Deposition Field Guide

Litigation Field Guides

Pre-Trial Flight List

(May be modified by court or stipulation)

1) **Complaint**:

- Allege facts to show – if true – relief would be available (FRCP8(a))
- Jurisdiction: short and plain statement
- Claim(s): show pleader is entitled to relief
- A demand for relief sought: may be pled in the alternative
- may attach central to the plaintiff's claim

2) **Motions In Response To Complaint:** (optional)

- Motion for More definite statement: If complaint is so vague, can't respond. (FRCP12(e))
- Motion to Dismiss, lack of jurisdiction: Plaintiff has the burden of proving jurisdiction. (FRCP12(B)(1))
- Motion to dismiss, failure to state a valid claim: Allegations don't assert a plausible claim. (FRCP12(B)(6))
- Allegations are assumed to be true; Court's analysis based solely upon pleadings.

3) **Answer**:

- Must respond to allegations in complaint, and assert affirmative defenses. (FRCP8)
- Responses to allegations in complaint: (1) "admit"; (2) "deny;" (3) "Aver that. . . deny rest." (aka partial admission, with explanation); (4) Admits allegation to the extent supported by the document cited, which is the best evidence of its contents; otherwise denies the allegation; (5) allegation is merely plaintiff's characterization of its case - no answer is required; otherwise deny; (6) conclusions of law - no answer is required, otherwise deny; (7) deny for lack of knowledge or information sufficient to form a belief as to their truth.
- Affirmative defenses: (examples) • accord and satisfaction • arbitration and award • assumption of risk • waiver • contributory negligence • duress • estoppel • failure of consideration • fraud • illegality • laches • license • payment • release • res judicata • statute of frauds • statute of limitations.

4) **Amending Complaint**:

- Complaint may be amended once as a matter of right. (FRCP15)
- Due 21 days after serving complaint, 21 days after responsive pleading, or 21 days after motion to dismiss/clarify.

5) **Motion For Judgment On The Pleadings**:

- May seek to dismiss complaint after pleadings are closed.
- May be brought by either side, may be based upon an affirmative defense. (FRCP12(C))

6) **Early Meeting Of Counsel**:

- The parties must discuss (1) the proposed discovery plan; (2) Rule 26 disclosures; (3) Settlement; and (4) preserving discoverable information; and (4) possibilities for settlement. (FRCP26(f))

7) **Rule 26 Disclosures**:

- Parties must provide – without awaiting requests (1) a list of individuals likely to have discoverable information; (2) a description of all documents that may support the party's claims or defenses; and (3) a computation of each category of damages claimed by the disclosing party. (FRCP26(a)(1))

Pre-Trial Flight List (cont)

8) **Submit Discovery Plan**:
Parties submit a discovery plan to the court, including: (1) the discovery period; (2) the scope of discovery, (3) whether fact and expert discovery should overlap; (4) how electronic discovery will be handled; (5) protective orders to limit disclosure of materials; and (6) claw back agreements. (FRCP26(f)(3)(1))

9) **Court Issues Scheduling Order:**
- Court must typically issue a scheduling order. (FRCP16(b))
- Provides: pleading schedule, discovery schedule, time to file dispositive motions. (FRCP16(b)(3))
- May only be amended for good cause shown. (FRCP16(b)(4))

10) **Fact Discovery:**
- May overlap with expert discovery, or take place in stages.
- Requests for documents and tangible things may be issued; response due in 30 days. (FRCP34(a); (b)(2))
- Interrogatories may be issued to parties (25 including subparts); 30 days to respond. (FRCP33)
- Requests for admissions issued to parties (unlimited); 30 days to respond or deemed admitted. (FRCP36)
- Depositions may be taken, 10 per side, 7 hours each. (FRCP30)

11) **Expert Discovery:**
- Expert reports from those (1) testifying under FRE 702, 703, 705; and (2) specifically retained to offer this testimony, or whose duties as party's employee regularly include expert testimony. (FRCP26(a)(2))
- Expert report discloses: (a) all opinions, (b) facts or data considered; (c) exhibits to be used to summarize, (d) qualifications; (e) previous testimony for past 4 years; (f) compensation being paid.
- Non-reporting experts disclose: (a) testimony's subject; (b) facts/ opinions in testimony. (FRCP26(a)(2)(c))
- All testifying experts may be deposed. If report is due, depose after report is provided. FRCP26(b)(4)(A).

12) **Motion For Summary Judgment:**
- Unless limited by the court may be filed until 30 days after discovery closes.
- Must show (1) no genuine issue of material fact, and (2) entitled to judgment as matter of law. (FRCP56)
- May be based upon (1) sworn testimony of personal knowledge, (2) admissible facts and exhibits.
- Court may defer or deny motion to permit nonmovant time to obtain necessary responsive evidence.

13) **Pretrial Disclosures:**
- At least 30 days before trial, parties must disclosure. (FRCP26(a)(3))
- The name and contact information of witnesses, distinguishing: will-be-called from may-be-called.
- The witnesses who will be presented at trial by deposition.
- Identification of exhibits – including summary exhibits (FRE 1006); distinguish those it will and may use.

14) **Pretrial conference:**
- Court may schedule pre-trial conference; may set scope of trial and resolve motions in limine. (FRCP16)

15) **Pretrial Order**:
- Court should issue order reciting actions taken in pretrial conference. (FRCP16(d))

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Deposition Field Guide

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Appreciation: Some ideas herein may have had their origin with others; if I could identify them by name, I would, but the information contained in this field guide was accumulated in practice over years, and not as a scholarly exercise. Appreciation and credit must be given en masse: I have learned much over the years from my colleagues – some on my side, some on the other; some by setting high standards and a positive example, others by demonstrating mediocrity, low spirit, and thoughtless bullying. Disclaimer: To the extent this document may ever find its way into the hands of a non lawyer, this publication IS NOT A SUBSTITUTE FOR THE ADVICE OF AN ATTORNEY – IF YOU REQUIRE LEGAL OR OTHER EXPERT ADVICE, YOU SHOULD SEEK THE SERVICES OF A COMPETENT ATTORNEY OR OTHER PROFESSIONAL. The contents of this field guide represent the research and analysis of its author and should not be attributed to his employer in any way. This guide was meant as an overview for lawyers – the rules, as they are applied in different districts and circuits, may differ; a comprehensive (or academic) discussion would have been beyond the scope of this field guide and would have defeated the purpose of putting together an overview for quick reference. Also, the law changes – sometimes quickly. So do your own homework – this is simply what it appears to be, something for attorneys to take in the field for quick reference; do not cite as authoritative. Finally, case names are often much longer than necessary – I've trimmed them to keep this volume small.

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[A1] DEPOSITION OVERVIEW

QUICK RULE: *Depositions are the only means of discovery that all attorneys to obtain evidence unfiltered through opposing counsel. They are the backbone of civil discover[i]y.*

DISCUSSION:

I. **Ode To A Deposition**: "Only by examining a witness live can a lawyer use the skills of his trade to plumb the depths of a witness' recollection, using to advantage not only what a witness may have admitted in answering interrogatories, but also any new tidbits that usually come out in the course of answering carefully framed and pin-pointed deposition questions. Written interrogatories are not designed for that purpose; pointed questions at deposition are the only effective way to discover facts bottled up in a witness' recollection." *Shoen v. Shoen*, 5 F.3d 1289, 1297 (9th Cir. 1993).

II. **Purpose of Discovery**: The objective of discovery is to accomplish a full disclosure of the facts. *Zucker v. Sable,* 72 F.R.D. 1, 3 (D.C.N.Y. 1975). Specifically, to obtain information and become familiar with the facts and issues that to be tried, and thereby limit trial by surprise. *Scott v. Snider*, 1994 WL 388959, 4 (E.D.Pa.). One of the primary objectives of the FRCP's discovery provisions is elimination of surprise in civil trials. *Erskine v. Consolidated Rail Corp.*, 814 F.2d 266, 272 (6th Cir. 1987); *Davis v. Marathon Oil Co.*, 528 F.2d 395, 404 (6th Cir. 1975). "Trial by ambush is not contemplated by the Federal Rules of Civil Procedure." *Woods v. International Harvester Co.*, 697 F.2d 635, 639 (5th Cir. 1983). "The primary policy behind discovery is to seek truth so that disputes may be decided by facts that are revealed rather than concealed." *Wolt v. Sherwood, a Div. of Harsco Corp.*, 828 F.Supp. 1562, 1567 (D.Utah 1993).

A. **Objective Of Discovery: Mutual Knowledge Of All Facts**: Supreme Court has acknowledged the "fundamental maxim of discovery that '[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.'" *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 540 n. 25 (1987). To that end, either party may compel the other to disgorge whatever facts he has in his possession. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

III. **Role Of Depositions In Discovery**: Depositions are the centerpiece of civil discovery. Parties have the opportunity to call and question witnesses to determine what really happened. District courts typically treat oral depositions as a means of obtaining discoverable information that is preferable to written discovery. *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 69 -72 (2nd Cir. 2003).

A. **In Place Of Trials**: The phenomenon of the "vanishing trial" has been widely reported. *Brincko v. Rio Properties, Inc.*, 2011 WL 6029680, 8 (D.Nev.). Fewer and fewer civil cases are tried. As a result, depositions are "the factual background where the vast majority of litigation actually takes place." *Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D.Pa.1993).

IV. **Accept No Substitute**: Written discovery cannot replace depositions because of the need for follow-up questions, observation of the witness's demeanor, and avoidance of receiving prepared answers so carefully tailored that they generate additional discovery disputes. *Mill-Run Tours v. Khashoggi*, 124 F.R.D. 547, 549-50 (S.D.N.Y. 1989). "Experience has made it abundantly clear that the advantages of oral examination far outweigh the advantages of written interrogatories in carrying out the deposition procedures in aid of discovery under" the Federal Rules of Civil Procedure. *Greenberg v. Safe Lighting*, 24 F.R.D. 410, 411 (S.D.N.Y. 1959); *see also National Life v. Hartford Acc.*, 615 F.2d 595, 600 n. 5 (3d Cir. 1980)("[T]here are strong reasons why a party will select to proceed by oral deposition rather than alternate means, most significantly the spontaneity of the responses.").

A. **Declaration Is No Replacement**: It is unreasonable to conclude that a declaration would provide an adequate substitute for a deposition. *Cavanaugh v. Wainstein*, 2007 WL 1601723, 10 (D.D.C.). The courts have emphasized the importance of depositions among the discovery tools available to a litigant. *Founding Church of Scientology v. Webster*, 802 F.2d 1448, 1451 (D.C.Cir. 1986). "Depositions ... rank high in the hierarchy of pretrial, truth-finding mechanisms." *Id.* A declaration "is simply not an adequate substitute for live testimony," such as a deposition. *Alexander v. FBI*, 186 F.R.D. 113, 121 (D.D.C.1 998). "[S]uch an approach eschews the opportunity for opposing counsel to probe the veracity and contours of the statements. Furthermore, counsel propounding the question is denied the opportunity to ask probative follow-up questions." *Id.*

B. **Interrogatories Are No Substitute**: "Interrogatories and depositions serve different functions: 'Written interrogatories are rarely, if ever, an adequate substitute for a deposition when the goal is discovery of a witness' recollection of conversations.'" *Bashkin v. San Diego County*, 2011 WL 109229, 2 (S.D.Cal.)(quoting *Shoen v. Shoen*, 5 F.3d 1289, 1297 (9th Cir. 1993)). Although the Federal Rules do not prescribe an order of preference for discovery techniques, one method cannot arbitrarily be demanded over another simply because it is less burdensome to the moving party; depositions do much to identify the items of discovery and to establish the rights of the parties. *Belcher v. Bassett Furniture Industries*, Inc. 588 F.2d 904, 910 (4th Cir. 1978).

V. **Expectation Of Honesty**: There is no guarantee that any witness will tell the truth. *Price v. Time, Inc.*, 416 F.3d 1327, 1347 (11th Cir. 2005). Still, "we indulge the expectation that runs throughout the law that testimony given under oath will be truthful." *Id.*

VI. **What To Expect When You're Deposing**: Taking a quality deposition is a skill; a result of practice, experience, and personality. Easy depositions with a forthright witness can make the deposing attorney look skillful and talented; difficult depositions with ornery witnesses and obstreperous opposing counsel will seem a slog, even for the most talented practitioner. Attorneys at all skill levels frequently ask the question: "what should I be working on now." To offer some rough benchmarks, I've organized the various skills into a format that resembles Tae Kwon Do – with the understanding (1) to move on to a higher level, one should master the skills at a given level, and (2) it's never too early or late to work on all the skills described. After each deposition, invest the time in reading the transcript and measuring your performance.

A. **<u>White Belt</u>:** A beginner. ***Before the deposition***: outline the deposition, develop questions, and organize documents so they fit logically into the deposition. Write questions for each document. ***During the deposition***: work on (1) listening to the answers, (2) getting an answer to every question, (3) pacing the deposition so you don't get bogged down on unimportant minutia, (4) avoiding time-wasting discussions with opposing counsel on the record.

B. **<u>Yellow Belt</u>:** An informed beginner. ***Before the deposition***: understand how the deposition fits into the case and what are the "good" and "bad" answers; write foundational questions for each document regarding authenticity. ***During the deposition***: work on (1) using the documents, referring to them consistently by exhibit number, (2) avoiding pronouns and undefined terms that create ambiguity in the transcript, (3) listening to the answers and asking follow-up questions that develop information at a deeper level, (4) ignoring opposing counsel's objections, unless they interfere with the deposition.

C. **<u>Green Belt</u>:** A competent, intermediate. ***Before the deposition***: anticipate likely evidentiary questions that may arise during the deposition; prepare questions for full admissibility foundation; develop a solid working knowledge of attorney-client and work-product privileges so that they can be skillfully addressed when they arise. ***During the deposition***: work on (1) completely deposing on a specific subject or issue – moving from broad, wide open questions to helpful leading questions, to documents – then on to the next subject; (2) taking narrative answers and summarizing the helpful information in a follow up question; (3) identifying evasive, partial answers and digging to obtain complete answers; (4) working patiently, rhythmically, without delays, so witness can't reconsider past answers or predict where you are going.

D. **<u>Blue Belt</u>:** A skilled intermediate. ***Before the deposition***: work on having a solid, working knowledge of the rules of evidence, for identifying admissibility issues on the fly, and developing information during the deposition to resolve those issues. Understand the difference between (a) gaining information to undermine the other side's case, (b) gaining information to establish your own case, (c) gaining information to undermine the witness, should that become necessary. Gain mastery over the attorney-client and work-product privileges. ***During the deposition***: work on (1) measuring every answer; lock in the good answers in a manner that is useable at trial; (2) seeking information to undermine the bad answers; lock the witness out of a subject when they claim not to remember; (3) by probing answers, testing the witness's credibility; (4) maintaining a clear, understandable transcript, even when deposing a fact witness regarding complicated events or sophisticated analysis.

E. **<u>Red Belt</u>:** A budding expert. ***Before the deposition***: perform at least three cross examinations at trial during which depositions were used to control the witness; master the rules of evidence; develop a good, working knowledge of the other rules of discovery, to appreciate how the deposition fits into the discovery process. ***During the deposition***: work on (1) using an effective game plan and information you gather during the deposition to move the witnesses off of unhelpful testimony; (2) gathering the pieces necessary for use in an effective cross examination, without tipping your hand as to the planned cross examination, (3) understanding when to challenge a witness in the deposition on an inconsistency, and when to save it for cross examination; (4) deposing experts regarding complicated technical/scientific issues, challenging the expert when necessary, and creating a transcript that can be understood by a juror or judge.

F. **Black Belt**: An expert. ***Before the deposition***: perform at least 10 cross examinations at trial; three expert cross exams as well; perform at least 3 closing arguments; master the rules of discovery. Mentor five young attorneys through depositions without taking over or undermining their confidence. Work on learning the case and the different ways the witness's testimony might fit into each part of the case; to the extent possible, becoming more familiar with the facts than the witness. ***During the deposition***: work on: (1) as answers come in, anticipating how they might fit into the case and how they can be used in a courtroom, so that questioning and follow up are part of the developing, shifting trial strategy; (2) understanding the deposition is merely the process of mixing paints and stretching canvas - painting comes later; (3) handling any type of opposing counsel: treating colleagues at the bar with respect and professionalism; refusing to be intimidated or goaded by the lunatics and freaks who call themselves lawyers; never losing your cool or sense of humor. Always know a great place near the deposition for lunch. Never stop improving.

Notes:

[A2] DISCOVERY PLANS

QUICK RULE: *Discovery plans are the most efficient way to plan and manage depositions.*

DISCUSSION:

I. **Purpose Of A Discovery Plan**: As a case moves from the pleading stage to discovery, counsel should create a discovery plan that will identify when depositions will take place and what information will be sought. Often, an attorney will make an informal plan on scrap paper – or keep one unwritten in her head. Neither approach is optimal. A written discovery plan will ensure that pieces don't slip through the cracks – especially as the attorney moves between the various matters she may be handling. A discovery plan format may look like this:

(1) Legal Theories / affirmative defenses	(2) Specific Allegations	(3) Information Needed	(4) Sources of Information/ Discovery Device	(5) Scheduled/ completed

A. **Completing The Discovery Plan:** The plan should be filled in before discovery starts and then updated as information from the discovery process informs the remainder of discovery.

1. **Legal Theories**: List each fully identified legal theory proffered by the plaintiff (whether that's you or the other side), as well as each affirmative defense.

2. **Specific Allegations**: For each legal theory or defense, identify the specific factual allegation that might support this theory.

3. **Information Needed**: For each allegation, identify the specific information you will want to investigation to prove or disprove the allegation.

4. **Sources**: For each piece of information, identify the possible sources of information.

5. **Schedule**: As discovery begins, identify the schedule you have to compete getting the identified information. As each source is tapped and completed, identify this on the schedule.

B. **Using The Discovery Plan**: Once filled out, the discovery plan may be used to identify the documents to seek, write interrogatories, and schedule depositions.

Example Discovery Plan

Legal Theories/ Affirmative Defenses	Specific Allegations	Information Needed About:	Sources of Information/ Discovery Device*	Scheduled/ completed
1. Discrimination against Jane Doe because of gender by creating hostile work environment	Def. displayed gender based hostility to Doe by permitting the language used to and around her	1) Profane discussion in locker room 2) Murphy screamed profanity at Doe in her office 3) Doe sent email to Murphy regarding mistreatment	# Smith (D) # Murphy (D) - Doe (In) - Emails to Murphy (DR)	3/24
		1) Smith's phone conversation with Murphy, called her $%# 2) In Gold's office, Smith cursed at Doe 3) Smith told members of sales staff that Doe was a $%%*	# Employees in sales office (D) - Emails and memos to sales staff (DR)	
	Smith prevented Doe from performing her job	1) Smith told employees not to cooperate with Doe 2) Smith refused to help Doe with sales	- Doe (In) # Smith (D) # Employees in sales office (D)	
	Smith made sexual advances towards Doe	1) Smith hugged Doe; professed love at sales conference	- Doe (In) # Smith (D) - conference attendees (In)	
	Conduct violated harassment policy		- Describe harassment training (D)(30(b)(6)) - Harassment Policy (DR) - CEO (D)	
	Conduct was pervasive		-Other complainants (IR)	
2.Wrongful firing of Doe for reporting conduct				

(D) = deposition, (In) = interview; (DR) = document request; (RFA) = requests for admissions; (IR) = interrogatories

[B1] NOTICING THE DEPOSITION

QUICK RULE: • *Depositions of individuals who are plaintiffs or are controlled by plaintiffs may be noticed under FRCP 30(b)(1).*
• *Depositions of corporations or organizations that are parties may be taken under FRCP 30(b)(1) or FRCP 30(b)(6).*
• *Depositions of non-party witnesses (including former employees and employees that are not officers, directors, or managing agents) must be subpoenaed under Rule 45*
• *If a third-party witness is overseas, procedures of the Hague Convention or other applicable treaty must be used.*
• *The witness and opposing parties are entitled to reasonable notice of a deposition's time and place, the name and address of each person or organization being examined, and the method by which the deposition will be recorded.*
• *Witnesses and opposing parties must attend a properly noticed deposition, seek a protective order, or face possible sanction.*

DISCUSSION:

I. **Leave Of The Court Not Usually Necessary**: Generally, a party may take a deposition without seeking the court's permission. Four exceptions exist, where litigants must obtain permission before noticing a deposition: (1) if the witness is in prison, (2) if the deposition would exceed the 10 deposition limit, (3) if the witness has already been deposed before, or (4) if the deposition would precede the FRCP 26(f) meet-and-confer session. FRCP 30(a)(2). Party stipulation avoids the need for court permission in the last three circumstances listed. *Id.*

II. **Notice Requirement**: Before taking a deposition, a party must give all other parties reasonable written notice. *F.A.A. v. Landy*, 705 F.2d 624, 634 (2nd Cir. 1983)(Citing FRCP 30(b)(1)). The type of notice required is affected by who the witness is and the type of deposition to be taken.

A. **Electronic Notice**: Parties may serve notice electronically (E-mail or facsimile) when the person being served has consented to electronic service in a writing. FRCP 5(b)(2)(E); *E. & J. Gallo Winery v. Gibson, Dunn & Crutcher LLP*, 2011 WL 1626535, 1 (9th Cir.).

B. **Notice Necessary When Deposing Third Party**: A party must give reasonable notice to other parties before deposing a third party. FRCP 30(b)(1). Because the injury that flows from inadequate notice accrues to the party-opponents, they have standing to force compliance with the rules. *Rahn v. Hawkins*, 464 F.3d 813, 822 (8th Cir. 2006).

C. **Affidavit v. Deposition**: Notice need not be given to obtain an affidavit, but if a witness is put under oath and subject to questions by a party, it is properly deemed a deposition and is subject to the notice requirement. *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 203 (4th Cir. 2001) (*citing* Black's Legal Dictionary 396 (5th ed. 1979)).

III. **<u>Notice v. Subpoena</u>**: By serving a deposition notice on another party or, if they appear by counsel, on that counsel, the recipient must typically appear for deposition. *Chevron Corp. v. Salazar*, 275 F.R.D. 422, 424 -425 (S.D.N.Y. 2011) (citing FRCP 30(a)). Depositions of non-party witnesses must be subpoenaed. FRCP 45. *Id.*

A. **<u>Employees Of A Corporate Party</u>**: For corporate parties, the depositions of individuals may be noticed if the person is a corporate party's officer, director, or managing agent. *JSC Foreign Economic Ass'n v. IDTS*, 220 F.R.D. 235, 237 (2004). If a corporation or organization is a party, a deposition notice compels that party to produce any officer, director or managing agent named in the deposition notice. *Cadent, Ltd. v. 3M Unitek Corp.*, 232 F.R.D. 625, 627 n. 1 (C.D.Cal. 2005). It is not necessary to subpoena such individuals. *El Camino Resources Ltd. v. Huntington Nat. Bank*, 2008 WL 2557596, 2 (W.D.Mich. 2008)(citing FRCP 30(b)(1)).

1. **<u>Other Employees</u>**: A corporate employee or agent who is not an officer, director, or managing agent is effectively a third party and is not subject to deposition by notice. *Dubai Islamic Bank v. Citibank, N.A.*, 2002 WL 1159699, *2 (S.D.N.Y.); *Sugarhill Records Ltd. v. Motown Record Corp.*, 105 F.R.D. 166, 169 (S.D.N.Y. 1985)).

2. **<u>Managing Agents</u>**: "The test for a managing agent is not formulaic." *Boss Mfg. v. Hugo Boss*, 1999 WL 20828, at *3 (S.D.N.Y.). Courts analyze whether a person is a managing agent, and therefore subject to a deposition notice, pragmatically and on a fact-specific basis. *Schindler Elevator Corp. v. Otis Elevator Co.*, 2007 WL 1771509, 2 -3 (S.D.N.Y.)(citing 8A Wright, et al., *Federal Practice and Procedure* § 2103, at 39 (2d ed. 2007)). Because of the "vast variety of factual circumstances" the standard remains a functional one "to be determined largely on a case-by-case basis." *United States v. Afram Lines (USA), Ltd.*, 159 F.R.D. 408, 413 (S.D.N.Y. 1994); *Founding Church of Scientology, v. Webster*, 802 F.2d 1448, 1452 (D.C.Cir. 1986). "The term 'managing agent' should not be given too literal an interpretation." *Tomingas v. Douglas Aircraft Co.*, 45 F.R.D. 94, 96 (S.D.N.Y. 1968).

a. **<u>Factors To Consider</u>**: Courts may consider five factors in determining whether an individual is a managing agent: 1) whether the organization invests the person with general powers allowing him to exercise judgment and discretion in corporate matters; 2) whether the individual can be relied upon to give testimony, at his employer's request, in response to the discovery request; 3) whether a higher authority than the designee exists in the subjects to be addressed in the deposition; 4) the individual's general responsibilities regarding the matters involved in the litigation; and 5) whether the individual can be expected to identify with the corporation's interests. *Sugarhill Records Ltd. v. Motown Record Corp.*, 105 F.R.D. 166, 169 (S.D.N.Y. 1985).

b. **<u>Need Not Be A Person:</u>** The five-step analysis is "fully applicable" where the agent is a corporate entity rather than an individual and an independent contractor rather than an employee. *Schindler*, 2007 WL at 2 -3; *Afram Lines*, 159 F.R.D. at 413.

B. **Party Subpoenas**: Although a subpoena is not required to depose an adverse party, courts are split as to whether a subpoena may properly be served on a party. *Mezu v. Morgan State University*, 269 F.R.D. 565, 581 -582 (D.Md. 2010).

1. ***Hasbro, Inc. v. Serafino***, 168 F.R.D. 99, 100 (D.Mass. 1996): Rule 45 subpoenas are only applicable to non-parties.

2. ***First City, Texas-Houston, N.A. v. Rafidain Bank***, 197 F.R.D. 250, 255 n. 5 (S.D.N.Y. 2000): Nothing in the FRCP "explicitly precludes the use of Rule 45 subpoenas against parties." *See also Mortgage Information Services, Inc. v. Kitchens*, 210 F.R.D. 562, 564-66 (W.D.N.C. 2002) ("there is no express limitation on the type of person who may be subject to the rule, as its language describes the individual upon whom a Rule 45 subpoena may be served simply as a "person" rather than a "non-party.").

C. **Subpoena Experts**: The rules are not explicit regarding whether expert depositions should be noticed or subpoenaed. In practice, parties often use these approaches interchangeably for experts. *See Bethany Medical Center v. Harder*, 1987 WL 47845, 9 (D.Kan.). The best practice is to subpoena expert witness depositions. Experts are not parties and they are often not employed by parties (but by counsel), so subpoenas are best and safest form to assure attendance. *See F.T.C. v. Dalbey*, 2011 WL 6413819, 1 (D.Colo.).

	Deposing: A party (individual)	*Opposing Party*: An organization *Deposing*: An individual (not director, officer, manager)	*Opposing Party*: An organization *Deposing*: A director, officer, or manager	*Opposing Party*: An organization *Deposing*: An organization; under 30(b)(1) or 30(b)(6)	**Third Party witness, Or Expert witness**
Subpoena		X			X
Notice	X		X	X	

IV. Contents Of Subpoena Or Deposition Notice Depends Upon Deposition Type:

There are three types of depositions, each of which is available for the deposition of party and non-party witnesses. For all types, the subpoena or deposition notice must contain (1) the time for the deposition, (2) the place of the deposition, (3) the name and address of each person or organization being examined, and (4) the method by which the deposition will be recorded. Rule 30(b)(1). The subpoena's or notice's other contents will depend upon the deposition's nature.

A. **Individual Testifying On Own Behalf:** Generally, witnesses are called to testify on their own behalf. 30(b)(1). Thus, their testimony only reflects their own beliefs. This is the default. An attorney may later argue that the witness' statements should be considered party admissions under FRE 801(d)(2), however, the deposition of an individual is not – inherently – the deposition of a corporation or organization, regardless of the person's role in the organization.

1. **Procedure**: The deposition notice need not contain any further information.

2. **Personal Knowledge**: A witness testifying on her own behalf testifies only from personal knowledge. *Harris v. Koenig*, 271 F.R.D. 356, 368 (D.D.C. 2010).

B. **Individual Testifying On Behalf Of A Corporation Or Entity:** A party may depose a corporation (or other organization) through two methods: 30(b)(1) and 30(b)(6).

1. **30(b)(1) Depositions:** A party noticing or subpoenaing a deposition may name a corporate employee, by name or position, as the deponent. Rule 30(b)(1); *Moore v. Pyrotech Corp.*, 137 F.R.D. 356, 357 (D. Kan. 1991)(*citing GTE Products Corp. v. Gee*, 115 F.R.D. 67, 68 (D.Mass. 1987). If the named employee is a *director, officer, or managing agent* of the corporation, the employee will be regarded as the corporation's representative. *Id; see also* FRCP 32(a)(3). An employee who is not an officer, director, or managing agent, and who has not been designated by a corporation under Rule 30(b)(6) is treated as a nonparty. *Satisfaction Services of New England, LLC v. Satisfaction Services FLC, Inc.*, 2011 WL 2297642, 2 (S.D.Fla. 2011) (citing 8A Wright et al., *Federal Practice and Procedure: Civil* § 2103 n. 40).

   a. **Benefits:** Depositions under 30(b)(1) provide the corporation's testimony. If the corporation is a party, the deposition testimony may be used at trial by an adverse party for any purpose. FRCP 32(a)(3). *See also See Kolb v. Suffolk County*, 109 F.R.D. 125, 127 (E.D.N.Y. 1985). The witness, however, is only testifying from personal knowledge. *Harris v. Koenig*, 271 F.R.D. 356, 368 (D.D.C. 2010).

   b. **Procedure:** Each deposition notice or subpoena should clearly indicate that the deposition is noticed under 30(b)(1), and that the deposition is being taken of the organization through the named official or representative.

   c. **Note:** A party cannot notice the deposition of a corporation by a particular person who is not an officer, director or managing agent. The depositions of non- managing agents and servants of a corporate party must be subpoenaed as individuals. *GTE Products Corp. v. Gee*, 115 F.R.D. 67, 69 (D.Mass. 1987).

2. **30(b)(6) Depositions:** Depositions may be taken of the organization, wherein the organization designates the individual(s) who will testify on the organization's behalf. FRCP 30(b)(6). Under FRCP, counsel properly prepares the witness/representative to testify with the full range of information available within the organization – often well beyond personal knowledge.

   a. **Procedure:** The 30(b)(6) notice must describe with reasonable particularity the matters upon which examination is requested. A generic Rule 30(b)(6) notice does not meet this standard. *Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1058 (7th Cir. 2000).

   b. **Overbroad 30(b)(6) Notice**: Courts will not enforce an overbroad 30(b)(6) notice, which subjects the noticed party to an impossible task. *Reed v. Bennett*, 193 F.R.D.

689, 692 (D.Kan. 2000). To avoid liability, the noticed party must designate persons to testify regarding the areas listed in the notice. *Id.* Where the deposition's defendant cannot identify the expected boundaries, compliance is not possible. *Id.* Thus, a notice requesting testimony on "any matters relevant to this case" does not meet the "reasonable particularity" requirement. *Alexander v. Federal Bureau of Investigation*, 188 F.R.D. 111, 114 (D.D.C. 1998).

V. **Sufficiency Of Notice**: A deposition notice must be sufficient to be enforceable.

A. **Actual Notice:** That opposing counsel has actual knowledge of a deposition does not relieve a party from the requirement of giving plaintiff "reasonable notice in writing." *Lauson v. Stop-N-Go Foods, Inc.*, 133 F.R.D. 92, 94 (W.D. N.Y. 1990). Written notice may be dispensed with only in the most unusual circumstances. *Id.* (*citing C & F Packing Company, Inc. v. Doskocil Companies, Inc.*, 126 F.R.D. 662, 678 (N.D.Ill. 1989) and *F.A.A. v. Landy*, 705 F.2d 624, 634 (2d Cir. 1983)).

1. **Avoiding Notice Requirement**: If a party seeks to avoid the notice requirement, they must apply to the court for an appropriate order. *Lauson v. Stop-N-Go Foods, Inc.*, 133 F.R.D. 92, 94 (W.D. N.Y. 1990).

2. **Electronically Noticing A Deposition:** Although deposition notices may be filed with the court, the rules don't require this. *Rushing v. Board of Supervisors of University of Louisiana System*, 270 F.R.D. 259, 261 (M.D.La. 2010). Deposition notices that don't go through the court's electronic filing system are not properly served if simply e-mailed to the opposing counsel, unless the recipient has agreed to such service in writing. *Rushing v. Board of Supervisors of University of Louisiana System*, 270 F.R.D. 259, 261 (M.D.La. 2010).

B. **Waiving Notice Requirement:** Objections to defective service are waived if not timely raised. *See, In re United States,* 864 F.2d 1153, 1156 (5th Cir. 1989). As a "general rule, when a party fails to object timely to interrogatories, production requests, or other discovery efforts, objections thereto are waived." *Id.* A timely objection to improper service gives the opposing party time to cure. *Rushing v. Board of Supervisors of University of Louisiana System*, 270 F.R.D. 259, 261 (M.D.La. 2010).

C. **Penalty For Failing To Give Notice:** The court may prevent use of deposition transcripts at trial if the deposition was not properly noticed. *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1067 (9th Cir. 2000); *Lauson*, 133 F.R.D. at 94.

VI. **Subpoenas**: Subpoenas are necessary to command appearance at a deposition by non-party witnesses.

A. **Subpoenas Create Jurisdiction:** The court acquires jurisdiction over non-parties during discovery when a subpoena is issued and served upon the person. *Cuthbertson v. Excel Industries, Inc.*, 179 F.R.D. 599, 602 (D. Kan. 1998). The court will not have jurisdiction to compel answers or sanction non-party witnesses absent a subpoena. *Id.*

1. **Subpoena Must Issue From Proper Court:** The FRCP are designed to ensure that district courts control depositions involving nonparties located in their districts. A subpoena to depose a nonparty witness must issue from the court for the district where the deposition will be taken. *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 444 F.3d 462, 468 (6th Cir. 2006) (*citing* FRCP 45(a)(2)(B)-(C)).

2. **Enforcement Of Out-Of-District Subpoena:** Disputes arising over non-party subpoenas are decided by the court that issued the subpoena. *Id. See* FRCP 45(a)(2)(B). The power to quash or modify the subpoena likewise resides with the issuing court. *See* FRCP 45(c)(3)(A). There is case law, however, that supports a court's authority to transfer a discovery motion to the district where the underlying litigation is pending. *See In re Digital Equip. Corp.*, 949 F.2d 228, 231 (8th Cir. 1991); *Shelby v. Ingersoll-Rand Co.*, 2011 WL 1118613, 4 (W.D.N.Y.).

B. **Method Of Service:** A party properly serves a subpoena by "delivering a copy" of the subpoena to the proposed witness. FRCP 45(b)(1). The courts are split as to what constitutes permissible service:

1. **Requiring Personal Service:** "[T]he weight of authority is that a subpoena duces tecum must be served personally" and "the Court is without authority to sanction an alternative form of service." *Agran v. City of New York*, 1997 WL 107452, at *1 (S.D.N.Y.). "Nowhere in Rule 45 is the Court given discretion to permit alternate service in troublesome cases." *Conanicut Investment Co. v. Coopers & Lybrand*, 126 F.R.D. 461, 462 (E.D.N.Y. 1989); *F.T.C. v. Compagnie de Saint-Gobain-Pont-A- Mousson*, 636 F.2d 1300, 1312-13 (D.C.Cir. 1980).

2. **Not Requiring Personal Service:** When a non-party is served, the method needs to be one that ensures the subpoena is placed in the actual possession or control of the person to be served. *Firefighter's Institute for Racial Equality ex rel. Anderson v. City of St. Louis*, 220 F.3d 898, 903 (8th Cir. 2000)(*citing Doe v. Hersemann*, 155 F.R.D. 630, 630 (N.D.Ind. 1994) (allowing service by certified mail)). This interpretation of FRCP 45(b)(1) may allow service by other than personal delivery; it is not broad enough to include either fax or regular mail because the court cannot be assured that delivery has occurred. *Id.*

C. **Serving A Corporation:** When serving a subpoena, there is no distinction between individuals, corporations, or other legal entities. "It is a good idea in that case (service of a subpoena *duces tecum* on a corporation) to have the subpoena delivered to a person who could be served with a summons in the corporate (or other entity's) behalf, such as an officer or managing agent (see Rule 4[d][3]), which will clarify that the subpoena has reached someone of responsibility. Serving a person in some menial position in the corporate employ, while it may work, reduces the prospect of a contempt punishment for disobedience if the corporation should claim that it never got notice."

D. **Tendering Fees And Travel Expenses:** Most parties must tender expected travel costs and witness fees along with any subpoena. FRCP 45(b)(1). The rules, however, expressly exclude the United States and its agencies from this requirement. FRCP 45(b)(1).

E. **Limits On Travel:** To comply with a subpoena, a nonparty witness cannot be compelled to travel more than 100 miles from where the witness resides, is employed, or regularly transacts business in person. *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333, 1337 (Fed. Cir. 2009); FRCP 45(c)(3)(A)(ii).

VII. Errors Noticing The Deposition: For errors and irregularities regarding deposition notices, parties must provide written objection promptly after receiving the defective notice. FRCP 32(d)(1). "This rule essentially requires that notice defects be pointed out promptly in order to give the erring party an opportunity to correct the mistake." *Bobrosky v. Vickers*, 170 F.R.D. 411, 415 (W.D.Vir. 1997)(*citing Brown Badgett v. Jennings*, 842 F.2d 899, 902 (6th Cir. 1988)).

A. **No Notice Means No Waiver:** It is impossible to serve a written objection to a defective notice if, in fact, no notice at all is provided. *Brown Badgett, Inc. v. Jennings*, 842 F.2d 899, 902 (6th Cir. 1988). Some notice must be given before any objections can be deemed to be waived. *Id.* If notice is not provided, an adversary's rights to attend the deposition and cross-examine the witness are completely compromised, and the deposition may be excluded. *Id.*

B. **Subpoena Duces Tecum**: A subpoena duces tecum requires the production of documents at the time of deposition. Courts have held that the failure to object in writing to a subpoena duces tecum within the time specified ordinarily constitutes a waiver of objections. *Tuite v. Henry*, 98 F.3d 1411, 1416-17 (D.C.Cir. 1996); *Wang v. Hsu*, 919 F.2d 130, 131 (10th Cir. 1990). This rule applies to the assertion of privileges. *See, e.g., Brogren v. Pohlad*, 1994 WL 654917 (N.D.Ill.). In explaining the rationale for these holdings, the Second Circuit stated that "[w]e believe that Rule 45(c)(2)(B) does require the recipient of a subpoena to raise all objections at once, rather than in staggered batches, so that discovery does not become a 'game.'" *In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2d Cir. 1998)(*quoting United States v. Bryan*, 339 U.S. 323, 331 (1950)).

1. **Avoids Second Deposition**: A timely objection allows production issues to be resolved by the parties or the court before the deposition, avoiding the need for a second deposition should documents withheld later be deemed discoverable. *See Deal v. Lutheran Hospitals*, 127 F.R.D. 166, 168 (D. Alaska 1989)(failure to object timely can lead to "unnecessary expense and inconvenience to the parties"); *Oneida, Ltd. v. United States*, 43 Fed.Cl. 611, 616 (Fed.Cl. 1999).

VIII. Failure To Attend: The failure to attend a deposition is sanctionable. Courts routinely award sanctions for a failure to appear at a properly-noticed deposition. *See Billips v. NC Benco Steel, Inc.*, 2011 WL 3444161, at *6 (W.D.N.C.) (awarding sanctions pursuant to FRCP 30(d)(2) where either plaintiff appeared at his examination and contrary to the rules failed to proceed, or he failed to appear); *Miles v. Elliot,* 2011 WL 857320, at *8 (E.D.Pa.) (awarding sanctions pursuant to FRCP 30(d)(2) where designee failed to appear for his properly-noticed deposition). The failure to obey a subpoena "without adequate excuse . . . may be deemed a contempt of the Court from which the subpoena issued." FRCP 45(e). Even when there is notice that the witness won't attend, sanctions may be awarded. *F.T.C. v. Dalbey*, 2011 WL 6413819, 2 (D.Colo.). Extremely late notice is still grounds for sanctions.

A. **Must Seek Protective Order**: A party cannot unilaterally decide not to attend, but – if an agreement can't be reached with the noticing party - must file for a protective order, to stay the deposition. *Hoffman v. United Parcel Service, Inc.*, 206 F.R.D. 506, 508 (D.Kan. 2002).

Notes:

[B2] LOCATING THE DEPOSITION

QUICK RULE: *The party taking the deposition may unilaterally choose the place for deposing an opposing party. Non-party witnesses must be deposed within 100 miles of their home or work.*

DISCUSSION:

I. **The Deposition's Location Depends Upon The Witness's Role In The Lawsuit**: The party noticing the deposition initially selects the deposition's location. FRCP 30(b)(1); *Turner v. Prudential Ins.*, 119 F.R.D. 381, 383 (M.D.N.C. 1988). This choice is then subject to the court's authority to grant a protective order designating another place. *Scooter Store, Inc. v. Spinlife.com, LLC,* 2011 WL 2118765, 1 (S.D.Ohio 2011). In practice, the proper location for the deposition will depend upon whether the proposed witness is associated with one party or is a third-party witness. "Underlying this rule appears to be the concept that it is the plaintiffs who bring the lawsuit and who exercise the first choice as to the forum. The defendants, on the other hand, are not before the court by choice." *Farquhar v. Shelden,* 116 F.R.D. 70, 72 (E.D.Mich. 1987). Where this factual premise is attenuated, the presumptions regarding deposition location are weakest. *Pinkham v. Paul*, 91 F.R.D. 613, 614-15 (D.Me. 1981).

A. **Deposition Location – Plaintiff As Witness**: Generally, the defendant may depose the plaintiff in the forum district, as plaintiff has consented to participating in proceedings there. *In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 471 (E.D.Va. 2010); *United States v. Rock Springs Vista Development*, 185 F.R.D. 603, 604 (D. Nevada 1999). There is, however, "no absolute rule as to the location of the deposition of a nonresident plaintiff." *Id.*

1. **Plaintiff Rule Limited**: The presumption on forum depositions for plaintiff wanes where the plaintiff is not litigating in his choice of forum as a consequence of a defendant's successful motion to transfer venue. *Scooter Store, Inc. v. Spinlife.com, LLC*, 2011 WL, 2118765, 2 -3 (S.D.Ohio). "If plaintiff has sued in a court far distant from home because the transactions in question occurred in that district, and a suit elsewhere would probably have been transferred in any event, the usual rule requiring plaintiff to come to the forum for his or her deposition seems inappropriate. And if the plaintiff had no choice of forum to begin with, there seems very little reason to give weight to the selection of the forum as against facts indicating that another place for taking the deposition would be more just." *Id.* (*quoting* 8A Wright, et al, *Federal Practice & Procedure* § 2112 (3d ed. 2010)).

2. **Plaintiff May Seek To Move Deposition**: To avoid an "in forum" deposition, plaintiff must show good cause for not being required to come to the district where the action is pending. Wright, et al, *Federal Practice and Procedure* § 2112 (1994)). *See also Clem v. Allied Van Lines*, 102 F.R.D. 938 (S.D.N.Y. 1984). As the party resisting in-forum discovery, the plaintiff must establish good cause for having her deposition taken in in another district. *Dieng v. Hilton Grand Vacations Co., LLC*, 2011 WL 1299695 (D.Nev.)(*citing United States v. Rock Springs Vista*, 185 F.R.D.

603, 604 (Dist NV 1999)). Mere inconvenience or expense will not justify moving the plaintiff's deposition from the forum where the suit is pending. *Id.*

B. <u>Deposition Location - Defendant As Witness</u>: Because a non-resident defendant ordinarily has no say in selecting a forum, the court will typically respect an individual defendant's preference for a deposition near her place of residence - as opposed to the judicial district in which the action is being litigated. *In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 471 (E.D.Va. 2010); *Steppe v. Cleverdon*, 2007 WL 6831006, at *2 (E.D.Ky.). Courts often honor this rule in the breach. *Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547, 550 (S.D.N.Y. 1989); *Afram Export Corp. v. Metallurgiki Halyps*, S.A., 772 F.2d 1358, 1365 (7th Cir. 1985).

1. **<u>Relevant Factors</u>**: Various factors may persuade the court to permit the defendant's deposition outside its home district. *Turner v. Prudential Ins. Co.*, 119 F.R.D. 381, 383 (M.D.N.C. 1988); *Resolution Trust*, 147 F.R.D. at 127; *Rapoca*, 199 F.R.D. at 193.

   a. the location of counsel for the parties;
   b. the number of corporate representatives a party is seeking to depose;
   c. defendant choosing a representative that resides outside the location of the principal place of business and the forum district;
   d. significant discovery disputes and the anticipated intervention by the forum court;
   e. whether the persons sought to be deposed often travel for business purposes,
   f. whether the defendant has filed a permissive counterclaim; and
   g. the relevant equities involved.

2. **<u>Defendant Is Corporation</u>**: For corporate defendants that have not asserted claims in the litigation, the default rule provides for depositions where the corporation is headquartered or principle place of business. *E.g., Rapoca v. AMCI Export*, 199 F.R.D. 191, 193 (W.D.Va. 2001); *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *El Camino v. Huntington Nat'l Bank*, 2008 WL 2557596, at *3 (W.D. Mich.).

   a. **<u>Rule Subject To Modification</u>**: Courts may reject the corporate situs rule when justice requires. *Mapes v. Wellington Capital Group*, 2008 WL 624471, 4 (D.Neb. 2008)(*citing* Wright, *Practice & Procedure* § 2112). The party proposing an alternate location for the deposition has the burden of overcoming the general presumption. *See McDougal-Wilson v. Goodyear Tire*, 232 F.R.D. 246, 249 (E.D.N.C. 2005).

   b. **<u>Permissive Counter Claims</u>**: If a defendant files a permissive counterclaim, the court may order that the defendant-counterplaintiff be deposed at the place of trial. *Chris-Craft Indus. Products, Inc. v. Kuraray Co., Ltd.*, 184 F.R.D. 605, 607 (N.D. Ill. 1999). In considering such a request, the court will examine whether the deposition is in support of the original claim or the counterclaim. *Id.*

C. <u>Deposition Location: Third-Party Witnesses</u>: Courts will quash or modify a subpoena if it requires a person who is not a party or an officer of a party to travel more than 100 miles from the place where that person resides, is employed or regularly transacts business in person. FRCP 45(c)(3)(A)(ii).

D. **Deposing Party Employees**: The courts distinguish between a company's ordinary employees, and its directors, officers, and other high-level representatives. *Archer Daniels Midland Co. v. Aon Risk Services*, 187 F.R.D. 578, 587-88 (D. Minn. 1999). A party's directors, officers, and managing agents are subject to the same rule as the party itself. FRCP 45(c)(3)(A)(ii). Ordinary employees are subject to the general rule that a deponent should be deposed near his or her residence, or principal place of work. *Metrex Research Corp. v. United States*, 151 F.R.D. 122, 125 (D.Colo. 1993).

1. **Foreign Employees**: Parties may be required to produce for deposition in the United States their foreign-situated employees if (1) the employees are considered managing agents, (2) the witnesses' interests are identical to the interests of the corporate party, and (3) the corporate party has the authority to direct the witnesses to appear for deposition. *See, e.g., In re Honda Am. Motor Co.*, 168 F.R.D. 535, 540 (D.Md. 1996). "The 'paramount test' is whether the individual can be expected to identify with the corporation's interests as opposed to an adversary's." *Id.* Under such circumstances, resort to the Hague convention for foreign deposition (see below) may not be necessary.

E. **Expert Depositions**: Unless the expert is a party executive, expert depositions are treated – and located – the same as third-party depositions: near the residence or place of business. Moreover, time an expert spends traveling to and from the deposition generally is regarded as an expense that should be shifted to the deposing party. *See, Frederick v. Columbia University*, 212 F.R.D. 176, 177–178 (S.D.N.Y. 2003); *Haarhuis v. Kunnan Enterprises*, 223 B.R. 252, 258 (D.D.C. 1998) *aff'd*, 177 F.3d 1007 (D.C.Cir. 1999); *Magee v. Paul Revere Life*, 172 F.R.D. 627, 646 (E.D.N.Y. 1997). The deposing party can control the traveling costs by locating the deposition so as to minimize an expert's travel time. *Rock River v. Universal Music*, 276 F.R.D. 633, 637 (C.D. Cal. 2011).

II. **Court Involvement In Choosing Deposition Location**: A court has broad and substantial discretion to determine the appropriate time and place for the examination and whether any special conditions should be attached. *Armsey v. Medshares Mgmt. Serv., Inc.*, 184 F.R.D. 569, 571 (W.D.Va. 1998); *Asea, Inc. v. Southern Pac. Transp. Co.*, 669 F.2d 1242, 1248 (9th Cir. 1981); *In re Standard Metals Corp.*, 817 F.2d 625, 628 (10th Cir. 1987); *Botkin v. Donegal Mut. Ins. Co.*, 2011 WL 2447939, 8 (W.D.Va.). The Court may order a defendant to appear for its deposition in the forum where the litigation is based under certain circumstances. *E.g., Resolution Trust*, 147 F.R.D. at 127 (*citing Turner v. Prudential Ins. Co.*, 119 F.R.D. 381, 383 (M.D.N.C.1988)); *Rapoca Energy*, 199 F.R.D. at 193 (*citing Armsey v. Medshares Mgmt. Serv., Inc.*, 184 F.R.D. 569 (W.D.Va. 1998)).

III. **Taking Depositions In Foreign Countries**: Discovery taking place within the borders of any other country is subject to the rules governing such discovery. It is vital to review what discovery is permitted – if any – before seeking discovery abroad, as the rules vary by country and some are subject to local criminal prosecution for violation. *In re Vitamins Antitrust Litigation*, 120 F.Supp.2d 45, 55 (D.D.C. 2000). Depositions may be taken in foreign countries, (1) pursuant to an applicable treaty or convention, such as the Hague Convention on the Taking of Evidence, (2) under a letter of request, whether or not captioned as a letter rogatory, (3) on notice before a person authorized to administer oaths in the place where the examination is to be held, or (4) before a person commissioned by the court to administer oaths and take testimony. FRCP 28(b); *Recaro North America, Inc. v. Holmbergs Childsafety Co. Ltd.*, 2011 WL 5864727, 1 (E.D.Mich.).

A. **Discovery In Non-Hague Countries**: For discovery in countries not parties to the Hague convention on Evidence, Courts must consider and apply the general principles of comity and territorial preferences as expressed in international treaties and laws. *In re Vitamins*, 120 F.Supp.2d 45, 55 (D.D.C. 2000).

IV. Hague Convention: "The Hague Evidence Convention serves as an alternative or 'permissive' route to the federal Rules of Civil Procedure for the taking of evidence abroad from litigants and third parties alike." *Tulip Computers Int'l B.V. v. Dell Computer Corp.*, 254 F.Supp.2d 469, 472 (D.Del. 2003) (*citing Societe Nationale v. United States District Court*, 482 U.S. 522, (1987)). "The Convention allows judicial authorities in one signatory country to obtain evidence located in another signatory country 'for use in judicial proceedings, commenced or contemplated.' " *Id.* (*quoting Hague Evidence Convention, Art. 1*). The United States is a contracting state under the Hague Evidence Convention.

A. **Explanation Of The Hague Convention**: The Hague Evidence Convention codifies the taking of depositions on notice and commission before consuls and court appointed commissioners, providing minimum standards with which contracting states agree to comply. The Convention reconciles different, often conflicting, discovery procedures in civil and common law countries. The Convention also streamlines procedures for compulsion of evidence, using a form "letter of request" which can be sent directly by the United States court to a foreign central authority, eliminating the cumbersome "diplomatic channel." *See International Soc"y for Krishna v. Lee*, 105 F.R.D. 435, 442-443 (S.D.N.Y. 1984); *Philadelphia Gear v. American Pfauter Corp.*, 100 F.R.D. 58, 59 (E.D. Pa. 1983). Article 1 of the Convention provides that assistance is to be provided in "civil and commercial" matters. The term "civil and commercial" is not defined.

B. **Declarations And Reservations**: Each signatory to the Convention had the opportunity of making reservations and declarations regarding the applicability of each article of the Convention. This makes the Convention different for each country.

C. **Exclusivity**: The nonexclusivity of the Hague Evidence Convention procedures was at issue in *Societe Nationale v. U.S. District Court*, 482 U.S. 522 (1987), where the Supreme Court held that the Convention did not bar a district court, pursuant to the FRCP, from ordering a foreign litigant over which that court exercised personal jurisdiction to produce evidence located within the foreign litigant's own territory. The "language, history, and purposes" of the Hague Convention indicate "that it was not intended to prescribe the exclusive means by which American plaintiffs might obtain foreign evidence." *Id.* The Convention was intended as a permissive supplement, not a pre-emptive replacement, for other means of obtaining evidence located abroad. *Id.*

D. Methods Of Obtaining Evidence: There are three methods of taking evidence pursuant to the Convention: (1) by a Letter of Request or "letter rogatory" from a United States judicial authority to the competent authority in the foreign state, (2) by an American or foreign diplomatic or consular officer or agent after permission is obtained from the foreign state, and (3) by a private commissioner duly appointed by the foreign state. *Pronova BioPharma Norge AS v. Teva Pharmaceuticals USA, Inc.*, 708 F.Supp.2d 450, 452 -453 (D.Del. 2010).

1. **Compulsion Of Evidence Through Letters Rogatory**: Testimony and documentary or physical evidence may be compelled using the "Model Letter of Request" provided in the Hague Evidence Convention. The court in the U.S. transmits the request with appropriate translations directly to the foreign central authority. See Moore's Federal Practice, 3d, Section 28.12[8]. Article 3 provides mandatory provisions concerning the content of the letter of request.

    a. **Transmitting Request**: The requesting court in the United States transmits the model letter of request and accompanying documents and appropriate translations, in duplicate, directly to the central authority.

    b. **Execution Of The Request**: Article 9 provides that letters of request will be executed in accordance with local foreign law. The Article requires that requests be executed "expeditiously." Requests under the Hague Evidence Convention are executed somewhat faster than letters rogatory, due - in part - to the direct channel from the U.S. court to the foreign central authority. The general estimate of 6 months to a year to execute the request is still used.

    c. **Return Of Executed Request**: Article 13(1) provides that the executed request shall be returned to the issuing authority (requesting court) by the foreign central authority.

    d. **Letter Of Request**: Upon receipt of a Letter of Request, which must provide specific information regarding the lawsuit and the information sought to be discovered, the signatory state shall then apply the appropriate measure of compulsion as is customary for the execution of orders issued by the authorities of its own country. Individuals to whom a Letter of Request is directed have the right to refuse to give evidence to the extent they are protected by a privilege under either the law of the State of execution or the State of origin.

    e. **Pre-Trial Discovery Of Documents**: (A total hornets' nest) Most countries party to the Convention, with the exception of the Czech Republic, Israel, the Slovak Republic and the United States, made specific declarations objecting to the Article 23 provision on pre-trial discovery of documents.

2. **Depositions Of Willing Witnesses**: Some countries allow depositions of willing witnesses only under specific conditions. www.martindale.com/products/intl law dir.html.

a. **Arranging Consular Depositions**: When a U.S. consular officer is needed to preside at the taking of a voluntary deposition at an American embassy or consulate scheduling depositions is done directly by United States embassies and consulates at a time and date mutually convenience to the participants and the consular officer. The consular officer generally administers the oaths to the witnesses, court reporter and interpreter and withdraws, subject to recall. The actual questions are posed by the attorneys. See 22 C.F.R. 92.56, consular officers will comply with special instructions which accompany the request for deposition on notice or commission. Requesting counsel must make arrangements with the witness to insure his or her appearance for the deposition.

b. **Depositions By Court-Appointed Commissioners:** Article 17 provides for the possibility of court appointed commissioners to take depositions under restrictions similar to those confronting consular officers. To date, only Finland and the United States have given broad permission for court appointed commissioners to take depositions.

E. **Invoking The Hague Convention**: A party which seeks the application of the Hague Evidence Convention procedures rather than the FRCP must persuade the trial court of the necessity of proceeding pursuant to the Hague Evidence Convention. *Valois of Am., Inc. v. Risdon Corp.*, 183 F.R.D. 344, 346 (D.Conn. 1997). That burden is not great as the Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention. *Pronova BioPharma Norge AS v. Teva Pharmaceuticals USA, Inc.*, 708 F.Supp.2d 450, 452 -453 (D.Del. 2010). Typical showing may include the fact that the target of the discovery is not a party, have not voluntarily subjected themselves to discovery, are citizens of a Hague Convention signatory, and are not otherwise subject to the court's jurisdiction. *See Tulip Computers Int'l B.V.*, 254 F.Supp.2d at 474.

V. **Organizing The Deposition**: Typically, the party noticing the deposition will pay for the court reporter and the witness's travel. The noticing party will also choose whether the deposition will be in person, telephonic, or by video conferencing. The court, however, may order the deposition conducted to reduce the expense to the other parties. In *Connell v. City of New York*, 230 F.Supp.2d 432, 436-37 (S.D.N.Y. 2002), the court ordered a deposition taken by video conference due to plaintiff's indigence. In *Jahr v. IU International Corp.*, 109 F.R.D. 429, 430-33 (M.D.N.C. 1986), the court ordered the deposition taken by telephone due to plaintiff's financial necessity. In *Cacciavillano v. Ruscelo, Inc.*, 1996 U.S. Dist. LEXIS 18968, at *3-4 (E.D.Pa. 1996), the court ordered the party insistent on taking a deposition in person to pay the expenses of the other side.

VI. **Practice Points**: Counsel selecting a deposition site should ensure access to a speakerphone, so that the parties may call judge or magistrate should this become necessary. It can often be advantageous to depose third parties or experts at their offices or places of employment. This permits the noticing attorney to obtain documents or materials discussed during the deposition. For example, if an expert refers to a treatise that he used, he may have a copy in his office.

Notes: ______________________________

[B3] WHEN THE DEPOSITION SHOULD TAKE PLACE

QUICK RULE: *A party may depose a witness after the discovery conference, or earlier (1) by the court's leave, (2) by the parties' stipulation, or (3) if the witness is leaving the United States before the discovery conference. The party seeking a deposition must give the opposing party and the witness "reasonable notice." FRCP 30(b)(1).*

DISCUSSION:

I. **Depositions Must Wait Until Discovery Opens**: Generally, when the case requires initial disclosures under FRCP 26(f), discovery may not begin before the parties have held their initial conference. FRCP 26(d)(1). The rules provide three possible avenues for beginning discovery before a required Rule 26(f) discovery conference.

A. **Witness Leaving The Country**: If the party expects the witness to leave the United States and be unavailable for deposition in this country after the discovery conference, the party may notice or subpoena the expedited deposition without the court's leave. FRCP 30(a)(2)(A)(iii). The deposition notice must contain a certification with facts supporting the need for the expedited deposition. Id.

B. **Party Stipulation**: The parties may agree, without the court's involvement, to start discovery before the discovery conference. FRCP 26(d)(1).

C. **Court Order**: Either party may petition the court to begin discovery – and permit depositions – before the Rule 26(f) discovery conference. FRCP 30(a)(2)(A). In the absence of a specific standard delineated in the Federal Rules, courts have considered two different standards in evaluating expedited discovery motions, one applying modified preliminary injunction factors and another "reasonableness," or "good cause" test. *ForceX, Inc. v. Technology Fusion, LLC*, 2011 WL 2560110, 5 (E.D.Va.); *St. Louis Group, Inc. v. Metals and Additives Corp., Inc.*, 275 F.R.D. 236, 239 (S.D.Tex. 2011).

1. **Reasonableness / Good Cause Test (Majority)**: A party seeking expedited discovery in advance of a Rule 26(f) conference has the burden of showing good cause for the requested departure from usual discovery procedures. *See Qwest Communications Intern., Inc. v. WorldQuest Networks, Inc.*, 213 F.R.D. 418, 419 (D.Colo. 2003). "Although the rules do not say so, it is implicit that some showing of good cause should be made to justify such an order." *Alternative Energy Solutions, Ltd. v. Chico*, 2011 WL 3880439, 1 (N.D.Ind.)(*quoting* 8 C. Wright, et al, *Federal Practice and Procedure* § 2046.1, p. 592 (2d ed. 1994). Courts consider requests to expedite discovery based upon the entire record and the reasonableness of the request in light of all the surrounding circumstances. *Merrill Lynch, Pierce, Fenner & Smith v. O'Connor*, 194 F.R.D. 618, 623 (N.D.Ill. 2000); *Dimension Data v. NetStar-1*, 226 F.R.D. 528, 531 to 226 F.R.D. 528, 532 (E.D.N.C. 2005) (rejecting expedited discovery because good cause not shown).

2. **Injunctive Standard Test (Minority)**: Before expedited discovery, some courts require a showing similar to that involved in obtaining preliminary injunctions. *ForceX, Inc. v. Technology Fusion, LLC*, 2011 WL 2560110, 5 (E.D.Va.). This is based upon the conclusion that expedited discovery requests are routinely considered either during a court's consideration of motions for a preliminary injunction or temporary restraining order, or directly before such motions in order to prepare for a preliminary injunction argument. *Id.* This more rigid approach, which is in a shrinking minority, *See St. Louis Group, Inc. v. Metals and Additives Corp., Inc.*, 275 F.R.D. 236, 239 (S.D.Tex. 2011), considers four elements: (1) irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted. *Id. See also Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982); *Crown Crafts, Inc. v. Aldrich*, 148 F.R.D. 151, 152 (E.D.N.C. 1993).

II. **Reasonable Notice**: A party seeking to depose a person must give "reasonable written notice" to every other party. FRCP 30(b)(1). The non-noticing party may choose to attend the deposition, and waive the required reasonable notice. Absent evidence that the parties and witnesses were given reasonable written notices, however, the court has no authority to compel witnesses, including the parties, to attend any depositions. *Pegoraro v. Marrero*, 2011 WL 5223652, 4 (S.D.N.Y.); *Standiford v. Humberto*, 2011 WL 400013, 3 (N.D.W.Va.). The rules require a court to quash or modify any subpoena that "fails to allow a reasonable time to comply" or "subjects a person to undue burden." *Ike-Ezunagu v. Deco, Inc.*, 2010 WL 4822511, 2 (D. Md.) (quoting FRCP 45(c)(3)(A) (i), (iv)).

A. **Local Rules May Define Reasonable Notice:** In many districts, local rules define what constitutes reasonable notice for a deposition. For example, in the District of Maryland, the local rules define reasonable notice as 14 days. *Templeton v. First Tennessee Bank, N.A.*, 2011 WL 6014212, (D.Md). The local rules for Kansas define reasonable notice as 5 business days. *Horsewood v. Kids "R" Us*, 1998 WL 892667, *1 (D.Kan.) (Citing D.Kan. Rule 30.1). *See also* Eastern District of Virginia local rule 30(H) ("As a general rule, eleven (11) days in advance of the contemplated taking of a deposition shall constitute reasonable notice. . . .").

