PLI PRACTISING LAW INSTITUTE

Litigation and Administrative Practice
Course Handbook Series

Fundamentals of Taking and Defending Depositions 2017

Chair
Gerald A. Stein

LITIGATION AND ADMINISTRATIVE PRACTICE SERIES
Litigation
Course Handbook Series
Number H-1052

Fundamentals of Taking and Defending Depositions 2017

Chair
Gerald A. Stein

To order this book, call (800) 260-4PLI or fax us at (800) 321-0093. Ask our Customer Service Department for PLI Order Number 187375, Dept. BAV5.

Practising Law Institute
1177 Avenue of the Americas
New York, New York 10036

 978-1-4024-2867-8

PLI Course Handbook Usage Policy

The Practising Law Institute publishes over 200 Course Handbooks each year. The primary function of each Course Handbook is to serve as an educational supplement for each program and to provide practical and useful information on the subject matter covered to attorneys and related professionals.

The printed and/or electronic copy of the Course Handbook each attendee and faculty member receives is intended for his or her individual use only. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting or other professional services. If legal advice or other expert assistance is required, the services of a professional should be sought.

Distribution of the Course Handbook or individual chapters is strictly prohibited, and receipt of the Course Handbook or individual chapters does not confer upon the recipient(s) any rights to reproduce, distribute, exhibit, or post the content without the express permission of the authors or copyright holders. This includes electronic distribution and downloading of materials to an internal or external server or to a shared drive. If a firm or organization would like to arrange access for a wider audience, printed copies of the Course Handbook are available at http://www.pli.edu. In addition, PLI offers firm or company-wide licensing of our publications through our eBook library, Discover PLUS. For more information, visit http://discover.pli.edu.

The methods of reproduction, both print and electronic, were chosen to ensure that program registrants receive these materials as quickly as possible and in the most usable and practical form. The Practising Law Institute wishes to extend its appreciation to the authors and faculty for their contributions. These individuals exemplify the finest tradition of our profession by sharing their expertise with the legal community and allied professionals.

Prepared for distribution at the
FUNDAMENTALS OF TAKING AND DEFENDING DEPOSITIONS 2017
Program
New York City, Live Webcast, www.pli.edu, and Groupcast Locations, March 10, 2017

CONTENTS:

Program Attorney: Dana M. Berman

Program Schedule

Fundamentals of Taking and Defending Depositions 2017
New York City, Live Webcast, www.pli.edu, and Groupcast Locations, March 10, 2017

Program Schedule (9:00 a.m. – 5:00 p.m.)

Morning Session 9:00 a.m. – 12:30 p.m.

9:00 **Opening Remarks and Introduction**

Gerald A. Stein

9:15 **Overview and Application of Deposition Rules**

- Federal rules
- New York State rules
- How the rules apply to specific situations
- Understanding similarities and differences between Federal and New York State rules
- New York State Commercial Division rules on entity depositions
- New York State Commercial Division limitations on the duration and number of depositions

Partha P. Chattoraj

10:15 **Deposition Preparation, Exhibit Selection and Logistics**

- Reviewing pertinent facts and legal issues
- Preparing an outline and selecting exhibits
- Making and handling objections
- Utilizing the court reporter
- Controlling and running a smooth deposition

David A. Piedra, Denise Plunkett, Randi W. Singer

11:15 **Networking Break**

11:30 **Preparing the Witness and Defending the Deposition**

- Preparing fact and 30(b)(6) witnesses
- Dealing with difficult witnesses and adversaries
- How and when to "cross-examine" your own witness
- Considerations for a videotaped deposition

James S. Goddard, Barbara Hart

12:30 **Lunch**

Afternoon Session 1:45 p.m. – 5:00 p.m.

1:45 **Demonstration and Analysis of Deposition Techniques**

- How to effectively examine witnesses
- How to get the most out of exhibits
- How to get a witness to commit to an answer
- Making sure your transcript is usable for trial impeachment

Rishi Bhandari, Charles Michael

3:15 Networking Break

3:30 **Ethical Dilemmas Arising With Depositions**

- Obligations of lawyers when clients do not tell the truth
- How to handle tricky or abusive behavior during depositions
- Issues arising with attorneys who implant memories or instill doubt about recollections in witnesses during preparation
- Coaching or talking with witnesses during depositions
- Limits on informal discovery from potential witnesses before deposition
- Using social media to collect information about deponents

David G. Keyko, Blythe Lovinger, Francis J. Menton, Jr.

5:00 **Adjourn**

Faculty

Chair:

Gerald A. Stein
Northeast Region
Federal Trade Commission
New York City

Speakers:

Rishi Bhandari
Mandel Bhandari LLP
New York City

Partha P. Chattoraj
Allegaert, Berger & Vogel
New York City

James S. Goddard
Director/Associate General Counsel,
Office of the General Counsel
Citi
New York City

Barbara Hart
Lowey Dannenberg Cohen & Hart, P.C.
White Plains, New York

David G. Keyko
Pillsbury Winthrop Shaw Pittman LLP
New York City

Blythe E. Lovinger
Vedder Price
New York City

Francis J. Menton, Jr.
Willkie Farr & Gallagher, LLP
New York City

Charles Michael
Steptoe & Johnson LLP
New York City

David A. Piedra
Morrison Cohen LLP
New York City

Denise Plunkett
Ballard Spahr LLP
New York City

Randi W. Singer
Weil, Gotshal & Manges LLP
New York City

Program Attorney: Dana M. Berman

Faculty Bios

GERALD A. STEIN
Federal Trade Commission, Bureau of Competition, Northeast Region, New York, New York

Gerald A. Stein is an attorney in the Bureau of Competition at the Federal Trade Commission, Northeast Region, where he investigates and litigates enforcement actions involving merger and anticompetitive conduct matters in a wide variety of industries. Prior to joining the FTC in 2009, Gerald was counsel at the New York office of O'Melveny & Myers LLP, where he was a member of the Firm's Litigation Department and Antitrust and Competition Group from 2004 to 2009. From 1997 to 2004, Gerald was a senior associate in the Litigation Department of Weil, Gotshal & Manges LLP. From 1993 to 1997, Gerald practiced at Bower & Gardner and then Wilson, Elser, Moskowitz, Edelman & Dicker.

While in private practice, Gerald represented major corporations in a wide range of antitrust actions, including class actions and multidistrict litigation, involving allegations of anticompetitive and deceptive trade practices. He has broad experience representing clients in state and federal actions.

Gerald is in the leadership of the American Bar Association, Section of Antitrust Law, currently serving as Vice-Chair of the Content Delivery Committee and a member of the Long Range Planning Committee. His prior positions in ABA leadership include Chair and Vice-Chair of Programs and participation in other task forces. Gerald is on the Executive Committee of the Antitrust Section of the New York State Bar Association, and is Chair of the Unilateral Content Committee. Gerald frequently writes and speaks on various issues regarding antitrust law and litigation practice. He is an Adjunct Lecturer for Labor Relations in Sports, Master of Science in Sports Business Program at the New York University School of Professional Studies.

Gerald earned his J.D., *cum laude*, from Pace University School of Law, where he served on the Pace Law Review, and earned his B.A. from Tufts University.

RISHI BHANDARI

T: 212 269 5600 Ext.100
F: (646) 964-6667
rb@mandelbhandari.com

Rishi Bhandari is a partner at Mandel Bhandari LLP, which he co-founded. He is an experienced litigator and problem solver. Rishi is a highly respected trial attorney who frequently takes cases just days or weeks before trial. He has been selected as a Rising Star by the New York Super Lawyers magazine and has been certified as a Trial Advocacy Teacher by NITA.

Since founding the firm, Rishi has been lead counsel or co-lead counsel in seven cases that have resulted in verdicts or settled on very favorable terms on the first day of jury selection or shortly after opening statements. Rishi has achieved outstanding results for his clients, including a jury verdict that was more than nine times larger than the defendants' final settlement offer and the settlement of claims worth more than $35,000,000.

Rishi started his legal career at the business litigation powerhouse Quinn Emanuel Urquhart & Sullivan. While at Quinn Emanuel, Rishi represented Fortune 500 companies, helped formulate the litigation strategy on behalf of one of the world's largest dairy producers, and worked closely with one of the name partners on behalf of a major Hollywood talent agency embroiled in a legal malpractice and bad faith insurance action.

Before co-founding Mandel Bhandari, Rishi practiced at the highly regarded white collar and commercial litigation boutique Brune & Richard. At Brune & Richard, Rishi represented billion-dollar hedge funds, sizable private equity funds, and many different types of operating companies, from the publisher of business-to-business magazines, to one of the nation's largest temporary staffing agencies, to a leading manufacturer of video game accessories.

Rishi has also devoted considerable time to public interest causes. He was a Teach for America Corps member and teacher in Baltimore and Washington, D.C. and worked for the Democratic National Committee's voter protection unit. Rishi co-authored materials and led training sessions for over 1,200 attorneys who volunteered for Michigan's voter protection program.

Partha P. Chattoraj Biographical Summary

Partha Chattoraj from Allegaert Berger & Vogel LLP has broad experience counseling and litigating on behalf of business clients. A seasoned litigator, Mr. Chattoraj has litigated and tried intellectual property and general commercial cases, appeals, arbitrations, and mediations, including copyright, trademark, trade secret, non-competition, and debt and equity fraud and contract matters. As a trial lawyer and as appellate counsel, he has represented some of the largest companies in the world in federal and state courts and arbitrations around the country.

After graduating from Harvard College and earning a master's degree in literature from Yale University, Mr. Chattoraj graduated from the Yale Law School, where he was Articles Editor of the Yale Law Journal and Executive Editor of the Yale Journal of Law & the Humanities. Mr. Chattoraj began his legal career by clerking for the Honorable Jon O. Newman, of the United States Court of Appeals for the Second Circuit. After his clerkship, Mr. Chattoraj was associated with Wachtell, Lipton, Rosen & Katz. Mr. Chattoraj was of counsel in the New York offices of Quinn Emanuel Urquhart & Sullivan LLP before joining Allegaert Berger & Vogel, LLP, a litigation boutique firm focusing on securities, commercial, and intellectual property disputes, as a partner.

Mr. Chattoraj is a member of the Federal Bar Council Second Circuit Courts Committee and the New York City Bar Association's Federal Courts Committee and Council on Judicial Administration. He has been a Continuing Legal Education panelist on depositions, trial practice, and legal ethics for the New York City Bar Association, the New York State Bar Association, the Practising Law Institute, and in-house legal departments.

James S. Goddard is a Director and Associate General Counsel with Citi f/k/a Citigroup in New York, NY, and has been a senior litigation attorney with Citi's predecessors-in-interest, beginning with Shearson Lehman Brothers in 1991. Mr. Goddard's practice focuses on banking, securities, commercial and residential realty, intellectual property, technology, abandoned property and general commercial transactions. His litigation experience includes jury and bench trials in state and federal courts, as well as arbitrations in several forums.

Prior to joining Shearson Lehman Brothers, Mr. Goddard was a litigation associate with Davis Polk & Wardwell, Edwards & Angell and Coudert Brothers. Mr. Goddard served as Law Clerk to the Honorable William H. Timbers, U.S. Court of Appeals for the Second Circuit.

Barbara Hart is President and CEO of Lowey Dannenberg Cohen & Hart, P.C. She represents a broad range of clients in complex litigation, with a particular emphasis on securities and antitrust litigation. Ms. Hart has earned the AV Preeminent 2016 award, Martindale-Hubbell's highest rating a lawyer can obtain, indicating a very high to preeminent legal ability and exceptional ethical standards as established by confidential opinions from members of the Bar. Ms. Hart was the 2014 Chair of the Executive Committee of the New York State Antitrust Committee. She is a member of the National Association of Public Pension Attorneys.

Recently, Ms. Hart and Lowey Dannenberg Partner Vincent Briganti were appointed as Co-Lead Counsel in *In re: London Silver Fixing Ltd., Antitrust Litigation* (Docket No. 1:14-md-02573), which is pending in the U.S. District Court for the Southern District of New York. The suit alleges that some of the world's largest financial institutions colluded to manipulate the price of silver.

In 2013 Ms. Hart, as Lead Counsel, won Judge Colleen McMahon's approval of a $219 million settlement of Madoff feeder-fund litigation. Judge McMahon commended her on the "unprecedented global settlement" and recognized that Ms. Hart "carried the laboring oar."

Judge McMahon's praise continued:

"Your clients - all of them - have been well served . . . rarely has there been a more transparent settlement negotiation. It could serve as a prototype for the resolution of securities-related class actions, especially those that are adjunctive to bankruptcies . . . **the proof of the pudding is that an astonishing 98.72% of the Rule 23(b)(3) Class Members who were eligible to file a proof of claim did so (464 out of 470), and only one Class Member opted out (that Class Member was not entitled to recover anything under the Plan of Allocation). I have never seen this level of response to a class action Notice of Settlement, and I do not expect to see anything like it again** . . .**I am not aware of any other Madoff-related case in which counsel have found a way to resolve all private and regulatory claims simultaneously and with the concurrence of the SIPC/Bankruptcy Trustee**."

Ms. Hart is Lead Counsel for the NYC Pension Funds prosecuting a securities class action against Community Health Systems, Inc. (*Norfolk County Retirement System v. Community Health Systems, Inc.,* 11-cv-0433) currently pending in the United States District Court for the Middle District of Tennessee. Ms. Hart also served as Lead Counsel in the *Juniper Networks Securities Litigation* (N.D. Cal.) involving allegations of massive options backdating. On August 30, 2010, in approving the $169,000,000 settlement, the Hon. James Ware deemed it an "excellent result." The recovery was the third largest of any of the dozens and dozens of litigations involving options backdating.

After multiple days of testimony and argument, Ms. Hart won a multi-million dollar award on behalf of a minority partner in a real estate development partnership. In 2014, after enforcement of that verdict, Ms. Hart's client recovered 100% of damages with statutory interest.

Ms. Hart served as Lead Counsel representing the Office of the Treasurer of the State of Connecticut in the *In re Waste Management Securities Litigation*, which settled for $457 million and was (at the time) the third-largest securities class action settlement. Ms. Hart was appointed Co-Lead Counsel in the *In re Air Cargo Antitrust Litigation* (E.D.N.Y) one of the largest collusion cases in history involving most of the world's major airlines. Ms. Hart was Co-Lead Counsel in the *In re El Paso Corporation Securities Litigation*, garnering a $285 million settlement. In addition, she led the team prosecuting the *In re Amgen Corporation Securities Litigation*.

A few of her other notable antitrust settlements include: *In re Stock Exchange Options Trading Antitrust Litigation* ($47 million settlement); *In re Brand Name Drug Litigation* ($65 million settlement); *In re Augmentin Antitrust Litigation* ($29 million settlement); *In re Paxil Antitrust Litigation* ($65 million settlement); *In re Sodium Erythorbate and Maltol Antitrust Litigation* ($18.45 million settlement); *In re*

Synthroid Marketing and Antitrust Litigation ($87.4 million settlement); and *In re Warfarin Sodium Antitrust Litigation*($44.5 million settlement).

On behalf of her clients Ms. Hart pushed for reform to both New York's Martin and Donnelly Acts. Ultimately, her efforts led to an amendment making New York an "Illinois Brick" repealer state granting standing to injured New Yorkers. This precipitated similar amendments in other states. Ms. Hart co-edited the 2011 New York Antitrust and Consumer Protection Law handbook. Ms. Hart has successfully represented New York institutional clients as *amici curiae* on various matters, including on New York's Martin Act.

Ms. Hart co-authored "Depositions as a Means of Building Your Trial Narrative," Fundamentals of Taking and Defending Depositions 2015 Course Handbook, 2015. Also, Ms. Hart co-authored "Conduct Within the Scope Cannot Be Beyond the Reach," New York Law Journal NYSBA Annual Meeting Special Report, January, 26, 2015; "Another Alarm Blasts as the Second Circuit Rejects Class Action Tolling of the Statutes of Repose" NAPPA article, August 2013 Volume 27, Number 3; "Don't Bend 'American Pipe'" New York Law Journal, November 7, 2012; as well as "NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.: The Implications on Class Standing and Why We Should Think About Amici Support Now," The NAPPA Report, Vol. 26, Number 4, November 2012. Ms. Hart's other writing includes Morrison v. National Australia Bank: "The Potential Impact on Public Pension Fund Fiduciaries" The NAPPA Report, Vol. 24, Number 3, August 2010. She has also written on the impact of other Supreme Court decisions including: "Donnelly Act Class Claimants Given New Lease on Life" New York Law Journal, May 17, 2010. Other writings include "New York's Martin Act: Investor Sword or Fraudster Shield?" New York Law Journal, December 11, 2009; "Can Public Pension Funds Make SOX Meaningful?" The NAPPA Report, Vol. 22, Number 4, Nov. 2008; "Loss Causation in the Ninth Circuit" New York Law Journal, September 2, 2008; and "Antitrust Protections Expanded in New York" New York Law Journal, June 22, 1999. In addition, she is regularly called on cutting-edge issues in her field: see "Ruling Calls Into Question Investors' Reliance on U.S. Securities Law in Foreign Transactions" Council of Institutional Investors, Volume 15, No. 25; FOX News program on Madoff on the day he pleaded guilty. In October 2013 Ms. Hart spoke on private claims under international antitrust laws at the Research in Law and Economics Conference also cited in the 2014 "Research in Law and Economics" Volume 26 "The Law and Economics of Class Actions". In 2011 Ms. Hart moderated a special section of the Fiduciary Responsibility Summit called "The Impact of Stepped-Up Government Regulation on Fiduciary Responsibilities. Ms. Hart spoke at the American Constitution Society's 2011 National Convention on the Supreme Court's *Twombly* and *Iqbal* decisions and on antitrust developments in an ABA Antitrust Forum questioning "Is the Robinson-Patman Act the right Rx for Pharmaceutical Industry." She has appeared before the Council of Institutional Investors, The Federalist Society, the New York State Bar Association, the Institute for Law and Economic Policy, the Public Funds Forum and the Practicing Law Institute.

Ms. Hart is a graduate of Vanderbilt University (B.A. 1982), the University of North Carolina (M.A. 1987), and the Fordham University School of Law (J.D. 1992), where she was a member of the Law Review and on the Dean's List. Ms. Hart is admitted to practice in New York and Connecticut, and is a member of the bars of the U.S. Supreme Court; the U.S. Courts of Appeals for the 2nd, 3rd, and 7th Circuits; and the U.S. District Courts for the Southern and Eastern Districts of New York.

pillsbury

New York
1540 Broadway
New York, NY
10036-4039
Tel. +1.212.858.1604
Fax. +1.212.858.1500

David G. Keyko
Partner
david.keyko@pillsburylaw.com

Practices / Industries

Litigation
- Appellate
- Financial Services Litigation
- Securities Litigation & Enforcement

Antitrust & Competition
Corporate & Securities
Life Sciences & Pharma
- Life Sciences

Admissions

State of New York

Education

J.D., New York University School of Law, 1977
cum laude, Order of the Coif; Articles Editor, *Annual Survey of American Law*

B.A., Yale University, 1974
magna cum laude

David Keyko is a partner in the law firm's Litigation practice and is located in the New York office. His practice has focused on major, complex litigation, often involving multiple parties. He has handled cases involving allegations of securities or other types of fraud, antitrust violations, ethics issues and trusts and estates issues across the country, often involving insurance coverage issues. He has conducted internal investigations and represented clients responding to government probes. Trials include: representing a plaintiff in a four-week bench trial in federal court in New York concerning a fraudulent scheme to finance the importation of coffee beans, which resulted in a $90 million judgment; a five-week jury trial in federal court in New Jersey concerning an alleged scheme to manipulate world-wide commodity prices; and a four-month bench trial in federal court in Louisiana concerning the finances of a bankrupt oil and gas company. He has also served as an expert witness in connection with legal malpractice litigation. Among the prominent cases Mr. Keyko has handled was the representation of the primary claimant to a $1.5 billion estate in lawsuits filed in several jurisdictions.

Mr. Keyko was named the "New York City Best Lawyers Ethics and Professional Responsibility Law Lawyer of the Year" for 2012 and 2017. He has lectured and written widely on securities, antitrust, legal ethics and general litigation topics, and chairs PLI's programs on federal pretrial practice and ethics for corporate lawyers. He is a former columnist for the *New York Law Journal* and has written several dozen articles on litigation and ethics issues for such publications as the National Law Journal, and Metropolitan Corporate Counsel, on whose advisory board Mr. Keyko served.

Mr. Keyko has undertaken a variety of pro bono projects, including representing for over 20 years a death row inmate in Alabama asserting that the inmate is innocent of the crime for which he was convicted, serving as Chair of the Board of MFY Legal Services, Inc., and serving two terms as a member of the Departmental Disciplinary Committee of the First Department. He was Chairman of the Professional Responsibility Committee of the Association of the Bar of the City of New York. He chaired the ad hoc committee of the Association that commented on proposed SEC regulations under Section 307 of the Sarbanes-Oxley Act of 2002. He is currently the chair of the Association's Legal Referral Service Committee and is a member of the Association's Professional and Judicial Ethics Committee.

Mr. Keyko is a member of Pillsbury's Sarbanes-Oxley Committee, Opinions Committee and Professional Responsibility Committee. He is an adjunct professor at the Fordham University School of Law.

Representative Matters

Representative Securities Matters:

pillsbury

- Representing media company in connection with restatement of financials.
- Representing issuers in the securities laddering cases now pending in the Southern District of New York.
- Defending a high tech company and officers with respect to securities claims in connection with the restatement of the company's financial statements.
- Advising financial institutions about potential liabilities of their clients with respect to pending securities class actions.
- Representing the trustee of a bankrupt company in connection with claims arising from the issuance of $100 million of high-yield notes.
- Counseling a company in connection with allegations of insider trading of its securities.
- Defended an international consumer products company in a class action involving its initial public offering.
- Represented parties in takeover litigation with regard to securities issues.
- Defended an industry association against charges of manipulating prices in connection with securities transfers.
- Prosecuted a manufacturer's claims arising from sale of its Brazilian subsidiary for inflated securities.
- Defended banks against proxy disclosure claims.
- Representing a brokerage firm in an SEC investigation.

Representative Antitrust Matters:

- Defending two foreign companies in connection with investigations and potential claims.
- Defending a chemical company against price-fixing claims in federal and state courts.
- Defended international paper manufacturer against claims of manipulation of world-wide prices of raw materials.
- Represented luxury goods manufacturer in FTC pricing investigation.
- Handled defense of pharmaceutical company in various FTC investigations concerning patent rights.
- Counseled advertising agency in Justice Department grand jury price fixing investigation.
- Defended ice cream manufacturer in dealer terminations lawsuits.

Representative Internal and Government Investigations:

- Conducted internal investigations on accounting, bribery, insider trading and price fixing allegations.
- Defended against SEC, Justice Department, FTC, and states attorneys general investigations.

pillsbury

Representative Class Action/Product Liability Cases:

- Defending a manufacturer of generators from a product liability claim.
- Prosecuting claims for utility companies in connection with the construction of a nuclear power plant.
- Defending class action claims charging a financial services company with misleading its customers.
- Overseeing the defense of product liability claims arising from the sale of prescription drugs.

Representative Law Firms Litigation:

- Defended a law firm against claims of breach of fiduciary duty.
- Defended a law firm in a legal malpractice suit.
- Represented a law firm and its partners in disciplinary inquiries.
- Defended a law firm against a lawsuit brought by a former partner.
- Advised a law firm in connection with its dissolution.
- Assisted a law firm in negotiating the terms of a merger with another law firm.
- Served as an expert witness in connection with legal malpractice claims.
- Assisted a law firm in revising its partnership agreement.
- Provided advise to a law firm on conflict issues and represented it in connection with disqualification proceedings.

Representative Trust and Estates Litigation

- Representing children in claims to multi-million dollar estates and trusts.
- Representing an adopted daughter in her claims to her mother's $1.5 billion estate.
- Defending a financial institution against charges that it mismanaged an estate.
- Seeking recovery of $200 million looted from an estate.

Representative Insurance Recovery Matters

- Representing a co-owner of the Macondo leasehold in litigation of insurance claims arising from the well blowout and Deepwater Horizon incident.
- Representing a media company in seeking insurance coverage for antitrust liabilities.
- Represented an industrial conglomerate in a $1.5 billion appeal to recover for asbestos liabilities under the company's CGL insurance policy.
- Represented a financial institution in seeking coverage claims in connection with the importation of coffee under a marine insurance policy.
- Represented an insurance company in litigation of insurance claims in

connection with CGL policies.

- Counseling clients on a variety of D&O insurance coverage issues.

Honors & Awards

- *Best Lawyers in America*, Commercial Litigation, Ethics and Professional Responsibility Law, Litigation – Antitrust, Litigation – Banking & Finance, Litigation – Securities (2007-2017); Bet-the-Company Litigation (2007-2015)
- *Best Lawyers in America*, Lawyer of the Year, Ethics and Professional Responsibility — New York (2012, 2017)
- *Legal 500 US*, Antitrust - Civil Litigation/Class Actions (2016)
- American Bar Association, Commendation for Drafting Resolution for Standing Committee on Lawyer Referral and Information Services (2016)
- MFY Legal Services, Honoree for Pro Bono and Other Legal Contributions (2016)
- *Super Lawyers* (2007-2015)

Chair of Practising Law Institute programs on:

- Federal Pretrial Practice
- Ethics for Corporate Lawyers
- Ethics for New Lawyers

Courts

Courts of the State of New York; the Southern and Eastern Federal District Courts of New York; Federal District Court of Connecticut; United States Second Circuit Courts of Appeals; United States Third Circuit Courts of Appeals; United States Supreme Court

Speaking Engagements

"The Decade's Most Important Ethics Opinions, an Ethics Quiz Show…or, When to Say Deal or No Deal," Pillsbury's 2016 CLE Marathon – Virginia, September 27, 2016

Publications

Supreme Court: Don't Give Inside Information to Friends or Family, 12/7/2016

New York Adopts Rules Permitting Practice of Law by Foreign-Admitted In-House Counsel and Attorneys Temporarily in New York, 1/5/2016

Interdependent Settlements: Ethics of Simultaneously Settling Separate Actions in N.Y. Mass Tort Actions, 9/1/2015

New York and English Courts Issue Similar Joint Memoranda on the Enforcement of

pillsbury

Money Judgments with Dubai Courts, 8/4/2015

Legal Ethics Opinions Concerning In-House Corporate Counsel, 2012

Ethics Issues in Corporate Compliance (chapter 57), 2009

Unique Dilemmas Facing Corporate Counsel: E-Ethics in Today's eDiscovery World (chapter 26), 2008

Practicing Ethics, 10/26/2007

Practicing Ethics, 6/22/2007

Practicing Ethics, 4/27/2007

Practicing Ethics, 2/23/2007

Supreme Court Rejects “Price Inflation” Theory of Pleading and Proving Loss Causation in Securities Fraud Cases Under Rule 10b-5, 4/29/2005

The WorldCom and Enron Settlements: Imposing Personal Liability on Public Company Directors, 1/20/2005

VedderPrice

Blythe E. Lovinger

Shareholder

1633 Broadway
New York, NY 10019
+1 (212) 407 7770
blovinger@vedderprice.com

Client Services
Employment

Employment Class Action Defense

Employment Law Training

Labor Relations

Wage and Hour Compliance

Education
George Washington University Law School, J.D., 1995

Cornell University, B.S., 1992

Bar Admissions
New Jersey, 1995

New York, 1996

Affiliations
Member, Labor and Employment Law Committee, New York City Bar Association

Blythe E. Lovinger is a Shareholder in the New York office of Vedder Price and a member of the firm's Labor and Employment practice group.

