(e) allows a deponent to

> make changes in form or substance to a deposition transcript provided the deponent complies with the procedures of the rule. Although there is authority to the contrary, *see Greenway v. International Paper Company*, 144 F.R.D. 322, 324–25 (W.D.La. 1992); *Rios v. Bigler*, 847 F.Supp. 1538, 1546 (D.Kan. 1994), the express language of Rule 30(e) allows a deponent to change the substance of his answers. Hence, changed deposition answers of any sort are permissible. The deponent, however, must supply a reason for the changes which is not conclusory. The standard to reopen a deposition is whether the changes contained in the errata sheets make the deposition incomplete or useless without further testimony.

*Tingley Sys., Inc. v. CSC Consulting, Inc.*, 152 F. Supp. 2d 95, 119–20 (D. Mass. 2001) (citations and quotation marks omitted).

## § 3.5.2 Objections and Motions to Strike

Taking a deposition in accordance with Mass. R. Civ. P. 30(c), i.e., reserving all objections except as to the form, seems to be the most common way to weave your way through the lengthy procedure of a deposition. Some counsel say that they want motions to strike included in the deposition as it is being taken so that they can cure any defect brought up by the motion to strike. This is a matter of individual style. You should examine carefully anything that occurs in the deposition to which you object and that the other side could cure at the deposition.

## § 3.5.3 Protective Orders

Sometimes you find out as you are going through the stipulations with opposing counsel at the start of the deposition that he or she objects and, in fact, may not go forward because your expert witness, or your inside counsel or your client, is present and there is no protective order in place that provides for this. The first protection against this kind of problem is to confirm several weeks in advance of the deposition by letter with opposing counsel who will be present for your side and ask that counsel confirm by letter to you who will be present for the opposing side. This provides adequate time for protective orders, resolving problems, negotiations and whatever else is needed before the deposition is taken. You do not want to show up in a difficult place and have the witness present, under subpoena, only to find out that you are not going forward. Nor do you want to engage in time-consuming and momentum-lessening motion practice. Appearing in a foreign jurisdiction before a judge who has little desire to see you or to deal with a problem that he or she properly considers to be something that could have been handled in advance in the jurisdiction of the case can be difficult.

If the deposition is to be taken under any kind of protective order, a copy of the order should be available and, if advisable, entered as part of the deposition record. This way, if there is a dispute, the magistrate or the judge will have the order as a ready reference to lend perspective to the argument.

As mentioned earlier, if you expect difficulty with the protective order because of a claim of privilege or a claim of confidentiality in the case of a trade secret issue, it is prudent to have either an agreed-upon glossary of terms that relates to the trade secret or advance guidance or clarification on how the trade secret issue will be handled, which you have acquired by having gone before the judge or magistrate prior to the deposition. At that hearing, you should have all disputed exhibits premarked and assembled for the court, in case the court wishes to examine the exhibits that are going to be at issue under the protective order.

## § 3.5.4 Scheduling the Deposition

### (a) *Date and Location*

In large cases where there are many depositions, and particularly in international cases where the witnesses are from various countries, it is often useful to work out a central location and bring the witnesses in individually for the convenience of all counsel. If there is disagreement about the time and place of the deposition, this can be dealt with through negotiation. If that fails, take it to the court, but take it long before the scheduled date of the deposition. The location of the deposition may seem immaterial, but in many cases depositions are taken in certain places merely to inconvenience the witness, and this should be resisted once it is clear that this is a calculated imposition.

Taking the deposition at the office of the deponent invites many interruptions, phone calls, other executives of the company coming in for decisions, etc. If possible, the deposition should be taken at a law office where the interruptions can be controlled and where proper facilities, copying and support services are available.

### (b) *Time Limits*

Rule 30(d)(1) of the Federal Rules of Civil Procedure states:

> Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

There is no analogous provision in the Massachusetts Rules of Civil Procedure.

In larger cases it is wise to adopt a uniform policy ahead of time on the hours of the deposition. Whatever is reasonable today will be unreasonable tomorrow when opposing counsel is on the other side of the issue. Starting the deposition promptly at 10:00, going to 1:00 with a break or two, commencing at 2:00 and going to 5:00 with a break or two is a reasonable schedule when you consider that both sides will have days when time for preparation and time for rest for the witness will be important. Trying to insist on late hours or early starting times generally does not lead to good results for either side.

If the deposition is a matter of substance, there may be days of deposition testimony, and it should be agreed in advance how many days the witness will go on a consecutive basis. If opposing counsel will not agree to a break in the deposition after two or three days, or whatever is reasonable from your point of view, then advise opposing counsel well in advance and at the beginning of the deposition exactly when the deposition will either finish or suspend. There is nothing worse than a witness who thinks that he or she will be able to leave town at the end of two or three days and finds that that is not going to happen. There is no reason why the scheduling cannot be known in advance; you need only put it in writing and force the issue.

