NDNY FEDERAL COURT BAR ASSOCIATION, INC.
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NOTICE OF CLE PROGRAM

The NDNY-FCBA's CLE Committee

Presents

"Socially Distant Depositions"

Thursday, May 28, 2020

Because of COVID-19 related restrictions, this CLE will be offered in a virtual setting, via Zoom. To register for this CLE webinar, click the link provided to receive a link to log in.

10:30 a.m. – 12:00 p.m.

R.S.V.P. for CLE by Thursday, May 21, 2020

While remote depositions were an available method of deposing witnesses in federal court cases before the COVID-19 pandemic curtailed in-person contact, the pandemic has certainly increased the popularity and use of these types of depositions. Even as states begin the re-opening process, we expect to see the continued use of remote depositions because some form of restrictions as to person-to-person contact are sure to remain in place for the near future. This CLE is intended to provide an overview and demonstration of remote deposition technology offered by one of our local court reporting services, and will offer discussion about the legal basis for remote depositions, tips for preparing for, taking and defending these depositions, as well as identifying ethical considerations to be aware of when proceeding in this fashion.

Presenters:

Mitchell J. Katz, Esq.
Partner
Barclay Damon

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Agenda*:*

10:30 am – 10:35 am: Introduction of topic and presenters

10:35 am - 11:30 am: Demonstration of Remote Deposition Technology

- This portion of the CLE is intended to be interactive. Participants will be allowed to submit questions through the Chat and/or Q&A function in Zoom, which will be monitored and addressed while the live demonstration is ongoing.

11:30 am -12:00 pm: Overview of the legal basis for depositions in federal court and ethical considerations involved in remote depositions

The Northern District of New York Federal Court Bar Association has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York.

"Socially Distant Depositions" has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for 1.5 credits with 1.0 credit for Skills and .5 for Ethics and Professionalism requirement.

A code will be provided at a particular point in the program, which can be used to claim CLE credit for participation in the webinar.

This program is appropriate for newly admitted and experienced attorneys.

This is a single program. No partial credit will be awarded.

This program is complimentary to all Northern District of New York Federal Court Bar Association Members.

"Socially Distant Depositions"

Northern District of New York Federal Court Bar Association

May 28, 2020

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I. Federal Rule of Civil Procedure 30(b). Depositions Take by Oral Examination – Notice of the Deposition; Other Formal Requirements

(B) Notice of the Deposition; Other Formal Requirements

(1) Notice in General. *A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.*

(2) Producing Documents. *If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.*

***(3)* Method of Recording.**

(A)* Method Stated in the Notice.** ***The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B)* Additional Method.** ***With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4)* By Remote Means.** ***The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) Officer's Duties.

(A) Before the Deposition. *Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:*

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) **Conducting the Deposition; Avoiding Distortion.** ***If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.***

(C) After the Deposition. *At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.*

(6) Notice or Subpoena Directed to an Organization. *In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.*

A. Generally, a plaintiff is ordinarily required to make themselves available for a deposition within the jurisdiction in which the action was commenced. *Price v. Priority Transp.*, 2008 U.S. Dist. LEXIS 77326 (W.D.N.Y. Oct. 1, 2008) (citing *A.I.A. Holdings, S.A. v. Lehman Bros., Inc.*, 2002 U.S. Dist. LEXIS 9218 (S.D.N.Y. 2002)).

B. Rule 30 allows a court to order "that a deposition be taken by telephone or other remote means." Fed. R. Civ. P. 30(b)(4); *Alpha Capital Anstalt v. Real Goods Solar, Inc.*, 323 F.R.D. 177 (S.D.N.Y. 2017) ("Holding a deposition by videoconference is frequently a preferred solution to mitigate the burden of a deposition location inconvenient to one or both sides." (internal quote and citation omitted)).

1. The parties may stipulate or request a court order to conduct a deposition by remote means. *Nowlin . Lusk*, 2014 U.S. Dist. LEXIS 10341 (W.D.N.Y. Jan. 28, 2014).

2. Some courts have held that a hardship showing is unnecessary before permitting a telephonic deposition. *See Zito v. Leasecomm Corp.*, 233 F.R.D. 395 (S.D.N.Y. 2006).

3. Other decisions have held that a party must demonstrate compelling circumstances, such as financial hardship or physical inability, before a court may order a telephonic deposition over an objection. *See Gerasimenko v. Cape Wind Trading Co.*, 272 F.R.D. 385 (S.D.N.Y. 2011).

4. When there is a dispute about the location of a deposition, the court is empowered with discretion to make a final determination. *Bank of N.Y. v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135 (S.D.N.Y. 1997); *Alpha Capital Anstalt v. Real Goods Solar, Inc.*, 323 F.R.D. 177 (S.D.N.Y. 2017); *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 69 (2d Cir. 2003) (district court have "broad discretion to manage the manner in which discovery proceeds").

C. Swearing in the Witness

1. Federal Rule of Civil Procedure 28. Persons Before Whom Depositions May be Taken

(a) Within the United States

(1) *In General.* Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or

(B) a person appointed by the court where the action is pending to administer oaths and take testimony.

(2) *Definition of "Officer."* The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

2. Unless the parties stipulate otherwise, the deposition must be conducted before an officer as defined in FRCP 28.

3. As a result of the COVID-19 pandemic, the S.D.N.Y. confirmed/clarified that: "A deposition will be deemed to have been conducted 'before' an officer so long as that officer attends the deposition via the same remote means (*e.g.,* telephone conference call or video conference) used to connect all other remote participants, and so long as all participants (including the officer) can clearly hear and be heard by all other participants." *Sinceno v.*

Riverside Church in the City of New York, 2020 U.S. Dist. LEXIS 47859, at *1 (S.D.N.Y. Mar. 18, 2020).

D. Can Parties Use FRCP 30(b)(4) to Avoid Traveling to the Forum for Depositions?

1. *Shibata v. Swingle*, Civil Action No. 3:16-cv-1349, 2018 U.S. Dist. LEXIS 226630 (N.D.N.Y. Feb. 26, 2018) (BKS/DEP)

Pro se plaintiffs asserted a breach of contract action against the Defendant in this diversity action. The action arose out of a proposed residential construction project for property situated in New York. Defendant noticed plaintiff's deposition to be conducted in Binghamton. Plaintiff requested an order directing that her deposition be conducted remotely via videoconference or telephone because it would cause a financial hardship for her to travel to the district for a deposition.

Holding: "…the court is not persuaded that travel to this district would impose an extreme hardship on [plaintiff] or that a deposition by remote means would be an effective alternative. [Plaintiff] does not disclose any extraordinary or unusual expenses, debts, or financial obligations, other than ordinary cost-of-living expenses. I find that the balance of the certificate of deposit, as well as her real estate holdings, reflect that [plaintiff] possesses sufficient funds, and traveling to New York for her deposition would not impose an extreme hardship.

Rationale: The court questioned the truthfulness of plaintiff's portrayal of her financial circumstances, as her alleged living expenses totaled over $1,800 per month, while her disclosed monthly income totaled only $125 per month. Magistrate Judge Peebles held that "absent compelling circumstances," because plaintiff elected to commence her lawsuit in the Northern District, her deposition should be held within the forum. Further "[i]n an action such as this, where defendants will require [plaintiff] to review a number of documents during the course of her deposition, a telephonic deposition will no doubt be ineffective."