Ms. Lovinger focuses her practice on employment litigation before federal and state courts, administrative agencies and arbitration panels. She has defended employers and senior executives against claims of discrimination, harassment and retaliation as well as actions brought under the Fair Labor Standards Act, the New York Labor Law and the Family and Medical Leave Act. Ms. Lovinger has extensive experience prosecuting and defending cases involving trade secrets, restrictive covenants, unfair competition and related business tort claims.

Ms. Lovinger advises clients on a wide range of employment issues, including disciplinary actions and terminations; employment, consulting and separation agreements; employment policies and practices; reductions-in-force; wage and hour auditing; investigations of alleged harassment and other employee misconduct; and litigation avoidance. Ms. Lovinger conducts numerous anti-harassment and other specialized training programs for clients.

She is a member of the Labor and Employment Law Committee of the New York City Bar Association.

Court Admissions

U.S. Court of Appeals, Second Circuit, 2009

U.S. District Court, Eastern District of New York, 1996

U.S. District Court, District of New Jersey, 1996

U.S. District Court, Southern District of New York, 1996

Francis J. Menton, Jr. retired from Willkie Farr & Gallagher LLP on December 31, 2015 after a career of more than 40 years, 31 as partner. At Willkie Farr, he practiced in the area of commercial litigation and conducted more than 30 trials in state and federal courts around the country. He served for many years as co-head of the Business Litigation group, and also for fifteen years as Chair of the Conflicts & Ethics Committee. Currently he has a solo practice specializing in commercial litigation and issues of conflicts and legal ethics.

Charles A. Michael

Partner
Steptoe & Johnson LLP
1114 Avenue of the Americas
New York NY 10036
TEL: +1 212 378 7604
FAX: +1 212 506 3950

Charles Michael has successfully handled a wide range of commercial litigation matters. He has obtained favorable settlements or dismissals on behalf of clients accused of securities fraud, intellectual property infringement, antitrust violations, wrongful termination and breach of contract. He has also successfully represented clients bringing claims for breach of fiduciary duty, trademark infringement, breach of contract, and professional malpractice.

Mr. Michael was recently part of the trial team that obtained a complete victory after a bench trial of a $120 million suit relating to a collateralized debt obligation (CDO) transaction. He also secured a preliminary injunction preserving a medical practice's contractual option to buy the company supplying the practice's non-medical support staff, and won an appellate decision reversing the trial court and dismissing a $200 million fraud and alter ego suit against a private equity firm.

Mr. Michael is also experienced in regulatory and criminal investigations. He has represented clients under investigation by the Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA), and the US Department of Justice (DOJ).

He is the founder and editor of the SDNY Blog which covers civil litigation and trial practice in the US District Court for the Southern District of New York. Additionally, Mr. Michael has recently given several presentations to in-house counsel at private equity firms and others about limiting the risk of being held responsible in court for portfolio company liabilities, and preserving the attorney-client privilege among corporate affiliates.

Representative Matters

- Defeated a Japanese billionaire's federal court petition to force a US-based global investment bank to produce, for purposes of a Japanese litigation, extensive discovery from the bank's Japanese broker-dealer
- Successful dismissal of multimillion-dollar breach of contract and fraud suit brought by real estate developer against project owner
- Granted summary judgment for a home furnishings company accused of failing to pay over $20 million in alleged liabilities under an acquisition agreement
- Defended software firm in dispute relating to $150 million acquisition of another software firm
- Defended dietary supplement maker in multimillion-dollar lawsuit arising from the failed launch of a pre-workout beverage
- Secured a preliminary injunction in a case involving theft of trade secrets
- Successfully defended several asset purchasers in successor liability lawsuits in multiple jurisdictions
- Granted summary judgment that largely disposed of case seeking $15 million in damages for alleged breaches of an oil rig lease and related contracts
- Defended investment banking executive in multiple investigations relating to auction-rate securities market collapse
- Successfully defeated, before trial court an on appeal, a motion to preliminarily enjoin a consumer products manufacturer from selling its largest brand
- Defended private equity firm in $55 million wrongful termination lawsuit brought by its former president
- Defended the former owners of the "Tinkerbell" trademark in a fraud and breach of contract action brought by a former licensee
- Obtained summary dismissal of a securities fraud case against a publicly-traded technology firm
- Obtained a preliminary injunction against a company improperly using a client's trademarks
- Represented a consumer products manufacturer in an lawsuit accusing two of the company's former executives accounting fraud
- Represented a public company in multibillion-dollar class action accounting fraud case
- Successfully defended publicly-traded investment bank accused of understating options compensation in proxy statement

- Represented bank in DOJ investigation of money transfers to sanctioned countries and entities

Noteworthy

- New York *Super Lawyers*, Business Litigation, 2013-2016

Select News & Events

- *Law360* Covers Steptoe's New York Appellate Win for Leonid Lebedev
- NY Appeals Court Rules in Favor of Lebedev in $2B Oil Proceeds Dispute
- New York *Super Lawyers* Recognizes Steptoe Attorneys
- *Associated Press* Covers Steptoe's Success for 'Quackwatch' Website
- *Law360* Quotes Charles Michael on Top Law Blogs Lawyers Should Read
- Steptoe Relaunches SDNY Blog
- "Fundamentals of Taking and Defending Depositions," *Practicing Law Institute*, 2015
- "Fundamentals of Taking and Defending Depositions," *Practicing Law Institute*, 2014

Selected Publications

- SDNY Blog
- A Middle-Ground Approach To 'Piggybacking'

  June 2, 2015, *Law360*

- Judge Rakoff Allows FIRREA Claims Where Bank's Misconduct 'Affects' Itself

  August 23, 2013, *The CLS Blue Sky Blog*

MorrisonCohen LLP
Law Firm to the Middle Market®

Our People

David A. Piedra
Partner

Tel: 212.735.8775
Email: dpiedra@morrisoncohen.com

Biography

David is a Partner in the Business Litigation department, and also serves as the Firm's General Counsel. He handles all phases of complex litigation, from pleading through trial and appeals.

David has a broad-based practice, including commercial, real estate, insurance, and securities matters. He regularly represents real estate developers, landlords, property owners, and lenders in property, lease, land use, and construction disputes; counsels insurance companies and insureds regarding insurance and reinsurance disputes (which have included disputes involving credit risk insurance, residual value insurance, classic property and casualty insurance, business interruption losses, medical insurance, and life insurance); defends complex securities claims on behalf of officers, directors, and corporations; and advises clients in connection with the defense (or prosecution) of business tort claims. David is also frequently called upon to represent high net-worth individuals (and their business entities) in professional and personal disputes, including partnership, contract, employment, compensation, securities, and royalty disputes, as well as complex matrimonial and child support matters.

Practices

Business Litigation
Bankruptcy & Restructuring

Education

Fordham University School of Law, J.D.
University of Colorado at Boulder, B.A.

Admissions

New York
Connecticut
U.S. Supreme Court
U.S. Court of Appeals for the Second Circuit
U.S. District Courts for the Southern and Eastern Districts of New York
U.S. Tax Court

Professional Activities

American Bar Association
New York City Bar Association

Recognition

Fordham International Law Journal
Research & Writing Editor

News & Publications

D. Piedra, "Partnership Agreements Make a Difference", New York Law Journal, (June 26, 2006)

D. Piedra, "Section 42 of the Lanham Act and Non-Genuine Gray Market Goods: Reevaluating the Affiliate Exception," 13 Fordham International Law Journal 490 (1990)

D. Piedra (Co-author), "Are Arbitration Awards Still Sacrosanct?", Commercial and Business Litigation Newsletter, American Bar Association, Litigation Section, (Summer, 1999)

D. Piedra (Co-author), "A Commercial Practitioner's Perspective on the United Nations Convention on Contracts for the International Sale of Goods," Commercial and Business Litigation Newsletter, American Bar Association, Litigation Section (Fall, 1999)

Denise L. Plunkett is a partner in the Antitrust and Consumer Financial Services Groups in Ballard Spahr's New York office. Ms. Plunkett has significant experience in the payment card, financial services, and pharmaceutical industries, including individual and class actions, multidistrict and multidefendant litigations, and international arbitration. She has successfully litigated an impressive array of claims, ranging from common law claims and business torts to alleged violations of antitrust laws and consumer protection statutes. Ms. Plunkett's experience includes trial and appellate work in state and federal courts throughout the United States. She regularly counsels clients on antitrust issues, and helps them navigate issues related to regulatory compliance and business planning.

Weil

Randi W. Singer

Partner, New York
randi.singer@weil.com
767 Fifth Avenue
New York, NY 10153-0119
Tel +1 212 310 8152
Fax +1 212 310 8007

Randi Singer is a litigation partner in Weil's New York office and a member of the Firm's Intellectual Property & Media practice and its Cybersecurity, Data Privacy & Information Management group. She focuses primarily on copyright, Lanham Act false advertising, and trademark litigation, privacy, cybersecurity, and social media counseling, and music licensing, First Amendment, right of publicity, and other intellectual property issues, in addition to complex commercial litigation and bankruptcy proceedings.

Ms. Singer has been repeatedly recognized as a leading intellectual property and media & entertainment lawyer by legal industry publications, including *The Legal 500 US*, *Chambers USA*, *World Trademark Review*, and *Benchmark Litigation*, Managing IP Magazine's *IP Stars*, and *Super Lawyers*, and in 2012 she was named a "Rising Star" in Media and Entertainment by *Law360*. She has successfully represented and counseled clients on a wide variety of copyright and trademark matters involving both classic ownership and fair use issues, as well as evolving secondary liability issues arising from social media platforms. Her advertising, trademark, and state unfair trade practices cases have spanned a broad spectrum of consumer products and services, from over-the-counter drugs, razors, toothpaste, paint, food and cosmetics, to financial services, luxury goods and consumer electronics.

Ms. Singer has earned the Certified Information Privacy Professional (CIPP/US) and Certified Information Privacy Technologist (CIPT) credentials and regularly counsels clients in connection with privacy, cybersecurity, and social media issues in a wide variety of matters, including such high-profile transactions as Facebook's acquisition of Whatsapp, Inc., Yahoo!'s acquisition of Tumblr, and Signet Jewelers Limited's acquisition of Zale Corporation. In 2015, *The National Law Journal* recognized Ms. Singer as one of its inaugural "Trailblazers" nationwide for her cutting-edge work in the cybersecurity and data privacy area.

Experience

- Obtaining a number of victories in multiple jurisdictions for The Walt Disney Company and Marvel Comics in significant copyright ownership cases involving iconic Marvel characters including Spider-Man, Iron Man, The Fantastic Four, The Incredible Hulk, and Ghost Rider.
- Representing eBay in its successful defense of a suit in which Tiffany had claimed that eBay was responsible for policing counterfeit merchandise offered on its site. In that matter, Weil represented eBay through trial in the U.S. District Court for the Southern District of New York, on appeal in the U.S. Court of Appeals for the Second Circuit, and through the denial of Tiffany's petition for a writ of certiorari with the U.S. Supreme Court.
- Obtaining a number of other major victories for eBay, including securing summary judgment in a copyright infringement action brought by a photographer in the U.S. District Court for the Central District of California, and several trademark victories for eBay subsidiaries Bill Me Later and Where.com.
- Advising Verizon Communications Inc. in its agreement to purchase AOL Inc. for approximately $4.4 billion, in a deal that will further drive Verizon's LTE wireless video and OTT (over-the-top video) strategy.
- Representing Facebook in multiple matters, including in its $16 billion acquisition of WhatsApp, a provider of a cross-platform mobile messaging application that allows a client to exchange messages without having to pay for short messaging service (SMS).

- Representing and counseling a wide array of technology companies, private equity firms, and corporates on privacy and cybersecurity issues arising in many acquisitions and licensing deals.
- Defending Procter & Gamble against an $80 million claim brought by Colgate-Palmolive. The suit stemmed from Colgate's allegations that P&G's advertising for its highly successful at-home tooth-whitening products, Crest Whitestrips and Crest Night Effects, were false under the federal Lanham Act. Obtained a complete defense verdict for Procter & Gamble after a three-week jury trial.
- Successfully representing the publisher of the "Chicken Soup for the Soul" series of inspirational self-help books and Daymon Worldwide in trademark and trade dress litigation brought by Campbell Soup Company (CSC) in New Jersey federal court. CSC alleged that the publisher's then-forthcoming line of soups came in packaging that infringed on Campbell's protected designs and trade dress. The parties stipulated to a dismissal of the claims without costs.
- Defending GlaxoSmithKline (GSK) against a preliminary injunction motion based on allegations by Pharmacia Corporation that GSK commercials for Nicorette gum and NicoDerm CQ patches were false and violated the Lanham Act. Successfully obtained a motion on GSK's behalf to preliminarily enjoin Pharmacia's "Trying to Quit" commercial for Nicotrol due to violations of Section 43(a) of the Lanham Act.

In addition to her active practice, Ms. Singer has taught a course on Trademarks and Unfair Competition Law as an adjunct professor at St. John's University School of Law and is a popular speaker whose speaking engagements include panels and discussions concerning copyright, advertising, and other intellectual property issues for organizations such as the Copyright Society, the National Advertising Division, the Practising Law Institute, the American Conference Institute, and the New York State Bar Association Section on Intellectual Property. Other professional affiliations include the International Trademark Association (INTA), The International Association of Privacy Professionals (IAPP), the New York State Bar Association, the Private Advertising Litigation subcommittee of the ABA, and the Trademarks and Consumer Affairs Committees of the Association of the Bar of the City of New York.

Ms. Singer is a member of the global steering committee for Women@Weil, Weil's women's affinity group, the winner of Weil's first-ever mentoring award, and an inductee into the YWCA's Academy of Women Leaders. In addition to her work as the General Counsel for the Lang Lang International Music Foundation, her pro bono work includes litigation successes for the Hebrew Immigrant Aid Society and Sanctuary for Families, trademark and IP counseling for organizations such as The Joyful Heart Foundation and the Breast Cancer Research Foundation, as well as extensive legal support and counseling concerning ambush marketing for NYC2012, New York City's bid for the 2012 Olympics.

Ms. Singer graduated *magna cum laude* from Harvard University. After receiving her J.D. from Columbia Law School, where she was a Harlan Fiske Stone Scholar, Ms. Singer clerked for the Honorable Richard Owen, US District Judge for the Southern District of New York.

Education

Columbia Law School (J.D., 1998)
Harvard University (B.A., *magna cum laude,* 1994)

1

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

Partha P. Chattoraj

Allegaert, Berger & Vogel

If you find this article helpful, you can learn more about the subject by going to www.pli.edu to view the on demand program or segment for which it was written.

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.

NOTES

NOTES

2

Deposition Practice Tips and Logistics (Substantive Outline) (January 2017)

Randi W. Singer, Esq.

Weil, Gotshal & Manges LLP

Denise L. Plunkett, Esq.

Ballard Spahr LLP

David A. Piedra, Esq.

Morrison Cohen LLP

The author expresses her appreciation to Rachel Liebert, Esq., for her assistance in the preparation of this outline.

PLANNING THE DEPOSITION

1. Noticing the Deposition (FRCP 30 / CPLR 3107)
    a. Who is the deponent?
        i. Individual
        ii. Corporate Representative (FRCP 30(b)(6) / CPLR 3106(d) designee)
        iii. Records Keeper
        iv. Written Questions (CPLR 3108-09/ FRCP 31)
    b. When will deposition take place?
        i. CPLR 3017 – 20 days notice
        ii. FRCP – reasonable time
        iii. Court ordered discovery deadlines
    c. Where will deposition take place? There are strategic and practical considerations to the location. CPLR 3110 – FRCP is silent on location)
        i. Your office
        ii. Adversary's office
        iii. Neutral location (hotel, court reporter's office, etc.)
        iv. Courthouse
        v. Remote means (FRCP 30(b)(4))
        vi. Out of state / country?
    d. How will you record it?
        i. Transcribed
        ii. Videographed
2. Objections to Notice of Deposition
    a. **Fed. R. Civ. P. 32(d)(1):** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.
    b. **N.Y. CPLR 3112:** All errors and irregularities in the notice for taking a deposition are waived unless at least three days before the time for taking the deposition written objection is served upon the party giving the notice.

3. Other pre-deposition logistics
    a. Choosing the right court reporter / videographer – subject matter of case, nature of the deposition, need for expedited transcript
    b. LiveNote?
    c. Exhibits – sufficient copies need to arrive on time to deposition location

PREPARING FOR THE DEPOSITION

1. Develop Case Strategy
    a. Map the Case with Themes and a Narrative
        i. Connect each witness to your narrative
        ii. Identify the role(s) of the deposition in the overall case strategy. For example, you may want your deposition to accomplish one or more of the following:
            1) To "freeze" the testimony of a witness
            2) To authenticate documents for trial
            3) To obtain background information necessary for future discovery requests or depositions
            4) To assess the credibility / effectiveness of an important trial witness
            5) To obtain party admissions as to important facts necessary for summary judgment
    b. Prepare basic case chronology
    c. Create a "witness file" for use in preparing your outline:
        i. documents authored by the witness
        ii. documents sent to (or by) the witness
        iii. references to the witness in the testimony of other deponents
        iv. references to the witness in pleadings, interrogatory responses, etc.
        v. other critical documents in the case (whether authored by witness or not)
2. Prepare the Deposition Outline
    a. Establish the goals of the deposition and create a list of things you need
    b. Using Topic Modules
        i. Prioritize topics
        ii. Create a table of contents

c. Scripted Questions
    i. Advantages and Disadvantages
    ii. Foundation checklists
d. Research the witness (social media, writings, etc.)

3. Understand All Applicable Rules
    a. Federal or state (or foreign laws and applicable treaties)
    b. Local rules
    c. Court orders (case specific, judge specific, standing orders)
    d. Authorization to practice/conduct discovery in the jurisdiction
        i. Out of state commissions
        ii. Admissions pro hac vice, if necessary
        iii. Hague Convention/foreign discovery issues
4. Understand Individual Case Protocols
    a. Agreed-upon stipulations
    b. Exhibit handling
    c. Confidentiality issues
5. Exhibits
    a. Selecting exhibits – don't attempt to mark and examine a witness regarding every document in their witness file. Be selective.
    b. Purpose of selected exhibits
        i. Inquiry
        ii. Impeachment
        iii. Admissibility / Authentication
    c. Exhibit Checklist: prioritize exhibits as to importance to your case strategy and deposition strategy. Be certain to mark, and examine the witness about, any exhibits you deem critical to your strategy.
    d. Sufficient number of copies – always make one more copy than you think you will need.

e. System for ensuring that marked copies are not accidentally distributed. (At the conclusion of the deposition, make sure you check that all the marked exhibits are intact before everyone leaves the deposition room)

DEPOSITION PRELIMINARIES

1. Court Reporter
    a. Case caption
    b. Swearing in
    c. Identify counsel of record and other attendees on the record
2. Stipulations
    a. The "usual stipulations" – make case-specific stipulations clear on the record
    b. Potential Stipulations
        i. Applicable rules governing the deposition
            1) "Usual Stips" – Always ask what the "usual stips" are. Before your deposition begins, you can ask your court reporter for a copy of the "usual stips," he or she will generally have a printed page of the stips for you to review before you agree to them.
        ii. Agreement to "waive objections"
            1) To "waive objections" or "reserve objections except as to form," typically means that counsel may, and should, make any objections to the form of the question at the deposition, but any other objections should be reserved for trial and are not waived.
            2) *See* NY CPLR 3115 (objections to form are waived if not made; objections to competency of witness or admissibility of the evidence are not waived)
        iii. Agreement to waive the requirement to sign the transcript
            1) FRCP 30(e). Under the Federal Rules, if the deponent wants an opportunity to read and correct the transcript, it must be requested. A request for review is an "absolute prerequisite" to deposition corrections. *Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217 (9th Cir. 2005).
            2) CPLR 3111. Deposition must be submitted to the witness for review and signature.

a) **Practice tip**: You should generally have the witness review and sign the transcript. Review helps assure that the testimony is accurate. In addition, the transcript will be more useful at trial (or on summary judgment) because the witness will be unable to complain that the transcript is inaccurate or incomplete.

iv. Objection by one is an objection by all (for multi-party cases)

3. Preliminary Questioning

a. Extent may depend on goal or nature of deposition, sophistication of witness, time constraints, desire to build rapport, personal style, strategy

b. Examples

i. Instructions regarding deposition protocol and expectations

ii. Witness competency

iii. Deposition experience

iv. Preparation (especially for a 30(b)(6) designee)

Sample Preliminary Questions

I. **INTRODUCTION**

Good morning, Ms. Smith. I am Lionel Hutz from the law firm of Rich & Famous, LLP. We represent Big Company, the defendant in this action, and I'll be asking you questions today.

First, please state your name and address for the record.

Have you ever been deposed before? How many times? What kind of cases?

Are you represented by counsel today? And is that Mr. Jones?

II. **GROUND RULES**

I'm sure Mr. Jones has explained the process to you, but I want to make sure you understand how we will proceed today.

1. I'm going to ask you a series of questions. You are to answer them as completely and accurately as you can. Do you understand?

2. Do you understand that you have just taken an oath to tell the truth?
3. Is there any reason you can't testify completely and accurately today? [Is the witness on medication? Does the witness have his glasses?]
4. If you don't hear a question, please tell me, and I'll repeat it.
5. If you don't understand a question, please tell me, and I'll try to rephrase it in a way that you do understand.
6. The court reporter is going to take down everything we say, so please answer my questions audibly. Head nods and mm-mms don't come through clearly.
7. Only one of us can speak at a time, so even if you can anticipate the rest of a question, let me finish asking it before you answer so that the transcript is clear.
8. If you need a break, just let me know, and I'll try to find a convenient stopping point – just not while a question is pending.
9. Do you understand that the testimony you provide today may be used at trial?
10. Do you understand these rules / do you have any questions about these rules?

MAKING AN INTELLIGIBLE AND USABLE RECORD

1. Ask your questions slowly and clearly.
2. Do not talk over the witness. Let the witness finish her answer, and then pause for a moment before you ask your next question.
3. Clarify any ambiguous terminology, and do not use "shorthand" unless you have defined the term and the witness confirms that they understand your definition, for example:

   Q. When I refer to "XYZ" I will mean the XYZ Manufacturing Company and not XYZ Holdings LLC, do you understand that?

4. Do not point to a document or use the articles "this" or "that" when asking a question. Instead, state the specific exhibit, page number, paragraph reference or other thing to which you are referring. Similarly, clarify the witness' testimony if she refers to "this" or "that," rather than a specific thing, for example:

   Q. When you said the words "this document" in your answer a moment ago, were you referring to the document that we have marked as Plaintiff's Exhibit 1, correct?

5. If an objection to form has been lodged prior before the witness gives an answer that you feel is important, consider whether a correction or re-phrasing of the question would eliminate the objection. Ask counsel for clarification if you do not understand the basis for the objection. Don't risk having good testimony rendered useless at trial because you failed to address an objection at the deposition.
6. Always be sure the witness hears and understands your question. If the witness appears puzzled, ask if they understood the question.
7. Do not accept evasive answers. Rephrase/repeat your question if not sufficiently answered by the witness.

   If using LiveNote, check transcript when needed

8. Beware verbal tics (ok, um, so, you know, etc.)

HANDLING EXHIBITS

1. Mark the deposition notice or subpoena as an exhibit
2. Bring enough copies of exhibits for all counsel
3. Be aware of numbering protocol for your case, if already established.
   a. Smith Exhibit 1
   b. Plaintiffs Exhibit 12
4. Consider bringing someone to assist with voluminous exhibits/ checklist
5. Consider pre-marking exhibits at breaks or before the deposition begins, but be careful not to skip pre-marked exhibits or review out of order – it can create a lack of clarity in the transcript.
6. Consider confidentiality – may need to exclude people from the room when discussing confidential exhibits

Sample Exhibit Procedure

Hand the Court Reporter the exhibit and ask her/him to mark the Exhibit.

Q. Please mark this as Plaintiffs' Exhibit No. 1

Give a copy of the exhibit to opposing counsel.

Keep a copy for yourself and write the exhibit number on it.

Give the exhibit marked by the court reporter to the witness, and have the witness identify it for the record:

Q. Ms. Smith, I am showing you a document that has been marked as Plaintiffs' Exhibit 1, which is bates-numbered D004 to D005. Do you recognize this document?

Establish foundation for questioning on the exhibit.

Q. What is Exhibit 1?

Q. Is this a true and correct copy of ____?

Q. Please turn to the second page of the document, which is bates-numbered D005. Is that your signature at the bottom of the page?

