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Fundamentals of Taking and Defending Depositions 2017

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Overview of the Rules Governing Depositions in Practice (Substantive Outline) (2016)

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This outline is intended to provide a broad overview of some of the rules relating to depositions in federal court. This outline is not exhaustive, but it is intended to be useful as a guide to your own research and practice.

I. RULES GOVERNING DEPOSITIONS

A. Rules governing depositions in federal courts may be located in several places, for example:

1. Federal Rules of Civil Procedure
2. Federal Rules of Evidence
3. Judges' Individual Practices
4. Local Civil Rules for Federal District Courts (e.g., Local Rules of the United States District Courts for the Southern and Eastern Districts of New York) ("Local Civil Rules")
5. Statutes (e.g., 28 U.S.C. § 1782 (Assistance to Foreign and International Tribunals and to Litigants before Such Tribunals), 28 U.S.C. § 1785 (Subpoenas in Multiparty, Multiforum Actions)), 28 U.S.C. § 1821 (Witness Fees))
6. New York or Other States' Rules of Professional Conduct
7. Case Law

B. Rules governing depositions in New York state courts may be located in several places, for example:

1. Civil Practice Law & Rules ("CPLR")
2. Judges' Individual Practices
3. Statements and Standing Orders of Administrative Judges
4. Uniform Civil Rules for New York State Trial Courts (22 NYCRR § 202 for Supreme Court)
5. Commercial Division Rules of Practice (22 NYCRR § 202.70)
6. Uniform Rules for the Conduct of Depositions (22 NYCRR §§ 221.1-221.3)
7. Statutes (e.g., General Municipal Law §50-h for deposition of personal injury claimants against municipalities)
8. New York Rules of Professional Conduct
9. Case Law

10. Special rules regarding discovery, beyond the scope of this outline, exist for matrimonial, medical malpractice, real property tax, and other actions.

II. DEPOSITIONS UNDER THE FEDERAL RULES

A. Depositions are one of the discovery methods permitted by the federal rules. See Fed. R. Civ. P. 30(a).

B. Depositions may be taken by stipulation, or on notice or by subpoena. See Fed. R. Civ. P. 29, 30(b), 45. No order of the court is necessary to take a deposition, except in certain circumstances listed in Fed. R. Civ. P. 30(a)(2).

C. Before an action is commenced or while an action is on appeal, a deposition may be obtained by court order to perpetuate testimony or to aid in bringing an action. See Fed. R. Civ. P. 27.

III. DEPOSITIONS GENERALLY UNDER NEW YORK STATE LAW

A. Deposition is one of the disclosure devices authorized by the CPLR. See CPLR 3102(a). Practitioners who frequently appear in New York state court often refer to depositions as "EBTs," which is short for "examinations before trial."

B. Deposition may be taken by stipulation, or on notice without leave of the court. See CPLR 3102(b).

C. Before an action is commenced, deposition (or other discovery) may be obtained by court order to preserve information or aid in bringing an action. See CPLR 3102(c).

IV. PRIORITY OF DEPOSITIONS IN NEW YORK STATE COURT

A. Defendant normally has priority to take the first deposition. See CPLR 3106(a); Serio v. Rhulen, 29 A.D.3d 1195 (3d Dep't 2006) ("As a general rule, in the absence of `special circumstances,' priority of examination belongs to the defendant if a notice therefor is served within the time to answer; otherwise, priority belongs to the party who first serves a notice of examination.") (citations omitted). **Practice Tip**: If you represent a defendant, serve a notice of deposition with your answer to preserve deposition priority.

B. Plaintiff must obtain leave of court to serve a deposition notice before defendant's time for serving a responsive pleading has expired. CPLR 3106(a). If plaintiff can show "special circumstances," a reversal of priority may be warranted. Bennet v. Riverbay Corp., 40 A.D.3d 319 (1st Dep't 2007).

C. Defendant may lose priority: "priority is deemed abandoned, however, where a party fails diligently to pursue disclosure." Bucci v. Lydon, 116 A.D.2d 520 (1st Dep't 1986).