2. *Packard v. City of New York*, 326 F.R.D. 66 (S.D.N.Y. 2018)

This was a civil rights action in which the plaintiffs (on behalf of themselves and other similarly situated) asserted claims against the City of New York arising out of their arrests during the Occupy Wall Street protests. Plaintiff Meacham (who at the time of his arrest resided in New York) resided in Taiwan at the time that his deposition was noticed. Defendant moved to compel Meacham to appear in New York for an in-person deposition; Meacham cross-

moved for a protective order allowing him to appear remotely by videoconference from Taiwan.

Holding: Meacham was permitted to have the option of having his deposition taken by videoconference from Taiwan with 2 conditions: (1) Meacham had to make all necessary arrangements for having his deposition in Taiwan in accordance with the requirements of the FRCP; and (2) Meacham had to bear any additional expenses.

Rationale: Meacham had established that it would be somewhat of a burden for him to travel to New York for his deposition. Further, "[a]ny prejudice to the City of holding a deposition by videoconference seems to the Court to be minimal, since the City will be able to observe Meacham's demeanor through the video connection."

3. *Forauer v. Vt. Country Store, Inc.*, 2014 U.S. Dist. LEXIS 79234 (D. Vt. June 11, 2014)

Defendant made a motion to compel certain plaintiffs to attend their depositions in a conditionally certified FLSA action, in which plaintiffs alleged that they were not properly compensate for pre- and post-shift work. A potion of the plaintiffs had refused, without explanation, to attend depositions, and 4 of the plaintiffs who resided outside of the Vermont, sought an alternative means for taking their depositions that would not require them to travel to Vermont.

Holding: In this case, the court finds that, "considering the policy behind the FLSA [of] encouraging collective actions so that [P]laintiffs may pool their resources, requiring the out-of-state [Plaintiffs] to travel to [Vermont] for a deposition would place a burden on them that would cancel much of the benefit gained by joining in the collective action." Accordingly, the court denied the defendant's motion to compel, and ordered the plaintiffs to be deposed by remote means pursuant to FRCP 30(b)(4).

Rationale: This was an FLSA collective action, in which the discovery dispute focused on whether individualized discovery should be permitted. In considering whether representative discovery is appropriate in these types of cases, courts can consider whether the discovery sought is "unduly burdensome." Here, the court determined that the burden or expense of producing the 25 plaintiffs to appear for depositions did not outweigh the defendant's need for the deposition testimony. The alternative means that are offered by FRCP 30(b)(4) may be appropriate in the FLSA context because "[o]ne of the chief advantages of opting into

a collective action…is that it 'lowers individual costs to vindicate rights by the pooling of resources."" (quoting *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989)). Here, the defendant provided no compelling reason why the depositions of the out-of-state plaintiffs could not occur by alternative means.

II. New York Civil Practice Laws and Rules Section 3113(d) and 22 NYCRR 202.15 (Videotape Recording of Civil Deposition)

CPLR 3113(d) *The parties may stipulate that a deposition be taken by telephone or other remote electronic means and that a party may participate electronically. The stipulation shall designate reasonable provisions to ensure that an accurate record of the deposition is generated, shall specify, if appropriate, reasonable provisions for the use of exhibits at the deposition; shall specify who must and who may physically be present at the deposition; and shall provide for any other provisions appropriate under the circumstances. Unless otherwise stipulated to by the parties, the officer administering the oath shall be physically present at the place of the deposition and the additional costs of conducting the deposition by telephonic or other remote electronic means, such as telephone charges, shall be borne by the party requesting that the deposition be conducted by such means.*

22 NYCRR 202.15 Videotape Recording of Civil Depositions

(a) When permitted.

Depositions authorized under the provisions of the Civil Practice Law and Rules or other law may be taken, as permitted by section 3113(b) of the Civil Practice Law and Rules, by means of simultaneous audio and visual electronic recording, provided such recording is made in conformity with this section.

(b) Other rules applicable.

Except as otherwise provided in this section, or where the nature of videotaped recording makes compliance impossible or unnecessary, all rules generally applicable to examinations before trial shall apply to videotaped recording of depositions.

(c) Notice of taking deposition.

Every notice or subpoena for the taking of a videotaped deposition shall state that it is to be videotaped and the name and address of the videotape operator and of the operator's employer, if any. The operator may be an employee of the attorney taking the deposition. Where an application for an

order to take a videotaped deposition is made, the application and order shall contain the same information.

(d) Conduct of the examination.

(1) The deposition shall begin by one of the attorneys or the operator stating on camera:

(i) the operator's name and address;

(ii) the name and address of the operator's employer;

(iii) the date, the time and place of the deposition; and

(iv) the party on whose behalf the deposition is being taken.

The officer before whom the deposition is taken shall be a person authorized by statute and shall identify himself or herself and swear the witness on camera. If the deposition requires the use of more than one tape, the end of each tape and the beginning of each succeeding tape shall be announced by the operator.

(2) Every videotaped deposition shall be timed by means of a time-date generator which shall permanently record hours, minutes and seconds. Each time the videotape is stopped and resumed, such times shall be orally announced on the tape.

(3) More than one camera may be used, either in sequence or simultaneously.

(4) At the conclusion of the deposition, a statement shall be made on camera that the recording is completed. As soon as practicable thereafter, the videotape shall be shown to the witness for examination, unless such showing and examination are waived by the witness and the parties.

(5) Technical data, such as recording speeds and other information needed to replay or copy the tape, shall be included on copies of the videotaped deposition.

(e) Copies and transcription.

The parties may make audio copies of the deposition and thereafter may purchase additional audio and audio-visual copies. A party may arrange to have a stenographic transcription made of the deposition at his or her own expense.

(f) Certification.

The officer before whom the videotape deposition is taken shall cause to be attached to the original videotape recording a certification that the witness was fully sworn or affirmed by the officer and that the videotape recording is a true record of the testimony given by the witness. If the witness has not waived the right to a showing and examination of the videotape deposition, the witness shall also sign the certification in accordance with the provisions of section 3116 of the Civil Practice Law and Rules.

(g) Filing and objections.

(1) If no objections have been made by any of the parties during the course of the deposition, the videotape deposition may be filed by the proponent with the clerk of the trial court and shall be filed upon the request of any party.

(2) If objections have been made by any of the parties during the course of the deposition, the videotape deposition, with the certification, shall be submitted to the court upon the request of any of the parties within 10 days after its recording, or within such other period as the parties may stipulate, or as soon thereafter as the objections may be heard by the court, for the purpose of obtaining rulings on the objections. An audio copy of the sound track may be submitted in lieu of the videotape for this purpose, as the court may prefer. The court may view such portions of the videotape recording as it deems pertinent to the objections made, or may listen to an audiotape recording. The court, in its discretion, may also require submission of a stenographic transcript of the portion of the deposition to which objection is made, and may read such transcript in lieu of reviewing the videotape or audio copy.

(3)

(i) The court shall rule on the objections prior to the date set for trial and shall return the recording to the proponent of the videotape with notice to the parties of its rulings and of its instructions as to editing. The editing shall reflect the rulings of the court and shall remove all references to the objections. The proponent, after causing the videotape to be edited in accordance with the court's instructions, may cause both the original videotape recording and the deleted version of the recording, clearly identified, to be filed with the clerk of the trial court, and shall do so at the request of any party. Before such filing, the proponent shall permit the other party to view the edited videotape.