If the exhibit is a business record, immediately establish the business record foundation based on the applicable rules of the jurisdiction. For example:

Q. Was Exhibit 1 prepared in the ordinary course of the business of your company?

Q. Was Exhibit 1 prepared on or about the date of the events that are reflected in Exhibit 1?

Q. Was it a regular part of your company's business to create and maintain records of the type reflected in Exhibit 1?

Q. Where are these types of documents generally stored after they are prepared?

Q. Where was Exhibit 1 retrieved from?

Q. Do you have any reason to doubt that Exhibit 1 is a true copy of a record created in the ordinary course of business of your company?

MAKING AND HANDLING OBJECTIONS

1. Speaking Objections
    a. Improper in most, if not all, jurisdictions.
        i. *See* **Fed. R. Civ. P. 30(c)(2)** above ("An objection must be stated concisely in a nonargumentative and non-suggestive manner.")
        ii. Uniform Rules for N.Y.S. Trial Courts, §221.1(b)

            Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.
    b. Create a record if necessary, and suspend deposition/reserve right to move to compel further deposition if time limits become an issue.
2. "Form" Objections
    a. What is a proper "objection to the form?"
        i. A form objection is one that challenges the manner in which the question is posed. The reason that the "usual stipulations" require objections to the form of the question to be made at the deposition (lest the objection be forfeited) is that it gives the questioner a chance to rephrase the question to cure the objection.
        ii. Examples of form objections include, but are not limited to:
            1) Ambiguous
            2) Argumentative
            3) Asked and answered
            4) Assumes facts not in evidence
            5) Calls for speculation

6) Compound

7) Leading

8) Mischaracterizes prior testimony

9) Calls for legal conclusion or lay opinion

iii. Form objections do not include hearsay, or objections that go to the admissibility of the testimony or evidence.

b. Form objections (as well as objections to any "error or irregularity" in the procedural aspects of the deposition) usually are waived if not made at the time of the question.

i. **Fed. R. Civ. P. 32(d)(3)**

> (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.

ii. **N.Y. CPLR 3115**

> (b) Errors which might be obviated if made known promptly.
>
> **Errors and irregularities** occurring at the oral examination in the manner of taking the deposition, **in the form of the questions or answers**, in the oath or affirmation, or in the conduct of persons, and errors of any kind which might be obviated or removed if objection were promptly presented, **are waived unless reasonable objection thereto is made at the taking of the deposition**.
>
> (d) Competency of witnesses or admissibility of testimony.
>
> Objections to the competency of a witness or to the admissibility of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if objection had been made at that time.

3. Objections ≠ Instructions Not To Answer

a. Instructions not to answer are generally permissible only to preserve a privilege or enforce a limitation set by the court.

b. **Fed. R. Civ. P. 30(c)(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)**.

c. **Uniform Rules for N.Y.S. Trial Courts, §221.2**

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

4. Conferring with the Witness

a. It is usually improper to confer with a witness during a question or while a question is pending.

Uniform Rules for N.Y.S. Trial Courts § 221.3

> An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

b. Exception: When the witness is not sure whether an answer implicates a privilege, he or she may ask to consult with the attorney on that issue alone.

ENDING THE DEPOSITION

1. Final questions
    a. Lack of recollection
        i. Refreshed?
        ii. Others with more knowledge?
    b. Further intended testimony for trial
2. Take a break to make sure you have covered everything on your checklist: witness connected to narrative, goals met?
3. End versus suspend
    a. Motion to compel
    b. Judge's rules/practice regarding resolving disputes mid-deposition
4. Agreement re reading and signing transcript
    a. Understand the applicable rule
5. Post-Deposition
    a. Exhibits – who has custody of official exhibits? Generally, deposing attorney or court reporter
    b. Submit transcript to witness for review and signature
    c. Form of errata
        i. Substantive changes to testimony
        ii. Implications

NOTES

3

Defending Witness Depositions; Lessons from Class Actions and Beyond (Substantive Outline) (December 28, 2016)

Barbara Hart
Jennifer Risener

Lowey Dannenberg Cohen & Hart

By Barbara Hart, President and CEO, Lowey Dannenberg Cohen & Hart and Jennifer Risener, Associate. December 28, 2016.

If you find this article helpful, you can learn more about the subject by going to www.pli.edu to view the on demand program or segment for which it was written.

When any attorney endeavors to defend a deposition, a key issue is proper, thorough, and appropriate preparation. The understanding of your adversary's goals, the elements of proof and defenses are foundational. Understanding your witness, his or her strengths, manner and what his or her exposure may be is also central to success. Finally, working with the witness after a careful review of his or her documents is essential; surprise is not your friend and can undermine your credibility with your witness and your witness's confidence.

A particular scenario in which witness preparation is pivotal is the class action class representative deposition. The key issues being tested at a class representative deposition are typicality and adequacy.

A class action can arise out of a variety of disputes, including consumer law, fraud, securities, discrimination, etc…All class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. Rule 23(a) sets forth four requirements for class certification: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Additionally, a proposed class will have to satisfy one of the three requirements listed in Rule 23(b). Fed. R. Civ. P. 23.

Numerosity and commonality are fairly easy to meet. In the Second Circuit, numerosity is presumed for classes larger than 40.[2] Commonality simply requires that there are common legal theories or facts that the representative plaintiff and the class will rely on or have to prove.[3]

Typicality implicates the specifics of the putative class representative and demands the putative class representative's claims be shown to match class members' claims and that the representative's claim arises from the same course of events and similar legal arguments from which to prove the defendants liability. "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class… [C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation."[4] The typicality requirement is not "highly

2. See *Penn. Public School Employees' Retirement System v. Morgan Stanley & Co. Inc*., 772 F.3d 111, 120 (2d Cir. 2014) citing *Consol. Rail Corp. v Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).
3. *Lapin v. Goldman Sachs & Co*., 254 F.R.D. 168, 176 (S.D.N.Y. 2008).
4. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citing cases).

demanding" as the claims need only share the same essential characteristics.[5] They need not be identical.

Rule 23(a) (4)'s adequacy requirement demands a plaintiff prove that his/her interests are "not antagonistic to other members of the class, and that Plaintiffs' attorneys are qualified, experienced, and able to conduct the litigation."[6] The aim is to uncover conflicts of interest, if any, between the plaintiff and the class they seek to represent so to ensure the efficiency and fairness of class certification.[7]

To warrant a denial of class certification, a conflict must be "so palpable as to outweigh the substantial interest of every class member in proceeding with the litigation."[8] An antagonism capable of defeating certification must strike at the heart of the subject matter at issue. Disagreements concerning the remedy are not dispositive.

Preparing the Witness for Deposition

A lawyer has a professional duty to prepare their witness for deposition. This includes preparing the witness for the questions that they will face, but also making sure they understand how the deposition will be used, and proper behavior expected of them. It is best to meet at least twice with your witness, once just after they receive the subpoena, and the second time as close to the date of the deposition as possible. It is important to go over what things will look like inside the room, how documents will be presented, and what the witness should expect from the examiner, as well as whether or not you will be able to object.[9]

A key aspect of preparation is practice. You can familiarize the witness in two ways: (1) show the witness a sample deposition so that they understand the process and setting; and (2) conduct a mock deposition with your witness. When conducting a mock deposition, ask your

---

5. *Bolanos v. Norwegian Cruise Lines Ltd*., 212 F.R.D. 144, 155 (S.D.N.Y. 2002). See also *In re Polaroid ERISA Litig*., 240 F.R.D. 65, 75 (S.D.N.Y. 2006)("When the same alleged unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims.").
6. *Toney-Dick v. Doar*, No. 12 civ 9162 (KBF) 2013 WL 5295221, at *8 (S.D.N.Y. Sept. 16, 2013).
7. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).
8. *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 514-15 (S.D.N.Y. 1996).
9. Erin E. Rhinehart, *The Power Prep: Effective Preparation of Your Client For a Deposition*, American Bar Association, Feb. 13, 2013 available at http://apps.americanbar.org/litigation/committees/pretrial/email/winter2013/winter2013-0213-power-prep-effective-preparation-your-client-deposition.html.

witness questions you expect the examiner will ask. Go over the content of their answers, as well as preferred vocabulary, making sure that the witness remains truthful.[10] When asking questions, make sure your witness is pausing after each question and understands all of the concepts and terms used.

While conducting the mock deposition, make sure your witness, if they are your client, is aware of and properly declines to answer questions that involve privileged content. The witness can and should ask to confer with his/her counsel if he/she thinks a response might involve privileged material. If the deposition is being recorded, make sure your client is aware of that.[11]

Finally, to have a successful deposition, you need to know the rules. Every jurisdiction has different rules about what a defending lawyer can do. Following the rules that explain when a defending lawyer can make an objection is extremely important and can gain the lawyer credibility and good-will with the judge and jury. Rules for depositions can be found in the Federal Rules of Civil Procedure, local court rules, or the judge's rules.[12] Once you know the rules, briefly explain to the witness what your role will be.

ADVISE YOUR WITNESS ON THE FOLLOWING BASICS:

1. Tell the truth: Advise your witness to tell the truth. Make sure your witness knows that he should correct himself immediately if he recognizes that he misspoke.[13]
2. Take your time: Advise your witness to pause after each question to carefully consider her answer, to avoid "blurting", and to give you time to make an objection.

---

10. John C. Maloney, Jr., *Ten Commandments for Preparing The Deposition Witness*, 12 TODAY'S GEN. COUNSEL, 54, 55 (2015). http://digital.todaysgeneralcounsel.com/?issueID=29&pageID=56.
11. Erica W. Harris, Preparing Your Witness for Deposition, Presented at UT Law Winning at Deposition: Skills and Strategy, Oct. 22, 2015 available at http://www.susmangodfrey.com/media/1279/ehar_-_paper_for_october_2015_ut_cle_on_preparing_your_witness_for_deposition.pdf.
12. John C. Maloney, Jr., *Ten Commandments for Preparing The Deposition Witness*, 12 TODAY'S GEN. COUNSEL, 54, 55 (2015). http://digital.todaysgeneralcounsel.com/?issueID=29&pageID=56.
13. Erica W. Harris, Preparing Your Witness for Deposition, Presented at UT Law Winning at Deposition: Skills and Strategy, Oct. 22, 2015 available at http://www.susmangodfrey.com/media/1279/ehar_-_paper_for_october_2015_ut_cle_on_preparing_your_witness_for_deposition.pdf.

3. Ask for clarification: Advise your witness to ask the examiner to rephrase, repeat or provide specifics if he does not understand the question.

4. Understand and review every page of a document: Encourage your witness to ask themselves the following questions when they are given a document: Have you seen the document before? What is the date? Did you write it? Did you receive it? Is it a draft? Is it data? Is it a letter? Is this document helpful or damaging?

5. Dress professionally: Encourage your witness to dress neatly, which will foster credibility and show professionalism.

ALSO, ADVISE YOUR WITNESS TO NOT:

1. Speculate: Conjecture and guessing can lead to the witness losing credibility if she is wrong. Explain to your witness that it is best to say that he does not remember, does not recall, or does not know.[14]

2. Answer a question that was not asked: Explain to your witness that they need to pay attention to the question that was asked and answer it as concisely as possible, avoiding any extra details.

3. Be afraid to break questions down into subparts: Prepare your witness for multipart and leading questions by advising them to (1) break multipart questions down and answer it in parts; and (2) avoid accepting any leading questions or the examiner's characterizations as true if the witness is uncomfortable with them.[15]

4. Use absolutes in responses: Make sure your witness knows that he shouldn't use "always" or "never". You should advise them to leave as much flexibility as possible.

5. Make jokes or off-hand comments: Advise your witness that something said in jest might be damaging; it is best for them to avoid using jokes or sarcasm.

---

14. John C. Maloney, Jr., *Ten Commandments for Preparing The Deposition Witness*, 12 TODAY'S GEN. COUNSEL, 54, 61 (2015). http://digital.todaysgeneralcounsel.com/?issueID=29&pageID=56 ("'I do not remember' presumes you knew at one time and the examiner is entitled to try to refresh your recollection. Be careful when responding with 'I do not know,' since it is difficult to say later that you do know.").
15. John C. Maloney, Jr., *Ten Commandments for Preparing The Deposition Witness*, 12 TODAY'S GEN. COUNSEL, 54, 61 (2015). http://digital.todaysgeneralcounsel.com/?issueID=29&pageID=56.

6. Not to lose her temper: Being argumentative is costly, and the jury will lose sympathy. It can also make the witness look evasive. It is therefore best for you to advise your witness to remain calm and steady. If necessary, they can ask for a bathroom break or pause and take a few deep breaths.

NOTES

4

Demonstration and Analysis of Deposition Techniques (Substantive Outline) (December 2016)

Charles Michael

Steptoe & Johnson LLP

Rishi Bhandari

Mandel Bhandari LLP

I. BASIC DEPOSITION GOALS

A. Gain information
   1. Learning the witness's story
   2. Locking the witness into a story

B. Gain admissions

II. LEARNING THE WITNESS'S STORY

A. Ask open-ended questions.

B. Frame the questions with the standard who, what, where and why.
   1. Avoid "did you," or other closed-end phrasings.

C. Allow the witness to fill in silences, and to elaborate.

D. Speak in plain simple, English.

E. Listen carefully to the witness.
   1. Do not ignore the answer while thinking of your next question.
   2. If there are pauses between questions, even long ones, that is perfectly fine.

F. Don't forget that you need to learn not only what the witness knows, but where else to direct your discovery efforts? You can ask:
   1. Who else has information?
   2. What other documents exist?

III. LOCKING THE WITNESS INTO A STORY

A. Close out, or exhaust topics
   1. Ask questions like
      (a) What else did you say/do/hear?
      (b) Who else was there?
      (c) Is there anything else you can remember about the events?

B. Ask short questions.

1. Questions with multiple parts have multiple parts with which a witness can disagree.

2. Focus on one fact at a time.

C. Press the witness who always wants to preserve "wiggle room"

1. Witnesses are often coached to leave wiggle room, with statements like, "that's all that comes to mind."

2. Press those witnesses to think of what else could job their memory.

(a) Did you take notes?

(b) Did you speak to anyone else about the events?

(c) Can you think of anything that might refresh your recollection?

D. For testimony about conversations, ensure that you get the witness's best recollection of exactly who said what to whom, not just impressions of the overall conversation — otherwise you will allow too much room for altered testimony at trial

IV. GAINING ADMISSIONS

A. Be persistent

1. Do not be afraid to ask a question over and over again until you have an answer.

2. This will signal to the witness early that evasive responses will not cause you to give up.

B. Insist on a yes or no answer.

1. Try: "So that is a yes?" or "So that is a no?"

2. You can tell a witness that once you get a "yes" or "no," you'll be happy to let the witness explain further.

3. Try the converse of the proposition the witness is resisting

(a) *So you have signed contracts without reading them?*

4. Ask the witness to explain why he or she cannot answer the question with a yes or a no.

C. Do not let witnesses play dumb with language

1. If a witness feigns confusion over terminology, make them use their own definition of words

(a) *Sir, you have an MBA, right?*

And you've been in finance for 15 years?

Any in that time, you've heard the phrase "net margin"?

You've used that phrase?

What does it mean to you?

Ok, using your definition, …

D. Where necessary, recap the witness's testimony so that there is a clean excerpt for summary judgment or for trial.

E. For critical testimony, consider writing out the question word for word in advance.

V. USE OF DOCUMENTS

A. Don't forget to authenticate documents. For example:

1. What is Ex. 1?
2. Ex. 1 is an email from you to your boss, correct?
3. Do you have any reason to doubt that you sent and received the emails on the email chain marked as Ex. 1?

B. Consider asking a question or two that references a document before showing the witness the document

1. *E.g.*, Have you ever called your boss a "snake"? …. Let me show what I'll mark for identification as .. . .
2. This will make the witness believe that there is a document behind every factual assertion in your questions.

C. Establish evidentiary elements so that business records are admissible

1. Was this document made at or near the time of the information in it?
2. Did the person who supplied the information have knowledge of the information?

3. Is this document produced in the course of a regularly conducted activity of your business?

4. Is creating this document part of the regular practice of that activity?

VI. MANAGING OBSTRUCTIONIST OPPOSING COUNSEL

A. Don't get baited by obstruction. Keep your eyes on the witness.

B. Generally ignore objections, though occasionally ask for the basis for the objection

1. if the testimony is critical or

2. to keep your adversary on his/her toes.

C. Do not be afraid to call the court. Only threated to call if you are prepared to do so.

D. If opposing counsel tells the witness not to answer, be prepared with exactly what you will say to challenge that position.

1. In federal court: "Rule 31(c)(2) says you can only instruct a witness not to answer only "[1] when necessary to preserve a privilege, [2] to enforce a limitation ordered by the court, or [3] to present a motion" to the court to halt or limit the deposition. Which ground are you relying on?

(a) Note: motions to the court are for circumstances when the deposition "is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party."

2. In New York state court: "Uniform Rule 221.2 allows you to instruct a witness not to answer only "(i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person." Which ground are you relying on? What is the prejudice?

E. If opposing counsel asserts a privilege that you believe is improper, ask all the questions that will test the privilege

1. Who else was present?

2. What was the general topic of conversation?

3. Who initiated the conversation?
4. What were you trying to accomplish?
5. What is such-and-such person's job title?
6. What does he or she do for the business?

NOTES

5

Transcript of Deposition, *Data Trace Information Services LLC v. Recorder of Cuyahoga County, Ohio*, In the Supreme Court of Ohio, Original Action in Mandamus, Case No. 2010-2029 (December 30, 2010)

Submitted by:
Gerald A. Stein
Federal Trade Commission

IN THE SUPREME COURT OF OHIO

ORIGINAL ACTION IN MANDAMUS

STATE ex rel. DATA TRACE INFORMATION SERVICES LLC, ET AL.,	)	
Relators,	)	
vs.	)	Case No. 2010-2029
RECORDER OF CUYAHOGA COUNTY, OHIO,	)	
Respondent.	)	

- - - - -

DEPOSITION OF LAWRENCE PATTERSON
Thursday, December 30, 2010

- - - - -

Deposition of LAWRENCE PATTERSON, called by the Relators for examination under the Federal Rules of Civil Procedure, taken before me, the undersigned, Rebecca L. Brown, Registered Professional Reporter, a Notary Public in and for the State of Ohio, at the offices of Baker & Hostetler LLP, 1900 East Ninth Street, Suite 3200, Cleveland, Ohio 44114, commencing at 1:07 p.m. the day and date above set forth.

- - - - -

APPEARANCES:

On Behalf of the Relators:

David L. Marburger, Esq.
Jack Blanton, Esq.
Baker & Hostetler LLP
1900 East 9th Street
Suite 3200
Cleveland, OH 44114-3485
dmarburger@bakerlaw.com

On Behalf of the Respondent:

Matthew Cavanagh, Esq.
McDonald Hopkins LLC
600 Superior Avenue East
Suite 2100
Cleveland, OH 44114
216-348-5400
mcavanagh@mcdonaldhopkins.com

- - - - -

EXAMINATION INDEX

- - - - -

EXHIBIT INDEX

- - - - -

OBJECTION INDEX

- - - - -

MR. CAVANAGH: I just want to state on the record that Mr. Patterson is here today solely because the Relators have issued a subpoena compelling him to be here today for deposition. He's not here under Rule 30(b)(5), and, in fact, the Relators have not issued a Rule 30(b)(5) Notice to the Recorder in this case.

Mr. Patterson is not testifying on the Recorder's behalf here today, and the Recorder has not designated him to testify on its behalf today. He's instead here testifying as an individual.

It is the Relators, and not the Recorder, who have chosen Mr. Peterson to testify here today. The Recorder therefore objects to the extent the Relators attempt to use Mr. Peterson's testimony as that of the Recorder's office.

MR. MARBURGER: I take exception to the objection. The

Rules of Evidence will decide how we can use Mr. Patterson's testimony.

MR. CAVANAGH: I'm sorry. I called you Peterson, Mr. Patterson.

- - - - -

LAWRENCE PATTERSON

called by the Relators for examination under the Federal Rules of Civil Procedure, after having been first duly sworn, as hereinafter certified, was examined and testified as follows:

EXAMINATION

BY MR. MARBURGER:

Q I'm David Marburger. I represent two companies that have asked for electronic copies of records that are recorded with the Recorder's office and have sued the Recorder to get those copies, as well as to try to compel the Recorder to charge less money than the Recorder had wanted to charge for electronic copies of the records that these companies have asked for. One is called Data Trace Services, and the other one is called Property Insight.

Would you state your name and spell it.

A Lawrence Patterson, L-A-W-R-E-N-C-E --

Q Well, not that part, but the Patterson.

A Patterson, P-A-T-T-E-R-S-O-N.

Q How long have you been with the Recorder's office?
A I started employment with the Recorder's office January of '99.
Q So Pat O'Malley was the Recorder when you started?
A That's correct.
Q What's your title today?
A Truthfully, I don't know.
Q What are your responsibilities today?
A I run most of the servers and computers for the Recorder's office.
Q Have you run most of the servers and the computers for the Recorder's office since you started there in 1999?
A No.
Q Did you report to a guy named Jim Zak?
A Yes.
Q And was that his job to be responsible for the computers and the servers in the Recorder's office?
A Was it his job?
Q Did you understand that that was part of his responsibilities?
A Not in 1999, no.
Q Okay. Why don't you tell us what your

responsibilities were when you got there and take us sequentially up to the present day.
A I started in data entry for the Recorder's office.
Q Okay.
A I worked in cashiers for the Recorder's office, and I worked in the computer department at the Recorder's office.
Q Was data entry part of the computer department or separate?
A No.
Q Is there a department that data entry was part of?
A No.
Q Was it called data entry?
A Yes.
Q What did you do?
A Entered data.
Q Well, what kind of data?
A Grantors, grantees, data from documents.
Q Okay. So there are certain records that the Recorder files as part of their duties, such as mortgages, deeds, and other records that are presented to the County Recorder to be filed, recorded, and indexed; isn't that true?

You've been there since 1999.
A Correct.
Q You don't have any doubt that that's true, do you?
A The question was a little bit long. If you could just make it a little more simple.
Q You understand that people present records such as deeds --
A Yes.
Q -- or mortgages to the Recorder's office, don't you?
A Yes.
Q And that the Recorder's duty or job is to record those records or the information from them and index them. You understand that, don't you?
A I'm aware that we do.
Q Okay. You understand that the principal job of the Recorder is to keep a record of certain kinds of documents, many of which pertain to real estate. You understand that, don't you?
A I'm not an expert of what the Recorder's job is.
Q Even if you're not an expert, you understand what the function of that office is, don't you?
A I could tell you what we do in our office.
Q What do you do in your office?

A People present copies of real estate documents, we index them, and make sure records are available.
Q To the public?
A Correct.
Q Okay. And so all I was -- the only reason for asking that is that I wanted to establish what kind of data you enter, and the kind of data you enter is data from the records that are presented for filing with the Recorder's office.
A Correct.
Q And that's distinct -- did you say yes?
A The data that we enter is from the documents that are presented in the office.
Q Yes.
A Correct.

- - - - -

(Jack Blanton, Esq. enters proceedings.)

- - - - -

MR. MARBURGER: This is Jack Blanton who's a young lawyer here, and I said he's welcome to sit in and watch.

BY MR. MARBURGER:
Q That's distinct from something like internal payroll records, that's not the data that you were

entering --
A Correct.
Q -- right?
You're not entering like personnel records of the people who work at the Recorder's office, right? That's not the data you entered?
A Correct.
Q You're entering the data that pertains to the official duties of the Recorder's office to index records?
MR. CAVANAGH: Objection.
Q I'm not holding you to any issue of law, but what you're entering is data that's being brought in by members of the public that pertain to the duties of the Recorder to store and index certain kinds of records.
If we're going to spend an hour on this, we will, but it's a simple enough question. My point is there is two kinds of records: You could deal with internal and administrative records, like your payroll; or records that are coming from the outside that pertain to real estate, veterans discharges, UCC filing statements and the like.
Do you understand that?
A I understand what you're saying, yes.

Q And the data that you were entering was data from records that came in from the outside that have some relation to the Recorder's reason for existing, the Recorder's duties?

MR. CAVANAGH: Objection.

Q Is this a hard question, Mr. Patterson?

MR. CAVANAGH: I think he's getting hung up on the legal duty part.

MR. MARBURGER: I don't care about legal duties.

MR. CAVANAGH: I don't think he's qualified to say what the Recorder's statutory duties are.

MR. MARBURGER: But I'm not trying to hold him to that either.

MR. CAVANAGH: Then ask the question then.

BY MR. MARBURGER:

Q You have an understanding that the Recorder has a reason for being, don't you, sir? A reason to exist?

A I'm sure it does.

Q And you understand that the reason to exist, as you've told us, has some relation to receiving

documents from people who don't work for the Recorder's office and indexing those so that the public can take a look at those records and use the indexes for whatever purposes. You understand that you are sort of a depository of records that are indexed and many of which pertain to real estate.
A I agree that we're -- people deposit documents with us for information regarding to real estate, yes.
Q Okay. That's all I'm getting at.
The data you would enter would be data from those records, right?
A Correct.
Q Like if Pat O'Malley writes an internal memo to his chief assistant, that isn't the data you're entering, right?
A That's correct.
Q That's all I'm trying to get at.
MR. CAVANAGH: David, in all fairness, the question included a statement about what the objectives and goals and reasons for the existence of the County Recorder's office are, and he doesn't know that.

MR. MARBURGER: Well, he probably does know that.

Q But no one is asking you to give anything other than a layperson's understanding of what the Recorder's office is supposed to do.

A Thank you.

Q I'm not asking you to be the legislature.

A Thank you.

Q So in entering data like from a deed you would enter what kind of data?

A Grantor, grantee, legal description.

Q Okay. And how long -- if you started there in January of '99, how long was your tenure in that position?

A I'm terrible with dates.

Q Ballpark it for us.

A Maybe --

Q It doesn't matter to me what the answer is. I just need to have a feel for it.

A Maybe six months.

Q Okay. And then did you become in the cashier's department?

A That's correct.

Q In the cashier's department, would this include what your duties were, that if -- let's say I came in

with a deed that I wanted to record with the Recorder's office, I would give that to somebody in the cashier's office -- that would be the procedure, correct?

A Yes.

Q -- and I would have to pay an amount of money, some sort of fee, correct?

A Yes.

Q And the cashier's office would receive the fee, correct?

A Yes.

Q And receive the deed that I present, correct?