B. **Opposing Short Notice**: Generally, when local rules don't define reasonable notice, courts have concluded that fewer than ten-days notice is unreasonable.

- Written notice was not reasonable, as it was served 30 hours prior to the close of discovery, making the 30(b)(6) deposition a practical impossibility. *Lathon v. Wal-Mart Stores East, LP*, 2009 WL 1810006 (E.D.Va.).

- Two-days notice is unreasonable. *Stover v. Universal Moulded Products*, 11 F.R.D. 90, 91 (E.D.Pa. 1950); *Lloyd v. Cessna Aircraft Co.*, 430 F.Supp. 25, 26 (E.D.Tenn. 1976).

- Three business-days notice unreasonable, especially for busy witnesses. *United States v. Philip Morris Inc.*, 312 F.Supp.2d 27, 36 (D.D.C. 2004)(subpoena quashed).

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- Four business days were insufficient for an attorney and three VA employees to alter their schedules to attend the depositions. *Brockway v. Veterans Admin. Healthcare System*, 2011 WL 1459592 (D.Conn.).

- Six days is not reasonable notice. *In re Stratosphere*, 183 F.R.D. 684, 687 (D.C.Nev. 1999); *Great American Ins. v. McElwee Brothers*, 2004 WL 574749, *4 (E.D.La.).

- "Requiring individuals to appear for depositions two to three days before Thanksgiving on—at most—eight days notice does not provide these individuals with 'reasonable time to comply' with the subpoenas." *Ike-Ezunagu v. Deco*, 2010 WL 4822511, 2 (D. Md.).

- Sixteen depositions in ten cities on the same date, served ten days before trial not "reasonable notice." *Mims v. Central Manufacturers' Mutual*, 178 F.2d 56, 59 (5th Cir. 1949).

C. **<u>Permitting Short Notice</u>**: In determining reasonable notice, courts may consider actual rather than only written notice. *Ranger Transp., Inc. v. Wal-Mart Stores*, 903 F.2d 1185, 1188 n. 6 (8th Cir. 1990) (parties received two days written notice of depositions, the attorneys had received informal notice eight days earlier and therefore such notice was reasonable.).

- When determining whether notice is unreasonably short, the Court shall consider the noticing party's special needs for haste. *Forstater v. State Farm*, 1992 WL 70402, *2 (E.D.Pa.) (two days unreasonable without "exceptional circumstances").

- Four-days notice for newly discovered witness was deemed reasonable with trial pending and based upon court's determination that cite of deposition had easy airplane access. *F.A.A. v. Landy*, 705 F.2d 624, 634 (2nd Cir. 1983).

- Twenty-four-hours notice not necessarily unreasonable, depending upon circumstances. *State v. Superior Court of Pima County*, 416 P.2d 435 (Az. 1966).

D. **<u>When Notice Includes A Document Request</u>**: When the notice joins a request for the production of documents, the procedures for FRCP 34 apply and a minimum of 30 days' notice is required. *Guatay Christian Fellowship v. San Diego*, 2009 WL 2044621, 1 (S.D.Cal.).

Notes: ______________________________

[B4] HOW MANY DEPOSITIONS MAY TAKE PLACE

QUICK RULE: *If a party or related parties wish to take more than ten depositions in a case, they must seek the court's permission, or get consent from the other parties. FRCP 30(a)(2)(A)(i).*

DISCUSSION:

I. **Ten Deposition Limit**: The rules presumptively cap the number of depositions in a case at ten, FRCP 30(a)(2)(A)(i), while giving the trial courts broad authority to increase this number depending upon the circumstances. *Universal City Studios v. Reimerdes*, 104 F.Supp.2d 334, 342 (S.D.N.Y. 2000); *Ritchie Risk-Linked Strategies v. Coventry*, 273 F.R.D. 367, 371 (S.D.N.Y. 2010). The ten-deposition limit applies to what the Advisory Committee Notes call a "side." Local rules can alter the number of presumptive depositions.

A. **Purpose**: The ten deposition limit enables courts to maintain a 'tighter rein' on discovery and to minimize the potential cost. *Whittingham v. Amherst Coll.*, 163 F.R.D. 170, 171-72 (D.Mass. 1995)(*citing* FRCP 26(b)(2) Advisory Notes). The limit also seeks to emphasize that attorneys are professionally obligated to develop mutual, cost-effective plans for discovery. *American General Life Ins. Co. v. Billard*, 2010 WL 5477716, 1 -2 (N.D.Iowa)(*quoting* FRCP 30, Advisory Notes (1993)). *See also Presidio v. American Technical*, 2009 WL 861733, 4 (S.D.Cal.). "Consideration should normally be given at the planning meeting of the parties under Rule 26(f) and at the time of a scheduling conference under Rule 16(b) as to enlargements or reductions in the number of depositions, eliminating the need for special motions." *Id.*

II. **Seeking More Depositions**: Parties may seek additional depositions, when necessary.

A. **Stipulation**: Parties may generally stipulate to any number of depositions they wish. *Dixon v. Certainteed Corp.*, 164 F.R.D. 685, 692 (D.Kan. 1996) (citing FRCP 30(a)(2)(A)). Under some local rules, however, the parties cannot grant themselves permission to take more than ten depositions per side by entering a stipulation. Rather, an order of a judicial officer must be sought and obtained. *See, e.g.,* Local Rule 26.1(C) District Court of Massachusetts.

B. **Court Order**: Absent stipulation, a party seeking more than ten depositions must obtain the court's permission before exceeding that limit. *Advanced Sterilization Products v. Jacob*, 190 F.R.D. 284, 286 (D. Mass. 2000). Courts have discretion regarding whether to permit additional depositions. *Raniola v. Bratton*, 243 F.3d 610, 628 (2d Cir. 2001); *see also Bell v. Fowler*, 99 F.3d 262, 271 (8th Cir. 1996) (District court did not abuse its discretion by denying motion to take additional depositions).

1. **Applicable Legal Standard**: If a party seeks leave to take additional depositions without the consent of the other party, "the court must grant leave to the extent consistent with Rule 26(b)(2)." *Byrd v. District of Columbia*, 259 F.R.D. 1, 4 (D.D.C. 2009). The rules provide several discretionary factors to be weighed in imposing the ten-deposition limit. *Raniola v. Bratton*, 243 F.3d 610, 628 (2d Cir. 2001). Specifically, the

depositions will be allowed unless (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. FRCP 26(b)(2). More than ten depositions per side must be justified under the "benefits v. burdens" approach of Rule 26(b)(2). *Martinez v. California*, 2008 WL 5101359, 2 (E.D.Cal.)(*citing* FRCP 30(a)(2) Advisory Notes (1993)).

a. **Necessary Showing**: Generally, a party seeking to exceed the presumptive number of depositions must make a "particularized showing of why the discovery is necessary." *Daniels Midland Co. v. Aon Risk Services*, 187 F.R.D. 578,586 (D.Minn. 1999); *Barrow v. Greenville*, 202 F.R.D. 480 (N.D.Tex. 2001) (party failed to justify exceeding the deposition limit where assertion of relevance was speculative).

b. **No Fishing**: Additional depositions will not be permitted to facilitate a fishing expedition. *Pedraza v. Holiday Housewares, Inc.*, 203 F.R.D. 40, 42 (D. Mass. 2001). "A vague possibility that loose and sweeping discovery might turn up something. . .does not show particularized need and likely relevance that would require moving discovery beyond the natural focus of the inquiry." *Id.*

2. **Application Of Standard Varies Greatly**: Courts have differed greatly as to what showing is necessary to obtain additional depositions.

a. **General Requirements**: Courts may require the party seeking additional depositions to first exhaust the allotted ten depositions, or to identify the names of the additional deponents. *See Whittingham v. Amherst College*, 163 F.R.D. 170-72 (D.Mass. 1995)(Must show necessity to take extra depositions). The party seeking the additional depositions may need to specify who is to be deposed and the reasons why their testimony is necessary. *See San Francisco Health Plan v. McKesson Corp.*, 264 F.R.D. 20, 21 (D.Mass. 2010)

b. **Difficult Standard**: Some courts are extremely reluctant to permit additional depositions, viewing them as a burden upon the witnesses.

i. **Justifications**: Some courts require that, before obtaining additional depositions, the requesting party must justify each deposition previously taken without leave of court. *AIG v. O'Neill*, 2010 WL 4116555, 16 (S.D.Fla.)(*citing Mazur v. Lampert*, 2007 WL 676096 (S.D.Fla.). Requiring the party to justify prior depositions precludes the possibility that a party could circumvent the depositions cap by exhausting the maximum allotted number to take those that she could not justify under Rule 26(b)(2) standards, and then seeking leave to exceed the limit to take depositions that she could substantiate. *Barrow v. Greenville*, 202 F.R.D. 480, 483 (N.D.Tex. 2001).

ii. **Not Entitled To Depose All Knowledgeable People**: "The mere fact that many individuals may have discoverable information does not necessarily entitle a party to depose each such individual." *Dixon v. Certainteed Corp.*, 164 F.R.D. 685, 692 (D.Kan. 1996). Simply because more than ten witnesses have relevant knowledge does not, alone, justify a party to exceed the deposition limit. *Olivia Marie v. Travelers Cas.*, 2011 WL 6739400, 2 (E.D.Mich.). "Although a witness might have discoverable information, a party is not always entitled to depose that individual." *Snoussi v. Bivona*, 2011 WL 6761068, 1 (E.D.N.Y.)(*quoting C.F.T.C v. Commodity Inv.*, 2005 U.S. Dist. LEXIS 27454, at *2 (S.D.N.Y.)). "The number of potential witnesses does not justify deposing every one. Many of them may duplicate each other's testimony. " *In re At Home*, 2005 WL 289976, *3 (N.D.Cal.).

iii. **Not Entitled To Depose All Trial Witnesses**: Some courts have held that the fact that a party may "have to face trial witnesses and declarants without having first deposed them does not amount to a particularized showing [for exceeding the limitation on the number of depositions] as contemplated by the FRCP." *Dominguez v. Schwarzenegger*, 2010 WL 3341038, 8 (N.D.Cal.)(*quoting Finazzo v. Hawaiian Airlines*, 2007 WL 1425241, at *3 (D.Haw.). These bad decisions ignore the purpose behind the FRCP. [ed.]

c. **Lenient Standard**: Some courts allow parties to exceed the ten deposition limit when the proposed deponents were identified as having information regarding liability and/or damages. *See Hoffman v. BLR Group of America, Inc.*, 2009 WL 1768799, 1 (S.D. Ill.). One court framed the necessary showing as "a good-faith basis for seeking the additional depositions and a prima facie showing that they are necessary." *San Francisco Health Plan v. McKesson Corp.*, 264 F.R.D. 20, 21 (D.Mass. 2010). "Counsel know the case far better than the court, and counsel's judgment about what it needed is entitled to a good deal of deference." *Id.* Additional depositions may be permitted if they will save time during motions and trial. *Martinez v. California*, 2008 WL 5101359, 2 (E.D.Cal.).

III. **Fewer Than Ten**: In some cases the ten-per-side limit should be reduced. *American General v. Billard*, 2010 WL 5477716, 1 -2 (N.D.Iowa)(*quoting* FRCP 30 Advisory Notes (1993)). To limit depositions to fewer than ten, a party must obtain a protective order under Rule 26(b) (2)(C). *Structural Group, Inc. v. Liberty Mut. Ins. Co.*, 2008 WL 4616843, 6 (M.D.Pa.)(denying a protective order limiting the total number of depositions to three per side). A "party wishing to obtain an order of protection over discovery material must demonstrate that 'good cause' exists for the order of protection." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," do not support a showing of good cause. *Id.* (*quoting Cipollone v. Liggett Group*, 785 F.2d 1108, 1121 (3d Cir. 1986)).

IV. **Counting Depositions**:

A. **Experts**: It is unsettled whether the ten-deposition limit includes expert depositions. Expert depositions, addressed in FRCP 26(b)(4), could also be included in FRCP 30's broad application to "any person." Neither cases nor commentary resolve this issue. *Express One Intern., Inc. v. Sochata*, 2001 WL 363073, *3 (N.D.Tex.).

1. **Experts Not Counted**: Several courts have held that expert witness depositions do not count towards the ten per-side deposition limit of Rule 30(a)(2)(A)(i). *Rayco Mfg., Inc. v. Deutz Corp.*, 2010 WL 183866, at * 3 (N.D.Ohio); *see also Royal Bahamian Ass'n, Inc. v. QBE Ins. Corp.*, 2010 WL 3003914, 1 (S.D.Fla.). "A party may depose any person who has been identified as an expert whose opinions may be presented at trial." FRCP 26(b)(4)(A). This would remove experts from the ten-deposition limit, as any expert may be deposed – even if eleven are identified.

2. **Experts Counted**: Some courts apply the ten-deposition limit to experts. Stating that "Expert depositions may or may not be subsumed in Rule 30(a)(1)'s broad reference to 'any person,'" the court in *Presidio Components v. American Technical*, 2009 WL 861733, 4 (S.D.Cal.), allowed additional depositions for experts but not before a full analysis. In *Powell v. Texvans, Inc.*, 2011 WL 108950, 3 (D. Nev.), the court held that "Plaintiffs may depose two of Defendants' three designated expert witnesses."

B. **30(b)(6) Depositions**: When counting depositions, a 30(b)(6) deposition is counted as a single deposition, regardless of the number of witnesses designated. *State Farm v. New Horizont*, 254 F.R.D. 227, 234 -235 (E.D.Pa. 2008)(*citing* Advisory Notes); *Sabre v. First Dominion*, 2001 WL 1590544, *1 (S.D.N.Y.); Wright, et al *Federal Practice & Procedure* § 2104 (2d ed. 1994). This limit is logical, as large corporations with large and complex documents may require testimony from multiple officers and custodians to provide comprehensive testimony regarding all matters "known or reasonably available to the organization." *State Farm Mutual Auto. Ins. Co. v. New Horizont, Inc.*, 254 F.R.D. 227, 234 -235 (E.D.Pa. 2008). A contrary rule would place an unfair constraint on the number of depositions allowed to parties needing to conduct Rule 30(b)(6) depositions.

C. **Interviews**: A witness interview is not a deposition. *U.S. ex rel. Block v. Del Campo*, 2010 WL 2698295, 5 (N.D. Ill.).

D. ***De Benne Esse* Depositions**: The rule is not clear as to whether the ten-deposition limit applies to *de bene esse* depositions. *Marmelshtein v. City of Southfield*, 2010 WL 4226667, 2 (E.D. Mich.). In *Rayco Mfg., Inc. v. Deutz Corp.*, 2010 WL 183 866 (N.D.Ohio), the court concluded, in dictum, that trial depositions are not subject to the ten-per-side deposition limits provided under FRCP 30(a)(2)(A) (i). In a different approach, the court in *El Camino Res., Ltd. v. Huntington Nat'l Bank*, 2009 WL 1228680 (W.D. Mich), recognized the distinction between discovery depositions and *de bene esse* depositions, yet still granted leave to depose the witness under Federal Rule of Civil Procedure 30(a)(2)(B), recognizing that leave of court was necessary because the proposed witness was incarcerated in prison. *Id.* at *1, 6.

E. **Written Questions**: Depositions on written questions count toward the ten-deposition limit. Wright, et al, *Federal Practice & Procedure* Civil 2d, § 2104 (2d ed. 1994).

[B5] RE-DEPOSING THE SAME WITNESS

QUICK RULE: *Absent stipulation, leave of the court is generally required to re-depose an individual. Rule 30(a)(2)(A)(ii). Courts are split as to whether this applies to corporate witnesses.*

DISCUSSION:

I. **Leave Of Court Required For Deposition**: Absent stipulation, a party must obtain the court's permission before a witness can be deposed a second time in the same case. *Burdick v. Union Sec. Ins. Co.*, 2008 WL 5102851, 2 -3 (C.D.Cal.)(*citing* FRCP 30(a)(2)(A)(ii)); Wright, et al, *Federal Practice & Procedure* § 2104). Under the rule, the court's permission is necessary if "the deponent has already been deposed in the case." It doesn't say that the requesting party has to have been the party that took the first deposition. *Presidio v. American Technical*, 2009 WL 861733, 4 (S.D.Cal.).

A. **Reopening A Deposition v. Starting A Second Deposition**: Reopening a completed deposition and taking a second deposition are properly treated as the same thing. *See E.E.O.C. v. Holmes*, 2011 WL 6069306, 2 (D.Utah)(*citing* FRCP 30(a)(2)(A)(ii)).

1. **Requirement Not For Adjournment**: Courts distinguish between the continuation of a temporarily recessed deposition and a completed deposition that a party wishes to reopen or duplicate. The requirement for leave of court "does not apply when a deposition is temporarily recessed for convenience of counsel or the deponent or to enable additional materials to be gathered before resuming the deposition." *Huertas v. City of Camden*, 2009 WL 3151312, 2 (D.N.J.)(quoting FRCP 30, Notes of Advisory Committee on 1993 Amendments to Rules).

a. **Continuing A Deposition**: The distinction between a recess and a completed deposition may be sliced very thin. *See Morningware, Inc. v. Hearthware Home Products, Inc.*, 2011 WL 6753994, 3 (N.D.Ill.) (deposition halted with the knowledge that the party would not be able to depose witness again absent a court order). In *Lewis v. United States*, 2004 WL 3254734, *2 (W.D.Tenn.), counsel noted on the record that they wanted to continue the deposition at a later date because it was discovered during the deposition that certain documents had not been produced. Court viewed second day of deposition as a continuation of the initial deposition.

2. **Extending First Deposition's Length v. Seeking Second Deposition**: The same showing that may be sufficient for obtaining an extension to the presumed seven-hour deposition time limit may be sufficient to support an order for a second deposition. *See Kress v. Price Waterhouse Coopers*, 2011 WL 5241852 (E.D.Cal.).

B. ***De Benne Esse* Depositions**: *De Benne Esse* depositions are not exempt from the requirement regarding re-depositions. *Landis v. Galarneau*, 2010 WL 446445 (E.D.Mich.); *Marmelshtein v. City of Southfield*, 2010 WL 4226667, 2 (E.D. Mich.). The need for a *de benne esse* deposition – to preserve testimony and bring it to court – may serve as the necessary showing to obtain court permission. *See Landis v. Galarneau*, 2010 WL 446445 (E.D.Mich.).

C. **Rule 30(B)(6) Depositions May Be Subject To Re-Deposition Rule**: Courts disagree as to whether the leave requirement for second depositions applies if a party seeks a second Rule 30(b) (6) deposition of a previously deposed, corporate party. The rules are silent on the relationship between Rule 30(a)(2)(A)(ii) and Rule 30(b)(6).

1. **30(B)(6) Not Subject To Rule (Minority Rule)**: Regarding the rule allowing for a limit of 10 depositions without leave, the commentary states: "A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify." FRCP 30(a)(2)(A) Advisory Note (1993). Reasoning from this note that "Rule 30(b)(6) depositions are different," at least one court has held that leave of court is not required when seeking a second FRCP 30(b)(6) deposition of a corporate party. *See Quality Aero Tech. v. Telemetrie,* 212 F.R.D. 313, 319 (E.D.N.C. 2002); *see also Kimberly-Clark v. Tyco Healthcare*, 2007 WL 601837, at *3 n. 1 (granting leave but noting that "there is some question about whether leave of court is even required").

2. **30(B)(6) Subject To Rule (Majority Rule)**: Parties must request the court's permission before taking the second deposition of an organization pursuant to Rule 30(b)(6). *Walker v. State Farm*, 2012 WL 1155140, 9 (S.D.W.Va.); *Polycarpe v. E & S Landscaping*, 275 F.R.D. 700, 701 (S.D.Fla. 2011)("the Federal Rules of Civil Procedure require leave of court to take more than one deposition of a party"). "This court agrees with the reasoning and decisions of those courts which have held that the prior judicial approval requirement applies to deposition notices and subpoenas issued to corporations pursuant to Rule 30(b)(6)." *Burdick v. Union Sec. Ins. Co.*, 2008 WL 5102851, 2 -3 (C.D.Cal.).

   a. **Textual Default**: "There is nothing in the text, history, or purpose of Rule 30 that supports the conclusion that 'for purposes of' the prior judicial approval requirement for successive depositions, Rule 30(b)(6) depositions should be treated differently from depositions of individuals." *In re Sulfuric Acid*, 2005 WL 1994105 at *3; *Ameristar Jet v. Signal Composites, Inc.*, 244 F.3d 189, 192 (1st Cir. 2001) (affirming district court's decision to quash deposition subpoena and to issue protective order vis-a-vis non-defendant corporation because successive Rule 30(b)(6) deposition subpoena issued without leave of court was invalid).

   b. **Analysis**: The latter view appears to be the better one. "This Court respectfully disagrees with the Court's ruling in *Quality Aero Technology*, and holds that leave of court is required before a party may take a second Rule 30(b)(6) deposition of a corporation or other entity." *Foreclosure Management Co. v. Asset Management*, 2008 WL 3895474, 3 (D.Kan.). Taking serial depositions of a single corporation may be as costly and burdensome, if not more so, as serial depositions of an individual. *State Farm v. New Horizont, Inc.*, 254 F.R.D. 227, 234 -235 (E.D.Pa. 2008). In both cases, each new deposition requires time for preparing, traveling, and providing testimony. *Id.* In addition, allowing for serial depositions, whether of an individual or organization, provides the deposing party with an unfair strategic advantage, offering it multiple bites at the apple, each time with better information than the last. *Id.* In short, the unfairness that manifests under Rule 30(a)(2)(A)(i), justifying an exception to the 10-deposition limit, does not manifest under Rule 30(a)(2)(A) (ii). *Id.*

C. **Fact / Corporate Crossover**: A witness already deposed as an individual may be re-deposed when designated as 30(b)(6) witness even when the entity is a closely held corporation. *DHL Express v. Express Save*, 2009 WL 3418148 (S.D.Fla.).

II. **Basis Of Court's Analysis**: If a party requests leave for a second deposition, the court "must" consider whether (1) the deposition is unreasonably cumulative or duplicative, (2) the information is available from an alternative, more-convenient source, (3) whether the party seeking discovery had ample opportunity to obtain the information sought, and (4) whether the burden of the proposed discovery outweighs its likely benefit. *See In re Sulfuric Acid*, 2005 WL 1994105 *2 (N.D.Ill.2005) (leave to take successive deposition shall be granted, but only if the requested discovery is consistent with the principles stated in Rule 26(b)(2)); *Burdick v. Union Sec. Ins. Co., 2008 WL 5102851*, 2 -3 (C.D.Cal.).

A. **First Consideration: Is The Deposition Necessary**: The party seeking the re-deposition must show that discovery already conducted in the case is insufficient and that a second deposition of the witness will not be cumulative. *See Clay v. Bd. of Tr. of Neosho Cnty. Comm. Coll.*, 1995 WL 646817, *2 (D.Kan.). Cumulative evidence is defined as evidence which goes to prove what has already been established by other evidence. *Smith v. Sec. of New Mexico Dep't of Corr.*, 50 F.3d 801, 829 (10th Cir. 1995).

B. **Second Consideration: Information Available Elsewhere**: The rules give the courts authority to limit discovery if it determines that the discovery sought is obtainable from other sources. *Mulvey v. Chrysler Corporation*, 106 F.R.D. 364, 366 (D. R.I. 1985).

C. **Third Consideration: Has Party Wasted Past Opportunities**: The court must limit discovery if the party seeking the re-deposition has already had ample opportunity to obtain the requested information during discovery. FRCP 26(b)(2)(C)(ii). When combined with the first consideration, the tell-tale sign is that there was some other opportunity (perhaps the first deposition) to obtain the information, and the requesting party did not seize the day. *See, Arugu v. City of Plantation*, 2010 WL 2609394, (S.D. Fla.)(rejecting motion to re-depose where the witness was deposed to completion in the same case, and finding that the plaintiff's "choice (or even his neglect) not to ask questions he could have asked" at the first deposition did not constitute good cause).

D. **Fourth Consideration: Burden of Additional Discovery**: The court must limit discovery if the burden of the movant's request outweighs the proposed benefit of discovery. FRCP 26(b)(2)(C)(iii). To consider this, court should perform a cost / benefit analysis, including a consideration as to how the proposed depositions are relevant to the case. *See, e.g., Trentadue v. F.B.I.*, 572 F.3d 794, 808 (10th Cir. 2009) (denying a plaintiff's discovery request when the plaintiff failed to demonstrate the relevance of proposed depositions); Re-depositions on tangential items not typically allowed. *Kasperski v. Village of New Haven*, 2009 WL 1010916, 1 (E.D.Mich.).

1. **Further Considerations On Burden**: In determining whether the burden or expense of the proposed discovery outweighs its likely benefit, a court should consider "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." *York v. Tropic Air, Ltd.*, 2011 WL 5827299, 1 -2 (S.D.Tex.).

E. **Re-Depositions Generally Disfavored**: Repeat depositions are not favored, except in certain circumstances, some of which include a long passage of time with new evidence, or where an amended complaint has added new theories. *Graebner v. James River Corporation*, 130 F.R.D. 440, 441 (N.D.Cal. 1990). "Courts generally disfavor repeat depositions," *Dixon v. Certainteed Corp.*, 164 F.R.D. 685, 690 (D.Kan.1996), but courts must also "'be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.'" *Foreclosure Mgmt. Co. v. Asset Mgmt. Holdings, LLC*, 2008 WL 3895474, * 3 (D.Kan.) (quoting FRCP 26 advisory comm.).

1. **Court Discretion**: The Rules confer "considerable discretion upon a district court to limit discovery, especially where the party seeking discovery has already had 'ample opportunity' to obtain the information sought, and the burden of the proposed discovery outweighs its likely benefit." *Seymore v. Penn Maritime, Inc.*, 2007 WL 101818, at *1 (S.D.Tex.).

2. **Courts Differ**: Courts differ on what must be shown and by whom. In *Cuthbertson v. Excel Industries, Inc.*, 179 F.R.D. 599, 604-05 (D.Kan. 1998), the Court stated '[T]he court will generally not require a deponent to appear for a second deposition' absent some showing of a need or good reason for doing so." See also Sentry Insurance v. Shivers, et al., 164 F.R.D. 255 (D.Kan. 1996). In *Christy v. Pennsylvania Turnpike Com'n*, 160 F.R.D. 51, 53 (E.D. Penn. 1995), the Court permitted a second deposition because the opposing party had not shown good cause why they should receive a protective order.

F. **Examples Of Court Decisions:**

1. **New Facts**: Good cause shown for second deposition when party did not obtain documents and relevant information necessary for deposition until after the first deposition was completed. *Heller Healthcare Finance, Inc. v. Boyes*, 2002 WL 1558337, *1 (N.D.Tex.).

2. **Changed Claims**: Good cause shown for second deposition when plaintiff amended complaint, witness had information regarding new claims, and plaintiff could not show that second deposition would be unduly burdensome or expensive. *Collins v. International Dairy Queen*, 189 F.R.D. 496, 498 (M.D. Georgia 1999).

3. **New Parties**: "Good cause" for an order exists where new parties have been added, *Christy v. Pennsylvania Turnpike*, 160 F.R.D. 51, 52–53 (E.D.Pa. 1995). When a party is added after depositions have already been taken, courts may order the prior deposition "reconvened" so that the new party is not prejudiced by their absence. *Jansen v. Aaron Process Equipment Co., Inc.*, 207 F.3d 1001, 1004 (7th Cir. 2000).

4. **New Information**: Courts will typically reopen a deposition where there is new information on which a witness should be questioned. *Ganci v. U.S. Limousine Service, Ltd.*, 2011 WL 4407461, 2 (E.D.N.Y.). *See Saleh v. American S.S. Co.*, 2011 WL 2214134, 1 (E.D.Mich.)(Allowing second deposition because "It is undisputed that Plaintiff has undergone not just 'continued medical treatment' but additional procedures including a surgery"). This may occur when evidence arises conflicting with an already-deposed-witness's testimony. *See also Vincent v. Mortman*, 2006 WL 726680, at *1–2 (D.Conn.); *Chang v. Safe Horizons*, 2004 WL 1874965, at *2 (S.D.N.Y.); Keck, 1997 WL 411931, at *2 (deposition reopened where affidavit provided evidence conflicting with witness testimony)).

5. **New Documents**: A party's failure to produce documents before a deposition can support reopening the deposition, even for third party witnesses. *Walker v. Venetian Casino*, 2011 WL 5007886, 3 (D.Nev.). "Good cause" for an order exists where new documents have been produced. *Miller v. Federal Express*, 186 F.R.D. 376, 389 (W.D. TN 1999), *Harris v. New Jersey*, 259 F.R.D. 89, 94 (D.N.J. 2007).

6. **Amended Complaint**: If a party substantively amends their complaint after a deposition, courts will usually allow a second deposition to address the new elements. *See Geer v. Amex Assur. Co.*, 2009 WL 4646021, 3 (E.D.Mich.) ("The Court finds that the Defendant has established a need to depose Plaintiff related to counts II, III, IV, V, and VI of the Second Amended Complaint. The deposition will be limited to two hours.").

7. **Changed Claim**: "Good cause" for an order exists where new claims or defenses have been added. *Collins v. Int'l Dairy Queen*, 189 F.R.D. 496, 498 (M.D.Ga. 1999). If the substance of a party's claim is changed, the court will typically allow a second deposition. *York v. Union Pacific R. Co.*, 2009 WL 3633827, 1 (D.Neb.). "Plaintiff did not disclose he was claiming an alleged hip injury during his first deposition, which was taken on January 21, 2008, despite the fact he was asked to identify all injuries that were at issue in the litigation. The first time plaintiff disclosed the injury was in April 2009, when he responded to Union Pacific's second set of interrogatories. Union Pacific is entitled to question plaintiff about this issue, and alternative methods of discovery are not a sufficient substitute in this case." *Id.*

8. **Changed Counsel**: Court allowed original deposition to be reopened and completed (effectively a second deposition) when one defendant had new counsel and didn't have an opportunity to prepare for the plaintiff's deposition. *E.E.O.C. v. Holmes & Holmes Indus., Inc.*, 2011 WL 6069306 (D.Utah).

9. **Important Issues Not Yet Addressed In Deposition**: Court may permit second deposition where several important issues related to the allegations remained to be addressed. *Kress v. Price Waterhouse Coopers*, 2011 WL 5241852 (E.D.Cal.). *Practice point – in these circumstances, better approach is to keep the deposition open and seek additional time.*

10. **Extensively Interrogated**: Court refused to allow a second deposition when plaintiffs had already "extensively interrogated" the party to be re-deposed. *Bonnie & Company Fashions, Inc. v. Bankers Trust Company*, 945 F.Supp. 693, 732-33 (S.D.N.Y. 1996). Another court refused to reopen a deposition because the witness had fairly answered the questions and counsel's improper objections did not substantially interrupt or delay the deposition. *Saye v. Old Hill Partners, Inc.*, 2004 WL 1944024, *7 (D.Conn.)

III. **Penalty For Failure To Seek Permission**: Failure to seek permission before noticing a re-deposition undermines any possibility of enforcing the improper deposition notice or subpoena. Failure to follow this rule may, alone, be the basis for denying a subsequent re-deposition motion. *See Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 170 F.R.D. 111, 119 (S.D. N. Y. 1997). Some courts routinely deny motions seeking to re-depose a party for failure to comply with the rules. *See Innomed Labs, LLC v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D.N.Y. 2002) (denying leave to re-depose corporation), *Pkfinans International Corp. v. IBJ Schroder Leasing Corp.*, 1996 WL 591213 *2 (S.D.N.Y. 1996)).

A. **Objection Subject To Waiver**: Objections to a re-deposition may be subject to waiver once the deposition has begun. FRCP 30(c)(2).

IV. **Limited Scope**: To prevent the second deposition from becoming duplicative or unnecessarily burdensome, the court may limit the scope. *See Christy v. Pennsylvania Turnpike*, 160 F.R.D. 51, 53 (E.D. Penn. 1995). For example, where the deposition is reopened because of newly discovered information, the court may limit questioning to the newly produced information. *Ganci v. U.S. Limousine*, 2011 WL 4407461, 2 (E.D.N.Y.); *Martin v. Fidelity Nat.*, 2011 WL 3349843, 4 (E.D.La.). *See also PHI, Inc. v. Office & Prof'l Emps.*, 2009 WL 1530939, *2–3 (W.D.La.) (allowing limited re-deposition to address newly prepared Rule 1006 summary); *Hayden v. Acadian Gas*, 1997 WL 180380, *6 (E.D. La.) (permitting limited re-deposition of a witness to explore new allegations in the amended complaint).

Notes:

[B6] DEPONENT'S ATTORNEY IS LIKELY WITNESS

QUICK RULE: *Under the Model Rules of Professional Conduct, an attorney may represent a party in pre-trial discovery even if it is likely the attorney will testify at trial.*

DISCUSSION:

I. **Depositions Of Opposing Counsel**: Depositions of opposing counsel are disfavored. *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 185 (2d Cir. 1991). Courts are leery of turning trial counsel in the case before them into subpoenaed witnesses, because too often it is an effort to harass and intimidate and make trouble for a party by going after the lawyer. *Tucker v. American Intern. Group, Inc.*, 2012 WL 314866, 13 (D.Conn.). Federal courts have held that depositions of attorneys inherently constitute an invitation to harass the attorney and parties, and to disrupt and delay the case. *West Peninsular Title Co. v. Palm Beach Cnty.*, 132 F.R.D. 301, 302 (S.D.Fla. 1990).

II. **Whether Attorney's Role As Witness Requires Recusal**: Whether an attorney, properly identified as a witness, must recuse herself from the case depends upon the unique facts of the case and the governing ethical rules, which vary from state to state.

A. **Model Rule 3.7**: The "Lawyer as Witness" rule, as provided in the model rules and as adopted by many states, limits a lawyer's ability to be advocate and witness in the same case. It provides:

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:
(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9. *See Tucker v. American Intern. Group, Inc.*, 2012 WL 314866, 13 (D.Conn.).

1. **Interpretation Of The Model Rule**: The four concerns that animate the advocate-witness rule, at least when the attorney testifies for his client, have been summarized as follows: (1) the lawyer might appear to vouch for his own credibility; (2) the lawyer's testimony might place opposing counsel in a difficult position when she has to cross-examine her lawyer-adversary and attempt to impeach his credibility; (3) some may fear that the testifying attorney is distorting the truth as a result of bias in favor of his client; and (4) when an individual assumes the role of advocate and witness both, the line between argument and evidence may be blurred and the jury confused. *Murray v. Metro. Life Ins. Co.*, 583 F.3d 173, 178 (2d Cir. 2009); *Parlin Funds LLC v. Gilliams*, 2011 WL 7004193, 15 (S.D.N.Y.).

2. **Model Rule's Application To Pre-Trial Proceedings**: "[O]n its face [the Model Rule] does not apply to pretrial proceedings." *Droste v. Julien*, 477 F.3d 1030, 1036 (8th Cir.

2007); *Williams v. Borden Chemical, Inc.*, 501 F.Supp.2d 1219, 1221 (S.D.Iowa 2007). The rule does not require the court to disqualify a lawyer from all pretrial activities, such as participating in strategy sessions, pretrial hearings or conferences, settlement conferences, or motions practice. *Lowe v. Experian*, 328 F.Supp.2d 1122, 1126 (D. Kans. 2004). This proposition may change when the pretrial activity includes obtaining evidence which, if admitted at trial, would reveal the attorney's dual role. *World Youth Day v. Famous Artists Merchandising*, 866 F.Supp. 1297, 1303 (D. Col. 1994).

B. Possibility Of Conflict Not Enough: The mere possibility of a potential malpractice claim against an attorney does not result in automatic disqualification. *See Lease v. Rubacky*, 987 F.Supp. 406, 408 (E.D.Pa. 1997). Where claims against an attorney are largely speculative and unlikely to be pursued, disqualification is not necessary. *Feingold v. Liberty Mut. Group*, 2011 WL 6085829, 3 (E.D.Pa.).

II. ABA's Opinion: The ABA has held that a lawyer who anticipates testifying as a witness on a contested issue at a trial may represent a party in discovery and other pre-trial proceedings provided the client consents after consultation and the lawyer reasonably believes that the representation will not be adversely affected by the lawyer's own interest in the expected testimony. ABA Comm. on Ethics and Pro. Responsibility, Informal Op. 89-1529. This opinion was based upon the Model Rules of Professional Conduct, Rule 3.7. The Bar association, however stated that it would not be a good practice for an attorney to represent herself at her own deposition. See *Ayus v. Total Renal Care, Inc.*, 48 F.Supp.2d 714, 718 (S.D. Tex. 1999).

A. Examples:

a. Although counsel would eventually testify at trial, counsel's taking of deposition would not prejudice opposition as there was no risk of confusing fact finder. *Williams v. Borden Chemical, Inc.*, 501 F.Supp.2d 1219, 1222 (S.D.Iowa 2007).

b. Lawyers performing substantial pretrial work did not violate Rule 3.7 because they did not plan to act as advocates at trial. *Culebras v. Rivera-Rios*, 846 F.2d 94 (1st Cir. 1988)

c. Lawyer may fully participate in pretrial stage even though the lawyer will probably be called as a witness. *United States v. Castellano*, 610 F.Supp. 1359 (S.D.N.Y. 1985).

Notes: ______________________________

[C1] WHO MAY ATTEND THE DEPOSITION

QUICK RULE: *Parties must seek a protective order to exclude someone from a deposition. FRCP 26(c)(1)(E). Courts require a showing of good cause, which exists when exclusion will help the questioner obtain clear and accurate answers from the witness. Courts split on whether a concern that the witnesses will "revise history" is good cause.*

DISCUSSION:

I. **No Right To Limit Attendance At A Deposition**: As a general proposition, pretrial discovery must take place in public unless compelling reasons exist for denying the public access to the proceedings. *BCI Commc'n Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154, 157 (N.D. Ala. 1986). Accordingly, there is no right to limit attendance at a deposition. "[D]eposition witnesses are not subject to sequestration as a matter of course." *Jones v. Circle K Stores*, 185 F.R.D. 223, 224 (M.D.N.C. 1999). If attendance at a deposition is to be limited, it must come by an order from the court. Except "under exceedingly narrow circumstances," courts will not close or limit attendance at a deposition. *Visor v. Sprint/United*, 1997 WL 567923, at *1 (D.Colo.).

A. **Background**: Although parties have the right to limit attendance at trial, this right does not extend to depositions. Generally, the examination and cross-examination of a deponent is to proceed "as they would at trial under the Federal Rules of Evidence." FRCP 30(c)(1). This admonition, however, is expressly limited in that it does not apply to FRE 615, which permits sequestration at trial. *In re Terra Int'l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998). In 1993, the FRCP was amended to address disagreement among courts as to sequestration at deposition. *Id.* The advisory committee explained "The[1993] revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered" under Rule 26(c)(1)(E) when appropriate. FRCP 26(c) advisory committee notes to 1993 amendment.

B. **Alternative To Sequestration**: Even where circumstances suggest the potential for witness intimidation, the court may seek alternatives to barring attendance at the deposition. In *Neely v. Ethicon Inc.*, 2001 WL 36097430, 1 (E.D.Tex.), one party sought to prevent the other party's consultant from attending a deposition of the testifying expert on the basis that the expert once worked for the consultant and was intimidated by him. The court rejected the motion to exclude but held that consultant couldn't speak during the deposition. *Id.*

II. **Courts May Exclude Given Proper Showing**: Parties may seek – and the trial court may grant – an order limiting attendance at a deposition pursuant to Rule 26(c)(1)(E). *Harwood v. Ferguson Advantage Imports*, 2010 WL 3239368, 1 (N.D.Okla.). A party - for good cause shown - may move for a protective order that discovery be conducted with no one present except persons designated by the court. *Weisler v. U.S. Department of Veterans Affairs*, 2002 WL 987372, 1 (E.D.La.).

A. **Good Cause**: To establish 'good cause' for a protective order under FRCP 26(c), courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements. *In re Halkin*, 598 F.2d 176, 193 (1979)) (*quoting* 8 Wright et al, *Federal Practice and Procedure* § 2035, p. 265 (1970)).

B. **Exclusions To Prevent Witnesses From Shaping Testimony**: Trial courts will not typically issue protective orders closing depositions merely to prevent one likely witness from watching another testify. *See United States v. Garrett*, 571 F.2d 1323, 1326 n. 3 (5th Cir. 1978). Such a request facially fails to meet FRCP 26(c)'s specificity requirement. *See Tuszkiewicz v. Allen Bradley Co.*, 170 F.R.D. 15, 17 (E.D.Wis. 1996); The necessary showing to exclude other witnesses differs among the courts.

1. **Majority View**: A generalized concern that one witness's testimony will be tainted by attending the deposition of another is generally not good cause under Rule 26(c) for a protective order. *See Solar Turbines, Inc. v. United States*, 14 Cl.Ct. 551, 553 (1988). Unsupported assertions that witnesses will be influenced by the attendance of others is not sufficient to exclude attendees. *In Re: Terra International, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998).

2. **Minority View**: Courts have granted closure motions to ensure that deponents testify only to matters within their independent recollections and without influence from statements made by other witnesses. *Beacon v. R.M. Jones Apartment Rentals*, 79 F.R.D. 141, 142 (N.D. Ohio 1978); *Frideres v. Schiltz*, 150 F.R.D. 153, 158 (S.D. Iowa 1993). "Excluding witnesses serves two main purposes. The first is to prevent the testimony of one witness from being tailored by what he hears in the testimony of another . . . . The second reason is to assist the parties in detecting error or falsehood by the witnesses." 3 Lousell, *Federal Evidence* § 370 at 595-96 (citations omitted). "The common law has favored the sequestration of witnesses so that they cannot either directly or subtly influence each other's testimony. This principle has been applied in the deposition context to exclude witnesses for this reason and constitutes good cause for their exclusion in the absence of competing and overwhelming interests." *Athridge v. Aetna Cas. & Sur. Co.*, 1997 WL 732430 (D.D.C.).

C. **Closure For Other Circumstances**: There may be circumstances where excluding witnesses may be necessary. *Radian Asset Assur., Inc. v. College of the Christian Bros. of New Mexico*, 2010 WL 5476782 (D.N.M.). These may include:

- Circumstances when a deponent may be intimidated by the attendance of non-attorneys. *See Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973).

- Where the deposition may elicit confidential information that could be harmful in the hands of a competitor. *Radian Asset Assur., Inc. v. College of the Christian Bros. of New Mexico*, 2010 WL 5476782 (D.N.M.), *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892 (D.C.Cir. 2006)); *Kerschbaumer v. Bell*, 112 F.R.D. 426 (D. Colo. 1986).

- Where it is clear a group of witnesses is trying to get its story down. *See Dunlap v. Reading Co.*, 30 F.R.D. 129, 131-32 (E.D.Pa. 1962).

- Where the court seeks to protect the identity of a confidential informant. *Marbet v. City of Portland*, 2003 WL 23540258, 6 (D.Or.).

D. **Excluding Parties**: Factors that might justify exclusion of nonparties from a deposition might not be sufficient to exclude parties because of the parties' substantial interest in being present. It is generally recognized that a court may exclude a party from attending a deposition only in extraordinary circumstances. *Weisler v. U.S. Department of Veterans Affairs*, 2002 WL 987372, 1 (E.D.La.)(*citing* 6 Moore, et al., *Moore's Federal Practice* ¶ 26.105[6] (3d ed.1999); and FRCP 26(c)). Furthermore, when the person to be excluded is a party to the action, the court must also consider any constitutional right to be present at the deposition. *Id.*

III. **Scope Of Exclusion**: If a sequestration order is issued for a deposition, the order's scope may include preventing those being excluded from reading the deposition's transcript, if that would further the sequestration order's objectives. See FRCP 26(c) Advisory Notes (1993).

Notes: ____

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Notes:

[C2] DEPOSITION DURATION

QUICK RULE: *Unless authorized by the court or stipulated to by the parties, a deposition is limited to one day of seven hours. Good cause must be shown to extend the deposition's length. The court must allow additional time if necessary for a fair examination of the deponent or if the witness or attorney impedes or delays the exam. Rule 30(d)(1).*

DISCUSSION:

I. **General Rule**: Absent stipulation or court order, depositions are limited to one day of seven hours. FRCP 30(d)(1). This is a "presumptive time limit." *Margel v. E. G.L. Gem Lab Ltd.*, 2008 WL 2224288, at *8 (S.D.N.Y.). When parties seek additional time, "the court should begin with the presumption that the seven-hour limit was carefully chosen and that extensions of that limit should be the exception, not the rule." *Roberson v. Bair*, 242 F.R.D. 130, 138 (D.D.C. 2007).

A. **Counting Seven Hours**: Only the time taken for the actual deposition, not breaks, counts toward the seven hours. *Condit v. Dunne*, 225 F.R.D. 100, 112–13 (S.D.N.Y. 2004). "This limitation contemplates that there will be reasonable breaks during the day for lunch and other reasons and that the only time to be counted is the time occupied by the actual deposition." FRCP 30(d) Advisory Notes (2000); *Santana v. RCSH Operations, LLC*, 2011 WL 4527797 (S.D.Fla.). Preoccupation with timing is to be avoided. *Id.*

B. **Depositions Of Corporations/Organizations**: When measuring the duration limit, the deposition of each person designated under FRCP 30(b)(6) is a separate deposition. *See Blackmon v. Bd. of County Com'rs*, 2011 WL 663195 (D. Kan.)(*citing* FRCP 30(D), Advisory Notes (2000)).

1. **Individuals And Corporations**: Depositions of a person noticed as an individual witness under FRCP 30(b)(1), and also produced as a corporate representative under FRCP 30(b)(6) are presumptively subject to independent seven-hour time limits. *Sabre v. First Dominion Capital,* 2001 WL 1590544, *1 (S.D.N.Y.).

C. **Terminating Deposition Before Seven Hours**: The decision to terminate a deposition before seven hours does not ensure that the attorney taking the deposition will be permitted to reopen the deposition at a later time. *Beneville v. Pileggi*, 2004 WL 1631358, *1 (D.Del.)(refusing to reopen a six-hour deposition because moving party did not demonstrate that additional time was necessary).

D. **Timing The Request**: The request for additional time may come either before the deposition begins or after the seven hours has run. *Dow Chemical Co. v. Reinhard*, 2008 WL 1735295 (E.D.Mich.).

II. **Stipulations**: Without involvement by the court, parties may stipulate to lengthen a deposition. FRCP 30(d)(1). The commentary indicates that "a refusal to agree to a reasonable request for some additional time," when that request does not violate local rules, may be sanctionable. *Smith v. Video Monitoring Service*, 1999 WL 124417 (E.D.Pa.)(*quoting* FRCP 30(d) Advisory Notes (1993)). "It is expected that in most instances the parties and the witness will make reasonable accommodations to avoid the need to resort to the court." FRCP 30(d) Advisory Notes (2000).

III. **Court May Modify Deposition Length**: The trial court has the authority to modify the deposition's length for good cause shown. *Condit v. Dunne*, 225 F.R.D. 100, 112–13 (S.D.N.Y. 2004). "A district court has broad discretion to set the length of depositions appropriate to the circumstances of the case." *Arista Records*, 2008 WL 1752254, at *1 (citing *In re Agent Orange Prod. Liab. Litig.*, 517 F.3d 76, 103 (2d Cir. 2000)). Indeed, the court must permit additional time beyond the seven-hour limit if required to enable the fair conduct of the deposition or if a deponent hinders the deposition, unless such additional time would be cumulative or unreasonably burdensome. *George v. City of Buffalo*, 789 F.Supp.2d 417 (W.D.N.Y. 2011); *Dow Chemical Co. v. Reinhard*, 2008 WL 1735295 (E.D.Mich.).

A. **Burden Of Establishing The Need For More Time**: The party seeking to extend the time permitted under Rule 30 must provide good cause to justify an enlargement. *See Carmody v. Vill. of Rockville Ctr.*, 2007 WL 2177064, at *2 (E.D.N.Y.); *Jensen v. Astrazeneca*, 2004 WL 2066837, *3 (D. Minn.)(*citing* FRCP 30(d)(2) Advisory Notes). "The determination of whether good cause exists is fact specific." *Margel v. E. G.L. Gem Lab Ltd.*, 2008 WL 2224288, at *8 (S.D.N.Y.).

B. **Relevant Factors For Extending The Deposition**: A court may consider various factors when asked to extend a deposition, including the need for an interpreter, the duration of the events covered, if the witness will be questioned about numerous lengthy documents, or in multi-party cases. FRCP 30(d)(1) Advisory Notes.

1. **Based Upon Witness's Conduct Or Condition**: If the witness's conduct delays or hinders the deposition, it may serve as basis for extending the seven hour limit. If the deponent impedes or delays the examination, the court must allow additional time for the deposition. *Davis v. Calvin*, 2008 WL 4287149, 3 (E.D.Cal.)(citing FRCP 30(d)(1)).

a. **Method Of Answering**: Non responsive answers by witness can serve as the basis for adding time onto the deposition. *See Jackson v. Swift Transport*, 2010 WL 457484 (M.D.Tenn.); *Cf. Calderon v. Symeon*, 2007 WL 735773, at *2 (D.Conn.) (allowing five additional hours for the defendants to depose plaintiff upon finding that "plaintiff was recalcitrant and uncooperative.").

b. **Refusal To Answer**: Refusal to answer relevant, non-privileged questions in the deposition can support a motion to extend the deposition. *Brockmeier v. Solano County Sheriff's Dept.*, 2010 WL 148179 (E.D.Cal.).

c. **Medical Condition**: Additional time may be given when a witness's medical impairment affects the pace at which he can respond to questioning. *Johnson v. Couturier*, 261 F.R.D. 188 (E.D.Cal. 2009).

2. **Based Upon Attorneys' Conduct**: In evaluating a request to extend a deposition, the court will enquire into the defending attorney's conduct and whether it prevented counsel from completing the deposition. *See Synventive Molding Solutions, Inc. v. Husky Injection Molding Systems, Inc.*, 262 F.R.D. 365 (D.Vt. 2009).

3. **Based Upon The Case's Complexity**: A case's complexity may support additional deposition time. *S.E.C. v. Schroeder*, 2009 WL 3320417 (N.D.Cal.). Complex cases often require more detailed inquiry and can serve as basis for additional time. *See Canal Barge Co. v. Commonwealth Edison Co.*, 2001 WL 817853, *4 (N.D.Ill.).

   a. **Multiple Parties**: When there are multiple parties with differing interests wishing to depose a witness, more time will be given to ensure each has the opportunity to complete its questioning. *E.E.O.C. v. Lowe's HIW, Inc.*, 2009 WL 811495 (W.D.Wash.); *Saeed v. Count of Nassau*, 2011 WL 6945755 (E.D.N.Y.); *Calderon v. Symeon*, 2007 WL 735773, at *1 (D.Conn.).

   b. **Multiple Claims**: Courts may allow additional deposition time based on the number of claims and counterclaims. *Gibbs v. Family Care Center*, 2011 WL 772877 (N.D.Ind.); *Jackson v. Swift Transport*, 2010 WL 457484 (M.D.Tenn.)

4. **Delayed Production**: When one party delays providing documents or information called for in discovery requests, the court may provide the other party with extended deposition time to either fill in the blanks or follow up once the information is properly produced. *Estrada v. First Transit, Inc.*, 2008 WL 1744567 (D.Colo.); *City of Raton v. Arkansas River Power Authority*, 2009 WL 1300798, * 7-8 (D.N.M.).

   a. **Written Discovery Delayed**: The deposition may be extended due to a party's incomplete response to written discovery. *Osborne v. Columbia Helicopters, Inc.*, 2009 WL 2215076 (S.D.W.Va.)(additional deposition time to compensate for opposing party's incomplete and unverified interrogatory responses).

   b. **Written Discovery Amended**: When a party amends its answer to written discovery, previously completed depositions may be reopened with additional time to protect the party that propounded the written discovery. *Powell v. Fulton-El Camino Recreation*, 2010 WL 3341817 (E.D.Cal.)(party could correct its non-answering of requests for admissions, but court added deposition time to opposing party to avoid prejudice).

   c. **Document Production**: Failure to produce documents to the deposing party before the deposition may support additional deposition time once those documents are produced. *Crawford-Bey v. New York & Presbyterian Hosp.*, 2010 WL 2143673 (S.D.N.Y); *Greenly v. Lee*, 2007 WL 2221444 (E.D.Cal.)(additional time provided because two documents were withheld before deposition began).

5. **Document Intensive Case**: Document intensive cases – and the need to refer to many documents during the deposition, may justify an extended deposition. *Canal Barge Co. v. Commonwealth Edison Co.*, 2001 WL 817853, *4 (N.D.Ill.). When the

deposition must cover large amounts of documents, the court may extend the deposition. *Tatum v. Schwartz*, 2008 WL 298824 (E.D.Cal.) Where a deposition entails consideration of thousands of pages of written material, courts have discretion under FRCP 30(d)(1) to extend the deposition beyond seven hours. *Baker v. PPL Corp.*, 2011 WL 1811106 (M.D.Pa.). *See also In re Intel Corp.*, 2008 WL 53377979 (D.Del.) (authorizing 14 and 15 hour depositions in case where testimony spanned events covering 8 years, and entailed review of thousands of pages)).

a. **Pre-Disclosure May Be Necessary To Obtain More Time**: If a witness will be questioned about numerous or lengthy documents, courts may prefer for the interrogating party to send the documents to the witness, in advance, for review. *Tatum v. Schwartz*, 2008 WL 298824 (E.D.Cal.)(*quoting* FRCP 30(D) Advisory Notes). Accordingly, a court may conclude that "A deliberate decision not to do so is not good cause for extending a deposition beyond the presumptive time limit set by the rule." *Stevens v. City of Red Bluff*, 2007 WL 184816 (E.D.Cal.).

6. **Translation**: If a deposition will be translated, the court may extend the deposition to compensate for the time lost in translation. *See In re Republic of Ecuador*, 2011 WL 736868 (N.D.Cal.).

7. **Witnesses Relevance And Schedule**: The witnesses' depth of knowledge, busy schedule, and prior depositions and testimony are all relevant in the court's consideration as to whether to extend the deposition's length. *See MCC Management of Naples Inc. v. Arnold & Porter, LLP*, 2010 WL 1949160 (W.D. Olk.).

8. **Cross Examination**: Although it is undisputed that the defending attorney is generally entitled to cross examine his own witness, the rules are less than clear regarding whether that time must come from the seven hours allotted. The better rule, and one suggested by the advisory notes is that if the lawyer representing the witness wishes to examine the witness, the noticing attorney may stipulate. If, however, the noticing attorney objects, the need for cross examination may support a motion to exceed the seven-hour limit. *See Dow Chemical Co. v. Reinhard*, 2008 WL 1735295 (E.D.Mich.)(*citing* FRCP 30(d) Advisory Note (2000)).

C. **Additional Time May Come With Limits**: When allowing additional deposition time, courts may limit the topics to be covered during that time. *Gibbs v. Family Care Center*, 2011 WL 772877 (N.D.Ind.). The court may place other conditions on extending the time, such as making the deposing party pre-submit to the other side the documents it will use during the deposition. *S.E.C. v. Schroeder*, 2009 WL 3320417 (N.D.Cal.). Also, the court may require the deposing party to pay costs for the additional time.

D. **Court May Shorten The 7 Hours**: The court may shorten a deposition from the presumptive 7 hours upon a showing of good cause. *Withers v. eHarmony, Inc.*, 267 F.R.D. 316 (C.D.Cal. 2010). The rules provide that "the court may alter the limits in these rules on . . . the length of depositions under Rule 30." FRCP 26(b)(2)(A). The party seeking a court order to extend or shorten a deposition examination, or otherwise alter the deposition limitations, is expected to show good cause to justify such an order. *See* FRCP 30 Advisory Note, 2000 Amendment.

IV. **Extending v. Re-Deposing**: At the end of a deposition, if the calling party seeks a continuance – or refuses to close the deposition – the question will be whether they may obtain more time. If the deposition is closed – even with time remaining on the clock – the party must seek permission from the court to redepose the witness. *See Home Design v. W. Gargas Const.*, 2009 WL 3190462 (N.D.Fla.). The requirement for leave of court does not apply when a deposition is temporarily recessed for convenience of counsel or the deponent or to enable additional materials to be gathered before resuming the deposition. *Huertas v. City of Camden*, 2009 WL 3151312 (D.N.J.)(*quoting* FRCP 30 Advisory Notes (1993))

V. **Practice Points**: It is hard to demonstrate need for more than seven hours before the deposition has begun. Often, the parties should proceed with the deposition to see how much is covered in seven hours. In *In re Tennessee Valley Authority Ash Spill Cases*, 2010 WL 2757176 (E.D.Tenn.), the court found that it could not judge whether more than "1 day of 7 hours" would be necessary until seven hours of deposition had been completed. After seven hours, if additional time is needed, either the parties can stipulate to extend or the party calling the deposition can seek court intervention. *Malec v. Trustees of Boston College*, 208 F.R.D. 23, 24 (D. Mass. 2002). A pre-deposition request, however, will best serve when the complexity of the case, or opposing counsel's past conduct, make the need for more time likely and travel considerations may reward knowing the deposition's length before starting.

A. **Planning**: If a party seeks to extend the deposition, one consideration will be whether the party should contact the court at or near the close of the permitted seven hours, or whether to submit the request to the court through a written motion. Depending upon the preferences of the judge or magistrate, a written motion is typically better, as the movant may lay out the bases for the requested extension, including the witness's non-responsiveness and counsel's interference, if either has been a factor. If travel or timing concerns would make it difficult to reconvene the deposition, then the calling attorney should ask court reporter mark places in the deposition where the witness or her counsel has wasted time. These can be read back to the court over the telephone as part of the motion. Conversely, the attorney seeking to oppose an extension may ask the reporter to mark the places where the calling attorney has re-asked the same questions.

B. **Tracking Time**: For all depositions, whether as calling or defending, counsel or her paralegal should track time used in the deposition. You should ask the reporter to mark beginning and ending times on the record or state them from a watch.

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[C3] TRANSLATORS

QUICK RULE: *Under FRCP Rule 30(c) and FRE 604, an interpreter who translates the testimony of the deponent must make an oath or affirmation to make a true translation.*

DISCUSSION:

I. **General**: An expert hired to translate testimony in real time must meet two requirements (1) he must qualify as an expert in the making of translations, and (2) he must take an oath to translate accurately. *See, e.g. United States v. Pluta*, 176 F.3d 43, 51 (2nd Cir. 1999) and FRE 604. This requirement applies to depositions. *See, e.g., United States v. Kramer*, 741 F.Supp. 893, 893 -894 (S.D.Fla. 1990). Challenges to qualifications should properly be made before or during the deposition. *See American Nat. Fire Ins. Co. v. Mirasco, Inc.*, 265 F.Supp.2d 240, 251 (S.D.N.Y. 2003).

A. **Translator Should Be Neutral**: "[T]he law contemplates that a fair, impartial, and correct interpretation shall be had, and to this end, a disinterested interpreter should be provided if possible." *United States v. Damra*, 621 F.3d 474, 497 (6th Cir. 2010) (*quoting Prince v. Beto*, 426 F.2d 875, 877 (5th Cir. 1970).

B. **Need To Re-Swear Translator**: The rules do not indicate whether a translator, once sworn, needs to be re-sworn for each deposition she may translate in a case. *See United States v. Solorio*, 2012 WL 161843, 5 (9th Cir. 2012). A best practice would be to re-swear the translator for each deposition, although this may not be necessary. The Administrative Office of the United States Courts ("AO"), has published guidelines on the administration of oaths to interpreters, observing that "[p]olicies with regard to the oath of interpreters vary from district to district and from judge to judge." 5 *Guide to Judiciary Policy* § 350(b) (2010). Although some courts administer oaths to interpreters each day, or once for an entire case, others "administer the oath to staff and contract interpreters once, and keep it on file." *Id.*

C. **Translation v. Interpretation**: Courts distinguish between (a) an interpreter hired to translate the witness's testimony, and (b) a language expert hired to translate a document or recording. *United States v. Taren-Palma*, 997 F.2d 525, 532 (9th Cir. 1993) (per curiam) abrogated on other grounds by *United States v. Shabani*, 513 U.S. 10, (1994).

D. **Not Necessarily Prejudicial**: Failure to swear a translator is not, on its face, prejudicial. *United States v. Kramer*, 741 F.Supp. 893, 893 -894 (S.D.Fla. 1990). Reliance at trial on unsworn translations is not reversible error, without a showing of prejudice. *United States v. Solorio*, 2012 WL 161843, 6 (9th Cir. 2012).

II. **Translator's Oath**: A typical translator's oath will state: Ms._______, do you swear or affirm that you will interpret the questions from English into Japanese and the answers from Japanese into English to the best of your knowledge and ability.

III. **Objections To Translations**: Parties must make contemporaneous objections if they believe a witness is being misinterpreted. *United States v. Urena*, 834 F.Supp. 1282, 1285 (D.Kan. 1993). It is not sufficient to make a general objection to the interpretation at the beginning of the deposition, because such an objection does not permit review. *Id.* For example, in *American Nat. Fire Ins. Co. v. Mirasco, Inc.*, 265 F.Supp.2d 240, 251 (S.D.N.Y. 2003), the court refused to exclude the interpreted deposition based upon one party's argument that the Arabic word "hather" should have been interpreted as "embargo," but was not. Among the bases for rejecting this motion, the court noted that the objection was not raised in the deposition.

IV. **Practice Points**: To avoid difficulties, when a deposition is to be translated, the party noticing the deposition should take the following steps: 1) pre-disclose the name of the proposed translator to the other side so that objections may be resolved before the deposition; 2) if there are technical or complicated terms that may be discussed, propose a list of agreed-upon translations for those terms; 3) if documents are to be shown to the witness, pre-disclose translations of the documents – if available – so that challenges to the translations may be resolved before the deposition. (Your author once spent almost an hour arguing about the proper Mandarin Chinese interpretation to the English word "understand").

A. **Bring A Check Translator**: Attorneys participating in translated depositions should hire a consultant, "check-translator," to attend the deposition and advise the attorney regarding possible errors in the translation. The check-translator is not sworn in and does not speak for the transcript. Instead, the check-translator works only for the hiring party. This permits the calling or defending attorney to raise objections to - or request corrections in - the translation from English to the second language, as well as from the second language to English. For important depositions, have your check-translator pre-screen the neutral translator to make sure of his or her quality.

B. **Timing**: Translation more than doubles the length of a deposition, as every statement must be stated both in English and the second language. This may properly serve as the basis for extending the seven hour deposition limit. *See In re Republic of Ecuador*, 2011 WL 736868 (N.D.Cal.). There is, however, no reason to have objections translated, as the witness need not understand the objections to give full testimony.

C. **Determine The Actual Need For A Translator**: Some bi-lingual witnesses ask for translators as a tactic, or because they don't feel totally confident in English. During the deposition, explore the range of the witness's proficiency in English – this may be helpful if any challenges arise to the translation, as the witness may actually understand the English terms. This may include questions about: (1) the witness's studies in English, (2) books or magazines the witness has read in English, (3) documents in the record the witness received that were written in English, and (4) did the witness take their drivers-license test in English.