(ii) The court may, in respect to objectionable material, instead of ordering its deletion, permit such material to be clearly marked so that the audio recording may be suppressed by the operator during the objectionable portion when the videotape is presented at the trial. In such case the proponent may cause both the original videotape recording and a marked version of that recording,

each clearly identified, to be filed with the clerk of the trial court, and shall do so at the request of any party.

(h) Custody of tape.

When the tape is filed with the clerk of the court, the clerk shall give an appropriate receipt for the tape and shall provide secure and adequate facilities for the storage of videotape recordings.

(i) Use at trial.

The use of videotape recordings of depositions at the trial shall be governed by the provisions of the Civil Practice Law and Rules and all other relevant statutes, court rules and decisional law relating to depositions and relating to the admissibility of evidence. The proponent of the videotaped deposition shall have the responsibility of providing whatever equipment and personnel may be necessary for presenting such videotape deposition.

(j) Applicability to audio taping of depositions.

Except where clearly inapplicable because of the lack of a video portion, these rules are equally applicable to the taking of depositions by audio recording alone. However, in the case of the taking of a deposition upon notice by audio recording alone, any party, at least five days before the date noticed for taking the deposition, may apply to the court for an order establishing additional or alternate procedures for the taking of such audio deposition, and upon the making of the application, the deposition may be taken only in accordance with the court order.

(k) Cost.

The cost of videotaping or audio recording shall be borne by the party who served the notice for the videotaped or audio recording of the deposition, and such cost shall be a taxable disbursement in the action unless the court in its discretion orders otherwise in the interest of justice.

(l) Transcription for appeal.

On appeal, visual and audio depositions shall be transcribed in the same manner as other testimony and transcripts filed in the appellate court. The visual and audio depositions shall remain part of the original record in the case and shall be transmitted therewith. In lieu of the transcribed deposition and, on leave of the appellate court, a party may request a viewing of portions of the visual deposition by the appellate court but, in such case, a transcript of pertinent portions of the deposition shall be filed as required by the court.

A. Swearing in of the Witness

1. The party authorized to administer the oath, typically a notary public, must be present with the witness during the witness's testimony. CPLR § 3113(d); *Washington v. Montefiore Hosp.*, 7 A.D.3d 945 (3d Dept. 2004).

2. However, as a result of the COVID-19 pandemic, the Governor has allowed all notarial acts to be performed by remote means. Executive Order 202.74 (effective March 19, 2020-April 18, 2020) and Executive Order 202.28 and 202.29 (extending the relevant portions of 202.74 through June 6, 2020).

   Any notarial act that is required under New York State law is authorized to be performed utilizing audio-video technology provided that the following conditions are met:
   - *The person seeking the Notary's services, if not personally known to the Notary, must present valid photo ID to the Notary during the video conference, not merely transmit it prior to or after;*
   - *The video conference must allow for direct interaction between the person and the notary (e.g., no pre-recorded videos of the person signing);*
   - *The person must affirmatively represent that he or she is physically situated in the State of New York;*
   - *The person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed;*
   - *The Notary may notarize the transmitted copy of the document and transmit the same back to the person; and*
   - *The Notary may repeat the notarization of the original signed document as of the date of execution provided that Notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution.*

   a. The Executive Orders allowing a deponent to be sworn in remotely during the COVID-19 pandemic apply only to witnesses who are physically situated within New York at the time of the deposition.
   b. The New York Department of State has issued guidance to notaries who are notarizing documents remotely pursuant to the relevant Executive Orders. Arguably, some of this guidance could apply to notaries who are swearing in witnesses for depositions. *See*

https://www.dos.ny.gov/licensing/notary/DOS_COVID19_RemoteNotaryGuidance.pdf

i. The person seeking the Notary's services, if not personally known to the Notary, must present a valid photo ID to the Notary during the video conference, not merely transmit it prior to or after
ii. The video conference must allow for direct interaction between the person and the Notary (e.g. no pre-recorded videos of the person signing)
iii. The person must affirmatively represent that he or she is physically situated in the State of New York
iv. The EO does not authorize other officials to administer oaths or to take acknowledgements, and only applies by notary publics commissioned by the Secretary of State's office.

3 Tips For Deposing Difficult Witnesses Remotely

*By **Qian Julie Wang***

By **Qian Julie Wang** April 17, 2020, 5:21 PM EDT

Qian Julie Wang

Law360 (April 17, 2020, 5:21 PM EDT) -- Many lawyering tasks can be handled easily, and just as effectively, remotely. Taking a deposition of an uncooperative witness, though, is one task made immeasurably more difficult during the current pandemic.

Although the end product of a deposition is a written transcript that can be just as easily produced via a virtual deposition, much of the art of taking a deposition comes down to reading and deploying body language and using momentum to control adverse witnesses. As incredible as technology has become, it offers poor substitutes for nonverbal communication, which can have pivotal effects on how a deposition transcript unfolds.

While this may not be a problem where the witness is cooperative, that is rarely the case. And as more and more courts around the country order that depositions be held remotely, many attorneys will soon be in the unenviable position of deposing adverse witnesses remotely.[1]

Here, I offer a three strategic tips for those still learning to navigate these new dynamics. Notably, my perspective on depositions is informed by my experiences from various angles: as a trial attorney building the record; an appellate litigator making strategic decisions based on that record; and a judicial law clerk poring through the record to arrive at recommendations for judges.

1. Get to know the technology and make sure you have standby support

There are myriad services offering technological options for remote depositions. Consider scheduling demos with several services to find the best fit for your style and the particular deposition.

Once you've chosen a provider, be sure to run at least one, if not several, follow-up demos to troubleshoot and develop full comfort with the software. Understand all of the various functions of the software so that you know, for instance, to request that the private chat function between the witness and his counsel be deactivated for your deposition.

Notably, certain facets of the technology have been designed to cater to the strategic needs of depositions. For instance, services are careful to give the deposing attorney full and complete control of when the witness is privy to each exhibit.

Regardless of whether you choose to use a share screen function to present exhibits or an outside exhibit management program like eDepoze, you have full control over when the witness and opposing counsel has access to each document. With share screen, no one is able to see the exhibits until the attorney presses the button to begin screen sharing, and with exhibit management programs, no one

will see the exhibits until you formally introduce them.

Regardless of which form of exhibit presentation you choose, however, make sure to practice with the program until it becomes as rote as, for instance, the process of marking an exhibit or laying foundation. Technological glitches can be an insidious barrier to getting key admissions from a difficult witness, because the strategy may often turn on projecting authority and using the element of surprise.

With that in mind, make sure you know exactly how to introduce an exhibit on the software at the exact time you need it. Presenting a smoking gun exhibit only to be hit by a technological hiccup gives the witness (and her counsel) much-needed time to regroup and formulate explanations that dodge key admissions. This is not to say that you can ever ward against all glitches, but developing agility with the software will ensure that any issues will not throw you off focus.

Attorneys are also well-advised to pay extra for a dedicated standby technician, a service many providers offer. Even without a standby person, providers can always be reached to fix glitches, and for the most part, they are resolved in approximately 10 minutes. Reserving a technician in advance just for your deposition can reduce that lag time and keep the parties' focus on the questioning.

2. Be sure to hire a videographer, and consider making more note and stipulations on the record.

Hiring a certified videographer is a must.[2] First, without a certified videographer, any footage of a deposition that may be captured by the software is not admissible at trial. Second, unless you're deposing a movie star, most people do not feel comfortable being recorded. Videography can be an added tool in your arsenal to subtly exert pressure on the witness and opposing counsel.