A Yes.

Q Okay. And from that point the cashier's office would cause it to be processed in some way so that the Recorder's office could keep or collect the data on that deed; is that true?

MR. CAVANAGH: What time frame are we talking about? I don't know if it changed or not, but it might matter.

Q It doesn't matter. For my purposes, I don't care what mechanism you used.

My point is -- if we're going to play games, why don't you just tell me, when I give you the deed,

what was the process for handling it when you first became a cashier?

A Wow. So when you give me a deed, what do we do with it?

We would examine it for the requirements, count the number of pages, collect the fee, sticker the pages -- there was a sticker that went on the pages -- and then send it for process in the scanning department.

Q And then?

A I think that's it.

Q Well, when it was scanned, didn't you return the original to the person who brought it in?

A When I was in the cashier's department, is that the question?

Q Yeah.

A No. The cashier's department did not return the document.

Q Was it your understanding that somebody in the Recorder's office would take some steps to get the original back to the person that presented it?

A Yes.

Q Okay. And when you say "scanned," you understood, didn't you, that that was an electronic scanning as opposed to a photocopy, or did you do

either?
A I don't know what you mean by that.
Q Okay. When you said "scanned," what were you thinking of when you said it was sent to be processed in the scanning department?
A We would put it in a basket, the basket was delivered to the scanning department.
Q Did you develop any understanding in the time that you've been there, since 1999 until now, which is some eleven years, as to what the scanning department did with it?
A Yes.
Q What was your understanding?
A They placed it in a scanner and scanned it, and -- yeah, they placed it in the scanner and scanned it.
Q And did you ever develop an understanding from 1999 to the present as to what the function of that scanning was?
A The function? I'm not sure.
Q What did you think happened in the scanner? Didn't know?
A It never even occurred to me to think about it until you asked me.
Q So you're in the computer department now.

A That's correct.
Q And you're in charge of the computers and the servers.
A That's correct.
Q But you've not developed an understanding as to what a scanner does? Is that what the Ohio Supreme Court should understand from your testimony?
A Scanners aren't computers.
Q Whether they are or not, you don't have any understanding -- you've not ever developed an understanding since 1999 of what the scanner did?
A What it does?
Q Yeah. What was its function.
A I've never repaired scanners or opened them.
Q So you don't know what they do at all, huh?
A I've never thought about it.
Q So you don't understand that they have a way of recording data, do you?
A I've never thought about it.
Q So you don't really -- you're in charge of the computer system and the servers, and you don't know -- I want to be absolutely certain the Ohio Supreme Court understands that the head of the computer department in the Recorder's office has no clue as to what it is to scan a document. Is that

really fair?

MR. CAVANAGH: Objection. You're misrepresenting his testimony. He didn't say he has no idea what a scanner does.

MR. MARBURGER: I asked him if he developed an understanding and he said no.

BY MR. MARBURGER:

Q Now, you either have an understanding or you don't, Mr. Patterson.

MR. CAVANAGH: If you know what a scanner does, explain it to him.

A How it operates?

Q No. I asked you what its function was.

A The question was did you --

Q No. I asked you what the function was was my question.

A What the function of a scanner --

Q What's the function of that scanner at the Recorder's office.

A Oh, okay. The function of a scanner is to preserve an image of the document.

Q That's right. So that you'll have some

electronic copy of what the document said; isn't that true?
A That's -- I don't understand exactly what you mean when you say so you'll have an electronic copy. I understand that we place the documents in the scanner, it goes through the scanner. When it's done, I have a copy.
Q All right. Is your hang up with the word "electronic"?
A Yes, sir.
Q So you have a copy. You have some way of seeing what that document said after the original's been returned to the guy who presented it; isn't that true?
A That's correct.
Q So your hang up is what to call it, electronic or some other word; is that right? Is that what your issue is?
You know what a copy is, right?
A Yes, I know what a copy is. I've always referred to it as a copy.
Q And that copy need not be on paper, you can still read it even if it's not on -- your copy isn't on paper; is that true?
A Yes, it is.

Q You can see it on a computer monitor; isn't that true, sir?
A Yes, it is.
Q All right. In fact, unless you see it on either paper or a computer monitor, a screen of some kind, you can't see it at all, can you, sir?
A That would be correct.
Q How long were you in the cashier's department?
A Once again, I'm bad with dates. I'm going to guess probably six months.
Q And then after that did you join the computer department?
A Yes, sir.
Q And what did you do in the computer department?
A Repair computers, respond to help desk phone calls.
Q Anything else?
A That should probably cover everything when I first started in the computer department, repair computers, answer help desk calls.
Q Since you first started -- I didn't mean to interrupt you. You were speak so quietly I didn't hear you. What did you just say?
A Just recapping what I said originally, when I first started in the computer department I repaired

computers, I answered help desk phone calls.
Q Okay. From the time that you joined the computer department have you stayed in the computer department?
A Yes, sir.
Q It's fair to say you've been in the computer department for at least nine years?
A Probably.
Q In that time what else did you do in the computer department during those nine years?
A Server maintenance, PC maintenance, system admin duties.
Q Admin is abbreviated for administrative?
A Yeah. System administrative duties.
Q Anything else?
A That is most of -- that should cover what I do.
Q When you said you responded to help desk calls, is that people who were employed by the Recorder's office and needed help making the software do what they wanted it to do?
A That includes that, yes.
Q Before you joined the Recorder's office where did you work?
A Wow.
Q Immediately before.

A Immediately before? Wow. I held a lot of little jobs. Was unemployed for a while, so I worked for like a temporary agency and went out and did interviews during the day.
Q Did you have -- I'm sorry. Go ahead.
A So that's why I'm trying to recollect immediately before.
Q All I'm really getting at is did you work for any -- what I was wanting to see is if you had worked for any companies or agencies, governmental or non-governmental, where you had to work -- where you had to know anything about the technical element of a computer system.
A No. I apologize. I've worked on computers, you know, for other companies, for my family's company, yes.
Q What's your family's company?
A It's a transportation company.
Q Does it have anything to do with developing software?
A No.
Q What kinds of things did you do to work on computers before for other companies before joining the Recorder's office?
A PC repair.

Q Anything else?
A Mainly PC repair.
Q Do you have any formal education in computer science or something related to the technical element of computer systems?
A Yes.
Q What's that?
A I attended Akron University for programming. I hold -- I am certified in Novell Administrator.
Q What is that?
A Novell is an operating system. I hold a Microsoft certification. I've had training in wireless systems, security.
Q You mean computer system security?
A Yes.
Q What else?
A I think that just about covers it.
Q What year did you -- did you graduate from Akron U?
A No, sir.
Q How far did you get in your education?
A Three years.
Q So what year was the last year you attended in Akron?
A Probably '93, I'm guessing. It was either '92,

'93, '94, because I'm terrible with dates, as I told you.
Q How long have you had your current responsibilities?
A Once again, I'm terrible with dates, so --
Q Zak now works for the county court system, correct, Jim Zak?
A Yes. That sounds correct.
Q Have you had your current responsibilities since he left?
A That sounds correct, yes.
Q Can you give us an approximate year in which he left?
A 2010.
MR. CAVANAGH: Did you say 2010?
THE WITNESS: Yes. This year.
Q I know he just went over there this year.
Prior to him leaving -- were your responsibilities immediately prior to him leaving the Recorder's office, were they sort of as his number two in that department?
A That sounds correct.
Q How long did you hold those responsibilities as

the number two person?
A Probably -- I'm guessing, because I'm terrible with dates, probably since maybe a year after I started in the computer department.
Q Oh. So about eight years roughly, seven to eight years, would that be right?
A I guess so.
Q Now, today if I get on to the Cuyahoga County Recorder's website using my personal computer, I can see deeds that have been filed and other records that have been filed there; am I correct?
A That's correct.
Q And I will see -- whatever it is that I'm seeing would replicate what's actually been scanned by your department if it was, for example, a deed; is that correct?
A Whatever you're seeing would replicate what was actually scanned?
Q By your department.
A No.
Q What would the different -- what difference, if any, can you identify?
A A watermark.
Q The watermark is on the image I see on my computer screen, or is it on the original when you --

was it one of the things that was scanned -- how is the watermark different? Explain that difference.
A There is a system in place that -- for a website image that places a watermark on the image.
Q So if I were to print the image from your website using my PC's printer, the idea is that the watermark would also print?
A Yes.
Q Okay. If I went to your office personally and said may I have a paper copy of my deed, it wouldn't necessarily have a -- the paper copy wouldn't necessarily have a watermark, would it?
A That's correct.
Q Do you understand what the purpose of the watermark is for printout from the website?
A It's to make it identifiable as a copy from the website.
Q Have you developed an understanding as to what value that has to the Recorder's office, to have a watermark more or less imbedded in the website image?
A It's -- let's see. It's -- I felt that I explained it.
Q I mean, why is it a value to have a watermark on the website image, but if I come in and get a paper copy directly from you it wouldn't necessarily have a

watermark?
A We would like to be able to identify copies that come from our website.
Q This is not intended to, you know, pin you down, but I've got to understand this.
A Right.
Q Is the purpose of the watermark then for you, to give you a sense of genuineness?
A It's just to identify copies from the website. That is it.
Q Do you have an understanding as to why that is valuable for your office?
A I believe, and you'll have to -- this is not my area of expertise. You'll have to get confirmation from someone else, but I believe that we want to make sure that when a copy is used, that we're able to identify it.
Q As genuine? As actually from you as opposed to counterfeit?
A I don't know if I would say that.
Q What would you say?
A I think I would say that we -- sometimes an individual will come in and say, well, I got this from your website, and it's not that -- I don't think it's that they're trying to provide a counterfeit

document of any way, but sometimes the document may not be accurate.
Q So it's a way of verifying that it is, in fact, coming from your office? Is that the purpose of the watermark, as you understand it?
A It's a way of -- I wouldn't even say that. We just want to identify it as a copy that came from the website as opposed to a copy that someone came in and got a certified copy of or as opposed to anything else.
Q Well, as opposed to me just constructing my own replica of a deed that would originate from me and not from your office, is that a value to your office?
A Is that a value? It's a way of identifying. It's a way of identifying.
Q That it came from you as opposed to some other source?
A I don't know if that's a value or not. It's a way of identifying that this is a copy and from our website, yes. I don't know. The other source thing or counterfeit, that bothers me. I never looked at it that way.
Q Now, do you work Monday through Friday, you personally, at the Recorder's office?
A Yes.

Q And has that been the case since you've been in the computer department?
A Yes.
Q Regular business hours. When the department opens and when it -- aren't your hours at the Recorder's office like 8:30 to 4:30 or 8:00 to 4:30?
A Correct.
Q Do you typically work those hours in the office?
A No.
Q What do you typically do?
A 8:00 to 4:00.
Q But typically in the Recorder's office?
A Correct.
Q And since you've been in the computer department, have you had an opportunity to communicate with whoever your supervisor was?
A Yes.
Q And was that typically in person, by phone, by email, all of those, any of those?
A Typically in person or over the phone.
Q And would you say that you converse with whoever your supervisor was every day?
A Yes.
Q And did you also have an opportunity -- did you also converse with the people who weren't your

supervisors but who also worked in the Recorder's office? Did you typically do that every day?
A Yes.
Q And some of those people might be subordinate to you or -- some of those people were your subordinates; is that true?
A I wouldn't identify them as a subordinate.
Q They would be people who weren't your supervisor.
A Correct.
Q Maybe people that you supervise.
A I don't envision myself as an official supervisor for the Recorder's office.
Q Do you have anybody that reports to you in the chain of command?
A I would say more or less I'm more like a team leader than a supervisor.
Q Do you have people on your team then?
A Yes.
Q Did you communicate with people on your team?
A Yes.
Q Every day?
A Yes.
Q Now, were there other people who were in charge of departments in the Recorder's office who weren't

on your team?
A Yes.
Q Did you communicate with them at least every week?
A Yes.
Q So in all these communications, you've had plenty of opportunity to develop an understanding as to some of the basic functions of the Recorder's office. Would you agree with that?
A Yes.
MR. MARBURGER: Let me take a break.
(Recess had.)
BY MR. MARBURGER:
Q While Pat O'Malley was the Recorder, there was a process implemented at the Recorder's office, wasn't there, where each day's filings were -- and maybe this still happens -- were recorded onto a compact disc?
A Correct.
Q Do you still do that or not anymore?
A The images from the day are recorded onto a CD.
Q And it's a CD-R; is that right?
A I guess.
MR. CAVANAGH: Do you know,

Larry, or no?
Q Is it your understanding that it's a compact disc that you can write on?
A Correct.
Q That's all I care about.
MR. CAVANAGH: There's CD minus R's and CD plus R's --
A I don't --
MR. CAVANAGH: -- CD-RW.
Q The kind of compact disc that one might see at Staples or Office Depot or OfficeMax for sale; am I right?
A Yes.
Q And was it your understanding that the purpose of making a record of each day's filings on a compact disc was so you would have a backup of the records that were otherwise stored in your computer system and filed that day?
A Yes.
Q And did you sometimes refer to that CD generically as like the master CD for daily work?
A It is referred to as that.
Q See, I know what's going on in that office.
And are those master CDs stored in like a CD spindle of some kind at the Recorder's office?

A Yes.
Q And the device used to record information from your computer system onto the master CD is a device within the Recorder's office -- is that correct? -- as opposed to being in some other building somewhere?
A Yes.
Q During your tenure in the computer department at the Recorder's office, has the Recorder's office had photocopying machines?
MR. CAVANAGH: Objection.
Q Any photocopying machine?
A When you say "photocopying machine," what do you mean?
Q Let me be -- let me make sure I understand your question. You don't have an understanding of what a photocopying machine is?
A No. I want to make sure that I answer your question correctly.
MR. CAVANAGH: Dave, I'll object to the tone of the question. You make it sound like it's unbelievable to you that he wouldn't know what the definition of a photocopy machine is.
MR. MARBURGER: I didn't ask

him to define it. I asked him if he had any.

A When you say "photocopying machine," what do you mean?

Q Let me be clear. The term "photocopying machine" is so ambiguous that you can't picture in your mind what a photocopying machine is in an office setting?

A I just want to make sure I answer your question correctly.

Q Well, we'll find out. If you can say yes or no, I can do follow-ups, but it seems -- if you really don't know in an office setting what a photocopying machine is, I'd like the Ohio Supreme Court to hear you say so.

A I just want to make sure I answer your question correctly.

MR. CAVANAGH: There's different types of photocopiers, Dave.

MR. MARBURGER: You're speaking instead of -- you're not under oath. This guy is.

MR. CAVANAGH: I understand that, but I understand what his

objection is. You want him to answer the question, but I don't think it's fair.

MR. MARBURGER: It's not fair?

MR. CAVANAGH: It's not a fair question. A photocopy machine can be a machine that uses photostatic technology, that uses xerographic technology, that uses scanning technology.

BY MR. MARBURGER:

Q I don't care what kind of technology it uses. Has your office -- we don't have technocrats on the Ohio Supreme Court. We've got people like me, general guys --

MR. CAVANAGH: Objection.

Q -- or gals. I'm not really very interested in what the technology element of it is. I want to know --

MR. CAVANAGH: That's what's at issue in the case, Dave.

MR. MARBURGER: Not in my judgement.

BY MR. MARBURGER:

Q Do you have photocopying machines at the Recorder's office? If you don't know what that means in an office setting, please tell the Court you don't know what it means in an office setting to have a photocopying machine.
A I would like to answer your question to the best of my ability.
Q I'm asking you to answer that.
A So if you could explain to me what you mean by --
Q I'm not going to do that because I want you -- I want to establish on the record that you really don't know what it is. I want to establish that.
Now, do you know what it is or do you not know what it is? Do you understand what that term means in common parlance or not?
A Common parlance?
Q Common language.
A I'm sorry. I didn't know what that meant.
I understand that there are photocopying machines, and there are different types of them just like --
Q Are there any in the Recorder's office?
A -- there are different cars. Some of them run under gas power, some of them under electric power,

and I'm asking if you could help me out by explaining what you mean by "photocopying machines" --

Q That's a great point.

A -- instead of trying to make me feel stupid.

Q If you feel stupid, it's not because I'm making you feel that way.

MR. CAVANAGH: Objection.

A I have self-confidence and I have no problem.

Q I don't think you're stupid.

A I think -- I don't have any problem answering the question.

Q I think you're playing games with me.

MR. CAVANAGH: Dave, the word "photocopying" is at issue in this case, and you're asking him whether something is or isn't a photocopy machine, which is a legal conclusion --

MR. MARBURGER: This isn't a patent case. There's no statute that defines -- where I'm asking him to define technology for me. I'm asking -- I want to find out from a layperson's perspective, not an engineer's perspective, not a

technician's perspective, but from -- I have an idea.

BY MR. MARBURGER:

Q How about this: Have you ever heard the term "photocopier" or "photocopy" used in the Recorder's office by anybody?

A Photocopy? I'm sure in the time I've been there someone has used the term.

Q And have you ever heard them use it in referencing a particular device or machine within the Recorder's office? By way of example, "can you photocopy that for me?" That's an example of office parlance.

A That particular terminology I've not witnessed.

Q What was the context that you've heard the term "photocopy" used in the Recorder's office?

A I'm sure it's been used. I didn't say I remembered a specific instance.

Q All right. But you have general understanding that people have used the term "photocopy" within the Recorder's office in terms of something that could be done there; is that true?

A I'm sure it's been used. I don't remember a specific instance or how it was used. I'm sure it's been used.

Q And is it fair to say that it's been used in terms of being able to copy one piece of paper onto another piece of paper using a machine? No? Not sure of that?
A I'm sure it's been used. I don't recall a specific instance in which it was.
Q Do you have a secretary?
A No.
Q Does anybody there have a secretary?
A Yes.
Q Have you ever heard a secretary use the term "photocopy"?
A No.
Q Have you ever -- do you have machines there where I can put in a paper document, push a button or two, and out will come copies of that paper document also on paper? Do you have such a machine?
A Yes, sir.
Q What do you call that machine?
A Xerox.
Q Xerox. Is the machine made by the Xerox Company? Is that why it's called Xerox?
A No.
Q So xerox, in the parlance that you've described, the language that you've described, is being used

generically as opposed to describing a particular brand; is that right?
A All of my life I've just known people to say xerox. It's not commonplace to use the terminology that you're using.
Q You mean it's more -- people say xerox instead of photocopy?
A If you're referring to a type of machine where you place a piece of paper on the top and press a button and out comes copies of it, they usually refer to it as xerox.
Q Have you ever heard it referred to as photocopying?
A Not with my generation, no.
Q And you've never heard anybody in the Recorder's office refer to that as photocopying; is that true?
A I don't remember any specific instance where that's referred to as photocopying.
Q Have you ever heard it referred to as photocopying in any office context?
A I've always heard of it as xerox.
Q Let me be clear: You've never heard of that called photocopying; is that correct, Mr. Patterson?
A When people speak of using a type of machine that you described, they speak of it as could you

make a xerox of that or could you xerox this for me.
Q But you've never heard them refer to that as photocopying; is that correct?
A I'm sure it's been said. I don't remember any specific instance. What I remember is it referred to as xeroxing a piece of paper to make additional copies.
Q I know. You've told us that.
Let's be very clear here. You've never heard that process called "photocopying." Is that true or false?
A I'm sure the term has been used by someone.
Q Because you've heard that or you're just guessing?
A I do not remember a specific instance where someone used the term "photocopying." My generation and people around me typically refer to placing an image on the top of a machine and having two or three copies come out as xeroxing.
Q Okay. Would it be synonymous in your understanding with xeroxing to call that photocopying?
A I don't know. I don't know what the legal definition of photocopying is.
Q I don't know if there is a legal definition.

I'm talking about what lay people say.

MR. CAVANAGH: Aren't we asking the Ohio Supreme Court to decide that issue?

MR. MARBURGER: No.

MR. CAVANAGH: No?

MR. MARBURGER: You might be. I'm not.

MR. CAVANAGH: Why don't you just call it a copy machine. Why do you have to call it a photocopier?

BY MR. MARBURGER:

Q I can call it anything I want to call it. I want to see if you understand what I'm talking about.

A I call it a xerox.

Q Do you happen to know the names of the units that you have that xerox? Do you happen to know what they are -- what brand they are and what model or unit they are?

A I should, but right now, due to the pressure that you're placing me under, it's not coming to mind.

Q I'm not placing -- am I placing you under pressure, Mr. Patterson?

A I think it begins with an M. I can't remember

currently.
Q Do you feel that I'm placing you under pressure?
MR. CAVANAGH: Be honest.
A Yes. This is not my normal environment. I'm not a lawyer and, you know, I'm nervous that my answers -- you will try to use in a way in which I wouldn't intend them to be.
Q Well, you're in control of that. If you give us an honest, forthright, clear answer, you'll decide whether your testimony can be used in a strange or odd way. That's up to you, not up to me.
A Okay.
Q Now, do you need a break --
A No, sir.
Q -- so that I'm not pressuring you?
A No.
Q Well, what can we do to remedy the pressure that you apparently feel?
A You could stop trying to rephrase questions to place words in my mouth.
Q All you have to do is say no.
A Okay.
Q If I'm phrasing it inaccurately, all you have to do is say that's not the truth.
MR. CAVANAGH: I think he's

done that. He's spoken up.
Q Do you have any fax machines at the Recorder's office?
A Yes.
Q Have you ever used -- do you have more than one?
A I believe there are two.
Q Have you ever used them yourself?
A Yes.
Q Would this generally describe how your fax machines are used by a regular -- someone who's not a technical person: You take the records that you want to fax, which is a paper record; put it in some sort of hopper; dial a phone number, which is going to be the destination, the machine to which it will be transmitted; and push some sort of button; and the machine then takes the document from there and transmits data from it?
Is that generally what happens with your fax machine? Is that generally what happens?
A Generally what happens is I place paper on the top of the machine, dial a number, it processes them in such a way that it transmits it, and whatever fax machine receives it gets a reproduced image.
Q And the number that you said you dial is a telephone number, isn't it?

A That's correct.
Q So that the data that's being transmitted is going through telephone lines. Is that your understanding?
A Yes.
Q Okay. And does the Recorder's office -- do you have an understanding whether the Recorder's office uses a commercial telephone company to place voice calls like AT&T?
A To answer your question how you want it answered, it's my understanding that we switched to a phone system that we run, that we own, but I'm sure elsewhere in the building there are phones that runs over AT&T.
Q I don't care what company, but all I'm getting at is simply this: If you pick up the phone and make a call to Washington, D.C. from one of the phones in the County Recorder's office, would the Recorder's office typically be charged more for that call than if the call was here in Cleveland? Do you know?
A I have no idea.
Q Like are there long distance charges?
A I have no idea.
Q In your job as being responsible for the computer systems and the servers, does that include

anything having to do with the fax equipment?
A No.
Q Or the telephones?
A No.
Q Do you have a budget that you are responsible for?
A No.
Q Do you have input into the County Recorder's budget as it would pertain to the things that you're responsible for?
A To try to help you with the answer to your question that I think you're looking for, I can review computer equipment and suggest a purchase for a computer or server, or I need this or I need that.
Q Are there outside vendors that charge the Recorder's office money for things that come within your responsibility? By way of example, if I get onto my PC here and I log onto something called Lexis, we get -- somebody gets charged for that, either my firm does or the client does, or some combination of the two. That's what I'm getting at.
Within your responsibilities, does your department incur charges that the Recorder's office would have to pay?
A Yes. We use services in which the Recorder's

office would have to pay. Yes.
Q Are any of those charges from a telephone company?
A Yes.
Q And for what uses of the telephone company services do you have to pay?
A We're talking about for like Internet access.
Q Okay. And those would be flat charges or are they charges that fluctuate?
A I have no idea.
Q What other kinds of charges does your department incur through a telephone company?
A That would be it.
Q Internet access?
A Correct.
Q Do you have an understanding as to whether the phone company's charges for Internet access fluctuate based on how often you use the Internet from your office?
A No.
Q Okay.
A You know what? I don't know the answer to that question. The charges for the Recorder's office concerning the Internet I'm not involved with, so I don't --

Q But you have an understanding that you get charged?
A Yes. We get charged for the Internet. Correct.
Q Now, does your office sometimes send by email over the Internet images known as pdf files?
A Do we send pdf files? I have sent people pdf files, yes.
Q Just so our audience knows what we are talking about, pdf is portable document format, right?
A Yes.
Q In effect, from a lay perspective, a pdf would be an electronic image of the exact font, the exact spacing, the exact graphics, the exact text of a written document; is that right?
A I guess so.
Q In effect, an exact mirror of an original document.
A I'm not an expert on pdf files, but if that's what you're saying.
Q You've seen them, haven't you?
A I've seen them. Whether or not they're an exact replica of the exact size and the font and everything else, I don't know. I'm going with your explanation. We don't use pdf files intrinsically at the Recorder's office as part of our function. It's

not a format in which we need to know a lot about.
Q Okay. Do you know what a TIFF file is?
A Yes.
Q Is that a format you use frequently at the Recorder's office?
A Yes.
Q And do you sometimes transmit documents to remote locations in a TIFF format?
A No, we don't transmit.
Q How do use TIFF?
A We don't transfer documents to remote locations in a TIFF document. Documents in-house are stored on TIFF format.
Q I see. Just so our audience understands what that is, would you explain it?
A It is a file type that holds an image.
Q It's analogous to pdf, isn't it, in the sense that it will try to replicate what's on the image, on the document?
A Sure. Yes.
Q And doesn't TIFF stand for something like tagged image file format?
A Something like that.
Q And it's -- I don't need to get into TIFF. But you don't transmit documents via the Internet to

places, let's say, outside of Cuyahoga County in a TIFF format?

A You're right. I forgot about the website which does transmit. I got caught up with the word "transmit." We don't really transmit. We have files there and people download them.

Q Like yesterday I got on my computer and I looked up my ex-wife's deed, and I could see, you know, what appeared to me to be exactly what a deed would look like. Am I looking at a TIFF file?

A Yes.

Q Okay.

A Yes.

Q All right. And would I then be -- do you have an understanding as to whether I'm looking at what is functionally a copy of your electronic deed when I'm looking at a particular deed?

I'm not looking at your original TIFF image, I'm looking at a copy of it; am I not?