D. In practice, this issue is often addressed at a preliminary conference with the court, in which both priority and a timetable and schedule for depositions are often determined. See 22 N.Y.C.R.R. § 202.13; Commercial Division Rule 11(c).

V. TIMING AND NUMBER OF DEPOSITIONS UNDER FEDERAL RULES

A. In federal court, pursuant to Fed. R. Civ. P. 26(d)(1), depositions ordinarily may not be taken until after the parties have conferred in good faith about various matters, including the timing and scope of discovery, see Fed. R. Civ. P. 26(f), and after the parties have exchanged "initial disclosures," which include the names and addresses 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," Fed. R. Civ. P. 26(a)(1). Certain types of proceedings are exempt from these requirements. See Fed. R. Civ. P. 26(a)(1)(B).

B. The Rule 26(f) conference and Rule 26(a) initial disclosures must ordinarily take place before a scheduling conference is scheduled and a scheduling order, governing the course of discovery, is entered by the district court under Fed. R. Civ. P. 16(b). See Fed. R. Civ. P. 26(a)(1)(C), 26(f)(1).

C. Unlike in New York state court, there is no "priority" in federal practice. See, e.g., Nairobi Holdings Ltd v. Brown Bros. Harriman & Co., No. 02-CV-1230, 2005 WL 742617, at *3 (S.D.N.Y. Mar. 18, 2005). In other words, the defendant is not presumptively entitled to take depositions first; either party may take depositions first, and no party is required to delay taking discovery based on another party's discovery requests. See Fed. R. Civ. P. 26(d)(3).

D. In federal court, leave of the court is required if the deposition would result in more than 10 depositions being taken by one "side" of the litigation (plaintiffs, defendants, or third-party defendants). See Fed. R. Civ. P. 30(a)(2)(A)(i). If there are multiple parties on one side, they are expected to confer and agree in advance on which depositions they collectively seek to take under the presumptive ten-deposition limit. See Advisory Committee Notes (1993 Amendment).

VI. TIMING AND NUMBER OF DEPOSITIONS UNDER NEW YORK STATE RULES

A. In New York State Supreme Court generally, there is no limit on the number of depositions, other than as agreed by the parties or ordered by the Court.

B. In the case of an action to recover damages for personal injury, injury to property or wrongful death predicated solely on a cause or causes of action for negligence, a party is not permitted to serve interrogatories on and also conduct a deposition of the same party without leave of court. *See* CPLR 3130.

C. In New York State Supreme Court generally, depositions are conducted "continuously and without unreasonable adjournment" from day to day until complete. CPLR 3113(b).

D. In the Commercial Division of New York State Supreme Court, however, depositions are limited to 10 in number per side, and each deposition is limited to 7 hours, as in federal court. *See* Commercial Division Rule 11-d(a).

VII. NOTICES OF DEPOSITION AND DEPOSITION SUBPOENAS IN FEDERAL PRACTICE

A. Only a party to litigation may be compelled to give testimony pursuant to a notice of deposition. See, e.g., United States v. Afram Lines (USA), Ltd., 159 F.R.D. 408, 413 (S.D.N.Y. 1994). This includes officers, directors and "managing agents" of a corporate party or entity. See id.

B. A subpoena is required to obtain the deposition of a non-party (including employees of corporate parties or entities who are not officers, directors, or managing agents), or, for overseas witnesses, the "Hague Convention on the Taking of Evidence Abroad in Civil or

Commercial Matters" or other procedures may have to be followed. See id.

C. A non-party deposition subpoena is issued from the court in which the action is pending, see Fed. R. Civ. P. 45(a)(2), but in practice it can be issued and signed by the attorney representing the taking party, with caption designating the appropriate court, see Fed. R. Civ. P. 45(a)(3).

D. The subpoena must also include the text of Fed. R. Civ. P. 45(d) and 45(e), relating to duties and rights of non-parties responding to a subpoena. An official form of deposition subpoena, issued by the Administrative Office of the United States Courts, in fillable PDF format, is available online at http://www.uscourts.gov/forms/notice-lawsuit-summons-subpoena/subpoena-testify-deposition-civil-action.