Third and perhaps most importantly, videography can offset many of the disadvantages of taking a remote deposition.

In an in-person deposition, you would be entitled to look at any notes that the witness has brought to the session, and you would know if opposing counsel were coaching the witness. In a remote setting, it is not possible to know for certain whether the witness is consulting notes taped to the wall across from him, or covertly reading private text messages or emails from his attorney.

It is unlikely that you will be able to lock down a witness's computer and phone, so consider having the witness sit a few feet back from the screen, such that his torso and arms are fully visible. Then, have him testify on the record at the beginning of the deposition that he has no other programs open and will not be consulting any notes, texts, emails, chats, or anything of the sort while in session.

This makes it so that if the witness later appears to be consulting another source, you can note that on the written record in a timely and clear fashion — both to alert the court and to control the witness.

Indeed, consider erring on the side of making more stipulations and notes upfront and on the record, whether it pertains to the validity of having the witness be sworn over videoconference, or whether additional time incurred by technological issues will go toward the federal rules' ceiling of seven hours.[3]

3. Consider adopting a different style that may be better suited to videoconference.

Deposition style is a very personal matter that comes down to the most effective technique for the particular attorney. Certain styles, however, may be extremely forceful in person and have limited effectiveness over videoconference. If you usually play the "bad cop," consider whether your go-to techniques may inflict less distress on a witness who is in the comfort of her own home and where your presence is limited to a small screen.

And, if you frequently deploy using long pauses to induce the witness to fill the silence, think about whether that may work less forcefully now that the parties are no longer in the same room together. Indeed, extended silence may in fact give the witness or her counsel opportunity to muck up your record — such as by inquiring whether the audio has dropped and asking whether you are still connected.

The possibility of technical issues may also counsel attorneys to prepare questioning and outlines in the form of modules that are more malleable in sequence. Technology demands flexibility. If an important line of questioning loses momentum or force due to a break in internet connection, consider falling back to safer ground, and revisiting the original topic when momentum has built up again.

Similarly, if you're having a hard time getting the witness to give you a clean admission, consider a method by which you return to an important topic throughout the deposition, intermingling those questions with more innocuous questions on other topics.

Split what would otherwise be one block of important questioning into two or three blocks, and spread them out over the course of the day. This may be more effective than asking them in close sequence, which will tip the witness off to the exact admission you're pursuing, and likely cause defense counsel to interject.

Of course, this approach works only for certain types of topics and questions, but if you are used to working off a set order of closely related questions, the technique may be more applicable than you might think.

Remember that law clerks, judges and jurors rarely read entire swaths of the transcript sequentially or in full: instead, they will read what you present to them, through quotes in your filings and exhibits. As such, getting a series of interrelated testimony culminating in one key admission can be effective even if it is meted out over the course of the day because you can still cobble the bits together after the fact. And of course, it is certainly better than no admission at all.

Finally, repurpose what travel time you save by writing tight questions that are closely hewed to the exhibits. This serves a dual purpose.

First, it is always the case that well-worded and artfully written questions give adverse witnesses less room to wriggle away from the admissions you're after. It is even more vital now that you are limited to engaging with the witness through the narrow confines of a computer screen.

Second, questions that hew closely to the language of the underlying documents give you the flexibility to get fundamental testimony before tipping your hand with the exhibits themselves. In some situations, they may even allow you to dispense with introducing certain exhibits altogether.

This can be critical if you encounter repeated issues with the exhibit management software, as you

might be able to save valuable time without much sacrifice by working off your questions alone. It can also be a game-changer if you find that a lag is repeatedly giving the witness or defense counsel enough lead time with key exhibits to come up with evasive explanations and disruptive interjections that impede your ability to create a clean record.

There are many advantages to remote depositions, chief among them flexibility, reduction in expenses and travel, the increased likelihood that defense counsel will zone out or get distracted, and even ease of training access for junior associates who would otherwise not be able to attend and observe a deposition.

Most of all, though, they have become a necessity. Through diligent preparation, attorneys can ward against the disadvantages of deposing difficult witnesses remotely and still accord their clients the best advocacy possible while staying safe and healthy during these extraordinary times.

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[1] Courts across the country, ranging from the U.S. District Court for the Southern District of New York and the U.S. District Court for the Northern District of Illinois to the U.S. District Court for the the Middle District of Louisiana, have ordered that depositions go forward via videoconference. At least one court, in the District of Delaware, has declined to compel depositions by videoconference, indicating instead that the depositions did not need to proceed as scheduled prior to the coronavirus outbreak.

[2] Although videography does mean additional cost, much of that cost may be defrayed by the savings in airfare and accommodations that regular depositions would otherwise incur.

[3] Some courts have offered clear guidance on the swearing-in process. The Southern District of New York, for instance, has specifically ordered in one case:

> Unless the parties stipulate otherwise, the deposition must be "conducted before an officer appointed or designated under FRCP 28" and the deponent must be placed under oath by that officer. "Before an officer" includes an officer that attends the deposition via the same remote means (e.g. telephone conference call or video conference).

The Florida Supreme Court has also explained that witnesses may be sworn "remotely by audio-video communication technology from a location within the State of Florida, provided they can positively identify the witness." If the witness is outside of Florida, he or she "may consent to being put on oath via audio-video communication technology by a person qualified to administer an oath in the State of Florida."

View comments

TEN COMMANDMENTS FOR PREPARING THE DEPOSITION WITNESS

By John C. Maloney Jr.

Depositions are the principal and preferred discovery tool in civil litigation. They provide opportunities for adverse party counsel to find out the facts of the case, and to assess the credibility of and obtain admissions from the deponent. To perform well at a deposition, a witness must be thoroughly prepared by counsel. Indeed, the lawyer has an ethical as well as a professional duty to prepare the client for deposition.

However, in most jurisdictions there are significant restrictions on what the defending lawyer can do at the deposition itself with respect to objecting to questions, directing the witness not to answer or conferring with the witness after the deposition begins. The restrictions found in the Rules of Civil Procedure, local court rules or individual judge rules effectively make the defending lawyer a

"potted plant" during the deposition. In fact, a recent decision in a federal court in Iowa, to make it unmistakably clear that the defending lawyer is expected to remain as silent as possible during the deposition, sanctioned a major national firm because it found that counsel's persistent, unspecified form objections to the examiner's questions constituted witness coaching and excessive interruptions.

As a result of these constraints on defense counsel, the deposition witnesses must largely be able to fend for themselves. This means counsel best defends the witness by preparation in advance of the deposition. The skills necessary to succeed at deposition can be learned, but it takes significant time, effort and planning by counsel during the preparation sessions.

Counsel and witness should plan to meet at least twice, once shortly after receipt of the notice of deposition or subpoena, and a second time as close to the date of the deposition as possible. At the first session, counsel should assess the witness to determine how much preparation will be necessary, explain the basics of what occurs at a deposition – including who is entitled to be present from the other side – and discuss the specific roles and responsibilities of the witness and defense counsel at the deposition.

Subsequent preparation sessions will require an intensive review of the pleadings, key interrogatories and critical documents relevant to the lawsuit. A chronology, list of key participants and identification of trial themes will help to provide the needed context.