MR. CAVANAGH: Objection.

A So to answer your question, when you look at an image --

Q From my computer screen.

A -- from your computer, you have already downloaded a TIFF image.

Q Yeah. And it's a copy -- like a whole -- you can have -- everybody in my office building could be looking at the same deed on your website and we're all looking at copies; is that correct?
A You're not looking at the original. That's correct.
Q Okay. So would this also be true that what I'm seeing on my PC here at the office is an image that my PC, or whatever it's connected to, was already downloaded from your website?
A This is correct.
Q So it's a copy of the image that you have stored on your servers in your computer system?
A This is correct.
Q Okay. Now, I can look at that image on my PC system through your website without charge from the Recorder's office; is that true?
A This is correct.
Q And I can print it out on my printer and your office doesn't charge me to do that either; is that true?
A This is correct.
Q Okay. Those machines that you referred to as xeroxing machines, have you ever known them to make copies onto any medium other than paper?

A No.
Q So to the extent that they make copies at all, they make paper copies; is that true?
A Yes.
Q And do you sometimes -- does your office sometimes receive faxes?
A I'm sure we could. We have fax machines.
Q Have you ever seen a fax come in?
A I'm not in proximity to fax machines, no.
Q You have to have an understanding that you developed over time there that when your office receives a fax that is typically paper, what you receive is paper?
A Yes.
Q When we were talking about seeing an image of a deed that I would pull up by getting onto your website, you aren't aware, are you, of the Recorder's office being charged -- that you're charged for my being able to see that image?
A I'm not familiar with the fees charged to the Recorder.
Q Now, when you create -- when your office created these masters CDs of each day's worth of filings -- I'm going to go into some of the mechanical procedure of that in this very rudimentary sense.

You understand, don't you, that there's a time each day where the Recorder's office will accept no more documents that day for filing, even though the Recorder's office is still open a little bit beyond that time?

A Yes.

Q Okay. For example, in your office, four o'clock is supposed to be the last time that your office will accept a document to be filed, even though your office will be open to the public until 4:30.

A Yes.

Q And is it true that one of the reasons for accepting a document before the office closes is so that you can process each day's work while personnel are still in the office?

A That's a broad generalization, but I guess so.

Q Now, how many different devices are there for creating the master CD of each day's worth of filings?

A How many different devices?

Q Are there in the Recorder's office. Just one, two, three? That's all I'm getting at.

A If you mean take -- I'll say one.

Q Okay.

A Yeah. I'll say one.

Q I mean, in effect, does it work that you take a blank CD, put it in a slot, and then what do you do?
A You start up a program which extracts images from that particular day. You start up an additional program which then --
Q Which what?
A Which then burns those files to the CD.
Q In the machine that you use, how many CDs could you record at once simultaneously?
A One or two.
Q Pardon me?
A One or two.
Q Of the same data?
A At once?
Q Like if you wanted --
A One.
Q You can't simultaneously burn the same data onto more than one CD?
A No.
Q Have you personally ever observed how long it takes to download one day's worth of recorded documents onto your master CD?
A I've not personally observed that.
Q Have you developed an understanding as to how long that process takes?

A I never thought about it until you asked that question.
Q Have you developed an understanding that that process is done at the end of the workday?
A Yes.
Q Because you wouldn't -- the idea is to capture everything filed that day, correct?
A Correct.
Q So you would have to do it at the end of the workday.
A Okay.
Q Are the people who perform that function people who are on your team?
A No.
Q Whose team are they on?
A Cashiers.
Q So that Ron Mack would be their supervisor?
A I believe so. I'm guessing.
Q And Georges Asfour is one of those people?
A Yes, but I'm guessing.
Q Okay. Is it your understanding that to make the -- to record each day's work -- a particular day's work onto a CD, that an operator has to stand by the device to make sure that it continues to operate and can do no other duties?

A I don't have -- I've never witnessed it being done.
Q If have you developed an understanding as to approximately -- actually, before I get into -- do you know what an automated file number is within the Recorder's office?
A Yes.
Q And you can tell from looking at the automated file number how many documents were filed on that particular day, can't you, or at least you can tell whether that document was the first, the second, the third, or 241st, whatever?
A It depends, but, in general, the answer to your question is yes, but it depends.
Q So, for example, just to give you a piece of paper here --
A Can I just answer your question and give you what you're looking for? UCC filings are not sequential.
Q Okay. But deeds are?
A Correct.
Q Mortgages are?
A Correct.
Q So if I have a number -- and I'll write an AFN number -- let's see. If this was an AFN number --

I've shown you a number whose digits -- actually, we can make it an exhibit. Let's do that. This is for illustrative purposes only.

MR. MARBURGER: Let's make this Exhibit 1.

- - - - -

(Exhibit Patterson 1 was marked for identification.)

- - - - -

BY MR. MARBURGER:

Q Exhibit 1 is an AFN number. It happens to be my ex-wife's. Can we tell from this that the 2006 is the year that the document was recorded?

A Yes.

Q 06 means it was recorded in June of that year.

A Yes.

Q 12 is the 12th of June of that year.

A Yes.

Q And then 1152 means it was the 1,152nd document recorded that day.

A Yes.

Q Now, do you have a general understanding of what might be typical of the number of documents recorded in a given day at the Recorder's office?

A Not currently, no.

Q Do you understand that that would typically exceed 1,000?
A I don't have a current working knowledge of approximately how many documents we do a day.
Q Was there a time where you did have an understanding --
A Yes.
Q -- covering a different period of time?
A Yes.
Q Tell us about that.
A Typically it could be 1300, 1400 documents --
Q And that was --
A -- or something like that.
Q That was the case when?
A I'm terrible with dates.
Q I mean, before you became the -- before you took over Jim Zak's responsibilities?
A Before then.
Q Okay. But sometime while you were in the computer department?
A It was -- I don't remember if I was still in cashiers or not.
Q All I'm getting at, I'm not like -- it's not that important to nail it down, but would it be fair to say that that would be typical during O'Malley's

tenure as the County Recorder?
A It was during the height -- yeah, that would have occurred during O'Malley's.
Q And when we say in the case of this automated file number of 1,152nd document filed that day, that doesn't tell us how many pages that document had; is that correct?
A That's correct.
Q And in terms of paper pages, isn't it often the case that a document filed, recorded, and indexed with the Recorder is more than one page?
A Yes.
Q As a matter of fact, that's typical, isn't it?
A Typical that a document has more than one page?
Q Yes.
A Releases are one page. We file a lot of them.
Q Okay. Deeds and mortgages are examples of documents that typically exceed one page; is that true?
A Yes.
Q During your entire tenure with the Recorder's office from the time that you joined the computer department, has it been the Recorder's office practice to make a master CD of each day's filings?
A Yes.

Q Was there a time during your tenure in the computer department where at the same time that your office was making the master CD you also made CDs in order to give to companies such as Data Trace, title insurance related companies?
A No.
Q That was not the case?
A That was not -- your question was during my time in the computer department was there a time when you made the master CD at the same time in which you made CDs for other companies. You asked me earlier if we're able to make more than one master CD at a time, and my answer to that question was no. And my answer to your question now, in which I believe that you're trying to trick me into saying something different, is we can only make one master CD at a time.
Q Okay. I really wasn't trying to get you to contradict anything. I was just thinking in terms of at the end of the day when you make the master CD, did you also make at the end of the day, your office, CDs that were --
A You said at the same time.
Q I meant at the same stage of the day, but I understand your issue.
A All right.

Q Did your office also make CDs that were sold to title insurance companies like Chicago Title?
A Yes.
Q Did that use the same recording device that you used to make the master CD? Did you make --
A No.
Q -- the CDs for these title companies?
A No.
Q A different recording device?
A Yes.
Q Do you have any understanding as to how long it took to make the CDs for the title companies?
A No.
Q But you did understand, didn't you, that the CDs contained that day's particular filings?
A Yes.
Q At some point that stopped, didn't it?
A Yes.
Q Did that stop during Pat O'Malley's tenure?
A No.
Q Did that stop during the current County Recorder's tenure, Lillian Greene's?
A Yes.
Q Were you instructed to cause that practice to cease?

A You asked me earlier if the people that make the master CD were on my team, and I said no. And now you're asking me if I was told to cause that process to stop. Once again, I think you're trying to use double words. I'm not in charge of that process.
Q All you have to say is no.
A I'm not in charge of that process. I'm just explaining myself.
Q I understand that. I merely asked if you were directed to cause that process to cease.
A I'm not in charge of that process. No, I wasn't directed to.
Q Okay. Have you developed an understanding as to who gave the order for that process to cease?
A I believe it was Lillian Greene.
Q Have you developed an understanding of the rationale -- let me make that clear. I don't expect you to read anybody's mind.
But have you developed an understanding, based on the conversations that you daily have at the Recorder's office, as to what the reasoning was underlying that decision?
A I've heard people say things.
Q What have you heard?
MR. CAVANAGH: Don't reveal

anything that attorneys have told you.

Q Yeah. And I don't care about attorneys.

A Okay. So if I were to guess at what the reasoning was --

MR. CAVANAGH: Don't guess. He's asked if you heard anything.

Q You said you had heard some things so I asked you to just explain that.

A We're not -- we're not ordered by the ORC to sell the CDs, and there is no fee mandated in the ORC related to selling a CD to title companies or to the general public, I should say.

Q Have you ever developed an understanding that your office made CDs for members of the general public that were not acting on behalf of a business?

A No.

Q When members of the general public ask for copies, they typically get a paper copy rather than a CD; isn't that right?

A Yes.

Q Have you ever developed an understanding that the reason for ceasing the practice of providing CD copies of records was because the title companies might make a profit in using the information on the

CDs?

MR. CAVANAGH: Objection.

MR. MARBURGER: I just asked if he's heard that.

A My understanding was that the ORC doesn't define an amount for us to charge for a CD.

Q Have you ever heard Lillian Greene say or seen it written down --

A No.

Q -- that the fact that these companies might make a profit on using that information or might attempt to make a profit, that that was a reason not to provide the CDs?

A I've never seen it written down, and I haven't heard Lillian Greene say it.

Q At some point your office decided to charge -- did you understand that under O'Malley's tenure as the Recorder that your office was charging -- the title companies who received the CDs had to pay for them? You understood that, didn't you?

A By way of word, yes. Not firsthand.

Q And you understood that the fee was 50 bucks per CD, didn't you?

A By way of word, but not firsthand.

Q All right. But the answer is that was your

understanding.
A That's just what, I guess, was being charged. I don't know that for sure.
Q At some point the Recorder's office, based on whatever you understood the truth to be, decided to charge more than 50 bucks a CD if a title company wanted a CD; is that true?
A I've never heard that until you just said it.
Q Okay. It's never come to your attention that the Recorder's office would provide the title companies a CD if they paid a certain fee for it? A CD meaning -- I'm using that as shorthand for --
A My issue is not with the term "CD." My issue was I have never heard that the Recorder's office will provide a CD at a rate. My understanding by way of word is that the ORC does not define a fee for us to charge for it. That was my understanding.
Q All right. Now, the device that was used to make the CDs that was sold to the title companies -- by the way, I want to make clear, when I say "title companies," I'm using that for shorthand for companies that maybe don't truly insure title. The guys I represent don't insure any title, but what they do do is accumulate data the title insurers use. So I don't want to label these guys as title

insurers when technically that's not what they're doing, but they're in that business.

With that said, going back to my question, back when the CDs were being sold to the title companies -- and I'm using that term in the broad sense -- you said a device was being used to burn those CDs other than the device that was used to burn the master CD that your office keeps; is that correct?

A That is correct.

Q How is that device -- the device that was used to make the CDs for the title companies, how is that device being used now?

A I don't know.

Q Is it being used now?

A I don't know.

Q Was it your understanding that when a CD was made for the master CD, that when that day's work was fully -- instead of saying "burned," I'm going to say "recorded" onto the CD -- that a human being had to stop it or would it -- when it was done downloading onto the CD, would that stop automatically, or you don't know?

A It stops automatically.

Q Was it your understanding that when the master

CD is being created of a particular day's work, that that process is begun before employees leave work, but the employees don't necessarily stay there that night for the job to be finished?
A I don't have an understanding of that. I've never witnessed the process.
Q Has it fallen within your responsibility either today or earlier in your career to acquire the blank CDs to be used for the master CD?
A There has been an occasion where if they're out of CDs they may come to me and ask me for a spindle of blank CDs.
Q Where do you get those from?
A From the front office.
Q What's the front office?
A Well, from the front office. It's where the fax machine is, where the secretaries are.
Q Within the Recorder's office?
A Yeah. The front office.
Q Have you developed an understanding as to from what vendor, Staples, Office Depot, that the Recorder's office always gets its CDs?
A No.
Q Have you ever developed an understanding as to how much the Recorder's office pays for the CDs?

A No.
Q Have you ever developed an understanding as to how the Recorder's office accounts or allocates costs for CDs?
A No.
Q You said that -- I thought you said that when you make the master CD, you could make another CD at the same time of the same data, or you can't even make a second one at the same time of the same data?
A I'm very clear about my answer.
MR. CAVANAGH: Objection.
Asked and answered.
Q I'm doing it to clarify because I thought --
A To clarify, you can only make one master CD at a time.
Q Okay. You cannot make a second CD at the same time you're making the master and have it contain the same data? You can't record two CDs simultaneously of the same data; is that true?
A You cannot make more than one master at the same time.
Q Well, leaving the term "master" out of it --
A Okay. Let me answer the question in the way I think that will benefit you. When a computer is making a CD, it can only make typically -- unless

there may be something else out there I'm not aware of; if there is, we don't use it. It can only make one CD at a time.

Q I see. I thought you said, and -- I'm not going after you, I'm just trying to understand. I thought you said that there was the capability to make more than one at a time, that you had more than one slot or something.

MR. CAVANAGH: He never said that.

A We never discussed slots.

Q How many slots are in your machine where you could insert a blank CD to be recorded?

A In the machine that makes the master CD, there is one drive that works to make a master CD.

Q Are there more CD drives than that one in that machine?

A There is another drive in it that doesn't currently -- that doesn't work and hasn't worked for I don't know how long, but there are only two drives in it, only one works as far as I can remember. You can only make one master CD at a time.

Q Okay.

A I'm being very clear about that.

Q Okay. Do you know who at the Recorder's office

has responsibility for acquiring the CDs, blank ones, from a vendor?
A I would guess it would be someone in the front office. Probably one of the secretaries.
Q Who are likely candidates for that responsibility?
A There are maybe Sandy May or maybe Tracy Morris.
Q Tracy Morris sounds familiar with me. I wonder if she worked somewhere else in the city. I feel like that's somebody I've deposed in the past.
Throughout your tenure at the Recorder's office, have you made the record of each day's filings by making a CD or by making a record some other way, a backup record in some other way?
MR. CAVANAGH: Objection. I don't understand it.
Q Okay. The purpose of the master CD is to have a second copy of the electronic images that you scanned that day; isn't that right?
A The purpose of the master CD is to make a second copy of electronic images that we did that day.
Q When you scan documents that day.
A The purpose -- here's what I'll say. The purpose of the master CD is to have a second copy of images from the day. Correct. Yes.

Q Okay. Other than making the master CD, have you ever had some other method of making copies of what was filed that day since you've been with the Recorder's office?
A Yes.
Q What other method did you have?
A Film.
Q Microfilm?
A I believe it's microfilm, yes. I have nothing to do with that process so --
Q Does that still go on?
A Yes.
Q So do you have -- the total images that you would have of everything filed today would be the scanned image that you make when the deed is presented, the master CD, and a microfilm copy as well?
A We make -- we scan an image, we make a master CD, and we make a film.
Q And does the film have everything on it the master CD would have on it?
A Yes.
Q Okay. Do you have backup copies made in any other medium or any other method?
A Yes.

Q What?
A We have backup copies of hard drives.
Q Any other methods?
A Not that I can think of currently.
Q In your tenure have there been any method of making copies of what you took -- what was recorded on a given day in addition to the methods you've just described, CD, film, and backup hard drive?
A I missed the original question.
Q Since you joined the Recorder's office, have there been any other methods of making duplicates of records that you recorded on a given day other than the ones you've just described? You described hard drive backup, a CD, microfilm.
A Not that I can think of currently.
Q Okay. And have they been making the CD master copies ever since you joined?
A I don't remember.

MR. MARBURGER: Okay. That's it. Thanks.

- - - - -

(Deposition concluded at 3:00 p.m.)

- - - - -

_____

Lawrence Patterson

The State of Ohio,)
) SS: CERTIFICATE
County of Cuyahoga.)

I, Rebecca L. Brown, Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the within-named LAWRENCE PATTERSON was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid; that the testimony then given by him/her was by me reduced to stenotypy in the presence of said witness, afterwards transcribed on a computer, and that the foregoing is a true and correct transcript of the testimony so given by him/her as aforesaid.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified and was completed without adjournment.

I do further certify that I am not a relative, employee of, or attorney for any of the parties in the above-captioned action; I am not a relative or employee of an attorney for any of the parties in the above-captioned action; I am not financially interested in the action; I am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Civil Rule 28(D); nor am I otherwise interested in the event of this action.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio on this 10th day of January, 2011.

Rebecca L. Brown, Notary Public
in and for the State of Ohio.

My commission expires 6/5/15.

NOTES

6

Deposition Ethics Issues (Substantive Outline) (December 2016)

David G. Keyko

Pillsbury Winthrop Shaw Pittman LLP

1. OBLIGATIONS WHEN A CLIENT LIES IN A DEPOSITION

- ABA Model Rule 3.3 and New York Rule of Professional Conduct 3.3 are substantively identical.
    - Under subdivision (a)(3) for both Rules, a lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. In civil matters, a lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
    - Under subdivision (c) for both Rules, a lawyer's duty to remedy a client's false testimony supersedes a lawyer's duty to not knowingly reveal confidential and privileged information relating to a client.
- ABA Model Rule 3.3 Comments.
    - Comment 1 notes that Rule 3.3 applies to depositions, as well as any other ancillary proceeding conducted pursuant to a tribunal's adjudicative authority.
    - Comment 5 clarifies that a lawyer may offer false evidence for the purpose of establishing its falsity.
    - Comment 6 explains that where lawyers know their clients intend to testify falsely, they should first attempt to dissuade their clients from doing so. If persuasion fails and the representation continues, the lawyer must, at the very least, refuse to offer the false portions of the deposition during trial.
    - Comment 8 states that the prohibition against offering false evidence only applies if the lawyer actually knows that the evidence is false. Mere reasonable belief does not rise to the level of knowledge, but knowledge may be inferred from the circumstances. Put otherwise, lawyers should resolve doubts about the veracity of testimony in favor of their clients but must not ignore an obvious falsehood.
        - Comment 9 notes that lawyers are permitted to refuse to offer testimony that they reasonably believe – but do not quite *know* – is false.

- Comment 10 explores the remedial measures available to a lawyer who discovers the falsity of a client's deposition testimony after it was given.
  - The lawyer must remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false testimony. A Lawyer may even withdraw from representing a client, if permitted by the court.
  - If none of these measures will undo the effect of the false evidence, lawyers must take further remedial action. The last-resort remedial measure is disclosing to the tribunal as is reasonably necessary to remedy the situation.
  - Comment 15 notes that upon disclosure, a lawyer is usually not required to withdraw from representing a client.
    - Rule 1.16(a) may, however, require a lawyer to seek permission of the tribunal to withdraw, if the lawyer's compliance with Rule 3.3 results in such an extreme deterioration of the client-lawyer relationship that competent representation is no longer possible.
- Comment 13 specifies that the obligation to rectify false deposition testimony lasts until a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

- American Bar Association Formal Ethics Opinion 93-376 (1993).
  - Rule 3.3(a), rather than Rule 4.1, applies when a client lies in a deposition.
- New York County Lawyers' Committee on Professional Ethics Formal Opinion 741 (2010).
  - A lawyer who discovers that a client has lied about a material issue in a civil deposition may not simply withdraw from the representation. Instead, the lawyer must take reasonable remedial measures, starting by counseling the client to correct the lie. If that fails, the lawyer must disclose the false testimony, but

disclosure of confidential information should be limited to the extent necessary to correct the false testimony.

- On timing.
  - The duty to remediate false testimony arises immediately upon gaining knowledge of its falsity. While there is no set deadline by which to remedy false testimony, "it should be remedied before it is relied upon to another's detriment." For instance, if a settlement is based even in part upon reliance on false testimony, the lawyer must correct or reveal the fact prior to settlement.
- On knowledge.
  - The duty to correct false testimony is triggered only if the lawyer actually *knows* of its falsity.
    - *See In re Doe*, 847 F.2d 57, 63 (2d Cir. 1988) (holding that a lawyer's suspicion or belief that a witness had committed perjury was not sufficient to trigger the duty to report).
  - Actual knowledge, however, may be imputed from the circumstances.
    - *See Patsy's Brand Inc. v. I.O.B. Realty et al.*, No. 99 Civ. 10175 (JSM), 2002 U.S. Dist. LEXIS 491, at *22 (S.D.N.Y. Jan. 16, 2002), *vacated on other grounds sub nom. In re Pennie & Edmonds LLP*, No. 02-7177, 2003 U.S. App. LEXIS 4529 (2d Cir. 2003) (finding knowledge where all of the facts available to the law firm "should have convinced a lawyer of even modest intelligence that there was no reasonable basis on which [he] could rely on [his client's explanation regarding its false statement]").
- Opinion 741 expressly overrules Opinion 712, which had held that under a previous version of the New York ethics rules, a lawyer (1) may not disclose the truth behind a client's false deposition testimony; and (2) may continue representing the lying client if the lawyer reasonably believes that he can argue or settle the case without using the false testimony.

- The Association of the Bar of the City of New York Committee on Professional Ethics Formal Opinion 2013-2 (2013).
    - Lawyers must comply with Rule 3.3(a)(3) even if the lawyer discovers *after* the close of a proceeding that the lawyer had offered false material evidence. If amendment, modification or vacation of the prior judgment is still possible, then the lawyer must disclose the falsity of the evidence to the appropriate tribunal and opposing counsel.
    - Rule 3.3(a)(3) obligations terminate "only when it is no longer possible for the tribunal to which the evidence was presented to reopen the proceedings based on the new evidence, and it is no longer possible for another tribunal to amend, modify or vacate the final judgment based on the new evidence."
- Definitions of materiality.
    - *See* Steven H. Goldberg, *Heaven Help the Lawyer for a Civil Liar*, 2 GEO. J. LEGAL ETHICS 885, 903 (1989) ("The *Model Rules* do not define 'material,' but at a minimum, facts must relate to something a decision maker has the power to decide in order to be 'material.'").
    - *See* BLACK'S LAW DICTIONARY 1066 (9th ed. 2009) (defining "material" as "[h]aving some logical connection with the consequential facts; . . . o[f] such a nature that knowledge of the item would affect a person's decision-making; significant; essential").
- *In re Mack*, 519 N.W.2d 900, 902 (Minn. 1994).
    - A lawyer's "silence in the face of his client's perjury," which was committed in a deposition and continued until the truth was revealed in the client's cross examination at trial, violated both Rule 3.3 and Rule 8.4. When the lawyer learned that the client was "perpetrating fraud on the judicial system," the lawyer had a duty "to advise against the continuation of such action, and if the client persisted, attempt to withdraw from the case."

2. USING SOCIAL MEDIA TO COLLECT INFORMATION ABOUT DEPONENTS

- ABA Model Rule 8.4 and New York Rule of Professional Conduct 8.4 are substantively identical.
    - Under subdivision (a) of both Rules, a lawyer shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another";
    - Under subdivision (c) of both Rules, a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."
- ABA Model Rule 5.3 and New York Rule of Professional Conduct 5.3 are substantively identical.
    - Under the ABA's subdivision (c)(1) and New York's subdivision (b)(1), a lawyer shall be responsible for the conduct of a nonlawyer employed, retained by or associated with the lawyer, if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.
- ABA Model Rule 5.3 Comments.
    - Comment 1 notes that Rule 5.3 applies to nonlawyers both within and outside the lawyer's firm.
    - Comment 2 clarifies that nonlawyers within the lawyer's firm include "secretaries, investigators, law student interns, and paraprofessionals." The measures employed in supervising such nonlawyers should account for the fact that nonlawyers do not have legal training and are not subject to professional discipline.
    - Comment 3 addresses the use of nonlawyers outside the lawyer's firm. Such examples include "the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information." When using such services outside the firm, lawyers must consider factors such as "the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the

protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality."

- Comment 4 notes that where the client directs particular nonlawyer services to be outsourced, the lawyer should defer to the client concerning the allocation of responsibility between the client and lawyer for monitoring the nonlawyers.

- ABA Model Rule 4.1(a) and New York Rule of Professional Conduct 4.1[2] are substantively identical.
  - Under both, in the course of representing a client, a lawyer shall not knowingly "make a false statement of … fact or law to a third person."
    - The ABA Rule applies to false statements of "material" facts; the New York Rule does not require materiality.
    - In Virginia, sanctions for lying under oath may be imposed regardless of materiality. *French v. Painter*, 86 Va. Cir. 344 (2013).
- ABA Model Rule 4.1 Comments.
  - Comment 2 notes that not all statements of fact involve a material fact. For example, "[e]stimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim" do not involve a material fact. Lawyers, however, "should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation."

2. ABA Model Rule 4.1(b) provides that in the course of representing a client, a lawyer shall not knowingly "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." New York Rule 4.1 lacks a corresponding subdivision (b).