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[C4] METHOD OF DEPOSITION

QUICK RULE: *The party noticing the deposition may select the method by which the deposition will be taken. FRCP 30(b)(3). A party may record a deposition by videotape unless the court orders otherwise, but the party must provide proper notice. Other parties may designate – and pay for – additional methods.*

DISCUSSION:

I. **General**: Unless the court orders otherwise, deposition testimony may be recorded by audio, audiovisual, or stenographic means, with the noticing party bearing the costs of recording. *Sloniger v. Deja*, 2010 WL 5343184, *11 (W.D.N.Y.). The party noticing the deposition has the right to designate the recording method. *Ward v. LeClaire*, 2007 WL 2687671, *2 (N.D.N.Y.); FRCP 30(b)(3)(B). The notice of deposition must state the means by which it will be recorded. FRCP 30(b)(3)(A). Although another party may designate an additional method to record the testimony, there is generally no basis for the notice recipient to object to the method originally selected by the noticing party. See FRCP 30(b)(3).

A. **Deposition Must Be Before An Officer**: Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under FRCP 28. *Ajaj v. Federal Bureau of Prisons*, 2011 WL 2791275, 1 (D.Colo.)(citing FRCP 30(b)(5)). This is true even for pro se or incarcerated parties wishing to notice depositions. *Id.* These rules safeguard the utility and integrity of all methods of recording the depositions. *Meacham v. Church*, 2010 WL 1576711, 4 (D.Utah)(*citing* FRCP 30, Advisory Note).

1. **Appointment Of Officer Not To Be Used To Reduce Costs**: Typically, depositions will be taken before an officer authorized to administer oaths. FRCP 28(a)(1)(A). The court, however, may appoint an individual to administer the oath and take the deposition – even if the person is not an officer authorized by law. *See Nusbaum v. MBFG*, 2009 WL 2605320, 2 (W.D.Pa.)(*citing* FRCP 28(a)). This is not to minimize costs but rather empower courts to appoint an officer "when depositions must be taken in an isolated place where there is no one readily available who has the power to administer oaths and take testimony." *Id.* (*citing* FRCP 28, Advisory Note (1946)).

B. **Bearing The Cost Of Transcription**: The rules distinguish between the cost of having the deposition recorded (recording cost) and the cost of having a written transcript created (transcription cost). "The noticing party bears the recording cost." *Smith v. City of Lebanon*, 2011 WL 66018, 3 (M.D.Pa.)(*citing* FRCP 30(b)(3)(A)). Any party may, at its own expense, arrange to transcribe the deposition. *Id.*

1. **Courts Will Not Shift Litigation Costs**: Parties are responsible for their own litigation costs, and their adversaries are not obligated to finance their litigation. *Bey v. City of New York*, 2010 WL 3910231, at *5 (S.D.N.Y.). This is true even for parties acting *pro se* or *in forma pauperis*. *See Sunegova v. Village of Rye Brook*, 2011 WL 6640424, 8

(S.D.N.Y.). There is no basis for the court to pay for a deposition. *Espinal v. Coughlin*, 1999 WL 1063186, at *2 (S.D.N.Y.). Also, there is no authority that requires the federal government to pay for the discovery expenses of a pro se plaintiff in a civil case. *Id.* The *in forma pauperis* statute, 28 U.S.C. § 1915, permits the waiver of fees and costs for some litigants. The statute, however, does not require the government to pay deposition transcription costs. *See Doe v. United States*, 112 F.R.D. 183, 184–85 (S.D.N.Y. 1986) ("[A] defendant is not required to advance a plaintiff's stenographic and transcription deposition expenses merely because a plaintiff is unable to pay for such expenses.").

C. **Noticing Party Must Produce A Transcript**: The court may require the noticing party to produce a deposition transcript, "soon after the deposition," to allow the witness to review the transcript for errors. *ACLI v. Rhoades*, 1991 WL 270450, at *3–4 (S.D.N.Y.) ("[F]airness ordinarily demands that a transcript be provided the deponent free of charge for review soon after the deposition."). Alternatively, the court may require a transcript before the party may use the deposition. *Sunegova v. Village of Rye Brook*, 2011 WL 6640424, 9 (S.D.N.Y.). *See also Hudson v. Spellman*, 178 F.R.D. 29, 31 (E.D.N.Y.1998) (for tape-recorded depositions to be used at trial, court ordered plaintiff to transcribe within forty-five days after discovery closed); *Ulyanenko v. Metro. Life Ins. Co* ., 275 F.R.D. 179, 185 (S.D.N.Y. 2011) (requiring deposition transcript within ten days of entry of order).

1. **Authenticating A Deposition Transcript**: "A deposition or an extract therefrom is authenticated in a motion for a summary judgment when it identifies the names of the deponent and action and includes the reporter's certification that the deposition is a true record of the testimony of the deponent." *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 774 (9th Cir. 2002).

D. **Parties May Choose Additional Method**: Any party attending the deposition may choose additional recording methods, beyond that chosen by the noticing party. *Woods v. G.B. Cooley*, 2009 WL 151078, 2 (W.D.La.). Thus, if the defendant plans to use a stenographer, the plaintiff may add a videographer. To do this, the party seeking to add the additional method must (1) pay for that means of recording, and (2) give prior notice to all other parties and the witness. *Id.* Failure to give prior notice may lead the court to exclude the results of the additional recording. *Id.* ("Macaluso's failure to provide notice violated Rule 30(b)(3), and the videotape will not be allowed into evidence").

II. **Videotaped And Audiotaped Depositions**: The rules authorize videotaped and audiotaped depositions as alternatives to traditional stenographic records. *See Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471, 1477 (10th Cir. 1997)(*citing* FRCP 30(b)). A party may choose the recording method and videotaping or audiotaping are authorized methods. *Ohlson v. Cadle Co.*, 2010 WL 1539727, 4 (E.D.N.Y.)(*citing* FRCP 30(b)(3)(A)). Courts assume a legitimate purpose for videotaping a deposition, given that the rules permit these recordings. *Id.* The commentary recognized that "the videotapes are a means of presenting deposition testimony to juries that is superior to reading from cold, printed records." *Id.*

A. **Mandatory Elements Of A Videotaped Deposition**: For a video recording to be admissible in court, the party taping the deposition must ensure that requirements found in FRCP 30(b)(5) are met. *American General v. Billard*, 2010 WL 4367052 (N.D.Iowa).

The officer must begin the deposition with an on-the-record statement that includes: (i) the officer's name and business address; (ii) the deposition's date, time, and location; (iii) the deponent's name; (iv) the officer's administration of the oath or affirmation to the deponent; and (v) the identity of all persons present. *Nusbaum v. MBFG Ltd. Partnership*, 2009 WL 2605320, 1 (W.D.Pa.)(*citing* FRCP 30(b)(5). If the deposition is not recorded simultaneously by a stenographer, the officer must repeat these statements at the beginning of each tape or disk. *Id.* Finally, the officer must state when the deposition has concluded. *Id.* If the video recording fails to comply with the rules, then it may be excluded. *American General*, 2010 WL 4367052.

1. **Example**: "The Court concludes that it will not permit the videotape to be presented at trial, unless plaintiff can show that (1) the deposition was videotaped in its entirety and (2) the requirements of Fed.R.Civ.P. 30 were met." *Reyes v. City of Glendale*, 2009 WL 2579614, 11 (C.D.Cal.).

B. **Videotape Need Not Be Made By Professional**: A professional videographer need not record the deposition for the tape to be admissible. *Pioneer Drive v. Nissan Diesel*, 262 F.R.D. 552 (D.Mont. 2009). "A deposed party or counsel concerned about accuracy or image manipulation can seek a protective order, can choose an additional method to record the deposition, or can move after the fact to strike the recording." *American General v. Billard*, 2010 WL 4367052 (N.D.Iowa). Nevertheless, absent stipulation, the deposition must be taken before a legally-empowered officer. FRCP 28. If a stenographer is not in the room, and an officer is not operating the videotape recorder, then an officer still must attend.

C. **Videotapes Are Not Transcripts**: Videotape and audiotape cannot act as a deposition's final transcript. *See Nusbaum v. MBFG*, 2009 WL 2605320 at *3 (W.D.Pa.). Typically, courts require written transcripts. The commentary states that parties "should understand that a transcript will be required by Rule 26(a)(3)(B) and Rule 32(c) if the deposition is later to be offered as evidence at trial or on a dispositive motion under Rule 56." *Smith v. City of Lebanon*, 2011 WL 66018, 3 (M.D.Pa.)(*citing* FRCP 30 Advisory Note (1993)).

1. **Transcription By A Non-Neutral Party**: The courts disagree as to whether a non-neutral party may transcribe a video or audio tape for the official transcript.

   a. **Non-Professional May Transcribe**: Although the rules require neutral officers to attend depositions, the rules do not require audiotaped depositions to be transcribed by a neutral party. *Jacobson v. Schwarzenegger*, 650 F.Supp.2d 1032, 1046 (C.D.Cal. 2009)(*citing* FRCP 26(c), Advisory Notes (1993)). The rules "reflect the legislative intent that law office personnel, rather than an independent stenographer, will most likely prepare the typed transcript of those portions of the audio or video depositions which counsel intends to introduce at trial." *Hudson v. Spellman High Voltage*, 178 F.R.D. 29, 31 (E.D.N.Y. 1998).

   b. **Neutral Professional Must Transcribe**: Parties may not transcribe videotapes as the result would likely be challenged by the opposing party. *Nusbaum v. MBFG Ltd. Partnership*, 2009 WL 2605320, 3 (W.D.Pa.)(parties shall each pay half for transcription by neutral reporter). [Ed. Note: This is the better view; allowing a non- professional to transcribe simply burdens the non-noticing party with the task of comparing the resultant transcript with the recording and then fighting with the opposing counsel about the results.]

D. **Costs Of Videotaping May Be Recovered**: The costs of videotaping a deposition are typically recoverable as awarded costs. *Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471 (10th Cir. 1997). *Contra Cherry v. Champion Intern.*, 186 F.3d 442, 449 (4th Cir. 1999).

E. **Practice Pointers**: The benefits of videotaping a deposition are case and deposition specific.

1. **Restrains Counsel**: Taping a deposition changes the room's dynamics. The prospect of being orally and visually recorded often restrains attorneys from obnoxious conduct in which they might otherwise engage. This is perhaps the greatest initial benefit for videotaping a deposition and, where opposing counsel is particularly unpleasant, is often reason enough to pay for videotape. If counsel persists in misbehaving or prompting the witness, the tape can be used to get an order limiting the counsel's conduct, or it can be shown to the fact finder to explain the basis of the witness's testimony.

2. **Witness's Demeanor**: Typically, there are two ways that the videotape might be used at trial. First, if the witness dies or becomes unavailable for the trial, the tape may be shown to the fact finder in lieu of live testimony. Second, the deposition may be used to impeach the witness. Under both circumstances, videotape best reflects the witness's demeanor. Nervous laughter, long pauses, and shifty eyes are not reflected in a deposition transcript. Under these circumstances, the videotape is a benefit. Some witnesses, however, speak slowly and quietly and are ill-suited for videotape. When it comes time to impeach the witness during trial, the use of a slow, unclear videotape is often less effective than the attorney reading the transcript himself, giving the words the inflection that best suits the point he hopes to make.

3. **Dynamics**: Most fact witnesses relax during the deposition. Although they know they're being stenographically recorded, they do not have a real understanding of what their words will look like on a typed page. Conversely, most witnesses are familiar with videotape, stay at a heightened level of alert when a deposition is videotaped, and are less like to let down their guard.

4. **Court's Benefit**: Videotaped depositions benefit the court. *See Riley v. Murdock*, 156 F.R.D. 130, 131 (E.D.N.C.1994) (discussing the various advantages to this form of testimony, including its ability to allow a better evaluation of the credibility of the deponent). Given these advantages, courts are reluctant to prevent depositions from being videotaped. *Alexander v. F.B.I.*, 186 F.R.D. 123, 127 (D.D.C. 1998); *see also Doe v. District of Columbia*, 697 F.2d 1115, 1119 (D.C.Cir. 1983).

III. **Remote Depositions**: "The parties may stipulate - or the court may on motion order - that a deposition be taken by telephone or other remote means." *Ajaj v. Bureau of Prisons*, 2011 WL 2791275, 1 (D.Colo.); *Akins v. Mason*, 2008 WL 4646142, 1 -2 (E.D.Tenn.)(*quoting*

FRCP 30(b)(4)). Remote depositions may be performed over the telephone or video-conferencing equipment.

A. **Motion Required**: The party seeking to take the remote deposition must establish a legitimate reason for its motion. *See Brown v. Carr*, 236 F.R.D. 311, 312 (S.D.Tex. 2006). Any party opposing such depositions must show good cause as to why the remote deposition should not allowed. *Id.* A party opposing a motion to take a remote deposition must make a particularized showing why it would be prejudiced. *United States v. $160,066.98*, 202 F.R.D. 624, 629 (S.D.Cal. 2001). *See also Rehau, Inc. v. Colortech*, 145 F.R.D. 444 (W.D.Mich. 1993)(approving of telephonic depositions); *Cressler v. Neuenschwander*, 170 F.R.D. 20 (D.Kan. 1996) (requiring justification for resisting telephonic deposition and a showing of prejudice).

1. **New Technologies Encouraged**: Courts liberally grant leave to take depositions by telephone. *Brown v. Carr*, 253 F.R.D. 410, 412 (S.D.Tx. 2008). Courts, moreover, have long encouraged experimentation in methods of recording depositions. *Rice's Toyota World v. Southeast Toyota*, 114 F.R.D. 647 (M.D.N.C. 1987) (court refused to limit video depositions to important witnesses who might be unavailable for trial). *Also see, Riley v. Murdock*, 156 F.R.D. 130 (E.D.N.C. 1994) (allowing videotaped deposition), and *Fanelli v. Centenary College*, 211 F.R.D. 268 (D.N.J. 2002) (anxiety over videotaping not good cause sufficient to warrant a protective order). At least one court has approved a video conference deposition over Skype. *Guillen v. Bank of America Corp.*, 2011 WL 3939690, 1 (N.D.Cal.).

2. **Basis For Objection**: The witness's importance and the party's need to see his demeanor may support the opposition to a telephonic deposition. *Gagasoules v. MBF Leasing*, 2009 WL 5176576 (E.D.N.Y.); *Capitol Records v. Alaujan*, 2009 WL 5873130 (D.Mass.)(expert depositions may be conducted by video conference but not telephone). If the deposition involves large or complicated exhibits, remote depositions become more difficult. *Id. See also Sloniger v. Deja*, 2010 WL 5343184, *11 (W.D.N.Y.); *Webb v. Green Tree*, 2012 WL 2899382, 3 (D.Md.).

B. **Procedures For Conducting Remote Depositions**: Remote depositions are taken at the place where the witness is to answer questions. FRCP 30(b)(4). Because a deposition must be taken "*before an officer*," the reporter must typically be in the same room as the witness. *Aquino v. Automotive Service Industry*, 93 F.Supp.2d 922, 923 (D.Ct. Ill. 2000). *Contra Akins v. Mason*, 2008 WL 4646142, 1 -2 (E.D.Tenn.) (although reporter was not with witness, counsel objecting to deposition was, resolving concerns about witness coaching). The parties may waive this requirement. FRCP 30(b)(5).

1. **Video Conferencing**: For video-conference depositions, the witness, videographer, and court reporter are in one place, while one or both parties' counsel are elsewhere. Videoconferencing can be an excellent means for a distant deposition without the expense of travel. *Estate of Harvey v. Roanoke*, 2007 WL 2821536, *3 (W.D.Va. 2007). The technology allows the parties to see and interact with the witness and is superior to telephone depositions. *Id.* A videoconference deposition is cost-effective

as it avoids expensive travel time and costs. *Guillen v. Bank of America Corp.*, 2011 WL 3939690, 1 (N.D.Cal.)

2. **Handling Documents**: Pre-marked exhibits can be provided to the court reporter who, in turn, can present them to the deponents. *Kelora Systems, LLC v. Target Corp,*. 2011 WL 3895303, 2 (N.D.Cal.). Alternatively, the noticing counsel can present exhibits to the witness via laptop. *Id.* Finally, if there is no surprise element to the documents, they may simply be sent ahead to the witness and he or she be asked to bring them to the deposition.

C. **Practice Pointer**: Some courts favor telephonic depositions as inexpensive and efficient. *See Marshall v. Managed Care Agency*, 452 F.Supp.2d 792, 793 (N.D.Ohio 2006). Telephone depositions, however, are not suitable for obtaining controversial testimony. The questioner cannot see the question's impact or the witness's nonverbal responses. Moreover, the questioner cannot determine if anyone is coaching the witness. *United States v. Rock Springs*, 185 F.R.D. 603, 604 (D. Nevada 1999)(*quoting* Schwarzer, et al, *Federal Civil Procedure Before Trial* § 11.443 (1997)). Even conferencing has its drawbacks - confrontation through a video monitor is not the same as physical face-to-face confrontation. *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006).

1. **Advice For Calling Attorney**: For all remote depositions, counsel should insist on not being at a disadvantage – if you're not going to be in the room, opposing counsel should also be absent – even if he's in the same town. This is the only way to insure there is no coaching.

2. **Advice For The Defending Attorney**: As with any deposition, the remote deposition may involve the assertion of privilege and instructions not to answer. This can be difficult to execute during a remote deposition with people talking over each other. The witness must understand that, after a question is asked, remote counsel must be given a chance to assert objections and protect privileges. Counsel should arrange for call-in numbers to allow discussion, should a privilege issue arise.

V. ***De Benne Esse***: A *de benne esse* deposition is a provisional examination of a witness whose testimony is important and might otherwise be lost. A *de benne esse* deposition is held out of court and before trial, with the understanding that the deposition may be used at trial in case the witness is unable or unwilling to attend. "Neither the Rules of Civil Procedure nor the Rules of Evidence make any distinction between discovery depositions and depositions for use at trial." *Niver v. Travelers Indem. Co. of IL*, 430 F.Supp.2d 852, 863 (N.D.Iowa 2006)(*quoting Henkel v. XIM Prods.*, 133 F.R.D. 556, 557 (D.Minn. 1991). Courts, however, have recognized some practical differences. *Spangler v. Sears, Roebuck and Co.*, 138 F.R.D. 122, 123 (S.D.Ind. 1991).

A. **Discovery Cut Off**: After the discovery cut-off a party may not engage in any further discovery, but the discovery cut-off "does not prevent a party from memorializing a witness' testimony in order to offer it at trial." *Charles v. F.W. Wade*, 665 F.2d 661, 664 (5th Cir. 1982)(holding abuse of discretion for a trial court to refuse to permit a deposition for trial testimony for the reason that discovery had closed). *Contra Chrysler Intern. Corp. v. Chemaly*, 280 F.3d 1358, 1361 (11th Cir. 2002).

B. **Witness Availability**: If a complete de bene esse deposition is available, the court may conclude that the witness is not "unavailable" trial witness within the meaning of Rule 804(b)(1). *Manley v. Ambase Corp.*, 337 F.3d 237, 248 (2nd Cir. 2003).

VI. **Deposition On The Written Question**: Any party may take depositions upon the written question of any person, organization, or agency. FRCP 31. The pursuing party develops questions for the witness, whose attendance may be compelled by subpoena FRCP 45.

A. **Procedure**: Before a party may take a deposition by written questions, he or she must serve those questions on every other party along with a notice that specifies not only who is to answer the questions, but before whom the deposition is to be taken. *Rahn v. Hawkins*, 464 F.3d 813 (8th Cir. 2006) (citing FRCP 31(a)(3)). Because the injury that flows from inadequate notice is one that accrues to the party-opponent, it is he or she who has standing to force compliance with the rules. *Id.* Within 30 days, any other party may serve cross questions. The questions are then provided to the officer taking the deposition. The officer swears the witness and then performs the examination using the questions provided. FRCP 31.

B. **Applications**: In certain circumstances, depositions by written questions are appropriate. For example, where the issues to be addressed by the witness are narrow and straightforward and the hardships of taking an oral deposition would be substantial, written questions may be an adequate substitute, at least in the first instance. *See Winbourne v. Eastern Air Lines, Inc.*, 632 F.2d 219, 226 (2d Cir. 1980). Written depositions may be ordered to control the deposition's scope. *See Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1423 (11th Cir. 1994) (No abuse of discretion in ruling that plaintiffs could only depose defendants' attorney by written questions).

1. **In Place Of Interrogatories For Nonparties**: Unlike interrogatories, depositions upon written questions can be taken of nonparties. FRCP 31. Thus, they may thus provide the functional equivalent of interrogatories. *New Hampshire Motor Transport Ass'n v. Rowe*, 324 F.Supp.2d 231, 237 (D. Maine 2004)(*citing* Grenig and Kinsler, *Handbook of Federal Civil Discovery and Disclosure* § 6.2 (2d ed.)).

VII. **Standard Stipulations For Videotaping Depositions**

1. The deposition shall be timed by means of additional clock (date- time generator), recording hours, minutes and seconds. Throughout the deposition, the additional read-out shall appear at the bottom or in an appropriate corner of the video screen.
2. The recording will run continuously throughout the deposition, but may be suspended during colloquy among counsel, breaks, etc., upon stipulation of all counsel present.
3. The party conducting the deposition shall prepare a log index which shall include:

(a) Case name and number;

(b) Names of all counsel and deponents present;

(c) Time, date and location;

(d) Start and end of each recording session, including recesses.

4. At the start of the deposition, the video technician shall make a statement on camera of the deposition's date, time, and place, as well as the case's title, and the counsel present.
5. The person being deposed shall be sworn as a witness on camera by an authorized person.
6. Prior to the examination, the parties shall stipulate to the zoom, angle, background, and other filming details. At the deposition the operator shall use the following recording techniques:

   (a) The video deposition shall be recorded in color;

   (b) One camera shall be used and fixed solely on the witness;

   (c) There shall be no unusual lighting in the deposition room solely for the video camera;

   (d) During the deposition proceedings the camera shall not be moved;
7. At the conclusion, the video technician shall state on camera that the recording is completed.
8. The party noticing the video deposition shall bear the cost of the videotaping which shall not be taxable as costs of the action. The recording will be created by a professional video technician. Videotaping shall not be discontinued during colloquy among counsel.
9. The deposition shall be concurrently recorded by a stenographer qualified pursuant to the FRCP. The stenographic transcript shall be the official record of the deposition and certification of this shall follow the procedures set forth in Rule 30. The use of the video tape record at trial is left entirely in the discretion of the trial judge.
10. The video technician shall use one recorder to produce one original video tape which the technician shall maintain. [Alternatively, the noticing party shall file the original video recording with the Court Clerk.] Any party is entitled to a reproduction of the original tape upon request and payment of the blank tape price.
11. Documents or exhibits used during the deposition must be marked and identified, and shall remain in the custody of the stenographic court reporter with copies for all counsel present.
12. Notice and subpoena for taking a video deposition shall contain the additional statement that the deposition shall be recorded by audio/visual means.
13. The videographer shall be sworn and the videographer shall certify as to the completeness of the video recording.

Notes: ______________________________

[C5] DEPOSING ORGANIZATIONS

QUICK RULE: Organizations - *corporations, non-profits, and agencies - may be deposed through their representatives. FRCP 30(b)(6). The recipient of the 30(b)(6) deposition request shall designate, and if necessary, prepare, a person to testify to "matters known or reasonably available to the organization." Testimony in a 30(b)(6) deposition is evidence, but is not considered an admission.*

DISCUSSION:

I. <u>**Overview**</u>: The rules provide two ways a party may notice and take a deposition: the party can depose a "person," or an "organization," through its employees or members. When a person is deposed, the witness testifies solely upon his personal knowledge. FRCP 30(b)(1). If the witness manages or runs an organization, the testimony may be attributed to the organization, but the deposition will still only capture witness's knowledge. *Id.* When an organization is deposed, the party seeking discovery identifies the deposition subjects, and the organization receiving the deposition notice must identify and produce responsive witnesses. *Resolution Trust Corp. v. Southern Union*, 985 F.2d 196, 197 (5th Cir. 1993). When a corporation or association designates a person to testify on its behalf, the organization appears vicariously through that agent. *Black Horse Lane v. Dow Chemical*, 228 F.3d 275, 303 (3rd Cir. 2000). A 30(b)(6) witness testifies about the organization's knowledge, not the individual's personal knowledge. *United States v. J.M. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996).

A. <u>**The Rule's Purpose**</u>: Depositions of organizations or corporations - a specialized form of deposition - streamline discovery. *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 687-691 (S.D.Fla. 2012); *Great Am. Ins. Co. v. Vegas Constr. Co., Inc.*, 251 F.R.D. 534, 539 (D.Nev. 2008). These depositions prevent 'bandying,' the practice whereby people are deposed in turn but each disclaims knowledge that is clearly known to persons in the organization and thereby to the organization itself. *Myrdal v. District of Columbia*, 248 F.R.D. 315, 317 (D.D.C. 2008) (*citing* FRCP 30(b)(6) Advisory Notes (1970)). Without organizational depositions, a corporation could "hide behind the alleged 'failed' memories of its employees." *Ierardi v. Lorillard, Inc.*, 1991 WL 66799, *2 (E.D.Pa.).

II. <u>**Noticing A 30(b)(6) Deposition**</u>: A 30(b)(6) notice or subpoena lists the subject areas to be addressed in the deposition. *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D.Minn. 2000). The party seeking discovery must describe the matters with reasonable particularity. *Great Am. Ins. Co. v. Vegas Constr. Co., Inc.*, 251 F.R.D. 534, 539 (D.Nev. 2008).

A. <u>**Appropriate For All Organizations**</u>: A 30(b)(6) notice or subpoena may be properly served upon a public or private corporation, a partnership, or a governmental agency. *See, e.g., F.C.C. v. Mizuho Medy Co. Ltd.*, 257 F.R.D. 679, 681 -683 (S.D.Cal. 2009).

B. <u>**Practice Point:**</u> The 30(b)(6) deposition transcript of a party is admissible as a party admission; accordingly 30(b)(6) depositions of party opponents are very useful. The

30(b)(6) deposition transcript of a third party raises significant hearsay issues and is likely not admissible at trial. Accordingly, although such depositions are useful in discovery, they cannot take the place of a 30(b)(1) deposition of a fact witness who can then be called to testify at trial.

III. **Responding To A 30(B)(6) Deposition Notice**: An organization receiving a 30(b)(6) notice or subpoena must provide witnesses to address the issues identified therein – these witnesses will provide binding answers on behalf of the organization. *Ecclesiastes v. LMC Holding Co.*, 497 F.3d 1135, 1147 (10th Cir. 2007). When a Rule 30(b)(6) deposition notice is sent, the recipient organization must designate a knowledgeable person to fully prepare and un-evasively answer questions about the designated subjects. *Bd. of Trs. of the Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 F.R.D. 524, 526 (C.D.Cal. 2008). The testimony of a Rule 30(b)(6) witness represents the collective knowledge of the corporation, not of the specific individual deponents. *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 687 -691 (S.D.Fla. 2012).

A. **Selecting The Witnesses To Testify**: The organization being deposed must designate and prepare a witness to testify on the organization's behalf. *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996); FRCP 30(b)(6). Specifically, an organization receiving a Rule 30(b)(6) subpoena or notice of deposition must produce as many witnesses as will satisfy the request, and, more importantly, prepare the witnesses so that they may give complete, knowledgeable and binding answers on behalf of the corporation. *Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989); *Calzaturficio v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 36 (D. Mass. 2001). Because the organization selects the witnesses, the party seeking discovery cannot insist that a specific person to testify. Wright, et al, *Federal Rules Of Civil Procedure* § 2103.

1. **Witness Need Not Have Personal Knowledge**: Rule 30(b)(6) witness need not have first-hand knowledge of the events in question, but must be prepared to discuss the identified issues. *SEC v. Morelli*, 143 F.R.D. 42, 44 (S.D.N.Y. 1992).

2. **Witness Need Not Be Most Knowledgeable Person**: The rule does not require the corporation to produce the "person most knowledgeable" for the corporate deposition. *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 687 -691 (S.D.Fla. 2012). Because the witness/designee need not have any personal knowledge, requesting the "most knowledgeable" witness is illogical. *PPM Fin., Inc. v. Norandal*, 392 F.3d 889, 894–95 (7th Cir. 2004) (rejecting argument that trial court should not have credited the testimony of a witness who lacked personal knowledge because the witness was a 30(b)(6) witness and "was free to testify to matters outside his personal knowledge as long as they were within the corporate rubric"). An organizations may have good grounds not to produce the "most knowledgeable" witness for a Rule 30(b)(6) deposition. *QBE Ins. Corp.*, 277 F.R.D. at 687 -691. For example, that witness might be inarticulate, he might have a criminal record, she might be out of town for an extended trip, he might not be photogenic (for a videotaped deposition), she might prefer to avoid the entire process or the organization might want to save the witness for trial. *Id.*

a. **Duty To Designate Person With Knowledge**: Some courts have suggested that Rule 30(b)(6) places the burden upon the deponent to "make a conscientious good faith endeavor to designate the persons having knowledge of the matters sought." *Costa v. County of Burlington*, 254 F.R.D. 187, 189 (D.N.J. 2008) (*quoting Harris v. New Jersey*, 259 F.R.D. 89, 92 (D.N.J. 2007)). This is – at best – a minority view, and probably best read to mean that, after preparation, the designated witness has become the most knowledgeable.

3. **Witness Need Not Be An Employee**: The responding party may select current or former employees as well as paid consultants. A 30(b)(6) witness need not actually work for the organization, so long as they consent to testify upon its behalf. *See Myrdal v. District of Columbia*, 248 F.R.D. 315, 317 (D.D.C. 2008).

4. **Practice Point**: Looking ahead to trial, there is a sound strategic reason to select 30(b)(6) witnesses who will not be testifying at trial. At least one commentator and one court have concluded that if the corporation's representative appears at trial as a witness, she cannot refuse to testify on the corporation's behalf to the matters covered in the deposition on grounds of lack of personal knowledge. *See* Wright, et al, *Federal Practice and Procedure* § 2103 (1993). "Although there is no rule requiring that the corporate designee testify 'vicariously' at trial, as distinguished from at the rule 30(b)(6) deposition, if the corporation makes the witness available at trial he should not be able to refuse to testify to matters as to which he testified at the deposition on grounds that he had only corporate knowledge of the issues, not personal knowledge." *Brazos Authority v. GE Ionics*, 469 F.3d 416, 434 (5th Cir. 2006) (citing FRCP 32(a)(2)). This rule, although not universally adopted, creates an enormous incentive to select 30(b)(6) witnesses who will not take the stand at trial, as this may open the door to examination regarding the "corporations' knowledge."

5. **Another Practice Point**: Do not designate lawyers as 30(b)(6) witnesses, even if they are to provide unprivileged information, as there is a risk that this will be perceived as waiving privilege on everything that lawyer knows. The better practice is to identify some willing fact witness, and prepare him with the information necessary to answer the questions identified by the other party.

B. **Duty To Prepare**: Because Rule 30(b)(6) explicitly requires a company to have persons testify on its behalf as to all matters reasonably available to it, the Rule implicitly requires persons to review all matters known or reasonably available to the organization in preparation for the Rule 30(b)(6) deposition. *Bd. of Trs. of the Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 F.R.D. 524, 526 (C.D.Cal. 2008). The duty to prepare is unique to 30(b)(6) witnesses and "goes beyond matters personally known to the designee or to matters in which that designee was personally involved." *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996); *Wilson v. Lakner*, 228 F.R.D. 524 (D.Md. 2005).

1. **Breadth Of Duty**: The duty to prepare includes all matters that are known or reasonably available to the corporation or organization. *Concerned Citizens of Belle Haven v. Belle Haven Club*, 223 F.R.D. 39, 43 (D. Conn. 2004); *F.C.C. v. Mizuho Medy Co. Ltd.*, 257 F.R.D. 679, 681 -683 (S.D.Cal. 2009). Counsel should prepare

witnesses to provide meaningful information about designated areas. ABA Standards, 19(f) (Duty to Prepare Witness).

a. **Duty To Inquire**: As a corollary to the corporation's duty to designate and prepare a witness, it must perform a reasonable inquiry for information that is reasonably available to it. *Fowler v. State Farm*, 2008 WL 4907865, at *4 (D.Haw. 2008); *Marker v. Union Fidelity*, 125 F.R.D. 121, 127 (M.D.N.C. 1989). The rule implicitly requires the corporation to review all matters known or reasonable available to it in preparation for a Rule 30(b)(6) deposition. *Wilson v. Lakner*, 228 F.R.D. 524, 529 (D.Md. 2005)("good faith effort" to "find out the relevant facts" and to "collect information, review documents and interview employees with personal knowledge").

b. **Good Faith Standard**: "While the rule may not require absolute perfection in preparation - it speaks after all of matters known or reasonably available to the organization - it nevertheless certainly requires a good faith effort on the part of the designate to find out the relevant facts - to collect information, review documents, and interview employees with personal knowledge just as a corporate party is expected to do in answering interrogatories." *Wilson v. Lakner*, 228 F.R.D. 524, 528–29 (D.Md. 2005).

c. **Limits Of Obligation To Prepare**: If a corporation genuinely cannot provide an appropriate designee because it does not have the information, cannot reasonably obtain it from other sources and still lacks sufficient knowledge after reviewing all available information, then its obligations under the Rule cease. *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 39 (D. Mass. 2001); *see also Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 76 (D.Neb. 1995).

2. **Steps For Preparation**: So long as the designee is prepared to provide binding answers under oath, then the organization may prepare the designee in whatever way it deems appropriate. *Reichhold, Inc. v. U.S. Metals*, 2007 WL 1428559, at *9 (D.N.J.). The rule "does not require that the corporate designee personally conduct interviews," but, instead, requires him to testify to matters known or reasonably available to the corporation. *Id.* If necessary, however, the responding party must prepare witnesses by having them review fact-witness depositions as well as documents and deposition exhibits. *Wilson Land v. Smith Barney, Inc.*, 2001 WL 1745241, 4 (E.D.N.C.)(*citing United States v. J.M. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996)). Even if the documents are large and the review burdensome, the deponents are still required to review them to prepare themselves to be deposed. *Skyline Potato Co., Inc. v. Tan-O-On Marketing, Inc.*, 2012 WL 3150385, 5 (D.N.M.). A corporate designee must provide responsive answers even if the information was transmitted through the corporation's lawyers. *Great Am. Ins. v. Vegas Constr. Co., Inc.*, 251 F.R.D. 534, 542 (D.Nev. 2008).

3. **Preparation Goes Beyond Facts**: Not only must the designee testify about facts within the corporation's collective knowledge, but the designee must also testify about the corporation's position, beliefs and opinions. . *Great Am. Ins. Co. v. Vegas Constr. Co., Inc.*, 251 F.R.D. 534, 542 (D.Nev. 2008); *United States v. J.M. Taylor*, 166 F.R.D. 356,

362 (M.D.N.C. 1996)(designee presents corporation's "position," its "subjective beliefs and opinions" and its "interpretation of documents and events").

4. **Failure To Prepare Witness May Be Sanctionable**: Some courts have held that, when a party designates a witness to speak on the organization's behalf pursuant to Rule 30(b)(6), producing an unprepared witness may be a sanctionable failure to appear. *Black Horse v. Dow Chem.*, 228 F.3d 275, 304 (3d Cir. 2000) (*quoting United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996)); Rule 37(d). ***Contra***: Sanctions for non-appearance are only available when a deponent literally fails to show up for a deposition session. *Baker v. St. Paul Travelers Ins. Co.*, 670 F.3d 119, 124 (1st Cir. 2012); *Salahuddin v. Harris*, 782 F.2d 1127, 1131 (2d Cir. 1986).

C. **Necessary Substitution**: The designating party must substitute an appropriate deponent if it becomes apparent that the prior deponent cannot respond to all relevant questions. *Myrdal v. District of Columbia*, 248 F.R.D. 315, 317 (D.D.C. 2008). If the designee is deficient, the organization is obligated to provide a substitute. *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D.Neb. 1995).

IV. **Scope Of 30(b)(6) Depositions**: The testimony by a corporate representative is not limited to facts, but can include subjective beliefs and opinions held by the entity. *Mayberry v. Wal-Mart Louisiana*, 2015 WL 420284, 2 (W.D.La. 2015)(*citing Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 433(5th Cir. 2006)). A 30(b)(6) deposition, like all discovery, must be "proportional to the needs of the case." *Wells v. Lamplight Farms, Inc.*, 303 F.R.D. 530, 539 (N.D.Iowa 2014). Circuits are split as to whether a designated 30(b)(6) witness may be questioned upon issues beyond the scope of the deposition notice or subpoena.

A. **Narrow Scope (Minority view):** There is nothing in the text of Rule 30(b)(6) or the advisory committee's notes which limit the scope of a Rule 30(b)(6) deposition to matters identified in the deposition notice. *Parparelli v. Prudential Ins. Co.*, 108 F.R.D. 727, 730 (D. Mass. 1985). Nonetheless, some courts have implied such a limitation based upon the rule's procedures and the reasons for the rule's adoption as noted by the Advisory Committee. *Id.* The rules implicitly restrict the scope of an examination by requiring the deposing party to describe "with reasonable particularity the matters on which examination is requested." *Id.*

1. **Not Proper Basis For Refusal To Answer**: Even if the district has adopted a narrowing rule on 30(b)(6) depositions, it is improper to instruct a witness not to answer when a question exceeds the 30(b)(6) notice, unless the court has ordered a limitation on the deposition's scope. *ZCT Systems Group, Inc. v. FlightSafety Intern.*, 2010 WL 1257824. Should the questioner try to go beyond scope described in 30(b)(6) notice, the proper course is to seek a protective order.

B. **Wider Scope (Majority View)**: Rule 30(b)(6) deponents may be questioned as broadly as any other deponent. The reasonable particularity language in 30(b)(6) does not limit the scope of the examination, but rather informs the entity of the information the designated deponent must supply. Rule 30(b)(6) is not to provide greater notice, but to have the correct person present at the deposition. *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D.Fla.

1995); *Green v. Wing Enterprises, Inc.*, 2015 WL 506194, 8 (D.Md. 2015) ("the scope of the questioning at a Rule 30(b)(6) deposition is governed by relevancy under Rule 26(b)(1) and not limited to the notice; but to the extent the questioning is beyond the scope of the notice the testimony will constitute that of the deponent in an individual capacity and not on behalf of his organization"). This is the "better" view, Moores *Fed Practice* § 30.25[4], and has been the ascendant position. *American General v. Billard*, 2010 WL 4367052 (N.D.Iowa); *Philbrick v. Enom, Inc.*, 593 F.Supp.2d 352, 363 (D.N.H. 2009).

1. **Questioning Beyond The Scope**: If questioning is allowed beyond the scope of the 30(b)(6) notice, the defending counsel should note on the record (1) which questions exceed the deposition notice, and (2) that answers to those questions are not intended as the answers of the organization that put forth the witness, but rather, of the witness as an individual. *See F.C.C. v. Mizuho Medy Co. Ltd.*, 257 F.R.D. 679, 681 -683 (S.D.Cal. 2009); *Detoy v. City and Cty. of S.F.*, 196 F.R.D. 362, 367 (N.D.Cal. 2000)(if deponent does not know the answer to question outside scope of matters described in the deposition notice, "that is the examining party's problem").

C. **Practice Point**: Whether questioning a 30(b)(6) witness may exceed the deposition notice only becomes material because of the 10 deposition limit under FRCP 30(a)(2)(A). The 30(b)(6) deposition only counts as one toward the limit, no matter how many people the responding party provides. Unless the count is a significant issue, and the responding party plans to bring numerous witnesses to address the 30(b)(6) issues, the best practice is to permit the party calling the deposition to exceed the 30(b)(6) notice, rather than make the witness come back to be re-deposed. The noticing party can avoid any trouble by issuing a separate standard notice to depose each identified 30(b)(6) witness.

1. **Practice Point**: If the deposition is to exceed the noticed subjects, defending counsel must ensure that the deposition transcript clearly states which portions of the testimony are responsive to the 30(b)(6) notice - and thus may be attributed to the organization - and which portions are simply attributable to the witness. Ideally, the calling attorney will agree to preserve questions beyond the scope of the notice until the noticed items are completed. Then both attorneys may state on the record that the remainder of the deposition can't be attributed to the organization. Absent such an agreement, the defending attorney should object to every question or answer beyond the notice' scope.

V. **Duration**: "For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition." FRCP 30(d)(2) Advisory Notes. *See also Sabre v. First Dominion Capital, LLC*, 2001 WL 1590544, 1 (S.D.N.Y.). Accordingly, the more witnesses used to respond to the deposition notice, the more time the calling attorney gets.

VI. **Effect Of A 30(b)(6) Deposition**: A Rule 30(b)(6) deposition is admissible against the party designating the representative. *Crompton Greaves, Ltd. v. Shippers Stevedoring Co.*, 776 F.Supp.2d 375, 393 (S.D.Tex. 2011)(*citing* Wright et al., *Federal Practice & Procedure* § 2103 (2d ed. 1994)). Courts have differed, however, as to whether testimony of a Rule 30(b)(6) designee binds the organization such that it may not offer evidence to the contrary.

A. **<u>Majority View: Organization Not Bound By 30(b)(6) Witness</u>**: Most courts have held that a 30(b)(6) witness testifies on behalf of the organization, but does not bind the organization in the sense of a judicial admission. *United States v. Taylor*, 166 F.R.D. 356, 362 n. 6 (M.D.N.C. 1996). Testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted at trial by the deposed party. *A.I. Credit v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001); *R & B Appliance v. Amana Co., L.P.*, 258 F.3d 783, 786 (8th Cir. 2001); *AstenJohnson, Inc. v. Columbia Cas.*, 562 F.3d 213, 229 (3rd Cir. 2009). The 30(b)(6) deposition may then be properly used for impeachment purposes, much like any other deposition. *Id.*

1. **<u>Bound</u>**: A corporation is 'bound' by its Rule 30(b)(6) testimony, in the same sense that any individual would be 'bound' by his deposition testimony. *A&E Products Group, L.P. v. Mainetti USA Inc.*, 2004 WL 345841 (S.D.N.Y. 2004)(*quoting W.R. Grace & Co. v. Viskase Corp.*, 1991 WL 211647, at 2 (N.D. Ill.). Thus, the witness has committed to a position at a particular point in time. The witness has not made a judicial admission that formally and finally decides an issue. *Id.*

B. **<u>Minority View: Organization May Not Contradict Its Witness</u>**: Some courts have held that, by commissioning the designee as the voice of the organization, a corporation cannot argue new or different facts that could have been asserted at the Rule 30(b)(6) deposition. *Rainey v. American Forest & Paper Ass'n, Inc.*, 26 F.Supp.2d 82, 94 (D.D.C. 1998). *See also Great American Ins. Co. of NY v. Summit Exterior Works, LLC*, 2012 WL 459885, 4 -5 (D.Conn.); *Chapman v. Ourisman Chevrolet Co., Inc.*, 2011 WL 2651867, 5 (D.Md.). Under this approach, a party may not submit an affidavit on summary judgment that conflicts with its own 30(b)(6) witness unless the organization can prove that the information was not known or was inaccessible at the deposition. *Id.*

C. **<u>Organization May Be Bound By Failure To Answer</u>**: When an organization's designee legitimately lacks the ability to answer relevant questions on listed topics and the organization cannot better prepare that witness or obtain an adequate substitute, then the "we-don't-know" response can be binding on the corporation and prohibit it from offering evidence at trial on those points. Phrased differently, the lack of knowledge answer is itself an answer which will bind the corporation at trial. *Fraser Yachts Fla., Inc. v. Milne*, 2007 WL 1113251, at *3 (S.D.Fla.); *Chick–fil–A v. ExxonMobil Corp.*, 2009 WL 3763032, at *13 (S.D.Fla.). If a party's 30(b)(6) witness, because of lack of knowledge or failing memory, provides a "don't know" answer, then "that is itself an answer" and the corporation "will be bound by that answer." *Ierardi v. Lorillard*, 1991 WL 158911 at *3(E.D.Pa.). Similarly, a corporation which provides a 30(b)(6) designee who testifies that the corporation does not know the answers to the questions "will not be allowed effectively to change its answer by introducing evidence at trial." *Id.*

VII. **<u>Opposing A Rule 30(b)(6) Notice</u>**: A Rule 30(b)(6) notice constitutes testimony from an organization; the deposition notice may be opposed when alternative methods exist. The proper method of opposition is a motion for a protective order, or to limit discovery under FRCP 26.

A. **<u>30(b)(6) v. Interrogatory</u>**: Whether a Rule 30(b)(6) deposition or a Rule 33(c) contention interrogatory is more appropriate is a factual determination. *Exxon v. United States*, 44

Fed.Cl. 597, 600 (1999); *McCormick-Morgan, Inc. v. Teledyne*, 134 F.R.D. 275, 286, *rev'd on other grounds*, 765 F.Supp. 611 (N.D.Cal. 1991).

B. Adoption Of Prior Testimony: An organization may seek to adopt prior testimony from an individual as testimony for the organization. Notably, in *Novartis Pharms. Corp. v. Abbott Labs.*, 203 F.R.D. 159, 162–63 (D.Del. 2001), the court denied a motion to compel a 30(b)(6) deposition where the opposing party agreed to be bound by the testimony of a person, deposed in his individual capacity, who would have been the designee for a 30(b)(6) deposition. In *Johnson v. Geico Cas. Co.*, 269 F.R.D. 406, 415–16 (D.Del. 2010), the Court granted - in part - Geico's motion for protective order as to a 30(b)(6) deposition notice based upon the fact that Geico previously "produced thousands of documents" and the plaintiff had "already deposed witnesses" with respect to the particular topic, finding that plaintiff's 30(b)(6) notice was "duplicative and unduly burdensome."

C. Cannot Discover Legal Theories: "[D]epositions, including 30(b)(6) depositions, are designed to discover facts, not contentions or legal theories, which, to the extent discoverable at all prior to trial, must be discovered by other means." *JPMorgan Chase Bank v. Liberty Mutual Ins. Co.*, 209 F.R.D. 361, 362 (S.D.N.Y. 2002). A party cannot obtain legal theories or legal analysis under the guise of a 30(b)(6) deposition. *U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 2012 WL 3537070 (M.D. Fla.).

D. Cannot Ignore Overbroad 30(b)(6) Notice: A party may not ignore a 30(b)(6) deposition notice simply because the party believes the topics noted therein are outside the proper scope of discovery. *DDR Holdings, LLC v. Hotels.com, L.P.*, 2012 WL 2935172, *3 (E.D. Tex.). Procedural devices, including a motion for protective order, are available to protect the 30(b)(6) recipient itself from potential discovery that may be outside the scope of the case. *Id.* (compelling discovery).

VIII. Deposing Organizations On A Written Question: Organizations may be deposed with written questions. FRCP 31(a)(4). This permits one party to send written questions to either a party or third party, which must be answered – under oath – by someone speaking on behalf of the organization. Rarely used, this approach trumps the similar interrogatories because (1) these may be served on parties and nonparties, (2) there is no limit on the number of questions that may be asked, (3) they are more likely to be useful at trial than interrogatories.

IX. Practice Point – Taking A Rule 30(B)(6) Deposition: The deposition transcript should reflect – at the beginning - that the witness has been designated under 30(b)(6), and which subject areas the witness will address. After the witnesses is sworn, the party noticing the deposition should mark a copy of the notice or subpoena as an exhibit and place it in the record. Then, the noticing attorney should confirm on the record that the witness has been selected to respond to the 30(b)(6) notice. If the responding party selects a series of witnesses to respond to various items in the 30(b)(6) notice, the noticing attorney should ask the defending attorney to note which items the attending witness is expected to address. A corporation which expects its designee to be unprepared to testify on any relevant, listed topic at the corporate representative deposition should advise the requesting party of the designee's limitations before the deposition begins. *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 39 (D. Mass. 2001).

[D1] USING DOCUMENTS IN A DEPOSITION

QUICK RULE: *In a deposition, documents must be handled to avoid ambiguity on the transcript as to which document is being addressed. To this end, all documents used during a deposition should be uniquely marked and identified for the record. All subsequent use should refer to the document by its exhibit number.*
There are three areas to explore with each document: (1) obtain foundational information necessary to enter the document into evidence at trial; (2) gather information regarding the circumstances of the document's creation, use, and meaning; and (3) refresh a witness's memory.

DISCUSSION:

I. **Use Of Documents (Overview)**: Documents - regardless of whether the term refers to memos, photographs, audio recordings, or emails - capture a moment when human actions and thoughts had yet to become the bases of litigation. These documents are often tremendously powerful as they bolster, refresh, or contradict testimony. Documents create two types of challenges for the calling attorney. The first challenge is procedural: how to manage the documents before, during, and after the deposition. The second challenge is substantive: what testimony can be (and should be) obtained when using the documents.

II. **Document Management**: An important, if subtle, skill in completing a successful deposition, is avoiding any unnecessary pauses or gaps in the questioning. Whenever the calling attorney stops asking questions, it invites the witness to reflect upon what has already been asked. Inevitably witnesses will (1) reconsider what they've already said, and attempt to modify it, and/or (2) try to figure out where the deposition is headed, and try and get there first. Organization and preparation before the deposition can limit the witness's opportunities.

A. **Document Management (Preparation)**: For documents, which include everything from emails to photographs, the organization may involve the following steps:

1. **Copies**: The attorney calling the deposition should bring extra copies of any documents he intends to use as exhibits both as a courtesy to opposing counsel and to avoid wasting time. Typically, at least three copies are necessary: one for the witness, one for the opposing counsel, and a copy for the calling attorney to keep and reference. These copies should be put in sequentially tabbed folders (Tab 1, Tab 2, Tab 3), with each folder holding the 3 copies. If you pre-sticker your exhibits (give them exhibit numbers before the deposition), do this to the copy that will be handed to the witness, and make copies of that document, so that everyone will have the exhibit number.

2. **Identify The Areas Of Interest**: On the copy reserved for the calling attorney, highlight the important portions, and write the questions you want to ask either directly on the document, or on notes attached to the document.

3. **Note The Tabs On Your Outline**: On your outline, note the related document tab numbers where you want the documents to be used. After you question the witness about a meeting, put in "[Tab 4]" notation, which will direct you to folder #4, which contains the minutes for the meeting. You will be able to locate the documents and pull the documents out without any break in the questioning.

B. **Document Management (During Deposition):** Attorneys should follow certain best practices when dealing with documents in a deposition to ensure that the record is not muddled. These practices, as a group, ensure that the transcript is clear what document is the subject of the questions and answers.

1. **Stickering**: Each document discussed during a deposition should be marked with a unique identification before the document is handed to the witness. This is often done with an exhibit sticker. Two common numbering schemes used to identify the exhibits are: (1) by the witness's name, or (2) by the party that noticed the deposition. Using the former format, documents are labeled "Jones-1," "Jones-2," and "Jones-3". The later format will result in "DX1" or "Defendant's Exhibit 1." Exhibit numbers may be affixed before the deposition by the calling attorney or at the deposition by the court reporter. There are several approaches to stickering – each has its fans:

   a. **Pre-Stickering, Unique Numbers:** In preparing for the deposition, counsel stickers (assigns exhibit numbers) to all of her exhibits. These are unique identifying numbers: so if there's an email from Joe to Steve, and it gets marked as "DX47," it will have that exhibit number for all the depositions throughout the case. A log is kept showing which exhibit numbers have been affixed to which documents. The benefits are that, any reference to any exhibit is easily tracked. This becomes more difficult for larger cases, when multiple attorneys are planning multiple depositions, and all are trying to pre-sticker their documents. The other downside is that in each deposition, the exhibits used will generally not start with "ex #1" and generally not be sequential.

   b. **Deposition Stickering, Unique Numbers**: With this approach, the exhibits are numbered sequentially throughout all the depositions in the case. Thus, the first document shown to the first witness noticed by the defendant will be identified as "DX1." Perhaps during the deposition, eight more documents are shown, including "DX9." For the next deposition, the attorney will start the next deposition with "DX10." This ensures that the defendant's deposition exhibits are uniquely labeled and cannot be accidentally attached to the wrong deposition. If a document is shown to multiple witnesses, it retains the same exhibit number. Thus, if DX1 is shown to three different witnesses, it is always marked as DX1. This approach takes a bit of management – keeping track of which documents have already been marked – and, thus, works best for simpler cases, with smaller document sets and fewer than 10 depositions.

   c. **Deposition Stickering, Non-Unique Numbers**: If the case is large, with multiple attorneys taking depositions at or near the same time, the best approach may be to use the witness's name as an identifier. This means that the same memo will be marked as "Jones-3" in the Jones deposition, and "Toorvald-17" in the Toorvald deposition. Not as elegant as the first two, but life is short and at some point – four attorneys deposing different witnesses in different cities, with hundreds of exhibits – it's just not worth trying to get every scrap of paper stickered in advance.

d. **Practice Pointer**: If documents are not pre-stickered, counsel must track exhibit numbers in the deposition. During the deposition, as the reporter identifies documents as PX3 or DX7, counsel (whether calling or defending) should write the exhibit identification number on their own copies to facilitate finding them and identifying them as the deposition continues. Often, a witness may wish to jump back to previous exhibits for reference or comparison.

2. **Referring To Documents During The Deposition**: All references to the document during the deposition must clearly establish which document is being used.

a. **First Reference**: The transcript must contain sufficient information regarding each document that the record can withstand a claim by the witness, at trial, that their testimony addressed a different document. To accomplish this, the first time the presenting attorney discusses a document, he should briefly describe the document, including its length. The following are examples of these descriptions:

• "Mr. Lasorda, the court reporter is now going to hand you what has been marked as DX4. It is a four page document that appears to be a letter from Peter O'Malley to Walter Alston written on May 5, 1993. . ."

• "Ms. Torre, you've been handed what has been marked as PX143, a 53-page document with the bates number A5400 through A5452. The document has the words 1993 Annual Report for Plymouth Corporation on the first page, and has text and graphics throughout the document . . ."

• "Mr. Valentine, you've been handed DX37, which appears to be a photograph of a red car with the license GX479 . . ."

b. **Subsequent References**: For all subsequent references to the document, attorneys should use the assigned exhibit number rather than the ambiguous "this" or "that document." When directing the witness to turn to different pages, re-identify the document for clarity: "If you could please turn to the seventh page of DX14, and look at the third paragraph . . ."

3. **Exhibits Created During Deposition**: It is often desirable to have a witness create a demonstrative during the deposition – especially when describing something visual, such as an organizational chart or the layout of a building. Sometimes, these created exhibits will take the form of hand drawings or lists created completely by the witness. Other times, a new exhibit will be created when a previous exhibit is marked up. For example, if an attorney is trying to establish where the witnesses were to a traffic accident, she may bring a diagram or photo of the intersection and ask the witness to place stickers on

the relevant spots "On PX48, please place a blue sticker where you were standing." Anything created in a deposition must have its own, independent, exhibit number.

C. **Document Management (After The Deposition)**: After the deposition is completed, the original exhibits shown to the witness should be maintained with the deposition. The best practice is to ask the court reporter to bind the documents in with the transcript. This ensures the documents travel with the original deposition transcript. FRCP 30(f)(2)(b).

III. **Using Documents In A Deposition**: It is axiomatic that documents say what they say and show what they show – in a discovery deposition, the caller has two objectives when presenting a document to a witness (1) lay the groundwork to use the document at trial or on summary judgment, and (2) see if, by using the document, you can get more information out of the witness than you would have obtained without the document.

A. **Timing: When To Bring Out The Document**: Time permitting, it is best to fully explore a subject with the witness before turning to related documents. Once a document is produced, the witness may limit her testimony to what is described in the document. Thus, if you have minutes of a meeting, first exhaust the witness's memory of the meeting before showing the minutes. If you have an expert, exhaust her knowledge of her opinions before you bring out the report. This approach generally produces a wider scope of testimony.

B. **Foundation**: One reason for presenting documents to a witness during a deposition is to gather information necessary to lay a foundation at trial. To this end, the attorney should gather information regarding Authenticity, Relevance, Privileges, Hearsay, Undue prejudice, Rules, and Best Evidence Rule. Typically, the most important elements to consider are authentication and hearsay.

1. **Authenticity**: The proponent must demonstrate document is what it purports to be: *Have you ever seen this document before? What is it? How do you know?*

2. **Relevance**: A document is relevant – and thus potentially admissible - if it would tend to make any fact "of consequence" more or less probable. Note this is a different standard that relevance for discovery.

3. **Privileges**: Is there anything in this document that could cause the invocation of a privilege, and, if so, is there an exception or did the circumstances surrounding the document waive the privilege? If a claim of privilege is asserted, are there non-privileged facts that can be gleaned to dislodge this claim?

4. **Hearsay**: Does the document contain an out-of-court statement which the attorney would like to offer for the truth of the matter asserted. Was it an admission by a party opponent (a statement by the other party or its employees). Does it fit into an exception to the hearsay rule? If you're going to rely upon the business record exception, obtain foundational information during the deposition.

5. **Undue Prejudice**: Does the document present a risk of prejudice that outweighs its probative value?

6. **Rules**: Does the document raise issues regarding specific exclusionary rules - such as those keeping out discussions of settlement? If so, is there a basis for challenge?

7. **Best Evidence**: Is there a question about the actual contents of the original document and the accuracy of any copy? Is there a compilation?

C. **Information Regarding A Document**: When questioning a person regarding a document, the attorney should keep in mind the witness's relationship with the document. These generally fall into a limited number of categories: (1) witness authorized or requested that the document be created; (2) witness authored or co-authored the document; (3) witness received the document; or (4) witness saw document in preparation. There are obvious questions given the witness's relationship:

1. **Witness authorized or requested that the document be created**
   - Why did you want the document created?
   - What was its intended purpose?
   - Who did you expect to receive the document?
   - What action did you expect them to take in response to the document?
   - From where did you expect the information that went into the document to come?
   - Did you understand/believe the information going into the document was accurate?
   - Did the document turn out the way you expected?

2. **Witness authored or co-authored the document**
   - What portions of the document did you write or create?
   - What are you communicating with this sentence?
   - When did you create the document?
   - Is the date on the document correct?
   - Is that your signature?
   - To whom did you expect the document to be circulated?
   - Did you create the document as part of your normal business practice?
   - Is part of your job to create documents of this type?
   - Did you believe it was accurate when you created it?
   - Did you or your secretary put a copy in your files?
   - Why did you create/write this?
   - Did you receive a response?
   - What actions, if any, did you want the intended recipient to take as a result of this document? Were those actions taken?
   - Turn to page __ and paragraph __ (read into record); what did you mean to convey by that statement?

3. **Witness received the document**
   - When did you receive the document?
   - What did you do when you received it?
   - Did you read it from beginning to end?
   - Did you agree with the opinions expressed in the document?
   - Did you agree with the facts identified in the document?
   - Did you share the document with anyone else?

- What was your understanding of reason the document was created?
- What was your understanding of why the document was transmitted to you?
- What's your relationship with the author?
- Did you understand the document? If no, did you take, if any, to resolve any questions you had regarding the document of its contents?
- What actions did you take in response to the document?
- Turn to page __ and paragraph __ (read into record); what did you understand the author meant to convey by that statement?
- [For unintended recipient] How did you come to possess the document?
- Did you read or review any of the document? Why?

4. **<u>Witness reviewed the document in preparation</u>**
   - When was the last time you saw this document?

D. <u>Refresh Witness's Memory</u>: Even if a witness is not familiar with a document, the document may have some use in questioning the witness. To do this properly, the document is shown to the witness and her counsel for review. The witness may be instructed to read the document or a portion. The witness is then instructed to return to the document to counsel and the questioning may continue regarding the (possibly) refreshed subject matter.

E. <u>Dealing With Large Documents</u>: Larger documents – particularly those over 15 pages – present challenges for the attorney calling the deposition. The deposition may be limited to seven hours; the witness, however, may insist upon his right to read the entire document before authenticating it or answering questions regarding the contents. In cases in which the witness will be questioned about numerous or lengthy documents, it is often desirable for the interrogating party to send copies of the documents to the witness sufficiently in advance of the deposition so that the witness can become familiar with them. *Johnson v. Couturier*, 261 F.R.D. 188, 190 (E.D.Cal. 2009) (*citing* FRCP 30, Advisory Notes (2000)). Should the witness nevertheless not read the documents in advance, thereby prolonging the deposition, a court could consider that a reason for extending the time limit. *Saunders v. Knight*, 2007 WL 38000, 3 (E.D.Cal.). This will, of course, surrender some bit of surprise regarding the documents turned over, but – for practical reasons – this may be the better choice.

Notes: ____

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[D2] REFRESHING DEPONENT'S MEMORY

QUICK RULE: *An adverse party is entitled to obtain documents a witness uses to refresh his memory while the witness is testifying. An adverse party may be entitled to obtain documents used to refresh the witness's memory before testifying. There is a split whether this rule is sufficient to overcome claims of privilege. Counsel may use unfamiliar documents to refresh a witness's memory.*

DISCUSSION:

I. **Documents Used To Refresh**: During a deposition, if a witness refers to a document to refresh her memory, an adverse party is entitled to obtain that document and question the witness about the document. FRE 612. This rule, which primarily applies at trial as a rule of evidence, also applies during depositions given the admonition that "Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence." FRCP 30(c); *see Sporck v. Peil*, 759 F.2d 312, 317 (3rd Cir. 1985); *James Julian, Inc. v. Raytheon*, 93 F.R.D. 138, 144 (D.Del. 1982); *Sauer v. Burlington Nothern*, 169 F.R.D. 120, 123 (D. Minn. 1996). Controversies under the rule arise when the reviewed document has been withheld upon a claim of privilege.

A. **While Testifying**: Courts grapple with the scope of Rule 612 with varying degrees of clarity. *Suss v. MSX Int'l*, 212 F.R.D. 159, 163 (S.D.N.Y. 2002). The rule establishes different requirements depending upon whether a document is used to refresh the witness's memory "while testifying" or "before testifying." Most courts agree that a witness using a document to refresh his memory while testifying must produce the writing. *Calandra v. Sodexho, Inc.*, 2007 WL 1245317, 3 -4 (D.Conn.); *Medlock v. Otsuka Pharmaceutical, Inc.*, 2008 WL 243674, 15 (D.Kan.).

1. **During Breaks**: Review of documents during breaks in the deposition is "before" the deposition. *Hiskett v. Wal-mart Stores, Inc.*, 180 F.R.D. 403, 406 (D. Kan 1998).

2. **Court May Require That The Document Actually Refresh**: Most courts have held that production of a document will only be ordered if it actually refreshes a witness's memory. "[E]ven where a witness reviewed a writing, if the witness did not rely on the writing to refresh memory, Rule 612 confers no rights on the adverse party." *United States v. Sheffield*, 55 F.3d 341, 343 (8th Cir. 1995)(*citing* 28 Wright et al, *Federal Practice and Procedure* § 6185, p. 465 (1993)). *Contra*: Actual refreshment of recollection is unnecessary. *Audiotext Communications v. U.S. Telecom, Inc.*, 164 F.R.D. 250, 254 (D.Kan. 1996); *Hiskett v. Wal-mart*, 180 F.R.D. 403, 406 (D. Kan 1998).