A significant amount of time, however, must be spent in practicing answering questions and working together on both the content and vocabulary used in the answers. Effective use of time spent in rehearsal and "woodshedding" the witness, or "sandpapering" the witness testimony, is critical to success in deposition testimony.

The lawyer preparing the witness confronts certain ethical constraints. Counsel may not help prepare testimony that counsel knows or ought to know is false. But so long as the testimony is not false or perjured and is the witness's own testimony, the lawyer has not crossed an ethical line. The lawyer can explain the law in a given situation and can seek to persuade a witness, even aggressively, that the witness's initial version of a certain fact situation is not complete or accurate.

Counsel also can make the witness aware of how other witnesses have testified on the same subjects. The lawyer may not, however, influence the witness to alter testimony in a false or misleading way or put words in the witness's mouth.

In the preparation sessions, the lawyer must know how far it's possible to go without crossing the ethical line. The lawyer also must make sure the witness buys into the learning process and the refinement of testimony. After practicing questions and answers, the witness must agree that the testimony, as refined and rehearsed, is truthful and is not misleading in any way. Finally, having experienced the toughest and most complete cross examination in the lawyer's preparation sessions, the witness will be ready to perform at the deposition with self-confidence and the conviction that the complete truth is on her side.

THE DEFENSE LAWYER IS EXPECTED TO REMAIN AS SILENT AS POSSIBLE DURING THE DEPOSITION.

The following checklist of ten commandments will assist counsel in preparing the deposition witness both effectively and ethically:

1. Tell the truth.

- First, last and always.
- You are entitled to a fair, understandable question, and the examiner is entitled to a complete and accurate answer.

2. Try to wait at least three seconds before responding to the question.

- Give your attorney time to make an objection.
- Think before you begin to speak.

3. Listen carefully to the question, and to your attorney's objection.

- Make sure you understand the question that was asked.
- Are you sure of the time period?
- Are you sure of the context?
- Do not hesitate to ask that the question be read back by the court reporter.

continued on page 61

Deposition Witness

continued from page 55

4. Do not hesitate to say you do not understand the question or to ask the examiner to rephrase the question or to be more specific (as to time period or context).

- Be polite and civil, but wary.
- Remember the examiner is not your friend.
- Despite the comfortable surroundings in the conference room, this is an interrogation, not a conversation.
- Watch any "off the record" chit chat.

5. Answer only the question that was asked. This is harder than you think.

- Do not volunteer unnecessary information (you will need to practice this).
- The examiner should follow up and get further details if he/she wants them.

6. Take the time to review every page of every document you are asked to look at or identify before responding to any question. As you review the document, ask yourself:

- Have I seen this before? (Maybe I saw it only during witness prep.)
- How am I linked to this document?
- Did I write it?
- Did I receive it (as addressee, "cc," or because it is a type of material that likely crossed my desk)?
- Is the document complete?

7. Recognize and be aware of the differences between responding "I do not know," "I do not remember" and "I do not recall."

- "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.

8. Be vigilant, and do not allow the examiner to put words into your mouth.

- Very few questions can be answered completely and accurately with a "yes" or "no" response.
- Do not be afraid to say you cannot answer.
- Do not accept examiner's characterization, descriptions or underlying assumptions if you are uncomfortable with them or any part of them.
- Before responding, you may need to break any question down into manageable subparts (as in "that is not completely true," or "that happened frequently, but not in this case…")
- When asked leading questions such as "would it be true to state," "is it correct that" or "isn't it a fact that," do not hesitate to respond by saying "it would not be entirely true," or "it would not be totally correct" or "it is not entirely true," if those are accurate responses. You are entitled to and should push back against the examiner, to resist total agreement or to refuse to provide requested "sound bites" if what follows the leading question is not entirely true or accurate.

9. Be wary of stating absolutes in your responses (as in "never" or "always") unless you are certain. You may need wiggle room later, so be modest in your recollection of events.

- This event happened "a long time ago," or "more than five years ago," or "I do not remember exactly, but…" or "there were a lot of documents involved."

10. Protect the attorney-client privilege and attorney work product doctrine.

- This is an exception to the general rule of "no conferences while a question is pending."
- Do not hesitate to ask to confer with your counsel before responding if you reasonably believe, or have some confusion about, whether your response may involve communication with your attorney. ■

EFFECTIVE USE OF TIME SPENT IN REHEARSAL AND "WOODSHEDDING" THE WITNESS, OR "SANDPAPERING" THE TESTIMONY, IS CRITICAL TO SUCCESS IN DEPOSITION TESTIMONY.

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I. DEPOSITION TIPS

A. Tell the truth.

B. The objectives of the deposition are:

1. To get the deposition over with;

2. To give the opposition as little information as possible consistent with the oath to tell the truth;

3. To remain in as strong a position as possible to be a positive witness at trial. The goal is not to prove your affirmative case or to show how smart you are.

C. The cardinal rule: LISTEN to the question and answer only what is asked. Do not volunteer additional information. In other words, the less you say, the better. We can always introduce the additional information later, if appropriate.

D. Every word said during the deposition is taken down by the court reporter. At the time of trial, all that matters is the transcript.

E. Each deposition is of critical importance to the case. No case is won or lost by a single deposition, but a witness can do serious damage to a case by an admission against interest or volunteering information the other side does not know. The deposition can be used to support a motion for summary judgment and can be read at trial to contradict testimony given at trial, thereby impeaching your credibility in front of a jury. Remember that a single question and answer can be read out of context; thus every question and answer is important.

F. Keep your answers as simple and direct as possible based on your own personal knowledge. The four preferred answers are "Yes", "No", "I don't know", or "I don't recall". Remember, however, that a "Yes" answer adopts all the characterizations of the question.

G. Avoid absolutes like "I never" or "I always" and where possible make the interrogator fight for details.

H. Remember that your only obligation is to testify to your own personal knowledge. You should never guess, speculate or assume something about which you do not have personal knowledge. For example, do not assume something happened based on standard operating procedures because there may have been an exception for the circumstances presented.

I. Do not speculate as to another's purpose, mental state or intent in performing some act or in writing some document.

J. Remember that you are not expected to know everything. Do not be afraid to say "I don't know".

K. There is a difference between answering "I don't know" and "I don't recall". The latter suggests that you did have personal knowledge but cannot remember now.

L. Wait until the question is completed before starting to answer. Always pause at least for a count of five, even in the seemingly easy background questions. (One simple way of doing this is to repeat the question in your mind.) This sets a patterned pace, allows me an opportunity to object and allows you to plan your answer.

M. Do not hesitate to ask that the question be repeated or rephrased to make sure that you heard all of it and understood it in its entirety.

N. Listen to any objections that I might make. One of the purposes of such objections is to signal traps or other problems that I see in a question. If I object that I did not understand the question, then you should say the same thing. Often times I will make an objection simply for the record and will instruct you to go ahead and answer the question.

O. Even if one of my objections seems petulant, or designed to harangue the interrogator, do not be concerned. This is not a waste of time but is part of our strategy.

P. Don't let the lawyers' arguing bristle you.

Q. Generally speaking, the less I have to say, the better things are going. If I have been quiet for a period of time and then I say something, listen because it must be important.

R. You may be asked a question that requests that you disclose privileged information. I will advise you before answering that you should not answer the question for the reason that you may be waiving a privilege which you personally or your company possess. In order to perfect the issue for presentation to the court, the interrogator may ask you whether you refuse to answer the question. Without reservation, you should answer "Yes, on advice of counsel".