- ABA Model Rule 4.2[3] and New York Rule of Professional Conduct 4.2(a) are substantively identical.
    - Under both, in representing a client, lawyers shall not communicate about the subject of the representation with a person they know to be *represented* by another lawyer in the matter, unless they have the consent of the other lawyer or are authorized by law or court order.
- ABA Model Rule 4.2 Comments.
    - Comment 3 notes that Rule 4.2 applies even if the represented person initiates or consents to the communication. In such cases, lawyers must immediately terminate the communication.
- ABA Model Rule 4.3 and New York Rule of Professional Conduct 4.3 are substantively identical.
    - Under both Rules, in dealing with an *unrepresented* person on behalf of a client, lawyers must not state or imply that they are disinterested. When lawyers know or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, lawyers must make reasonable efforts to correct the misunderstanding. Lawyers must not give legal advice to such persons if they know or should know that the interests of such persons are or have a reasonable possibility of being in conflict with the client's interests.
- The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2010-2 (2010).
    - Lawyers and their agents may use their real names and profiles to send a "friend request" to obtain information from an unrepresented person's social networking site. Lawyers and

3. New York Rule of Professional Conduct 4.2(b) provides that, unless otherwise prohibited, a lawyer "may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place." Subdivision (c) provides that a lawyer "who is acting *pro se* or is represented by counsel in a matter is subject to paragraph (a)," but may communicate with represented persons, provided that they are legally competent and are given reasonable advance notice by the lawyer. ABA Rule 4.2 lacks corresponding subdivisions (b) and (c).

their agents are not required to disclose the reasons for making such requests but may not attempt to do so under false pretenses or names.

- On creating fake profiles to reach unrepresented individuals.
  - Rules 4.1 and 8.4(c) prohibits lawyers or their investigators from creating false social networking profiles to reach unrepresented individuals. Such behavior would constitute "conduct involving dishonesty, fraud, deceit or misrepresentation," Rule 8.4(c), and a knowingly made "false statement of fact or law to a third person," Rule 4.1.
- On the applicability of Formal Opinion 2010-2 to agents and investigators.
  - "[I]t does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse."
  - Rule 8.4(a) prohibits a lawyer from violating or attempting to violate the Rules of Professional Conduct "through the acts of another."
  - Rule 5.3(b)(1) holds lawyers responsible for conduct of nonlawyers employed, retained or associated with the lawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer, if the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct.
- On rare instances where no other option is available to obtain such evidence.
  - While deception may be permissible in such rare instances, the "utility and ethical grounding" of those limited exceptions are mostly inapplicable to social networking websites. Non-deceptive means of communication are ordinarily available, so trickery cannot be justified as a necessary last resort.
- On Formal Opinion 2010-2's due deference to New York's policy favoring informal discovery.
  - *See Niesig v. Team I*, 76 N.Y.2d 363, 372 (1990) (overruling the Appellate Division because its rule "closes off avenues of informal discovery of information that

may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes").

- *See Muriel, Siebert & Co. v. Intuit Inc.*, 8 N.Y.3d 506, 511 (2007) (recognizing that "the importance of informal discovery underlies [the court's] holding"); c*f. Dixon-Gales v. Brooklyn Hosp. Ctr.*, 941 N.Y.S.2d 468, 473 (Sup. Ct. 2012) (holding that an ex-parte interview of defendant's current employee, whose conduct could be imputed to the defendant, is not permitted and does not further the policy stated by the *Niesig* and *Siebert* courts).

- New York State Bar Association Committee on Professional Ethics Formal Opinion 843 (2010).
  - If an opposing party's social networking site does not require pre-approval to gain access to its content (*i.e.*, no "friend request" approval is required before viewing the underlying content), a lawyer may ethically view and access the site but may neither "friend" the opposing party nor direct someone else to do so.
  - On the applicability of Rule 8.4.
    - Where the social networking site the lawyer wishes to view is accessible to all members of the network, Rule 8.4 would not be implicated because the lawyer is merely accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way.
    - Obtaining information about an opposing party from such "public" social networking user profiles is similar to obtaining information from publicly accessible online or print media, which is plainly permitted.
  - On the prohibition against "friending" both represented and unrepresented parties.
    - Rule 4.2, the "no-contact" rule, prohibits a lawyer from communicating with a *represented* party about the subject of the representation, absent prior consent from the represented party's lawyer. "Friending" constitutes communication.

        - Rule 4.3 governs where a lawyer attempts to "friend" an *unrepresented* party in the matter. In doing so, lawyers must not state or imply that they are disinterested; lawyers must correct any misunderstanding as to their role; and lawyers must not give legal advice other than the advice to secure counsel if the unrepresented party's interests are likely to conflict with those of the lawyers' clients.
        - Philadelphia Bar Association Professional Guidance Committee Formal Opinion 2009-02 (2009) addresses the scenario involving an adverse unrepresented *witness*.

- Philadelphia Bar Association Professional Guidance Committee Formal Opinion 2009-02 (2009).
    - Pennsylvania's Rule 8.4- and Rule 4.1-equivalents[4] prohibit lawyers from asking or ordering a third person, someone whose name an unrepresented witness will not recognize, to "friend" an unrepresented witness, in order for the lawyers to gain access to the information on the unrepresented witness's social networking site.
    - On whether government or civil rights lawyers may use such methods.
        - *See People v. Pautler*, 47 P.3d 1175, 1180 (Colo. 2002) (holding that no deception whatsoever is allowed, even if driven by "noble motive").
        - *See In Re Gatti*, 8 P.3d 966, 975-76 (holding that, under Oregon law, no deception is permissible, even by a government lawyer or in civil rights investigations).
    - On whether lawyers may use the information so unethically gathered during trial.
        - This issue is beyond the scope of the Committee. It is a matter of substantive and evidentiary law to be addressed by the trial court.

4. Pennsylvania's Rules 8.4(c) and 4.1 are substantively identical to their ABA Model Rule counterparts.

- San Diego County Bar Legal Ethics Committee Opinion 2011-2 (2011).
    - A lawyer may not make an *ex parte* "friend request" on social media websites to represented and unrepresented persons who are involved in the matter that is the subject of the lawyer's representation. Such a friend request would violate ABA Model Rule 4.2 and California's equivalent rule.
    - On whether the communication is "about the subject of the representation."
        - "If the [friend request] is *motivated* by the quest for information about the subject of the representation, the communication with the represented party is about the subject matter of the representation."
        - The "friend request" will be "about" or concerning the subject of the representation even if a lawyer does not directly reference the subject of the representation in the "friend request."
        - Conceptually, a communication "about the subject of the representation" has a broader scope than a communication "relevant to the issues in the representation," which determines admissibility at trial.
    - On whether "friending" a represented party is the same as accessing a public website.
        - The two are different. A lawyer is making a "friend request" exactly because the information on the represented party's Facebook page is unavailable and restricted to the general public.
    - On a lawyer's duty not to deceive.
        - By making such a "friend request" without disclosing the reason that the request is being made, a lawyer also "violates his ethical duty not to deceive." ABA Model Rule 4.1(a) and California's common law duty not to deceive prohibit such acts.[5]

5. Additionally, while not referenced in Opinion 2011-2, it is a criminal violation in California to "knowingly and without consent credibly impersonate[] another

- On "friend requests" to unrepresented persons.
  - Such requests are also prohibited. A lawyer should not send "friend requests" to an unrepresented person involved in the matter without disclosing the lawyer's affiliation and purpose for the request.
  - New York's 2010-2 Opinion held otherwise, but Philadelphia's 2009-02 Opinion is more persuasive.

- Pennsylvania Bar Association Formal Opinion 2014-300 (2014).
  - A lawyer "may not contact a represented person through social networking websites." Such contact would violate Pennsylvania Rule 4.2, which "clearly states" that a lawyer may not communicate with a represented party without the permission of its lawyer.
    - Even without pretext, contacting a represented party on social media is prohibited by Pennsylvania Rule 4.2
    - A lawyer may, however, access and view *public* portions of the represented person's social networking site.
  - A lawyer "may contact a represented person through social networking websites," but "may not use a pretextual basis for viewing otherwise private information on social networking websites." Such conduct would violate Pennsylvania Rule 4.3(a), which instructs that "a lawyer shall not state or imply that the lawyer is disinterested." Additionally, Pennsylvania Rule 8.4(c) prohibits a lawyer from using deception, such as using an alias to contact an unrepresented person.
    - Formal Opinion 2014-300 contains a helpful survey of ethics opinions on this topic from other states. The Opinion notes that it is in agreement with Philadelphia Opinion 2009-02 and San Diego Opinion 2011-2, *supra*.

- Philadelphia Bar Association Professional Guidance Committee Opinion 2014-5 (July 2014)
  - "A lawyer may advise a client to change the privacy settings on the client's Facebook Page."

---

actual person through or on an Internet Web site . . . for purposes of harming, intimidating, threatening, or defrauding another person." CAL. PENAL CODE § 528.5.

- But, as noted by the Committee, Pennsylvania case law permits opposing counsel to subpoena or compel discovery of the private portions of a litigants' Facebook profiles, provided the public portions of litigants' profiles justify such a request.

- A lawyer may not, however, "instruct or permit the client to delete/destroy a relevant photo, link, text or other content, so that it no longer exists."
  - Pennsylvania Rule 3.4(a) prohibits "unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potentially evidentiary value."
  - Pennsylvania Rule 3.3 requires, upon learning that a client has destroyed evidence, a lawyer to take reasonable remedial measures, "including, if necessary, disclosure to the tribunal."
  - However, if the lawyer takes "appropriate action to preserve the information in the event it should prove to be relevant and discoverable," the lawyer may instruct a client to delete damaging information from his or her Facebook page.
- A lawyer must obtain a copy of content posted by a client on the client's Facebook page in order to comply with a discovery request. Additionally, a lawyer must make "reasonable efforts" to obtain such content "about which the lawyer is aware if the player knows or reasonably believes it has not been produced by the client."
  - Pennsylvania Rule 4.1(a) prohibits "mak[ing] a false statement of material fact or law to a third person" while representing a client. When producing discovery to another party, a lawyer is affirmatively representing that the information is "full and complete to the best of his knowledge."
  - Also under Rule 4.1, "a lawyer is required to be truthful when dealing with others on a client's behalf," including the obligations to produce, and to make good faith efforts to obtain, relevant information from the client.
  - Pennsylvania Rule 8.4(c) prohibits "dishonesty, fraud, deceit or misrepresentation."

- *Robertelli v. New Jersey Office of Atty. Ethics*, 224 N.J. 470, 473 (N.J. 2016).
    - Defendant's attorneys directed their paralegal to access and monitor the non-public pages of the plaintiff's Facebook account. The paralegal submitted a "friend request," without revealing that she worked for the law firm representing defendants or that she was investigating the plaintiff in connection with the lawsuit. Plaintiff accepted the friend request, and the paralegal was able to obtain information from the non-public pages of his Facebook account.
    - Plaintiff learned of the law firm's actions during discovery, and objected to defendants' use at trial of the documents that the paralegal obtained from his Facebook page. He also filed a grievance with the District II-B Ethics Committee, asserting that attorneys violated the Rules of Professional Conduct by contacting him directly through his Facebook page without first contacting his attorney.
    - The Secretary of the District II Ethics Committee declined to docket the grievance, having concluded that the allegations, if proven, would not constitute unethical conduct. Plaintiff's attorney then contacted the Director of the Office of Attorney Ethics (OAE) and requested that the OAE docket the matter for a full investigation and potential hearing. After further investigation, the Director filed a complaint against plaintiffs with the District XIV Ethics Committee.
    - The defendant's attorneys requested that the Director withdraw the complaint, contending that the OAE was precluded from proceeding after the DEC declined to docket the grievance. When the Director refused to withdraw the complaint, the attorneys filed a complaint in the Superior Court to enjoin the OAE from pursuing the matter. The trial court dismissed the complaint, holding that the Supreme Court and the ethics bodies that it established have exclusive jurisdiction over attorney disciplinary matters. The Appellate Division, and the Supreme Court of New Jersey affirmed the trial court's decision.

3. OBTAINING INFORMAL DISCOVERY FROM POTENTIAL WITNESSES BEFORE DEPOSITIONS – TO WHOM CAN YOU SPEAK AND WHAT DISCLOSURE OBLIGATIONS DO YOU HAVE

- ABA Model Rule 4.2[6] and New York Rule of Professional Conduct 4.2(a) are substantively identical.
    - Under both, in representing a client, lawyers shall not communicate about the subject of the representation with a person they know to be *represented* by another lawyer in the matter, unless they have the consent of the other lawyer or are authorized by law or court order.
- ABA Model Rule 4.2 Comments.
    - Comment 3 notes that Rule 4.2 applies even if the represented person initiates or consents to the communication. In such cases, lawyers must immediately terminate the communication.
    - Comment 4 clarifies that Rule 4.2 "does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation." Further, lawyers may be found in violation of Rule 4.2 through the acts of another. See Rule 8.4(a).
    - Comment 5 provides examples of communications "authorized by law": (1) on behalf of a client who is exercising a constitutional or other legal right, lawyers may communicate with the government; and (2) in representing government agencies, lawyers may, directly or through investigative agents, engage in investigative activities prior to the commencement of criminal or civil proceedings.

---

6. New York Rule of Professional Conduct 4.2(b) provides that, unless otherwise prohibited, a lawyer "may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place." Subdivision (c) provides that a lawyer "who is acting *pro se* or is represented by counsel in a matter is subject to paragraph (a)," but may communicate with represented persons, provided that they are legally competent and are given reasonable advance notice by the lawyer. ABA Rule 4.2 lacks corresponding subdivisions (b) and (c).

- Comment 6 instructs that a lawyer, who is uncertain whether communication with a represented person is permissible, may seek a court order. In exceptional circumstances, a court order may override compliance with Rule 4.2
- Comment 7 applies to communications with represented organizations. In such instances, lawyers must not communicate with a "constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Communication with a *former* constituent, however, does not require consent of the organization's lawyer. In such cases, lawyers must also comply with Rule 4.4, which prohibits methods of obtaining evidence that violate the legal rights of the organization.
    - *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147, 1155 (D.S.D. 2001), *aff'd sub nom. Midwest Motor Sports v. Arctic Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003), contains a helpful survey of the numerous tests that attempt to "strike[] an appropriate balance between the interests of the corporation and the need of adverse parties to conduct inexpensive informal discovery." *Id*.
        - The "blanket" test, which "bar[s] all *ex parte* contact with current and former corporate employees";
        - The "scope of employment" test, which "prohibits contact with corporate employees about matters within the scope of their employment";
        - The "managing-speaking-agent" test, which "allows *ex parte* contact with corporate employees except for those who have legal authority ('speaking authority') to bind the corporation in a legal evidentiary sense";
        - The "balancing" test, which is "applied case-by-case to determine the degree to which ex parte communication is necessary to reveal relevant information, the danger of generating admissions against the corporation that are admissible at trial under

Federal Rule of Evidence 801(d)(2)(D), and the degree to which the effective representation of counsel requires corporate counsel to be present at employee interviews"; and

- The "control group" test, which "allows *ex parte* contact with all current corporate employees except the most senior management officials in the corporation's 'control group.'"

- Comment 8 adds that in order for Rule 4.4 to apply, a lawyer must have "actual knowledge" of the fact that a person is represented. Actual knowledge, however, may be inferred from the circumstances. Lawyers may not "clos[e] eyes to the obvious."

- ABA Model Rule 4.3 and New York Rule of Professional Conduct 4.3 are substantively identical.
  - Under both Rules, in dealing with an *unrepresented* person on behalf of a client, lawyers must not state or imply that they are disinterested. When lawyers know or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, lawyers must make reasonable efforts to correct the misunderstanding. Lawyers must not give legal advice to such persons if they know or should know that the interests of such persons are or have a reasonable possibility of being in conflict with the client's interests.

- ABA Model Rule 4.3 Comments.
  - Comment 1 instructs that, in complying with Rule 4.3, lawyers "will typically need to identify the lawyer's client," and where necessary, explain to the unrepresented persons that their interests may conflict with the interests of the lawyers' clients.
  - Comment 2 notes that whether a lawyer's advice is impermissible in this context "may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur." For one, Rule 4.3 does not prohibit lawyers from negotiating a transaction or a settlement agreement with an unrepresented person, so long as lawyers explain their adverse position.

- ABA Model Rule 4.4(a) and New York Rule of Professional Conduct 4.4(a) are substantively similar.
    - In representing a client, lawyers must not use means that have no substantial purpose other than to "embarrass, delay or burden a third person," under ABA's Rule 4.4(a), or "embarrass or harm a third person," under New York's Rule 4.4(a). Further, under both Rules, lawyers must not "use methods of obtaining evidence that violate the legal rights of such a person."
- ABA Model Rule 4.4 Comments.
    - Comment 1 explains that, while a lawyer's responsibility to clients requires the lawyer to subordinate the interests of others, the lawyer may not disregard the rights of third persons. There may be legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships.
- *Niesig v. Team I*, 76 N.Y.2d 363 (1990).
    - Relevant facts and procedural history:
        - Plaintiff, a construction worker, was injured when he fell at a work site. He sued his employer, the general contractor and the property owner.
        - Plaintiff moved for permission to conduct *ex parte* interviews of all employees who were at the site when and where plaintiff was injured.
        - The Appellate Division rejected the plaintiff's request, concluding that the defendant employer's current employees are within the scope of representation afforded by the employer's company counsel.
    - Held:
        - As the Appellate Division held, *former* employees are indeed not within the company counsel's scope of representation. *Id.* at 369. Former employees may be interviewed informally.
        - As for *current* employees, the company counsel's scope of representation covers only those current employees "whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter egos') or imputed to the corporation for purposes

of its liability, or employees implementing the advice of counsel." *Id.* at 374. All other current employees may be interviewed informally.

- New York State Bar Association Committee on Professional Ethics Formal Opinion 735 (2001)
    - Under New York Rules[7], lawyers may properly interview an *unrepresented* witness for the opposing side without the consent of opposing counsel. In this case, that unrepresented witness was an accountant hired as an independent contractor by the opposing party, a corporation.
    - On ascertaining whether such witnesses are in fact represented by the corporation's counsel.
        - The analysis set forth by the New York Court of Appeals in *Niesig* governs the question of whether independent contractors or employees are represented by the corporation's counsel. Communication is prohibited with those "corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter ego') or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally." *Id.* at 374. *See also Dixon-Gales v. Brooklyn Hosp. Ctr.*, 941 N.Y.S.2d 468, 473 (Sup. Ct. 2012) (holding that an ex-parte interview of defendant's current employee, whose conduct could be imputed to the defendant, is not permitted and does not further the policy favoring discovery stated by the *Niesig* court).
        - Lawyers may interview *former* employees, even if they were once privy to the adversary employer's privileged and confidential information. Lawyers must, however,

7. This opinion refers to the old New York provision, DR 7-104(A)(1), which provides that while representing a client, lawyers must not "[c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so." Today's equivalents are ABA Model Rule 4.2 and New York Rule of Professional Conduct 4.2(a). They are substantively identical.

refrain from eliciting privileged information from such former employees. *See Muriel Siebert & Co., Inc. v. Intuit Inc.*, 8 N.Y.3d 506 (2007).

- In *Muriel Siebert*, the defense counsel interviewed without the plaintiff corporation's consent its former "Executive Vice President and Chief Operating Officer," who was "both an important participant in the events at issue . . . and a member of [plaintiff's] 'litigation team' after the lawsuit began." *Id.* at 509. Before the interview began, defense counsel advised the former COO not to disclose any privileged or confidential information, including plaintiff's legal strategy and any conversations the former COO had with plaintiff's counsel. *Id.* at 510.
- The trial court disqualified defense counsel because "there was 'an appearance of impropriety' based upon the possibility that privileged information had been disclosed during the interview."
- The Appellate Division reversed, and the Court of Appeals affirmed the Appellate Division. Disqualification of defense counsel was not warranted "merely because [the former COO] was at one time privy to [plaintiff's] privileged and confidential information." *Id.* at 511. Since defense counsel conformed to all other applicable ethical standards by properly advising the former COO before the interview began, there was no basis for disqualification. *Id.* at 512.
- For a further analysis on *former* employees, see American Bar Association Formal Ethics Opinion 91-359 (1991). In conducting informal interviews with such formal employees, lawyers must comply with Rules 4.3 and 4.4. *Id.* That said, "a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may . . . communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer." *Id.*; *Niesig*, 76 N.Y.2d at 369

(affirming that former employees are not considered to be represented by the company counsel).

- On the extent of permissible communications.
  - Lawyers may not deliberately elicit privileged or confidential information from an unrepresented employee-witness who is not authorized to make disclosure. In this case, if the lawyer discovers that the *only* relevant information possessed by the unrepresented employee-witness is protected from disclosure, then communication with that unrepresented employee-witness would be improper.
- See also Rule 4.3.
  - In dealing with an *unrepresented* person on behalf of a client, lawyers must not state or imply that they are disinterested. When lawyers know or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, lawyers must make reasonable efforts to correct the misunderstanding. Lawyers must not give legal advice to such persons if they know or should know that the interests of such persons are or have a reasonable possibility of being in conflict with the client's interests.

- New York State Bar Association Committee on Professional Ethics Formal Opinion 904 (2012).
  - In representing the victim of an alleged financial crime in a civil proceeding against the alleged perpetrator, a lawyer may not informally contact the alleged perpetrator if he is known to have retained counsel for the related criminal investigation. However, a lawyer may informally contact the alleged perpetrator if (a) the criminal counsel consents or disavows representation in the civil proceeding; or (b) the law authorizes the victim's lawyer to communicate directly with the alleged perpetrator.
  - On a lawyer's knowledge of a party's status of representation.
    - Prior ethics opinions have stated that "when a lawyer has a reasonable basis to believe that a party may be represented by counsel, then the lawyer has a duty of inquiry to ascertain whether that party is in fact represented by

counsel in connection with that particular matter." New York State Bar Association Committee on Professional Ethics Formal Opinion 768 (2002) (citations to previous ethics opinions omitted).

- Further, when lawyers also have a way of ascertaining the name of one of the party's attorneys, they must contact that attorney to inquire about the scope of representation. For example, where a lawyer knew that an opposing party had previously been represented by counsel, that lawyer had an independent duty under the no-contact rule "to verify that [the opposing party] was no longer represented." New York County Lawyers' Association Committee on Professional Ethics Formal Opinion 708 (1995).
- However, if it is impossible for a lawyer to know whether the opposing party is represented by counsel, contact may be permitted. See New York State Bar Association Committee on Professional Ethics Formal Opinion 607 (1990). There, prior to filing a personal injury lawsuit on behalf of a client who was hit by a car, a lawyer wished to send a letter to the driver (1) advising that the lawyer is representing the injured person; and (2) requesting the driver to complete a statement form detailing, among others, the driver's version of the accident and the reasons for such beliefs. The Committee held that the lawyer may send such a letter, but the lawyer must additionally inform the driver that, in the event that the driver is represented by counsel, the documents should be referred to counsel.

- On the applicability of Rule 4.2(a) and the definition of "person . . . in the matter."
  - Rule 4.2's no-contact rule is not limited to formal parties to litigation. Instead, it applies to (1) individuals "who retain[] counsel in connection with a dispute even prior to the filing of a lawsuit"; (2) represented witnesses in civil lawsuits; (3) potential witnesses; and (4) "others with an interest or right at stake, although they are not nominal parties to the lawsuit." New York State Bar Association Committee on Professional Ethics Formal Opinion 735 (2001).

- On when Rule 4.2(a)'s no-contact rule is triggered.
  - *McHugh ex rel. Kurtz v. Fitzgerald*, 280 A.D.2d 771, 772 (3d Dep't 2001) ("[C]ommencement of the litigation is not the criteria for determining whether communication with an adverse party is in derogation with [a previous, identical version of today's Rule 4.2(a)].").

4. CONTACTING THIRD PARTIES TO VOLUNTEER TO REPRESENT THEM AT YOUR CLIENT'S COST

- ABA Model Rule 7.3 and New York Rule of Professional Conduct 7.3, as applicable in this context, are substantively similar.
  - Under ABA's subdivision (a) and New York's subdivision (a)(1), where a significant motive is their pecuniary gain, lawyers must not solicit professional employment in person, through the phone, or through real-time electronic contact, unless the person contact is a close friend or relative or has a prior professional relationship with the lawyer.
    - Unlike under the ABA Rules, in New York, a lawyer is expressly permitted to solicit business from a former or existing client.
  - Under ABA's subdivision (b) and New York's subdivision (a)(2) a lawyer must not solicit professional advice in any means if the target of the solicitation expressed to the lawyer a desire not to be solicited or if the solicitation involves "coercion, duress or harassment."
    - The New York Rules impose additional prohibitions unlike the ABA Rules. In New York, a lawyer must not solicit business from someone the lawyer knows, due to age or a mental illness, would not "exercise reasonable judgment" in deciding to retain the lawyer. Further, a lawyer must not solicit business from someone whose work will be handled by someone who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.
- ABA Model Rule 7.3 Comments.
  - Comment 1 explains that a solicitation is a "targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be

understood as offering to provide, legal services." A lawyer's communications, however, "typically does not constitute a solicitation if it is directed to the general public."

- Comment 2 cautions that "there is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services . . . ."
- Comment 6 warns that "even permitted forms of solicitation can be abused." Any form of solicitation containing "false or misleading" information is prohibited.

- ABA Model Rule 1.8 and New York Rule of Professional Conduct 1.8, as applicable in this context, are substantively identical.
  - Under subsection (f) of both Rules, lawyers must not "accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to the representation of a client is protected as required by Rule 1.6."
- ABA Model Rule 1.8 Comments.
  - Comment 11 cautions that "[b]ecause third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client."
- ABA Model Rule 4.2[8] and New York Rule of Professional Conduct 4.2(a) are substantively identical.

---

8. New York Rule of Professional Conduct 4.2(b) provides that, unless otherwise prohibited, a lawyer "may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place." Subdivision (c) provides that a lawyer "who is acting *pro se* or is represented by counsel in a matter is subject to paragraph (a)," but may

- Under both, in representing a client, lawyers shall not communicate about the subject of the representation with a person they know to be *represented* by another lawyer in the matter, unless they have the consent of the other lawyer or are authorized by law or court order.

- ABA Model Rule 4.2 Comments.
  - Comment 3 notes that Rule 4.2 applies even if the represented person initiates or consents to the communication. In such cases, lawyers must immediately terminate the communication.
  - Comment 6 instructs that a lawyer, who is uncertain whether communication with a represented person is permissible, may seek a court order. In exceptional circumstances, a court order may override compliance with Rule 4.2
  - Comment 7 applies to communications with represented organizations. In such instances, lawyers must not communicate with a "constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Communication with a *former* constituent, however, does not require consent of the organization's lawyer. In such cases, lawyers must also comply with Rule 4.4, which prohibits methods of obtaining evidence that violate the legal rights of the organization.