E. When a deposition subpoena is served, a witness fee "for 1 day's attendance and the mileage allowed by law" must be served with the subpoena. See Fed. R. Civ. P. 45(b)(1). The witness fees and mileage are calculated pursuant to 28 U.S.C. § 1821. The witness fee for one day's attendance is $40.00 (forty dollars). Mileage is calculated from the witness's residence to the place of deposition, and can be based on either "common carrier" fares or automobile mileage, plus tolls, parking fees, etc. See 28 U.S.C. § 1821.

F. Generally, witness fees are paid by check from the serving party's law firm, payable to the witness, and served with the deposition subpoena. Failure to include the check "can serve as an adequate ground for the invalidation of a subpoena." Carey v. Air Cargo Assocs., No. M18-302, 2011 WL 446654, at *3 (S.D.N.Y. Feb. 7, 2011). **Practice tip**: Include with the subpoena a check for $40.00 plus a good-faith estimate of mileage fees in order to avoid problems.

G. Copies of notices of deposition must be served on all parties; when a deposition subpoena is served, a notice of the subpoena must be served on all other parties. See Fed. R. Civ. P. 30(b)(1).

H. Service: A notice of deposition is served like other litigation papers, generally by service on the other parties' attorneys. See Fed. R. Civ. P. 5. A deposition subpoena must be served "at any place within the United States" upon the named person pursuant to Fed. R. Civ. P. 45(b)(2).

I. Timing of Notice: The notice must be in writing and specify the time and date of the deposition, providing "reasonable" advance notice to

all parties. Fed. R. Civ. P. 30(b)(1). A deposition subpoena may be quashed or modified by a court if it "fails to allow a reasonable time to comply." Fed. R. Civ. P. 45(d)(3)(A)(i).

J. Place of Deposition: The notice or subpoena must state the place of the deposition, typically in an attorney's office, but sometimes in a courthouse, a court reporter's office or other locale.

1. Plaintiffs: As a general rule, a plaintiff, having selected the forum in which the suit is brought, will be required to make himself or herself available for examination there. See, e.g., Estate of Gerasimenko v. Cape Wind Trading Co., 272 F.R.D. 385, 387 (S.D.N.Y. 2011) (collecting cases).

2. Defendants: As a general rule, defendants are required to be deposed within 100 miles of their residence, employment, or regular transaction of business (or within the state of their residence, employment, or regular transaction of business, even if the distance to the deposition is greater than 100 miles). See Fed. R. Civ. P. 45(c)(1). There is a general presumption that a defendant's deposition will be held in the district of his or her residence. See, e.g., Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., 203 F.R.D. 98, 107 (S.D.N.Y. 2001).

3. Non-Parties: Non-parties are required to be deposed within 100 miles of their residence, employment, or regular transaction of business. See Fed. R. Civ. P. 45(c)(1).

4. Attorney's Fees for Distant Depositions: "When a deposition upon oral examination is to be taken at a place more than one hundred (100) miles from the courthouse, any party may request the Court to issue an order providing that prior to the examination, another party shall pay the expense (including a reasonable counsel fee) of the attendance of one attorney for each other party at the place where the deposition is to be taken." Local Civil Rule 30.1.

5. These location requirements can be altered by stipulation or by court order, upon a showing of hardship or other circumstances.

6. The Federal Rules expressly contemplate that a deposition can be taken by telephone or other "remote means" by stipulation or by court order. See Fed. R. Civ. P. 30(b)(4). A motion of a party to take the deposition of an adverse party be telephone or

other remote means will "presumptively" be granted under Local Civil Rule 30.2.

K. Duration of Deposition: In federal court, depositions are presumptively limited to "1 day of 7 hours," unless otherwise stipulated or ordered by the court. Fed. R. Civ. P. 30(d)(1). (This limitation does not appear in New York state court practice, other than in the Commercial Division of the Supreme Court.) The only time counted toward this limit is "the time occupied by the actual deposition," which excludes "reasonable breaks during the day for lunch and other reasons." Advisory Committee Notes (2000 Amendment).

L. Production of Documents: The deposition subpoena or notice of deposition may require the production of documents or other things at the deposition. See Fed. R. Civ. P. 30(b)(2), 45(a)(1)(C).