S. You always have a right to consult with your attorney during the deposition. While you are free to consult with me prior to answering a question, you should use this privilege sparingly. Opposing counsel can note the consultation on the record and use it at trial to argue that the answer was contrived.

T. It is important that you remain calm and controlled during the deposition. Be respectful; do not argue or become angry no matter what is said by opposing counsel. On the other hand, do not relax until the deposition is over. Do not make jokes, be sarcastic, cute or devious or use profanity. The written word will not reflect your inflections or humorous intent and can be read back verbatim to a judge or jury to haunt you.

U. Do not worry if you should happen to make a mistake in testifying; it is not unusual. You may want to point out that you are mistaken on a certain proposition or to advise me of the mistake at a convenient break so that we can clear the matter up at an appropriate opportunity.

V. You will be shown documents during your deposition. You should first determine what connection you have with the document, i.e., addressee, author, carbon copy, etc. Before answering any question about the document, read the entire document. Do not characterize the document, particularly where it is written by someone else. Do not agree to supply other documents or information. I will handle those requests from the interrogator.

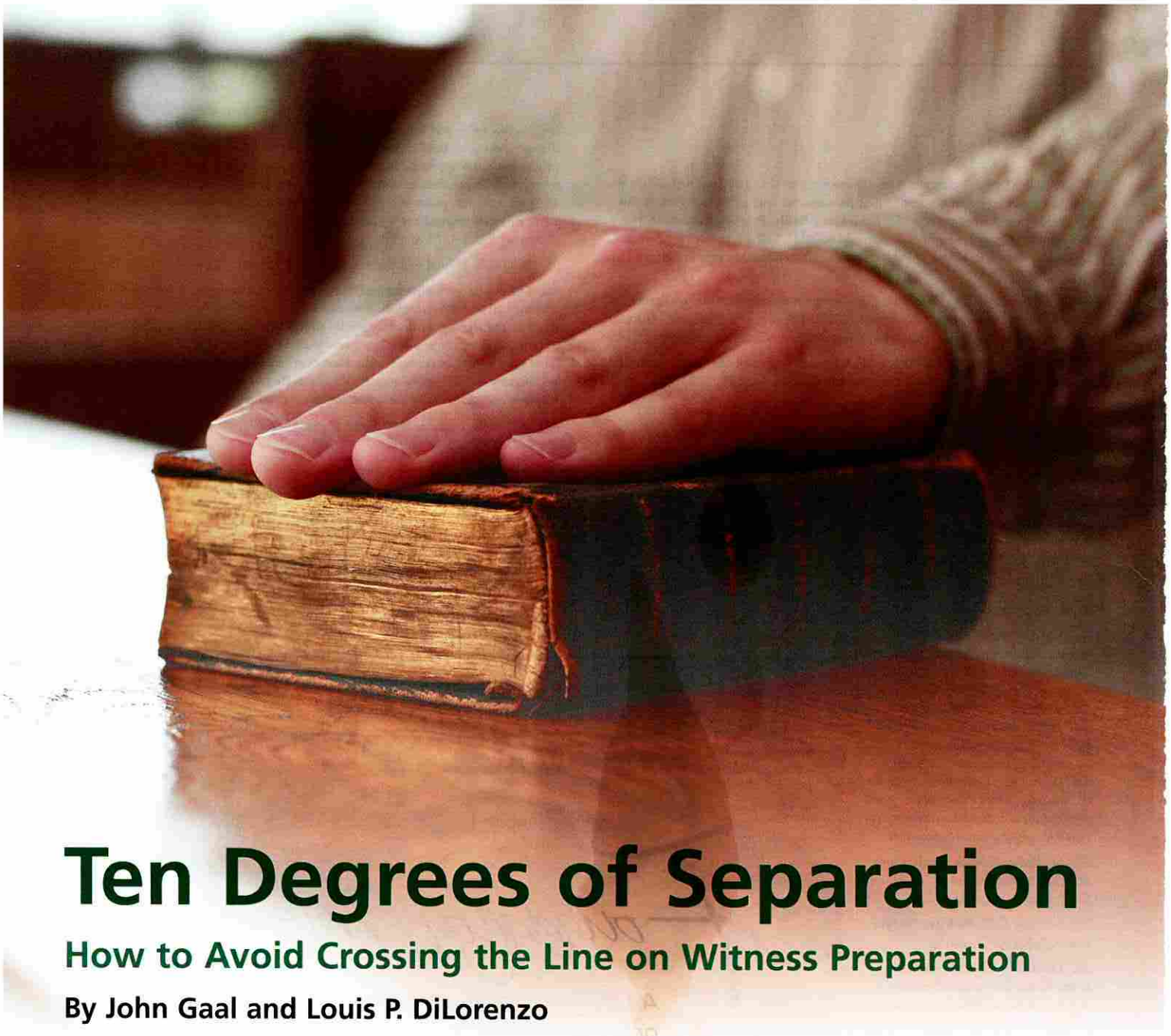
W. If asked during the deposition whether you have met with counsel prior to the deposition, do not hesitate to say that you have. Every deponent has a right to confer with counsel beforehand.

X. If you are asked hypothetical questions, I will object. If the interrogator persists, do not answer such questions until you are sure you understand the assumptions and feel they are realistic. If you disagree with the assumptions or based on your experience feel they do not

accord with reality, then say so and express a preference not to speculate or guess. If the assumption does not correlate with your experience, your honest answer may well be "I don't know" or "that has never happened in my experience, so I would be guessing".

Y. If you get tired, want to use the washroom or want to discuss something with me, don't hesitate to ask for a break.

Z. If the interrogator asks you something like "Is there anything you could do to refresh your memory on this topic?", and you cannot think of anything specific which would, you should respond "Perhaps, but I can't think of anything right now".



Ten Degrees of Separation

How to Avoid Crossing the Line on Witness Preparation

By John Gaal and Louis P. DiLorenzo

Witness preparation is an accepted practice in the United States. Attorneys are not only expected to prepare witnesses for trials and depositions, but it is their professional responsibility as advocates for their clients to do so.

Attorneys often meet with witnesses before they give testimony to discuss with them what they should expect at an upcoming proceeding. Although there is no explicit affirmative duty to prepare a witness for trial, the failure to do so can constitute a breach of an attorney's professional responsibility, as attorneys are required to "competently" represent their clients.[1]

This representation of clients, however, must be "within the bounds of the law." Attorneys must be careful not to cross the line from permissible witness preparation to impermissible witness coaching by suggesting what testimony a witness should give. A widely quoted rule of thumb has been that "an attorney can instruct a witness how to testify, but should refrain from telling a witness what to say."[2] As noted by the N.Y. Court of Appeals:

> [An attorney's] duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.[3]

The *Restatement (Third) of the Law Governing Lawyers* § 116, Comment b broadly[4] provides that witness preparation may include:

> [D]iscussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observa-

> tions or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear.

However, Comment b also states that a lawyer may not "assist the witness to testify falsely as to a material fact." It also further notes that inducing a witness to testify falsely can be a crime, "either subordination of perjury or obstruction of justice, and is ground for professional discipline and other remedies."

So, how does an attorney discern what is permissible and what constitutes crossing the line? Below are 10 steps to follow as you walk the line.