- ABA Model Rule 4.3 and New York Rule of Professional Conduct 4.3 are substantively identical.
  - Under both Rules, in dealing with an *unrepresented* person on behalf of a client, lawyers must not state or imply that they are disinterested. When lawyers know or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, lawyers must make reasonable efforts to correct the misunderstanding. Lawyers must not give legal advice to such persons if they know or should know that the

---

communicate with represented persons, provided that they are legally competent and are given reasonable advance notice by the lawyer. ABA Rule 4.2 lacks corresponding subdivisions (b) and (c).

interests of such persons are or have a reasonable possibility of being in conflict with the client's interests.

- ABA Model Rule 4.3 Comments.
    - Comment 1 instructs that, in complying with Rule 4.3, lawyers "will typically need to identify the lawyer's client," and where necessary, explain to the unrepresented persons that their interests may conflict with the interests of the lawyers' clients.
    - Comment 2 notes that whether a lawyer's advice is impermissible in this context "may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur." For one, Rule 4.3 does not prohibit lawyers from negotiating a transaction or a settlement agreement with an unrepresented person, so long as lawyers explain their adverse position.
- ABA Model Rule 4.4(a) and New York Rule of Professional Conduct 4.4(a) are substantively similar.
    - In representing a client, lawyers must not use means that have no substantial purpose other than to "embarrass, delay or burden a third person," under ABA's Rule 4.4(a), or "embarrass or harm a third person," under New York's Rule 4.4(a). Further, under both Rules, lawyers must not "use methods of obtaining evidence that violate the legal rights of such a person."
- ABA Model Rule 4.4 Comments.
    - Comment 1 explains that, while a lawyer's responsibility to clients requires the lawyer to subordinate the interests of others, the lawyer may not disregard the rights of third persons. There may be legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships.
- *Rivera v. Lutheran Med. Ctr.*, 866 N.Y.S.2d 520 (N.Y. Sup. Ct. Kings Cty. Oct. 16, 2008), *aff'd*, 899 N.Y.S.2d 859 (2d Dep't 2010).
    - Relevant facts:
        - In order to preclude plaintiff from obtaining informal discovery from their client's employees, a corporate defendant's lawyers reached out to those employees and offered to represent them at the corporation's expense.

        - Under New York law[9], plaintiffs were entitled to informally interview the client's employees.
        - If the employees, however, retained counsel in the matter, then plaintiff's counsel would be unable to informally interview them without violating Rule 4.2, which prohibits lawyers from speaking with individuals "know[n] to be represented by another lawyer in the matter" without the consent of their attorneys or a court order.
    - Held:
        - Lawyers must not solicit non-parties, such as potential or current witnesses, to offer free representation, for which the fees would be paid by the lawyers' clients.
        - In soliciting their client's employees, the defendant's lawyers violated Rule 7.3, as well as plaintiff's right to informally interview certain employees under *Niesig*.
        - Defendant's lawyers were disqualified from representing non-party employees.
- *U.S. v. Occidental Chemical Corp.*, 606 F. Supp. 1470 (W.D.N.Y. 1985).
    - Relevant facts:
        - Between deposition sessions of a non-party employee witness (the "Employee"), counsel for corporation offered to represent the Employee at the corporation's cost. After having been deposed for three days without representation, the Employee accepted.
        - The government brought motion to disqualify corporation's counsel and to preclude him from soliciting other employees who were also potential witnesses.

9. *See Niesig v. Team I*, 76 N.Y.2d 363, 374 (1990) (holding that lawyers may interview all employees of an adverse corporation other than those current employees "whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter ego') or imputed to the corporation for purposes of its liability, or current employees implementing the advice of counsel").

- Held:
  - Upon these facts, the lawyer's acts were not unethical or improper. Disqualification deemed unwarranted. However, the corporation's law firm may not solicit by mail other former employees, expressly offering representation at no cost. If former employees request the services of the corporation's law firm on their own, the law firm may represent them, and the corporation may incur the costs. The attorney-client relationship, "if it is established at all, [must] come about at the initial request of the former employees." *Id.* at 1477.
  - While the court "did not believe [the corporation's lawyer at the deposition]'s conduct relating to the [Employee] was unethical or wrong under the circumstances," it noted that ideally the Employee, not the lawyer, should have initiated the arrangement. *Id.*

- *Wells Fargo Bank, N.A. v. Lasalle Bank Nat'l Ass'n*, No. 08-CV-1125-C, 2010 U.S. Dist. LEXIS 38279 (W.D. Okla. April 19, 2010).
  - Relevant facts:
    - Defense counsel had allegedly contacted the defendant corporation's former employees and "offered to represent them free of charge throughout the litigation." *Id.* at *1.
    - Plaintiff sought to disqualify defense counsel from representing the defendant corporation's former employees. It argued that defense counsel's behavior "constitute[d] improper phone solicitation in violation of [Oklahoma's Rule 7.3-equivalent, which is identical to the ABA's]" and "hindered [plaintiff's] ability to conduct discovery." *Id.* at *2.
  - Held:
    - Defense counsel's behavior did not constitute soliciting professional employment because the attorney's pecuniary gain was not a significant motive behind those actions. Instead, defense counsel was properly "attempting to represent its client, the corporation, and also to protect the interests of the former employees whose conduct forms the basis for Plaintiff's claims . . . ." *Id.* at *3.

- The court noted that the plaintiff was "not seeking to elicit information from [the former employees] through any type of information" and did not find any proof that defense counsel improperly coached the former employees during their depositions. *Id.* at *4.
- The court also noted the fact that plaintiff had known for approximately two years that defense counsel was representing certain former employees before bringing the motion to disqualify. *Id.* at *5.

5. ASSERTING THAT YOU REPRESENT ALL THE CLIENT'S PERSONNEL WHEN YOU HAVE NOT BEEN RETAINED BY EACH INDIVIDUAL

- ABA Model Rule 4.1(a) and New York Rule of Professional Conduct 4.1 are identical.
  - Under both Rules, in the course of representation, a lawyer must not knowingly "make a false statement of material fact or law to a third person."
- ABA Model Rule 4.1 Comments.
  - Comment 1 notes that a misrepresentation can occur by "partially true but misleading statements," which are the equivalent of affirmative false statements.
- ABA Model Rule 3.4(f)[10].
  - A lawyer must not request a nonclient to "refrain from voluntarily giving relevant information to another party," unless (1) the nonclient is a client's relative, employee or agent, *and* (2) the lawyer reasonably believes that the nonclient's interests "will not be adversely affected by refraining from giving such information."
- ABA Model Rule 3.4 Comments.
  - Comment 4 explains that, when employees identify their interests with those of an employer, lawyers for the employer

10. New York's Rule 3.4 does not have a similar provision.

are permitted to advise employees to refrain from giving information to another party.

- ABA Model Rule 1.13 New York Rule of Professional Conduct 1.7, as applicable here, are substantively identical.
    - Under the ABA's subdivision (f) and New York's subdivision (a), when representing an organization whose interests may differ from those of its constituents, lawyers must explain that the lawyer is the lawyer for the organization only and not for any of the constituents.
- ABA Model Rule 1.13 Comments.
    - Comment 10 explains that when representing an organization whose interests may differ from those of its constituents, lawyers must advise the constituents that the lawyer cannot represent them and that they may wish to obtain independent representation.
    - Comment 11 notes that whether the warning mandated in Comment 10 should be given to a particular constituent depends on the facts of each case.
- ABA Model Rule 1.7 and New York Rule of Professional Conduct 1.7 are substantively identical.
    - Under subdivision (a) of both Rules, a lawyer generally must not represent a client if the representation will be directly adverse to another client or there is a significant risk that the lawyer's representation of one client will be materially limited by the lawyer's responsibilities to another client.
    - Under subsection (b) of both Rules, however, a lawyer may represent both such clients if four requirements are met:
        - The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
        - The representation is not prohibited by law;
        - The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

        - Each affected client gives informed consent, confirmed in writing.

- ABA Model Rule 1.7 Comments.
    - Comment 4 explains that if a conflict arises after the lawyer began representing both clients, then the lawyer must generally withdraw unless subsection (b) is met.
    - Comment 8 cautions that "[e]ven where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."
    - Comment 18 notes that "informed consent" requires "each affected client [to] be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client." Further, "[w]hen representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved."
    - Comment 29 warns that generally, if the common representation fails, a lawyer will be "forced to withdraw from representing *all* of the clients."
    - Comment 30 states that the effect on attorney-client confidentiality and privileges may play an important factor in this context. The rule is that privilege does not attach between commonly represented clients. Thus the clients should be advised that the privilege will not protect their communications if litigation arises between them.
    - Comment 31 notes that where one client requests the lawyer not to disclose to the other client information relevant to the representation, continued common representation will "certainly be inadequate." A lawyer has an equal duty of loyalty to each client and should advise all parties at the outset that all information will be shared.

- Comment 33 states that each client in a common representation will subsequently have the same rights as any other former client as stated in Rule 1.9.

- ABA Model Rule 1.8 and New York Rule of Professional Conduct 1.8 are substantively identical.
  - Under subsection (b) of both Rules, lawyers must not "use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by" the ABA or New York Rules.

- ABA Model Rule 1.8 Comments.
  - Comment 5 explains that such use would violate a lawyer's duty of loyalty. Further, it clarifies that Rule 1.8 "does not prohibit uses that do not disadvantage the client." For instance, a lawyer who learned something during one representation may use that information to benefit other clients. Lastly, it notes that disadvantageous use of client information may be permitted or required by Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

- ABA Model Rule 4.3 and New York Rule of Professional Conduct 4.3 are substantively identical.
  - Under both Rules, in dealing with an *unrepresented* person on behalf of a client, lawyers must not state or imply that they are disinterested. When lawyers know or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, lawyers must make reasonable efforts to correct the misunderstanding. Lawyers must not give legal advice to such persons if they know or should know that the interests of such persons are or have a reasonable possibility of being in conflict with the client's interests.

- RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 (2000).
  - "In the course of representing a client and dealing with a nonclient who is not represented by a lawyer: (1) the lawyer may not mislead the nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents; and (2) when the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands

the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient."

- RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 Comments.
    - Comment (e) explains that a corporate counsel's duty to clarify the nature of the relationship between such counsel and an employee depends on the circumstances and requires balancing several considerations.
        - Generally, if counsel believes, "based on information available . . . at the time, that the [employee] understands that the lawyer represents the interests of the organization and not the individual interests of the [employee]," then no warning to the nonclient employee is required . . . ."
        - However, when a lawyer does not have a reasonable belief that the nonclient employee is adequately informed that the lawyer only represents its employer, the lawyer must take reasonable steps to correct the nonclient employee's "reasonably apparent misunderstanding, particularly when the risk confronting the [nonclient employee] is severe."
            - Nonclient employees' misunderstandings are "reasonably apparent," where they express a belief, for instance, (1) that the lawyer will "keep their conversation confidential from others with decisionmaking authority in the organization," or (2) that the interests of the nonclient employee and the organization are the same, when in reality they are not.
            - Nonclient employees may be prone to such misunderstandings "particularly if the lawyer has formerly provided personal counsel" to them or if the lawyer is inside legal counsel, "due to the greater personal acquaintanceship."
        - "Failing to clarify the lawyer's role and the client's interests may redound to the disadvantage of the organization if the lawyer, even if unwittingly, thereby undertakes concurrent representation of both the organization

and the [nonclient employee]." Put otherwise, "the lawyer's failure to warn the [nonclient employee] of the nature of the lawyer's role could prejudicially mislead the [nonclient employee], impair the interests of the organization, or both."

- Comment (f) warns that a court "may order disqualification of an offending lawyer or law firm" when "necessary in order to remedy or deter particularly egregious violations."

- Colorado Bar Association Formal Ethics Opinion 120 (2008).
  - Pursuant to Rule 4.1 and Rule 3.4, lawyers may not knowingly assert that they represent current or former constituents of an organization without having a reasonable belief that they have been engaged by the constituents.
    - Rule 4.1(a) prohibits lawyers from knowingly making a false statement of material fact or law to a third person.
  - Pursuant to Rule 1.13(f), when lawyers represent only the organization and when they know or reasonably should know that the organizational client's and the nonclient constituent's interests are in conflict, lawyers must clarify their roles.
  - Failure to adhere to Rules 4.1(a) and 1.13(f) may result in further violations.
    - Rule 3.4(a) prohibits lawyers from "unlawfully obstruct[ing] another party's access to evidence." By asserting that an attorney-client relationship exists between him and a constituent, a lawyer would effectively preclude an adversary from communicating *ex parte* with the constituent without the lawyer's consent.
    - Rule 3.4(f) prohibits lawyers from "request[ing] a person other than a client to refrain from voluntarily giving relevant information to another party unless" (1) the person is a client's relative, employee or agent; and (2) lawyers reasonably that "the person's interests will not be adversely affected by refraining from giving such information."
      - For example, a lawyer for a trucking company may request a non-client constituent to refrain from giving relevant information to another party where the nonclient constituent, a truck driver, was involved in a truck driving accident.

- But such a request would be inappropriate in a class action suit against the organization for employment discrimination. The constituent, who may have been subject to similar discrimination, may have interests that may be adversely affected by the constituent's withholding relevant information.

- *Yanez v. Plummer*, 221 Cal. App. 4th 180 (2013).
  - Relevant Facts:
    - An employee was injured at work and sued his employer, seeking to recover for his injuries under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 et seq.
    - A second employee, the eventual plaintiff ("Employee"), witnessed the incident and provided his supervisor with a statement.
    - Before the Employee's deposition in the FELA suit, he expressed concern that his deposition testimony could jeopardize his job if it is unfavorable to the employer. The employer's in-house counsel, the eventual defendant (the "Lawyer"), assured the Employee that the Lawyer was acting has the Employee's attorney and that Employee's job status would be safe as long as he told the truth.
    - During the Employee's deposition, the Lawyer pointed out a contradiction in the Employee's various statements relating to the FELA suit but did not offer the Employee an opportunity to explain himself.
    - A company supervisor, who was present at the Employee's deposition, initiated disciplinary proceedings against the Employee based on the contradiction in his deposition testimony. The Employee was charged with dishonest conduct and was fired.
    - The Employee sued the Lawyer for legal malpractice, breach of fiduciary duty and fraud, alleging that the Lawyer engaged in an improper conflict of interest by representing both the Employee and the employer. The Employee also alleged that at his deposition, the Lawyer engaged in conduct that favored the employer's interests over the Employee's.

- Held:
  - A lawyer may not represent both an employer and an employee at the employee's deposition in a matter in which the two clients have conflicting interests.
  - The Lawyer's conduct at the deposition violated California Rule 3-310(C)(2), which is the state's ABA Rule 1.7-equivalent.
  - The court noted the following key facts: (1) Lawyer himself brought out the contradiction between the Employee's various statements; and (2) the Lawyer did not inform the Employee of the conflict between his interests and those of the employer, and the Lawyer did and did not attempt to obtain the Employee's written consent to the joint representation.
  - Procedurally, the California Court of Appeals reversed the trial court's granting of the Lawyer's motion for summary judgment, holding that there were factual issues as to whether the Lawyer's conduct was a proximate cause of the Employee's termination.

NOTES

NOTES

7

Deposition Ethics Issues (Substantive Outline)

Blythe E. Lovinger
Vedder Price

If you find this article helpful, you can learn more about the subject by going to www.pli.edu to view the on demand program or segment for which it was written.

Deposition Ethics Issues

By Blythe E. Lovinger[1]
March 10, 2017

I. COACHING A WITNESS DURING A DEPOSITION – HOW FAR CAN YOU GO?

- Rule 30, FED. R. CIV. P., sets out general requirements for objections raised at deposition.
    - Subdivision (c)(2) requires that any objections "be stated [on the record] concisely in a nonargumentative and nonsuggestive manner."
    - Sanctions may be awarded under Subdivision (d)(2) where an attorney, *inter alia*, "impedes, delays, or frustrates the fair examination of the deponent."
    - Under subdivision (c)(2), an attorney may only instruct a deponent not to answer a question at deposition where "necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)," which permits a party to move to limit or terminate a deposition where such was conducted "in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party . . . ."
- Section 221 of the New York Codes, Rules and Regulations sets forth New York's Uniform Rules for the Conduct of Depositions, and similarly prohibits lengthy objections.

[1] Blythe E. Lovinger is a shareholder in the Labor and Employment Group in the New York office of Vedder Price P.C. Kimberly R. Greer is an associate in the Labor and Employment Group in the New York office of Vedder Price P.C.

- Section 221.1(b) requires that objections "be stated succinctly and framed so as not to suggest an answer to the deponent," and prohibits an attorney from making "statements or comments that interfere with the questioning" except to raise objections.

- In addition to the foregoing express limitations on conduct during a deposition, an attorney's conduct during a deposition also may run afoul of other ethical obligations.

  - ABA Model Rule 3.4(a)(1) and New York Rule of Professional Conduct 3.4(a)(1), which are substantially similar, prohibit an attorney from obstructing the other party's access to documents or otherwise concealing or suppressing evidence, either directly or through another person. Comment 1 to each Rule notes that "the procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."

  - ABA Model Rule 3.4(c) and New York Rule of Professional Conduct 3.4(c) prohibit an attorney from ignoring a rule of a Court, such as by instructing a party not to respond to a deposition question. Under ABA Model Rule 3.4(c), a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." Under New York Rule 3.4(c), a lawyer shall not "disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling."

- ABA Model Rule 8.4(c) and (d) and New York Rule of Professional Conduct 8.4(c) and (d), which are identical, state that it is "professional misconduct" for an attorney to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation," or "that is prejudicial to the administration of justice."

- Case law makes clear that courts are wary of coaching by counsel during a deposition, and have awarded monetary and other sanctions for such conduct. As the court in *In re Neurontin Antitrust Litig.*, No. 02-1390(FSH), 2011 U.S. Dist. LEXIS 6977 (D.N.J. Jan. 24, 2011) cautioned:

  > [C]ounsel should know that the purpose of a deposition is to find out what the witness thinks, that objections should be concise, non-argumentative, and non-suggestive, and hence that counsel should not (1) make speaking, coaching or suggestive objections; (2) coach or change the witness's own words to form a legally convenient record; (3) frustrate or impede the fair examination of a deponent during the deposition by, for example, making constant objections and unnecessary remarks; (4) make speaking objections such as 'if you remember,' 'if you know,' 'don't guess,' 'you've answered the question,' and 'do you understand the question'; or (5) state that counsel does not understand the question.
  >
  > *In re Neurontin Antitrust Litig.*, No. 02-1390(FSH), 2011 U.S. Dist. LEXIS 6977, at *40 (D.N.J. Jan. 24, 2011) (*citing Mazzeo v. Gibbons*, Civ. No. 08-1387, 2010 U.S. Dist. LEXIS 88523, at *2 (D. Nev. July 27, 2010)).

  - Speaking objections are often viewed as a means for an attorney to coach a witness during the course of a deposition. A speaking objection is "[a]n objection that contains more information

(often in the form of argument [or suggestion]) than needed by the judge to sustain or overrule it." BLACK'S LAW DICTIONARY 1178 (9th ed. 2009). *See also Cincinnati Ins. Co. v. Serrano*, No. 11-2075-JAR, 2012 U.S. Dist. LEXIS 1363, at *15 (D. Kan. Jan. 5, 2012) ("An objection that a question is 'suggestive' is an improper speaking objection. Its only object can be to warn the witness not to agree.").

- Courts may also consider communications during a break or recess to constitute coaching. By way of example, in *Prosser v. Avanti Petroleum, Inc.*, No. 4:98CV1104 JCH, 1999 U.S. Dist. LEXIS 20843 (E.D. Mo. Nov. 30, 1999), the Court disqualified plaintiff's counsel where, after a break, the plaintiff materially changed testimony from that given just prior to the break. *Id.* at *5-6. The Court stated: "The change took place after a break in the proceedings during which [counsel and plaintiff] admittedly discussed the testimony at issue, however briefly. The Court thus finds the possibility of tainted testimony and/or witness tampering in the instant case too substantial to ignore, and in the interest of the appearance of propriety will therefore order that [counsel] be disqualified from acting as Plaintiffs' attorney in this matter." *Id.*

- *Sec. Nat. Bank of Sioux City, Iowa v. Abbott Labs.*, 299 F.R.D. 595 (N.D. Iowa 2014) rev'd sub nom. Sec. Nat. Bank of v. Jones Day, 800 F.3d 936 (8th Cir. 2015).
  - The sanctions in this case were vacated on appeal because the Judge failed to give particularized notice of the unusual nature of the sanctions. However, the case is still relevant because the conduct is sanctionable and demonstrates a court's ability to craft unique sanctions.

  - The Court criticized counsel's deposition conduct, noting three categories of improper conduct as

counsel: (1) "interposed an astounding number of 'form' objections, many of which stated no recognized basis for objection"; (2) "repeatedly objected and interjected in ways that coached the witness to give a particular answer or to unnecessarily quibble with the examiner"; and (3) "excessively interrupted the depositions . . . frustrating and delaying the fair examination of witnesses." *Abbott Labs*, 299 F.R.D. at 600.

- The Court imposed a unique sanction, noting "less interest[] in negatively affecting Counsel's pocketbook than . . . in positively affecting Counsel's obstructive deposition practices." *Id.* at 609. Thus, the Court ordered the attorney to make a training video on the proper scope of objections permissible in a deposition, stating:

> Counsel must write and produce a training video in which Counsel, or another partner in Counsel's firm, appears and explains the holding and rationale of this opinion, and provides specific steps lawyers must take to comply with its rationale in future depositions in any federal and state court. The video must specifically address the impropriety of unspecified "form" objections, witness coaching, and excessive interruptions. The lawyer appearing in the video may mention the few jurisdictions that actually require only unspecified "form" objections and may suggest that such objections are proper in only those jurisdictions. The lawyer in the video must state that the video is being produced and distributed pursuant to a federal court's sanction order regarding a partner in the firm, but the lawyer need not state the name of the partner, the case the sanctions arose under, or the court issuing this order. Upon completing the video, Counsel must file it with this court, under seal, for my review and approval . . . .

Id. at 610.

- *Faile v. Zarich*, HHDX-04-CV-06-5015994-S, 2009 Conn. Super. LEXIS 1600 (Conn. Super. June 15, 2009).

    - From 1997 through 2008, a Connecticut attorney was sanctioned on five separate occasions for engaging in misconduct at depositions. The rules governing an attorney's conduct at depositions in Connecticut are substantially similar to those in New York.

    - In 2008, an opinion was issued detailing conduct giving rise to the fifth set of sanctions, and ordering $2,368 in sanctions. *See Faile v. Zarich*, 2008 Conn. Super. LEXIS 1779 (July 9, 2008).

    - ***Speaking Objections***: The Court found that, *inter alia*, the sanctioned attorney made comments on the record that "went well beyond making an objection as to the form of the question or simply were improper comments." *Id.* at *7. The Court explained that a proper objection is limited to a simple statement of the objection, recognizing that "[s]imply stating, 'Objection to the form of the question,' is usually sufficient." *Id.* at *8.

    - ***Witness Coaching***: The Court also sanctioned the attorney for witness coaching on numerous occasions during various depositions.

        > Q [Plaintiffs' counsel]: And how would gaining access cause a branch of the femoral artery to be sheared off? What mechanically would have to happen?
        > [Sanctioned Counsel]: I am going to object. This is completely hypothetical. Are we talking about in this case, under a particular set of circumstances?
        > [Plaintiffs' counsel]: In the process of gaining access to a femoral artery.

> [Sanctioned Counsel]: I just think that is beyond what – Dr. Driesman didn't perform that part of the procedure. He wasn't there when that part of the procedure was performed.

Id. at *8-9. The Court recognized this to be witness coaching, as it stated: "By her interjection of her statement of evidence . . . defense counsel was . . . suggesting to the witness what she wanted him to say in response to plaintiffs' counsel's question." *Id.* at *9.

- The Court also addressed the following interaction at deposition:

> Q [Plaintiffs' Counsel]: Would there have been also an attending cardiologist likewise on call?
> A. Yes.
> Q: Was that Dr. Zarich that day?
> A. Yes.
> [Sanctioned Counsel]: Do you know that? Be careful of that because I don't think he was on call that day, but I could be wrong.

Id. at *11. The Court found the latter statement by counsel to be coaching of the witness: "Her question to the witness when opposing counsel was examining him was improper, as was her comment about what she thought the evidence showed." *Id.*

- Similarly, when a non-party witness was asked about a document, the following exchange occurred:

> Q [Plaintiffs' Counsel]: So if a CAT scan demonstrates two hours after the stick that there's an active brisk arterial bleed, that's not an indication that it's continuing and not stopping on its own?

A: I can't comment on this but I don't know if a CAT scan can tell you there is a continuous brisk bleed.
[Sanctioned Counsel]: Where does it say there's a brisk bleed?
A: It's only suggesting. They cannot be certain.
[Sanctioned Counsel]: Would you just point that out--
[Plaintiffs' counsel]: I don't have it in front of me.
[Sanctioned Counsel]: I'm looking at Bates stamp 1672.
[Plaintiffs' counsel]: 'There are multiple foci of dense contrast within the hematoma suggesting brisk active hemorrhage.'
[Sanctioned Counsel]: But that doesn't say that there's an active bleed.

Id. at *12. The Court described this as "coaching" and stated that this was an "inappropriate suggestion to the witness as to how to testify." *Id.*

- In 2009, the attorney was sanctioned for the sixth time overall, and a second time in the same case, in the amount of $11,884. *See Faile v. Zarich*, HHDX-04-CV-06-5015994-S, 2009 Conn. Super. LEXIS 1600 (Conn. Super. June 15, 2009). On this occasion, the Court found that the attorney had been obstructive and improperly refused to allow deponents to answer questions that had been posed. *Id.* at *15.

- *In re Neurontin Antitrust Litig.*, No. 02-1390(FSH), 2011 U.S. Dist. LEXIS 6977 (D.N.J. Jan. 24, 2011)

  - Defense counsel was subject to non-monetary sanctions because during a deposition, he made statements to "interject information to share with the deponent; add to the deponent's answers; contribute his own nuanced views of the testimony, facts, pleadings, or the criminal

information—notwithstanding the deponent's answers; interrupt the plaintiffs' counsel mid-question; express his umbrage at having to defend the antitrust defendants' denials; and make speaking objections." *Id.* at *41 (internal footnotes omitted).