M. Recording Method: The notice of deposition must state the method by which testimony will be recorded, see Fed. R. Civ. P. 30(b)(3)(A), as must a deposition subpoena, see Fed. R. Civ. P. 45(a)(1)(B). Typically the testimony will be transcribed by a court reporter ("stenographic means"), and it may also be recorded ("audio means") or videotaped ("audiovisual means").

N. Objections: Objections to an error or irregularity in a deposition notice is waived "unless promptly served in writing on the party giving the notice." Fed. R. Civ. P. 32(d)(1).

VIII. NOTICE OF DEPOSITION AND DEPOSITION SUBPOENAS IN NEW YORK STATE COURT PRACTICE

A. Where the person to be deposed is not a party or an officer, director or member of a party, you must serve a subpoena to obtain their deposition. See CPLR 3106(b). Otherwise a notice of deposition is sufficient.

B. Timing. A notice of deposition or deposition subpoena must be in writing and provide at least 20 days' notice to parties (CPLR 3107) and to non-parties (CPLR 3106(b)).

C. Subpoenas. Article 23 of the CPLR governs subpoenas generally. See CPLR 2301 et seq.

1. Subpoenas must be served in the same manner as a summons. CPLR 2303(a).

2. As in federal practice, a witness fee must be paid to the witness in advance. CPLR 2303(a).

   (a) The witness fee is governed by CPLR 8001, and is generally $18.00 for non-party deponents, plus $0.23/per mile from place of service. No mileage fee is required if the witness must travel wholly within a city, under CPLR 8001(a).

   (b) The witness cannot be compelled to attend unless the fee is paid in advance. Hampton v. Annall Mgmt Co., 168 Misc. 2d 138 (App. Term 1st Dep't 1996).

3. Pursuant to CPLR 3101(a)(4), the subpoena must indicate "the circumstances or reasons such disclosure is warranted." Kooper v. Kooper, 74 A.D.3d 6 (2d Dep't 2006). The amount of disclosure required by this rule varies between Appellate Division departments.

4. If reasonable notice of an adjournment of the deposition is given to the witness, no further process is required to compel the witness to attend on the adjourned date. See CPLR 2305(a). **Practice tip**: Include both your email address and phone number on the subpoena and invite the non-party witness or their counsel to contact you about scheduling.

D. Place. The notice or subpoena must state the place of the deposition. Rules governing the location of the deposition in state court are as follows:

1. Parties must be deposed in the county where the party resides, has an office for the regular transaction of business or the county in which the action is pending. CPLR 3110(1).

2. Non-Parties – If the non-party is a resident of New York, she must be deposed in the county where she resides or works. If she is not a resident of New York, she must be deposed in the county in which she was served, is employed or has an office. See CPLR 3110(2).

3. Where the party is a public corporation (such as a city, town, school board, etc.), the deposition must take place in the county where the action is pending; however, it must be in the office of the attorney representing the public corporation, unless the parties agree otherwise. See CPLR 3110(3).

4. All five counties (boroughs) of New York City are treated as a single county for purposes of CPLR 3110.

5. Where the application of the normal rules concerning location would impose "hardship," the court may alter the location of the deposition. LaRusso v. Brookstone, Inc., 52 A.D.3d 576 (2d Dep't 2008).

E. Production of documents or things. The notice of deposition or subpoena may require the production of documents or other things at the deposition. See CPLR 2305, 3111. If the subpoena requires production of documents or things by a non-party, the party issuing the subpoena must defray the reasonable costs of production. See CPLR 3111.

F. Special Considerations.

1. Videotape. If you wish to videotape the deposition, you must comply with the Uniform Civil Rules for the Supreme Court, 22 NYCRR § 202.15(c), which require that the notice state the deposition will be videotaped, the name and address of the videotape operator and the operator's employer.

2. Interpreter. The party taking a deposition must pay for the costs of an interpreter if the witness does not speak the English language. See CPLR 3114.

G. Errors in Notice. Errors in a notice of deposition are waived unless written objection is served at least three days before the time for taking the deposition. See CPLR 3112.