1. Instructing a Witness About the Law Before Learning the Facts

A common issue for lawyers is whether to advise a client (or other witness) of the applicable law before hearing the client's (or witness') version of the facts.[5] Under New York Rules of Professional Conduct Rule 3.4(b) (RPC), a lawyer must not "participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false." Similarly, under the ABA Model Rules of Professional Conduct, a lawyer must not "counsel or assist a witness to testify falsely."[6] However, lawyers are permitted to interview witnesses prior to their testifying, and in preparing a witness to testify, a lawyer may discuss "the applicability of law to the events in issue."[7] The obvious concern in leading with the legal "lecture" is that doing so may induce a client/witness to alter testimony to fit "legal needs" rather than to only tell the truth. On a less sinister level than outright fabrication, the lecture might simply subconsciously alter a witness' perception and recollection.[8]

The Nassau County Bar Association Committee on Professional Ethics has specifically addressed this issue in Opinion No. 94-6 (1994). It considered the following scenario:

> A client consults with inquiring counsel about an automobile accident the client was involved in. Prior to discussing the case further inquiring counsel explains what is necessary to be successful on a claim as follows:
>
> Before you tell me anything . . . I want to tell you what you have to show in order to have a case. Just because you got hurt it doesn't mean you have a case. I can't tell you what to say happened because I wasn't there. And I am bound by what you tell me happened and it must be the truth. Now, I know the intersection.
>
> Main Street [place where the accident took place] is governed by a Stop Sign. If you went through the Stop Sign without stopping – you will most likely have no case. If you stopped momentarily and then proceeded through the intersection you might have a case. If you stopped at the intersection and before proceeding to enter the intersection looked carefully and saw no cars that you believed would impede your proceeding then you have a much better case.

The Committee noted that whether this interview approach was appropriate presented a difficult question. On the one hand, the Committee recognized that by educating the client before being given a full recitation of the facts, the attorney may be allowing the client to tailor his story to fit the legal standards. On the other hand, to mandate keeping the client ignorant of the law until he has given a recitation of the facts could be viewed as "legislating" a mistrust of the client's honesty. The Committee ultimately determined that as long as the attorney in good faith did not believe that he or she was participating in the creation of false evidence, the conduct did not violate the N.Y. Code of Professional Responsibility.

This scenario presents perhaps the classic illustration of the importance of "intent." Clearly making sure a witness – especially a client who has a direct interest at stake – understands the legal requirements to prevail so that he can better understand the context of his testimony and is better positioned to tell his lawyer, truthfully, about facts which he might not otherwise appreciate as significant, is permissible. Lecturing a witness/client on the law before learning what he has to say, for the purpose of allowing – even inducing – him to conform his testimony, and create helpful "recollections" accordingly, is not. Generally, the most prudent course of action – to avoid even an appearance of impropriety – is to "save the lecture" until after the lawyer has learned the basics of the witness' testimony so that it is better used as a true "memory jogger" rather than a "memory creator."

Professor Wydick,[9] along with several other commentators, reference the "lecture" scene from *Anatomy of a Murder* by Robert Traver, 35–49 (1958), as perhaps the best example of using the "lecture" to cross the line in witness preparation.[10]

Anatomy of a Murder is a story of a criminal defense attorney, Biegler, and his client, Army Lt. Manion. Manion, in front of several witnesses, shoots a man who raped Manion's wife. The lawyer is worried that in preparing his client, "a few wrong answers to a few right questions" will leave the lawyer with a client "whose cause was legally defenseless."[11] As a result, the lawyer lectures his client on the law of murder and possible defenses. He explains the law in a way that makes his client understand his only hope is a type of insanity. The self-interest light bulb goes on and the client then describes his mental

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condition so as to fit within the definition his lawyer just explained in detail. In case the reader missed what just happened in the story, the jurist-author explains:

> The Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical . . . Hence the Lecture, an artful device as old as the law itself, and one used constantly by some of the nicest and most ethical lawyers in the land. "Who, me? I didn't tell him what to say," the lawyer can later comfort himself. "I merely explained the law, see." It is a good practice to scowl and shrug here and add virtuously: "That's my duty, isn't it?"[12]

There appears to be no per se ethical prohibition against the simultaneous preparation of multiple witnesses.

2. Altering the Witness' Words

Lawyers, more than most people, understand the importance of words, especially the "right words." As Mark Twain wrote, "the difference between the almost right word and the right word . . . [is] the difference between the lightning bug and the lightning."[13] In the course of preparing witnesses to testify, lawyers often – sometimes at their own initiation and sometimes at the request of the witness – suggest ways to better communicate the substance of the testimony the witness is to deliver, including the suggestion of specific wording. This issue was addressed in D.C. Bar Ethics Opinion No. 79:

> [T]he fact that the particular words in which testimony . . . is cast originated with a lawyer rather than the witness whose testimony it is has no significance so long as the substance of that testimony is not, so far as the lawyer knows or ought to know, false or misleading. If the particular words suggested by the lawyer, even though not literally false, are calculated to convey a misleading impression, this would be equally impermissible from the ethical point of view. Herein, indeed, lies the principal hazard . . . in a lawyer's suggesting particular forms of language to a witness instead of leaving the witness to articulate his or her thought wholly without prompting: there may be differences in nuance among variant phrasings of the same substantive point, which are so significant as to make one version misleading while another is not. Yet it is obvious that by the same token, choice of words may also improve the clarity and precision of a statement: even subtle changes of shading may as readily improve testimony as impair it. The fact that a lawyer suggests particular language to a witness means only that the lawyer may be affecting the testimony as respects its clarity and accuracy; and not necessarily that the effect is to impair rather than improve the testimony in these respects. It is not, we think, a matter of undue difficulty for a reasonably competent and conscientious lawyer to discern the line of impermissibility, whether truth shades into untruth, and to refrain from crossing it.[14]

We all remember, for example, James Mason preparing the anesthesiologist to testify in the movie *The Verdict*. When asked what caused his patient to lose oxygen, he first says, "She'd aspirated vomitus into her mask." In response, Mason says, "Cut the bullshit, please. Just say it. She threw up in her mask," and the doctor then repeats that phrase verbatim.

But, of course, even this conduct can go "too far." For example, influencing a witness in an automobile accident case to change her unfiltered statement about a "recklessly speeding car" which was involved in a "thunderous crash" to one about a "car traveling down the road and hit a parked vehicle" may go too far. While the "revised" statement may be accurate, the changes have affected the substance of the testimony.[15]

In *Ibarra v. Harris County Texas*,[16] the court considered the impact of a trial consultant's introduction of "new language" into the testimony of witnesses. In this case, which involved a § 1983 action against a Texas county and several law enforcement officers, an expert consultant had prepared a report justifying the conduct of the officers, in part, based upon the fact that the events in question had taken place in what the consultant described as a "high crime area" and that the officers' conduct could be justified because of concern over "retaliation." Both of those terms became linchpins of the defense theme, yet neither were ever mentioned in the officers' pretrial statements. Their trial testimony, which followed meetings with the consultant, referred repeatedly to these specific concepts.