- The Court highlighted certain examples of improper coaching during the deposition, including the following:

> Q: Okay. And let's also look at paragraph 105, 105 of the CVS complaint.
> A: Sorry.
> Q: Okay. The complaint first mentions bipolar mental disorders, and I believe you have testified that Pfizer did in fact illegally promote Neurontin for that particular indication?
> [Sanctioned Counsel]: Sorry. Could you repeat the question?
> [Plaintiffs' Counsel]: Could you read it back, please.
> [Record read.]
> [Sanctioned Counsel]: Objection. Mischaracterizes his testimony. I believe he said consistent with the plea.
> A: Consistent with the plea, bipolar disorder was admitted in the information and the plea.
> Q: Was that plea consistent with Pfizer's conduct?
> [Sanctioned Counsel]: Objection. Vague.
> A: As is consistent with the plea. That is what we admitted to.
>
> *Id.* at *41 n.10
>
> * * *
>
> Q: Do you have any information what — what this other information is that would expound on the information provided to you by counsel on pages 9 through 12?

A: Oh, just an example would be other policies that would be consistent with some of the examples that we have identified here that show the duration of the policies over — over the multiple year period in question.
Q: Is it —
[Sanctioned Counsel]: Let me also object and note for the record that as counsel is aware this information comes from the MDL case, from the Franklin case, and from the record in those cases that is incorporated in this case, and that is a massive record, you know, accounting for hundreds of depositions and millions of documents.
Q: Is it —
[Sanctioned Counsel]: Let me also note for the record that counsel is essentially with your questions preventing the witness from listing the depositions that form the basis of the company's denial of this paragraph as well as addressing the issue of how the denial is consistent with the information included.

Id. at *41 n.11.

* * *

Q: I read those complaints as being substantially similar, if not identical, the allegations in those two particular complaint paragraphs.
A: That is fair.
Q. Okay. And then I assume or I hope I can assume that if I were to ask you the same series of questions that I asked with respect to paragraph 105, if I ask you those same questions with respect to paragraph 61 your answers would be the same?
[Sanctioned Counsel]: I am sorry. With respect to 105 and 61?
[Plaintiffs' Counsel]: Yes.

[Sanctioned Counsel]: I object. I mean there are — paragraph — they are different in terms of referencing the strategy, for example, and also I think referencing against pursuant to this strategy in paragraph 61, which does refer back to paragraph 60. So they are different in terms of what they are —

Id. at *43 n.12.

* * *

[Sanctioned Counsel]: Objection. Foundation. You're assuming that —
[Plaintiffs' Counsel]: Let him answer the question.
[Sanctioned Counsel]: Pfizer drafts —
[Plaintiffs' Counsel]: Let him answer the question. If you have an objection as to form make the objection. No speaking please, [Sanctioned Counsel].
[Sanctioned Counsel]: Yes, sir. Objection. Foundation, calls for speculation.
[Plaintiffs' Counsel]: Fine.
[Sanctioned Counsel]: You can't make up facts.
[Plaintiffs' Counsel]: That — you shouldn't add commentary. If you have an objection—
[Sanctioned Counsel]: I am explaining my foundation objection.

Id. at *43 n.13.

* * *

Q: And that was with respect to some — a potential civil liability as opposed to criminal?
[Sanctioned Counsel]: The document speaks for itself. I don't know if you said it for the record that it is quoting something else.
A: Yes. Again, the document here, whatever is said here, I'm not sure of the accuracy of this particular statement.

* * *

> Q: Mr. Gibney, was there a civil and criminal investigation into Pfizer's conduct relating to the promotion of Neurontin for off-label uses?
> [Sanctioned Counsel]: Just to the best of his knowledge?
> A: Yes. To the best of my knowledge, yes, there was.

Id. at *47 n.17.

- *Marino v. Usher*, Civ. No. 11-6811, 2014 U.S. Dist. LEXIS 69521 (E.D. Pa. May 21, 2014).
    - A federal judge sanctioned plaintiff's counsel for acting "disgracefully" where counsel engaged in improper conduct, despite express instructions from the Court to cease such conduct. *Id.* at *36.
    - Specifically, after an instruction from the Court to refrain from making lengthy speaking objections during depositions, the sanctioned attorney made 65 speaking objections during a deposition. *Id.* at *5.
    - Counsel also made sexist and abusive remarks, such as the following to defense counsel:

> [Sanctioned Counsel]: Don't be a girl about this. . . .
> [Defense Counsel]: I would appreciate you not referring me to as a girl, which you have done repeatedly off the record and on the record.

Id. at *7. Similarly, the Court objected to counsel's abusive titling of briefs, which included captions such as "Response in Opposition Re Joint Motion for Sanctions by Moving Defendants Who Are Cry Babies" and "Plaintiff's Response to Defendants' Incessant Complaining." *Id.* at *10.

- The Court also found that in the course of the litigation, the sanctioned attorney had "[lied] to an unsophisticated, impoverished, unrepresented party, thus convincing the [party] to expose himself (probably baselessly) to substantial liability." *Id.* at *36.

- *Simmons v. Minerley*, 847 N.Y.S.2d 905 (Sup. Ct., Dutchess Cnty. 2007).

  - A lawyer was sanctioned in the amount of $2,500 for making numerous suggestive objections that instructed his client on how to respond to questions posed. For example, when stating an objection to a question about a notice of claim, the sanctioned attorney stated:

    > I will not allow him to answer that because, what's in the Notice? There's no testimony that he's read it and knows what's in it, so there's no foundation for that question. What the document says and what he knows it says may be two different things. *Id.* at 9.

- *Specht v. Google, Inc.*, 268 F.R.D. 596 (N.D. Ill. 2010).

  - The Court awarded sanctions in the amount of $1,000, with a stern warning of more severe sanctions should improper conduct continue. The Court found that the sanctioned attorney had made improper speaking objections, among other things. This included the following:

    > A: No, I wouldn't –
    > Sanctioned Counsel: Object – stop. You've got to let – you've got to let me object. Object to the form of that question as calling for material that would constitute work product. It's argumentative.

A: I'm going to refuse to answer that based on attorney-client privilege and work product doctrine.
[Plaintiff's Counsel]: But do you understand why you're here today as a witness, sir?
[Sanctioned Counsel]: Yeah. Because he's been subpoenaed. That's why he's here. You issued a subpoena, and we accepted service of the subpoena. That's why he's here.
[Plaintiff's Counsel]: Mr. Fleming, do you have an objection, rather than just speaking and testifying for the witness?
[Sanctioned Counsel]: Well, these questions are ridiculous. Why is he here? He's here pursuant to legal process. That's why he's here, because you guys issued a subpoena, and we accepted service. That's why we're here.
[Plaintiff's Counsel]: And we've asked if he understands --
Sanctioned Counsel: He's not here -- sorry?
[Plaintiff's Counsel]: Mr. Fleming --
[Sanctioned Counsel]: That's the answer. Okay. Answer the question. Why are you here, [witness]?
A: Pursuant to a subpoena.

Id. at 598-99.

* * *

Q: [C]ould you give me an idea from 2001 to the time this case started, what the breakdown would be in terms of time spent on client work and time spent on your own business ventures?
A: I have no idea.
Q: You couldn't – 50/50, 25/30?
A: I would be guessing.
Q: Can you give me your best guess?
[Sanctioned Counsel]: Well, don't guess. Don't guess.
A: I'm not going to guess.

> Q: Well, I'm asking you to give me your best guess, sir.
> [Sanctioned Counsel]: He's not going to give you a guess. So don't answer the question. Asked and answered. Let's move on.
> [Plaintiff's Counsel]: Counsel, unless it's privileged matter or work product, you cannot instruct the witness not to answer.
> [Sanctioned Counsel]: You know, when it becomes abusive, absolutely I can. You've asked the question. He's told you he'd have to guess. You asked him to guess. He said he won't guess.
>
> *Id.* at 599.

- *Tucker v. Pacific Bell Mobile Services*, 186 Cal. App. 4th 1548 (2010).
    - During a deposition, the plaintiffs' counsel "wrote on a legal pad and showed it to [his witness]." *Id.* at 1550. Counsel also instructed the witness not to answer certain questions relating to the witness's viewing of the legal pad, as well as other standing issues. After the deposition, counsel threw the notes away. Defendants moved for sanctions, and the court granted the motion.

- *Ngai v. Old Navy*, No. 07-5653(KSH)(PS), 2009 U.S. Dist. LEXIS 67117 (D.N.J. July 31, 2009).
    - After accidentally texting plaintiff's counsel during a video-conference deposition, it became apparent that defense counsel had been communicating with his witness via text message during questioning. Plaintiff's counsel moved for sanctions, which the Court granted, additionally finding that the text messages exchanged during the deposition were not privileged. *Id.* at *3.

- *Hallam v. Johnson*, No. D054852, 2009 Cal. App. Unpub. LEXIS 9866 (Cal. Ct. App. Dec. 15, 2009).

    - The court held that, among other things, counsel had coached the witness through speaking objections, and that counsel's more than 300 objections throughout the deposition were intended to interrupt the flow of deposition. The attorney was sanctioned in the amount of $25,607.03. *Id.* at *36.

- *Briese Lichttechnik Vertriebs GmbH v. Langton*, No. 09 Civ. 9790(LTS)(MHD), 2011 U.S. Dist. LEXIS 6340 (S.D.N.Y. Jan. 14, 2011).

    - Motion for sanctions was granted where, *inter alia*, counsel interposed speaking objections and even engaged in the "bizarre" practice of providing the witness with written statements in response to questions. *Id.* at *24.

- More recently, a New York court went through each deposition question and objection before ruling on whether the objection was proper. *See Rodriguez v. Clarke Worley Goodman, M.D.*, 805453-2013, 2015 N.Y. Misc. LEXIS 2782 (Sup. Ct. NY C'nty July 28, 2015). Although the court declined to sanction the attorney, it nevertheless found that the attorney violated NYCRR Rules 221.1 and 221.3 by making speaking objections and suggestive answers. For example:

    > **Q (Deposing Counsel)**: In your experience, was there any custom and practice within how long an EKG result would be reviewed after it was taken?
    > **(Violating Counsel)**: Objection to form. A custom and practice is linked to a particular individual, so you're asking about —

(Deposing Counsel): No. I'm asking if there was a custom and practice—
(Violating Counsel): Standard of care.
(**Deposing Counsel**): I'm asking if there was a custom and practice in the ER within how long an EKG would be—
(Violating Counsel): whose custom and practice?
(Deposing Counsel): The custom and practice in the ER.
(Violating Counsel): The ER is not a person. Only people can have a custom and practice.
(Deposing Counsel): Are you instructing him not to answer the question?
(Violating Counsel): I'm asking you to be more specific with your question.
(Deposing Counsel): That's my exact question.

Here, the court found that the deposing counsel asked the question plainly and that the inquiry was not a "compound question, argumentative, presumptive, misleading, or excessively broad." It therefore concluded that "the objection itself was unwarranted and disruptive." *Id.* at *11-12.

- Witness coaching also runs the risk of penalties for suborning perjury and/or witness tampering, which presents the risk of severe sanctions and even potential criminal liability. *See In re Brican Am. LLC Equip. Lease Litig.*, No. 10-md-02183, 2013 U.S. Dist. LEXIS 142842, at *1291 (S.D. Fla. Oct. 1, 2013) (considering, but denying, motion based on accusations that counsel engaged in witness tampering and suborning perjury); *Riley v. City of New York*, No. 10-CV-2513 MKB, 2015 WL 541346, at *36-37 (E.D.N.Y. Feb. 10, 2015) (holding that monetary sanctions, *in addition to* notifying the jury of plaintiff's witness tampering and permitting the jury to

draw an adverse inference against plaintiff based on the witness tampering allegations, are appropriate sanctions).

II. TALKING TO A WITNESS ABOUT TESTIMONY DURING A DEPOSITION

- Rule 30.4 of the Local Civil Rules for EDNY/SDNY addresses conferences between a defending attorney and a deponent during the course of a deposition.

    - This Rule provides: "An attorney for a deponent shall not initiate a private conference with the deponent while a deposition question is pending, except for the purpose of determining whether a privilege should be asserted."

- Section 221.3 of the New York Codes, Rules and Regulations similarly addresses communications between an attorney and deponent during a deposition. This Section states:

    > An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 [privilege, in violation of Court-imposed limitation, or improper and prejudicial] of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

- However, local rules of Courts and/or jurisdictions may differ and even proscribe communications during depositions and even recesses. For this reason, counsel should consult the relevant local rules of practice before taking and/or defending a deposition.

    - For instance, Rule 30.6 of the U.S. District Court for the District of Delaware Local Rule of Practice and Procedure states:

        > From the commencement until the conclusion of deposition questioning by an opposing party,

including any recesses or continuances, counsel for the deponent shall not consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given, except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order. (emphasis added.)

- South Carolina follows a similar rule whereby attorney-client communications are prohibited following the start of a deposition, except to determine privilege. "[E]ven during breaks in the deposition such as a lunch or overnight break, witnesses and their counsel cannot talk substantively about prior or future testimony." *In re Anonymous Mbr. of S.C. Bar*, 346 S.C. 177, 191 (S.C. 2001) (*citing* S.C. R. CIV. P. 30(j)(5)).

- By way of contrast, Texas permits private conferences during recesses that are agreed upon by the parties. TEX. R. CIV. P. 199.5(d) (providing that "Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments.").

- The Los Angeles County Bar Association Professional Responsibility and Ethics Committee has taken a broader position regarding deposition break consultations. *See* Formal Ethics Opinion 497 (March 8, 1999). The Committee held that there "is no ethical duty to refrain from interrupting a deposition to consult with the client or to consult with a client during breaks or recesses in the client's deposition," and that an attorney may even be ethically obligated to do so at times, such as when the lawyer knows that the

client has testified in a manner that is intentionally false or misleading, or if a deposition question calls for privileged information to be disclosed. The Opinion further explained that it was the content of the communication – and not the timing during the deposition – that matters, *i.e.*, "whether the purpose or consent of the consultation crosses the line between proper advocacy and suborning perjury or obstructing justice."

- Courts also have taken differing views on the propriety of communications during a deposition.

    - In *In re Stratosphere Corp.*, 182 F.R.D. 614 (D. Nev. 1998), the Court prohibited conferences during questioning, *id*. at 620, but permitted conferences during breaks *that counsel did not request*. *Id*. at 621. Such conferences are proper to ensure that the client did not "misunderstand or misinterpret questions or documents," or to "attempt to help rehabilitate the client by fulfilling an attorney's ethical duty to prepare a witness." *Id. See also Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 347 P.3d 267, 273 (NV 2015) (declining to approve witness-counsel conferences during requested breaks, except to determine whether to assert a privilege and holding that for the attorney-client privilege to apply to these conferences, counsel must state on the deposition record: (1) the fact that a conference took place; (2) the subject of the conference; and (3) the result of the conference); *Circle Grp. Internet, Inc. v. Atlas, Pearlman, Trop & Borkson, P.A.*, 2004 WL LEXIS 2609, at * 5 (N.D. Ill. Feb. 19, 2004) (conference acceptable so long as no question pending); *In re Braniff, Inc.*, No. 89-03325-BKC-6C1, 1992 Bankr. LEXIS 1563, at *34-35 (Bankr. M.D. Fla. Oct. 2, 1992) (prohibiting conferences while a question is pending but otherwise permitting conferences).

- Other courts have taken the position that counsel can engage in discussions during recesses ***only if*** the consultation is initiated by the witness and ***not by counsel***, which is the position set forth in the Local Rules for the Southern and Eastern Districts of New York (*see supra*). *See Murray v. Nationwide Better Health*, No. 10-3262, 2012 U.S. Dist. LEXIS 120592, at *12-13 (C.D. Ill. Aug. 24, 2012) ("[T]his Court holds that defense counsel may have a private conference with [the witness] during a recess that counsel did not request (and so long as a question is not pending), during the hour break already scheduled by the Court, and at any time for the purpose of determining whether a privilege should be asserted."); *Okoumou v. Horizon*, No. 03 Civ. 1606 (LAK) (HBP), 2004 U.S. Dist. LEXIS 19120, at *5 (S.D.N.Y. Sept. 23, 2004) ("[C]onsultation between counsel and a witness at a deposition raises questions only when the consultation is initiated by counsel.").

- Other courts have held that following the start of a deposition, communications must be limited to only ascertaining whether a response would be privileged. *See Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 347 P.3d 267, 273 (NV 2015) (*supra*). In *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993), the Court held, "once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth." *Id.* at 528. Observing that conferences during a deposition "tend to disrupt the question-and-answer rhythm of a deposition an dobstruct the witness's testimony," the court announced a rule prohibiting conferences, even during recesses. *Id.* at 530.

More recently, a Pennsylvania court, following *Hall*, established concrete rules for future depositions in light of the dispute that arose between the parties. The dispute concerned communications with witnesses during breaks in the depositions. *See Dalmatia Imp. Grp., Inc. v. Foodmatch, Inc.*, 2016 U.S. Dist. LEXIS 145991, at *17-18 (E.D. Pa. Oct. 21, 2016). Specifically, the court held that moving forward: "(1) counsel will not communicate with deponents during breaks regarding the substance of their deposition testimony other than to discuss the assertion of a privilege;" (2) "the deposing party may inquire of a witness regarding whether he or she discussed the substance of his or her testimony with counsel during breaks in the deposition;" and "(3) if the deponent testifies that he or she did have such discussions with counsel, the deposing party may question the witness regarding the communications with counsel that related to the substance of the deponent's testimony." *Id.*

- As a general principle, courts agree that a recess and/or communications while a question is pending are improper. In *In re Neurontin Antitrust Litig.*, No. 02-1390(FSH), 2011 U.S. Dist. LEXIS 6977 (D.N.J. Jan. 24, 2011), the Court highlighted as inappropriate the following which occurred during a deposition and non-monetary sanctions were awarded:

  > Q: Is it your understanding that a particular allegation has to be in the Information in order for Pfizer to admit a particular allegation?
  > A: Yes.
  > [Sanctioned Counsel]: Hold on a moment Counsel.
  > [Plaintiffs' Counsel]: I'd like the record to — are you having a discussion with counsel?
  > [Sanctioned Counsel]: Yes, because I — actually let me state a belated objection since

you were calling for a legal conclusion. We'll go back over this. Let's take a two-minute break.
[Break ensues]
[Sanctioned Counsel]: Joe, would you read the last question again, and the answer?
[Record read.]
A. I'd like to add to that. In addition to what's in the Information, the company and its lawyers does an assessment beyond what's just in the Information to make those determinations.

Id. at *47-48 n.17.

- **Attorney-Client Privilege:** Courts are divided on whether communications between an attorney and client during the course of a deposition – even during breaks, recesses, and/or lunch – are privileged, with the caveat that communications to determine whether or not a response would be privileged are universally protected.

    - Many courts have taken the position that communications between a client and attorney are privileged so long as they occur during a break or recess, and so long as no question is pending. *See, e.g.*, *Pia v. Supernova Media, Inc.*, No. 2:09-CV-840 CW, 2011 U.S. Dist. LEXIS 140396, at *11-12 (D. Utah Dec. 6, 2011) ("[T]he truth finding function is adequately protected if deponents are prohibited from conferring with their counsel while a question is pending; other consultations, during periodic breaks, luncheon and overnight recesses, and more prolonged recesses ordinarily are appropriate.") (*quoting McKinley Infuser v. Zdeb*, 200 F.R.D. 648, 650 (D. Colo. 2001)); *Gibbs v. City of New York*, No. CV-06-5112(ILG)(VVP), 2008 U.S. Dist. LEXIS 22588 (E.D.N.Y. Mar. 21, 2008) (applying privilege analysis to communications between counsel and client during recess in deposition); *Henry v. Champlain Enters.*, 212 F.R.D. 73, 92 (N.D.N.Y

2003) (noting that disclosure of communications between client and attorney during a break "may truly intrude upon the attorney-client privilege and the work product doctrine").

- Conversely, other courts have taken the position that once a deposition starts, no communications between an attorney and a client are privileged, except to the extent that such communications are to determine privilege. The seminal case for this approach is *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993), wherein the Court held that "[t]o the extent that such conferences do occur . . . [they] are not covered by the attorney-client privilege, at least as to what is said by the lawyer to the witness. Therefore, any such conferences are fair game for inquiry by the deposing attorney to ascertain whether there has been any coaching and, if so, what." *Id.* at 529 n.7; *see also Wei Ngai v. Old Navy*, No. 07-5653 (KSH)(PS), 2009 U.S. Dist. LEXIS 67117, at *16 (D.N.J. July 31, 2009) ("[C]ommunications between the client and counsel during breaks in an ongoing deposition, other than to discuss a privilege, are not privileged."); *Craig v. St. Anthony's Med. Ctr.*, No. 4:08CV00492 ERW, 2009 U.S. Dist. LEXIS 19909, at *4 n.1 (E.D. Mo. Mar. 12, 2009) (where attorney had been accused of coaching, the court held that future conferences during depositions, besides to ascertain privilege, would not be privileged); *Holland v. Fisher*, 1994 Mass. Super. LEXIS 12, at *18-19 (Mass. Super. Ct. Dec. 21, 1994) (following *Hall* and noting that where party did not state on the record that conference was to establish privilege, and what result was, privilege as to the conference was waived).

- Other courts have ordered an *in camera* conference to determine whether the attorney client privilege can be asserted to protect a conference during a deposition. In *LM Ins. Corp.*

v. ACEO, Inc., 275 F.R.D. 490 (N.D. Ill. 2011), counsel for the deponent interrupted the examiner while a question was pending, stating that he wanted to confer with his client (the deponent). The conference lasted nearly thirty minutes. When the examiner re-asked the pending question, the deponent radically changed her testimony but denied that it was due to instructions from her counsel. The court ordered that the deponent resume under judicial supervision in the courtroom, and that an *in camera* conference be held to determine whether the attorney-client privilege attached to the contested communication between counsel and the deponent. *Id.* at 492.

- Even where courts recognize that attorney-client communications during breaks are generally privileged, they have taken differing views on whether an attorney's coaching of a witness during a break is privileged.

    - *Compare Haskell Co. v. Georgia Pacific Corp.*, 684 So.2d 297, 298 (Fla. Ct. App. 1996) ("There is no recognized exception to the privilege for a communication between an attorney and client which occurs during a break in deposition. If a deponent changes his testimony after consulting with his attorney, the fact of the consultation may be brought out, but the substance of the communication generally is protected."), with *In re Flonase Antitrust Litigation*, 723 F. Supp. 2d 761, 764-65 (E.D. Pa. 2010) (declining to follow *Hall*, but nonetheless finding that coaching by an attorney during a recess would not by protected by the attorney-client privilege).

III. USE OF MISLEADING QUESTIONS

- None of the Federal Rules of Civil Procedure, the ABA Model Rules, or the New York Rules of Professional Conduct expressly addresses an attorney's use of misleading questions at a deposition. However, they do set guidelines for appropriate behavior by attorneys both at depositions and more generally.

- Fed. R. Civ. P. Rule 30(d)(3)(A) governs a parties' ability to move to terminate or limit a deposition. Such is appropriate where the deposition "is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party . . . . If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order."

- ABA Model Rule 4.4(a) and New York Rule of Professional Conduct 4.4(a) set general guidelines regarding attorney conduct.

    - ABA Model Rule 4.4(a) provides that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

    - New York Rule 4.4(a) provides that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person."

- ABA Model Rule 8.4(c) and New York Rule of Professional Conduct 8.4(c) are identical.

    - Both provide that it is "professional misconduct" for an attorney to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ."

- Some jurisdictions have developed rules prohibiting or limiting the use of misleading questions at depositions.

    - For instance, Rule 199.5(h) of the Texas Rules of Civil Procedure states that "[a]n attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time." Additionally, Rule 199.5(f) provides that an attorney may instruct a witness not to answer a question that "for which any answer would be misleading . . . ."

- The ABA advises that when faced with an adversary asking misleading questions, counsel "should object to and identify the examining counsel's improper behavior on the record."[2]

    - In doing so, the ABA relies on Moore's Federal Practice § 30.43, which states: "When faced with misleading questions by the examining attorney, counsel defending the deposition should be permitted to identify counsel's misleading behavior . . . and correct the record." 7 MOORE'S FED. PRAC. § 30.43 (2012); *see also Stoffregen v. Luu*, 2014 Cal. App. Unpub. LEXIS 6460, at *12 (CA App. Sept. 12, 2014) (indicating that if a deponent is asked confusing or misleading

[2] *See* American Bar Association, *Your Questions Answered: Preparing Your Witness for a Deposition*, http://apps.americanbar.org/litigation/committees/pretrial/email/spring2013/spring2013-0513-your-questions-answered-preparing-your-witness-deposition.html.

questions, the party could correct the transcript, correct or bring a motion to suppress the deposition in its entirety) (citing Code Civ. Proc., § 2025.520 (b), (c), (g)).

- The ABA additionally cautions that where an attorney engages in misleading questions, the attorney runs the risk that the deposition might be terminated and/or limited under Fed. R. Civ. P. 30(d)(3), if such questions are "made in bad faith, to annoy or embarrass the witness, or are otherwise oppressive . . . ."[3]
    - *Webb v. CBS Broadcasting, Inc.*, No. 08 C 6241, 2011 U.S. Dist. LEXIS 3458, at *17 (N.D. Ill. Jan. 13, 2011) (deposition questions outside of scope of judicial order and other "bizarre" and harassing questions "went over the line in a manner that unreasonably annoyed, embarrassed, or oppressed the witnesses" and terminated the depositions).

    - *Smith v. Logansport Comm. School*, 139 F.R.D. 637, 646 (N.D. Ind. 1991) (suggesting that duplicative questions, if asked in "bad faith," could constitute basis to terminate deposition).

[3] *See* American Bar Association, *Your Questions Answered: Preparing Your Witness for a Deposition*, http://apps.americanbar.org/litigation/committees/pretrial/email/spring2013/spring2013-0513-your-questions-answered-preparing-your-witness-deposition.html.

NOTES

Index

D

E

F

P

R

T