B. **Document Used To Refresh Before Testifying**: If a witness refreshes his memory with a document before testifying, the trial court may compel production of that document "if the court determines it is necessary in the interests of justice." *Burns v. Exxon Corp.*, 158 F.3d 336, 343 (5th Cir. 1998). Rule 612(2) grants trial courts discretion in ordering the production of documents. *See Cosden Oil & Chemical Co. v. Akteingesellschaft*, 736 F.2d 1064, 1076-77 (5th Cir. 1984). Documents used to refresh a witness's memory before the witness testifies is only producible when the court concludes justice requires as much. Tension exists between Rule 612(2) and the work-product doctrine (FRCP 26(b)(3)). *Server Technology v. American Power Conversion Corp.*, 2011 WL 1447620 (D.Nev.). Congress amended Rule 612 to include a distinction for material reviewed in advance of testifying to prevent "fishing expeditions among a multitude of papers which a witness may have used in preparing for trial." *In re Yasmin*, 2011 WL 2580764, 3 (S.D.Ill.) (*citing* FRE 612 Advisory Notes). Little, if anything, can be said regarding the uniformity of courts as to when pre-deposition refreshment will require the production of documents. A sampling of the court's approaches:

1. **Foundational Test**: "Invocation of Rule 612 requires the establishment of foundational facts. In particular, the questioner must elicit testimony demonstrating (1) loss of memory on the part of the witness, (2) use of a specific document to refresh that memory, (3) actual refreshment of memory, and (4) intent to use the document for the purpose of testifying." *In re Yasmin*, 2011 WL 2580764, 3 (S.D.Ill.) (citing FRE 612(2)).

2. **Waiver Presumed**: When confronted with the conflict between the command of Rule 612 to disclose materials used to refresh recollection and the protection provided by the attorney-client privilege, one line of cases holds that the privilege is waived. *Ehrlich v. Howe*, 848 F.Supp. 482, 493 (S.D.N.Y. 1994); *S & A Painting Co. v. O.W.B. Corp.*, 103 F.R.D. 407, 408 (W.D.Pa. 1984)).

3. **No Waiver Presumed**: The relevant inquiry is whether the documents were used in a manner which waived the privilege. This could happen, for example, if privileged communications were disclosed to an individual outside the privileged relationship. *Suss v. MSX Int'l*, 212 F.R.D. 159, 164 (S.D.N.Y. 2002). On the other hand, the privilege would not be lost if an individual were to review his own already privileged documents. Wright et al, *Federal Practice and Procedure: Evidence* § 6188 at p. 485; *E.E.O.C. v. Continental Airlines*, 395 F.Supp.2d 738 (N.D.Ill. 2005); *In re Managed Care*, 415 F.Supp.2d 1378 (S.D.Fl. 2006). "The Advisory Committee notes state that the rule does not bar assertion of a privilege. Thus, any discretion used by the court should take into account the particular privilege being asserted. The legislative history supports this conclusion." *Suss*, 212 F.R.D. at 164.

4. **Functional Test**: Under the functional analysis approach, before ordering production of privileged documents under FRE 612, courts determine whether the documents have sufficiently affected the witness's testimony. *In re Rivastigmine Patent Litigation*, 486 F.Supp.2d 241, 243 (S.D.N.Y. 2007); *Bank Hapoalim v. Am. Home Assurance*, 1994 WL 119575 (S.D.N.Y.). Once this element has been satisfied, courts balance factors such as whether production is needed for a fair cross-examination, and whether seeking party is engaged in a 'fishing expedition.' *In re Rivastigmine*, 486 F.Supp.2d at 243.

5. **Three-Part Test With Eight-Part Kicker**: Some courts apply a three-part test to determine whether otherwise privileged documents should be produced under Rule 612 based on their pre-deposition use to refresh a witness's memory: "(1) a witness must use a writing to refresh his or her memory; (2) for the purpose of testifying; and (3) the court

must determine that, in the interest of justice, the adverse party is entitled to see the writing." *Nutramax Laboratories v. Twin Laboratories*, 183 F.R.D. 458, 468 (D. Md. 1998); *Coryn Group II v. O.C. Seacrets*, 265 F.R.D. 235, 242 (D. Md. 2010); *Ferry v. BJ's Wholesale Club v. Tethys Bioscience,* 2011 WL 4829340, 2 (E.D.Va.). In exercising its discretion under Rule 612(2), courts balance the need for disclosure, in order to examine the witness fully, against the need to protect the policies underlying the asserted privilege. *Coryn Group*, 265 F.R.D. at 241; *Nutramax Labs*, 183 F.R.D. at 468.

a. **Factors Considered**: Factors courts consider when making this determination include the following: (1) the witness's status; (2) the importance of the witness's testimony to the case; (3) when the events took place; (4) when the documents were reviewed; (5) the number of documents reviewed; (6) whether the witness prepared the documents reviewed; (6) what type of privilege applies to the documents; (7) whether the documents were previously disclosed; and, (8) the existence of credible concerns regarding manipulation, concealment, or destruction of evidence. *Nutramax Labs., Inc.*, 183 F.R.D. at 469–70; *see also Coryn Grp. II, LLC*, 265 F.R.D. at 244.

6. **A Different Three-Part Test**: In deciding whether to order production of such privileged materials, some courts have relied on a balancing test, considering three relevant factors: (1) whether witness "coaching" may have occurred; (2) whether the documents reviewed constitute "factual" or "opinion/core" work product; and (3) whether the request constitutes a fishing expedition. *Parry v. Highlight Industries, Inc.*, 125 F.R.D. 449, 452 (W.D. Mich. 1989). Good luck with this one.

C. **Breadth Of Disclosure**: The rule only requires disclosure of the passage the witness actually used, and other portions relating to the same subject matter. *See* FRE 612, Advisory Note; *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982).

D. **Examples**: Where plaintiff spent two hours reviewing counsel's twenty-six page chronology and testified that it was the only document he reviewed in preparation for his deposition, the court found production was justified. *Lebow v. Meredith Corp.*, 2007 WL 1343744, 2 (D.Kan.). The use of a document which possessed little, if any, work product value, for the express purpose of refreshing an important witness' recollection about dates, called for it to be produced to the opposing party in order to further the interest of justice. *Tattletale Portable Alarm v. Calfee, Halter*, 276 F.R.D. 573, 574 -577 (S.D.Ohio 2011). In *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138 (D.Del. 1982), the court held a binder of documents used for witness preparation constituted work product because the selection and compilation revealed counsel's understanding of the case, but that the use of the binder to refresh the witness's memory before testifying waived the protection.

IV. **Unfamiliar Documents**: It is neither irrelevant, nor improper, to show a witness documents he has never seen before in an honest attempt to refresh the witness's memory. An attorney may use notes to refresh a witness's memory, even if the witness had never seen the notes before. *See Thompson v. United States*, 342 F.2d 137, 140 (5th Cir. 1965) ("The fact that a government agent instead of the witness prepared the statement [used to refresh] is inconsequential."); *United States v. Landof*, 591 F.2d 36, 39 (9th Cir. 1978) (use of FBI report to refresh recollection permitted).

Notes:

[D3] RELEVANCE AND THE SCOPE OF DISCOVERY

QUICK RULE: *Information is relevant if reasonably calculated to lead to the discovery of admissible evidence. Rule 26(b)(1). Absent privilege or a contrary order, parties may obtain discovery regarding any matter relevant to a party's claim or defense. For good cause, the court may broaden the scope of discovery to any matter relevant to the subject of the lawsuit.*

DISCUSSION:

I. **Overview**: The FRCP set out an extremely permissive deposition-discovery regime, to which courts have long accorded a broad and liberal treatment to effectuate their purpose that civil trials in the federal courts need not be carried on in the dark. *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964) (*citing Hickman v. Taylor*, 329 U.S. 495, 501, 507 (1947).

II. **Rules Create A Two-Tier Discovery Process**: The rules implement a two-tiered discovery process. *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1188 -1197 (10th Cir. 2009). The first tier is attorney-managed discovery of information relevant to any claim or defense of a party, and the second is court-managed discovery that can include information relevant to the subject matter of the action. *Id.* (*citing* 6 Moore et al., *Moore's Federal Practice* § 26.41[1] (3d ed. 2007); 8 Wright et al., *Federal Practice and Procedure* § 2008 (2d ed. 2008)).

A. **Court's Approach**: When an objection arises as to the relevance of discovery, the court becomes involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it, so long as it is relevant to the subject matter of the action. *In re Subpoena to Witzel*, 531 F.3d 113, 118 (1st Cir. 2008)(discussing Advisory Notes); *see also In re Sealed Case (Med.Records)*, 381 F.3d 1205, 1215 n. 11 (D.C.Cir. 2004).

B. **Defining Relevance**: Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. *S.E.C. v. Rajaratnam*, 622 F.3d 159, 181 (2d Cir. 2010)(*citing* 26(b)(1)). This rule implements the general principle that broad discovery is an important tool for the litigant. *WWP, Inc. v. Wounded Warriors Family Support, Inc.*, 628 F.3d 1032, 1039 (8th Cir. 2011).

1. **Different Standard Than For Trial**: "[T]he standard for determining whether information is relevant for purposes of pretrial discovery is substantially broader than the standard for relevance during trial." 7 Moore's, *Moore's Federal Practice*, § 37.22[2][a].

2. **Possible Relevance Enough**: The rules do not define what is deemed relevant. *Allen v. Pacific Coast Feather Co.*, 2012 WL 1120040, 2 (E.D.N.C.). Relevance has been broadly construed to encompass any possibility that the information sought may be relevant to the claim or defense of any party. *Equal Employment Opportunity Comm'n v. Sheffield Fin. LLC*, 2007 WL 1726560, at *3 (M.D.N.C.)(*quoting Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 473 (N.D.Tex. 2005).

C. **<u>Attorney-Guided Discovery</u>**: Parties may "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." *In re Agent Orange Product Liability Litigation*, 517 F.3d 76, 103 (2d Cir. 2008)(*citing* FRCP 26(b)(1)). "Relevant matters are therefore ones which relate to a party's claim or defense. Relevancy does not extend more broadly to the subject matter of the action unless the Court orders it upon a finding of good cause. Upon this framework, relevancy is conceptually broad. Information is relevant if there is any possibility that it might relate to a claim or defense of any party." *Walker v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 1155140, 8 -9 (S.D.W.Va.).

1. **<u>Read Broadly</u>**: Relevancy is to be broadly construed for discovery issues and is not limited to the precise issues set out in the pleadings. *Plambeck v. Kroger Co.*, 2012 WL 640051, 4 -5 (D.S.D.). Relevancy encompasses any matter that could bear on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. *E.E.O.C. v. Woodmen of the World Life Ins. Society*, 2007 WL 1217919 at * 1 (D.Neb.)(*quoting Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).

   a. **<u>Rule Narrowed In 2000</u>**: The rule was changed in 2000. FRCP 26 Advisory Note (2000). Before that time, the available scope of discovery was that which was relevant to the subject matter of the action. *Id.*

2. **<u>Contours Of Discovery</u>**: A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. *Adelman v. Boy Scouts of America*, 276 F.R.D. 681, 689 (S.D.Fla. 2011)(*citing* Advisory Notes). One illustration of a subject encompassed by the scope of discovery, even though not directly linked to a claim or defense, is "information that could be used to impeach a likely witness." *Id.* Incidents of the same type, or involving the same product, could be properly discoverable under the current standard. *Baptist Health v. Bancorpsouth Ins. Services, Inc.*, 2010 WL 1759229, 2 (N.D.Miss.). Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. *Id.*

   a. **<u>Case Specific</u>**: What is "relevant to the claims or defenses depends on the circumstances of the pending action." FRCP 26 Advisory Note (2000).

   b. **<u>Discovery Not For Claim Development</u>**: The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings. *Walker v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 1155140, 8 -9 (S.D.W.Va.).

   c. **<u>Discovery Not Limited By Adverse Party</u>:** In determining what is discoverable, a party is not be limited by its opponent's theory of the case. The scope of attorney-directed discovery is based upon both parties' claims and defenses. FRCP 26.

   d. **<u>Circumstantial Evidence</u>**: Circumstantial evidence related to claims or defenses may be probative and is generally discoverable. *See, e.g., In re Subpoena to Witzel*, 531 F.3d 113, 120 (1st Cir. 2008).

3. **Burden On Party Seeking Discovery (Threshold Showing):** "There is no presumption in the Federal Rules of Civil Procedure that a discovery request is relevant." *Herrmann v. Rain Link, Inc.*, 2012 WL 1207232, 2 (D.Kan.). Relevance, however, is often apparent on the face of the request. *Presbyterian Manors, Inc. v. Simplexgrinnell, L.P.*, 2010 WL 3880027, at *7 (D.Kan.). When relevance is not facially obvious, the proponent of the discovery must show the relevance of the discovery sought. The party seeking discovery must make a "threshold showing of relevance before production of information, which does not reasonably bear on the issues in the case, is required." *Plambeck v. Kroger Co.*, 2012 WL 640051, 4 -5 (D.S.D.)(citing *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1993)). "Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe with a reasonable degree of specificity, the information they hope to obtain and its importance to their case." *Id.*

   a. **Burden Of Production Shifts**: Once the requesting party has made a threshold showing of relevance, the party resisting discovery must demonstrate that the discovery is not relevant; how it is overly broad, burdensome, or oppressive; or why it is subject to protection. *Penford Corp. v. National Union Fire Ins. Co.*, 265 F.R.D. 430, 433 (N.D.Iowa 2009); *St. Paul Reinsurance v. Commercial Financial*, 198 F.R.D. 508, 511 (N.D.Iowa 2000). When requested information appears relevant, the party objecting to providing it must demonstrate that the information has no bearing upon a claim or defense of any party. *See Desrosiers v. Mag Industrial Automation*, 675 F.Supp.2d 598, 601 (D.Md. 2009)(*citing* FRCP 26(b)(2)(C)).

D. **Judge Managed Discovery**: Relevancy does not extend more broadly to the subject matter of the action unless the Court orders it upon a finding of good cause. *Walker v. State Farm*, 2012 WL 1155140, 9 (S.D.W.Va.). For good cause, the court may broaden discovery to include any matter relevant to the subject matter involved in the action. *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1188 -1197 (10th Cir. 2009)(*quoting* FRCP 26(b)(1)).

   1. **Explanation Of Second Tier**: "To put it in the terms colloquially used by litigators who seek more court management of contentious discovery, the amended rule's second tier aims to provide 'adult supervision' to contain possible squabbles when any party seeks and may engage in broader subject-matter discovery." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1188 -1197 (10th Cir. 2009).

III. **Relevancy Of Settlement Discussions**: The Federal Rules of Evidence limit the admissibility of various types of settlement-related materials. FRE408. In enacting Rule 408, Congress did not take the additional step of expressly protecting settlement negotiations from discovery. To limit discovery of these materials, some courts have found a settlement privilege. This area is still evolving, but those circuits favoring such a privilege are in the minority.

A. **Rejecting A Settlement Privilege**: "A federal settlement privilege does not exist as a matter of law." *Matsushita Electric Industrial Co., Ltd. v. Mediatek, Inc.*, 2007 WL 963975, 2 (N.D.Cal.) Two circuits have rejected the idea of a settlement privilege. *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1124 n. 20 (7th Cir. 1979); *In re MSTG, Inc.*, 2012 WL 1155736, 4 (Fed. Cir. 2012). "Rule 408 does not warrant protecting settlement negotiations from discovery. On its face, the rule applies to the admissibility of evidence at trial, not to whether evidence is discoverable." *Phoenix Solutions Inc. v. Wells Fargo Bank, N.A.*, 254 F.R.D. 568, 583 (N.D.Cal. 2008). *See also* 2 Weinstein & Berger, *Evidence* ¶ 408[1] at 408-15 to 408-16 (1986)(party is not allowed to use Rule 408 as a screen for curtailing his adversary's rights of discovery.)

1. **Difficulty Enforcing**: Any settlement privilege would necessarily have numerous exceptions. Rule 408 itself contemplates a host of scenarios under which documents related to settlement negotiations would be admissible for purposes other than "prov[ing] or disprov[ing] the validity or amount of a disputed claim or [ ] impeach[ing] by a prior inconsistent statement or a contradiction." *Id. See also In re Subpoena Issued to Commodity Futures Trading Comm'n*, 370 F.Supp.2d 201 (D.D.C. 2005). Adopting a settlement privilege would require the courts to go further than Congress thought necessary to promote the public good of settlement, or in other words, to strike the balance differently from the one Congress has already adopted in FRE 408. *In re MSTG, Inc.*, 2012 WL 1155736, 4 (Fed. Cir. 2012).

B. **Adopting A Settlement Privilege**: "Any communications made in furtherance of settlement are privileged." *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 979–83 (6th Cir. 2003). Confidential settlement communications are a tradition in this country. *Id. See Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir. 1985); *In re Franklin Nat'l Bank*, 92 F.R.D. 468, 472 (E.D.N.Y. 1981); *California v. Kinder Morgan Energy Partners, L.P.*, 2010 WL 3988448 (S.D.Cal.).

1. **Higher Showing Necessary**: Some courts have held that parties seeking to discover such communications must make a heightened, more particularized showing of relevance. *Lesal Interiors v. Resolution Trust Corp.*, 153 F.R.D. 552 (D.N.J. 1994); *Ford Motor Co. v. Edgewood Properties, Inc.*, 257 F.R.D. 418, 423 (D.N.J. 2009).

Notes: ______________________________

[D4] LAY WITNESS TESTIMONY

QUICK RULE: *A lay witness may only offer testimony regarding opinions, or inferences which are (a) rationally based on the witness's perception, (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue,* ***and*** *(c) not based on scientific, technical, or other specialized knowledge. FRE 701. If otherwise admissible, lay witnesses in a civil case may testify regarding ultimate issues of fact. FRE 704(a).*

DISCUSSION:

I. General: Lay witnesses may offer opinion testimony if the opinions or inferences are (a) rationally based on the witness's own perception, and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. FRE 701; *United States v. Sarras*, 575 F.3d 1191, 1217 (11th Cir. 2009). To ensure that the rule is not used to undermine FRE and FRCP expert disclosure requirements, lay witness opinions cannot be based upon scientific, technical, or other specialized knowledge. FRE 701(c).

A. Rationale: Courts admit lay-witness, opinion testimony not because of experience, training, or specialized knowledge within the realm of an expert, but because of the witness's particularized knowledge based upon personal experience. *See King v. Hartford Packing Co., Inc.,* 189 F.Supp.2d 917, 924-5 (N.D.Ind 2002).

B. Opinion Must Be Rationally Based: The rule reflects the general requirement that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." *United States v. Kaplan,* 490 F.3d 110, 119 (2d Cir. 2007) (*quoting* FRE 602). *See JGR, Inc. v. Thomasville Furniture Indus., Inc.,* 370 F.3d 519, 526 (6th Cir. 2004) (district court abused its discretion by admitting lay testimony of witness who lacked personal perception). Opinion testimony of lay witnesses must be predicated upon concrete facts within the witness's own observation. *United States v. Durham,* 464 F.3d 976, 982 (9th Cir. 2006).

1. Personal Knowledge: Lay opinion testimony regarding another's knowledge will only satisfy the rationally-based requirement if the witness has personal knowledge of one or more "objective factual bases from which it is possible to infer with some confidence that a person knows a given fact . . . includ[ing] what the person was told directly, what he was in a position to see or hear, what statements he himself made to others, conduct in which he engaged, and what his background and experience were." *United States v. Kaplan,* 490 F.3d 110, 119 (2d Cir. 2007)(*quoting United States v. Rea,* 958 F.2d 1206, 1215 (2d Cir. 1992)).

2. Court Must Ensure Witness Can Offer Lay Opinion: A trial judge must rigorously examine the reliability of a layperson's opinion by ensuring that the witness possesses sufficient specialized knowledge or experience which is germane

to the opinion offered. *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1200-01 (3d Cir. 1995).

B. **<u>Opinion Testimony Must Be Helpful To Fact Finder</u>**: The basic approach to opinions - lay and expert - is to admit them when helpful to the trier of fact. *United States v. Perez*, 280 F.3d 318, 341 (3rd Cir. 2002); FRE 704 Advisory Committee Notes. The evidence must be otherwise admissible as lay testimony under FRE 701, *United States v. Baskes*, 649 F.2d 471, 478-79 (7th Cir. 1980), or expert testimony under FRE 702, *United States v. Scavo*, 593 F.2d 837, 844 (8th Cir. 1979).

1. **<u>Lay Witness Cannot Offer Legal Conclusion</u>**: A lay witness cannot offer a legal conclusion because it is not helpful to the jury. *United States v. Noel*, 581 F.3d 490, 496 (7th Cir. 2009); FRE 701(b). A lay witness's purpose is to inform the jury what is in the evidence, not to tell it what inferences to draw from that evidence. *Id. See United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004); *United States v. Wantuch*, 525 F.3d 505, 514 (7th Cir. 2008) (whether the defendant knew his actions were legal demanded a conclusion as to the legality of the defendant's conduct, which was unhelpful to the jury under FRE701).

2. **<u>Ultimate Issues Of Fact</u>**: Under the FRE, testimony is not objectionable solely "because it embraces an ultimate issue to be decided by the trier of fact." FRE 704(a); *United States v. Wantuch*, 525 F.3d 505, 513 (7th Cir. 2008). A lay witness may offer opinion testimony that is otherwise admissible even if "it embraces an ultimate issue to be decided by the trier of fact." *United States v. Espino-Rangel*, 500 F.3d 398, 400 (5th Cir. 2007) (*quoting* FRE 704).

II. **<u>Distinction Between Expert And Lay Testimony</u>**: The rules distinguish between lay and expert *testimony*, not *witnesses*. *United States v. White*, 492 F.3d 380, 403 (6th Cir. 2007). The distinction is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field. *United States v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir. 2008) (*quoting* FRE 701 Advisory Committee Notes). A "lay opinion must be the product of reasoning processes familiar to the average person in everyday life." *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005). *Any* part of a witness's opinion that rests on scientific, technical, or specialized knowledge must be determined by reference to FRE 702, not FRE 701. *Id.* (*citing* FRE 701 Advisory Committee Notes).

A. **<u>Distinction When Specialized Knowledge Is Applied</u>**: The distinction between lay and expert testimony is far from clear in cases where a witness with specialized or technical knowledge was also personally involved in the factual underpinnings of the case. *United States v. White*, 492 F.3d 380, 401 (6th Cir. 2007) (*citing United States v. Ayala-Pizarro*, 407 F.3d 25, 28 (1st Cir. 2005)). Trial courts must be especially vigilant in evaluating the admissibility of expert testimony where a witness is called on to testify as a fact witness but also functions as an expert. *United States v. Cruz*, 363 F.3d 187, 194 (2d Cir. 2004) (DEA agent, called as fact witness, improperly permitted to testify to the meaning of the phrase "to watch someone's back" as used in a drug transaction); *United States v. Perkins*, 470 F.3d 150, 155 (4th Cir. 2006).

1. **When Specialized Testimony Is Allowed**: Courts have "allowed lay witnesses to express opinions that required specialized knowledge" where "No great leap of logic or expertise was necessary for one in [the witness's] position to move from his observation . . . to his opinion." *United States v. Riddle,* 103 F.3d 423, 428 (5th Cir. 1997); *United States v. Grote,* 632 F.2d 387, 390 (5th Cir. 1980) (allowing an IRS official to compare defendant's tax returns and characterize some as "acceptable").

2. **Fact v. Opinion Testimony**: The line between fact and opinion testimony is often illusory. "There is no conceivable statement however specific, detailed and 'factual,' that is not in some measure the product of inference and reflection as well as observation and memory." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 168-169 (1988) (*quoting McCormick on Evidence* 27 (1984)).

B. **2001 Amendment**: The 2001 version of FRE 701 added a clause to the end of the rule to clarify the distinction between lay and expert testimony. *See* FRE 701(c). The modification requires that opinion testimony by lay witnesses be limited to opinions "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." This addition was not intended to substantively change FRE 701. *United States v. Garcia*, 291 F.3d 127, 139 (2nd Cir. 2002).

III. **Examples**: The "prototypical examples" of lay opinion testimony relate to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and numerous items that are indescribable factually apart from inferences. *Tampa Bay Shipbuilding v. Cedar Shipping,* 320 F.3d 1213, 1222 (11th Cir. 2003).

A. **Business Value**: A contentious issue regarding lay witness testimony is the extent to which a lay witness may testify to lost profits. The owner or officer of a business may usually testify to the business's value or projected profits, without qualifying the witness as an accountant, appraiser, or similar expert. FRE 701 Advisory Notes.

B. **Repairs**: Trial court properly permitted fact witnesses to opine about the reasonableness of the costs and time required to repair a ship. *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., Ltd.,* 320 F.3d 1213, 1216 (11th Cir. 2003).

C. **Computers**: The trial court properly excluded "lay testimony" from a computer specialist regarding running commercially-available software, obtaining results, and reciting them. *United States v. Ganier,* 468 F.3d 920, 925 (6th Cir. 2006). The proposed testimony required the witness to apply knowledge and familiarity with computers and the particular software well beyond that of the average layperson. *Id.*

D. **Motivation**: A witness may opine as to why an individual acted in a certain way, provided sufficient foundation as to the factual basis. *United States v. Tsekhanovich,* 507 F.3d 127, 130 (2d Cir. 2007). A witness could testify as to why the defendant was sending the witness cars to repair, based upon an extensive previous relationship. *Id.*

E. **Truthfulness**: Opinion testimony regarding a witness's truthfulness is admissible under the rules for impeachment. FRE 608(a). The opinion witness's testimony must comply with FRE 701; accordingly, a lay witness offering an opinion for truthfulness must testify from first-hand knowledge. *See United States v. Ruiz-Castro,* 92 F.3d 1519, 1530 (10th Cir. 1996); *United States v. Cortez,* 935 F.2d 135, 139-40 (8th Cir. 1991) (rejecting opinion testimony by police officers because they had minimal, post-arrest contacts with witness and they merely expressed their belief witness's story).

F. **Handwriting**: A lay witness may testify as to the author of handwriting provided the witness has prior, pre-litigation experience with the writing. Lay witness testimony without prior familiarity with the handwriting would not be helpful to the jury and is prohibited. *United States v. Scott*, 270 F.3d 30, 49 (1st Cir. 2001) (*citing* FRE 701). A lay witness may not enter court and compare unfamiliar handwriting samples; the result is the same if the witness compared the samples before entering the courtroom. *Id.; See United States v. Pitts,* 569 F.2d 343, 348 (5th Cir. 1978).

Notes

[D5] ADMISSIBILITY OF EXPERT TESTIMONY

QUICK RULE: *If scientific, technical, or other specialized knowledge will assist the fact finder to (1) understand the evidence, or (2) determine a fact in issue, a witness qualified as an expert may testify as to opinions and analysis. FRE 702. To be qualified as an expert, the witness must have specialized knowledge, skill, experience, training, or education. Expert testimony must (1) be based upon sufficient facts or data, (2) be the product of reliable principles and methods, and (3) apply the principles and methods reliably to the facts of the case. FRE 702.*

DISCUSSION:

I. **Admissibility Of Expert Opinion**: The rules create a four-part test for the admissibility of expert testimony:

- The testimony must be scientific, technical, or other specialized knowledge that will assist the fact finder to understand the evidence or determine a fact in issue;
- The witness must be qualified as an expert;
- The testimony must have indicia of reliability; and
- The proffered testimony must "fit" the facts of the case.

A. **Court Is Gatekeeper**: The rules impose a "special obligation" upon on trial courts to act as "gatekeepers" to ensure that expert testimony meets the requirements of qualification, reliability, and fit. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 597 (1993). The court must consider the proposed expert's qualifications, the reliability of her methods, and whether her testimony "fits" the case at hand. *Schneider v. Fried,* 320 F.3d 396, 404 (3d Cir. 2003).

1. **Credibility For Factfinder**: Whether the expert is credible or whether the theories being applied by the expert are correct, is a "factual one that is left for the jury to determine after opposing counsel has been provided the opportunity to cross-examine the expert regarding his conclusions and the facts on which they are based." *Smith v. Ford Motor Co.,* 215 F.3d 713, 719 (7th Cir. 2005). Furthermore, "[i]t is not the trial court's role to decide whether an expert's opinion is correct. The trial court is limited to determining whether expert testimony is pertinent to an issue in the case and whether the methodology underlying that testimony is sound." *Id.*

a. **Factfinder May Reject Qualified Expert Testimony**: After the court has found expert testimony admissible under FRE 702 and *Daubert*, the fact finder may choose to reject it as not credible or reliable. Juries are not bound to believe expert opinions. *See United States v. Oliver,* 278 F.3d 1035, 1043 (10th Cir. 2001). It is solely within the jury's province to weigh expert testimony. *Id.* In *United States v. Madrid,* 673 F.2d 1114 (10th Cir. 1982), the court of appeals affirmed a conviction for robbery even though "four of the five experts who expressed opinions on the issue of sanity concluded that [the defendant] was not capable of conforming his conduct to the requirements of the law at the time of the robbery."

2. ***Daubert* Hearing Not Necessary**: The trial court possesses "latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability." *Kumho Tire*, 526 U.S. at 152. Although the rules do not mandate the process, *Daubert* hearings are the most common method for fulfilling the gatekeeper function. *United States v. Turner*, 285 F.3d 909, 913 (10th Cir. 2002). *Daubert* challenges, like other preliminary questions of admissibility, are governed by Rule 104(c), which provides that a hearing outside the presence of the jury shall be conducted "when the interests of justice require." *McCoy v. Whirlpool Corp.*, 214 F.R.D. 646, 653 (D.Kan. 2003)(*citing Summers v. Mo. Pac. R.R.*, 132 F.3d 599 (10th Cir. 1997).

B. **First Inquiry - Testimony Must Assist The Fact Finder**: To be admissible, expert testimony must be directed to the witness' scientific, technical, or specialized knowledge and not to lay matters which a jury is capable of understanding and deciding without the expert's help. *Andrews v. Metro North Commuter R. Co.*, 882 F.2d 705, 708 (2nd Cir. 1989); *McGowan v. Cooper Indus., Inc.*, 863 F.2d 1266, 1272 (6th Cir. 1988). If proffered analysis invades an area in which the jury does not need assistance, the subject is not proper for expert testimony. *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir. 1988); *Brassette v. Burlington Northern, Inc.*, 687 F.2d 153, 158 (8th Cir. 1982).

1. **Subjective Opinions**: Opinions based on personal, subjective views do not meet the core requirement that expert testimony rest on "knowledge," a term that "connotes more than subjective belief or unsupported speculation." *In re Rezulin Products Liability Litigation*, 309 F.Supp.2d 531, 543 (S.D.N.Y. 2004); FRE 702. *See Grdinich v. Bradlees*, 187 F.R.D. 77, 81 (S.D.N.Y. 1999) (excluding as speculation expert opinion based on claimed industry standards, where only bases was general "common-sense" guidelines.).

2. **Testimony Cannot Encompass Legal Analysis**: It is legal error for a witness to testify regarding legal conclusions or legal principles, as those are the domain of the court. *Marx & Co. v. Diners' Club*, 550 F.2d 505 (2d Cir. 1977) (error to allow witness to testify about meaning of contract's "best efforts" provision); *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537 (11th Cir. 1990) (in breach of contract case, court properly excluded expert's testimony that insurer was liable under "duty to defend" clause); *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1258 (2d Cir. 1987) (attorney-expert's testimony that contracts lacked essential terms and therefore were unenforceable properly excluded in breach case); *Energy Oils, Inc. v. Montana Power Co.*, 626 F.2d 731 (9th Cir. 1980) (expert witness improperly allowed to testify about agreement's legal effect in breach of contract case).

a. **Regulatory Interpretation**: Because regulatory interpretation is a legal issue, expert testimony relating to this question, such as the affidavit of a former government official, "should not be received, much less considered." *Mola v.*

United States, 516 F.3d 1370, 1379 n. 6 (Fed. Cir. 2008) (*citing Rumsfeld v. United Techs. Corp.*, 315 F.3d 1361, 1369 (Fed. Cir. 2003)).

b. **Interpretation Of Legal Standard**: Experts cannot interpret legal standards. Opinions offered to "illuminate the applicable negligence standard" is inadmissible as it would encroach on the role of the trial judge in instructing the jury as to the applicable law. *United States v. Lumpkin,* 192 F.3d 280, 289 (2d Cir. 1999); *United States v. Duncan,* 42 F.3d 97, 101 (2d Cir. 1994).

3. **Behavior Of Organizations**: Expert testimony as to "the intent, motives or states of mind of corporations, regulatory agencies and others have no basis in any relevant body of knowledge or expertise." *In re Rezulin Products Liability Litigation,* 309 F.Supp.2d 531, 546 (S.D.N.Y. 2004). *See also DePaepe v. General Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998) (trial court erroneously allowed expert to testify as to why General Motors had reduced the padding in its automobile; expert "lacked any scientific basis for an opinion about the motives of GM's designers.").

4. **Custom And Usage**: Custom and usage are relevant to contract interpretation, and may properly be the subject of expert testimony where foundational facts demonstrating relevancy or qualification are sufficiently established. *See A.J. Cunningham Packing Corp. v. Florence Beef Co.,* 785 F.2d 348, 351 (1st Cir. 1986); *LuMetta v. U.S. Robotics, Inc.*, 824 F.2d 768, 771 (9th Cir. 1987); *Nucor Corp. v. Nebraska Pub. Power Dist.*, 891 F.2d 1343, (8th Cir. 1989).

5. **Specific Causation**: An expert must hold a medical license to testify on specific causation in a toxic tort case. *Plourde v. Gladstone*, 190 F. Supp. 2d 708 (D. Vt. 2002), *aff'd,* 2003 WL 21511764 (2d Cir. 2003). *See Goewey v. United States*, 886 F. Supp. 1268 (D. S.C. 1995), *aff'd,* 106 F.3d 390 (4th Cir. 1997); *Conde v. Velsicol Chem. Corp.*, 804 F. Supp. 972 (S.D. Ohio 1992), *aff'd*, 24 F.3d 809 (6th Cir. 1994). To allow someone without a medical license to practice medicine in the legal arena is contrary to established statutory law in many states.

C. **Second Inquiry - Expert Qualifications**: Before a person may offer expert testimony, the court must qualify the witness as an expert in identified and articulated fields of knowledge. *LuMetta v. U.S. Robotics, Inc.,* 824 F.2d 768, 771 (9th Cir. 1987). To make this finding, the proffering party must demonstrate that the expert has sufficient background and possess "specialized knowledge that 'will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Crowe v. Marchand,* 506 F.3d 13, 17 (1st Cir. 2007).

1. **Basis Of Expertise**: The basis of "specialized knowledge" can be from "practical experience as well as academic training and credentials." *Waldorf v. Shuta,* 142 F.3d 601, 625 (3d Cir. 1998). Courts may consider factors such as experience, certification, education, and membership in certain organizations to determine whether individual may qualify to testify. Examples: An elected sheriff did not have requisite experience to qualify as an expert on the effects of disciplining officer *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994). A witness's extensive

experience as a firefighter and fire investigator qualified him as expert in fire scene investigation. *Hickerson v. Pride Mobility Products Corp.*, 470 F.3d 1252, 1257 (8th Cir. 2006).

2. **Scope Of Expertise**: The permissible scope of expert testimony is broad; trial courts have broad discretion in making admissibility determinations. *Hill v. Reederei F. Laeisz G.M.B.H. Rostock*, 435 F.3d 404, 423 (3d Cir. 2006). The witness's scope of expertise must encompass her proffered testimony. A district court properly disqualified an engineer who did not have the requisite experience to support his proffered theory. *Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1055 (3d Cir. 1997). *See also Aloe Coal Co. and Commercial Union Ins. Co. v. Clark Equip. Co.*, 816 F.2d 110, 114-15 (3d Cir. 1987) (the trial court abused its discretion by allowing a salesman to testify about the cause of an equipment fire).

3. **Standard For Finding Expertise**: The threshold question of whether a witness is competent as an expert is solely for the trial judge. *Fox v. Dannenberg*, 906 F.2d 1253, 1256 (8th Cir. 1990). The trial judge has considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. *Kumho Tire*, 526 U.S. at 152. Generally, the rejection of expert testimony is the exception rather than the rule. FRE 702 Advisory Committee Notes. The trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system. *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1995).

   a. **Cross Examination Often Preferred Over Exclusion**: Minor challenges with an expert's experience on specific points of a case are properly explored on cross-examination, and tend to the proffered testimony's weight and credibility - not its admissibility. *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2d Cir. 1995). Put another way, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 595. "[W]here the opposing side has the opportunity to cross-examine an expert regarding his qualifications and where the jury is properly instructed to determine for itself the weight and credibility to be given to the expert's testimony, an argument opposing admissibility of the testimony on the grounds that it is outside the witness's area of expertise must fail." *Benton v. Ford Motor Co.* 492 F.Supp.2d 874, 877 (S.D.Ohio 2007).

4. **Expert Need Not Be The Most Qualified Person**: The fact that the proffered expert is not the "best qualified" or does not have the most appropriate specialization is not sufficient grounds for excluding an expert. *Lauria v. Natl. R.R. Passenger Corp.*, 145 F.3d 593, 598-99 (3d Cir. 1998).

D. **Third Inquiry - Reliability Of Testimony**: "In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science." FRE 702 Advisory Notes.

1. ***Daubert* Factors**: The Supreme Court identified a series of factors the trial court may consider when evaluating the reliability of the proffered expert testimony. The *Daubert* factors are:
   - Whether a theory or technique can be (and has been) tested;
   - Whether the theory or technique has been subjected to peer review and publication;
   - Whether there is a known or potential error rate and whether there are standards for controlling errors; and,
   - Whether the theory or technique enjoys general acceptance within a relevant scientific community. *See Terran v. Secretary of Health and Human Services*, 195 F.3d 1302, 1316 (Fed. Cir. 2000).

   a. **Testing**: The ability and feasibility of testing the theory or technique is case dependent. The expert need not perform the most elaborate and expensive tests possible. The failure to perform any testing at all, when some methods exist for testing, undermine the reliability of proffered testimony. *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 433 (6th Cir. 2007) (Expert's "complete failure to test his proposed design cuts heavily against him.").

   b. **Flexibility**: The inquiry envisioned is a flexible one. Its overarching subject is the scientific validity - and thus the evidentiary relevance and reliability - of the principles that underlie a proposed submission. *Bonner v. ISP Technologies, Inc.*, 259 F.3d 924, 929 (8th Cir. 2001); *Daubert,* 509 U.S. at 594-95. The focus must be solely on principles and methodology, not on the conclusions that they generate. *Id.*

2. ***Kumho* Clarification**: Six years after issuing *Daubert,* the Court made clear in *Kumho* that the same factors apply in the context of "engineering" testimony as well as "scientific" testimony. The distinction between "scientific knowledge" (at issue in *Daubert*) and "technical or other specialized knowledge" (at issue in *Kumho*) is fuzzy. *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 429 (6th Cir. 2007). Rather, "the gatekeeping inquiry must be tied to the facts of a particular case," depending on "the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Id.*

3. **Other Factors**: The *Daubert* factors are neither mandatory nor exclusive; the trial court must decide which *Daubert* factors are appropriate, use them as a starting point, and then ascertain if other factors should be considered. *See Black v. Food Lion,* 171 F.3d 308, 311-12 (5th Cir. 1999).

   a. **Prepared Solely For litigation**: One significant fact is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying. *Johnson v. Manitowoc Boom Trucks*, 484 F.3d 426, 434 (6th Cir. 2007); *Daubert v. Merrell Dow Pharmaceuticals,* 43 F.3d 1311 (9th Cir. 1995) ("*Daubert II*")). That an expert testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science. *Id.*

b. **Improper Extrapolation**: The court may consider whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

c. **Alternatives**: The court should consider whether the expert has adequately accounted for alternative explanations (on matters of causation). *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994); *contra Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996)(unconsidered alternative causes is an issue of weight, so long as expert has considered obvious causes).

d. **Care Taken**: The court should consider whether the expert was as careful as he would be in his regular professional work outside his litigation consulting. *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997).

4. **Court's Role**: The trial court is "both authorized and obligated to scrutinize carefully the reasoning and methodology underlying" expert testimony. *Claar v. Burlington Northern,* 29 F.3d 499, 501 (9th Cir. 1994). *See Greenwell v. Boatright*, 184 F.3d 492, 501 (6th Cir. 1999)(judges "have an unequivocal duty to give careful scrutiny to the testimony of paid experts in order to avoid verdicts based on 'junk science'").

a. **Specific Findings**: When trial judges admit testimony under *Daubert,* the court must make "specific findings on the record" rather than rule "off-the-cuff." *United States v. Nacchio,* 519 F.3d 1140, 1153 -1154 (10th Cir. 2008); *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003). The trial court must then create a sufficiently developed record to allow a determination on appeal of whether the trial court properly applied the relevant law. *Id.*

b. **Reliability Affects Weight**: The question of reliability goes both to admissibility and weight. Even if testimony is deemed sufficiently reliable to permit admissibility, the fact finder might find the testimony is due little if any weight. *Libas, Ltd. v. United States*, 193 F.3d 1361, 1365-1969 (Fed. Cir. 1999). The difference between weight and admissibility is often a close question. *Id.* When the issue of reliability is raised, it is a key consideration in determining the weight to be given to expert testimony. See *United States v. Velasquez*, 64 F.3d 844, 848 (3rd Cir. 1995). In general, criticisms touching on whether the expert made mistakes in arriving at her results are for the jury. *United States v. Bonds,* 12 F.3d 540, 563 (6th Cir.1993).

5. **Assumptions**: *Daubert* analysis does not preclude testimony merely because it may be based upon an assumption; however, "the supporting assumption must be sufficiently grounded in sound methodology, and reasoning to allow the conclusion it supports to clear the reliability hurdle." *In re TMI Litigation,* 193 F.3d 613, 677 (3d Cir. 1999).

E. **Forth Inquiry: "Fit"**: It is not enough for the expert opinions to be reliable – they must be demonstrably related to the facts of the case. In *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997), the Supreme Court explained that the FRE do not require "a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." The court may conclude that there is too great an analytical gap between the data and the opinion proffered. *Id.*

1. **Proper Inquiry**: Identified by the term "fit," the principles or methods underlying the testimony must be both (1) relevant to the facts of the case, *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1228 (9th Cir. 1998); and (2) properly applied to the facts of the case. *See General Elec*, 522 U.S. at 146. "[W]ithout more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible." *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 424 (5th Cir. 1987). "An expert's testimony will not support a verdict if it lacks an adequate foundation in the facts of the case." *Genmoora Corp. v. Moore Bus. Forms, Inc.*, 939 F.2d 1149, 1157 (5th Cir. 1991) (rejecting expert valuation estimate based on assumptions about financial status and financial report errors which lacked supporting record evidence).

II. **Procedure Of *Daubert* Challenge**: The rules do not state when a *Daubert* challenge may or must be raised. A challenge may be raised in a motion in limine, after voire dire, or after cross examination. Variables to consider are the likelihood of success on the challenge, when you will have sufficient information to make the best possible challenge, and the judge's general practice.

A. **Burden Of Proof**: The rules regarding the admissibility of expert testimony is consistent with other areas of evidence: when a challenge to the admissibility of expert testimony is raised, the proponent of that testimony must provide the necessary foundation for its admissibility. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) (following remand from the Supreme Court)("*Daubert II*").

B. **Standard Of Proof**: Courts apply a preponderance of evidence standard to determine whether an expert is qualified to testify. FRE 104(a); *See Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). The party proffering an expert must prove the testimony's reliability by a preponderance of the evidence. *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (en banc). An expert's blank assurances that he used generally accepted scientific methodology is insufficient. *Id.*

C. **Summary Judgment**: In response to a summary judgment motion, to show a genuine issue of material fact, the plaintiff must produce reliable expert opinions that meet the standards of FRE 702. *See Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1140 (9th Cir. 1997).

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[D6] EXPERT DEPOSITIONS

QUICK RULE: *A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If the rules require the expert to submit a report, the deposition shall be conducted after the report is provided. Generally, the party taking the deposition must pay the expert's fees. A party may depose a non-testifying expert only upon exceptional need.*

DISCUSSION:

I. **Deposing Experts (General)**: An "expert" is a person who possesses "specialized knowledge" due to his "skill, experience, training, or education" that "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Banister v. Burton*, 636 F.3d 828, 831 - 834 (7th Cir. 2011)(citing FRE 702). Expert testimony results from a process of reasoning which can be mastered only by specialists in the field. *United States v. White*, 492 F.3d 380, 401 (6th Cir. 2007)(citing Advisory Notes). Three useful species of experts have been identified: (1) testifying experts, (2) expert consultants; (3) fact witnesses with expert knowledge. *See Brigham Young University v. Pfizer, Inc.*, 2012 WL 1029304, 2 (D.Utah)(citing Wright & Miller, *Federal Practice and Procedure: Civil* § 2029). The opportunity for discovery is different for each type.

A. **Testifying Experts**: A party may depose any person who has been identified as an expert whose opinions may be presented at trial. FRCP 26(b)(4)(A). If the expert is required to write a report, the deposition must take place after the report is issued. FRCP 26(b)(4)(A).

1. **Identification Of Testifying Experts**: During discovery, a party must disclose the identity of any witness that will provide expert testimony. Rule 26(a)(2)(A). The expert designation requirement applies to all testifying experts. *Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875, 882 -883 (5th Cir. 2004). The disclosure requirements encompass any person who may be used to provide expert testimony at trial, not merely to those experts who are hired or employed to provide expert testimony in the case. *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756-57 (7th Cir. 2004)(citing FRE 702, 703, 705). That duty to disclose a witness as an expert is not excused when a witness who will testify as a fact witness and as an expert witness is disclosed as a fact witness. *Tribble v. Evangelides*, 670 F.3d 753, 759 -760 (7th Cir. 2012)

a. **Results Of Identification**: By designating a witness as an expert, a party brings the expert and his report - should he write one - within the universe of material that is discoverable by all parties and, generally, admissible at trial. *Penn National v. HNI*, 245 F.R.D. 190, 193 (M.D.Pa. 2007); *Flickinger v. Toys R Us*, 2011 WL 2160493, 7 (M.D.Pa.). Some courts have held that once a witness is designated as an expert, she may be called by the opposing party, although not designated by that party. *Nat'l R.R. Passenger Corp. v. Certain Temp. Easements*, 357 F.3d 36, 42 (1st Cir. 2004); *Kerns v. Pro-Foam*, 572 F.Supp.2d 1303, 1305, 1308-10 (S.D.Ala. 2007).

b. **<u>Sanction For Failure To Identify</u>**: Non-disclosed expert testimony is automatically excluded unless "the failure was substantially justified or is harmless." FRCP 37(c)(1); *Musser v. Gentiva Health Serv's*, 356 F.3d 751, 758 (7th Cir. 2004). This is a strict but well-founded requirement: "Knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial." *Id.* Without proper disclosures, a party may miss its opportunity to disqualify the expert, retain rebuttal experts, or hold depositions for an expert not required to provide a report. *Id.*

2. **<u>Expert Reports</u>**: Not all witnesses providing expert testimony need issue an expert report. FRCP 26(a)(2)(B). A party must file a written report "if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." *Banister v. Burton*, 636 F.3d 828, 831 -834 (7th Cir. 2011). The rule contemplates a general category of persons who will give expert testimony and a subcategory of persons who are specifically retained to give expert testimony. *Lamere v. New York State Office for the Aging*, 2004 WL 1592669 (N.D.N.Y.); *Franz v. New England Disposal Technologies, Inc.*, 2011 WL 5443856, 2 -3 (W.D.N.Y. 2011). The rule provides an employee-expert exception to the written report requirement for "individuals who are employed by a party and whose duties do not regularly involve giving expert testimony." *Torres v. City of Los Angeles*, 548 F.3d 1197, 1214 (9th Cir. 2008); *Tokai Corp. v. Easton Enterprises, Inc.*, 632 F.3d 1358, 1365 (Fed. Cir. 2011).

3. **<u>Scope of Discovery Limited for Experts</u>**: Pursuant to recent rule changes, drafts of any report are now protected from disclosure, regardless of the form in which the draft is recorded. *Graco, Inc. v. PMC Global, Inc.*, 2011 WL 666056, 7 (D.N.J.)(citing FRCP 26(b)(4)(B)). Similarly, communications between the party's attorney and any witness required to provide an expert report, regardless of the form of the communications, are protected from disclosure, with few exceptions. FRCP 26(b)(3)(A) and (B). Those communications still discoverable are those related to: (i) compensation for the expert's study or testimony; (ii) facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) assumptions that the party's attorney provided and that the expert relied on in forming the expressed opinions. *Id.*

B. **<u>Consultants</u>**: Non-testifying experts may be retained to provide advice to the party and its attorneys. Often called "consultants," the rules generally preclude discovery against an expert consulted in preparation for trial. *In re Cendant Corp. Securities Litigation*, 343 F.3d 658, 665 (3rd Cir. 2003); FRCP 26(b)(4)(D)). A party may take the deposition of another party's non-testifying expert only upon a showing of special circumstances. *R.C. Olmstead, Inc., v. CU Interface, LLC*, 606 F.3d 262, 272 (6th Cir. 2010). A party may only discover facts known or opinions held by consulting experts upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. FRCP 26(b)(4)(D).

1. **<u>Reasons Consultants Are Generally Protected From Discovery</u>**: There are four commonly identified considerations underlying the protection of non-testifying consultants: (1) the "interest in allowing counsel to obtain the expert advice they need in order properly to evaluate and present their clients' positions without fear that every

consultation with an expert may yield grist for the adversary's mill"; (2) the view that "each side should prepare its own case at its own expense"; (3) the concern that it would be unfair to the expert to compel its testimony and also the concern that experts might become unwilling to serve as consultants if they suspected their testimony would be compelled; and (4) the risk of prejudicing the party who retained the expert merely based upon retention. *Long-Term Capital Holdings, LP v. United States*, 2003 WL 21269586, 2 (D.Conn.); *Bank of Brussels Lambert v. Chase Manhattan Bank*, 175 F.R.D. 34, 45 (S.D.N.Y. 1997); *Rubel v. Eli Lilly and Co.*, 160 F.R.D. 458, 460 (S.D.N.Y. 1995).

2. **Procedure under 26(b)(4)(D)**: If testimony is sought from an expert consultant (1) who has been retained or employed in anticipation of litigation or for trial (on this issue the objector has the burden), and (2) who is not expected to be called as a witness, then before discovery can be ordered, the court must find exceptional circumstances. *Toledo Edison Co. v. G.A. Technologies, Inc.*, 847 F.2d 335, 340-41 (6th Cir. 1988). Once such a showing is made, a court, before ordering discovery, must analyze the policy considerations underlying the rule to determine whether they outweigh the exceptional circumstances. *Moore's Federal Practice* § 26.80[2], at 26-236.5.

   a. **Exceptional Circumstances**: The party seeking discovery of a non-testifying expert carries the burden of showing exceptional circumstances. *Bank of Brussels Lambert v. Chase Manhattan Bank*, 175 F.R.D. 34, 44 (S.D.N.Y. 1997). There are two situations where exceptional circumstances are commonly identified: (1) where the object or condition observed by the non-testifying expert is no longer observable by an expert of the party seeking discovery, and (2) where it is possible to replicate expert discovery on a contested issue, but the costs would be judicially prohibitive. *Id.* The latter situation exists when the replication would cause the party to expend enormous time and resources in duplicating the experts' efforts. *See In re Agent Orange*, 105 F.R.D. 577, 581 (E.D.N.Y. 1985).

3. **Rule Only Applies To Experts Retained For Litigation**: Experts not consulted in anticipation of litigation are freely discoverable as any ordinary witness. *USM Corp. v. American Aerosols, Inc.*, 631 F.2d 420, 425 (6th Cir. 1980). Limitations on free discovery only apply to expert knowledge prepared "in anticipation of litigation" and not to expert knowledge in general such as that acquired or developed before litigation was expected. *Hoover v. U.S. Dept. of the Interior*, 611 F.2d 1132, 1145 (5th Cir. 1980).

4. **Rule Does Not Protect Potential Fact Witnesses**: Protection for consulting experts is limited to experts retained or specially employed by the party but who are not expected to be witnesses. *Jones v. Celebration Cruise Operator, Inc.*, 2012 WL 1029469, 2-3 (S.D.Fla. 2012) (citing Advisory Notes, 1970 Amendments). The rule does not address or protect the consulting expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. *Id.* Such an expert should be treated as an ordinary witness. *Id.*; *Harasimowicz v. McAllister*, 78 F.R.D. 319, 320 (E.D.Pa. 1978) (protections are not triggered when opponent attempts to discover information that was not obtained or developed in anticipation of the litigation).

a. **Rule Can't Be Used To Shield Fact Witness**: "There is a legitimate concern that a party may try to immunize its employees who are actors or viewers against proper discovery by designating them experts retained for work on the case. . . .[C]ourts should be exceedingly skeptical when employees who have otherwise discoverable information are designated 'experts.'" 8A Wright, et al, *Federal Practice and Procedure*, § 2033 (3d ed. 2010). If an expert consultant has a history of working for a party before getting hired to consult on the law suit, communications regarding that past work history are discoverable. *Bartram, LLC v. Landmark American Ins. Co.*, 2011 WL 284448, 3 (N.D.Fla.).

b. **Some Consultants Wear Two Hats**: It is possible for a witness to wear two hats: one as a specially employed expert in anticipation of litigation and one as an ordinary witness. *Caribbean Owners' Ass'n, Inc. v. Great American Insurance Co. of New York*, 2009 WL 499500 1, 2 (S.D.Ala.)(*citing Essex Builders Grp., Inc. v. Amerisure Ins.*, 235 F.R.D. 703 (M.D.Fla. 2006)); *In re Shell Oil Refinery*, 134 F.R.D. 148, 150 (E.D.La. 1990). When that happens, some of the information that the expert holds may be protected, while other such information may be subject to disclosure. Experts fall outside the protection of consulting expert privilege rules when they simultaneously are an ordinary actor or witness in a dispute. *Millsaps v. Aluminum Co. of America*, 2012 WL 203458, 2.

c. **Identity Of Consultants**: The rule does not prevent disclosure of the identity of a nontestifying expert, but only "facts known or opinions held" by such an expert." *Ibrahim v. Department of Homeland Sec.*, 669 F.3d 983, 999 (9th Cir. 2012).

C. **The Facts-pert**: There is a difference between a percipient witness who happens to be an expert and an expert who, without prior knowledge of the facts giving rise to litigation, is recruited to provide expert opinion testimony. *Saline River Properties, LLC v. Johnson Controls, Inc.*, 2011 WL 6031943, 8 (E.D.Mich.). As life becomes more specialized, fact witnesses may be experts in their field. Accordingly, there may be crossover between a fact witness who is explaining the actions he took, but based upon his own expertise. An expert who was an "actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit" is to be treated as an ordinary witness. *Battle ex rel. Battle v. Memorial Hosp. at Gulfport*, 228 F.3d 544, 552 (5th Cir. 2000)(citing Advisory Notes). An expert who is part of an ongoing sequence of events and arrives at his causation opinion during treatment, his opinion testimony is not that of a retained or specially employed expert. *Downey v. Bob's Discount Furniture Holdings, Inc.*, 633 F.3d 1, 7 (1st Cir. 2011).

1. **Example: Treating Physician As Fact Witness**: The quintessential example of a non-retained expert is the treating physician of a personal injury plaintiff, whose testimony, while necessarily based on his expert opinion as to diagnosis and treatment, is not specially formulated for trial purposes. *Beechgrove Redevelopment, v. Carter & Sons*, 2009 WL 981724, 4 (E.D.La.). A treating physician "can express an opinion regarding the cause of any medical condition presented in a patient, the diagnosis, the prognosis and the extent of the disability, if any, caused by the injury" so long as the opinion is based upon the medical provider's care and treatment of the patient. *Zanowic v. Ashcroft*, 2002 WL 373229, at *3 (S.D.N.Y.).

a. **<u>Treating Physician As Expert</u>**: A treating physician who provides expert testimony as to the cause of the plaintiff's injury, but who did not make that determination in the course of providing treatment, should be deemed to be one "retained or specially employed to provide expert testimony in the case," and thus is required to submit an expert report. *Meyers v. National Railroad Passenger Corp.*, 619 F.3d 729, 734–35 (7th Cir. 2010)(*citing* FRCP 26(a)(2)). When the "doctor's opinion testimony extends beyond the facts disclosed during the care and treatment of the patient and the doctor is specifically retained to develop opinion testimony, he or she is subject" to the expert reporting rules." *Peck v. Hudson City*, 100 F.Supp.2d 118, 121 (N.D.N.Y. 2000); *Lewis v. Triborough Bridge & Tunnel Auth.*, 2001 WL 21256 (S.D.N.Y.).

D. **<u>Expert Witness May Be Converted To Consultant</u>**: Courts disagree about whether an expert, after being designated a testifying witness, may be re-designated a consultant to avoid a deposition.

1. **<u>Testifying Experts Converted</u>**: Several courts have allowed parties, even after issuing an expert report, to re-designate a testifying expert as a consultant to avoid deposition. *Estate of Manship v. United States*, 240 F.R.D. 229 (M.D.La. 2006); *Brigham Young v. Pfizer*, 2012 WL 1029304, 3 (D.Utah); *Ross v. Burlington Northern*, 136 F.R.D. 638 (N.D.Ill. 1991). In these cases, the courts often noted that experts are deposed to prepare for cross-examination; the courts concluded that where the expert won't testify, no deposition is needed. *Hartford Fire v. Transgroup*, 2009 WL 2916832 (N.D.Ill.).

   a. **<u>Permitted To Change Trial Strategy</u>**: Some courts have noted that parties may reasonably change their minds on their litigation strategy and should be able to protect their expert's work from disclosure. *Hartford Fire Inc. v. Transgroup*, 2009 WL 2916832 (N.D.Ill.). *See also In re Shell Oil*, 132 F.R.D. 437, 440–41 (E.D.La. 1990) (refusing expert discovery where a party changed the designation of its expert from testifying to non-testifying); *FMC v. Vendo*, 196 F.Supp.2d 1023, 1042–47 (E.D.Cal. 2002) (granting motion to quash subpoenas of settling defendants' experts even though expert reports had been exchanged).

2. **<u>Designated Experts Cannot Be Converted</u>**: Some courts have held that once an expert is designated for testifying, that expert forever loses coverage as a consulting expert. *Flickinger v. Toys R Us*, 2011 WL 2160493, 7 (M.D.Pa.); *House v. Combined Ins. Co.*, 168 F.R.D. 236, 245 (N.D.Iowa 1996) ("designation of an expert as expected to be called at trial," even if subsequently withdrawn, permits deposition as a matter of right).

E. **<u>Deposing Testifying Expert's Assistant</u>**: Courts have consistently held that an expert may rely on the work of others when preparing an expert report, particularly when it is the sort of work that is reasonably relied upon by experts in the relevant area of expertise. *See, e.g., Bouygues v. Tekelec*, 472 F.Supp.2d 722, 728 (E.D.N.C. 2007); *McReynolds v. Sodexho*, 349 F.Supp.2d 30, 36–37 (D.D.C. 2004). If, however, the testifying expert is merely acting as a mouth piece for a non-testifying expert, the court may exclude the "mouthpiece" testimony. *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 612–13 (7th Cir. 2002).

1. **<u>Deposing Non-Testifying "Assistants"</u>**: A non-testifying expert is usually protected from deposition absent exceptional circumstances. Courts have differed as to when the non-testifying expert's role as an assistant to the testifying expert may open the consultant up to a deposition.

   a. **<u>Deposition Of Assistant Allowed</u>**: Exceptional circumstances may exist – and therefore allow the deposition of a non-testifying expert - when a non-testifying expert's report is used by a testifying expert as the basis for an expert opinion, or when there is evidence of substantial collaborative work between a testifying expert and a non-testifying expert. *Long-Term Capital Holdings, LP v. United States*, 2003 WL 21269586, 2 (D.Conn.). *See also Derrickson v. Circuit City Stores, Inc.*, 1999 U.S. Dist. LEXIS 21100, at *18 (D.Md.).

   b. **<u>Assistant May Be Deposed To Ensure Quality</u>**: A party may depose an expert's assistants to ensure they performed their tasks competently. *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 612 (7th Cir. 2002).

   c. **<u>Assistant May Be Deposed If Expert Relies On Conclusions</u>**: If one expert relies upon the conclusions of another, non-testifying expert, the party proffering the testimony should disclose the non-testifying expert and make her available for deposition. *Malletier v. Dooney*, 525 F.Supp.2d 558, 666 (S.D.N.Y. 2007).

   d. **<u>Assistant May Be Deposed For Completeness</u>**: After noting that the associate performed more than half of the total hours to generate the expert report, and accounted for more than half of the fee, the court in *Hartford Fire v. Pure Air*, 154 F.R.D. 202, 208 (N.D.Ind. 1993), held that the "fruits of the [expert's] labor [were] indivisible" from the work of the associate; thus, the defendant was entitled to explore that associate's performance. *See also, Herman v. Marine Midland Bank*, 207 F.R.D. 26, 31 (W.D.N.Y. 2002) ("the expert report submitted by Mr. Gordon was the result of substantial collaborative work by he and Mr. Sommer . . . Under the circumstances, the fruits of Gordon Associates' labor is indivisible, and defendant is entitled to explore what Mr. Sommers did.").

2. **<u>Deposition Of Assistant Not Allowed</u>**: If a non-testifying consultant merely generates data and provides it to the expert, the consultant may not be properly deposed. *Oki America, Inc. v. Advanced Micro Devices, Inc.*, 2006 WL 2987022, 1 (N.D.Cal.). In *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742 , 765 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999), the Fourth Circuit upheld the denial of discovery of non-testifying consultants who developed data underlying the expert's statistical analysis. The court concluded that the expert's report supported his conclusions, and the defendant was able to examine the expert about the basis and methods of his analysis.

II. **<u>Disclosures Define Expert's Trial Testimony</u>**: The breadth of expert testimony is constrained by what has been disclosed in discovery.

A. **<u>Importance Of Disclosure</u>**: For witnesses subject to the expert report requirement, the report must disclose "a complete statement of all opinions the witness will express and the basis and reasons for them." *Gay v. Stonebridge*, 660 F.3d 58, 62 (1st Cir. 2011)(*citing* FRCP 26(a)(2)(B)). The rules facilitate a fair contest with the basic issues and facts disclosed to the fullest practical extent. *Lohnes v. Level 3*, 272 F.3d 49, 60 (1st Cir. 2001).

1. **Sanction For Failure To Disclose Testimony**: Unless the failure was substantially justified or is harmless, failure to comply with the disclosure rule may preclude the party from using that witness to supply evidence on a motion, at a hearing, or at trial. FRCP 37(c)(1); *Esposito v. Home Depot*, 590 F.3d 72, 77 (1st Cir. 2009). The rules "prevent the unfair tactical advantage that can be gained by failing to unveil an expert in a timely fashion." *Poulis–Minott v. Smith*, 388 F.3d 354, 358 (1st Cir. 2004)(*citing* FRCP 26, 37).

B. **Testimony Not Limited To Written Report**: The disclosure rule eliminates "unfair surprise to the opposing party." *Sylla–Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995). The rule, however, "does not limit an expert's testimony simply to reading his report." *Muldrow ex rel. Estate of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 167 (D.C. Cir. 2007). The rule contemplates that the expert will supplement, elaborate upon, and explain his report in his oral testimony. *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006); *see also Minebea Co. v. Papst*, 231 F.R.D. 3, 8 (D.D.C. 2005).