IX. DEPONENTS THAT ARE ENTITIES (PARTY OR NON-PARTY) IN FEDERAL PRACTICE

A. Entities: When the person to be deposed is an entity (e.g., a corporation, LLC, municipality, etc.), you do not have to designate in the notice of deposition or subpoena the particular officer, director, member or employee of that entity that you wish to depose. Instead, you must "describe with reasonable particularity the matters for examination," and the named organization "must then designate one of 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." Fed. R. Civ. P. 30(b)(6).

1. The persons designated by the entity "must testify about information known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6).

2. The deposition of each individual designated by the entity pursuant to this rule is considered a separate deposition of 1 day of 7 hours. See Advisory Committee Notes (2000 Amendment).

3. "A subpoena must advise a nonparty organization of its duty to make this designation." Fed. R. Civ. P. 30(b)(6).

4. **Practice tip**: Rule 30(b)(6) provides a powerful discovery tool because of the obligation of the receiving entity to identify relevant personnel and to investigate the designated subject matters to "educate" the designated testifying witness.

B. Specific Individuals: "This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules." Fed. R. Civ. P. 30(b)(6). Thus, when the person to be deposed (either a party or a non-party) is an individual, including a particular officer, director, member, manager or employee of a party, you can simply designate that person by name in the notice of deposition (if a party) or in the subpoena (if a non-party).

X. DEPONENTS THAT ARE ENTITIES (PARTY OR NON-PARTY) IN NEW YORK STATE COURT

A. Individuals. When the person to be deposed (either a party or a non-party) is served with the notice or subpoena as an individual (for example, if they are parties in their individual capacities, or percipient witnesses outside the scope of their employment), you simply designate that person by name in the notice of deposition (if a party) or in the subpoena (if a non-party).

B. Entities. When the person served with the notice or subpoena is an entity (e.g., a corporation, LLC, municipality, etc.), and you wish to depose a specific individual within that entity, you may designate in the notice of deposition (or subpoena) the particular officer, director, member or employee of that entity that you wish to depose. See CPLR 3106(d).

1. The individual identified in the notice of deposition (or subpoena) must be produced, unless the entity notifies you in writing that that another person will be produced instead, and provides the

identity, description or title of that person, at least ten days prior to the scheduled deposition. See CPLR 3106(d).

2. If the person produced lacks sufficient knowledge of the facts at issue in the litigation, you can make a motion to compel the deposition of the particular individual you wish to depose. You will be required to make a "detailed showing" of the necessity for that deposition. See Colicchio v. City of New York, 181 A.D.2d 528 (1st Dep't 1992). You will need to explain in detail why the produced witness was inadequate. See Brown v. Home Depot, 304 A.D.2d 699 (2d Dep't 2003).

C. Commercial Division. Under Commercial Division Rule 11-d(d), each deposition of an individual (even those employed by entities, if such individuals are percipient fact witnesses) is treated as a separate deposition for purposes of the durational and numerical limits on depositions. Each deposition of an entity through a corporate representative is treated as a single deposition for purposes of those limits, "even though more than one person may be designated to testify on the entity's behalf." Rules 11-d(c), 11-d(e). These rules can be altered by a stipulation of the parties or an order of the court. Id.

XI. MOTION PRACTICE FOR DEPOSITIONS IN FEDERAL COURT

A. Motion to Compel Compliance by Party: A motion to compel compliance with a notice of deposition to a party is filed with the court in which the action is pending. Fed. R. Civ. P. 37(a)(2).

B. Motion to Compel Compliance by Non-Party: Under Fed. R. Civ. P. 37(a)(2), a motion to compel compliance by a non-party must be filed with the court for the district where the deposition is or will be taken. Failure to obey the subpoena or an order related to it may be punished as contempt of court. See Fed. R. Civ. P. 45(g).

C. Timing of Motion to Compel: A motion to compel responses to specific questions can be filed after the deposition is otherwise completed, if necessary. Fed. R. Civ. P. 37(a)(3)(C).

D. Protective Order: A motion for a protective order, or to limit or terminate a deposition taken pursuant to a notice of deposition, can be filed with the court in which the action is pending or in the court for the district where the deposition will be or is being taken. Fed. R. Civ. P. 26(c)(1), 30(d)(3).