## § 3.5.5 Audiovisual Depositions

Audiovisual or video depositions are becoming more and more accepted and, in some cases, useful. There is a school of thought that they are sleep inducers for most juries; however, there are situations in which they are not only advisable but necessary. Here again, solid preparation with a detailed stipulation specifying exactly what will happen, who will do what, how long it will last and how it will work saves problems the day of the deposition.

The Federal Rules of Civil Procedure are not as specific as the Massachusetts Rules as to audiovisual depositions. *Compare* Fed. R. Civ. P. 30(b)(3) *with* Mass. R. Civ. P. 30A (which is quite detailed and helpful). Usually, the recording company is quite familiar with the rules, but there is a danger in allowing them to run the deposition.

Lawyers, just like witnesses, can sometimes be intimidated by video depositions and can be tense and nervous far beyond what would normally be expected in the stress of a deposition. This cannot be totally avoided, but it certainly can be alleviated by preparation, including some practice videotaping at your office. It is especially important to prepare a comprehensive checklist or outline for video depositions. Video depositions reveal pauses and confusion on the part of the examining lawyer much more than a two-dimensional, written transcript does. It is helpful to formulate questions on key points in advance and write them out, word-by-word, so that there is no delay or fumbling of words to distract future listeners. Avoid awkward pauses, compound questions and speech fillers, such as "um" or "like," which can also distract listeners. Your image is being conveyed just as the witness's is, so be crisp with your language, enunciate clearly and be as articulate as possible. Also, be aware of your own nervous habits during depositions, and try not to fidget, shuffle papers or display any mannerisms that will take attention away from the witness's testimony. One final reminder about video depositions is that your own demeanor is being preserved, so you should avoid the appearance of being unreasonable or argumentative, or of harassing the witness. You should never act this way with a witness regardless of the form of deposition, but such conduct will be all the more obvious on videotape and will likely work against you in the future.

If you anticipate that during a video deposition there will be a procedural fight over questioning in areas that one side may claim to be privileged, or on documents that one side may claim are privileged or some other matter, such as claimed trade secrets, you may want to bring a motion in limine prior to the deposition to obtain an advance court ruling on the issue. This is far preferable to having to go forward with the deposition or terminate it, particularly if it is in a remote location. Anticipating problems usually forces opposing counsel to deal with you in good faith, at least to a greater extent than they would if you had not brought the matter up well in advance.

## § 3.5.6 Foreign Depositions

Depositions taken within the federal district court system have a relatively simple procedure that allows the deposition subpoena to be transferred to another district where the witness may be found. See generally the rules of discovery and Fed. R. Civ. P. 45 for the specifics. The most important point is that the deposition notice in the case of a party, or subpoena in the case of all other witnesses, should be properly and completely done in accordance with all applicable rules. This is more difficult than it appears, in that almost every jurisdiction has its own local rules, customs, traditions and procedures as well as those specified in the Federal Rules of Civil Procedure. Again, the importance of local counsel with knowledge of the local "scene" cannot be overemphasized.

As in all matters that require technical compliance with specific rules, time works for you if you prepare early and get it all done well in advance. Petty annoyances or mistakes or omissions on your part can all be remedied if there is time to do so. Lawyers tend to delegate this important responsibility to paralegals or other attorneys, which is fine, provided there is adequate supervision. Nothing is so embarrassing as having to explain to a client why a deposition for which he or she has waited months is not going to go forward due to a procedural problem of some kind. Deposition procedure in international settings (outside of the federal districts of the United States) is a bit more complex, but again need only be the subject of attention under the Hague Convention rules or other applicable procedures.

Out-of-state depositions for cases pending in Massachusetts state court require a letter rogatory. *See generally* Mass. R. Civ. P. 26–32. Specifically, Rule 28(b) lays out the methods for taking depositions in foreign countries.

By far the best means of taking depositions in a foreign country is by stipulation or agreement among the parties. Short of that, go by the book—get the competent commission from the court or the letter rogatory, engage local counsel in the country where the witness is to be found, petition that court or competent authority for subpoena power if possible and take the deposition as best you can.

If there is to be a series of depositions in a foreign country or if you anticipate difficulties, it is advisable to ask for a conference with your local judge, or with the magistrate in the case of some federal courts, at which you discuss the process of taking the foreign deposition and ask for the court's guidance or perhaps even for an order. The order could lay out the procedure of the deposition so that if you have difficult opposing counsel, you have done your best to structure a platform from which to launch an attack on the other party's failure to act in good faith. You also can request an order requiring them either to produce the witness in the United States or to bar their testimony from the trial or some other sufficiently serious sanction to force them into allowing you to take the deposition properly.

Alerting the judge or magistrate in advance of possible problems may provide you with the leverage to keep otherwise difficult counsel from ruining the deposition. If your adversary has a history of being difficult and obstructive, you might ask for a master to preside over the hearings in a foreign country, thereby providing the ability to take a reasonable deposition under reasonable circumstances. Be careful that the country you are seeking to be the locus of the deposition will allow a master procedure presided over, from their point of view, by a foreign national. In Denmark, for instance, the crown must have its own representative at the deposition, even though that person may not do anything but be present and may not even speak English.