1. **Testimony Disclosed In Deposition**: As a practical matter, courts typically consider information disclosed in deposition as fair game for the expert testimony at trial, even if not in the expert's report. *See Siemens Medical v. Saint-Gobain*, 637 F.3d 1269, 1287 (Fed. Cir. 2011) (affirming decision to limit expert to matters disclosed in report and deposition). As a practical matter, it is hard to show the requisite surprise or prejudice regarding any opinions disclosed in deposition. See FRCP 37(c)(1). There is, however, a "theoretical possibility" that failure to disclose an opinion in an expert report – and then a disclosure of that opinion at deposition – could prejudice the opposing party in taking the expert's deposition or in formulating a strategy on calling experts. *Neiberger v. Fed Ex*, 566 F.3d 1184, 1192 (10th Cir. 2009). This can usually be remedied with a continuance and extra time in the deposition.

III. **Payment For Deposition Testimony**: The party deposing an expert witness shall "pay the expert a reasonable fee for time spent." *Halasa v. ITT Educational*, 2012 WL 639520, 2 (S.D.Ind.)(*citing* FRCP 26(b)(4)(E)(i)). Unless manifest injustice would result, the court shall require that the party seeking expert discovery to pay the expert's fee. *Research Systems v. IPSOS*, 276 F.3d 914, 920 -921 (7th Cir. 2002). This is true, even if the expert ultimately doesn't testify, unless there is evidence that the proposed expert testimony was a sham. *Id.* The noticing party must pay the expert's fees whether or not the expert was "retained" and whether or not they have filed a report. *Lamere v. New York State Office*, 223 F.R.D. 85, 93 (N.D. N.Y. 2004).

A. **Calculating The Expert's Fee**: The court has discretion to establish a reasonable appearance fee. *New York v. Solvent Chemical*, 210 F.R.D. 462 (W.D.N.Y. 2002). No clear standard exists for determining reasonableness when it comes to expert fees. *See Goldwater v. Postmaster General*, 136 F.R.D. 337, 339 (D.Conn. 1991) ("There is very little authority as to what is meant by the term 'a reasonable fee.'"). The goal is to calibrate expert fees so that the party seeking discovery will not be hampered by unreasonably high fees, without placing an undue burden on efforts to hire quality experts. *Fleming v. United States*, 205 F.R.D. 188, 189 (W.D.Va. 2000). The party seeking reimbursement of deposition fees must prove reasonableness; absent such evidence the court may use its discretion to determine a reasonable fee. *Solvent Chemical*, 210 F.R.D. at 468.

1. **Determining The Reasonable Fee**: A reasonable fee can be identified by considering the following factors: (1) the witness' area of expertise; (2) the education and training that is required to provide the expert insight that is sought; (3) the prevailing rates for other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the cost of living in the particular geographic area, (6) the fee actually being charged to the party who retained the expert; and (7) fees traditionally charged by the expert on related matters. *Mathis*, 165 F.R.D. at 24-25; *Goldwater*, 136 F.R.D. at 340.

2. **Determining Covered Costs**: A "reasonable fee" includes compensation for the expert's time during a deposition, but the potential compensability of other related costs is not clearly. *Conte v. Newsday*, 2012 WL 37545 (E.D.N.Y.)(*quoting* 6 Moore et al., *Moore's Federal Practice* § 26.80(3)(d) (3d ed. 2011). "Even less certain is whether other expenses such as preparation time, lodging, and travel costs should be included in the "reasonable fee" determination." *Id.* The determination of a reasonable fee and for what services, including preparation, is discretionary. *Reit v. Post Properties*, 2010 WL 4537044, at *2 (S.D.N.Y.); *Lamere v. N.Y. Office*, 223 F.R.D. 85, 93 (N.D.N.Y. 2004).

   a. **Preparation Costs**: The rules permit recovery of expert costs for "time spent in responding to discovery." FRCP 26(b)(4)(E). Time spent preparing for a deposition is, literally speaking, time spent in responding to discovery. *Collins v. Village of Woodridge*, 1999 WL 966455, 3 (N.D.Ill.). Thus, courts may require the noticing party to pay for preparation time. *Am. Steel v. Penn Cent.*, 110 F.R.D. 151 (S.D.N.Y. 1986). Fact-specific cases are generally not helpful; the time spent in deposition prep may be limited by the time spent conducting the deposition itself. *Packer v. SN Servicing*, 243 F.R.D. 39, 43 (D.Conn. 2007).

   b. **Fee For Travel**: Nothing in the rules requires costs for expert travel time; rather, the court has discretion. *United States v. 1.604 Acres of Land*, 275 F.R.D. 234, 235 (E.D.Va. 2011). Many courts permit parties to recover fees for an expert's "time spent traveling to and from the deposition, and the expenses incurred during travel," provided the fees are "reasonable." *See Solvent Chem.Co.*, 210 F.R.D. at 471–72. *But see Mark Andrew v. GMAC*, 2003 WL 21767633, at *2, n. 3 (S.D.N.Y.) (rejecting costs for travel time where party chose non-local expert and made no showing that "equally skilled local experts are unavailable").

      i. **Calculating The Fee For Expert Travel**: Courts have awarded costs for expert travel time under various approaches. *See Frederick v. Columbia Univ.*, 212 F.R.D. 176, 177 (S.D.N.Y. 2003)(travel time is generally compensable but reducing hourly rate of travel to $200.00 as compared to hourly rate for deposition of $375.00).

[D7] HOW TO DEPOSE AN EXPERT

QUICK RULE: *Experts may be attacked in four broad areas: expertise, assumptions, opinions, and credibility. The objective is to degrade the expert's standing in these areas so that his conclusions will be questioned or disregarded.*

I. **Expert Deposition Overview**: Expert depositions are, first and foremost, depositions. Expert depositions require the same skill set that fact depositions require: preparation, knowledge of what helps you and what hurts you, identification of the documents you want to use, patient questioning, listening to ensure you've got answers to your questions, and follow up questions to clarify answers or to dig deeper. What makes expert depositions unique is the deposition's subject matter. The rules provide certain hurdles the expert must clear to be able to testify at trial; human nature provides additional areas where experts are subject to attack. An expert deposition explores these areas.

A. **Deposing The Expert**: There are four general areas to explore: Expertise, Assumptions, Opinions, and Credibility. Each is described below. For each, it is important to understand the objective (what does a successful cross examination look like regarding this subject), and the tools that might be gathered during the deposition to allow for the cross examination.

II. **Preparing For The Expert Deposition**: Expert depositions reward preparation with a much higher rate of return than fact depositions. Although preparation is encouraged for both, for the fact deposition the attorney could – in theory – walk into the deposition knowing nothing and walk out with the necessary facts; the attorney taking the fact deposition will know when the witness is being non-responsive, uncooperative, or evasive. With experts, a lack of preparation will reveal itself when the attorney doesn't have the slightest idea what the expert is talking about; it is difficult to test an expert's answers if you don't understand them.

A. **What The Deposing Attorney Should Know Before The Deposition**: An attorney can take an expert deposition without being deeply steeped in the relevant subject matter. Having some knowledge, however, will allow the calling attorney to ask informed follow up questions, preventing the expert from covering up mistakes with expert mumbo-jumbo. Understanding the area of expertise will also allow the calling attorney to make the deposition more efficient. Thus, the attorney preparing for an expert deposition should aspire to being an informed novice, at a minimum.

B. **Obtain Relevant Articles, Books**: The expert will provide her CV during mandatory disclosure. Seek out and read any articles the expert has published that sound relevant to the area of testimony. They may be really boring, but the leg work can pay off big.

C. **Investigate Prior Testimony**: Experts must identify each prior case in which they testified. Contact the attorney that deposed / cross examined the expert. If not under seal, see if you can get the report, the deposition transcript, and the cross examination transcript. Having these before your deposition will allow you to better understand areas of interest, see how the expert has been qualified in the past, and get the expert to recommit to statements made in prior hearings.

D. **What Does Your Expert Need To Know**: If you have hired your own expert - responding to the witness for whom you are preparing - your expert needs to help you identify what information she wants to obtain during the deposition. Sometimes, there are areas that are genuinely unclear in the other side's expert's report; sometimes it's simply a matter of locking the expert in.

III. **Objectives In The Expert Deposition**: When deposing an expert, the calling attorney has three overlapping objectives. First, to lock the expert into her conclusions and the approach she has taken. Second, to obtain a genuine understanding of what the expert has done and why. Finally, to gather the tools necessary to attack the expert at trial.

A. **Locking Up The Expert**: The first goal is to lock the expert into her conclusions, and the approach she took to reach these conclusions. Litigation is fluid; each side seeks to take advantage of the other side's weakness; each side seeks to shore up its own weakness. A party has a distinct advantage if it can limit the other side's witnesses from shifting their testimony as the case – and trial – progress. Clear, precise depositions are key for locking witnesses into a static position. This is especially true for experts, who are not limited to recounting what factually happened, but instead are offering opinions designed to meet their client's needs. As trial nears, an expert may come up with an additional opinion they would like to offer; as the expert's assumptions fail the expert may decide she'd rather rely on a wholly different set of assumptions; a mathematical error at the center of the expert's calculations may become irrelevant given a range of "conservative" elements in the expert's analysis. By locking the expert into their position at a given point in time, the expert's pivots and pirouettes become more costly (as a hit on the expert's credibility) or may be rejected by the court altogether.

B. **Understand What Expert Did**: You need to understand what the expert did. This includes what steps were taken, and what analysis was performed. It is impossible to critique (and attack) a methodology without fundamentally understanding what that methodology is. Thus, if the expert is testifying as to what a business's lost profits would have been in the absence of a breach of contract, you must understand how the expert reached these conclusions. If an expert is testifying about contamination of groundwater, the steps the expert took to evaluate the groundwater are vital. If work was pushed off on an underling, or subcontracted to a non-testifying expert, that must be captured, as well.

C. **Gather Tools To Attack**: Finally, you will use the deposition to gather the elements necessary to attack the expert. For each area, we consider what the attack might look like at trial, and what must be gathered during the deposition to prepare for that avenue of attack.

IV. **Deposing An Expert Regarding Expertise**: Before a witness can offer an expert opinion, the court must conclude whether the proffered witness has any expertise – and if so, in which specific areas. The witness's ability to get qualified as an expert, and the breadth of the expertise, will be based upon her qualifications: education, experience, and professional participation (awards, books, articles, etc). The expert will only be able to offer an opinion if that opinion falls within the scope of her qualification. Once qualified as an expert, the witness's credentials provide heft to the expert's opinions – the more significant and applicable the qualifications, the more likely the fact finder will rely upon the expert's opinion.

A. **Objectives In Challenging An Expert's Credentials**: The expert's credentials will define the scope and significance of the expert's testimony. On cross examination, we will degrade the expert's qualifications – both limiting the scope of the expert's testimony and the fact finder's confidence in the expert. If possible, we try to shrink the scope of the expert's qualification so that the expert may not be able to offer some or all of her planned testimony. For example, an ichthyologist is proffered to opine about the harm an oil spill caused to all aquatic life within 100 miles of the spills epicenter. At trial, we successfully demonstrate that – although she is clearly an expert in fish and aquatic mammals, she has very little expertise in squids and mollusks. The court refuses to qualify her as an expert in shellfish, and she is unable to discuss the harm to oyster beds. By limiting the scope of her qualified expertise, we have successfully limited the scope of her testimony. Moreover, even if the court finds that she is qualified to testify about bivalves, by undermining her credibility on the subject, her testimony is less likely to be believed.

B. **What To Gather On Credentials During The Deposition**: During the deposition, we need to gather two types of information regarding the expert's credentials (1) for each opinion the expert plans to offer, what expertise is required to offer an informed opinion, (2) the expert's credentials in each relevant area of expertise. Credentials would include real world experience, education, teaching, writing in the field, prior qualification as an expert in the field, and prior testimony in the field. Experts, by their nature, want to expand the scope of their expertise. The greater the scope, the greater the number of testifying positions for which they might qualify. In deposition, we dig down deep to understand the limits of their practical expertise.

V. **Depositing An Expert Regarding Assumptions**: The expert will be adding her gloss to the underlying facts of the case. The expert, however, typically doesn't have personal knowledge of the facts. For any facts the expert can't – or hasn't – verified, the expert must assume the facts are true. These are factual assumptions. Similarly, an expert may offer testimony predicated on the conclusions of some other expert. These are expert assumptions. If these assumptions turn out to be false – if the fact finder adopts facts different from those assumed by our expert - her testimony may be damaged or destroyed. For example, the plaintiff argues that she was misdiagnosed by the defendant physician, who improperly read and relied upon her x-ray. The defendant brings in an expert to offer an opinion about what that x-ray – taken 3 years ago – shows. The expert (we'll call him Joe) didn't take the x-ray and didn't examine the equipment when the x-ray was taken. Joe will assume that the x-ray was properly taken, on properly functioning equipment. Other witnesses – perhaps fact witnesses (describing what actually happened on the day the x-ray was taken) or other experts (explaining why the x-ray equipment is reliable) will be needed to support Joe's assumptions. If Joe's assumptions are attacked – and if they crumble – they can undermine Joe's conclusions.

A. **Assumptions: Objective Is To Disconnect Conclusions From Facts**: The objective at trial will be to undermine as many assumptions in the expert's analysis as possible. The process for doing this is straightforward: (1) identify the material assumption, (2) identify what will happen to the expert's opinion if the assumption fails, and (3) undermine the predicate for the assumption. Any or all of these steps may be done during cross of the expert - or they may come in at other parts of the trial. Of course, getting the expert to acknowledge as many of these steps as possible, during cross exam, is the strongest means of undermining that element. For the x-ray example above: (1) we get the expert to acknowledge that he's assuming the x-ray is actually of the plaintiff – he hasn't made any attempt to verify this himself; (2) we get him to acknowledge that his entire testimony is worthless if he's looking at the wrong x-ray; (3) find some way to cast doubt upon the x-rays authenticity.

B. **<u>What to Gather On Assumptions During Deposition</u>**: During deposition, we try and gather the predicate for each of the three steps – for as many assumptions as we can.

1. **<u>Identify The Assumptions</u>**: For each opinion the expert is offering, we try and nail down what assumptions the expert is relying upon. Sometimes these are spelled out in the expert's report – for other experts, they have to be pried out one at a time. For example, we have an expert appraiser who has opined as to the value of an apartment building; as part of his calculation, he must determine what the apartment's average occupancy rate would be in the next five years. He has adopted a 95% occupancy rate. We need to determine if he arrived at this number on his own (that is, is he offering an expert conclusion about this number), or if the number came from some other source. If the number is itself a separate opinion, then we pursue the expert as described below (see attacking the opinion). If the number, however, came from an unverified source, then it's an assumption. This would include: (1) if it came from a trade journal, (2) if it came from someone who manages a building in the area, (3) if it's a rule of thumb in the neighborhood real estate market, (4) if another expert will be opining as to the number. Some experts won't use the word "assumption," but however they choose to phrase it, an unverified element supporting their conclusion is an avenue of cross. Throughout the deposition, as each element of the expert's analysis is revealed, look for assumptions and verify how they fit into the expert's analysis.

2. **<u>What Happens If The Assumption Fails</u>**: For each assumption we identify with the expert, we need to lock the expert in as to what she thinks will happen if the assumption is wrong. The easiest way to phrase this is "if the fact finder concludes that this is incorrect, how will that affect your conclusion." Some assumptions are not material – and the expert explains why the changed assumption wouldn't affect the analysis (or affect their confidence in the conclusion). Some assumptions will clearly undermine the expert's opinion. Sometimes, the expert will admit he doesn't know what will happen if the assumption fails. This is near as good as an admission of failure.

3. **<u>Challenges To The Assumptions</u>**: Finally, once we have identified an assumption and its impact on the expert's conclusions, we need to explore if the expert has any information that makes the assumption fragile. Ultimately, we will not have to prove the assumption false – merely prevent the opposition from proving the assumption to be true. Any help we can get from the expert – based upon her experience, or evidence she's seen in the case – is a bonus. Sometimes, before the deposition starts, we will have definitive evidence that one or more of the expert's assumptions will fail. In those cases,

it's best to reserve the evidence for trial, unless we are confident the expert cannot recover from the upending of her assumptions.

VI. **Deposing An Expert Regarding Opinions**: Experts produce opinions – that is their output – based upon their assumptions and their expertise. These opinions can be conclusions ("the breach of contract cost $74,000 in lost profits"), or intermediary elements of final conclusions ("The accident occurred when the latch gave way"). The expert's opinion is not just the result, but the means by which the result was obtained ("I applied the M&M principles in evaluating what damages the bank suffered."). An expert's opinion can substitute for a missing fact witness. If an attorney wants to prove the speed a car was going, she might call a fact witness that saw the car, or an expert to analyze the skid marks and then opine on speed.

A. **Opinion – Objective Is To Reduce Certainty**: For each opinion the expert offers, we consider an attack on the expert's conclusions, which includes the methodology the expert applied in reaching these conclusions. Although our goal, generally, is to get the fact finder to reject the expert's opinion, our goal on cross examination is usually more narrow. It would take the odd combination of slipshod work and blatant honesty for an expert to admit on the stand that her opinion – to which she opined just minutes before - is garbage and should be disregarded. Mortal blows to an expert's opinions generally come when the expert is not on the stand – when another expert is brought in to trump the opining expert. The two areas of attack on the expert's opinion are (1) undermine the certainty in the approach or methodology, and (2) undermine the certainty in the expert's execution in this case.

B. **What To Gather On Opinions During The Deposition**: During deposition, we try and gather information for both types of challenges:

1. **Get A Clear List Of The Expert's Opinions**: You will need a clear list of the opinions the expert is giving – both to lay the groundwork for attack, and to be sure the expert doesn't later expand the list. Asking for a list at the beginning ("Please list the conclusions you've reached") is helpful, but as you progress through the deposition, you may find elements of the expert's analysis that are based solely upon the expert's experience. These are also opinions.

2. **Attacking the Expert's Certainty In The Chosen Approach**: For cross examination, we seek to reduce the certainty with which the expert asserts the opinion. Let's consider a range of possible confidence levels an expert might portray in the approach he's undertaken in reaching his opinion:

Certainty Scale
(1) Universal acceptance of expert's approach (everyone does it this way)
(2) Not everyone has accepted his approach (dissenters are "quacks")
(3) Split in authorities; he's in majority, but minority view respected
(4) Admits equal split among experts; prestigious colleagues divided
(5) Admits split among experts, his view in minority
(6) Admits range of alternatives exist, his approach favored by few (considers himself in the vanguard)
(7) Admits own approach is preposterous

a. **Expert's Position**: Experts often suggest that their approach has universal acceptance in their field of expertise (level 1). This certainty, if left unchallenged, gives significant heft to the expert's conclusions – making them seem inevitable. On cross, if possible, we seek admissions forcing the expert to acknowledge that her approach actually rests farther down the certainty scale. By undermining certainty, we create room for our own theory of the case. To challenge the expert's approach, we will make the expert acknowledge the existence of alternative approaches and how frequently the alternatives are used.

b. **What To Gather During The Deposition**: During the deposition, we need to ask about alternative approaches to the expert's. To help, we look for some other source as authoritative as the expert (sometimes it's the expert herself in a past case or article).

   i. **What are the "Bibles" in the expert's field**? These are the books everyone agrees are authoritative. Once the expert blesses them, they can be used to undermine the expert where she has taken a different approach. Can also ask: What books did the expert consult when writing the report? What books are on his shelf at work? What magazines or journals does he write/work for?

   ii. **Did the expert author any books or articles that discuss the approach**? These may allow us to attack the approach using the expert's own words

   iii. **Does the expert teach this approach**? To whom? What text book does he use? Does he teach alternatives?

   iv. **What other approaches did the expert consider**? Why were they rejected? Has she used these alternatives in the past? This can open the door to other approaches, and actually get the expert to bless these other approaches.

   v. **If applied this other approach, how would that have affected the outcome**? Once you have identified alternatives or methodologies the expert didn't take, you need to find out what the expert thinks would have happened if he took these routes. The existence of an alternative will carry more power if it will affect the expert's conclusions. The expert may not know what would happen under this alternative approach, and that alone may be powerful.

3. **Attacking The Expert's Certainty In The Execution**: Identifying an expert's mistakes can be deeply gratifying – pointing them out while the expert is on the stand is just out and out fun. Some mistakes arise from faulty assumptions – we look at those above – while other mistakes are simply flaws in the expert's execution. The most common of these are calculation errors or spread sheet malfunctions where data become corrupted or misdirected. Often, in preparing for a deposition, you identify a clear mistake that an expert has made. The error may be in an assumption (expert assumes the number is 4 when the parties have stipulated that the number is 400), or in their analysis. Sometimes it's as simple as a calculation error, sometimes it's more technical in nature. When these

mistakes are found, the question often arises: should I ask about it in deposition or save for it for trial. The response depends upon what type of error you've discovered.

a. **<u>The Error Benefits Your Side</u>**: If the error actually benefits the party you represent, leave it alone. There is no value in cross examining a mistake in your favor. Further, if you raise it at deposition, the expert will try and correct it to your client's detriment – so make a note, and leave it alone.

4. **<u>The Error Is Neutral Or Benefits The Other Side</u>**: If the error is neutral or benefits the other side then it needs to be addressed. The question as to whether to save it for trial is answered by exploring two elements (1) am I sure that this is a mistake, and (2) can I force the expert to admit his mistake without losing or confusing the factfinder. If the answer to both these questions is yes, save it for trial – if not, explore the area in deposition. Expert testimony can be complicated; trying to get an expert to admit a mistake can be so confusing that there is no "aha" moment, even if you're successful. For example, if the expert has misidentified the number of x-rays taken of the plaintiff – and this number clearly shows up in an x-ray log – save this for trial. Using it at deposition will simply allow the expert to correct his testimony. At trial, the error will – at a minimum – show carelessness and may show more. If, however, the error involves a number on a spread sheet – and this number is derived from a formula based on five other numbers, there is simply no way that a cross exam will effectively show this error. If the expert is uncooperative, he can make the cross x on this point take 15 minutes. Better to explore it in deposition – see if you can get him to admit the number is wrong. Then if he changes the number for trial, the change can be used against him.

C. **<u>Possible Pitfalls When Attacking Opinion</u>**: If an attorney makes a point with an expert but it is so complicated or minute that no one is bothering to pay attention, does the attorney score any points. That's easy: nope. As you develop knowledge in a technical subject matter it's easy to begin to talk and sound like the experts – this is helpful when you want to corner an expert on a point, but it's destructive when the deposition transcript is incomprehensible to the lay person. To avoid this, every complicated term that comes up in the deposition must be defined and explained on the transcript – even if you already understand the term – so that the transcript (and a possible reader) can also understand the term. You can drill down on complicated areas with the expert, but then you need to find a way to capture the results in a way that will be useful for an unenlightened fact finder.

VII. **<u>Deposing An Expert Regarding Credibility</u>**: As with all witnesses, an expert must be credible before her testimony will be accepted. Some attacks on credibility are expert specific: demonstrating that the witness is swayed by the money she's receiving or by her frequent experience testifying for plaintiffs. Some attacks are not expert focused, but go after the witness's honesty – based, for example, on testimony changes after the deposition.

A. **<u>Bias</u>**: The subtext here is that the witness was not open-minded when he examined the case. Information to be gathered would be prior work experience for the party, the lawyer, and the side (plaintiff or defendant) in the case.

B. **Opinion For Sale**: The subtext here is that the witness is willing to testify for whomever will pay her. At the deposition, we gather financial information regarding this engagement (how much is she being paid, what percent is it of her annual income), financial information regarding past engagements (especially if for the same counsel or party), and whether she's ever rejected an invitation to testify.

C. **Lack Of Familiarity**: The subtext here is that the expert doesn't really know what this case is about. Gather information about what the expert doesn't know and what he hasn't bothered to look at. Also confirm the "documents considered" list to ensure it is complete. At trial, we may challenge the expert on documents she didn't consider.

VIII. Expert Reports: Expert reports come in various stripes. Some attorneys encourage their experts to make the reports sparse, either to confuse the other side or to avoid locking the expert into very specific testimony. Game playing such as this is dangerous. Occasionally, if an expert can't attend trial, the expert's report may be substituted for the testimony. If the report is incomprehensible, the proffering attorney is stuck. Even a good faith effort by an expert can produce an incomprehensible report; expertise in one subject doesn't often translate into either an ability to write, or an ability to explain their subject. During the deposition, the calling attorney will use the (1) to identify the subjects for preparation, (2) to ensure a full understanding of the planned testimony. The deposition, however, is not about the report. The calling attorney should walk through all areas of a deposition (everything discussed above) before presenting the expert with her report. Once the report is in the expert's hands, she will generally just read from the report. If she can't testify without the report, that should be captured in depth during the deposition. Only when the entire field of play has been covered, should you turn to the report. Then, walk through the report, asking the expert to explain her statements, her terms, and what she's describing. Also, she should explain all attachments, as they may be used as demonstratives at trial.

Notes: ______________________________

- Methodically walk through report to identify every opinion offered and point made in the report. Some of this may duplicate information gained before the report – some will augment.
- Ask the witness if there are any other grounds supporting the opinions that have not been disclosed on the record. Do not accept a vague answer. Permit witness to review her file, notes, report, or anything else that could refresh her recollection.

VI. **Work Performed**

- Using bills, time records, diaries and notes, ask the expert how much time she spent on the case in total and the amount of time:
  - reading/ materials from case;
  - discussing case with attorneys, other experts, or parties;
  - performing tests, calculations, experiments, visiting locations;
  - writing the report;
  - preparing for the deposition (to demonstrate she's familiar with the case file).
- Determine with whom the expert has discussed the case and the nature of the discussions.

A. **Significant Dates**: Ask the expert to identify the date she was retained, the date she formulated tentative and final opinions, and date when the expert was told she, in fact, would be called upon to testify.

VII. **What Assistance Has Been Received By The Witness**: Find out if anyone has assisted the expert and determine the nature of the assistance. Technical support, grad students, etc – find out how much of the work product belongs to the expert.

- Determine (by name) who made calculations, performed measurements and tests, and reviewed the litigation file. Find out what the expert knows of the assistant's background.
- Were there any disagreements between expert and assistant.
- Determine if this is the usual practice in the field.

VIII. **Expert's Background**: We save the expert's background because it is usually well disclosed in the mandatory parts of the report; if time runs short, this is where we can cut if time runs short.

A. **Education**

- List the expert's educational background and area of concentration.

B. **Past/Other Employment**

- Identify all facets of employment, including teaching, consulting, investing, writing, editing, and testifying, lecturing.
- How do her responsibilities, duties and experiences affect her qualifications.
- List any previous employment by the adverse party or opposing counsel.
- Prior employment history - proceed in chronological order. Cover part-time positions, including consulting work. Ask about the nature of the services that have been rendered.

C. **Publications And Other Writings**: Identify and describe all writings, including unpublished works. Ask about co-authors: are they experts? They may be the source of counter arguments.

- Which writings are relevant to testimony/ analysis in this case?
- For each publication, ask if there is anything in the publication which the expert has since refuted or changed her mind about?

D. **Memberships In Societies And Organizations**: What professional organizations does the expert belong to? What qualifications are needed for membership? What activities has the expert participated in for the organizations?

- Honors and awards; board certifications; disciplinary action taken against the witness; prosecutions; seminars attended by the witness; periodicals and journals regularly read by the witness to keep abreast of developments in her field.

IX. **Prior Experience As An Expert Witness**: List all prior matters in which the expert has provided a report or affidavit, been deposed, has testified at trial, or otherwise has been retained to testify. For each case, determine the name of case, the court in which it was filed, and attorneys/firms on both sides, whether she offered testimony for plaintiff or defendant, and the period she has served as an expert witness.

- List each case wherein the witness testified for the same party or the same attorney.
- List prior cases in which courts have qualified or not qualified the witness to testify.
- Specify the particular area or areas of expertise in which courts have found the witness to be qualified to testify as an expert.
- Describe the witness's other cases that involved the same issue(s) as the one in the current case.
- Has the witness ever turned down a request for expert assistance? Why?
- Describe opinions rendered in other cases that are identical, similar, or inconsistent with the current case.

X. **Expert's Retention**: How was the witness retained in the case?

A. **Assignment:** Find out what the expert was asked to do – some of this may touch on privileged information regarding intermediate opinions and discussions with counsel.

- What was discussed at the initial interviews with the witness.
- Determine if the expert expressed a (premature) opinion to opposing counsel based upon inadequate factual information.
- What was the expert's specific assignment. Determine her understanding of how she was supposed to go about performing her assignment.
- Find out if the initial assignment was modified in any way.

B. **Fee Arrangement**: Determine entire fee/compensation arrangement

- Compare the fee arrangement to other cases in which she has participated.
- Ask about the contents of the retention letter. Ask for and examine the witness concerning drafts of the retention letter. What were the terms of her retention?
- Does the expert have any relationship with the adverse party or opposing counsel.
- Any potential conflict of interest because of prior employment by the client.

Notes: ____

[E1] ATTORNEY / CLIENT PRIVILEGE

QUICK RULE: *The attorney/client privilege protects communications made in confidence by clients to their lawyers for the purpose of obtaining legal advice. The advice provided from counsel to client is privileged to the extent it discloses what the client told the lawyer. Facts are not privileged. Voluntary disclosure of privileged materials acts as waiver of relevant subject matter. Inadvertent disclosure does not result in waiver if reasonable efforts were taken to protect and retrieve privileged materials. FRE 502.*

DISCUSSION:

I. **General**: The attorney/client privilege encourages full and frank communication between attorneys and their clients and thereby promotes the public's interest in the observance of law and the administration of justice. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). The privilege protects communications made in confidence by clients to their lawyers for the purpose of obtaining legal advice. *American Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1987). The attorney's advice to the client is privileged to the extent it discloses, directly or indirectly, what the client told the lawyer. *Id.*

A. **The Test**: Some circuits apply an eight-part test; communications are protected when: (1) legal advice is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his insistence permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except upon waiver. *In re Impounded*, 241 F.3d 308, 316 (3rd Cir. 2001); *State of Maine v. U.S. Dept. of Interior*, 298 F.3d 60, 71 (1st Cir. 2002).

B. **Narrowly Construed**: Courts construe the attorney-client privilege narrowly because it comes with substantial costs and may interfere with the search for truth. *In re Keeper of Records (Grand Jury Subpoena)*, 348 F.3d 16, 22 (1st Cir. 2003).

C. **Burden Of Proof**: The party asserting attorney/client privilege must prove that the privilege applies; the communications were protected; and the privilege was not waived. *United States v. Aramony*, 88 F.3d 1369, 1389 (4th Cir. 1996).

II. **Who Is Covered**

A. **Prospective Client**: Privilege extends to consultations between attorneys and prospective clients, even if the attorney decides not to take the case. *Montgomery v. Leftwich, Moore & Douglas*, 161 F.R.D. 224, 225-6 (D.C.C. 1995).

B. **In-House Counsel**: (see below) The attorney/client privilege cloaks in-house counsel communications in same manner as counsel retained from outside. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

C. **Government Counsel**: A government entity can assert attorney-client privilege in the civil context. *Ross v. City of Memphis*, 423 F.3d 596, 601 (6th Cir. 2005)(*citing In re Grand Jury Investigation,* 399 F.3d 527, 532 (2d Cir. 2005). *See also In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910, 917 & n. 7 (8th Cir. 1997)(acknowledging government entities' successful assertions of the privilege in civil cases where "the party seeking information was a private litigant adversarial to the government"). "[T]he attorney-client privilege extends to a communication of a governmental organization." Restatement (Third) of Law Governing Lawyers § 74 (2000).

D. **Former Employees:** The attorney-client privilege applies to statements made by witnesses regardless of whether they were currently employed by the defendant at the time they were interviewed. *Crutcher-Sanchez v. County of Dakota, Neb.*, 2011 WL 612061 (D. Neb.). "An argument could be made that the attorney-client privilege does not protect statements made in conversations with former employees, although every circuit to address this question has concluded that the distinction between present and former employees is irrelevant for purposes of the attorney-client privilege." *Sandra T.E. v. South Berwyn School Dist.*, 600 F.3d 612, 622 (7th Cir. 2010)(citing *In re Allen,* 106 F.3d 582, 605-07 (4th Cir. 1997); *City of Long Beach v. Standard Oil Co. of Cal.*, 658 F.2d 1355, 1361 n. 7 (9th Cir. 1981)).

III. Communications Covered

A. **Confidential Communications**: The attorney-client privilege protects only confidential communications. *United States v. Bollin*, 264 F.3d 391, 412 (4th Cir. 2001). Someone claiming the privilege must have a reasonable expectation of confidentiality, either because the information disclosed is intrinsically confidential, or by showing that she had a subjective intent of confidentiality. *United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 2002). It is not enough for the meeting to be between a lawyer and would-be client, or that the meeting take place away from public view. *United States v. Melvin*, 650 F.2d 641, 646-47 (5th Cir. 1981).

B. **Facts Not Privileged**: The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts communicated to the attorney. "The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Upjohn v. United States*, 449 U.S. 383, 396 (1981).

C. **Facts Concerning Attorney/Client Relationship**: The attorney/ client relationship itself is not privileged, but only the underlying communications. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 982 (6th Cir. 2003). Privilege does not protect identify of client or attorney, when the relationship began, or how much is being paid for representation. *Diversified Ind. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1978)(en banc).

IV. **Waiver**: FRE 502, recently adopted, governs both the scope of intentional privilege waiver and when unintentional disclosure results in a waiver. Under the rule, disclosure "does not operate as a waiver" if: (1) the disclosure is inadvertent; (2) the privilege holder took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the errant disclosure, including (if applicable) following FRCP 26(b)(5)(B). *Heriot v. Byrne*, 257 F.R.D. 645, 655 (N.D. Ill. 2009); *Eden Isle Marina, Inc. v. United States*, 89 Fed.Cl. 480, 501 -502 (2009).

A. **Background**: Congress enacted FRE 502(d) to resolve "longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege" and to avoid unnecessary litigation associated with inadvertent privilege waivers. *Jicarilla Apache Nation v. United States*, 91 Fed.Cl. 489, 494 (2010)(citing 154 Cong. Rec. S1317-19 (Feb. 27, 2008)(statement of Sen. Leahy); *see also* 154 Cong. Rec. H7818-19 (Sept. 8, 2008)(statement of Rep. Jackson-Lee)).

B. **Document Must Be Privileged**: FRE 502 applies only to privileged information that was inadvertently disclosed. *Heriot v. Byrne*, 257 F.R.D. 645, 655 (N.D. Ill. 2009). Accordingly, before undertaking an analysis under FRE 502, the court should first determine if the privilege claim is valid.

C. **Inadvertent Disclosure**: The rules do not define inadvertent disclosure. *Amobi v. Dist. of Columbia*, 262 F.R.D. 45, 53 (D.D.C. 2009). Courts have considered two approaches, one is a balancing approach, the other bright line.

1. **Balancing Approach On Inadvertence**: Some courts consider a number of factors to determine inadvertency, including the number of documents produced in discovery, the level of care with which the review for privilege was conducted and even the actions of the producing party after discovering that the document had been produced. *Amobi v. Dist. of Columbia*, 262 F.R.D. 45, 53 (D.D.C. 2009)(*citing Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 388 (7th Cir. 2008) and *Heriot v. Byrne*, 257 F.R.D. 645, 658-9 (N.D. Ill. 2009)).

2. **Bright Line Approach**: Some courts, when considering inadvertence under Rule 502(b), consider only whether the party intended to produce a privileged document or if the production was a mistake. *Amobi v. Dist. of Columbia*, 262 F.R.D. 45, 53 (D.D.C. 2009); *Coburn v. Whitecap*, 640 F.Supp.2d 1032, 1037-1038 (N.D.Ill. 2009). This interpretation tracks the drafting committee's goal: to devise a rule to protect privilege in the face of an innocent mistake. *Coburn*, 640 F.Supp.2d at 1038.

3. **Intentional Disclosure**: Intentionally giving privileged documents to the other side, with the expectation they may be clawed back, is a flawed strategy. *Society of Professional Engineering v. Boeing Co.*, 2010 WL 1141269, 5 (D.Kan. 2010)("Boeing's decision to allow Spirit access to the e-mail messages from June 2005 to June 2006 was most assuredly *not* 'inadvertent.' Rather it was intentionally done for reasons of business continuity and economic convenience.").

D. **Correcting Errant Disclosure**: Delay in correcting a disclosure may result in loss of protection under FRE 502. *See Clarke v. J.P. Morgan*, 2009 WL 970940, at 6

(S.D.N.Y.)(two-month delay in asserting privilege weighed for finding waiver; describes cases in which a waiver was found after a delay ranging from six days to one month); *Preferred Care Partners v. Humana,* 258 F.R.D. 684, 699-700 (S.D.Fla. 2009)(three-week delay in asserting privilege weighed in favor in finding waiver).

E. **Disclosure Must Be Made In "Proceedings"**: The rule only protects documents disclosed (1) in Federal proceedings, (2) to a Federal office or agency, (3) in some state proceedings, or (4) pursuant to a court order. FRE 502. The new rule does not address disclosures to state agencies, *Bickler v. Senior Lifestyle Corp.,* 2010 WL 749924, 6 (2010), or disclosures to private parties outside of litigation.

F. **Burden On Document Holder:** The disclosing party must prove that the elements of FRE 502(b) have been met. *Peterson v. Bernardi*, 262 F.R.D. 424, 427 (D.N.J. 2009).

G. **Documents Clawed Back**: "Given that only four pages out of a more than 2000 page production were privileged, the documents were checked by three different attorneys prior to production, and counsel immediately sought the return of the documents once they discovered their mistake, return of the documents is required." *Edelen v. Campbell Soup*, 2010 WL 774186, 23 (N.D.Ga. 2010).

V. **In-House Counsel**: Because in-house lawyers often have other functions in addition to providing legal advice, the lawyer's role on a particular matter will not be self-evident as it is for outside counsel. *Minebea v. Papst*, 228 F.R.D. 13, 21 (D.D.C. 2005). Corporations can protect material as privileged only upon a "clear showing" that an in-house lawyer acted "in a professional legal capacity." *In re Sealed Case*, 737 F.2d 94, 99 (D.C.Cir. 1984). Communications by and to in-house lawyers with respect to business matters, management decisions, or business advice are not privileged. *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996). Corporations cannot insulate their files from discovery "simply by sending a 'cc' to in-house counsel." *USPS v. Phelps Dodge*, 852 F.Supp. 156, 163-64 (E.D.N.Y. 1994).

A. **Waiver**: Current management can waive a corporation's attorney/client privilege. *CFTC v. Weintraub*, 471 U.S. 343, 349 (1985).

B. **Personal Privilege**: Courts assume that attorneys only represents the corporation, not the individuals within the corporate sphere. *United States v. Bay State Ambul.*, 874 F.2d 20, 28 (1st Cir. 1989). To override this presumption, an employee asserting privilege must show: (1) she approached counsel for legal advice; (2) she stated that she was seeking legal advice in her individual capacity; (3) counsel advised her in her individual capacity; (4) the conversations were confidential; and (5) the substance did not concern matters within the company's affairs. *In re Bevil*, 805 F.2d 120 (3d Cir. 1986).

VI. **Crime Fraud Exception**: When a client seeks legal advice in furtherance of a crime or fraud, the communication is not privileged. *Clark v. United States*, 289 U.S. 1 (1933). To dispel the privilege, the opposing party must present a *prima facie* case that the communications furthered a crime or a fraud. *Id.*

[E2] WORK PRODUCT DOCTRINE

QUICK RULE: *The Work Product Doctrine protects (1) documents and tangible things, (2) prepared in anticipation of litigation or for trial, (3) prepared by a party or that party's representative (attorney, consultant, surety, or agent). Hickman v. Taylor, 329 U.S. 495 (1947); codified at FRCP Rule 26(b)(3). A party can overcome the work product doctrine by sufficient need.*

DISCUSSION:

I. Work Product Doctrine: The work product doctrine is governed by a uniform federal standard set forth in FRCP 26(b)(3). *In re Cendant Corp.*, 343 F.3d 658, 661–62 (3d Cir. 2003). The doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. *Id.* The privilege was first described in *Hickman v. Taylor*, 329 U.S. 495 (1947), where the Supreme Court extended protection to all inquiries and requests seeking "counsel's mental impressions, conclusions, or opinions." The work product doctrine protects the adversary trial process, rather than the attorneys' interests. *Coastal States v. Dep't of Energy*, 617 F.2d 854, 864 (D.C.Cir. 1980).

A. **Purpose**: The work product doctrine serves dual purposes: (1) to protect an attorney's thought processes and mental impressions against disclosure; and (2) to limit the circumstances in which attorneys may piggyback on the fact-finding investigation of their more diligent counterparts. *Sandra T.E. v. South Berwyn School Dist.*, 600 F.3d 612, 622 (7th Cir. 2010).

II. Documents And Tangible Things: The federal rules codified the work product doctrine, providing protection for *documents and tangible things* prepared in anticipation of litigation. FRCP 26(b)(3). The language in *Hickman* is broader than FRCP 26(b)(3); the doctrine is interpreted under both the rules and *Hickman. In re Qwest Communications Intern. Inc.*, 450 F.3d 1179, 1186 (10th Cir. 2006).

A. **Facts Not Covered**: The work product doctrine does not protect facts concerning the creation of work product or facts contained within the work product. *See RTC v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995)). The protection extends to underlying facts only when they "inherently reveal the attorney's mental impression." *Onwuka v. Federal Express Corp.*, 178 F.R.D. 508, 512 (D.Minn. 1997).

B. **Anticipation Of Litigation**: The doctrine protects materials prepared for any litigation or trial provided the materials were prepared by or for a party to the subsequent litigation. FRCP 26(b); *F.T.C. v. Grolier*, 462 U.S. 19, 25 (1983). The test is whether "'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998).

1. **Procedure**: To determine whether a document has been prepared "in anticipation of litigation," courts ask: 1) whether the document was prepared due to a party's subjective anticipation of litigation, rather than for ordinary business purpose; and 2) whether that subjective anticipation was objectively reasonable. *In re Professionals*, 578 F.3d 432, 439 (6th Cir. 2009). A document, prepared in anticipation of litigation, is protected even if also serves an ordinary business purpose. *Id.*

   a. **"For" v. "About"**: It is not enough to trigger work product protection that the *subject matter* of a document relates to a subject that might conceivably be litigated. *United States v. Textron Inc*, 577 F.3d 21, 29 -30 (1st Cir. 2009). The rules literal language protects materials *prepared for* any litigation or trial as long as they were prepared by or for a party to the subsequent litigation. *Id.*

   b. **Preparation By Lawyers Not Enough**: It is not enough that the materials were prepared by lawyers or represent legal thinking. *United States v. Textron Inc.*, 577 F.3d 21, 29 -30 (1st Cir. 2009). Even if prepared by lawyers and reflecting legal thinking, materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not protected as work product.

2. **Eventual Litigation**: The fact that litigation eventually ensues does not cloak materials prepared by an attorney with the protection of the work product doctrine. *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983). Conversely, even though litigation may have been contemplated, FRCP 26(b)(3) provides no protection for materials prepared in the regular course of business. *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 402 (8th Cir. 1987).

3. **Nonparties**: The rule, on its face, limits its protection to one who is a party (or a party's representative) to the litigation in which discovery is sought. *In re California Public Utilities Com'n*, 892 F.2d 778, 781 (9th Cir. 1989). "[D]ocuments prepared for one who is not a party to the present suit are wholly unprotected even though the person may be a party to a closely related lawsuit in which he will be disadvantaged if he must disclose in the present suit." Wright & Miller, *Federal Practice and Procedure* § 2024, at 201-02.

C. **Prepared By The Party**: The doctrine covers documents or tangible things prepared by a party's attorney, consultant, surety, indemnitor, insurer, or agent. *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (attorneys often must rely on investigators and the work product doctrine applies to materials prepared by such agents).

D. **Procedure**: A party seeking to withhold discoverable materials as work product must expressly assert the claim, and, without revealing protected information, describe the documents not produced to enable other parties to assess the privilege's applicability. FRCP 26(b)(5); *Garcia v. City of El Centro*, 214 F.R.D. 587, 591 (S.D. Calif. 2003).

1. **Burden Of Proof**: The party resisting disclosure must establish the documents' eligibility for protection. *Binks*, 709 F.2d at 1120. The party claiming protection

must show that anticipated litigation was the "driving force behind the preparation of each requested document." *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 439 (6th Cir. 2009); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992).

E. **Attorney's Interest In Work Product:** Unlike the attorney-client privilege, the attorney has an independent privacy interest in his work product and may assert the work-product doctrine on his own behalf. *Sandra T.E. v. South Berwyn School Dist.*, 600 F.3d 612, 618 (7th Cir. 2010). The doctrine's protection is not waived simply because the attorney shared the information with his client. *Id.*

III. **Opinion v. Fact**: The work product doctrine shields all work product from discovery. *Pacific Fisheries, Inc. v. United States,* 539 F.3d 1143, 1148 (9th Cir. 2008). Courts distinguish between "opinion" and "fact" work product when considering coverage.

A. **Opinion Work Product**: Opinion (or "core") work product describes documents containing "the mental impressions, conclusions, opinions, or legal theories of an attorney." *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977). To be entitled to protection for opinion work product, the party asserting the privilege must show "a real, rather than speculative, concern" that the work product will reveal counsel's thought processes "in relation to pending or anticipated litigation." *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183 -184 (2d Cir. 2007).

1. **Scope**: Opinion work product has *near* absolute immunity. *In re Cendant*, 343 F.3d 658, 663 (3rd Cir. 2003). One court gave opinion work product *absolutely* protection. *Duplan v. Moulinage*, 509 F.2d 730, 735 (4th Cir. 1974) - Not a majority view.

2. **Examples**: An attorney's notes and memoranda from a witness interview are opinion work product. *Baker v. General Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000). Legal research detailing counsel's mental impressions and conclusions is opinion work product. *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999).

B. **Fact Work Product**: Fact (or "ordinary") work product describes materials prepared in anticipation of litigation but which do not contain the attorney's mental impressions. FRCP 26(b)(3) provides qualified immunity to fact work product. *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992).

IV. **Overcoming The Work Product Doctrine**

A. **Obtaining Opinion Work Product**: Opinion work product may be discovered when mental impressions are at issue and the need for the material is compelling. *Holmgren v. State Farm*, 976 F.2d 573, 577 (9th Cir. 1992). The crime-fraud exception presents a rare and extraordinary circumstance in which opinion work product is discoverable. *Cox v. Administrator United States Steel*, 17 F.3d 1386, 1422 (11th Cir. 1994).

B. **Obtaining Ordinary Work Product**: To obtain ordinary work product a party must show both a substantial need for the information and that seeking the information through other means would cause undue hardship. *United Kingdom v. United States*, 238 F.3d 1312, 1322 (11th Cir. 2001)(*citing* FRCP 26(b)(3)). *See also Hickman*, 329 U.S. at 512-13 (production of the material is not merely relevant, but also necessary). Courts will not permit discovery of a witness's statement to opposing counsel if that witness is available to all parties. *Baker v. General Motors*, 209 F.3d 1051, 1054 (8th Cir. 2000).

V. **Waiver**: FRE 502, recently adopted, governs both the scope of intentional waiver and when unintentional disclosure results in a waiver. *See* Attorney Client Privilege section (E1).

VI. **Specific Applications**

A. **Testifying Experts**: In a significant rule change, many communications with experts are now protected under the work product doctrine. FRCP 26, as amended in 2010, now protects drafts and certain communications between a party's attorney and a testifying expert from disclosure. *PACT XPP v. Xilinx*, 2012 WL 1205855 (E.D. Tex.)(citing FRCP 26(b)(4)(B) & (C)). It is no longer true that all privileges and protections are waived as to confidential information disclosed to a testifying expert. *Id.*

1. **Non-Reporting Experts**: Although the amended rule explicitly provides these protections for expert witnesses who submit a written expert report under FRCP 26(a)(2)(B), the rules contemplate that privileges and protections may be available to protect communications with other types of expert witnesses. *PACT XPP Technologies, AG v. Xilinx, Inc.*, 2012 WL 1205855 (E.D. Tex.). "The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine." FRCP 26 Advisory Note (2010).

B. **Consultants**: A party has the right to consult with experts without designating them as expert witnesses and without calling them at trial. The opposing party may discover the opinions of that expert only in two situations: 1) as provided in Rule 35, and 2) only "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." *Lehan v. Ambassador*, 190 F.R.D. 670, 671 (E.D. Wash. 2000)(FRCP 26(b)(4)(B)).

1. **Exceptions**: "A number of cases hold that 'exceptional circumstances' allowing for discovery of a non-testifying expert's opinion exist where the object or condition observed is not observable by an expert of the party seeking discovery." *Hartford Fire v. Pure Air*, 154 F.R.D. 202, 208 (N.D.Ind. 1993)(*quoting Delcastor, Inc. v. Vail Assoc., Inc.*, 108 F.R.D. 405 (D.Colo. 1985); *Dixon v. Cappellini,* 88 F.R.D. 1 (M.D.Pa. 1980). Likewise, "exceptional circumstances" can be shown where a non-testifying expert's report will be used by a testifying expert as the basis for an expert opinion. *Id.* (*citing Heitmann v. Concrete Pipe,* 98 F.R.D. 740 (E.D.Mi. 1983)).

C. **Attorney As Witness**: An attorney may testify as a fact witness without waiving work product privileges. *In re Pioneer Hi-bred International, Inc*, 238 F.3rd 1370, 1374 (Fed. Cir. 2001); *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1552 (10th Cir. 1995).

[E3] OTHER PRIVILEGES

QUICK RULE: *In "federal question" suits, the evidentiary privileges come from the Constitution, Acts of Congress, and Federal common law. FRE 501. In civil actions, where an element of the action or defense is based upon state law, then that state's rules of privileges will apply. Id. The party seeking to assert an evidentiary privilege must establish its applicability.*

DISCUSSION:

I. **Fifth Amendment**: The Fifth Amendment guarantees that no person shall be compelled to be a witness against himself. This privilege applies in a civil context. *Pillsbury v. Conboy*, 459 U.S. 248, 256-7 (1983). The party invoking the privilege need only demonstrate a possibility of criminal prosecution, even if the possibility is remote. *Andover Data v. Statistical Tabulating*, 876 F.2d 1080, 1082 (2d Cir. 1989). The privilege only protects individuals, and may not be invoked by a corporation, association, or other collective entity. *Braswell v. United States*, 487 U.S. 99, 108-114 (1988). Absent a formal statutory grant of immunity, a court may not constitutionally compel a witness to testify over a valid assertion of his privilege. *Taylor v. Singletary*, 148 F.3d 1276, 1283 n.7 (11th Cir. 1998).

A. **Witness Is Party**: Even if the witness is a party, the witness does not forfeit his right to refuse to answer a question. "It is inconceivable that by exercising the constitutional right to bring or defend an action a person waives his or her constitutional right not to be a witness against himself or herself, and no case has so held." 8 *Federal Practice and Procedure*, § 2018 (2d ed.).

1. **Test**: There are exceptions to this principle. If a party refuses to answer incriminating questions, courts considering sanctions evaluate: (1) the validity of the privilege assertion, (2) the costs to the witness of compelling him to answer the deposition questions, (3) whether upholding his assertion thwarts discovery of issues at the heart of the lawsuit, and (4) whether and how easily the party seeking discovery could obtain the information from other sources. *Swann v. City of Richmond*, 462 F.Supp.2d 709, 712 -713 (E.D.Va. 2006); *Mount Vernon Sav. v. Partridge*, 679 F.Supp. 522, 529 (D.Md. 1987)).

B. **Specific Questions**: A claim of privilege against self incrimination must be directed to specific questions. *North River v. Stefanou*, 831 F.2d 484, 487 (4th Cir. 1987). By objecting to particular questions, a proper record for the court to consider each claim.

II. **Accountant/Client Privilege**: Neither federal statute nor federal common law recognize an accountant/client privilege. *Couch v. United States*, 409 U.S. 322, 335 (1973).

III. **Banker/Client Privilege**: Neither federal statute nor federal common law recognize a banker/ client privilege. *Young v. U.S. Dept. of Justice*, 882 F.2d 633, 642 (2nd Cir. 1989).

IV. **Physician/Patient Privilege**: Neither federal statute nor federal common law recognize a physician/ patient (or hospital-patient) privilege. *Northwestern Memorial v. Ashcroft*, 362 F.3d 923, 926 (7th Cir. 2004); *Whalen v. Roe*, 429 U.S. 589, 602 (1977).

V. **Priest/Penitent Privilege**: Federal courts recognize the priest-penitent privilege, protecting confidential communications, confessions, and advice from discovery. *Trammel v. United States*, 445 U.S. 40, 51 (1980); *United States v. Gordon*, 655 F.2d 478, 486 (2d Cir. 1981).

VI. **Therapist/Patient Privilege**: Federal courts recognize a privilege protecting confidential communications between a licensed psychiatrist/ therapist made in the course of treatment. *Jaffee v. Redmond*, 518 U.S. 1, 116 (1996). A witness can waive this privilege by putting their metal state at issue by: seeking to recover for emotional distress, *see Doe v. Dairy,* 456 F.3d 704 (7th Cir. 2006); basing her claim upon the psychotherapist's communications with her; or selectively disclosing part of a privileged communication to gain an advantage in litigation. *Koch v. Cox*, 489 F.3d 384, 389 -391 (D.C. Cir. 2007). A plaintiff does not put his mental state in issue merely by acknowledging he suffers from depression, for which he is not seeking recompense; nor may a defendant overcome the privilege by putting the plaintiff's mental state in issue. *Id.*

VII. **Adverse Spousal Privilege**: An individual "may be neither compelled to testify nor foreclosed from testifying" against the person to whom he or she is married at the time of trial. *United States v. Espino*, 317 F.3d 788, 796 (8th Cir. 2003). The testifying spouse may waive the privilege without consent of the defendant spouse. *Id.* This privilege may not be asserted after a marriage has ended. *Pereira v. United States*, 347 U.S. 1, 6 (1954).

A. **Civil Proceedings**: It is an unresolved whether this privilege applies in civil proceedings, and if it applies when the witness's spouse is not a party, even if the testimony is adverse. *See Knepp v. United Stone*, 2007 WL 2597936, 3 (M.D.Pa. 2007).

VIII. **Marital Communications Privilege**: Federal courts protect confidential communications made between spouses during the marriage. *Trammel v. United States*, 445 U.S. 40, 51 (1980). Either spouse may assert this privilege. The privilege has three prerequisites: (1) a legally recognized marriage at the time of communication; (2) "utterances or expressions intended by one spouse to convey a message to the other," *United States v. Lustig*, 555 F.2d 737, 748 (9th Cir. 1977); and (3) communications made in confidence. 2 Weinstein, *Weinstein's Evidence* § 505[4] (1992).

A. **Exceptions**: Courts recognize exceptions to the privilege: (1) communications pertaining to the spouses' joint criminal activity, and (2) where the communications were made after the spouses have permanently separated, even though not legally divorced. *In Re Witness Before Grand Jury*, 791 F.2d 234, 238 (2d Cir. 1986).

B. **Breadth**: This privilege probably applies to civil matters and even applies if the witness or spouse is not a party to the proceeding. *See Caplan v. Fellheimer et al,* 162 F.R.D. 490, 492 (E.D.Pa. 1995). The rationale behind the privilege of encouraging open and honest communications is only furthered if the spouses are able to keep the communication confidential, regardless of the type of case.

[F1] OBJECTIONS AND DIRECTIONS NOT TO ANSWER

QUICK RULE: *In Depositions, timely objections are necessary to preserve errors for later challenge. Objections regarding the manner in which the deposition was noticed or performed must be raised immediately. Objections regarding questions need generally only be raised regarding the question's form. These include: Ambiguous, Argumentative, Compound Question, Confusing, Leading, Mischaracterizes prior testimony, Calls for a narrative, Scope, and Vague. Objections regarding answers must be made to preserve objection. Objections regarding foundation, materiality, hearsay, and relevance are typically preserved under the rules.*

DISCUSSION:

I. **The Role Of Objections In Depositions**: Depositions have two potential evidentiary uses: on motions for summary judgment and at trial. Errors in the deposition's set up or execution may render some or all of the deposition testimony inadmissible. Because depositions typically take place out of court's view, the rules provide a means of accommodating three potentially conflicting goals: (1) preserve any challenges to the deposition's circumstances or contents, (2) put the other party on notice regarding potential flaws, so as to correct the flaws if possible, and (3) permit the deposition to proceed, if at all possible, with as little wastage as can be managed.

A. **First Priority: Avoid Technical Challenges**: The deposition rules are designed to render technical objections, based on errors and irregularities in the deposition, unavailable at trial. *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 921 (8th Cir. 1986) (citing 4A Moore, et al *Moore's Federal Practice* ¶ 32.11 (1984)). Accordingly, counsel must raise these objections immediately to allow their cure. Failure to raise the objections waives them and protects the deposition from later challenge. The rule's "general principle is to require defects in the taking of depositions to be pointed out promptly on pain of waiver" so as to "give the erring party an opportunity to correct the mistake, and to prevent waste of time and money by a subsequent claim that a deposition must be suppressed because of some technical error long ago." *Daigle v. Maine Medical*, 14 F.3d 684, 692 (1st Cir. 1994)(*quoting* 8 Wright et al, *Federal Practice and Procedure* § 2153, at 475 (1970); FRCP 32(d)(3).

B. **Second Priority: Avoid Unnecessary Objections**: The second objective is to limit the number of interruptions and confrontations during depositions. *See FedEx Corp. v. United States*, 2011 WL 2023297, 5 -11 (W.D.Tenn.)(*citing* FRCP 30(c) Advisory Note, (1993). The rules and case law divide the range of possible deposition objections into two categories: those that must be raised before or during the deposition to avoid waiver, and those that are preserved regardless of whether they are raised. Whether an objection falls into the former or latter categories depends upon the erring party's ability to cure, given prompt notice.

1. **Purpose Of Dichotomy**: The rules distinguish between (a) objections to the manner in which the deposition is taken, and (b) objections as to the substance of the testimony (such as relevancy or competency), because allowing counsel to wait until trial to object might encourage sandbagging. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1160 (11th Cir. 2005); *Kirschner v. Broadhead*, 671 F.2d 1034, 1037-38 (7th Cir. 1982).

C. **Third Priority: Continue The Deposition**: The third priority is that the deposition should continue, subject to uncorrected objections. FRCP 30(c)(2). Later, if a party seeks to move the contents of the deposition into evidence – either on SJ or at trial – the objection may be reasserted to the court. The court must then rule on the preserved objection before allowing the testimony into evidence. *See ADT v. Swenson*, 276 F.R.D. 278, 298 (D.Minn. 2011)(rejecting objections regarding speculative testimony before allowing it into evidence for Summary Judgment); *Wal-Mart Stores, Inc. v. Qore, Inc.*, 2009 WL 305817, 1 (N.D.Miss.)(striking deposition portion calling for speculation and improper expert testimony from fact witness).

II. **Objections To Notice, Format, Procedure, Conduct Or Transcription**: Objections to the deposition's notice, format, and the procedure surrounding the deposition must be raised as soon as the objecting party becomes aware of the objectionable conduct. Failure to raise a timely objection will waive any basis for later relief. FRCP 32(d)(3)(B).

A. **Objections As To Notice Or Subpoena**: Objections as to notice must be raised as soon as they become evident. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice. *Brown Badgett v. Jennings*, 842 F.2d 899, 902 (6th Cir. 1988). This rule requires that notice defects be quickly disclosed so that the erring party can correct the mistake. *Id.* Attending the improperly noticed deposition, without objection, waives the objection. *Griffiths v. Certain Underwriters*, 2010 WL 1463405 (D.N.H.)(*citing* FRCP 32(d)(1)).

B. **Objections To Rule 30(b)(6) Notice Or Subpoena**: The recipient of an overbroad or vague 30(b)(6) notice should negotiate with the issuing party to resolve objections to the notice. If these objections cannot be resolved, the recipient should seek court assistance. The only actions available to the recipient of an overbroad or confusing 30(b)(6) notice are (a) move for a protective order under Rule 26(c), (b) move to limit the scope of the deposition under Rule 30(d), or (c) move to limit the extent of discovery under Rule 26(b)(1)(C). *Lykins v. CertainTeed Corp.*, 2012 WL 3542016 (D. Kan.).

1. **Cannot Refuse To Cooperate**: "What is not proper practice is to refuse to comply with the notice, put the burden on the party noticing the deposition to file a motion to compel, and then to justify non-compliance in opposing the motion to compel." *New England Carpenters v. First Databank*, 242 F.R.D. 164, 165–166 (D.Mass. 2007). *See United States v. Health Alliance*, 2009 WL 5227661, at 2 (S.D.Ohio)(court could have granted defendant's motion to compel based upon the plaintiff's failure to seek a protective order before refusing refusal to produce a Rule 30(b)(6) deponent).

C. **Objection As To Standing Of Attorney Attending Deposition**: A challenge that an attorney participating in the deposition is not properly admitted to practice before the relevant court must be raised before or at the time of the deposition (if possible) or the objection is waived. *See In re Storage Technology Corp.*, 117 B.R. 610 (1990).

D. **Objection Regarding Translation**: If the deposition is translated, counsel must raise objections regarding the translation. Similarly, objections to the decision not to take the deposition in English – without translation – will be waived if not preserved. *See D'Agostino v. Housing Authority*, 2006 WL 3388403 (D.Conn.)(citing FRCP 32(d)(4)).

1. **Practice Point**: If a deposition is to be translated, counsel for either side may employ a check-translator to attend the deposition as a paid, unsworn consultant. This translator can advise counsel when objections might be called to the translation itself: for example, how the word "you" or "group" is to be translated. Failure to object during the deposition probably waives any challenge to the translation.

D. **Objections Regarding Attorney Conduct**: Generally, objections regarding counsel's conduct – or misconduct – must be raised in deposition to notify the offending attorney and to preserve the objection. Failure to object to argumentative questions during deposition are waived if not raised. *See Bahamas Agricultural v. Reily Stoker*, 526 F.2d 1174, 1180-81 (6th Cir. 1975). *See NDK Crystal, Inc. v. Nipponkoa Ins. Co., Ltd.*, 2011 WL 43093, 3 -4 (N.D.Ill.) (Before a party suspends a deposition because it is being done in bad faith, counsel must make a statement on the record).

1. **Asked And Answered**: An objection that a question has been asked and answered is, technically, not a challenge to the form of the question, but to the attorney's conduct in repeating already answered questions. FRE 611(a), 403. Generally, there is nothing objectionable about an attorney asking or re-asking a question multiple times, provided that the questioning does not become abusive or needlessly repetitive. "The truth seeking goal of depositions outweighs any undue harassment or manipulation . . . suffered in answering a similar question twice." *Daniels v. Pioneer Cent. School Dist.*, 2012 WL 70573, 5 (W.D.N.Y.). "The question was framed in a different manner, with more detail and background from which [the witness] could draw when answering. As such, it was permissible." *Id.* (*citing* FRE 611(a)).