E. Transfer of Motions: If the person subject to the subpoena consents or the court finds "exceptional circumstances," the court for the district where the deposition is being taken may transfer a subpoena-related motion to the district court where the subpoena was issued, i.e. the court where the subpoena was issued. Fed. R. Civ. P. 45(f). After the motion is decided, the issuing court may transfer the order back to the district court where the deposition is to be taken, in order to enforce the order. See id.

XII. MOTION PRACTICE FOR DEPOSITIONS IN NEW YORK STATE COURT

A. Motion to Compel Compliance by Party: A motion to compel compliance with a notice of deposition to a party may be filed with the court in which the action is pending, CPLR 3124, or in the court for the county where the deposition is to be taken, CPLR 3125.

B. Motion to Compel Compliance by Non-Party: Unlike in federal practice, a motion to compel compliance by a non-party may be filed either in the court where the action is pending or the county in New York State where the deposition is take place, at the option of the moving party. Failure to obey the subpoena or an order related to it may be punished as contempt of court. See CPLR 2308, 3126.

C. Protective Order: A motion for a protective order can be filed by the deponent or any party with the court in which the action is pending, and service of such a motion suspends "disclosure of the particular matter in dispute" (or, if necessary, the entire deposition) until the motion is resolved by the court. CPLR 3103.

XIII. TAKING THE DEPOSITION UNDER FEDERAL RULES

A. At the deposition, the officer before whom the deposition is conducted must put the deponent "under oath or affirmation" to tell the truth. Fed. R. Civ. P. 30(c)(1).

B. A deposition in the United States must be taken before "an officer authorized to administer oaths either by federal law or by the law in the place of examination," see Fed. R. Civ. P. 28(a)(1)(A), before a person appointed by the court where the action is pending, see Fed. R. Civ. P. 28(a)(1)(B), or before a person designated by stipulation of the parties, see Fed. R. Civ. P. 29(a).

C. Procedures applicable to the officer before whom a deposition in a foreign country is taken are set forth in Fed. R. Civ. P. 28(b).

D. 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. Fed. R. Civ. P. 28(c). **Practice tip**: Typically, the party noticing the deposition pays a court reporting service for the services of a stenographer to record and transcribe the deposition, and that stenographer is usually also a notary public who administers the oath to the witness.

E. Objections based on disqualification of the officer before whom a deposition is taken or to be taken are waived if not made before the deposition begins, or promptly after the basis for disqualification is known or could have been known. Fed. R. Civ. P. 32(d)(2).

F. Examination and cross-examination of the witness at the deposition "proceed as they would at trial under the Federal Rules of Evidence," except with respect to rulings by the court under Fed. R. Evid. 103 and exclusion of witnesses under Fed. R. Evid. 615. Fed. R. Civ. P. 30 (c)(1).

G. Because rulings by the court do not need to be made at the deposition itself, objections are "noted on the record, but the examination still proceeds; the testimony is taken subject to any objection." Fed. R. Civ. P. 30(c)(1). This includes any aspect of the deposition, including the qualifications of the officer before whom it is taken and the manner in which the deposition is taken.

H. Objections to the competence of the witness, or to the competence, relevance or materiality of testimony, are not waived by failure to make the objection before or during the deposition, unless the ground for the objection might have been cured at the time of the objection. Fed. R. Civ. P. 32(d)(3)(A). Similarly, any objections to the form of a question or answer, the manner of taking the deposition, the conduct of a party at the deposition, and other similar objections are waived if not timely made during the deposition, if such matters might have been corrected at that time. Fed. R. Civ. P. 32(d)(3)(B).

I. Most commonly, objections to the form of questions are waived if not made on the record at the deposition, because a timely objection could have permitted the questioning attorney to correct the question. By contrast, for example, objections to questions on the grounds of relevance or materiality can generally not be cured at the deposition,

and are therefore not waived if not made at the deposition. In other words, such objections are preserved even if they are not made at the deposition, and the objections can later be interposed if a party attempts to utilize the evidence.