Having a good lawyer from the foreign jurisdiction to assist you in court and to lend his or her name and reputation to your cause is very important. Even though it may seem exorbitant, an advance trip to set up your foreign deposition or depositions may be money well spent. As in other situations, having everything ready to go when you finally arrive in the country where the deposition is to be taken is far better than having procedural minefields placed in front of you by opposing counsel and spending days or even weeks trying to get them resolved before you take one word of testimony.

The court stenographer may be available locally, but many times it may be wiser to bring your own stenographer, even though it appears at the beginning to be more expensive. In the long run, you will have someone who understands your procedure, understands you, understands English and, if transcripts are not forthcoming, will be subject to the power of the court and to you to make that happen. You should be sure that the court stenographer has backup equipment. It is quite frustrating to have the stenotype machine break down in the midst of the deposition and to have to wait for one to be flown in or for emergency repairs to take place. Most court reporters have two, but make sure that yours has a backup.

Another method of handling disputes that may come up in a foreign deposition is to propose, at your predeposition conference with the magistrate or judge in the United States, holding telephone conferences and oral argument by telephone. This is very useful in disputes over privilege on the production of documents or of even ending the deposition after what you consider to be a reasonable time or continuing it if the other side wants to stop the deposition after an unreasonable period of time. The atmosphere in foreign depositions can be very tense indeed, and you should take your time and not be stampeded into taking unreasonable positions. Be ready with a policy position on what you want to do. Call the court, if necessary, and provided that you have alerted the court in advance through a thorough predeposition conference, the court will usually resolve matters very quickly. Returning home with all parties disagreeing as to what happened may just prolong the deposition or result in returning at great expense and inconvenience to finish the deposition.

Interpreters are also a major part of many foreign depositions. You should have an interpreter who is friendly to you, either a friend of the client, an employee of the client or someone who is your interpreter and who will provide backup for the official interpreter, who may or may not be doing the job correctly. This is particularly important with witnesses who speak a language that is unfamiliar to most Americans and whose court tradition is entirely different from ours.

## § 3.6 PROTOCOL

Show up early, set up all documents and exhibits (which should be organized already in folders) and have an associate or paralegal ready to distribute the copies to all interested counsel.

As part of deposition procedure, courteous counsel who are acting as true officers of the court will always provide copies of every exhibit introduced for all opposing counsel. There will always be space in the deposition room for expert advisors and authorized observers. The witness should be treated with the utmost courtesy, with breaks as requested, unless they are so frequent as to be unreasonable. Meal times should be a matter of agreement—pressing on with a deposition while the witness testifies between bites of his or her lunch is unproductive, unprofessional and discourteous. No counsel who wishes the witness to be able to give a comprehensive deposition should allow his or her attention to be distracted by having the meal during the deposition. Rushed short meals also do not provide the proper atmosphere for a witness to address a deposition adequately. The lunch break should be just that—a break and a rest for the witness. Most counsel will provide coffee, tea and water as a courtesy. Smoking becomes a problem only if people insist on doing it. Where smoking is prohibited in the deposition facility, breaks may be provided. If smoking is permitted and the witness is bothered by it, there should be an immediate request that smoking be banned.

Again, in deposition procedure, the court reporter is not merely a tool to be utilized during the deposition. He or she is a human being and a professional who is entitled to courtesy, the chance to relax on occasion, and assistance and respectful treatment by all counsel. The examiner should consider the availability and capacity of the court reporter when the hours of a deposition are to be extended. Having a court reporter who is passing out from hunger or fatigue will not provide a good transcript.

Some court reporters frequently interrupt to get names and spellings on the record before you go further. This can be extremely distracting for the witness and often annoying, neither of which is helpful to the witness or to counsel. If the court reporter cannot get the name without interrupting the flow of the deposition, one solution to the problem is to provide a list of names or terms at the break. Another way of assisting the court reporter is to provide in advance a glossary of names, terms and other data that you believe will be difficult for the reporter, and allow him or her to read it. You can either point to the glossary as the witness uses the term or name or, during the break, one of your party can assist the court reporter with it.

Marking exhibits is a matter of procedure. Some counsel premark all exhibits, thereby making the deposition go more smoothly and more swiftly. This can be an advantage or disadvantage depending on who is representing the witness and how good the witness is at maintaining the pace of the deposition to his or her advantage.

Be prepared to persist. General persistence is necessary to get important questions answered. If the witness will not respond, ask short questions that can be used to impeach at trial. If necessary, take a break and focus on the facts you want to bring out by writing out the questions or boxing the witness in with documents so that there can be no misunderstanding. It is easy to move on if the witness will not respond properly. This is not the time to win the “war of wills” or make it so difficult that the witness will not want to face you at trial. Hostility is not the route—perseverance and cool questioning are the proper way.

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