2. **Argumentative**: Except for explanatory statements to the witness regarding the nature and format of a deposition, the questioning attorney must typically act through questions. Statements to the witness "That's a stupid answer" are objectionable as improper, argumentative conduct. Questions or statements that unnecessarily challenge the contents of a witness's answers may be conduct objections ("when did you stop beating your wife").

3. **Objections Regarding Objections**: An objection that the defending attorney is making improper objections (ie., objections reserved by the rules), is making the objections in an improper manner (ie, speaking objections), or is otherwise disrupting the deposition or coaching the witness, must be made at the time to preserve the objection.

E. **Objections Regarding Oath**: Failure to raise concerns about the witness's oath that could have been cured at the deposition, waives the objection. *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1160 (11th Cir. 2005).

F. **Objections Arising After The Deposition**: Errors and irregularities in the manner in which the deposition is transcribed, prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer, are properly dealt with by a motion to suppress. Counsel waives these objections if she fails to act with reasonable promptness. *In re Ashley*, 903 F.2d 599, 603 (9th Cir. 1990).

III. **Objections To Questions (Basis)**: During the deposition, counsel may object to questions to preserve the right to challenge the admissibility of any subsequent answer. To preserve challenge, counsel must raise objections to a question's form. Objections regarding foundation, materiality, and relevance are typically preserved, and thus need not be raised during the deposition, although courts have differed when interpreting the rules. Objections regarding hearsay need not be raised during the deposition, as they are routinely preserved. It is improper to raise objections in the deposition when the rules otherwise preserve the objections for trial. *See Cincinnati Ins. Co. v. Serrano*, 2012 WL 28071, 4 -6 (D.Kan.).

A. **Form Objections Not Reserved**: An objection to "form" is an objection to the way the question is phrased, or to the way information is being sought. When there is a concern regarding a question's form, a timely objection notifies questioning counsel and thereby allows him to revise the question to avoid the problem. 8A Wright et al., *Federal Practice and Procedure*, §2156, at 206 (2d ed. 1994). Objections to the form of the questions in a deposition "are waived unless seasonable objection thereto is made at the taking of the deposition." *Scheidler v. United Wisconsin*, 2001 WL 34382022, 5 (W.D.Wis.) (*citing* FRCP 32(d)(3)(B)); *Boyd v. University of Maryland*, 173 F.R.D. 143, 147 n. 8.

1. **List Of Form Objections**: Courts are not in full agreement as to what constitutes a "form" objection. *See State Farm Mut. v. Dowdy*, 445 F.Supp.2d 1289, 1293 (N.D.Okla. 2006) (*quoting* Hecht, *Effective Depositions*, 359-62 (1998)). The best list includes:

a. **Argumentative**: The question or statement unnecessarily challenges the contents of witness's answers – these may be objections to form ("You hate women, don't you?"), or to counsel's conduct. FRE 611(a).

b. **Ambiguous**: The question is confusing because a word or phrase could be understood in more than one way; it is unfair to make a witness answer unclear questions. FRE 611(a).

c. **Compound Question**: The attorney asked two questions; it is unclear which the witness is answering. FRE 611(a).

d. **Confusing**: The question's structure or contents make it unclear or misleading. FRE 611(a).

e. **Leading**: Leading questions (questions that suggest the answer) are not permitted on direct examination of non-adverse witness. FRE 611(c). Objections as to leading questions are waived if not raised. *Roy v. Austin Co.*, 194 F.3d 840, 844 (7th Cir. 1999); *Oberlin v. Marlin American Corp.*, 596 F.2d 1322, 1328 (7th Cir. 1979). Leading questions, while potentially objectionable as to form, are permitted when the questioner is examining an adverse witness. *Cincinnati Ins v. Serrano*, 2012 WL 28071, 4 -6 (D.Kan.). This is especially problematic on cross examination, when the defending attorney questions her own witness. The use of leading questions during the cross-examination of a party by his own attorney, to the extent objectionable, is so at the time the deposition was taken. *Oberlin*, 596 F.2d at 1328. If raised during the deposition, the error might be cured. *Id.*

f. **Mischaracterizes The Witness's Prior Testimony**: A predicate to the question, improperly seeks to summarize or describe prior testimony. Example "You said the car was blue, where were you standing when you saw it." This objection is important because when the witness answers the question portion, it suggests the witness is agreeing with the summarizing of the facts in the predicate. This objection is not proper when the question itself is about the prior testimony: "You previously testified that the car was blue, correct?"

g. **Calls For A Narrative**: Counsel does not ask a question, but instead invites witness to testify at length about a subject. E.g., "Tell me about your childhood."

h. **Scope**: The question on cross exam exceeds scope of direct. FRE 611(b).

i. **Vague**: The question is unclear; it is unfair to make witness answer unclear questions. FRE 611(a).

2. **Other Potential Form Objections**: Some courts have identified as "form objections" those objections regarding questions that call for legal conclusions, call for expert testimony, and that assume facts not in evidence. *See Luangisa v. Interface Operations*, 2011 WL 6029880 (D.Nev.)(citing Schwarzer, et al, *Federal Civil Procedure Before Trial*, § 11:1551–11:1556); *Harper v. Griggs*, 2007 WL 486726, 1 -2 (W.D.Ky.). This is problematic because it is not the question's structure that is being challenged but the possible contents of the answer, which are properly deemed foundational challenges. Because raising these objections does not offer an opportunity to cure, they should properly be deemed reserved.

a. **Practice Point**: Because objections are waived if not preserved, counsel should look for one of two solutions if there are objections regard "calls for legal conclusion," "calls for expert testimony," and "assumes facts not in evidence." Go ahead and raise the objection when the issue comes up – if it arises multiple times or if the calling attorney gets annoyed, negotiate an on-the-record agreement that these objections are all preserved.

3. **Form Objections May Be Reserved**: The court may issue an order preserving objections on form until trial. *Abbott Laboratories v. Airco, Inc.*, 1985 WL 5212

(N.D.Ill.)(party that would otherwise be calling the objections may not complain about such an order). Similarly, parties may stipulate as to the reservation of form objections (see below).

4. **Proper Response to Form Objections**: Once an objection is made, the examining attorney can (1) ask the objecting counsel to clarify the objection (if necessary), (2) ask a different question in an attempt to overcome the objection, or (3) let the question stand and demand an answer. *See State Farm v. Dowdy*, 445 F.Supp.2d 1289, 1293. If the examining attorney lets the question stand, the deponent must answer the question - subject to the objection – with the questioner taking the risk that the court will sustain the objection and strike the question and answer. *Id.*

B. **Foundational Objections Reserved**: "Objections to the competency of a witness or to the competency, relevance, or materiality of testimony are not waived; and may be presented at the trial even though they were not noted at the deposition, unless the ground of the objection is one that might have been obviated or removed if presented at the time the deposition was being taken." *Luangisa v. Interface Operations*, 2011 WL 6029880 (D.Nev.)(quoting 8A Wright, et al, *Federal Practice & Procedure* § 2113 (3d ed.); *Rosary-Take One v. New Line Distribution, Inc.*, 1996 WL 79328, 1 (S.D.N.Y.). Accordingly, foundational objections are generally not waived by a failure to make them and the examination should not be lengthened or obstructed by interposing these objections. *See Gray v. Bruneau-Grand View School*, 2007 WL 3333273, 2 (D.Idaho).

1. **Exception - When Foundational Objections Are Required**: Counsel waives foundational objections if the grounds of the objection might have been cured if presented at the deposition. Thus, counsel must raise ***curable*** objections to the witness's competency or to the testimony's competency, relevancy, or materiality. *Daubach v. Wnek*, 2001 WL 290181, 1-2 (N.D.Ill.); *Kirschner v. Broadhead*, 671 F.2d 1034, 1037 (7th Cir. 1982). *See United States v. Johnson*, 2007 WL 1695740, 8 (D.Minn.) ("While the Johnsons can decry the foundation for Paul Johnson's deposition testimony, that objection is untimely, since the foundational objection, if it had been raised at the time of Paul Johnson's deposition, could have been cured at the time that the deposition was taken, and therefore, the objection has been waived.")(*citing* FRCP 32(d)(3)(B)).

2. **Objection As To Relevance**: It is usually not necessary to raise relevance objections. *Luangisa v. Interface Operations*, 2011 WL 6029880 (D.Nev.); *In re Stratosphere*, 182 F.R.D. 614, 618 (D.Nev. 1998). Failure to make relevancy objections at deposition can waive them for trial, however, if counsel could have cured the relevancy objection during deposition. *Kirschner*, 671 F.2d at 1038.

   a. **Relevance Objections Are Rarely Necessary**: "It is difficult to conceive of the likelihood that a question which calls for irrelevant information can be 'cured' by restating the question, unless the question is changed to ask for relevant (i.e., different) information. Accordingly, it would be rare that an irrelevant question could be cured. Thus, the objecting party may wait until trial (or just prior to trial) to make the objection when, and if, the deposition testimony is offered into evidence." *BNSF v. San Joaquin Valley R. Co.*, 2009 WL 3872043, 2 (E.D.Cal.).

b. **When Relevance Objections Become Conduct Objections**: It is inappropriate for a witness to refuse to answer a question on relevance grounds "unless and until the pervasive or other nature of the questioning makes it obvious that it is necessary to stop the deposition and seek relief under Rule 30(d)(3) for being conducted in a manner evidencing bad faith, or to embarrass, annoy, or oppress the deponent." *In re Stratosphere*, 182 F.R.D. at 619.

3. **Questions Calling For Speculation**: An objection that a question calls for speculation is a foundational objection. It is a challenge that a predicate has not been laid so that the witness's answer will not have any value. *See* FRE 602. An objection that a question calls for speculation "tends to coach the witness to respond that she does not know the answer. It is not waived if omitted under Rule 32, and is improper under Rule 30 and the guidelines." *Cincinnati Ins. Co. v. Serrano*, 2012 WL 28071, 4 -6 (D.Kan.).

a. **Exception**: Objections regarding speculation should be raised if it is a curable foundational objection – that is, by asking for more information, the questioner can lay the foundation that the sought information is not speculative. *Rosary-Take One v. New Line Distribution, Inc.*, 1996 WL 79328, 2 (S.D.N.Y.).

b. **Objections Regarding Speculation May Boomerang**: You best not object to a question as calling for speculation regarding a fact you need to prove: *See In re Motions to Certify Classes*, 715 F.Supp.2d 1265, 1279 (S.D.Fla. 2010)(objection that deposition question was speculative was "ironic" because "the nature of the plaintiff's attorney's objection, further supports the notion that damages cannot be calculated on a class-wide basis."). *See also Hower v. Wal-Mart Stores, Inc.*, 2009 WL 1688474, 7 (E.D.Pa.)(objection that question called for speculation used against objecting counsel to show that no one had the information).

4. **Objection As To Cumulative**: If the foundation of the objection is in the cumulative nature of the evidence, then objection need not be raised during the deposition as it is preserved. *Couch v. Wal-Mart Stores, Inc.*, 1999 WL 623454, 2 (7th Cir.)

5. **Objection As To Personal Knowledge**: Lack of personal knowledge is an objection to a deponent's competence, and defending attorney does not waive this objection by failing to make it at the deposition. *Consolidated Rail Corp. v. Grand Trunk Western R. Co.*, 2011 WL 6004291, 7 (E.D.Mich.).

6. **Questions Calling For Expert Testimony**: The objection that the question calls for an opinion from an unqualified witness is foundational and typically need not be raised deposition. *See contra, Boyd v. Univ. of Maryland Med. Sys.*, 173 F.R.D. 143, 147 n. 8 (D.Md. 1997), which suggests this objection must be raised or have it waived. This is problematic - if a question calls for expert testimony, there is no cure for the question – either the witness is an expert or is not.

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7. **<u>Objection As To Assuming Facts Not In Evidence</u>**: This is generally an unnecessary and improper objection. FRCP 32. The fact that a response to a question may not be supported by adequate foundation at the deposition does not mean a foundation may not be made at trial, through evidence outside of the deposition, for the admission of the response as evidence. *Cincinnati Ins. Co. v. Serrano*, 2012 WL 28071, 4 -6 (D.Kan.).

8. **<u>Objection As To Hearsay</u>**: Objections to questions calling for hearsay are not waived "unless the ground of the objection is one which might have been obviated or removed if presented at that time." *Gray v. Bruneau-Grand View School*, 2007 WL 3333273, 2 (D.Idaho)(*citing* Rule 32(d)(3)(A)). Generally, hearsay is present because of the nature of the witness (party or not), the contents of the out-of-court statement, and the purpose for which it is to be offered at trial. Accordingly, hearsay is generally not curable in the deposition, and need not be raised.

C. **<u>Objections Regarding Privilege</u>**: It is always proper for counsel to raise objections to questions that may call for privileged information, either based upon the common law or statutory privilege. *See* FRE 501, 502. Indeed, counsel must raise privilege objections or waive those objections. These objections may be accompanied by an instruction to the witness not to provide privileged information when answering the question. Counsel may also object to the use of privileged documents during the deposition.

V. **<u>Objections To Answers In A Deposition</u>**: Errors or irregularities in the form of answers which might be obviated during the deposition if promptly presented are waived absent timely objections. *Kirschner v. Broadhead*, 671 F.2d 1034 (7th Cir. 1982)(*citing Oberlin v. Marlin American Corp.*, 596 F.2d 1322, 1328 (7th Cir. 1979)).

A. **<u>Objection To Non Responsive Answer</u>**: Counsel must object to non-responsive answers to ensure they may be excluded: *In re Yasmin*, 2011 WL 6888480 (S.D.Ill.).

B. **<u>Statements For The Record</u>**: Statements by the witness, offered "for the record" are objectionable. Counsel should raise any objections regarding statements for the record at the time as argumentative and non responsive. Failure to object may waive the objections.

VI. **<u>Making Objections In A Deposition</u>**: Counsel for a deponent has a limited, though not unimportant, role to play during a deposition. *Luangisa v. Interface Operations*, 2011 WL 6029880 (D.Nev.). "An objection must be stated concisely in a nonargumentative and nonsuggestive manner." *Abu Dhabi v. Morgan Stanley*, 2011 WL 4526141, 7 (S.D.N.Y.) (*citing* FRCP 30(c)(2)). It is improper for objecting counsel to elaborate on the objection unless invited to do so by calling counsel. *Phillips v. Manufacturers Hanover Trust*, 1994 WL 116078, 3-4 (S.D.N.Y.). "Counsel's statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more." *Damaj v. Farmers*, 164 F.R.D. 559, 561 (N.D.Okla. 1995). All objections can be made in three words or less. *Turkes-Beckers v. New Castle*, 158 F.R.D. 573, 574 (D.Del. 1993). Indeed, most objections as to form can be made in two words: "objection, form." *See id.*

A. **<u>"Objection To Form" Is Sufficient</u>**: A lawyer making an objection must state the "specific ground of the objection, if the specific ground was not apparent from the context." FRE 103. Where counsel objects to a question's form and then instructs the deponent to answer there is no obligation to further explain the objection. *LeClair v. Napoli Group, LLC*, 2011 WL 2517228 (D.Vt.). "'Objection to form' should be sufficient explanation to notify the interrogator of the ground for the objection, and thereby allow revision of the question." *Applied Telematics v. Sprint Corp.*, 1995 U.S. Dist. LEXIS 2191, 4 (E.D.Pa.).

1. **<u>Form Objection May Briefly Specify Basis</u>**: An objection may briefly specify the nature of the form objection (*e.g.* "compound," "leading," "assumes facts not in evidence") without crossing the "concision" line. *See Cincinnati Ins. Co. v. Serrano*, 2012 WL 28071, 4 -6 (D.Kan.). If stating that, for example, the objection is vague, may clue in the witness then, a simple objection to form should be used. *Id.*

B. **<u>Speaking Objections Not Tolerated</u>**: "Speaking objections and coaching objections are simply not permitted in depositions in federal cases." *McDonough v. Kiniston*, 188 F.R.D. 22, 24 (D.N.H. 1998). Counsel "should not make 'speaking' objections unless the party conducting the deposition seeks the basis for an objection." *Flaherty v. Filardi*, 2007 WL 2398762, 4 (S.D.N.Y.). Objections that result in an incomplete answer or in the witness's adoption of counsel's statement are suggestive. *See Plaisted v. Geisinger Medical Center*, 210 F.R.D. 527, 534 (M.D.Pa. 2002).

C. **<u>Excessive Objections Not Tolerated</u>**: Making an excessive number of unnecessary objections may be improper, even if each individual objection is innocuous. *Medline v. Lizzo*, 2009 WL 3242299 (N.D.Ill.)(*citing* FRCP 30(d)(3) Advisory Note (1993)). "That is not to suggest that objections on the grounds of relevance will, in every case, be improper; but approximately 250 of these relevance objections cannot hide from impropriety." *Id. Contra Synventive Molding v. Husky Injection*, 262 F.R.D. 365 (D.Vt. 2009)(objections on 248 of 350 page transcript not enough to order second deposition or sanctions).

D. **<u>Interruptions - Conduct Should Simulate Trial</u>**: If an action or statement would not be allowed in the courtroom during a trial, it is generally not allowed in deposition. *Ethicon Endo-Surgery v. United States Surgical Corp.*, 160 F.R.D. 98, 99 (S.D.Ohio 1995). Defending counsel may not interrupt the deposition for reasons other than to object or ask for a reasonable break. "The court does not approve of defense counsel interrupting the deposition with statements to the effect that he was not going to 'let' Dr. Duhachek-Stapelman answer 'standard of care' questions." *Shell v. Sudan*, 2010 WL 1418303, 3-4 (D.Neb.). The rules prohibit any interruption which does not assert a necessary objection. Deposition testimony should be that of the deponent, not a version edited or glossed by the deponent's lawyer through coaching or speaking objections. *See e.g., <u>Quantachrome Corp. v. Micromeritics Instrument Corp.</u>*, 189 F.R.D. 697, 700 (S.D. Fla. 1999).

1. **<u>Colloquy</u>**: It is inappropriate for counsel to engage in extensive and unnecessary colloquy or use any opportunity to interrupt and argue with opposing counsel during a deposition. *Luangisa v. Interface Operations*, 2011 WL 6029880 (D.Nev.).

2. **Interpreting Questions**: Counsel is not entitled to assist his witnesses during a deposition. *Calzaturficio v. Fabiano Shoe Co.*, 201 F.R.D. 33, 40 (D.Mass. 2001). Counsel for the witness being deposed is prohibited from acting as an intermediary, interpreting questions, assisting the deponent with formulation of the answers, or deciding which questions should be answered. *Johnson v. Wayne Manor*, 152 F.R.D. 56, 59 (E.D.Pa. 1993); *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D.Pa. 1993). Courts have characterized such conduct as "Rambo litigation tactics" designed to interfere with or prevent the provision of meaningful testimony and disrupt the deposition's orderly flow. *E.g., In re Stratosphere*, 182 F.R.D. 614, 619 (D.Nev. 1998). Although this style might project zealousness, it does not, as required by FRCP 1, promote the "just, speedy, and inexpensive determination." *Luangisa v. Interface Operations*, 2011 WL 6029880 (D.Nev.)

3. **Side Comments To The Witness**: Instructions to a witness that they may answer a question "if they know" or "if they understand the question" are raw, unmitigated coaching, and are never appropriate. *Cincinnati Ins. Co. v. Serrano*, 2012 WL 28071, 4 -6 (D.Kan.). This conduct, if it persists after the deposing attorney requests that it stop, is misconduct and sanctionable. *Id.* The 1993 amendments to the Federal rules were designed to prevent multiple and/or unnecessary objections, statements such as "if you remember," "if you understand." *See Richardson v. Sugg*, 220 F.R.D. 343, 345 (E.D.Ark. 2004).

4. **Defending Attorney's Non-Understanding**: Objections and statements that the defending attorney does not understand a question are inappropriate because whether or not an attorney understands a question is irrelevant, and does not provide a reason for interrupting the deposition. *Hall v. Clifton Precision*, 150 F.R.D. 525, 530 (E.D.Pa. 1993). The witness should make the determination as to whether a question is clear and answer to the best of his ability. *Id.* Comments such as these are facially improper. *See Damaj v. Farmers Ins.*, 164 F.R.D. 559, 560 (N.D.Okl. 1995).

5. **Questions To Calling Attorney**: It is inappropriate to interrogate opposing counsel during the course of a deposition. *Luangisa v. Interface Operations*, 2011 WL 6029880 (D.Nev.). Neither the witness nor counsel shall make any comment or engage deposing counsel in an argument (other than grounds therefore) about the nature of the question or the witness' request for clarification." *Jones v. J.C. Penney's Dept. Stores, Inc.*, 228 F.R.D. 190, 204-05 (W.D.N.Y. 2005).

E. **Witness May Not Raise Objections**: The rules do not permit a deponent to interpose objections himself . *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 191 (E.D.Pa. 2008). A different rule may apply if the witness is self-represented, although – in those cases – the best approach would be for the parties to stipulate that most objections are reserved.

F. **Multiple Attorneys Calling Objections**: It is not uncommon to have multiple attorneys calling objections in a deposition. This may happen when there are multiple plaintiffs or defendants, represented by different counsel. This may also happen during the deposition of a third party when the witness's counsel and the non-noticing party may each call objections. Each party is entitled – indeed required – to protect the record with properly called objections. This only becomes problematic with the "echo objections" where one objection produces a rain of similar objections by the other defenders. This is best handled with a stipulation on the record that an objection – called by any defender – will preserve the objections for everyone in the room, removing the need for all to chime in.

VII. **Instructions Not To Answer**: Deposition testimony is taken subject to objection – that is, that even when an objection is interposed, the witness is compelled to answer. FRCP 30(c)(2). There are only three permitted circumstances in which counsel may properly instruct the witness not to answer a deposition question: (1) "when necessary to preserve a privilege;" (2) "to enforce a limitation on evidence directed by the court;" or (3) to protect a witness from an examination "being conducted in bad faith or in such a manner as unreasonably may annoy, embarrass, or oppress the deponent or party." *Brincko v. Rio Properties*, 2011 WL 6029680, 4 -5 (D.Nev.)(*quoting* FRCP 30(c)(2) & (d)(3)(A)). Other than for these narrow circumstances, an instruction not to answer is improper.

A. **Based On Privilege**: An attorney may instruct the witness not to answer a question if it potentially calls for privileged information. See FRCP 30(c)(2); *Quantachrome v. Micromeritics Instrument*, 189 F.R.D. 697, 700 (S.D. Fla. 1999); *Riddell Sports v. Brooks*, 158 F.R.D. 555, 557 (S.D.N.Y. 1994).

1. **Must Prove Privilege:** The party asserting a privilege as a bar to discovery must provide the basis for the claim. *See Resolution Trust v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995). A mere allegation of privilege is insufficient. *See Peat, Marwick v. West*, 748 F.2d 540, 542 (10th Cir. 1984); *FedEx v. United States*, 2011 WL 2023297, 5 -11 (W.D.Tenn.).

2. **Must Be Correct About Privilege**: The assertion of privilege must be accurate. Vague claims to privacy will not support a refusal to answer a deposition question. *Gober v. City of Leesburg*, 197 F.R.D. 519, 520 (M.D.Fla. 2000)(Refusal to answer deemed improper when based upon a mistaken claim of "financial privilege").

a. **Practice Point**: If counsel has instructed the witness not to answer a question, the calling attorney should confirm with the witness that she won't answer. This may be necessary in a motion to compel.

3. **To Challenge Privilege, A Motion To Compel Is Necessary**: Instructions to a deponent not to answer based upon an asserted privilege are best addressed by a subsequent timely motion to compel. *Perez v. Sphere Drake Ins., Ltd.*, 2003 WL 23198837, 3 (D.Vir. Is.)(*citing Plaisted v. Geisinger Medical Center*, 210 F.R.D. 527, 532-33 (M.D.Pa. 2002). This motion should be filed immediately after the deposition is competed. Some judges, however, prefer to be called during the deposition for such a motion, especially reconvening the deposition is costly. This has the twin salutary effects that it speeds discovery along and it saves trees and attorney time, which are of varying value.

B. **Enforcing A Court Order**: Counsel may instruct a witness not to answer a deposition question if necessary to enforce a court order. *See United States v. Carell*, 2011 WL

487627, 2 (M.D.Tenn.). The defending attorney should expressly identify the order – and instruction in that order – that counsel is seeking to enforce.

C. **Responding To Misconduct**: Attorney misconduct may support an instruction not to answer. A deponent or party may move to terminate or limit a deposition "on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party." *Brincko v. Rio Properties*, 2011 WL 6029680, 4 (D.Nev.)(*quoting* FRCP 30(d)(3)(A)). An attorney's conduct at the deposition may serve as the basis for suspending the deposition and seeking a protective order. *Rangel v. Gonzalez Mascorro*, 274 F.R.D. 585, 591-593 (S.D.Tex. 2011); *Carroll v. The Jaques Admiralty Law Firm*, 110 F.3d 290, 293 (5th Cir. 1997)(abusive behavior by use of threats and profanity at deposition warranted termination of the deposition).

1. **Must Seek Protective Order**: A lawyer may not simply instruct a witness not to answer repetitious, harassing or argumentative deposition questions. FRCP 30(c)(2*);Fondren v. Republic American*, 190 F.R.D. 597, 600 (N.D.Okla. 1999);, *Brincko v. Rio Properties*, 2011 WL 6029680, 4 -5 (D.Nev.). When instructing a witness not to answer because of misconduct, counsel must (1) make a statement for the record, (2) suspend the deposition, and (3) immediately file a motion under FRCP 30(d)(3) for a protective order. *See Layne Christensen v. Bro-Tech*, 2011 WL 6934112, 3 (D.Kan.); *Smith v. Logansport*, 139 F.R.D. 637, 643 (N.D.Ind. 1991).

   a. **Procedure**: For a party to suspend a deposition because it is being done in bad faith, a statement on the record must be made before the suspension. *NDK Crystal, Inc. v. Nipponkoa Ins. Co., Ltd.*, 2011 WL 43093, 3 -4 (N.D.Ill.). If counsel doesn't state – on the record – that he is seeking an order under 30(d) based upon counsel's conduct, the instruction not to answer is improper. *In re Method or Processing Ethanol Byproducts*, 2011 WL 5395336 *5 (S.D.Ind.). After the statement is made on the record, the deponent may suspend the deposition and immediately contact the court or terminate the deposition and file a motion. *Luangisa v. Interface Operations*, 2011 WL 6029880, 11 (D.Nev.).

   b. **Remedies For Misconduct In Deposition**: The court may limit the scope and manner of the questioning in response to misconduct. FRCP 30(d)(3); 26(c).

2. **Expected Attorney Conduct**: "During the taking of a deposition the witness has, in general, the same rights and privileges as would a witness testifying in court at a trial." *Bordelon Marine, Inc. v. Kenny Boy*, 2011 WL 164636, 4 -5 (E.D.La.)(*quoting* 8A Wright, et al, *Federal Practice and Procedure* § 2113 (2d ed. 1994)). "As officers of the court, counsel are expected to conduct themselves in a professional manner during a deposition. . . . it is to be conducted in a manner that simulates the dignified and serious atmosphere of the courtroom." *Ethicon Endo-Surgery v. U.S. Surgical Corp.*, 160 F.R.D. 98, 99 (S.D.Ohio 1995).

4. **Monkey See, Monkey Do**: Opposing counsel's outrageous conduct does not free an attorney from her responsibilities for civility. "Mutual enmity does not excuse the breakdown of decorum." *Redwood v. Dobson*, 476 F.3d 462, 469 (7th Cir. 2007). An

attorney with a righteous objection regarding the other party's vile behavior can undermine her position by mirroring that behavior. Stay calm – make your record.

D. <u>**No Other Basis To Instruct**</u>: Except for the three enumerated reasons (protect privilege, stop misconduct, and enforce a court order), it is improper to instruct a witness not to answer a question. A witness's refusal to answer a question for any other 'reason' is potentially sanctionable. *Lamex Foods v. Audeliz*, 646 F.3d 100, 112 (1st Cir. 2011).

1. <u>**WARNING: Court's Enforce This Rule**</u>: The rule speaks in absolute terms, permitting counsel to instruct the witness not to answer "only" to "preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." *GMAC v. HTFC*, 248 F.R.D. 182, 191 (E.D.Pa. 2008). Most courts interpret this strictly. *Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D.Pa. 1993). "Counsel shall not direct or request a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court." *Id.* Some courts read the rule with flexibility, but this is the minority position. *Prudential-LMI v. Windmere*, 1995 WL 37635, 2 (E.D.Pa.). Some courts "take the view that a deponent need not answer if the objection is that the question is irrelevant, argumentative, or misleading" *Id.* ***Best advice***: don't become a footnote; follow the rule.

E. <u>**Examples Of Improper Instructions Not To Answer**</u>: The history of litigation is littered with the carcasses of those who improperly instruct the witness not to answer the questions:

1. <u>**Relevance Not Proper Basis**</u>: "It is inappropriate to instruct a witness not to answer a question on the basis of relevance." *Resolution Trust v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995); *Medline v. Lizzo*, 2009 WL 3242299, 2 (N.D.Ill.). Even in the face of irrelevant questions, the proper procedure is to answer the questions, noting them for resolution at pretrial or trial, unless the questions are so pervasive that a motion for a protective order is appropriate. *In re Stratosphere*, 182 F.R.D. at 618–19.

2. <u>**Inadmissibility Not Proper Basis**</u>: Admissibility is not the standard for whether information is discoverable in a deposition. Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense. FRCP 26(b)(1). *FedEx v. United States*, 2011 WL 2023297, 5 -11 (W.D.Tenn.)

3. <u>**Speculation Not Proper Basis**</u>: It is improper to instruct a witness not to answer based on the conclusion that any answer would be speculative. *Specht v. Google*, 268 F.R.D. 596, 599 -601 (N.D.Ill. 2010)(Counsel "egregiously violated Rule 30(c)(2)" by instructing witness not to answer a question where answer would be a "guess.").

4. <u>**Prior Settlements**</u>: It is improper to instruct a witness not to answer questions regarding settlement discussions in other cases, even if evidence of those discussions would be inadmissible. *Dairyland v. United States*, 79 Fed.Cl. 709, 721 (2007).

5. <u>**Questions Already Asked And Answered**</u>: It is improper to instruct a witness not to answer based on the fact that the question has been asked and answered. *Provide*

Commerce v. Preferred Commerce, Inc., 2008 WL 360591, 1 (S.D.Fla.); *Goober v. City of Leesburg*, 197 F.R.D. 519, 520 (M.D.Fla. 2000).

6. **Questioning Exceeds 30(B)(6) Notice**: It is improper to instruct a witness not to answer questions beyond the scope of a 30(b)(6) notice. *ZCT v. FlightSafety*, 2010 WL 1257824; *Paparelli v. Prudential*, 108 F.R.D. 727, 730 (D.Mass. 1985); *Provide Commerce v. Preferred Commerce*, 2008 WL 360591, 1 (S.D.Fla.).

7. **While Motion For Protective Order Is Pending**: Even if a party has filed a motion for a protective order, if the court has not yet ruled on that motion, the party cannot refuse to answer deposition questions in the anticipation that it will obtain the requested order. *Goober v. City of Leesburg*, 197 F.R.D. 519, 520 (M.D.Fla. 2000).

8. **Witness May Not Unilaterally Refuse To Answer**: The rules do not permit a deponent to refuse unilaterally to answer questions. *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 191 (E.D.Pa. 2008).

VIII. **Practice Pointers Regarding Calling Objections At Deposition**: Every question is potentially objectionable. Counsel must show restraint in raising objections. Counsel should first consider how the deposition will be used. A deposition's three primary litigative uses are in a summary judgment motion, as testimony to replace an absentee witness, and to impeach a testifying witness. By objecting, counsel (1) encourages the attorney calling the deposition to correct the question so that it is not objectionable, and (2) preserves her right to argue the objection should the opposing side seek to place the responding testimony before the court. If an attorney is unlikely to win a "vagueness" argument before the court, then making such an argument at deposition gets him nothing. Thus, counsel should consider the merits of the possible objection. This may be witness dependent. An experienced expert can typically be counted on to pick up on whether a question is confusing, whereas the 75-year-old pensioner may not.

A. **There Are Two Types Of Objections That Should Be Routinely Stated**:

1. ***Questions with loaded predicates***: Some questions load assumptions into the predicate, and must be preserved for challenge at trial. For example, "You and Joe were friends for years, when did you first meet?" The witness thinks she is answering a question about when they met, but later may be taken to have agreed that she and Joe were friends for years. These are questions that are inherently tricky and need to be consistently preserved with an objection to form (confusing, compound, and misleading, if asked to specify). What you *don't* do, is then launch into a speaking objection about why the question is confusing (unless opposing counsel asks). Often, these types of questions will reference (or misquote) earlier testimony: For example, a witness testifies early in a deposition that she thinks the car was a Toyota, either blue or green; later, the witness faces this question: "You said this morning the car was a blue Toyota, what shade of blue?" Objection should be made that the question misstates earlier testimony.

2. ***Questions that are actually ambiguous***: Attorneys may ask questions that are ambiguous regarding material facts. *Example*: a tort case may revolve around a number

of injuries; a question such as "how does that injury affect your movement," must raise a form objection because the witness may actually be responding to the wrong question.

B. Practice Point Regarding Speaking Objections: Although it is unnecessary and improper to issue speaking objections, the reality is that many practitioners offer long, often elaborate statements of objection during depositions, or interrupt with comments such as "if you know." It is impossible to police this completely. This raises the question: when is it worth challenging opposing counsel regarding the nature of his objections? This is a results oriented test: are the attorney's comments interfering with the deposition either by coaching the deponent, distracting the calling attorney, or wasting time.

1. **A Deposition Machine**: If an attorney's conduct is not substantively affecting the proceedings, the conduct is best ignored. Efforts to police the rules are themselves distracting, and expend capital with the court, and thus not worth pursuing if opposing counsel's conduct is in effect harmless. Generally, the person calling the deposition should be focused on the witness, making every effort to tune out counsel's conduct.

2. **Addressing Speaking Objections**: When addressing the defending counsel's conduct during a deposition, there are two basic guideposts to keep in mind: (1) unnecessary conversations with counsel on the record are distracting and waste time, and (2) do not escalate the problem any further than necessary.

   a. **Conversations With Counsel**: Counsel calling the deposition should avoid any conversation or colloquy on the record. Arguing with or threatening counsel is unprofessional, and efforts to convince counsel are fruitless. When it becomes necessary to address or challenge counsel's conduct, comments should be made to the record and should not invite response.
   -*Proper*: "I will draw counsel's attention to the fact that speaking objections or other unnecessary comments during the deposition are prohibited by FRCP 30(d)(1) and all relevant caselaw."
   -*Less so*: "Do you know the rules? You shouldn't make speaking objections, jerk."

   b. **Move On**: After making your record on the point, do not expect capitulation by opposing counsel. Typically, he will make some comment, often demonstrating (1) his failure to understand the rules of procedure and decorum, and (2) a general lack of wit. The calling attorney should make every effort to ignore the response and resume the deposition, with the understanding that further interference will draw escalation (see below).

3. **Limited Escalation**: Without being anyone's patsy, counsel should always be the most reasonable person in the room. If the dispute continues, the court will review the transcript. Accordingly, the calling attorney must never escalate a conflict any further than necessary. Natural escalation points are:

   a) Ignore all non-interfering conduct;

b) Make a short statement on the record that speaking objections are not permitted, citing FRCP 30(d)(1). Even if opposing counsel says he will do what he wants, ignore him and return to the deposition;

c) Should counsel continue to use interfering speaking objections, ask the court reporter to mark the places where these occur; this will allow for easy identification should you wish to call the court;

d) After 2 or 3 more incidents of clear interfering conduct, make another statement for the record that speaking objections are not permitted. State that counsel's comments are interfering with the deposition and that if he continues either (1) you will not close the deposition at the end of the day, and consider seeking an order to require counsel to comply with FRCP 30(d)(1); (2) call the court; or (3) adjourn the deposition until the court can be reached.

B. Court Involvement: If counsel's conduct is akin to a misdemeanor, the best course is to complete as much of the deposition as possible, with the hope of returning to the deposition later with a court order. This way, if the court denies the order the party will at least have the deposition completed. If the defending attorney's conduct is more egregious, the decision to adjourn the deposition or call the court is judge and district dependent, and should only be made when the transcript fully supports the decision to adjourn.

IX. "Standard" Deposition Stipulations: Occasionally attorneys enter into stipulations regarding what objections will be saved for trial. There are no uniform set of standard stipulations. Thus an agreement to "standard stipulations" is vague. Stipulations are not necessary – in their absence the deposition is simply taken "under the Federal Rules of Civil Procedure."

A. Preserving Objections: To preserve all objections until trial, the attorneys should put the following stipulation onto the record before questioning begins:

The parties agree that all objections, including those to the form of the question and other objections that might have been obviated or removed during the course of the deposition are preserved and not waived by failure to make them before or during the deposition, notwithstanding the provisions of Rule 32(d) that would apply in the absence of this stipulation.

B. Preserving Some Objections: To preserve all objections until trial, except for those as to form, counsel should put the following stipulation onto the record before questioning begins:

The parties agree that all objections that might have been obviated or removed during the course of the deposition with the sole exception of objections to the form of a question, are preserved and not waived by failure to make them before or during the deposition, notwithstanding the provisions of Rule 32(d) that would apply in the absence of this stipulation.

C. Practice Point: Under the FRCP, objections as to form and other correctable objections must be raised during the deposition or they are waived. This rule provides the person calling the deposition with the opportunity to cure the question, either by rewording it or by laying the proper foundation, after an objection has been raised. Although it may seem attractive to the calling attorney to have opposing counsel sit quietly and not disturb his train of thought, stipulating to preserve objections places the caller at a significant disadvantage. Not only does he deprive himself of the objection - and the opportunity to cure - but he allows opposing counsel to spend an unlimited amount of time devising objections to the questions as posed. Conversely, if a defending attorney stipulates to preserve objections, she has essentially dealt herself out of the deposition altogether, and may have trouble staying engaged and alert when unpreserved issues of privilege arise. Generally, it is best to perform the deposition under the rules as stated in the FRCP.

Notes:

Notes:

Poise At The Deposition Table

The attorney calling a deposition has precious few tools to control the witness. These include the questions ask, the deposition's organization, and the poise with which the deposition is conducted. Deposition poise has the following trademarks:

- Sitting up straight, leaning slightly toward the witness.
- Engaging the deposition table as if it wereyour desk back in your office – you need not overwhelm it, but you can't hide behind it. Your hands and (sometimes) forearms should be comfortably perched on the table. If it becomes necessary to bear down on the witness, roll the chair forward so that your elbows rest on the table.
- Locking in with eye contact as each question is asked and answered.
- Treating everyone in the room with respect; if you need to make a point, do it by dropping your voice to a whisper, rather than raising to a shout.
- Looking relaxed creates authority and control; if you don't feel relaxed – fake it. If your hands are shaking, place them gently on the table top.

[F2] PROTECTIVE ORDERS, MOTIONS TO QUASH & COMPEL

QUICK RULE: *To limit discovery or limit a party's conduct, a party may obtain a protective order by showing "good cause," and that the requested order serves the interests of justice. FRCP 26(c); 30(d)(3). With respect to depositions, the trial court may issue a protective order regarding some or all of the following features:*
(A) forbidding the deposition altogether;
(B) specifying terms, including time and place, for the deposition;
(C) prescribing a discovery method other than a deposition;
(D) forbidding or limiting inquiry into certain matters;
(E) designating who may be present during depositions;
(F) sealing depositions, to be opened only on court order;
(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed in a specified way
Courts may quash or limit a subpoena for roughly the same reasons that the courts may issue a protective order.

DISCUSSION:

I. **General**: Because the rules provide an almost unlimited right to discovery, the FRCP also provide a safeguard to protect parties and witnesses. 8A Wright, et al, *Federal Practice and Procedure*, § 2036, p. 163 (3d ed. 2010). Given the "extensive intrusion into the affairs of both litigants and third parties" that is both permissible and common in discovery, *Seattle Times v. Rhinehart*, 467 U.S. 20, 30 (1984), the rules provide for protective orders, entered "for good cause," to protect litigants and third parties from the discovery's "annoyance, embarrassment, oppression, or undue burden or expense." *Bond v. Utreras*, 585 F.3d 1061, 1067 (7th Cir. 2009); FRCP 26(c)(1) Advisory Notes (1970); *United States v. Columbia Broadcasting System, Inc.*, 666 F.2d 364, 368-369 (9th Cir. 1982).

A. **Protective Orders In Litigation**: A party may obtain discovery regarding any relevant matter which is not privileged. FRCP 26(b)(1); *Heat & Control v. Hester*, 785 F.2d 1017, 1023 (Fed. Cir. 1986). Simply because requested information is discoverable, does not mean that discovery must be had. *Nicholas v. Wyndham*, 373 F.3d 537, 543 -544 (4th Cir. 2004). To overcome this presumption of discoverability, a party may demonstrate that either the content or means of the discovery are objectionable. *See In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 70 (2d Cir. 2003). If such a showing is made, the court will issue a protective order prohibiting or limiting discovery. A party seeking a deposition or asking a question need not demonstrate the request is proper; judges may, however, prevent or limit a proposed deposition when the facts and circumstances create an inappropriate burden or hardship. *Id.*

1. **<u>The Court's Role</u>**: District Courts manage discovery in civil suits by entering protective orders, limiting discovery, as the interests of justice require. *Degen v. United States*, 517 U.S. 820, 826 (1996)(citing FRCP 26(c)). In 2000, the rules were amended "to involve the court more actively in regulating the breadth of sweeping or contentious discovery." *In re Cooper Tire*, 568 F.3d 1180, 1188 -1190 (10th Cir. 2009). Courts have broad discretion in issuing such protective orders. *Seattle Times v. Rhinehart*, 467 U.S. 20, 36 (1984).

II. **<u>Obtaining A Protective Order</u>**: A district court may issue protective orders for good cause to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. *S.E.C. v. Rajaratnam*, 622 F.3d 159, 181-82 (2d Cir. 2010)(*citing* FRCP 26(c)(1)). *See also E.E.O.C. v. Caesars Entertainment,* 237 F.R.D. 428, 432 (D.Nev. 2006). Trial courts must balance the burden of proposed discovery against the likely benefit. *Gill v. Gulfstream Park*, 399 F.3d 391, 400 -401 (1st Cir. 2005)(*citing Farnsworth v. Procter & Gamble*, 758 F.2d 1545, 1547 (11th Cir. 1985)).

A. **<u>Certificate Of Good Faith</u>**: The motion for a protective order must include a certification that the movant conferred or attempted to confer with other parties to resolve the dispute without court action. FRCP 26(c)(1). The court may deny the order if the certification is absent. *Sprague v. S.N.A.*, 2011 WL 1936232, 2 (E.D.Pa.)(Motion denied because movant made no reasonable effort to resolve the dispute).

B. **<u>Good Cause</u>**: A party seeking a protective order must show "good cause." *Cipollone v. Liggett Group*, 785 F.2d 1108, 1121 (3d Cir. 1986). Generally, good cause requires the moving party to show that specific prejudice or harm will result if the protective order is denied. *Rivera v. NIBCO*, 384 F.3d 822, 826 (9th Cir. 2004); *Beckman Indus. v. International Ins.*, 966 F.2d 470, 476 (9th Cir. 1992). Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the test. *Frideres v. Schlitz*, 150 F.R.D. 153, 156 (S.D.Iowa 1993)*(citing FRCP 26(c)).*

1. **<u>Fact Based Analysis</u>**: Courts require significant showing before issuing protective orders. *Minter v. Wells Fargo*, 258 F.R.D. 118, 124-25 (D.Md. 2009). Whether good cause exists for a protective order is a factual matter, based on the nature and character of the information sought weighed against the factual issues involved. *United States v. Microsoft*, 165 F.3d 952, 959, 334 (D.C. Cir. 1999)(citing 8 Wright, et al., *Federal Practice & Procedure* § 2036 (2d ed. 2009)).

   a. **<u>Relevance</u>**: A showing that the proposed discovery will not produce relevant material will typically satisfy the "good cause" requirement. *Navel Orange v. Exeter Orange*, 722 F.2d 449 (9th Cir. 1983). The discovery of irrelevant material is always unnecessarily burdensome, as the expected result has no litigative value.

C. **<u>Burden Shifts</u>**: Once the party seeking a protective order has made a prima facie case of why a protective order is warranted, the burden of production shifts to the opposing party to show a need for the discovery such that their burden and expense would not be "undue." *Landry v. Air Line Pilots*, 892 F.2d 1238, 1270 (5th Cir. 1990).

D. **Court Has Discretion When Deciding Motion**: "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly." *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). Accordingly, trial courts have discretion to decide when a protective order is appropriate and what degree of protection is required. *Furlow v. United States*, 55 F.Supp.2d 360, 366 (D.Md. 1999)(*citing Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984)).

1. **Court Must Balance**: The court, in exercising its discretion, must substantively balance the competing interests. *Laxalt v. McClatchy*, 809 F.2d 885, 890 (D.C.Cir.1987). Specifically, courts balance the litigation needs of the requesting party and the protectable interests of the party from whom discovery is sought. *Mitchell v. Fishbein*, 227 F.R.D. 239, 245 (S.D.N.Y. 2005). Courts further balance the conflicting interests between the protection of FRCP 26(c) and the broad mandate of the admissibility of information in discovery conferred by FRCP 26(b)(1). *Brown Bag v. Symantec Corp.*, 960 F.2d 1465, 1472 (9th Cir. 1992); *In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1215-1216 (D.C. Cir. 2004).

2. **Rule Is Flexible**: The rules permitting courts to issue protective orders are flexible, having been designed to accommodate all relevant interests as they arise. *United States v. Microsoft Corp.*, 165 F.3d 952, 959, 334 (D.C. Cir. 1999)(*citing* FRCP 26(c), Advisory Note). "The Rule's incorporation of the concept of 'good cause' implies that a flexible approach to protective orders may be taken, depending upon the nature of the interests sought to be protected and the interests that a protective order would infringe." *Hines v. Wilkinson*, 163 F.R.D. 262, 266 (S.D.Ohio 1995).

3. **Appellate Review**: Appellate courts review limitations on discovery with an abuse of discretion standard. *Sanders v. Shell Oil Co.*, 678 F.2d 614, 618 (5th Cir. 1982). A district court abuses its discretion "when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment." *Gill v. Gulfstream Park*, 399 F.3d 391, 400 -401 (1st Cir. 2005).

III. **Breadth Of Protective Order**: In discovery, a party may seek protective orders limiting (1) the breadth of discovery, (2) the means by which discovery may be sought, or (3) the use to which the results of discovery may be put.

A. **Limits Based Upon Content**: A court may limit discovery – including a deposition's scope – if (a) the discovery is cumulative, (b) the discovery is available from a more convenient or less burdensome source, (c) the party has had ample opportunity to obtain the information, (d) the discovery is unduly burdensome given the case. FRCP 26(b)(2)(c); *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 69 (2nd Cir. 2003).

1. **Cumulative Or Duplicative Discovery**: A district court may limit "the frequency or extent of discovery" if the discovery is unreasonably cumulative or duplicative. *S.E.C. v. Rajaratnam*, 622 F.3d 159, 181-82 (2d Cir. 2010). "A court will generally not limit discovery simply because it may be somewhat cumulative and duplicative.

Rather, the discovery must be unreasonably so in light of the nature of the inquiry, before the court will limit the discovery sought." Moore, *Moores Fed Practice* § 26.60[1] (*citing Travelers Rental v. Ford Motor Co.*, 116 F.R.D. 140, 145 (M.D.N.C. 1989)). Courts may deny discovery when the information sought is "unreasonably cumulative" even if the information already obtained is not in the form most desired by the party seeking further discovery. *Spezzaferro v. F.A.A.*, 807 F.2d 169, 172 (Fed. Cir. 1986); *Bayer Ag v. Betachem*, 173 F.3d 188, 191 (3rd. Cir. 1999).

2. **Discovery From Another Source**: The court may limit discovery from one source if it is more readily available from another source. *Tower Press v. White*, 165 F.R.D. 73, 75 (N.D. Ohio 1996). For example, a court may quash a discovery request due to a witness's failing health or the overly burdensome nature of the request, particularly where the information is available elsewhere. *Ahrens v. Ford Motor*, 340 F.3d 1142, 1147 (10th Cir. 2003); *Micro Motion v. Kane Steel Co.*, 894 F.2d 1318, 1323 (Fed. Cir. 1990). Still, "The fact that the information sought might already be in the possession of the requesting party or obtainable from another source is not a bar to discovery of relevant information." *Moores Fed Practice* § 26.60[2].

   a. **Declaration Is No Substitute**: Deposition testimony cannot be replaced by written declarations, proffered by the witness, describing the witness's knowledge (or lack thereof). *Cavanaugh v. Wainstein*, 2007 WL 1601723, 10 (D.D.C.); *Founding Church of Scientology v. Webster*, 802 F.2d 1448, 1451 (D.C.Cir.1986) ("Depositions . . . rank high in the hierarchy of pretrial, truth-finding mechanisms."). Relying upon declarations would eschew the opportunity for opposing counsel to probe the veracity and contours of the statements and denies the opportunity to ask probative follow-up questions. *Flanagan v. Wyndham Intern. Inc.*, 231 F.R.D. 98, 104 -105 (D.D.C. 2005) (*citing Alexander v. F.B.I.*, 186 F.R.D. 113, 121 (D.D.C. 1998). Deposition testimony "permits examination and cross-examination of a live witness by counsel, where there is no opportunity to reflect and carefully shape the information given." *Id.*

3. **Prior Ample Opportunity**: If the party seeking discovery has already had a reasonable chance to get the information, the court may limit discovery. *Nicholas v. Wyndham Intern., Inc.*, 373 F.3d 537, 543 -544 (4th Cir. 2004)(affirming denial of deposition when "the amount of discovery that had already been completed in this lawsuit was 'excessive."). This basis is especially appropriate when a party has failed to make good use of the discovery already completed, by failing to ask the important questions or show the significant documents at the already-completed depositions.

   a. **Court Will Consider Type Of Discovery**: When considering prior discovery, courts will review which witnesses or parties are bound by the completed discovery. Discovery from individuals about a subject generally is not an "ample opportunity" such that an employer would be entitled to a protective order about the same subject. *Catt v. Affirmative Ins. Co.*, 2009 WL 1228605, 12 (N.D.Ind.). Although one party waited until the end of discovery to notice depositions, court refused a protective order, because that party was waiting for other depositions to be completed. *Carter v. Luminant Power*, 2011 WL 3648102, 1 (N.D.Tex.).

b. **Relating To Additional Discovery**: Court's often cite the rule regarding "ample discovery" when refusing (a) a request to expand discovery, (b) to permit a witness to be deposed for a second time, (c) to provide more time on an existing deposition, or (d) to allow discovery after a set cut off. *State Farm Mutual v. New Horizont, Inc.*, 254 F.R.D. 227, 236 (E.D.Pa. 2008); *Johnson v. Big Lots Stores, Inc.*, 253 F.R.D. 381, 394 (E.D.La. 2008). In those circumstances, where leave of the court is necessary for the discovery to take place, a protective order is technically not necessary, as the court may simply deny the request for cause.

4. **Unduly Burdensome**: Even if relevant, courts may deny discovery where no need is shown; compliance would be unduly burdensome; or where harm to the person from whom discovery is sought outweighs the need of the person seeking the information. *Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2*, 197 F.3d 922, 925 (8th Cir. 1999). Courts may limit discovery if the burden of the proposed discovery "outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." *Bowers v. Mortgage Electronic,* 2011 WL 6013092, 3-7 (D.Kan.); *In re Cooper Tire*, 568 F.3d 1180, 1188-90 (10th Cir. 2009); FRCP 26(b)(2)(C).

a. **Showing Undue Burden**: To show undue burden, the party seeking a protective order "must show a 'clearly defined and serious injury.'" *City of St. Petersburg v. Total Containment*, 2008 WL 1995298, at *2 (E.D.Pa.)(*quoting Transcor v. Furney Charters*, 212 F.R.D. 588, 592-93 (D.Kan. 2003)). A mere showing that the discovery may involve inconvenience or expense does not establish good cause. *Turner Broadcasting v. Tracinda*, 175 F.R.D. 554, 556 (D.Nev. 1997).

b. **Examples**: A 30(b)(6) deposition with numerous overly-broad and unnecessary topics may be blocked by a protective order to prevent undue expense. *Bowers v. Mortgage Electronic*, 2011 WL 6013092, 3 -7 (D.Kan.). In *Johnson v. Geico Cas. Co.*, 269 F.R.D. 406, 415–16 (D.Del. 2010), the court granted - in part - a protective order as to a 30(b)(6) deposition notice based upon the fact that Geico previously "produced thousands of documents" and the plaintiff had "already deposed witnesses" with respect to the particular topic, finding that plaintiff's 30(b)(6) notice was "duplicative and unduly burdensome."

5. **Prohibiting A Deposition Disfavored**: As a general rule, courts will not grant protective orders that prohibit the taking of deposition testimony. *E.E.O.C. v. Caesars Entertainment*, 237 F.R.D. 428, 432 (D.Nev. 2006); *Medlin v. Andrew*, 113 F.R.D. 650 (M.D.N.C. 1987); *Salter v. Upjohn*, 593 F.2d 649 (5th Cir. 1979); 8 Wright et al, *Federal Practice and Procedure*, § 2037 (1986 Supp.). Because courts regard unfavorably motions to block depositions, it is difficult to persuade a court to do so. *Minter v. Wells Fargo*, 258 F.R.D. 118, 124 -128 (D.Md. 2009); *Static Control v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001). A party seeking to prevent a deposition carries a heavy burden to show why discovery should be denied. *Afinity Labs v. Apple*, 2011 WL 1753982, at *15 (N.D.Cal.); *Groupion, LLC v. Groupon, Inc.*, 2012 WL 359699, 2 (N.D.Cal.).

a. **<u>Blocking A Deposition</u>**: A court may issue a protective order preventing a deposition that does not appear reasonably calculated to lead to the discovery of admissible evidence. *Braga v. Hodgson*, 605 F.3d 58, 60 (1st Cir. 2010).

b. **<u>Lack Of Knowledge Not Sufficient</u>**: A claimed lack of knowledge on behalf of the deponent does not alone provide sufficient grounds for a protective order. *Digital Equip. v. Sys. Indus.*, 108 F.R.D. 742, 744 (D. Mass. 1986); *Travelers Rental v. Ford*, 116 F.R.D. 140, 143 (D. Mass. 1987). A witness's bare claim that he knows nothing of relevance is not enough to establish an undue burden or to show some other exceptional circumstance that would justify prohibiting the deposition altogether. *CSC Holdings v. Redisi*, 309 F.3d 988, 993 (7th Cir. 2002) (*citing Kaiser v. Mutual Life*, 161 F.R.D. 378, 380 (S.D.Ind. 1994).

c. **<u>Declarations</u>**: A declaration claiming ignorance cannot forestall a deposition. *Amherst v. Emhart*, 65 F.R.D. 121 (D.Conn. 1974). "If the 'good cause' requirement could be thus simply met by an *ex parte* affidavit that the affiant had no relevant knowledge of the subject matter of the action the salutary purpose of Rule 26, providing for unlimited discovery would be easily and unjustifiably frustrated." *Parkhurst v. Kling*, 266 F.Supp. 780, 781 (E.D.Pa. 1967).

6. **<u>Protective Order v. Privilege Claims</u>**: If the information sought in discovery is protected by an evidentiary privilege and in the possession of the party asserting the privilege, that party need not obtain a protective order, but can simply withhold production on claim of privilege. *Pearson v. Miller*, 211 F.3d 57, 65 (3rd Cir. 2000). Thus, in a deposition, a witness may properly refuse to answer a question based upon a privilege claim, without seeking a protective order. FRCP 30(c)(2). The questioner then has the burden of pursuing a motion to compel, should one be warranted.

B. **<u>Protective Order Limiting Conduct In A Deposition</u>**: At any time during a deposition, the deponent or a party may move to terminate or limit the deposition if it is being conducted in bad faith, or in a manner that unreasonably annoys, embarrasses, or oppresses the witness. FRCP 30(d)(3)(B). The burden of proving such conduct lies with the objecting deponent. *Rivera v. Berg Elec.*, 2010 WL 3002000, 2 (D.Nev.)(*citing* 7-30 Stempel, *Moore's Federal Practice-Civil* § 30.51 (2009)). When discovery is conducted in bad faith, the court may terminate the discovery or limit its scope. *McClelland v. Blazin Wings*, 675 F.Supp.2d 1074, 1081 (D.Colo. 2009).

1. **<u>Nature Of Embarrassment</u>**: It is not the embarrassment or annoyance caused by unfavorable answer, but the manner in which the questioning is conducted that is the basis for refusing to proceed, followed by the required motion to seek relief. *Rivera*, 2010 WL 3002000, 2; *In re Stratosphere*, 182 F.R.D. 614, 619 (D.Nev. 1998).

2. **<u>Relevance Typically Not Proper Basis For Protective Order</u>**: The relevance of deposition questions "is an improper ground for a motion under Rule 30(d)(3)." *Medline v. Lizzo*, 2009 WL 3242299, at *2 (N.D.Ill.); *Int'l Union of Elec., Radio and Mack Workers v. Westinghouse*, 91 F.R.D. 277, 279 (D.D.C. 1981). The mere fact that more than one, or even that a series of irrelevant questions is asked does not, by

itself, constitute the annoyance or oppression contemplated by (30)(d)(3). *Rivera*, 2010 WL 3002000, 2 (D.Nev). A party that instructs a witness not to testify, because that party plans to seek a protective order, cannot rely on relevance as the basis for its contemplated motion. *NDK v. Nipponkoa*, 2011 WL 43093, 3 (N.D.Ill.).

a. **Beyond Possible Relevance**: The rules provide a deponent with a remedy in the case of persistent, pervasive irrelevant questioning. *Luangisa v. Interface Operations*, 2011 WL 6029880, 11 (D.Nev.). Where counsel's questions go "beyond the realm of possible relevance," they may be construed as abusive. *Youngblood v. City of Paducah*, 2011 WL 6749024, 2 (W.D.Ky.)(*quoting Rangel v. Gonzalez*, 274 F.R.D. 585, 590–91 (S.D.Tex. 2011)). Questions beyond all relevancy may support a protective order, as queries so disconnected from the matter at hand are only offered to annoy, embarrass, or oppress a deponent. *Id.*

b. **Unnecessarily Seeking Private Information**: For questions concerning private matters that ordinarily enjoy a measure of protection, such as the deponent's compensation and net worth, courts may require some demonstration of relevance before disclosure is required. *Dent v. U.S. Tennis Ass'n*, 2010 WL 1286391, 1 (E.D.N.Y.). Questions about these matters tend to be annoying and embarrassing, and in the absence of relevance, may be unreasonably so. *Id.* When a witness was asked "are you involved in any type of homosexual clique with any other defendants in this action?" the Seventh Circuit explained that the witness "would have been entitled to stalk out of the room. [His counsel] justifiably could have called off the deposition and applied for a protective order (plus sanctions)." *Redwood v. Dobson*, 476 F.3d 462, 468 (7th Cir. 2007).

C. **Protective Order Limiting Use**: Courts may issue protective orders limiting the use or disclosure of materials produced in discovery. *National Academy v. On Point*, 256 F.R.D. 678, 683 (C.D.Cal. 2009). Even where an evidentiary "privilege is not available, a party may petition the court for a protective order that limits discovery." *Pearson v. Miller*, 211 F.3d 57, 65 (3rd Cir. 2000)(*citing* FRCP 26(c)). Such an order might restrict use of discovery materials to the plaintiffs, their representatives, their counsel, and their experts or consultants. *Scott v. Monsanto Co.*, 868 F.2d 786, 792 (5th Cir. 1989).

1. **Trade Secrets**: "[T]here is no absolute privilege for trade secrets and similar confidential information." *Centurion v. Warren*, 665 F.2d 323, 325 (10th Cir. 1981); *Heat and Control v. Hester*, 785 F.2d 1017, 1025 (Fed. Cir. 1986). The courts do not give trade secrets automatic and complete immunity against disclosure, but, instead, weigh their claim to secrecy against the need for disclosure. *F.O.M.C. v. Merrill*, 443 U.S. 340, 362 (1979). Frequently, they have been afforded a limited protection. *Id.*

a. **Protective Order Available**: A protective order may be issued to limit the disclosure of trade secrets. *In re Cooper Tire*, 568 F.3d 1180, 1188 -1190 (10th Cir. 2009). Upon a showing of "good cause," the courts will ensure that discovery of secret or confidential information is only permitted when necessary, and that the party obtaining protected discovery limit its disbursement. FRCP 26(c)(1)(G); *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1357 (Fed. Cir. 2011).

b. **Step 1: Establish Information Is Secret Or Confidential**: To resist discovery, a person must first establish that the information sought is a trade secret and then demonstrate that its disclosure might be harmful. FRCP 26(c)(1)(G); *National Academy*, 256 F.R.D. at 683. When a party seeks such a protective order, it "must first establish that the information sought is a trade secret and then demonstrate that its disclosure might be harmful." *In re Cooper Tire*, 568 F.3d at 1188-90.

   i. **Information Kept Confidential**: The person opposing discovery must demonstrate that it he has taken reasonable steps to assure the confidentiality of this information and to prevent its disclosure to third parties. *Hill v. Eddie Bauer*, 242 F.R.D. 556, 561-62 (C.D.Cal. 2007). Conclusory arguments cannot establish that material contains trade secrets and merits confidential status and protection. *Creative Gifts v. UFO*, 183 F.R.D. 568, 571 (D.N.M. 1998). *See DIRECTV v. Puccinelli*, 224 F.R.D. 677, 690 (D.Kan. 2004)(rejecting objection to discovery request when party had not established (1) documents contained confidential information, and (2) disclosure would injury party or any other entity).

d. **Step 2: Burden Of Production Shifts**: If a target of discovery establishes that the information sought is protectable, the party seeking discovery must establish that the disclosure of trade secrets is relevant and necessary to the action. *Upjohn v. Hygieia*, 151 F.R.D. 355, 358 (E.D.Cal. 1993)(*citing Coca–Cola Bottling v. Coca–Cola*, 107 F.R.D. 288, 292 (D.Del. 1985)). If the party seeking discovery cannot prove that the information is relevant and necessary, then discovery should be denied. *Id.*

e. **Step 3: Balancing**: The court must balance the need for the trade secrets against the claim of injury resulting from disclosure. *In re Cooper Tire*, 568 F.3d at 1188-90. "It is within the sound discretion of the trial court to decide whether trade secrets are relevant and whether the need outweighs the harm of disclosure." *Id.* If the relevancy and need are shown, "the trade secrets should be disclosed, unless they are privileged or the subpoenas are unreasonable, oppressive, annoying, or embarrassing." *Centurion*, 665 F.2d at 325.