J. Objections must be made concisely and in a non-argumentative and non-suggestive manner (i.e. speaking objections are not permitted). Fed. R. Civ. P. 30(c)(2).

K. A person may instruct a deponent not to answer a question only when necessary to assert a privilege, to enforce a limitation ordered by the court, or to make a motion to terminate or limit the deposition. See Fed. R. Civ. P. 30(c)(3).

L. Under Local Civil Rule 30.3, "A person who is a party in the action may attend the deposition of a party or witness. A witness or potential witness in the action may attend the deposition of a party or witness unless otherwise ordered by the Court." This local rule clarifies the effect of the exception of Fed. R. Evid. 615 (witness exclusion) in Fed. R. Civ. P. 30(c)(1).

XIV. TAKING THE DEPOSITION UNDER NEW YORK STATE RULES

A. Uniform Rules for the Conduct of Depositions. See 22 NYCRR §§ 221.1-221.3.

(a) Prohibit 'speaking' objections.

(b) Allows only those objections under CPLR 3115(b), (c) or (d) that would be waived if not interposed. These include:

(i) defects in the manner of taking the deposition;

(ii) defects in the form of questions;

(iii) defects in the oath or affirmation; and

(iv) defects in the conduct of persons at the deposition.

(c) Prohibits instructions not to answer, except to preserve privilege.

(d) Prohibits conferences with the witness while a question is pending.

2. CPLR 3113 governs various matters, including:

(a) Persons before whom the deposition may be taken;

(b) Requires deposition to be recorded stenographically or otherwise;

(c) Objections are to be recorded;

(d) Deposition shall be taken continuously and without "unreasonable adjournment;

(e) Examination and cross examination proceed as at trial in open court, except that cross-examination is not limited to the scope of the direct examination, and a witness can be cross-examined by her own counsel.

B. The "usual stipulations": Generally the "usual stips," about which a court reporter or your adversary may ask you before the "EBT" commences, are to reserve all objections, except as to the form of the question, until the time of trial; waive "filing and sealing" of deposition and delivery to the clerk as otherwise required by CPLR 3116(b); and permit signing of the deposition before any notary. Generally speaking, however, it is worth asking exactly what stipulations are included in the "usual stips" before agreeing to them.

C. Expense of taking the deposition is borne by the party taking the deposition, unless the court orders otherwise. See CPLR 3116(d).

XV. SIGNING DEPOSITION TRANSCRIPTS UNDER FEDERAL RULES

A. Unlike in New York state court practice, the deponent is only given the opportunity to review and make changes to the deposition transcript or recording if the deponent or a party so requests "before the deposition is completed." Fed. R. Civ. P. 30(e)(1).

B. If the request is made, the deponent is given 30 days to review the transcript or recording, starting from when the deponent is advised that the transcript or recording is available. Id.

C. If the deponent makes any changes in form or substance, the deponent must sign a statement listing the changes and providing the reasons for making them. Fed. R. Civ. P. 30(e)(1)(B).

D. The officer before whom the deposition was taken (usually the court reporter) must sign and certify the transcript or recording, including any changes made by the witness, and "promptly send it to the attorney who arranged from the transcript or recording," who in turn is responsible for storing it. Fed. R. Civ. P. 30(f)(1).

E. The officer must also furnish a copy of the transcript or recording to any party to the litigation or to the deponent, upon payment of reasonable charges. Fed. R. Civ. P. 30(f)(3).

XVI. SIGNING DEPOSITION TRANSCRIPTS UNDER NEW YORK STATE RULES

A. Once the deposition is completed, it must be provided to the witness for review and signature under oath. See CPLR 3116.

B. The witness is free to make "any changes in form or substance which the witness desires to make," and must also provide "a statement of the reasons given by the witness for making them." CPLR 3116 (a). The witness is permitted to make substantive changes to the testimony, subject to the parties' rights to cross-examine the witness at trial about these changes. See Breco Envtl. Contractors, Inc. v. Town of Smithtown, 31 A.D.3d 359 (2d Dep't 2006); Matter of Mancuso, 196 Misc.2d 897 (Sur. Ct. Kings County 2003).