2. **Materials Submitted To The Court**: Documents submitted to a court are judicial documents to which a presumption of immediate public access attaches under both the common law and the First Amendment. *Lugosch v. Pyramid*, 435 F.3d 110, 126 (2d Cir. 2006). The First Amendment presumption gives rise to a higher burden on the party seeking to prevent disclosure; it can be overcome only by specific, on-the-record findings that higher values necessitate a narrowly tailored sealing. *Id.; In re Coordinated Pretrial Proceedings*, 101 F.R.D. 34, 38 (C.D. Cal. 1984)

3. **Private Information**: The court may fashion limits that allows relevant material to be discovered, while preventing unnecessary intrusions into the legitimate interests - including privacy and other confidentiality interests - that might be harmed by the release of the material sought. *Pearson v. Miller*, 211 F.3d 57, 65 (3rd Cir. 2000). Although the rules do not expressly reference privacy rights, such matters are implicit in the court's broad authority to issue protective orders. *In re Sealed Case*, 381 F.3d 1205, 1215-1216 (D.C. Cir. 2004)(*citing Seattle Times Co. v. Rhinehart*,

467 U.S. 20, 35 n. 21 (1984)). In exercising their discretion, courts have "recognized that interests in privacy may call for a measure of extra protection," even where the information sought is not privileged. *Id.* (*citing* FRCP 26(b) Advisory Notes (1970)).

a. **Privacy May Be Waived By Claim**: When a plaintiff files a lawsuit seeking damages for claimed personal injuries, he may waive certain privileges or privacy rights with respect to information concerning those injuries. *Thomas v. Four Seasons Nursing Centers*, 206 F.R.D. 294, 296 (N.D.Okla.).

IV. **Third-Party Discovery**: Non-parties may seek protective orders on the same basis as parties. Courts are especially careful in protecting the third parties from excessive or oppressive discovery. *Pennington v. G.H. Herrmann*, 2010 WL 148242 (S.D. Ind.)(*citing Cusumano v. Microsoft*, 162 F.3d 708, 717 (1st Cir. 1998)); *Haworth v. Herman Miller*, 998 F.2d 975, 978 (Fed. Cir. 1993)(under FRCP 26, a court may require parties to first seek discovery from other parties before burdening nonparties).

A. **Local Courts Issue And Control Subpoenas**: Parties may subpoena a nonparty witness for deposition or for a document production. FRCP 45. Formally speaking, the subpoena is issued from the court for the district where the deposition will be taken or the production will be made. *U.S. ex rel. Pogue v. Diabetes Treatment*, 444 F.3d 462, 468 (6th Cir. 2006) (*citing* FRCP 45(a)(2)(B)-(C)). Any disputes that arise over the subpoena of a nonparty are decided by the court that issued the subpoena. *Id.* (citing FRCP 45(c)(2)(B).

1. **Where Action Is Pending**: Subpoenas are process of the issuing court, and nothing in the rules even hints that any other court may quash or enforce the subpoenas. *In re Sealed Case*, 141 F.3d 337, 341 (D.C. Cir. 1998); *E.E.O.C. v. Original Honeybaked Ham*, 2012 WL 934312, 2 (D.Colo.). The court where the underlying action is pending does not have jurisdiction to rule on objections to deposition subpoenas obtained in another district. *In re Digital*, 949 F.2d 228, 231 (8th Cir. 1991).

2. **Transfer Of Disputes**: There is mixed authority for allowing the court that issued the subpoena to transfer a motion to quash to the court with underlying jurisdiction over the case. *See United States v. Star Scientific*, 205 F.Supp.2d 482, 485 n. 4 (D.Md. 2002). Courts in the Second, Eighth, and Tenth Circuits have supported such transfers, while courts in the Third, Seventh, and D.C. Circuits have found transfer of discovery disputes inappropriate. *Id.; Boy Racer v. Does 1-10*, 2012 WL 469829, 1 (S.D.Ohio).

B. **Motions To Quash (General)**: The court issuing a subpoena has the authority to modify or quash (withdraw) the subpoena. *In re Sealed Case*, 141 F.3d 337, 341 (D.C.Cir. 1998). The party seeking to quash a subpoena bears the burden of proof. *Irons v. Karceski*, 74 F.3d 1262, 1264, (D.C. Cir. 1995); *Northrop v. McDonnell Douglas*, 751 F.2d 395, 403 (D.C.Cir. 1984). A party seeking to quash a subpoena has a particularly heavy burden as contrasted with one who seeks only limited protection. *Howard v. Segway*, 2012 WL 2923230 (N.D. Okla). The rules identify when the issuing court must quash or modify a subpoena and when the issuing court may do so. *Walker v. Blitz*, 2008 WL 5210660 (ND WV).

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1. **<u>Mandatory</u>**: The issuing court must quash or modify a subpoena if it (a) requires the witness to travel more than 100 miles, (b) fails to allow reasonable time for compliance, (c) requires the disclosure of privileged or protected matter, or (d) subjects the witness to undue burden. FRCP45(c)(3)(i) – (ii).

   a. **<u>100-Mile Rule</u>**: Courts must quash or modify a subpoena if it requires a person who is not a party, or a party's officer, to travel more than 100 miles from that person's home, office, or where the witness works. *Cooper Tire v. Farese*, 423 F.3d 446, 452 (5th Cir. 2005); *Memory Bowl v. North Pointe*, 2012 WL 845928, 5 (D.N.J.).

   b. **<u>Privileged Material</u>**: Courts must quash or modify a subpoena that requires disclosure of privileged or other protected matter, if no exception or waiver applies. *Millsaps v. Aluminum Co. of America*, 2012 WL 203458, 2 (E.D.Pa.); FRCP 45(c)(3)(A)(iii).

   c. **<u>Undue Burden</u>**: A deposition subpoena is subject to the general relevancy standard of Rule 26(b). *Williams v. Franklin County*, 2011 WL 6749060, 2 (S.D.Ohio). Even if the information sought is relevant, discovery is not allowed where no need is shown, or where compliance is unduly burdensome, or where the potential harm caused by production outweighs the benefit. *Insulate v. Masco*, 227 F.R.D. 427, 432 (W.D.N.C. 2005); *MacDermid Printing v. E.I. Du Pont*, 2012 WL 734146 (M.D.N.C.). In determining whether a subpoena creates an undue burden, courts weigh the relevance of the requested information against the burden of its production. *EEOC v. Ford*, 26 F.3d 44, 47 (6th Cir. 1994).

2. **<u>Permissive</u>**: The issuing court may modify or quash a subpoena if it (i) requires disclosure of a trade secret or protected commercial information, (ii) requires disclosure of an un-retained expert's opinion or information.

   a. **<u>Trade Secrets</u>**: The issuing court may, on motion, quash or modify a subpoena if it requires disclosing a trade secret or other protected commercial information. *FieldTurf v. Tencate Thiolon*, 2012 WL 844671, 2 (W.D.Tex.)(*citing* FRCP 45(c)(3)(B)(i)).

   b. **<u>Un-Retained Experts</u>**: The rules protect un-retained experts, so that they are not dragged into a dispute through a subpoena. This rule "was designed to protect experts from being required to provide expert advice or assistance without proper compensation." *MedImmune v. PDL Biopharma*, 2010 WL 2794390, * 1. Thus, a party cannot use a subpoena to make an expert analyze the facts in a case, and form a new opinion. *In re Mentor*, 2010 WL 234797 (M.D. Ga.)(*citing* FRCP 45(c)(3)(B)(ii)). Further, an expert cannot be required to provide a previously formulated opinion, when a retained expert could do the same. *Kim v. NuVasive, Inc.*, 2011 WL 3844106 (S.D. Cal.).

      i. **<u>Expert May Be Deposed About Facts</u>**: An expert may be subpoenaed to provide facts or explanation regarding past-performed work. *Linsday v. C.R.*

Bard, Inc., 2011 WL 240104 (M.D.)(court permitted author to be deposed regarding the factual predicate of an important article, but not his opinions.).

ii. **Alternative To Quashing**: When the rules are permissive regarding modifying or quashing a subpoena, the court may permit an alternative. FRCP 45(c)(3)(B). Specifically, if the serving party shows substantial need, and can ensure that the subpoenaed person will be reasonably compensated, the court may permit the deposition to go forward. *Walker v. Blitz*, 2008 WL 5210660 (N.D.W.V.).

C. **Parties Cannot Challenge Subpoenas**: As a general rule, "a party has no standing to quash a subpoena served upon a third party, except as to privilege." *Vera v. O'Keefe*, 2012 WL 909316, 1 (S.D.Cal.); *Deployment Medicine v. Pipes*, 2011 WL 811579 *2 (S.D.Cal.).

1. **Protecting Privilege**: An adversary to the party seeking information may move to quash a subpoena, provided that the adversary has a personal right or privilege to the information sought. *Price v. Trans Union* 2012 WL 898768, 4 (E.D.Pa.)(citing FRCP 45(c) and 9A Wright et al, *Federal Practice and Procedure* § 2463.1 (3d ed. 2008)).

V. **Protective Orders During Depositions**: Generally, it is improper to terminate or pause a deposition unilaterally. *Ballan v. Upjohn*, 159 F.R.D. 473, 490 (W.D. Mich. 1994). A party or the deponent, however, may suspend the deposition "for the time necessary to make a motion for an order." FRCP 30(d)(3); *Vopak v. Hallett Dock.*, 210 F.R.D. 660, 662 (D.Minn. 2002). If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain a protective order. *Smith v. Stephens*, 2012 WL 899347, 5 (E.D.Mich.)(*quoting* FRCP 30(d)(3)(B).). The movant may choose to stop the deposition entirely for the submission of a written motion, but may face costs if the protective order is not granted. FRCP 37(a)(4)(B); *In re Omeprazole*, 227 F.R.D. 227, 232 (S.D.N.Y. 2005).

A. **Seeking A Protective Order**: In a deposition, if a party or the witness needs a protective order to limit conduct or questioning, counsel may file the motion in the court where the action is pending or where the deposition is being taken. FRCP 26(c)(1); 30(d)(3).

B. **Make The Record**: Before seeking a protective order to terminate or limit a deposition, the defending attorney should object, on the record, to the conduct. *In re Method or Processing Ethanol Byproducts*, 2011 WL 5395336, 5 (S.D.Ind.).

C. **Need for Speed**: Although the rules do not set forth a specific time for filing a motion for protective order or a motion to terminate or limit a deposition, courts demand that such motions must be filed "immediately" or "promptly" after the deposition is suspended. *Ferguson v. North Broward*, 2011 WL 1496771, 1 (S.D.Fla.)(*citing Buckley Towers v. QBE*, 2008 WL 2645680 (S.D. Fla.)). "The time for filing such a motion following a suspension of a deposition is certainly far less than 22 days." *Id. See also American Hanger v. Basis Line*, 105 F.R.D. 173, 175 (D.Mass. 1985); *F.C.C. v. Mizuho Medy*, 257 F.R.D. 679, 681-83 (S.D.Cal. 2009) (FCC erred by not filing immediate motion for protective order, but instead sought to negotiate with adverse party).

D. **Practice Point**: Rather than simply walking out, it is often preferable for counsel to ask for the opposing party's consent to call a magistrate judge in an attempt to resolve the issues. *See American General Life Ins. Co. v. Billard*, 2010 WL 4367052 (N.D.Iowa).

VI. **Motions To Compel:** Courts may compel discovery when a party fails to respond to discovery requests or has provided evasive or incomplete responses. FRCP 37(a)(2)-(3).

A. **Orders Compelling Production**: If a party fails to respond to discovery requests, the opposing party may file a motion to compel production. FRCP 37. Evasive or incomplete disclosures must be treated as a failure to respond. *Enpac v. Lucas*, 2012 WL 2992143 (W.D. Wash.); *E.E.O.C. v. Klockner*, 168 F.R.D. 233, 235 (E.D. Wis. 1996).

1. **Meet And Confer**: Before the court will consider a motion to compel, the party seeking discovery must have met and conferred with counsel refusing production to try and resolve the dispute. *Brooks v. Motsenbocker*, 2009 WL 414600 (S.D. Cal.).

2. **Initial Burden On Moving Party**: Despite the liberal breath of discovery permitted under the rules, the proponent of a motion to compel discovery bears the initial burden of proving that the information sought is relevant. *United States v. Farley*, 11 F.3d 1385, 1390 (7th Cir. 1993); *West v. Miller*, 2006 WL 2349988 (N.D.Ill.). A request for discovery "'should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action.'" *Id.* (*citing* 8 Wright et al, *Federal Practice and Procedure* § 2008 (1970)).

3. **Burden On Objecting Party**: If the discovery sought is relevant, the burden "rests upon the objecting party to show why a particular discovery request is improper." *Kodish v. Oakbrook Terrace*, 235 F.R.D. 447, 449-50 (N.D.Ill. 2006). The objecting party must show with specificity that the request is improper. *Graham v. Casey's General Stores*, 206 F.R.D. 251, 254 (S.D.Ind. 2002). That burden cannot be met by "a reflexive invocation of the same baseless, often abused litany" that the requested discovery is vague, ambiguous, overly broad, unduly burdensome or that it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. *Burkybile v. Mitsubishi Motors*, 2006 WL 2325506 at *6 (N.D.Ill).

4. **Court's Analysis**: A motion to compel discovery is granted or denied at the court's discretion. *Orange v. Burge*, 2006 WL 2567786 (N.D. Ill. 2006); *Shapo v. Engle*, 2001 WL 629303, at *2 (N.D.Ill.). Courts consider "the totality of the circumstances, weighing the value of material sought against the burden of providing it, and taking into account society's interest in furthering the truth-seeking function in the particular case before the court." *Patterson v. Avery Dennison*, 281 F.3d 676, 681 (7th Cir. 2002). *Cunningham v. Smithkline Beecham*, 255 F.R.D. 474, 478 (N.D. Ind. 2009).

B. **In Depositions**: Orders compelling discovery arise in depositions in two ways: (1) if a witness refuses to attend a properly noticed or subpoenaed deposition, a court may order the witness to attend, *Buyer's Direct v. Belk*, 2012 WL 3278928 (E.D.N.C.), and (2) if the witness has refuses to answer a permitted deposition question, the court may order the witness to answer. *Am. Hangar v. Basic Line*, 105 F.R.D. 173, 174 (D. Mass. 1985).

VII. Deposition Special Cases:

A. **Improper Deposition Notice Or Subpoena**: The recipient of an improper deposition notice or subpoena may not simply to refuse to attend. *Baltimore Line v. Brophy*, 771 F.Supp.2d 531, 548 (D.Md. 2011). After first attempting in good faith to resolve the dispute without court action, the named deponent may: (1) file a motion for a protective order, FRCP 26(c); (2) move to quash, if a subpoena has issued, FRCP 45(c)(3); or (3) move to terminate or limit the deposition, see FRCP 30(d)(3). *See Mezu v. Morgan State*, 269 F.R.D. 565, 581–85 (D.Md. 2010) (discussing proper resolution of deposition disputes); *Madison v. Harford County*, 268 F.R.D. 563, 565 (D. Md. 2010)(proper response to a premature discovery request is to respond in the form of an objection or to move for a protective order).

1. **Insufficient Notice**: Courts may issue protective orders quashing deposition notices when the notice does not give sufficient time for preparation. *LMD Integrated v. Mercer*, 2011 WL 1456145, 3 (W.D.Wash.)(12-day notice for 30(b)(6) deposition was unduly burdensome for out-of-state defendant; protective order granted.).

2. **Unnecessary Conflict**: When a noticed deposition raises a conflict for defending counsel, and the noticing party is unwilling to negotiate a new date, the court may find the discovery requested unduly burdensome. *Brockway v. Veterans Admin. Healthcare System*, 2011 WL 1459592, 8 (D.Conn.).

B. **Deposition Of Opposing Counsel**: Courts are wary about the burdens to the adversary process when lawyers receive discovery requests; courts resist the idea that lawyers should routinely be subject to broad discovery. *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 70 (2d Cir. 2003)(citing *Hickman v. Taylor*, 329 U.S. 495, 506-14, (1947)). Depositions of attorneys inherently constitute an invitation to harass the attorney and parties, and disrupt and delay the case. *West Peninsular v. Palm Beach*, 132 F.R.D. 301, 302 (S.D.Fla. 1990). Courts are reluctant to allow depositions of an opposing attorney, and have fashioned tests for whether to permit these depositions. *United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 185 (2d Cir. 1991).

1. **Shelton Test**: Under the "Shelton Test," parties seeking to depose opposing trial counsel must show that: (1) no other means exist to obtain the information sought through the deposition than to depose opposing counsel; (2) the information sought is relevant and not privileged; and (3) the information is crucial to the preparation of the case. *Shelton v. American Motors*, 805 F.2d 1323, 1327 (8th Cir. 1986). *See Nationwide v. Home*, 278 F.3d 621, 628 (6th Cir. 2002); *Floyd v. Suntrust Banks*, 2011 WL 2604818, 2 (N.D.Ga.).

a. **Limits On Shelton**: Courts have declined to apply *Shelton* when the proposed deponent is (1) not trial and/or litigation counsel, and (2) when such questioning would not expose litigation strategy in the pending case. *Sterne Kessler v. Eastman Kodak*, 276 F.R.D. 376, 380 (D.D.C. 2011). The Shelton factors did not apply when the deponent attorneys were assigned non-litigation responsibilities, and the proposed deposition would not cover litigation strategies related to the case. *United States v. Philip Morris*, 209 F.R.D. 13, 17 (D.D.C. 2002). The Eighth Circuit itself limited *Shelton*, stating that "[t]he Shelton test was intend[ed] to protect against the ills of deposing opposing counsel in a pending case which could potentially lead to the disclosure of the attorney's litigation strategy." *Pamida v. E.S. Originals*, 281 F.3d 726, 730 (8th Cir. 2002).

2. **"Flexible Approach"**: Some courts reject the *Shelton* test's burden-shifting and, instead, balance the need for the deposition against the corresponding disruption and privilege issues. *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 72 (2nd Cir. 2003).

C. **Apex Witness**: The court has discretion to limit the deposition of high-level executives ("apex" depositions). *Affinity Labs v. Apple*, 2011 WL 1753982, 15 (N.D.Cal.)(Refusing to let plaintiff depose Steve Jobs). "A witness cannot escape examination by claiming that he has no knowledge of any relevant facts... but a different result is sometimes reached when the proposed deponent is a busy government official, or a very high corporate officer unlikely to have personal familiarity with the facts of the case." *Minter v. Wells Fargo*, 258 F.R.D. 118, 124 -128 (D.Md. 2009)(*quoting* 8 Wright, et al, *Federal Practice and Procedure*, § 2037 (2d. 2009)).

1. **Purpose Of The Apex Rule**: Deposition notices directed at officials at the highest level or 'apex' of corporate management create a tremendous potential for abuse. *Celerity v. Ultra Clean Holding*, 2007 WL 205067, at *3 (N.D.Cal.). Where a high-level decision maker, removed from the daily subjects of the litigation, has no unique knowledge of the facts at issue, a deposition of the official is improper. *Baine v. General Motors*, 141 F.R.D. 332, 334 (M.D.Ala. 1991)). This is especially so where the information sought in the deposition can be obtained through less intrusive discovery methods (such as interrogatories) or from depositions of lower-level employees with more direct knowledge of the facts. *Six West Retail v. Sony Theatre*, 203 F.R.D. 98, 102 (S.D.N.Y. 2001) (it "may be appropriate" to preclude redundant depositions of high rank officials where other party officials will also be questioned).

   a. **Know-Nothing Apex Witnesses**: Court's will often protect apex witnesses if they don't have any personal knowledge of the matter. This treatment differs from non-Apex witness. *See Thomas v. Int'l Bus. Machines*, 48 F.3d 478, 483 (10th Cir. 1995)(affirming protective order prohibiting deposition of chairman of defendant's board of directors where he had no personal knowledge of plaintiff's claim and other employees had direct knowledge); *Lewelling v. Farmers*, 879 F.2d 212, 218 (6th Cir. 1989) (protective order affirmed where C.E.O. lacked personal knowledge); *Mulvey v. Chrysler*, 106 F.R.D. 364, 366 (D.R.I. 1985) (prohibiting Lee Iacocca's deposition where he had no personal knowledge).

   b. **Redundant Apex Witnesses** Courts may be inclined to protect busy executives from being subject to depositions where the information sought may be more easily obtained from others. *See Folwell v. Hernandez*, 210 F.R.D. 169 (M.D.N.C. 2002)(a court may appropriately seek to reduce the burden of a deposition on a corporate executive by limiting or precluding it).

2. **Applying The Apex Rule**: Courts have not universally adopted the Apex-witness rule, and when adopted, the approaches have not been uniform. Generally, the rule has the following aspects:

   a. **Step 1 - Must Demonstrate "Apex"**: For the Apex Witness rule to apply, the party opposing the deposition must demonstrate that the witness "is a high level corporate officer at the apex of their organization." *Dobson v. Twin City*, 2011 WL 6179154, 6 (C.D.Cal.). "The Court will not infer that he is an apex witness based solely on his title." *Id.* Simply because a witness is a CEO, does not bring the apex rule into effect – the witness must also keep a busy schedule, such that a deposition would be a significant inconvenience. *Minter v. Wells Fargo*, 258 F.R.D. 118, 124 -128 (D.Md. 2009).

      i. **Government Officials**: The Apex-witness rule is properly applied to "Apex" public officials. A busy official should not be taken away from his work to spend hours or days answering lawyers' questions unless there is a real need. *Olivieri v. Rodriguez*, 122 F.3d 406, 409 -410 (7th Cir. 1997)(*citing Van Arsdale v. Clemo*, 825 F.2d 794, 798 (4th Cir. 1987)).

   b. **Step 2 - No Alternative Method**: The Apex cases can generally be read that once the opposing party demonstrates that their subpoenaed witness is an "Apex" witness, the requesting party must demonstrate that the witness has unique information and that the party has exhausted other approaches to obtain the information. *Abarca v. Merck & Co., Inc.*, 2009 WL 2390583 (E.D.Cal.)("the burden-shifting approach provides guidance to this Court"); *See also DR Systems v. Eastman Kodak*, 2009 WL 2973008, 3 (S.D.Cal.). In *First Nat'l Mortgage v. Fed. Realty*, 2007 WL 4170548, *2 (N.D.Cal. 2007), the court allowed the depositions of high-level executives after depositions of lower-level employees suggested that higher-ups might have at least some relevant personal knowledge. *See Google v. Am. Blind & Wallpaper*, 2006 WL 2578277, *3 (N.D.Cal.2006) (allowing deposition of corporate founder only after learning from 30(b)(6) witnesses that he may have relevant, first-hand information).

   c. **Step 3 - May Depose Executive With Unique Information**: Courts will require corporate presidents or CEOs sit for deposition when those individuals have personal knowledge of facts relevant to a lawsuit. *See Luangisa v. Interface Operations*, 2011 WL 6029880, 13 (D.Nev.). The apex witness's busy schedule will not foreclose otherwise proper discovery. *CBS v. Ahern*, 102 F.R.D. 820, 822 (S.D.N.Y. 1984). Even the claim of the lack of knowledge by a high ranking official is "subject to testing by the examining party." *Six W. Retail v. Sony Theatre*, 203 F.R.D. 98, 102 (S.D.N.Y. 2001)(*quoting Consolidated Rail v. Primary Industries*, 1993 WL 364471, at *1 (S.D.N.Y.)); *In re Bridgestone/ Firestone, Inc.*, 205 F.R.D. 535, 536 (S.D.Ind. 2002) (evidence of "personal knowledge of and involvement in certain relevant matters" supports deposition).

      i. **Steve Jobs Corollary**: "As an apt illustrative example, the Northern District of California recently ordered Steve Jobs, the CEO of Apple Inc. and arguably the apex of all apexes, to sit for deposition. If Steve Jobs must sit for deposition, no CEO is ipso facto immune from deposition in the Court's mind." *In Re National Western Life Ins.*, 2011 WL 1304587, 1 -2 (S.D.Cal.).

3. **Alternative Apex Rule**: Some courts apply a slightly different two-step process: (1) the party seeking discovery needs to establish the relevance of the material sought from the apex executive under FRCP 26(b), *Alliance Industries, Inc. v. Longyear Holding, Inc.*, 2010 WL 4323071, 3-4 (W.D.N.Y.)(*citing Centeno-Bernuy v. Becker Farms*, 219 F.R.D. 59, 61 (W.D.N.Y. 2003); *and Cohen v. City of N.Y.*, 255 F.R.D. 110, 117 (S.D.N.Y. 2008); and (2) if that burden is met, the party opposing disclosure must show good cause for not producing its executive. *Id.*

Notes:

[F3] ATTORNEY / WITNESS CONFERENCES

QUICK RULE: *While a question is pending, neither a witness nor the witness's attorney may interrupt the deposition to confer, unless the conference is needed to determine whether a privilege should be asserted. Courts are split regarding consultations during breaks.*

DISCUSSION:

I. **Deposition Interruptions (General)**: A deponent and his attorney have no absolute right to confer during a deposition, except for the purpose of determining whether a privilege shall be asserted. *United States v. Philip Morris*, 212 F.R.D. 418, 420 (D.D.C. 2002). Questioning at a deposition proceeds as it does at trial. FRCP 30(c). During a civil trial, a witness and his lawyer cannot confer at their pleasure during the witness's testimony. *ZCT v. FlightSafety*, 2010 WL 1257824. The same is true at a deposition. *Plaisted v. Geisinger Medical Center*, 210 F.R.D. 527, 535 (M.D. Penn. 2002).

A. **With Question Pending**: When a question is pending, neither the deponent nor her counsel may interrupt the proceedings to discuss the question, the answer, or any document that is being examined, except to (1) assert a claim of privilege, (2) conform to a court order, or (3) seek a protective order. *In re Stratosphere*, 182 F.R.D. 614, 621 (D. Nev. 1998). An attorney violates FRCP 30 if he leaves the room with a witness while a question is pending. *Ngai v. Old Navy*, 2009 WL 2391282 (D.N.J.).

B. **Rationale For The Rule**: Attorney/witness conferences during the deposition directly conflict with the deposition's fact-finding function, which focuses on what the witness knows, not on what the witness's attorney can do "to mold a legally convenient record." *Beery v. Thomson Consumer Electronics*, 218 F.R.D. 599 (S.D.Ohio 2003).

C. **Exception For Privilege Concerns**: Attorneys may interrupt a deposition – even when a question is pending – when the defending counsel has a genuine concern regarding the possible disclosure of privileged information. *Hall v. Clifton Precision*, 150 F.R.D. 525, 529-30 (E.D.Pa. 1993). Courts recognize an exception where the answer to a pending question could reveal privileged information. *In re Stratosphere*, 182 F.R.D. at 621-22. In such circumstances, a conference is permissible in order to determine whether to assert a privilege. *Hall*, 150 F.R.D. at 529-30.

II. **Discussions During Breaks**: The courts are split as to whether, during a break, an attorney may speak to a client about the substance of his or her testimony. In *Hall v. Clifton Precision*, 150 F.R.D. 525, 529-30 (E.D.Pa. 1993), the court considered whether counsel could communicate during the deposition – including on breaks – and issued a strong prohibition regarding such contact. Since that time, other courts have defined their position on the issue as to whether they reject the *Hall* analysis, whether they adopt it in total, or whether they reach some mid point.

A. **No Discussion During Breaks (Hard Line)**: Counsel and witness are prohibited from engaging in private, off-the-record conferences during any breaks in a deposition, except for the purpose of deciding whether to assert a privilege. *Chassen v. Fidelity Nat.*, 2010 WL 5865977, 1 (D.N.J.)(*Citing Hall*). Attorneys and clients may not discuss the contents of the deposition during breaks or even overnight, if a deposition lasts longer than a day. *Hall*, 150 F.R.D. at 529; *Morales v. Zondo*, 204 F.R.D. 50 (S.D.N.Y. 2001).

B. **No Discussions During Short Breaks (Squishy Line)**: "This general prohibition on attorney/client discussions may extend to communications occurring during breaks, lunch, or even overnight, if a deposition lasts for longer than a day." *United States v. Philip Morris*, 212 F.R.D. 418, 420 (D.D.C. 2002). Such a prohibition is appropriate if there is no interruption and the deposition continues day-to-day. *Id.* There is, however, no absolute prohibition on discussions once a deposition has begun. *Id.* (*citing Odone v. Croda Int'l*, 170 F.R.D. 66, 68 (D.D.C. 1997)).

C. **Discussions Permitted (No Line)**: Consultations during periodic deposition breaks, lunch, and overnight recesses, are appropriate. *In re Stratosphere*, 182 F.R.D. at 621; *Odone*, 170 F.R.D. at 69-70 (refusing to follow *Hall* and refusing to sanction attorney for consulting with client during recess); *McKinley v. Zdeb*, 200 F.R.D. 648, 650 (D. Colo. 2001).

III. **Improper Conferences May Permit Inquiry**: If improper conferences occur, then they may be subject to inquiry in further discovery. *Hall*, 150 F.R.D. at 529; *BNSF v. San Joaquin Valley R. Co.*, 2009 WL 3872043, 3 (E.D.Cal.).

A. **Attorney May Seek Information After Break**: If counsel and witness engage in prohibited, private conferences during deposition breaks, the deposing attorney can ask about those communications to determine if the witness has been coached. *Chassen v. Fidelity Nat. Title*, 2010 WL 5865977, 1 (D.N.J.); *Chassen v. Fidelity Nat. Financial, Inc.*, 2011 WL 723128, 1 (D.N.J. 2011) ("improper coaching of a deponent during a short deposition break may undermine the truthfulness of the deposition testimony").

1. **Privilege Does Not Attach**: If an off-the-record conference occurs between the witness and her counsel about a topic other than to discuss asserting a privilege, then the discussion is not protected by the attorney-client privilege and a deposing attorney is entitled to inquire as to the content of the communication. *Ngai v. Old Navy*, 2009 WL 2391282 (D.N.J.)(emails to deponent during video conference were not protected and were producible); *see also Plaisted v. Geisinger Medical Center*, 210 F.R.D. 527, 533-35 (M.D.Pa. 2002)(communications between the client and counsel during breaks in an ongoing deposition, other than to discuss a privilege, are not privileged). **Contra** *In re Flonase*, 723 F.Supp.2d 761 (E.D.Pa. 2010)("Absent evidence of witness coaching by defendant or any other form of misconduct, I deny plaintiff's motion to compel" testimony regarding what was said during break).

B. **Court May Require Review**: If there is a question as to improper coaching during a break, the court may order in camera examination of the witness by the court – on the record. *LM Ins. Corp. v. ACEO, Inc.*, 275 F.R.D. 490, 490 -492 (N.D.Ill. 2011).

Notes: ______________________________

[F4] DEPOSITION SANCTIONS

QUICK RULE: *Sanctions may be available against a party or its counsel when (1) the party fails to appear at a properly noticed deposition; (2) the party is compelled to participate in discovery; or (3) the party refuses to comply with a discovery order.*

DISCUSSION:

I. **Discovery Sanctions (General)**: The federal rules identify numerous discovery-related sanctions, including sanctions for deposition-related misconduct. Discovery sanctions provide specific and general deterrence, and "ensure that a party will not benefit from its own failure to comply." *Update Art v. Modiin Publ'g*, 843 F.2d 67, 70 (2d Cir. 1988); *Dragon Yu v. Brand Science*, 2012 WL 1232959, 3 (S.D.N.Y.). The rules grant courts "broad power" to impose sanctions on a party who disobeys a discovery order. *See Friends of Animals v. U.S. Surgical*, 131 F.3d 332, 334 (2d Cir. 1997).

A. **Basis Of Discovery Sanctions**: Under the FRCP, courts may impose sanctions on a person who impedes, delays, or frustrates the deposition. FRCP 30(d)(2); *See Layne Christensen v. Bro-Tech*, 2011 WL 6934112, 4 (D.Kan.)(awarding expenses for improper instruction not to answer). All federal courts, moreover, have the inherent powers to manage their cases and courtrooms effectively and to ensure obedience to their orders. *Chambers v. NASCO*, 501 U.S. 32, 43 (1991). Through this power, courts may punish misconduct both within their confines and beyond. *See Young v. United States ex rel. Vuitton*, 481 U.S. 787, 798 (1987).

C. **Bad Faith**: Neither entry of a discovery order nor a finding of bad faith is a prerequisite for imposing sanctions under FRCP 37(d). *Halaco Eng. Co. v. Costle*, 843 F.2d 376, 380 (9th Cir. 1988); *Lee v. Walters*, 172 F.R.D. 421, 425 (D. Oreg. 1997).

II. **Failure To Appear At Or Prepare For Deposition**: The court may sanction a properly-served party that fails to appear for deposition. FRCP 37(d); *N.L.R.B. v. Cable Car Advertisers*, 319 F.Supp.2d 991, 1000 (N.D. Calif. 2004). *See also* Wright, et al, *Federal Practice and Procedure: Civil 2d*, § 2291, p. 721 (Rule 37(d) provides that the failure of a party to appear for deposition may result in the imposition of sanctions under Rule 37(b)(2)(A), (B) or (C)). This is true for the witness to be deposed, or counsel. *Wolters Kluwer v. Scivantage*, 564 F.3d 110, 118 (2d Cir. 2009). Failing to appear for deposition is a more significant violation than other discovery abuses. *Halas v. Consumer Servs.*, 16 F.3d 161, 165 n. 6 (7th Cir. 1994) (holding that dismissal for failure to appear for deposition does not require a finding of willfulness).

A. **Responsibility For Appearance**: Courts may sanction a party or its counsel if the party assumed responsibility for the appearance, at the deposition, of a now-missing witness, even if the party does not control the witness. *PrecisionFlow v. CVD*, 198 F.R.D. 33, 38 (N.D.N.Y. 2000)(*citing* FRCP 37(d)).

B. **Refusal To Participate**: Courts disagree regarding how to consider the witness who appears at the deposition, but then refuses to participate. For some courts, appearing at, but refusing to participate in, the deposition may also sanctionable. Thus, a witness's refusal to participate in the video taping of his deposition, when properly noticed, is sanctionable as a failure to appear. *Naseer v. Racine County*, 2011 WL 5180941, 1 (E.D.Wis.). For other courts, a distinction exists between failing to appear and appearing but refusing to answer questions. *Estrada v. Rowland*, 69 F.3d 405, 406 (9th Cir. 1995) (holding that a party who physically appeared but refused to answer questions at deposition was not subject to Rule 37(d) sanctions because the rule applies only when a deponent literally fails to show up).

C. **Failure To Prepare Rule 30(b)(6) Witness**: Failure to educate a Rule 30(b)(6) designee may be a sanctionable offense under Rule 37(d). *See Chicago Regional Council v. Woodlawn Community*, 2011 WL 6318605, 5-6 (N.D.Ill.). FRCP 30(b)(6) obligates the responding organization to provide a witness who can answer questions regarding the subject matter listed in the notice. *Starlight International v. Herlihy*, 186 F.R.D. 626, 639 (D.Kan. 1999). Although the rule speaks only of a failure "to appear" being sanctionable, in some cases inadequate preparation of a Rule 30(b)(6) designee may be sanctioned based on a lack of good faith, prejudice to the opposing party, and disruption to judicial proceedings. *Henrik Klinge Retained Trust v. Triumph Apparel*, 2012 WL 259989, 4 (M.D.Pa.); *Black Horse Lane v. Dow Chemical*, 228 F.3d 275, 304 (3rd Cir. 2000); *Adrian Shipholding Inc. v. Lawndale Group*, 2012 WL 104939, 9 (S.D.N.Y.).

1. **Rationale**: "[C]ourts have determined that sanctions under Rule 37(d) may be appropriately granted where a corporation designates a corporate representative for deposition under Rule 30(b)(6) who is not knowledgeable about relevant facts. . . . Rule 37(d) allows a court to impose various sanctions for a party's failure to comply with Rule 30(b)(6), including the preclusion of evidence." *Lincoln Diagnostics v. Panatrex*, 2009 WL 395793, 8 (C.D.Ill.).

D. **Costs**: If a party fails to appear at a properly-noticed deposition, the court may impose fees equal to the cost of (1) waiting for the noticed party to arrive, (2) unnecessary travel, and (3) duplicating preparation for the deposition. *Cabot v. United States*, 35 Fed.Cl. 80, 82 (1996).

III. **Refusal To Answer Deposition Question**: As a procedural matter, a party may, under limited circumstances, instruct a witness not to answer a deposition question. FRCP 30(c)(2). As a substantive matter, the refusing party does so at its own peril if it is wrong on the objection's merits. *Riddell Sports v. Brooks*, 158 F.R.D. 555 (S.D.N.Y. 1994); *Miller v. Waseca Medical*, 205 F.R.D. 537, 539 (D.Minn. 2002). By directing the deponent not to answer, counsel engages in potentially sanctionable conduct. *Layne Christensen v. Bro-Tech*, 2011 WL 4688836, 6 -8 (D.Kan.)(*citing Rangel v. Gonzalez*, 274 F.R.D. 585, 594 (S.D.Tex. 2011)). When a witness refuses to answer a question, the party noticing the deposition may move to compel the answer. FRCP 30(d)(4). If the court grants the motion to compel, it must award sanctions if the refusal was not substantially justified. FRCP 37(a)(4).

A. **Variations On Refusal To Respond**: The courts differ as to whether an award of sanctions is proper only where there has actually been a total failure to respond or whether sanctions might be imposed where a response is given, but is so flawed as to be tantamount to no response at all. *Melendez-Garcia v. Sanchez*, 629 F.3d 25, 34 (1st Cir. 2010). "Rule 37(d) allows the imposition of sanctions against a party for especially serious disregard of the obligations imposed by the discovery rules even though it has not violated any court order." 8B Wright, et al, *Federal Practice and Procedure* § 2291, at 630 (3d ed. 2010).

IV. **Sanctions Related To Improper Objections**: "Where counsel's objections have frustrated a fair examination of the deponent or have unreasonably prolonged the examination, a court may impose an appropriate sanction, including the reasonable expenses and attorney's fees incurred by any party, on the person who impedes, delays, or frustrates the fair examination of the deponent." *BNSF v. San Joaquin Valley R. Co.*, 2009 WL 3872043, 3 (E.D.Cal.) (citing FRCP 30(d)(2)). *See Deville v. Givaudan Fragrances*, 419 Fed. App'x 201, 209 (3d Cir. 2011)(affirming imposition of sanctions upon finding that attorney "testified on behalf of her witness by way of suggestive speaking objections"); *Craig v. St. Anthony's Medical Ctr.*, 384 Fed. App'x 531, 533 (8th Cir. 2010)(affirming sanctions due to "a substantial number of argumentative objections together with suggestive objections and directions to the deponent to refrain from answering questions without asserting a valid justification").

IV. **Sanctions For Forcing A Motion To Compel**: When a court grants a motion to compel, the court must require the party whose conduct necessitated the motion or its counsel to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds: **(i)** the movant filed the motion before attempting in good faith to obtain the discovery without court action; *Johnson v. Dovey*, 2010 WL 3058017 (E.D. Cal.), **(ii)** the opposing party's nondisclosure, response, or objection was substantially justified; *Swackhammer v. Sprint Corp. PCS*, 225 F.R.D. 658, 666 (D.Kan. 2004); or **(iii)** an award of expenses is unjust. FRCP 37(a)(5)(A)(ii); *Spears v. Brown*, 2012 WL 370096, 2 (E.D.Ark.).

A. **Late Is Not Good Enough**: The court may impose sanctions when a party provides the requested disclosure after the filing of the motion to compel. FRCP 37(5)(A)(i); *Johnson v. Dovey*, 2010 WL 3058017 (E.D. Cal.).

B. **Sanctions Mandatory**: The rule mandates that the court award expenses upon granting a motion to compel disclosure unless one of the specified bases for refusing to make such an award is found to exist. *Cobell v. Norton*, 226 F.R.D. 67, 91 (D.D.C. 2005). If sanctions are deemed appropriate, the court "must" require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure. *Employer Painters Welfare v. Atlas Drywall*, 2011 WL 5041215, 2 (D.Nev.).

C. **Substantially Justified**: The losing party - the party being sanctioned - must demonstrate that its position was substantially justified. *JPMorgan v. PT Indah Kiat*, 854 F. Supp. 2d 528 (N.D. Ill. 2012). The phrase substantially justified does not mean justified to a high degree. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). A legal position is "substantially justified" if there is a "genuine dispute" as to proper resolution or if "a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Decision Insights v. Sentia Group*, 311 Fed.Appx. 586 (4th Cir. 2009).

V. **Sanctions For Violating A Court Order**: Sanctions are available against a party that fails to obey a court order to provide or permit discovery. *Liew v. Breen*, 640 F.2d 1046, 1051 (9th Cir. 1981)(citing Rule 37(b)(2)). Courts distinguish Rule 37(b)(2) from Rule 37(a), which provides for the award of expenses resulting from efforts to secure an order compelling discovery. *Hyde & Drath v. Baker*, 24 F.3d 1162, 1169 (9th Cir. 1994).

VI. **Selection Of Sanctions**: The rules provide for a range of discovery sanctions. *Wachtel v. Health Net*, 239 F.R.D. 81, 84 (D.N.J. 2006); FRCP 37(b)(2)(A)(vi). The court may (1) take certain facts to be established, (2) prohibit the disobedient party from opposing or supporting designated claims or introducing designated matters into evidence, (3) strike out pleadings, (4) stay further proceedings until the order is obeyed, (5) dismiss the action or any part thereof, (6) render a default judgment, (7) treat as contempt of court the failure to obey the order, and (8) award the reasonable expenses caused by the failure. *Alaska Pulp v. United States*, 41 Fed.Cl. 611, 614 (1998); *Wyandotte Nation v. Sebelius*, 337 F.Supp.2d 1253 (D.Kan. 2004).

A. **Sanctions In Trial Court's Discretion**: The court has discretion as to imposing sanctions under Rule 37. *In re Rezulin*, 223 F.R.D. 109, 116 (S.D.N.Y. 2004). "The choice of the appropriate sanction is committed to the sound discretion of the district court." *Hewlett v. Davis*, 844 F.2d 109, 113 (3d Cir. 1988). Rule 37(b)(2) contains two standards - one general and one specific - limiting the court's discretion. First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery. *Compaq Computer v. Ergonome*, 387 F.3d 403, 413 (5th Cir. 2004)(*citing Ins. Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 707 (1982)).

B. **Factual Findings Necessary**: To support sanctions, the trial court must make clear factual findings regarding the award. *See Naviant Mktg. Solutions, Inc. v. Larry Tucker, Inc.*, 339 F.3d 180, 186–87 (3d Cir. 2003)(court abused discretion in imposing sanctions without explicit findings of misconduct; the record did not support such findings).

C. **Escalation**: Courts are split as to whether sanctions should be escalated over time.

1. **No Escalation Necessary**: Some courts have held that the trial court is not required to assess whether lesser sanctions would suffice, or to employ graduated sanctions. *Rice v. City of Chicago*, 333 F.3d 780, 784 (7th Cir. 2003).

2. **Escalation Necessary**: Some courts have held that, when measuring a sanction, the court must consider whether "less drastic sanctions would have been effective." *Belk v. Charlotte–Mecklenburg Bd. of Educ.*, 269 F.3d 305, 348 (4th Cir. 2001). These courts require that the trial court provide a "specific, reasoned explanation for rejecting lesser sanctions." *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1478-79 (D.C.Cir. 1995). This is the more defensible position, in the absence of egregious conduct. *Schilling v. Walworth County Park*, 805 F.2d 272, 278 (7th Cir. 1986). "The imposition of a sanction without a prior warning is to be avoided." *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993).

D. **Quantifying Sanctions**: The means by which financial sanctions are calculated are a matter of the court's discretion. *See Biovail Laboratories v. Anchen Pharmaceuticals*, 233 F.R.D. 648, 654-55 (C.D.Cal. 2006).

[G1] READING AND SIGNING

QUICK RULE: *A witness may read and sign the deposition within 30 days after the deposition is submitted to the witness if the witness or a party makes such a request before the close of the deposition. The witness must provide a reason for each requested change.*

DISCUSSION:

I. Read And Sign (General): Before the deposition concludes, the witness or a party may ask that the transcript be read and signed. If requested, the court reporter will let the witness know when the transcript is available. The deponent then has 30 days to review the transcript and, if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them. FRCP 30(e); *Foutz v. Town of Vinton*, 211 F.R.D. 293, 294 (W.D. Va. 2002). This list of corrections is called an ***errata sheet***. The overwhelming majority of case law instructs that the technical aspects of the rule are applied strictly. *Hershberger v. Ethicon Endo-Surgery*, 2012 WL 1067941, 3 (S.D.W.Va.); *E.I. du Pont v. Kolon*, 277 F.R.D. 286, 295 (E.D.Va. 2011).

A. **Requested During Deposition:** The rule requires the deponent or the interested party to request deposition review. *Hambleton Bros. v. Balkin Enterprises*, 397 F.3d 1217, 1224-26 (9th Cir. 2005); *Pacheco v. N.Y. Presbyterian Hosp.*, 593 F.Supp.2d 599, 605 n. 1 (S.D.N.Y. 2009). A timely request to review the transcript serves as "an absolute prerequisite to amending or correcting a deposition." *Rios v. Bigler*, 67 F.3d 1543, 1552 (10th Cir. 1995); FRCP 30(e) Advisory Note (1993). A deponent may only submit changes to the deposition if she requests review before the deposition is completed. *EBC v. Clark Bldg.*, 618 F.3d 253, 265 (3rd Cir. 2010). *See Agrizap v. Woodstream*, 232 F.R.D. 491, 493-94 (E.D.Pa. 2006) (a statement that "the witness will read and sign" may amount to a request to review).

B. **Running The Clock:** The thirty-day correction clock begins upon notification that the transcript is available, not on the witness actually having possession. *Hambleton Bros. v. Balkin Enterprises*, 397 F.3d 1217, 1224 -1226 (9th Cir. 2005).

1. **The Court May Exclude Untimely Corrections:** The court may strike errata sheets – and exclude corrections – if they are untimely. *See Blackthorne v. Posner*, 883 F.Supp. 1443, 1454 n. 16 (D.Or. 1995)(excluding untimely deposition corrections); *Workman v. Chinchinian*, 807 F.Supp. 634, 644-45 (E.D.Wash. 1992) (same); *see also Rios v. Bigler*, 67 F.3d 1543, 1552-53 (10th Cir. 1995)(corrections excluded, in part, because the record did not show that witness submitted corrections within the "mandatory" 30-day period).

2. **Time Bar Not Absolute:** Missing the 30-day deadline by a day or two might not alone justify excluding the corrections in every case. *Hambleton Bros. v. Balkin Enterprises*, 397 F.3d 1217, 1224-26 (9th Cir. 2005); *Teleshuttle Technologies v. Microsoft*, 2005 WL 3259992, *1 (N.D.Cal. 2005) (a two day delay, where unaccompanied by prejudice, would not cause the court to strike the corrections).

C. **Explanations Required For Changes**: Courts require explanations for each correction. This allows the court and parties to assess whether the alterations have a legitimate purpose. *Hambleton Bros. v. Balkin Enterprises*, 397 F.3d 1217, 1224-26 (9th Cir. 2005). The court may strike changes if the deponent does not state the specific reason for each particular change. *Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D.Ill. 1981); *Duff v. Lobdell*, 926 F.Supp. 799, 804 (N.D.Ind. 1996).

II. **Breadth Of Permitted Change**: Most courts agree that the deponent can and should change all form and transcription errors. Federal courts are split on the scope of substantive changes permitted under Rule 30(e). *Eicken v. USAA Federal*, 498 F.Supp.2d 954 (S.D.Tex. 2007).

A. **Broad Changes**: Traditionally, a deponent may change deposition testimony by timely corrections and with reasons, even if the changes contradict the original answers. *Devon Energy v. Westacott*, 2011 WL 1157334, 4 (S.D.Tex.); *Hawthorne Partners v. AT & T*, 831 F.Supp. 1398, 1406 (N.D.Ill. 1993); *Holland v. Cedar Creek*, 198 F.R.D. 651, 653 (S.D.W.Va. 2001). *Reilly v. TXU*, 230 F.R.D. 486 (N.D.Tex. 2005) (reading Rule 30(e) broadly and allowing "legitimate" substantive changes accompanied by reasons for the alterations).

1. **The Better Rule**: Moore describes this as the better view because of the absence of express direction by the FRCP and because any risk of manipulation is resolved by cross-examination of the deponent about the changes, impeachment by inconsistency, and resuming the deposition in cases of pronounced changes. *BNSF v. San Joaquin Valley R. Co.*, 2009 WL 3872043, 5 -8 (E.D.Cal.)(*citing* 7 *Moore's Federal Practice*, 3d. ed., ¶ 30.60[3], p. 30-107.). *See* practice point below.

2. **Reopening Deposition**: A court may reopen a deposition for further examination if the transcript changes effectively render the deposition incomplete or useless without further testimony. *Allen & Co. v. Occidental Petroleum*, 49 F.R.D. 337, 340 (S.D.N.Y. 1970). "If changes are made, this has the effect of making the examination uncompleted, and the parties ordinarily may then examine the witness further in the light of the new answers." *Eicken v. USAA*, 498 F.Supp.2d 954 (S.D.Tex. 2007)(quoting 8A Wright, et al, *Federal Practice and Procedure* § 2118 (2d ed. 1994)).

B. **Limited Changes**: Some courts have held that deposition witnesses may only make stenographic changes. *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000); *Rios v. Welch*, 856 F.Supp. 1499, 1502 (D.Kan. 1994)(witness may not "virtually rewrite portions of a deposition" by invoking Rule 30(e)). "'The Rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.'" *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 n. 5 (10th Cir. 2002) (*quoting Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D.La. 1992))

1. **Errata Sheet Cannot Create Factual Dispute**: Some circuits have a "sham" affidavit rule, which provides that "a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Kennedy v. Allied Mut.*, 952 F.2d 262, 266

(9th Cir. 1991). Courts have sought to prevent parties from using the errata sheet in a similar manner. *See Hambleton Bros. v. Balkin Enterprises*, 397 F.3d 1217, 1224 -1226 (9th Cir. 2005). The Ninth Circuit dismissed a case with prejudice because the attorney, in an effort to avoid summary judgment, made substantive changes to the party's deposition testimony in violation of FRCP 30(e). *Combs v. Rockwell*, 927 F.2d 486, 488-89 (9th Cir. 1991). The Tenth and Seventh Circuits have interpreted FRCP 30(e) similarly. *See Burns v. Bd. of County Comm'rs*, 330 F.3d 1275, 1281-82 (10th Cir. 2003); *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000).

III. **Effect Of Changes**: When a witness amends his testimony under Rule 30(e), the original deposition answer remains part of the record and can be read at the trial. *Podell v. Citicorp*, 112 F.3d 98, 103 (2nd Cir. 1997). "The witness who changes his testimony on a material matter between the giving of his deposition and his appearance at trial may be impeached by his former answers." *Innovative Mktg. v. Norm Thompson Outfitters*, 171 F.R.D. 203, 205 (W.D.Tex. 1997); *Eicken v. USAA*, 498 F.Supp.2d 954 (S.D.Tex. 2007).

IV. **Challenge To Errata Sheet**: A party may move to strike an errata sheet pursuant to FRCP 12(f). *BNSF v. San Joaquin Valley R. Co.*, 2009 WL 3872043, *5-8 (E.D.Cal.). A court may strike a document that does not conform to the rules. *Transamerican Corp. v. National Union*, 143 F.R.D. 189, 191 (N.D.Ill. 1992). Striking improper deposition corrections or errata has been held to be an appropriate remedy. *Hambleton Bros. v. Balkin Enterprises*, 397 F.3d 1217, 1226 (9th Cir. 2005).

V. **Duty To Supplement Deposition Testimony**: The supplementing duties of Rule 26(e) do not extend to deposition testimony, other than that of expert witnesses. *Encore Entertainment, LLC v. KIDdesigns, Inc.*, 2005 WL 2249897, 9 (M.D.Tenn. 2005)(citing *Moore's Federal Practice* § 26.131[1]). "[T]he obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, *but not ordinarily to deposition testimony*." Advisory Committee Notes to Federal Rule of Civil Procedure 26(e) (emphasis added); *see also U.S. ex rel. Ubl v. IIF Data Solutions*, 650 F.3d 445, 456 (4th Cir. 2011). The remarks of the Advisory Committee confirm the common sense proposition that, having once been deposed, a witness is under no duty to continuously review his testimony in order to revise his answers as a result of subsequently occurring events. *Intermedics, Inc. v. Cardiac Pacemakers, Inc.*, 1998 WL 35253493, *1-2 (D.Minn. 1998)(*citing Ransdell v. Russ Berrie and Company, Chicago, Inc.*, 1996 WL 242961 *5 (N.D.Ill.)).

A. **Different Duty For Experts**: With respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1). 146 F.R.D. 401, 641 (1993)

VI. **Practice Point**: The primary purpose for reading and signing a deposition is for the witness to confirm that the transcript properly recorded the witness's answers. Nevertheless, a witness should not sign a deposition with an affirmatively inaccurate answer (as opposed to an incomplete or ambiguous answer). If the witness provided an answer at deposition which, on reflection, they believe to be inaccurate, the witness should offer the correction on the errata sheet before signing. If this substantively changes an answer, counsel and the witness should be prepared for re-deposition regarding the change. For those responses that could be perceived as ambiguous, the witness is not under any duty to clarify the transcript before signing.

A. **Request Early**: Attorneys taking or defending a deposition should request the opportunity to read and sign at the very beginning, lest they forget.

Notes: ____

Notes: ____

[G2] USE OF DEPOSITIONS

QUICK RULE: *A deposition may be only be used at trial under limited circumstances, generally when the witness is not available. Depositions may properly be used to support or oppose a motion for summary judgment.*

DISCUSSION:

I. **Admissibility Of Deposition Transcripts**: Deposition testimony is normally inadmissible hearsay. *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 962-63 (10th Cir. 1993); FRE 801-804. This general rule is subject to numerous exceptions. Somewhat oddly, the Federal Rules of Civil Procedure create an exception to the hearsay rules. *S. Indiana Broadcasting, Ltd. v. FCC*, 935 F.2d 1340, 1341-42 (D.C.Cir. 1991) (citing FRCP 32(a)).

A. **Civil Procedure v. Evidence**: The rules of civil procedure provide a means for admitting deposition testimony such that the testimony need not also meet the requirements for admissibility set forth in the rules of evidence. *Nationwide Life v. Richards*, 541 F.3d 903, 914 -915 (9th Cir. 2008). Hearsay is admissible where allowed by the Federal Rules of Evidence, or "by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FRE 802. Federal Rule of Civil Procedure 32(a)(4) is one of these "other rules." See FRE 802 Advisory Note. FRCP 32(a) was intended to eliminate the possibility of certain technical hearsay objections which are based, not on the contents of deponent's testimony, but on his absence from court. FRCP 32 Advisory Note. Evidence authorized by Rule 32(a) cannot be excluded as hearsay, unless it would be inadmissible even if delivered in court. See *Ueland v. United States*, 291 F.3d 993, 996 (7th Cir. 2002).

1. **Procedure**: FRCP 32 does not resolve all admissibility challenges to a deposition transcript. For example, there may be a best-evidence challenge (see FRE 1002) regarding the deposition's contents. "In considering the use of depositions at a trial or hearing, it is helpful to remember that the problem has two aspects. First, the conditions set forth in Rule 32(a) must exist before the deposition can be used at all. Second . . . it must be determined whether the matters contained in it are admissible under the rules of evidence." *Kolb v. County of Suffolk*, 109 F.R.D. 125, 127 (E.D.N.Y. 1985)(*citing* 8A Wright, et al, *Federal Practice and Procedure* § 2142 at 159 (2d ed. 1994)).

B. **Burden Of Proof**: The deposition's proponent must prove that the transcript is admissible under Rule 32(a). *Garcia-Martinez v. Denver*, 392 F.3d 1187, 1191 (10th Cir. 2004).

C. **Depositions Second Best To Live Testimony**: Although the federal rules may permit the admission of deposition testimony, they do not alter the "long-established principle that testimony by deposition is less desirable than oral testimony." *Garcia-Martinez v. Denver*, 392 F.3d 1187, 1191-1192 (10th Cir. 2004)(*quoting Salsman v. Witt*, 466 F.2d 76, 79 (10th Cir. 1972). Parties at trial generally must prove their cases with live testimony rather than depositions. *Sara Lee Corp. v. Kraft Foods Inc.*, 276 F.R.D. 500, 502 (N.D.Ill. 2011).

II. **Structure Of Hearsay Exception For Depositions**: The rules provide six means of establishing the admissibility of deposition testimony. FRCP 32(a).

A. **Deposition Of A Party Or Party Representative**: An adverse party may use - for any purpose - the deposition of anyone designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation or organization. *Bays Exploration v. Pensa*, 2012 WL 122313, 1 -5 (W.D.Okla.)(*citing* FRCP 32(a)(3)). Similarly, an adverse party may use the deposition of an officer, director, or managing agent of a party. *Id.* One need not actually be a party when the deposition is taken, only when the deposition is offered for use. *Codeiro v. Levasseau*, 112 F.R.D. 209, 211 (D.R.I. 1986). The rationale of Rule 32(a) – that it is the interests of justice, that a person against whom a sworn statement is offered have notice and an opportunity to cross-examine – is satisfied as it is his own testimony which is at issue, cross-questioning is beside the point. *Id.*

1. **Managing Agent Test**: Courts consider various factors to determine if a person is a "managing agent." These include (1) whether the agent's interests are identified with the principal's rather than the other party; (2) the nature and extent of the agent's functions, responsibilities, and duties; (3) the agent's power to exercise judgment and discretion; (4) whether the corporation depends upon the employee to carry out her employer's direction to give testimony; and (5) whether anyone higher in authority than deponent was in charge of the particular matter or had all the necessary information sought in the deposition. *Young v. Delta Air Lines*, 216 F.R.D. 521, 523 (D. Utah 2003); *Bays Exploration v. Pensa*, 2012 WL 122313, 1 -5 (W.D.Okla.).

2. **Rule Focused On Parties**: This rule applies to party representatives. FRCP 32(a)(3). "When courts allow one party to admit Rule 30(b)(6) testimony from the opposing party, little concern arises about whether the opposing party was able to meaningfully cross-examine the statements of its own representative." *Sara Lee v. Kraft Foods*, 276 F.R.D. 500, 503 (N.D.Ill. 2011). The dangers of testimony based on corporate knowledge multiply where the FRCP 30(b)(6) witness is a third party. *Id.* "The concern about meaningful cross-examination is much greater with third-party Rule 30(b)(6) testimony; if the witness lacks personal knowledge, there may be little chance to meaningfully cross-examine the witness at the deposition." *Id.*

B. **Witness Is Dead**: If the witness is dead, the transcript may come in. This is a bright line test, except for zombies (Grrrr). FRCP 32(a)(4)(A).

C. **Witness Is 100 Miles Away**: A party may use a deposition at trial when a witness is farther than 100 miles from the court house. Rule 32(a)(4)(B). If a transcript is offered into evidence based on this rule, the court examines the deponent's location at every point during presentation of proponent's case when a trial subpoena could have been served. *United States v. IBM*, 90 F.R.D. 377, 383 (S.D.N.Y. 1981).

1. **Cannot Procure Absence**: The deposition's proponent must show that he did not procure the witness's absence. *Clarendon Trust v. Dwek*, 970 F.2d 990, 995 (1st Cir. 1992). The deposition proponent, however, need not try and fail to procure live testimony before offering a deposition under Rule 32(a)(3)(B). *Ueland v. United States*,

291 F.3d 993, 997 (7th Cir. 2002). When a party is absent, the trial court has significant discretion in applying Rule 32 to permit use of the party's own deposition. *See Garcia-Martinez v. Denver*, 392 F.3d 1187, 1192 (10th Cir. 2004).

2. **Court Of Federal Claims**: In this court, with national jurisdiction, the deposition's proponent must have moved to subpoena the witness from beyond 100 miles before relying upon witness's deposition. *Ryan-Walsh v. United States*, 39 Fed.Cl. 305 (1997).

3. **Lack Of Knowledge Not Enough**: The burden of showing the witness's unavailability rests with the party seeking to introduce the deposition. *Chao v. Tyson Foods*, 255 F.R.D. 560, 561 (N.D.Ala. 2009)(*quoting Jauch v. Corley*, 830 F.2d 47, 50 (5th Cir. 1987)). A party does not satisfy its burden by stating that he does not know where the witness is. *Collins v. Omega Flex*, 2010 WL 2470944, 3 (E.D.Pa.).

4. **Witness "Unavailability" Usually Not Required**: So long as the distance criterion is satisfied, the deposition's admissibility does not depend upon a showing that the witness is otherwise unavailable. *Daigle v. Maine Medical*, 14 F.3d 684, 691 (1st Cir. 1994). The rule does not require a finding "that the witness cannot attend or testify because of" distance. *Delgado v. Pawtucket Police Dept.*, 668 F.3d 42, 49 (1st Cir. 2012). Some cases, however, have held that the court has discretion in deciding whether a party must make an effort to procure a foreign witness's attendance at trial before the party may offer the witness's deposition testimony. *See Moore v. Miss. Valley State*, 871 F.2d 545, 552 (5th Cir. 1989); *In re Air Crash*, 720 F.Supp. 1493, 1502-03 (D.Colo. 1989).

5. **Measuring 100 Miles**: We're lawyers, so we're going to argue about this. There is a question as to whether the 100 mile rule should apply as-the-crow flies, or as measured by road. For example, in *SCM v. Xerox*, 76 F.R.D. 214 (D.Conn. 1977), the district court was presented with a witness who, when using the straight-line method, was 88 miles away from the courthouse in Hartford, Connecticut; yet the shortest route by normal modes of transportation would have required the witness to drive 113 miles. *Id.* at 214-15. The "modern trend" is to measure the distance in a straight line so that the area of service is indicated by a circle with the place of trial as its center. *McDaniel v. BSN Medical, Inc.*, 2010 WL 2464970, 1 -3 (W.D.Ky.)(*citing* 4B Wright et al, *Federal Practice and Procedure* § 1127 n. 1 (3d ed. 2001)).

D. **Witness Is Sick Or Imprisoned**: Deposition testimony is admissible when a witness is ill, infirm, or imprisoned, but only if the condition makes the witness unavailable for trial. FRCP 32(a)(4)(C). There must be a causal connection between age, illness, infirmity, or imprisonment and the inability to attend or testify. *Boca Investerings v. United States*, 197 F.R.D. 18, 19 (D.D.C. 2000). Specifically, the court must find "that the witness cannot attend or testify because of" one of the enumerated conditions. *Delgado v. Pawtucket Police Dept.*, 668 F.3d 42, 49 (1st Cir. 2012)(citing FRCP 32(a)(4)(C)).

E. **Party Is Unable To Procure Witness's Attendance**: A party may use a deposition transcript for any purpose if the party cannot obtain the witness's appearance through subpoena. *Williams v. Johnson*, 278 F.R.D. 1, 2 -6 (D.D.C. 2011)(*citing* FRCP 32(a)(4)(D)). The proffering party must use reasonable diligence to get the witness to attend, *Thomas v.*

Cook Cnty. Sheriff's Dep't, 604 F.3d 293, 308 (7th Cir. 2010); *Rascon v. Hardiman*, 803 F.2d 269, 277 (7th Cir. 1986), and offer some evidence beyond the "plain assertion that [the deponent] was unavailable." *Moore v. Mississippi Valley*, 871 F.2d 545 (5th Cir. 1989).

1. **Diligence**: "Reasonable diligence" is the "degree of diligence" expected from an attorney of "ordinary prudence" under the circumstances. *Black's Law Dictionary* at 523 (9th ed. 2009). The court may deny a request to admit deposition testimony "if the offeror's inability to procure the witness's attendance at trial is at least in part due to the offeror's own lack of diligence." *Williams v. Johnson*, 278 F.R.D. 1, 2 -6 (D.D.C. 2011).

F. **Exceptional Circumstances**: If the court finds that exceptional circumstances exist to admit the deposition, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, the court may do so. FRCP 32(a)(4)(E). "Exceptional circumstances" do not include the simple possibility that neither party will call the witness at trial. *Ryan-Walsh v. United States*, 39 Fed.Cl. 305, 306 (1997). Cost and trial efficiency also do not constitute such circumstances. *Id.*

1. **Prejudice**: "Serious prejudice" from the deposition's exclusion is not an exceptional circumstance. *Angelo v. Armstrong World Industries*, 11 F.3d 957, 963-64 (10th Cir. 1993). The other subsections of Rule 32 make clear "that it is not only a party's need for the evidence in a deposition, but also the nature of the circumstances that have made the deponent unavailable to testify, that determines whether the circumstances can be thought exceptional." *Griman v. Makousky*, 76 F.3d 151, 153 (7th Cir. 1996).

2. **Absence Unexpected**: The trial court may allow a party to admit a deposition when the witness's absence was unexpected. *Huff v. Marine Tank Testing*, 631 F.2d 1140, 1142-43 (4th Cir. 1980).

3. **Doctors May Or May Not Be Exceptional**: Courts are split upon when a physician's professional responsibilities may constitute 'exceptional circumstances,' justifying the admissibility of his deposition even when the witness is within the court's subpoena power. *Hague v. Celebrity Cruises*, 2001 WL 546519, at *1 (S.D.N.Y.).

   a. **Doctors Are Exceptional**: Some courts have held "that a physician or other witness with an unpredictable schedule is unavailable to testify at trial and thus allow his or her deposition testimony to be read." *Melore v. Great Lakes Dredge*, 1996 WL 548142, at *3 (E.D.Pa.)(a note from witness to the court indicating that she was "absolutely unavailable" because of her duties as a doctor presented exceptional circumstances); *McDaniel v. BSN Medical*, 2010 WL 2464970, 3 -4 (W.D.Ky.).

   b. **Doctors Not Exceptional**: Some courts have held that a doctor's "extremely busy" schedule cannot support a finding of exceptional circumstances under FRCP 32(a). *Angelo v. Armstrong World*, 11 F.3d 957, 963 (10th Cir. 1993); *Flores v. NJ Transit*, 1998 WL 1107871, at *2-5 (D.N.J.) (busy schedule of a doctor, even a specialist, does not present exceptional circumstances); *Bobrosky v. Vickers*, 170 F.R.D. 411, 415 (W.D.Va. 1997)(although doctors were deposed at great expense exceptional circumstances do not exist absent evidence "that the doctors' schedules or personal circumstances would preclude them from being able to appear in court."). "The Federal Rules make clear that live testimony is important—with no exceptions made for doctors or for bench trials." *Whyte v. U.S.P.S.*, 2012 WL 947006, 1 -2 (S.D.Fla.).

III. **Deposition Circumstances May Limit It Use**: A deposition must not be used when (1) a party received less than a 14-day notice of the deposition, (2) the party promptly moved for a protective order to prevent the deposition or for a change of time or place, and (3) the motion was still pending when the deposition was taken. *Smith v. Stephens*, 2012 WL 899347, 7 (E.D.Mich.). The rule does not remove the court's discretion to permit depositions on less than 14-day notice. *Landis v. Galarneau*, 2010 WL 446445, 2 (E.D.Mich.).

IV. **Party Admission**: Courts are split as to whether parties may offer deposition transcripts into evidence as party admissions, even if they don't meet one of the exceptions under FRCP 32. *See* FRE 801(d)(2)(D). There is a basic inconsistency (or at least ambiguity) in the rules: FRCP 32 creates a presumption that depositions will not replace live testimony at trial. Under FRCP 32, transcripts are only admissible when live testimony cannot be obtained or when the party's representative was deposed. The hearsay rules, however, remove hearsay problems regarding all party testimony, as they are admissions. Without a hearsay hurdle, the deposition transcripts of a party are generally admissible. The downside with, generally admitting party transcripts is that they can come in, even if the witness testifies.

A. **Position Favoring Admissibility Of Transcript**: A court does not abuse its discretion by admitting the deposition as an admission of a party-opponent under FRCP 32(a)(1) and FRE 801(d)(2). *Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 (10th Cir. 2009). *See also Globe Savings v. United States*, 61 Fed.Cl. 91, 97 (2004). Under this position, it is permissible under FRE 801(d)(2) to admit a deposition as a statement of a party-opponent. Moreover, neither Rule 801(d)(2) nor Rule 32(a)(1) require a showing of unavailability for admissions of party-opponents. "Rule 32 allows a party to introduce as a part of his substantive proof, the deposition of his adversary, and it is quite immaterial that the adversary is available to testify at trial or has testified there." *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 773 (10th Cir. 1999).

1. **Practice Note**: This is a flawed interpretation of the rules. If the witness is available and testifies, a modestly skilled attorney can get the witness to admit to the contents of her deposition – or read them in as prior inconsistent statements. This version of the rule is advocated by the cowardly and inexperienced. Allowing prior deposition testimony for a witness who is planning to take the stand merely causes confusion.

B. **Position Favoring Live Testimony**: The courts have long expressed a preference for live testimony. *United States v. Yida*, 498 F.3d 945, 950 (9th Cir. 2007); 3 Blackstone, *Commentaries on the Laws of England* 373-74 (1768)(Transcripts of a witness's prior testimony, even when subject to prior cross-examination, are deficient because "all persons must appear alike, when their [testimony] is reduced to writing."). Testimony by deposition obviously "is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person." *Boca v. United States*, 197 F.R.D. 18, 20-21 (D.D.C. 2000)(quoting 8A Wright, et al, *Federal Practice and Procedure* § 2142 at 158 (2d ed. 1994)). Judge Learned Hand stated "The deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand." *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939). The Federal Rules assume that under normal circumstances the deposition of a witness will not be used at trial in lieu of that witness's live testimony. *Bobrosky v. Vickers*, 170 F.R.D. 411, 414 (D.W.Va. 1997).

V. **Presentation Of Deposition Testimony At Trial**: The trial court has discretion to control the "manner in which deposition testimony is presented." *Nachtsheim v. Beech Aircraft*, 847 F.2d 1261, 1276 (7th Cir. 1988)(*citing* FRE 611). Rule 32 does not explicitly require that depositions be read in open court. *Stine v. Marathon Oil*, 976 F.2d 254, 267 (5th Cir. 1992).

A. **Completeness**: If a party introduces some portion of a deposition a trial, the opposing party is allowed to supplement in the interest of completeness. *In re Sims*, 534 F.3d 117, 141 (2d Cir. 2008)(citing FRCP 32(a)(6)). All parties have a right to counter-designate deposition testimony at trial to ensure that any portion of a deposition designation can be fairly read with other parts. *United States v. Cohen*, 2012 WL 668478, 18 (C.D.Ill.). The rule contemplates that the adverse party be able to introduce the counter-designations at the time the designated testimony is introduced. *In re Yasmin*, 2011 WL 6740391, 19 (S.D.Ill.). The rule allows counterdesignations of only so much material as is necessary to allow for a fair reading of the testimony. *Id.*

B. **Summaries**: Requiring deposition summaries can be a reasonable means of implementing the mandate of Rule 611, and falls within court's discretionary authority to regulate the conduct of civil trials. *Planned Parenthood v. American Coalition*, 290 F.3d 1058, 1083 (9th Cir. 2002)(*citing Oostendorp v. Khanna*, 937 F.2d 1177, 1180 (7th Cir. 1991)). This position has not been universally accepted. *See Id.* at 1115-20 (dissenting opinion).

VI. **Deposition Transcripts To Support Summary Judgment**: To support a motion for summary judgment, testimony must be sworn, competent and on personal knowledge, and set out admissible facts. FRCP 56(e). Depositions generally are admissible provided that the party against whom they are admitted was present, represented, or reasonably noticed. *See Nippon Credit Bank, Ltd. v. Matthews*, 291 F.3d 738, 751 (11th Cir. 2002). Depositions, even those taken without notice to or the presence of the later non-moving party on summary judgment, can also be admitted. Like an affidavit, the testimony is sworn. Therefore, it is admissible if the deponent's testimony was competent, on personal knowledge, and set out facts admissible at trial. *See Bozeman v. Orum*, 422 F.3d 1265, 1267 n. 1 (11th Cir. 2005) (sworn statements before a court reporter where non-moving party was neither noticed nor present satisfied requirements of Rule 56(e)); 8A Wright, et al, *Federal Practice and Procedure* § 2142 (2d ed. 1994)(deposition testimony is "at least as good as an affidavit and should be usable whenever an affidavit would be permissible").

Notes: ______________________________

[G3] DOCUMENT REQUESTS MADE DURING DEPOSITION

QUICK RULE: *Document requests made during depositions may only be enforced if they are sufficiently specific. The courts are split as to whether even a specific document request made during a deposition can force the production of documents.*

DISCUSSION:

I. **Document Requests (Generally)**: A party may request documents from another party under FRCP 34, or on a third party under FRCP 45 (subpoena). A document request describe the documents requested with "reasonable particularity." FRCP 34(b). *See Parsons v. Jefferson-Pilot Corp.*, 141 F.R.D. 408, 412 (M.D.N.C. 1992). The request must also specify a reasonable time, place, and manner in which the production will take place. Courts have interpreted the "particularity" requirement to mandate that a responding party be given sufficient information to enable it to identify responsive documents. *See Kidwiler v. Progressive Paloverde Insurance*, 192 F.R.D. 193, 202 (N.D.W.Va. 2000); *Nexxus Products v. CVS New York*, 188 F.R.D. 11, 20 (D. Mass. 1999). The courts properly strike - as too ambiguous - broad and undirected requests for all documents which relate in any way to the complaint. *Robbins v. Camden City Bd. of Educ.*, 105 F.R.D. 49, 50 (D.N.J. 1985).

II. **Document Requests Made During Depositions**: The courts have split as to whether a document holder must respond to a request made on the record at a deposition. The case law as to the degree of formality required for a Rule 34 Request for Production to be enforced through a Motion to Compel under Rule 37, reflects one of the fundamental rules governing discovery: discovery is within the trial court's sound discretion. *Trask v. Olin Corp.*, 298 F.R.D. 244, 260 (W.D.Pa. 2014)(*citing Harris v. Pa. Bd. of Prob. & Parole*, 2013 WL 5551206, 2 (M.D.Pa.)). In deciding if an informal document request can be enforced, courts conduct a fact-specific analysis into the course of discovery, the exchanges between counsel, and the judicial interests in both expediting litigation and promoting fair trial. *Id.* (finding emailed requests sufficiently formal given all circumstances).

   A. **Production Compelled**: In *Dixon v. Cappellini*, 88 F.R.D. 1 (D.C. Pa. 1980), the court held that an oral request for reports, made at deposition, supported a subsequent motion to compel discovery. The court relied upon the fact that counsel described the requested material with reasonable particularity and both parties were aware of which documents were involved. *See Swope v. National Presto Industries*, 1990 WL 149203, 2 (E.D.Pa. 1990). This is probably the better rule, as it is convenient for the parties, is standard practice, and puts substance over formality.

   B. **Production Not Compelled**: In *All West Pet Supply Co. v. Hill's Pet Products Div.*, 152 F.R.D. 634 (D. Kan. 1993), where the original request for documents was made during a deposition, the court would not compel the deponent to produce copies of reports created during his other engagements as an expert witness.

Afterward | G3 - 2

Notes:

[G4] DOCUMENT DESTRUCTION

QUICK RULE: *A party that destroys documents may face a variety of discovery sanctions. If, during a deposition, it appears documents are missing or may have been destroyed, counsel should develop the necessary foundation to establish document destruction.*

DISCUSSION:

I. **Document Destruction**: The intentional or negligent destruction of discoverable documents (often referred to as spoliation) may give rise to various sanctions, including adverse inferences against the party. *Eaton Corporation v. Appliance Valves Corporation*, 790 F.2d 874, 878 (Fed. Cir. 1986).

II. **Overview Of Spoliation**: Courts differ regarding what showing is necessary to obtain sanctions or penalties for the destruction of discoverable documents. Key considerations in determining whether sanctions are appropriate: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future. *Schmid v. Milwaukee Electric*, 13 F.3d 76 (3d Cir. 1994).

A. **Alternate Formulations Of The Test**: The evidence law create an adverse inference when evidence has been destroyed and (1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a culpable state of mind; and (3) the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *Residential Funding v. DeGeorge Fin.*, 306 F.3d 99, 107 (2d Cir. 2002); *Bull v. United Parcel Service*, 665 F.3d 68, 73 -79 (3rd Cir. 2012).

B. **Degree Of Fault**: Courts differ as to the necessary *mens rhea* necessary for spoliation sanctions. Some courts require bad faith; others apply a reckless or negligence standard.

1. **Bad Faith Necessary**: Most courts require a showing of bad faith to obtain sanctions for document destruction. *See Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008). Bad faith spoliation is advantage-seeking behavior by the party with superior access to the documents. *Morris v. Union Pacific*, 373 F.3d 896, 901 (8th Cir. 2004). A document is destroyed in bad faith if it is destroyed to hide adverse information. *Faas v. Sears*, 532 F.3d 633, 644 (7th Cir. 2008).

a. **Document Destruction Policy**: If a party adopts a document-retention policy to obtain an advantage in the litigation through the control of information and evidence, the court would be justified in making a finding of bad faith. *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311, 1326 -1332 (Fed. Cir. 2011). If the party implemented its document retention policy for legitimate business reasons such as general house-keeping, finding of bad faith is unwarranted. *Id.*

b. **Simple Error**: No unfavorable inference arises when the document or article has been lost or accidentally destroyed, or where the failure to produce it is otherwise accounted for. *Bull v. United Parcel Service*, 665 F.3d 68, 73 -79 (3rd Cir. 2012).

2. **Negligence Enough**: For some courts, negligence alone can support adverse inferences. *See Residential Funding*, 306 F.3d at 108; *Rogers v. T.J. Samson*, 276 F.3d 228, 232 (6th Cir. 2002). "If a party has notice that evidence is relevant to an action, and either proceeds to destroy that evidence or allows it to be destroyed by failing to take reasonable precautions, common sense dictates that the party is more likely to have been threatened by that evidence." *Mosaid v. Samsung*, 348 F.Supp.2d 332, 338 (D.N.J. 2004); *Scott v. IBM*, 196 F.R.D. 233, 248 (D.N.J. 2000).

B. **Duty To Preserve**: Courts apply a spoliation sanction only where a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent. *Burlington Northern v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007).

C. **Prejudice**: Prejudice requires a showing that the spoliation materially affects the adverse party and is prejudicial to the presentation of his case. *Wilson v. Volkswagen*, 561 F.2d 494, 504 (4th Cir. 1977). A party must only come forward with plausible, concrete suggestions as to what the destroyed evidence might have been. *Schmid v. Milwaukee Elec.*, 13 F.3d 76, 79 (3d Cir. 1994); *Leon v. IDX*, 464 F.3d 951, 960 (9th Cir. 2006).

1. **Bad Faith Presumes Prejudice**: If it is shown that the spoliator acted in bad faith, the spoliator bears the "heavy burden" to show a lack of prejudice to the opposing party. *Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985).

III. Deposition Outline For Establishing Document Destruction:

□ How are documents handled and stored in the organization
□ What is the organization's document retention policy?
  + When was it adopted? Why was it adopted? If adopted recently, what was previous policy?
  + Who is in charge of implementing the policy?
□ When did litigation become foreseeable?
  + After it was foreseeable, what steps were taken to preserve documents relevant to the lawsuit?
  + Was a hold letter sent from counsel's office? To whom?
□ Do we have (or know for certain that we have) all the documents that once existed?
□ What documents were destroyed?
  + Were the documents selectively destroyed (some kept and some destroyed)?
  + Can each destroyed document be identified, or were they destroyed as a group?
□ When were they destroyed?
  + Before or after litigation had begun or foreseen?
□ How were the documents destroyed?
□ Who was involved?
  + Were they aware of the potential of litigation?
  + Were they aware of their office's document retention policy?
  + Did this person usually have a role in destroying documents?

 Afterward | G5 - 1

[H5] OUTLINING THE TRANSCRIPT

GENERAL RULE: *For efficiency and clarity, outline the material results in a deposition transcript. The summary should be organized by subject matter and should contain all statements that are clear enough to be binding upon the deponent.*

<u>DISCUSSION</u>:

I. **<u>General</u>**: Discovery – in the sense of gathering information – is only half the battle. As a case moves toward dispositive motions or trial, organizing the information becomes paramount. As cases become more complicated, the ability to access information is key. If you can't find it, you don't have it. Depositions are messy, non-linear methods of gathering information. Because issues are often revisited, useful information about any one issue may be sprinkled throughout the transcript. The ability to quickly find references in a transcript is invaluable. Outlining plays a central part in preparing information obtained in discovery for trial. A well-outlined transcript allows quick access to statements the witness made on a given point; it also allows counsel to identify inconsistencies in the witness's testimony.

A. **<u>Outlining</u>**: To make the transcript most useful for trial, the deposition should be outlined. A high-quality outline will contain the following features: (1) organization by issue or sub issue, (2) references and citations only to language that can be used to control the witness, (3) short, clear, affirmative statements, (4) inclusion of documents that the witness can authenticate, and (5) binding information from documents that can also be linked to the witness.

1. **<u>Organization By Issue Or Subissue</u>**: The deposition should be organized by subject, such that any information from the deposition on an issue is gathered in one place. If the witness is deposed about an accident she witnessed, one heading should be "Car Description" and a subheading may be "car color." In that sub section, we will place citations to transcript locations where the witness identifies the car's color.

2. **<u>Only Use Controlling Language</u>**: The deposition transcript usually contains a range of noise: colloquy, half answers, and clarifications. The outline should only include answers that are clear enough to control the witness on the stand (*i.e*, clear enough for impeachment should the witness change her testimony). *See **H3 – Evaluating A Witness's Answer.*** A witness's statement that she doesn't know something should also be captured on the outline, as that can be used to impeach, as well.

3. **<u>Short, Clear, Affirmative Statements</u>**: Generally, the outline should be filled with short, clear statements such as "The car was green." This is preferred to any effort to quote the witness (*e.g.*, "Well, you know, it was, it was green."). These short statements will be the foundation of a cross examination.

4. **<u>Include Authentication</u>**: At the end, the outline should have a list of the documents for which the witness has given the foundational elements - and citations to those

foundations - in the transcript. In trial preparation, the question of which witness will bring in which documents can be readily answered with these references.

5. **Binding Information From Documents**: This is where we turbo-charge the outline. We take any document the witness can authenticate and look for affirmative statements we can add to our outline. For example, if the witness authenticates an email she sent to her mother, and in that email she wrote "I saw an accident today – a green car smashed a blue car." Whether or not the witness makes these statements in the deposition, we take them out of the document, and put them in the outline. This allows us to (1) search out instances where the deposition is supported by the documents, and (2) hunt out impeachable inconsistencies. The full benefit of this is, when preparing for cross examination, or performing the cross, the outline will allow instant access to all statements that can be forced on the witness – both in the documents and the transcript. Indeed, some witnesses have multiple depositions from older cases or related cases – some experts have been deposed many times – including useful information from past testimony in the same outline is very helpful.

B. **Sample Outlines**: A sample outline for the witness of a car accident

Personal		
	Lives at 200 Cherry Lane	Tr. At 3
	Attends college at University Of Michigan	Tr. At 4
	Deposed once before in divorce proceeding	Tr. At 6
	Wears prescription glasses; no contacts.	Tr. At 14; Exhibit 37
Work	Works at State department as secretary.	Tr. 37; 49
	Usually takes subway to work	Tr. 22
	Usually leaves for work at 8:15 a.m.	Tr. 99
Morning of accident		
	Woke at 7:00 a.m.	Tr. At 37; 45
	Breakfast at home.	Tr.12
	Called Mother to discuss Sunday dinner.	Tr 22; Ex 4
	Left home for work at 8:20	Tr.22
	Left home "on time"	Tr. 96
	Not sure when she left home.	Tr.197
	Sent two texts on walk to metro.	Tr.47; Exhibit 1; 2
	Sent text to mother about boyfriend.	Exhibit 1 at pg 2
Where she saw accident	Standing on corner of Wisconsin and East-West Highway.	Tr. 65; 98
	Waiting on corner for light to change	Tr.47
	Three people on corner with her: short man, two women.	Tr.99; 101
	Man was in front of her.	Tr. 102
	Not sure of man's height 5'6" at most.	Tr. 107; 110; Exhibit 8

[H1] STANDARD DEPOSITION INTRODUCTION

QUICK RULE: *It is best to start most fact depositions with a detailed introduction that clarifies the ground rules and ensures the witness can't later claim he didn't understand what was happening.*

GENERIC INTRODUCTION:

▸ <Swear witness>

▸ Good morning, Mr.______________, we met a few moments ago. My name is ________. I'm an attorney with the [Name of organization], and I represent [name of party] in [Name of case] currently pending the District of _______.

▸ Are you represented by counsel? And your counsel is ______.

▸ Have you ever had your deposition taken? How many times?

▸ I will be asking you a series of questions to which you are under oath to provide full and complete answers. If you do not understand any question that I ask you, will you please let me know before you respond and I will explain or rephrase the question?

▸ You took an oath before we started this morning? Do you understand the nature of the oath? It requires to fully answer each question, to the extent you can. If you're not sure of an answer or don't have a complete answer, then you must still answer the question to the extent you can. Do you understand this?

▸ As you can see, the court reporter is recording all that it said here. Because she can only record our words, please answer each question with a verbal response. Ok? [Always a joker who nods on this one].

▸ Have you taken or do you intend to take any medication that would affect your ability to testify accurately or honestly?

▸ Do you plan to read and sign the deposition? [ALT: Ask witness to read and sign - recommended]

▸ From time to time your counsel may object. After his objection, I'm going to ask you to go ahead and answer the question unless he instructs you not to. Do you understand?

▸ [For 30(b)(6) depositions: Mark the deposition notice or subpoena as Exhibit 1, then, to counsel: "This deposition is being taken pursuant to FRCP 30(b)(6). For which numbered items on Exhibit 1 is the witness being proffered?]

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Notes:

[H2] WITNESS PREPARATION CHECK LIST

Note: Do not show this to your witness. Use it to consider areas of preparation.

QUICK RULE: *It helps witnesses to prepare them for what they will experience in the deposition. The centerpiece of this preparation is telling them to answer questions completely and honestly and then stop.*

I. **Preparing A Client/Witness For Deposition**: In depositions, it is necessary to prepare more than, and better than one would for trial. "Any lawyer worth his salt prepares a witness he is going to call to the stand." *United States v. Beltran*, 165 F.3d 1266, 1272 (9th Cir. 1999) (Kozinksi, J., concurring). Preparing a witness involves both (1) a substantive preparation regarding the issues about which the witness may be asked, and (2) preparation regarding what to expect and how to behave during the deposition.

II. **Substantive Preparation**: The proper preparation for a witness involves a full review of the underlying events, including any documents or exhibits that will help the witness recall what took place and when. The overarching objective is to protect the witness from surprise regarding the subjects to be covered at deposition, and avoid having the witness testify inaccurately due to a faulty memory. It is fundamentally unfair to send an unprepared witness into a deposition.

III. **Preparation For The Deposition**: Part of the proper preparation for a witness includes discussing what to expect during the deposition and how to behave. The greatest emphasis must be placed upon the witness's duty to honesty. Both at the beginning and ending of the preparation, the witness should be reminded of this obligation.

A. **Duty To Honesty**: "Tell the truth. This is an overriding principal. Whatever else I tell you, to the extent you perceive it as being incompatible with the truth, tell the truth. You are under an obligation to completely and honestly answer each question asked. We want you to fulfill this obligation."

B. **Explaining The Witness's Role**: A deposition is an opportunity for the other side to ask questions of you. They are entitled to your cooperation, but not your assistance. The best deposition in the world - from the defending party's perspective - would be one where the witness comes into a room smiles and then leaves. A witness does not score points in a deposition, no matter how clear her testimony. A witness comes in with a score of zero and then proceeds to loose points as the deposition progresses and the other side gathers information and locks the witness into testimony. This is ok – in fact, it's required by the rules governing law suits. Volunteering information, however, can only increase the depositions length and the number of points you surrender. Be honest, forthright, and brief.

C. **General Review Subjects For Witness:** Depending upon the type of witness and range of deposition, you may want to discuss some or all of the following points with the witness in preparation.

1. **Pace**: Do not let opposing counsel set the pace for your answers. You should pause a second after a question is asked before beginning your answer. This will give you time to formulate your answer and will give counsel time to object if necessary.

2. **Not A Teacher**: Do not volunteer facts or answers to questions you have not been asked. Your job is to answer the question that is asked, not to educate opposing counsel.

3. **Never Guess Without Labeling It As A Guess**: Avoid speculation. If you are asked a question that calls for you to estimate or speculate, make it clear that you are not testifying based upon personal knowledge.

4. **Concision**: Answer all questions in as short and concise manner as possible. Short answers are always better than long answers. If you answer runs longer than a sentence, you're probably providing more information than is being sought in the pending question. If a "yes" or "no" answer is accurate, then stop there. Brief answers such as "yes" and "no" are not rude. This is not someone asking you for help in the supermarket. In this context, yes or no answers are appropriate.

5. **Confer With Counsel**: You have the right to confer with counsel, however avoid doing it while a question is pending unless you have a question that involves possible privilege.

6. **Not To Answer**: Your attorney can direct you not to answer a question. Please comply with this instruction. Unless you have such an instruction, answer every question to the extent you can.

7. **Breaks**: You may ask for a break whenever you need one. Remember, conversations with anyone other than your attorney may not be privileged. Even conversations with counsel may not be privileged.

8. **Speak Up**: You must answer audibly so the court reporter can hear your answer.

9. **Be Forthright**: Do not try to hide or sugar coat what you perceive to be damaging facts, opinions, or events. The facts are what they are.

10. **No Documents**: Do not offer to furnish documents to opposing counsel. Do not offer to locate, in documents, information responsive to opposing counsel's questions unless asked to do so.

D. **Do These Things**:

1. **Listen Up**. Use active listening. Listen for the tone of the opposing counsel.

2. **Avoid Characterizing Past Testimony:** For long depositions, attorneys frequently return to earlier subjects. Be careful of questions that begin "now earlier you testified to...." or "yesterday you said..." _ the attorney is trying to recharacterize your testimony. Only adopt what they're saying if it is 100% accurate – often, a discussion of prior

 Extras | H2 - 3

testimony doesn't give credit to the nuances of the original testimony. Listen for attorney buzzwords such as "so" and "then" which are used to recharacterize your testimony.

3. **Questions?**: Do you have any questions for me? If you do, make sure you get them answered before the deposition.

4. **Themes And Memes**: There may certain themes or catch phrases we've developed during your preparation; use these themes when appropriate throughout your testimony.

5. **Eyes Of The Beholder**: Use eye contact. Maintain eye contact with the opposing counsel. This will relax you and give the appearance that you are relaxed. It will also make you look serious and confident.

6. **Sound Of Silence**: Use Silence. If you are finished with an answer, just stop and do not expand upon it. Do not become uncomfortable with silence.

7. **Reading Is Fundamental**: It is your privilege to read, review, and examine every document. When an exhibit is handed to you, do not start to answer the question until you are familiar with it. If that means reading the entire document, do so.

8. **I Don't Know**: Remember to say "I Do not know" if it is the case. You should explain what you do remember without volunteering information that is not called for.

9. **Logistics**: Check logistics beforehand. Know the location, time, and conditions. Voice any special needs before hand (if you need time/place to smoke, etc).

10. **Etc**: Be polite. Avoid humor. Stay calm.

E. Avoid These Things:

1. **Self-impeachment**: Do not use phrases like "Well to be quite honest with you..." This hurts your credibility by giving the impression that you have not been honest in the past.

2. **Let The Man Finish**: Do not anticipate the end of the question being asked. You may answer the wrong question or give the opposing attorney ideas.

3. **Stop When Confused**: Do not answer a question that you do not understand. Ask counsel to rephrase the question or say you do not understand the meaning. Do not give opposing counsel suggestions as to how to rephrase or "I know what you're trying to ask. . ." Do not say "do you mean x or y."

4. **Themes Again**: Avoid adopting the other side's themes or phrases.

5. **Half Is Not Enough**: If you are asked a long question and you only agree with parts of it, say no.

6. **Stay Frosty**: Do not become close minded, righteous, or dogmatic. These emotions can destroy your credibility and hurt your ability to answer questions.

7. **It's Not About You**: Do not be defensive. Don't take the questions personally; don't let counsel get under your skin.

8. **Listen To Each Question**: Even if you are asked a dozen easy questions in a row – all with the answer "yes," you still have to consider each question - Do not answer yes so many times in a row that by accident you answer yes to a hard question.

9. **Do You Really Have An Opinion Or A Guess**: Do not volunteer an opinion in a field for which you are not an expert. If pressed, you may tell them what your lay opinion is.

10. **Other's Knowledge**: Do not testify as to what others may know or think or feel unless you have a real basis for knowing this information. Label all guesses as guess.

11. **No Further Work**: Do not prepare new materials between now and the deposition.

12. **The Truth, Again**: Last, the important thing to remember: Tell the truth, and stop.

Notes: ______________________________

[H3] EVALUATING THE WITNESS'S ANSWERS

I. **Answers (general)**: The most important elements of any deposition are the witness's answers - not only the information contained in those answers, but the form and clarity of the answers. To conduct a useful deposition, the calling attorney should have enough of an understanding of the case, the allegations, and the law to know which answers help, which answers hurt, and which answers are neutral.

A. **Helpful Answers**: When we receive answers that we perceive as helpful to our case we want to ensure that we have locked them in as clearly as possible (see grading and improving answers, below), and then we want to leave them alone.

B. **Harmful Answers**: When we receive answers that we perceive as harmful to our case, we want to probe them as deeply as possible to understand the basis and support for those answers – to see if they are fragile and how they may be subject to attack. This is what the deposition is for: to find out the bad things that the witness might say and see how rugged these things are.

C. **Neutral Answers**: At first glance, neutral answers might seem like a waste – they neither help nor hurt. As litigation progresses, however, the parties' positions and theories of the case may change as emerging facts make some approaches more or less promising. Locking in neutral answers can limit the opposing party's room to roam. Also, sometimes witnesses lie about items for reasons completely unrelated to the case – say because to admit the truth would make them look bad. Locking in a neutral answer – that's a lie – will open up inviting impeachment opportunities.

II. **Responsiveness**: The calling attorney is entitled to a responsive answer to every question that does not call for privileged information. The questions may be substantive ("the car was blue"), indicate lack of knowledge ("I don't know" or "I don't recall"), or indicate a failure to understand the question ("I'm not sure what you mean"). If a witness's answer is incomplete or ambiguous it is the responsibility of the calling attorney to follow up with a question that completes or clarifies.

Example:

Question: What color was the car?
Answer: I didn't really get a good look at it
(follow up)Question: But what color was the car?
Answer: Blue.

The calling attorney should stay focused on obtaining an answer to the pending question, even if the answer provided by the witness suggests a more fruitful area of examination:

Example:

Question: What color was the car?
Answer: I was distracted by a boy darting across the street
(Poor) Question: Which direction was he running in?
(Better) Question: But what color was the car?

Answer: Blue.
Question: What direction was the boy running in?

III. **Grading Answers**: An attorney may get so distracted by his outline, documents and opposing counsel, that the attorney fails to listen to the witness's answers. It is vital that the attorney calling the deposition listen to every answer, to judge whether it is responsive to the question, to determine if a follow up question is warranted, and to grade the quality of the answer. Although the information obtained in a deposition has a variety of uses, the deposition transcript only has three practical uses: to support a motion for summary judgment, to substitute for the witness's testimony at trial, and to impeach inconsistent statements at trial. For deposition answers to be functionally useful toward any of these three ends, the answers must be clear, unambiguous, and preferably concise. To this end, the calling attorney must evaluate every answer to determine if it contains valuable information, and whether it's presented in a useful manner.

A. **Basis For The Grade**: The first question to answer is: why do the various types of answers get the assigned grades? The grade reflects two factors: (1) the amount of damage the witness will suffer if she changes her testimony at trial, and (2) the clarity of the response; the jury's ability to quickly grasp that the deposition testimony conflicts with the trial testimony. Thus, "firmness" is a measure of usability - how usable is the testimony. Moreover, testimony as to what the witness "believes" or "feels" are often worthless. Subjective beliefs and feelings are not evidence. (43 F.Supp.2d 762, 776).

B. **Method For Grading**: Here is a simple method for grading deposition answers:

A+ Answer: In response to a nonleading question, the witness provides a firm answer regarding one specific fact:

Question: What did you notice about the car?
Answer: The car was blue.

This will have the most impact on cross examination, as it leaves the witness no place to hide, and can be easily quoted in a motion for summary judgment. It is both unprompted, unambiguous, and can be quickly read at trial to make the desired point. If the witness wants to change her answer and make the car red, she must admit that she has changed her testimony. An attorney cannot manufacture this answer. She must, however, be able to recognize an A+ answer and then leave it alone because it is not going to get any better.

A Answer: In response to a clear and unambiguous leading question regarding one specific fact, the witness provides a yes or no.

Question: Was the car Blue?
Answer: Yes.

Almost as good as the A+ answer, but now it has been prompted, and so it seems just a bit suggestive.

A- Answer: In a narrative answer, the witness makes a clear and unambiguous statement regarding a specific point.

Question: So what happened next?
Answer: Well, I turned around when I heard the crash and saw a blue car rolling over.

The witness states that the car is blue, clearly and unequivocally. When using this question and answer pair, however, it is not immediately clear the point that is being made. Although not entirely necessary, the natural follow up to this answer would be "So the car that was rolling over was blue?"

B+ Answer: A clear and unambiguous statement by the witness that they have no memory regarding a specific fact, and that it cannot be refreshed.

Question: What color was the car.
Answer: I just don't recall.
Question: Are you aware of anything that could refresh your memory?
Answer: No.

Depending upon the facts of the case, this answer may be good news or bad, but its clarity ensures that the witness cannot show up later with information regarding the car's color without paying a penalty in credibility.

B+ Answer: A clear answer that spans two questions:

Question: Did you see the car?
Answer: Yes.
Question: What color was it?
Answer: It was Blue.

This is clear and unambiguous, but reading it during a cross examination, or quoting it in a summary judgment brief will be a bit more distracting and time consuming.

B Answer: A clear and unambiguous statement by the witness that they "think" or "believe" a certain fact to be true.

Question: Was the car Blue?
Answer: I think so.

A witnesses' statement that they "think" or "believe" something is true is only of limited value. In a motion for summary judgment, courts may be unwilling to find an absence of disputed fact based upon what a witness "thinks" happened. At trial, a witness may be able to walk away from such testimony with little credibility damage.

C Answer: (and below): Any answer which is not clear, which is ambiguous, or in which the witness stakes out enough room within which they may comfortably change their answer at trial.

Question: Was the car Blue?
Answer: I'm really not sure (Or "It may have been Blue, but my memory's a bit fuzzy").

"C" answers include factual statements buried in long narratives or that require a series of three or more questions to put together

The most important deposition skill that an attorney can learn is how to identify the various categories of answers, and how to bring the witness up the scale, that is, to change a "C" answer to a "B." Ideally, you would never have to rely on answers below "A," in reality you can use a B+ or B, with the understanding that you have a much smaller stick to punish the witness if they change their testimony.

IV. **<u>Improving Answers</u>**: An answer can be improved simply by taking the information provided by the witness and repackaging or recharacterizing. This can only be done, of course, if you know what a helpful (for your case) answer looks like – there is little benefit in repacking and emphasizing bad evidence. For example, the following question has a minor pronoun problem that will make it hard to use at trial – the follow up resolves the pronoun problem and provides a clear answer:

Question: What did you see just before the accident?
Answer: A roadside worker was waving a flag, and then a car hit me.
Question: What color was it?
Answer: It was blue.
Question: The car that hit yours was blue?
Answer: Yes.

The follow up changed a useless answer into a clear, unambiguous answer. The depositions of experienced attorneys will constantly be restating and clarifying ambiguities in the witness's testimony. Of course this is not necessary for every fact identified by the witness, just the ones that might have some importance to the case.

This same approach can be used to summarize a long and unwieldy answer:

Question: What color was the car that hit you?
Answer: Well, I was out driving with Fred, it was such a nice day, and we were taking Hawkhurst Drive when a ***blue Datsun pickup*** came around the curve. Fred swerved and I shouted "Fred, there's going to be an accident," then ***the other car hit us***.
Question: A blue Datsun pickup hit your car?
Answer: Yes.

A well conducted deposition consists of a mix of open-ended questions seeking information, narrow questions pinning the witness down, and summarizing questions clarifying the transcript.

Notes: ____

[H4] THINGS TO BRING TO THE DEPOSITION

PACKING:

I. Things To Bring If You Are Calling The Deposition

□ Outline of questions
□ Documents: three copies of each (minimum)
□ Caption for court reporter (heading/styling of case title)
□ Copy of subpoena or deposition notice
□ If pursuant to FRCP 30(b)(6), list of topics
□ Phone number of trial judge or magistrate
□ Contact information for court reporter [sometimes they don't show up]
□ Tylenol
□ Snack
□ Copies of any court orders or letters between counsel regarding any deposition limits
□ This Fieldguide
□ Phone number of opposing counsel if there's an emergency change
□ For Expert witness: 2 extra copies of report; set of all "documents considered"

II. Things To Bring If You Are Defending A Deposition

□ The witness (always meet up before entering deposition site)
□ Ensure there will be a private place to consult with witness should that be necessary
□ Address of deposition
□ Copies of any court orders or letters between counsel regarding any deposition limits
□ Phone number of trial judge or magistrate
□ Tylenol
□ Snack for you and witness
□ Map/plan for how you and the witness will get lunch
□ This field guide
□ Phone number of opposing counsel if there's an emergency change
□ Nothing else: witness should not bring any day planners, notes etc.

Notes: ______

Notes:

Rule 26. Duty to Disclose; General Provisions Governing Discovery
(a) REQUIRED DISCLOSURES.
(1) Initial Disclosure.
(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure: (i) an action for review on an administrative record; (ii) a forfeiture action in rem arising from a federal statute; (iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; (iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; (v) an action to enforce or quash an administrative summons or subpoena; (vi) an action by the United States to recover benefit payments; (vii) an action by the United States to collect on a student loan guaranteed by the United States; (viii) a proceeding ancillary to a proceeding in another court; and (ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.
(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a

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statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state: (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made: Rule 26 FEDERAL RULES OF CIVIL PROCEDURE 36 (i) at least 90 days before the date set for trial or for the case to be ready for trial; or (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures.
(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) DISCOVERY SCOPE AND LIMITS.
(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) Limitations on Frequency and Extent.
(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting

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party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) Trial Preparation: Materials.
(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either: (i) a written statement that the person has signed or otherwise adopted or approved; or (ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.
(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between
a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only: (i) as provided in Rule 35(b); or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery: (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

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(5) Claiming Privilege or Protecting Trial-Preparation Materials.
(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed— and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) PROTECTIVE ORDERS.
(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

(d) TIMING AND SEQUENCE OF DISCOVERY.
(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: (A) methods of discovery may be used in any sequence; And (B) discovery by one party does not require any other party to delay its discovery.

(e) SUPPLEMENTING DISCLOSURES AND RESPONSES.
(1) In General. A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made

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known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.
(1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable— and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under
Rule 16(b).

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production— whether to ask the court to include their agreement
in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) Expedited Schedule. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule: (A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and (B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) SIGNING DISCLOSURES AND DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS.
(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, email address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

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(B) with respect to a discovery request, response, or objection, it is: (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Rule 27. <u>Depositions to Perpetuate Testimony</u>
(a) BEFORE AN ACTION IS FILED.
(1) Petition. A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

(2) Notice and Service. At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

(3) Order and Examination. If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.

(4) Using the Deposition. A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.

(b) PENDING APPEAL.
(1) In General. The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

(FRCP 27 Cont)
(2) Motion. The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show: (A) the name, address, and expected substance of the testimony of each deponent; and (B) the reasons for perpetuating the testimony.

(3) Court Order. If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.

(c) PERPETUATION BY AN ACTION. This rule does not limit a court's power to entertain an action to perpetuate testimony.

Rule 28. Persons Before Whom Depositions May Be Taken
(a) WITHIN THE UNITED STATES.
(1) In General. Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or (B) a person appointed by the court where the action is pending to administer oaths and take testimony.

(2) Definition of "Officer." The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

(b) IN A FOREIGN COUNTRY.
(1) In General. A deposition may be taken in a foreign country: (A) under an applicable treaty or convention; (B) under a letter of request, whether or not captioned a "letter rogatory"; (C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or (D) before a person commissioned by the court to administer any necessary oath and take testimony.

(2) Issuing a Letter of Request or a Commission. A letter of request, a commission, or both may be issued: (A) on appropriate terms after an application and notice of it; and (B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) Form of a Request, Notice, or Commission. When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) Letter of Request—Admitting Evidence. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(c) DISQUALIFICATION. A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

Rule 29. Stipulations About Discovery Procedure
Unless the court orders otherwise, the parties may stipulate that: (a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and (b) other procedures governing or limiting discovery be modified— but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

Rule 30. Depositions by Oral Examination
(a) WHEN A DEPOSITION MAY BE TAKEN.
(1) Without Leave. A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and: (i) the deposition would result in more than 10

(FRCP 30 Cont)
depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; (ii) the deponent has already been deposed in the case; or (iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) NOTICE OF THE DEPOSITION; OTHER FORMAL REQUIREMENTS.
(1) Notice in General. A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) Producing Documents. If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) Method of Recording.
(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) By Remote Means. The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) Officer's Duties.
(A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes: (i) the officer's name and business address; (ii) the date, time, and place of the deposition; (iii) the deponent's name; (iv) the officer's administration of the oath or affirmation to the deponent; and (v) the identity of all persons present.

(B) Conducting the Deposition; Avoiding Distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) After the Deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) EXAMINATION AND CROSS-EXAMINATION; RECORD OF THE EXAMINATION; OBJECTIONS; WRITTEN QUESTIONS.
(1) Examination and Cross-Examination. The examination and cross-examination of a deponent

(FRCP 30 Cont)
proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) Objections. An objection at the time of the examination— whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) Participating Through Written Questions. Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) DURATION; SANCTION; MOTION TO TERMINATE OR LIMIT.
(1) Duration. 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.

(2) Sanction. The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) Motion to Terminate or Limit.
(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) Award of Expenses. Rule 37(a)(5) applies to the award of expenses.

(e) REVIEW BY THE WITNESS; CHANGES.
(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: (A) to review the transcript or recording; and (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) CERTIFICATION AND DELIVERY; EXHIBITS; COPIES OF THE TRANSCRIPT OR RECORDING; FILING.
(1) Certification and Delivery. The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) Documents and Tangible Things.
(A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may: (i) offer

(FRCP 30 Cont)
copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or (ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) Copies of the Transcript or Recording. Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) Notice of Filing. A party who files the deposition must promptly notify all other parties of the filing.

(g) FAILURE TO ATTEND A DEPOSITION OR SERVE A SUBPOENA; EXPENSES.
A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to: (1) attend and proceed with the deposition; or (2) serve a subpoena on a nonparty deponent, who consequently did not attend.

Rule 31. Depositions by Written Questions
(a) WHEN A DEPOSITION MAY BE TAKEN.
(1) Without Leave. A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and: (i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; (ii) the deponent has already been deposed in the case; or (iii) the party seeks to take a deposition before the time specified in Rule 26(d); or

(B) if the deponent is confined in prison.

(3) Service; Required Notice. A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) Questions Directed to an Organization. A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

(5) Questions from Other Parties. Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(b) DELIVERY TO THE OFFICER; OFFICER'S DUTIES.
The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to: (1) take the deponent's testimony in response to the questions; (2) prepare and certify the deposition; and (3) send it to the party, attaching a copy of the questions and of the notice.

(c) NOTICE OF COMPLETION OR FILING.
(1) Completion. The party who noticed the deposition must notify all other parties when it is completed. (2) Filing. A party who files the deposition must promptly notify all other parties of the filing.

Rule 32. Using Depositions in Court Proceedings
(a) USING DEPOSITIONS.
(1) In General. At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(FRCP 32 Cont)
(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) Impeachment and Other Uses. Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) Deposition of Party, Agent, or Designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) Unavailable Witness. A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

(5) Limitations on Use.
(A) Deposition Taken on Short Notice. A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

(B) Unavailable Deponent; Party Could Not Obtain an Attorney.
A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) Using Part of a Deposition. If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) Substituting a Party. Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) Deposition Taken in an Earlier Action. A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) OBJECTIONS TO ADMISSIBILITY. Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) FORM OF PRESENTATION. Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) WAIVER OF OBJECTIONS.
(1) To the Notice. An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(FRCP 32 Cont)
(2) To the Officer's Qualification. An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made: (A) before the deposition begins; or (B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) To the Taking of the Deposition.
(A) Objection to Competence, Relevance, or Materiality. An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) Objection to an Error or Irregularity. An objection to an error or irregularity at an oral examination is waived if: (i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and (ii) it is not timely made during the deposition.

(C) Objection to a Written Question. An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) To Completing and Returning the Deposition. An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
(a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY.
(1) In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) Appropriate Court. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) Specific Motions.
(A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: (i) a deponent fails to answer a question asked under
Rule 30 or 31; (ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4); (iii) a party fails to answer an interrogatory submitted under Rule 33; or (iv) a party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) Payment of Expenses; Protective Orders.
(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust.

(FRCP 37 Cont)

(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) FAILURE TO COMPLY WITH A COURT ORDER.

(1) Sanctions in the District Where the Deposition Is Taken. If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) Sanctions in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following: (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)–(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) FAILURE TO DISCLOSE, TO SUPPLEMENT AN EARLIER RESPONSE, OR TO ADMIT.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi).

(2) Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(FRCP 37 Cont)

(d) PARTY'S FAILURE TO ATTEND ITS OWN DEPOSITION, SERVE INTERROGATORY ANSWERS, OR RESPOND TO A REQUEST FOR INSPECTION.

(1) In General.

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if: (i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or (ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) Unacceptable Excuse for Failing to Act. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)–(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) FAILURE TO PARTICIPATE IN FRAMING A DISCOVERY PLAN. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Rule 45. Subpoena

(a) In General.

(1) Form and Contents.

(A) Requirements—In General. Every subpoena must: (i) state the court from which it issued; (ii) state the title of the action, the court in which it is pending, and its civil-action number; (iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and (iv) set out the text of Rule 45(c) and (d).

(B) Command to Attend a Deposition—Notice of the Recording Method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) Command to Produce; Included Obligations. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) Issued from Which Court. A subpoena must issue as follows: (A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held; (B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and (C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) Issued by Whom. The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it.

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(FRCP 45 Cont)
That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of: (A) a court in which the attorney is authorized to practice; or (B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

(b) Service.
(1) By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(2) Service in the United States. Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place: (A) within the district of the issuing court; (B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection; (C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or (D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) Service in a Foreign Country. 28 U.S.C. §1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) Proof of Service. Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.
(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.
(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.
(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that: (i) fails to allow a reasonable time to comply; (ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held; (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden.

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(FRCP 45 Cont)
(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires: (i) disclosing a trade secret or other confidential research, development, or commercial information; (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or (iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party: (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and (ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.
(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.
(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

Notes:______________________________________

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If we are mark'd to die, we are enow To do our country loss; and if to live, / The fewer men, the greater share of honour. God's will! I pray thee, wish not one man more. / By Jove, I am not covetous for gold, Nor care I who doth feed upon my cost: It yearns me not if men my garments wear; Such outward things dwell not in my desires: But if it be a sin to covet honour, / I am the most offending soul alive. No, faith, my coz, wish not a man from England: God's peace! I would not lose so great an honour/ As one man more, methinks, would share from me For the best hope I have. O, do not wish one more! Rather proclaim it, Westmoreland, through my host, That he which hath no stomach to this fight, Let him depart; his passport shall be made / And crowns for convoy put into his purse: We would not die in that man's company That fears his fellowship to die with us. This day is called the feast of Crispian: He that outlives this day, and comes safe home, Will stand a tip-toe when the day is named, And rouse him at the name of Crispian. He that shall live this day, and see old age, Will yearly on the vigil feast his neighbours, And say 'To-morrow is Saint Crispian': Then will he strip his sleeve and show his scars. And say 'These wounds I had on Crispin's day.' Old men forget: yet all shall be forgot, But he'll remember with advantages/ What feats he did that day: then shall our names. Familiar in his mouth as household words Harry the king, Bedford and Exeter, Warwick and Talbot, Salisbury and Gloucester, Be in their flowing cups freshly remember'd. This story shall the good man teach his son; And Crispin Crispian shall ne'er go by, From this day to the ending of the world, But we in it shall be remember'd/ We few, we happy few, we band of brothers; For he to-day that sheds his blood with me/ Shall be my brother; be he ne'er so vile, This day shall gentle his condition: And gentlemen in England now a-bed Shall think themselves accursed they were not here, And hold their manhoods cheap whiles any speaks/ That fought with us upon Saint Crispin's day.

Common Hearsay Exceptions

Present Sense Impression: Statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately after. R803(1).
- Declarant personally perceives the event;
- Declaration is an explanation or description rather than narration; and
- Declaration and event are contemporaneous or nearly so.

Excited Utterance: Statement relating to a startling event or condition made while declarant was under stress of excitement caused by the event or condition. R803(2). Court considers:
- Event's characteristics;
- Time lapse between the startling event and the statement;
- Whether the statement responded to an inquiry;
- Declarant's age;
- Declarant's physical and mental condition; and
- Statement's subject matter.

Existing Mental, Emotional, Or Physical Condition: Contemporaneous declarations of feeling or intent may prove a party's state of mind. R803(3). The exception does not cover statements of memory or belief to prove the fact remembered or believed. Elements:
- Statement contemporaneous with the state of mind to be proved; and
- Declarant did not have time to reflect and fabricate his thoughts.

Business Record Exception: Records of regularly conducted activity are hearsay exempt. R803(6). The record must be:
- Based on entrant's knowledge, or knowledge of person with business duty to give information to entrant;
- Made at or near the time of the events recorded;
- Made in the regular course of a business activity; and
- Regularly kept by the business.

Record's Absence: If a set of records accords with the business record exception (R803(6)), evidence that a matter is not in the records may prove the event's nonoccurrence or nonexistence.
- The event must be the kind that regularly lead to a record's creation. R803(7)).

Statements For Medical Diagnosis Or Treatment: Statements made for medical diagnosis or treatment are hearsay exempt. R803(4).
- Includes statements describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or source.
- Exception applies only to statements by person seeking or receiving treatment.

Recorded Recollection: For a document to be admissible as recorded recollection, the party seeking to admit it must show:
- The record concerns a matter about which the witness once had knowledge,
- Witness's recollection is now insufficient for full and accurate testimony;
- Witness made or adopted the record when her memory was fresh; and
- Record reflects that knowledge correctly. R803(5).
- If predicate satisfied, record read into evidence, but not admitted as exhibit.

Public Records Exception: Public records are excepted from hearsay restrictions. R803(8). Records, reports, statements, or data compilations, in any form, of public offices or agencies, are admissible when:
- They set forth the activities of the office or agency, or
- Incorporate matters observed pursuant to duty imposed by law, or
- Present factual findings resulting from a legally authorized investigation.

Vital Statistics: Records or data compilations of births, deaths, or marriages, are excluded from hearsay limits if the report was made to a public office pursuant to legal requirement. R 803(9).
- Exception only applies when the responses were legally mandated.

Absence Of A Public Record: For a public database or record set, the absence of an expected record may prove the event didn't happen. R803(10).
- Public office or agency must regularly make or preserve the records;
- Someone must diligently search for the contemplated record; and
- May be established with affidavit from someone familiar with the records.

Ancient Documents: Statements in ancient documents are not hearsay exempt. R 803(16).
- Show document existed 20 years or more.

Market Publications: Market quotes, tabulations, lists, directories, or other published compilations are hearsay exempt. R803(17).
- Must show the reports are relied on by the public or people in a relevant field.

Learned Treatises: Statements are hearsay exempt if in published treatises; periodicals; or pamphlets. R803(18).
- Subject must be history, medicine, or other science or art; and
- Must be established as a reliable by (1) expert witness, or (2) judicial notice.
- The treatise may only be used while an expert is on the witness stand;
- Statements may be read into evidence; treatise may not be received as exhibit.

Former Testimony: Testimony given as a witness at another hearing may be hearsay exempt. R804(b)(1).
- Witness unavailable;
- Prior testimony in same or different proceeding; and
- Party now opposing admission had an opportunity and similar motive in prior hearing to develop testimony by direct, cross, or redirect examination.

Statement Against Interest: Statement against penal interest may be hearsay exempt. R804(b)(3).
- Witness unavailable;
- Statement against the declarant's penal interest; and
- Circumstances support statement's trustworthiness.

Residual Hearsay Exception: Out-of-court statements, otherwise inadmissible hearsay, may be admitted under the residual hearsay exception. R807. Courts consider whether:
- Statement evidences a material fact;
- Evidence is more probative on these issues than any other evidence;
- Admitting the evidence furthers the FRE's objectives and interests of justice;
- Evidence has circumstantial guarantees of trustworthiness; and
- Proponent gives notice to the other party before trial

ARPHURB

AUTHENTICITY: Before exhibit is admitted into evidence, it must be authenticated or identified.

- Satisfied by evidence supporting a finding that the object is what its proponent claims. FRE 901(a).
- Documents can be authenticated based upon origin or use. FRE 901(a).
- Unique items can be authenticated by anyone familiar with those items. FRE 901(a).
- Generic items/commodities need custody chain from use to court. *Abreu*, 952 F.2d 1458 (1st Cir. 92).

Self Authenticating: Some documents do not require external sources of authentication. FRE 902.

- Domestic public documents FRE 902(1/2)
- Foreign public documents FRE 902(3)
- Certified documents of public record FRE 902(4)
- Official publications FRE 902(5)
- Newspapers and periodicals FRE 902(6)
- Trade inscriptions FRE 902(7)
- Acknowledged documents FRE 902(8)
- Commercial paper and documents FRE 902(9)
- Presumptions in Congressional acts FRE902(10)
- Certified record, regular activity FRE902(12)

RELEVANCE: Relevant evidence is generally admissible. FRE 402.

- Evidence is relevant if it tends to make any "consequential" fact more or less probable. FRE 401.
- Court can admit evidence conditionally, subject to further evidence fulfilling condition. FRE 104(b).

PRIVILEGE: In "federal question" suits, evidentiary privileges come from the Constitution, acts of Congress, and Federal common law. FRE 501.

- Where a civil action or defense is based upon state law, state's privilege rules apply. FRE 501.

Attorney/Client Privilege: protects confidential communications by clients to their lawyers to obtain legal advice. The advice from counsel to client is privileged to the extent it discloses what the client told the lawyer. Facts are not privileged.

Work Product Doctrine: protects (1) documents and tangible things, (2) prepared in anticipation of litigation or trial, (3) prepared by party or representative (attorney, consultant, agent). FRCP 26(b).

- Work product doctrine can be defeated by sufficient need. *Hickman v. Taylor*, 329 U.S. 495 (1947).

Waiver: Voluntary disclosure of privileged materials waives privilege on relevant subject matter that "ought in fairness to be considered together." FRE 502.

- Clawback: Inadvertent disclosure does not waive privilege if reasonable efforts to protect and promptly retrieve materials. FRE 502. Applies to disclosures in federal and some state proceedings.

Executive Privileges: Executive privileges permit withholding documents: (1) Deliberative process privilege protects agency deliberation, (2) Investigative files privilege protects law enforcement files, (3) Informer's privilege protects the identity of informers, (4) Military and state secrets privilege protects national security, and (5) Presidential privilege protects presidential communications.

Common Law Privileges: Federal courts recognize (1) priest/penitent privilege, (2) therapist/patient privilege, (3) adverse spousal privilege, and (4) the Confidential Marital Communications Privilege.

Burden: Asserting party must establish privilege. *Marathon Oil*, 71 F.3d 1547 (10th Cir. 1995).

UNDUE PREJUDICE: Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, delay, or waste of time. FRE403.

- Evidence is unfair if "it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence." *Quattrone*, 441 F.3d at 186 (2d Cir.).

HEARSAY is (1) an oral, written, or nonverbal assertion, (2) other than one made while testifying at The trial or hearing, (3) offered in evidence to prove the truth of the matter asserted. FRE 801(c).

- Hearsay is generally not admissible, unless made admissible by the Federal Rules or statute. FRE 802.
- Double hearsay: hearsay that contains hearsay requires an exception for each hearsay level. FRE 805.

Not Hearsay: (801(d)).

- **Party**: Out-of-court statements by a party are not hearsay, when offered by opposing party.
  - Out-of-court statement can be attributed to a party if adopted, authorized, or by agent.
- **Prior Statement**: Witness's prior statement not hearsay if (1) witness adopts while testifying, (2) rebuts fabrication claim, or (3) made under oath and it contradicts witness's trial testimony.

Exceptions (Witness Availability Irrelevant). (1) Present sense impression; (2) Excited utterance; (3) Existing mental, emotional, or physical condition; (4) Statements for medical diagnosis or treatment; (5) Recorded recollection; (6) Business Records; (8) Public records / reports; (9) Records of vital statistics; (11) Records of religious organizations; (12) Marriage, baptismal, and family certificates; (13) Family records; (14) Records affecting property; (15) Statements in documents affecting property interests; (16) Statements in ancient documents; (17) Market reports, commercial publications; (18) Learned treatises; (19) Reputation concerning personal or family history; (20) Reputation concerning boundaries or general history; (21) Reputation as to character; (22) Judgment of prior conviction; (23) Judgment on family, or general history or boundaries. FRE 803.

Exceptions (Witness Unavailable). (1) Former testimony; (2) Dying declaration; (3) Statement (a) against penal interest; (b) of family history; (c) against party arranging witness's absence. FRE 804.

Exceptions (Residual Exception). Hearsay may be admissible under the residual hearsay exception if (1) it evidences a material fact; (2) is more probative on the issues than any other evidence; (3) has circumstantial guarantees of trustworthiness; (4) admitting the evidence furthers the FRE's objectives and the interests of justice; and (5) the adverse party notified in advance of trial. FRE 807.

RULES LIMITING ADMISSIBILITY

Character. Character evidence is not admissible to prove conformity with the character on a specific occasion. FRE 404(a). Evidence on habit or routine practice is admitted to establish action. FRE 406.

Impeachment. Most evidence may be used to impeach credibility, including bias, impairment, illness.

- FRE limit how four types of impeachment evidence (1) character evidence, (2) specific instances of conduct, (3) prior convictions, and (4) prior inconsistent statements. FRE 607, 608.

Settlement Discussions. Evidence of offer, conduct, or statement made in compromise negotiations not admissible to prove liability, validity, or claim amount, or to impeach. FRE 408. The evidence must be: (1) created after a claim exists, (2) offered to prove liability, invalidity, or the claim's value, (3) part of effort to compromise the claim, and (4) from the same or related claim or transaction.

BEST EVIDENCE RULE: When a document's contents are at issue, witness may not testify about the contents, unless there is a showing that the document does not exist or is unavailable. FRE 1002, 1004.

Copies. Parties may use copies (duplicates) in court unless there is doubt as to the copy's quality or the original's authenticity, then the original must be brought. FRE 1003.

Compilations. Voluminous contents of various documents can be presented in the form of a chart, summary, or calculation, as exception to best evidence rule. FRE 1006.

- Underlying documents must be admissible and made available for examination by the other side.
- The summary must be accurate, non prejudicial, and authenticated at trial by the creator.

OBJECTIONS BEFORE THE DEPOSITION

As To Notice: Objections as to notice must be raised as soon as they become evident.

As To Standing Of Attorney Attending Deposition: A challenge that an attorney participating in the deposition is not properly admitted to practice before the relevant court must be raised before or at the time of the deposition (if possible).

Regarding Oath: Must raise concerns about the witness's oath, if curable at the deposition, or concern is waived.

OBJECTIONS DURING THE DEPOSITION

Regarding Translation: Objections regarding the translation are waived if not preserved. Objections to the decision not to take the deposition in English – without translation – will be waived if not preserved.

Regarding Attorney Conduct: Objections regarding counsel's conduct – or misconduct – must be raised in deposition to put the offending attorney on notice and to preserve the objection.

- **ARGUMENTATIVE**: Statements (rather than questions) and aggressive, obnoxious questions may be grounds for conduct objection.
- **OBJECTIONS REGARDING OBJECTIONS**: An objection that the defending attorney is making improper objections, is objecting in an improper manner, or is disrupting the deposition or coaching the witness.

Regarding The Question's Form: Must be raised or waived – but note – courts disagree on this list, and some questions are objectionable for multiple reasons.

- **ARGUMENTATIVE**: Question or statement unnecessarily challenges the contents of witness's answers – these may be objections to form or to counsel's conduct.
- **AMBIGUOUS**: Question is confusing because a word or phrase could be understood in more than one way; unfair to make witness answer unclear questions.
- **COMPOUND QUESTION**: Attorney asked two questions; unclear which witness is answering.
- **CONFUSING**: Structure or contents of the question make it unclear or misleading.
- **LEADING**: Leading question (suggesting the answer) is prohibited on examination of non-adverse witness.
- **MISCHARACTERIZES THE WITNESS'S PRIOR TESTIMONY**: A predicate to the question, improperly seeks to summarize or describe prior testimony.
- **CALLS FOR A NARRATIVE**: Counsel did not ask a question, but invited witness to speak at length.
- **SCOPE**: Question on cross exam exceeds scope of direct.
- **VAGUE**: Question is unclear; unfair to make witness answer unclear questions.

Regarding The Question's Foundation: Raise these if potentially curable in the deposition.

- **CALLS FOR SPECULATION**: Because predicate has not been laid, the witness's answer will not have value.
- **OBJECTION AS TO PERSONAL KNOWLEDGE**: A challenge a deponent's competence to testify.
- **CALLS FOR LEGAL CONCLUSION**: Question seeks an interpretation of law.
- **CALLS FOR EXPERT TESTIMONY**: Question seeks specialized knowledge described in FRE 702, 703.
- **ASSUMES FACTS NOT IN EVIDENCE**: Assumes an unstated factual predicate.

Regarding Privilege: It is always proper for counsel to raise objections to questions that may call for privileged information, either based upon the common law or statutory privilege. Counsel may instruct not to answer.

Regarding Answers In A Deposition: Errors or irregularities in the form of answers which might be obviated during the deposition if promptly presented are waived absent timely objections.

- **OBJECTION TO NON RESPONSIVE ANSWER**: Answer is not responsive to question.
- **STATEMENTS FOR THE RECORD**: Witness statements offered "for the record" are objectionable.