C. Generally, even if a witness substantively changes their testimony, the party who took the deposition is NOT entitled to depose the witness again. See Cillo v. Resjefal Corp., 295 A.D.2d 257 (1st Dep't 2002). That said, a further deposition on the changes may be granted, upon motion, by the court (as in federal court).

D. If the witness does not return the notarized, signed transcript within 60 days, no further changes are permitted.

E. Unlike in federal court, the court reporter is required to file the original transcript of the deposition with the clerk of court, where it shall be "open to the inspection of the parties, each of whom is entitled to make copies thereof," unless "a copy of the deposition is furnished to each party or if the parties stipulate to waive filing." CPLR 3116(b). Because the latter circumstances almost always occur, actual court filing of the deposition transcript by the court reporter is rare.

XVII. USE OF DEPOSITION TRANSCRIPTS AT TRIAL AND ON SUMMARY JUDGMENT UNDER FEDERAL RULES

A. Use of depositions at trial is governed by Fed. R. Civ. P. 32 and various Federal Rules of Evidence.

B. A detailed discussion of the use of a deposition at trial is beyond the scope of this outline. As a general principle, depositions may be used at trial:

   1. To impeach the deponent if the deponent is testifying at the trial, see Fed. R. Civ. P. 32(a)(2);

   2. as an admission, if the deponent was a party, or an officer, director, managing agent, or Rule 30(b)(6) designee of a party, see Fed. R. Civ. P. 32(a)(3); or

   3. for any purpose if the deponent is unavailable for trial, see Fed. R. Civ. P. 32(a)(4).

C. If a party offers only part of a deposition in evidence, an adverse party may require the offeror to introduce other parts that in farness should be considered with the part introduced, and any party may introduce any other parts of the deposition. See Fed. R. Civ. P. 32(a)(6).

D. A deposition taken in an earlier federal or state court action may be used in a later action involving the same subject matter between the same parties, to the same extent as if taken in that later action. See Fed. R. Civ. P. 32(a)(8). The earlier deposition may also used at trial as allowed by (i.e., if it would be an admissible document under) other provisions of the Federal Rules of Evidence. See id.

E. In addition to use of depositions at trial, depositions are frequently used to support or oppose motions for summary judgment. See Fed. R. Civ. P. 56(c)(1)(A). In response, an adverse party is permitted to "object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2).

F. Objections to deposition testimony at the summary judgment stage must therefore be analyzed under the rules governing the use of depositions at trial, as well as the Federal Rules of Evidence governing testimony at trial and the use of documentary evidence as exhibits at trial and in depositions.

XVIII. USE OF DEPOSITION TRANSCRIPTS AT TRIAL IN NEW YORK STATE COURT

A. Under CPLR 3117, deposition transcripts may be used at trial:

   1. For impeachment of the deponent when testifying as a witness at trial (CPLR 3117(a)(1));

   2. By adverse parties for any purpose if the deponent was a party or an officer of a party (CPLR 3117(a)(2));

   3. By any party for any purpose against any party who was present at, or on notice of, the deposition, if the deponent is unavailable for trial, which "unavailability" is defined in CPLR 3117(a)(3);

   4. By any party, without the necessity of showing unavailability or special circumstances, if the deposition was of a person authorized to practice medicine, subject to the right of any party to move for a protective order "to prevent abuse." See CPLR 3117(a)(4). (This rule is intended to protect medical professionals from having to interrupt their medical practices every time their testimony is needed for a trial.)

B. If only part of a deposition is read into evidence at trial, any other party may read any other part of the deposition. CPLR 3117(b).

C. Depositions taken in prior state or federal actions involving the same subject matter between the same parties or their representatives or successors in interest may be used in subsequent New York state court actions "as if taken therein." CPLR 3117(c).

D. Merely taking the deposition of a person does not make that person a "party's witness" (i.e. for purposes of the party's case-in-chief at trial). CPLR 3117(d). The introduction in evidence of the deposition transcript or any part thereof for any purpose other than impeachment, however, makes the deponent the witness of the introducing party, unless that party is or was adverse to the deponent. Id. Notwithstanding these rules, at the trial, any party may rebut any relevant evidence contained in a deposition, whether introduced by that party or by any other party. Id.

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