In reviewing claims of improper witness coaching by defense counsel (since the consultant operated generally under the direction of and in conjunction with defense counsel), the Fifth Circuit noted that "[a]n attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way."[17] The plaintiffs in the 1983 case argued that these "terms of art" as additive of prior testimony reflected a conspiracy between the defendants and the consultant. The court, not surprisingly, noted that "the appearance of these terms in the litigation would not be noteworthy if they merely repackaged the witnesses' prior testimony, neither adding nor subtracting anything substantive." But it ultimately accepted the District Court's conclusion that this was an impermissible alteration of testimony in order to substantively conform the witness' testimony to the defense's novel theories of the case. The result was that the Fifth Circuit upheld misconduct findings and sanctions against the defense counsel involved.

In many situations, whether the suggested language change goes too far may depend on context and materiality. Where the language relates to something legally immaterial, but which nonetheless might be prejudicial to the jury, suggested alterations are likely to be more acceptable. On the other hand, where the testimony goes to the core issue, altering the witness's more emotional description may actually impact the substance of the testimony, thereby rendering it false, and goes too far.[18]

3. Changing the Witness's Appearance, Demeanor and/or Confidence

Most commentators seem to agree that influencing the witness's appearance and/or demeanor, to make a more presentable/likeable (credible) witness is permissible.[19] But at the extremes, "influence" in this context can be problematic. There is, of course, a natural disincentive to "tweaking" a witness's appearance/demeanor too much, in that it may become an easy target on cross-examination (or for rebuttal witnesses who "know" what the witness looks and sounds like in the "real world") and actually serve to undermine the witness's credibility. And, of course, going too far can simply amount to perpetrating a fraud on the court. Thus, no one would think that a lay witness could take the witness stand in clergy garb. Similarly, urging a non-Christian to wear a visible cross while testifying before what is believed to be an all-Christian jury may also go too far.[20]

In *Professional Conduct and the Preparation of Witnesses for Trial*,[21] the author writes of the communicative nature of demeanor and places it within one of three categories: (1) behavior not intended to be communicative (for example, involuntary or spontaneous conduct such as a yawn), (2) behavior intended to communicate a general message (for example, the use of polite mannerisms or wearing a suit, intended to convey the notion of an upstanding credible citizen) and (3) behavior intended to convey a specific message (such as expressing surprise at something). The author suggests that conduct in the first category is not intended to be communicative and, by definition, cannot be falsified. He also suggests that demeanor in terms of the second category is too general to be capable of being falsified or misrepresented, although it seems in the extreme (clergy garb or wearing a cross) it could be. The third category is of course the most subject to creating misrepresentation. Thus, for example, a witness' feigned surprise at a known fact or an insincere emotional reaction could be tantamount to an explicitly false statement.

More problematic, because of its easy potential to substantively alter the meaning of testimony, and the difficulty in countering it through cross-examination, is instilling a witness with "confidence" if false or taken to the extreme. While no one would quarrel with preparation and practice (even repeated) to make a witness more comfortable and to overcome the natural jitters of testifying, blindly instructing a witness of the need to be "confident" in her testimony can cross the line where the implicit meaning – or foreseeable outcome – is that the witness should come across as "firmly" recollecting that which in fact she is unsure of. Thus, as one commentator has observed, "[o]ne can easily envision situations . . . where insisting that a witness answer . . . with the tone and appearance of complete confidence will improperly mask the witness' real belief, which is that their recollection of a particular phone call or meeting is hazy at best, or that they were not fully comfortable with a decision they made . . . ."[22]

4. Creating Memory and/or Creating Inducements to False Testimony

A witness preparation Memo and the EEOC/Mitsubishi letter[23] illustrate the problems created by not relying on the witness to provide you with their testimony initially but rather "setting the stage" for the witness first. These issues are akin to the "lecture" problem except instead of leading with the "law," the lawyer is effectively leading with "desired facts" (or at least strong suggestions as to what those facts should be). In both the Memo and Mitsubishi cases, there were no final determinations of wrongdoing. Nonetheless, their substance is troubling. And it is particularly troubling if that information was first provided to the witness before discussions with counsel. Many of the matters raised in those documents might well have been proper for counsel to investigate with a witness after first hearing what they had to say on their own, but when performed in the fashion it appears it was completed, it smacks of an attorney introducing themselves to a witness with: "Here are the five things I need you to say to have a perfect case. How many of them can I get you to say?" Such a method raises serious questions about the reliability of the responses. Indeed, the same outcome is possible through the inappropriate use of leading questions to guide a witness in the development of his or her recollection.[24]

5. Simultaneous Preparation of Multiple Witnesses/ Using Other Sources to Refresh Recollection

There appears to be no per se ethical prohibition against the simultaneous preparation of multiple witnesses.[25] One court, the Sixth Circuit,[26] focused on whether information concerning the joint meeting could be a subject of cross-examination. Interestingly, there was a recording of the group meeting and one witness was persuaded in the joint session that he had heard racial slurs despite denying it earlier. Although there is no per se violation against group preparation, the process can create multiple problems (e.g., creating the appearance of collusion if it comes out at trial; weakening the value of each witness's testimony; creating false recollections and perceptions (even if unintentionally)) that often can outweigh the expediency and efficiency this approach offers.[27]

It is less problematic to use external sources – documents, another witness's recollection/version – to assist a witness in preparing for testifying when it is done after the witness has first exhausted their own, unassisted recollection. In the end, at least the D.C. Bar seems to be of a mind that "the governing consideration for ethical purposes is whether the substance of the testimony is something the witness can truthfully and properly testify to." If so, the fact that the particular point of substance was initially suggested by someone else is without significance.[28]

6. Only Answer the Question Asked/"I Don't Recall"

All lawyers have instructed witnesses, in one manner or another, to answer "only" the question asked and if they do not truly recall something, to say so. But this advice needs to be provided in a more complete context. For example, while the general proscription against volunteering information not asked for is appropriate, witnesses should understand that "half an answer" (even if literally due to having been asked only "half a question") which leaves a false or misleading impression is inappropriate.[29] So too can counseling a witness that "any memory less than a vivid one is no memory at all" (so that questions are untruthfully met with "I don't recall") constitute inappropriately influencing the substance of a witness' testimony.[30]

7. Repeated Rehearsals

It is common to hold multiple "rehearsal" or role playing sessions with a witness, to go over expected direct and cross examination. Like most witness preparation techniques, there is nothing inherently improper in this conduct.[31] Also like most preparation techniques, this practice can go too far, both practically and ethically. Some level of preparation allows a witness to feel comfortable and testify confidently in a focused manner. On the practical side, too much preparation can create the appearance of a witness who is too "slick" for his own good. It can also lead to a witness being very comfortable with the material covered in the preparation but completely at a loss to respond to any "twists" that often come up in the course of testifying, thereby undermining that portion of their testimony that initially appeared to go "well." The ethical concern is that repeated rehearsals can improperly affect both the substance of the witness' testimony and the conviction with which the witness presents it (despite internal doubts about the accuracy of what they have to say), leading to the creation of false evidence.

> If the purpose of role playing is merely to accustom the witness to the rough and tumble of being questioned, then it is ethically unobjectionable. If, however, the lawyer uses the role playing session as an occasion for scripting the witness's answers, then it is unethical.[32]

8. Obstructing Access to a Witness

The flip side of the witness preparation coin is whether an attorney may request a non-client witness to refrain from engaging in ex parte communications with opposing counsel, in an effort to impair that attorney's "preparation." Rule 3.4(f) of the ABA's Model Rules expressly addresses this issue, providing that a lawyer is generally prohibited from requesting a person other than a client to refrain from voluntarily giving relevant information to another party.[33] Exceptions to this prohibition exist in the Model Rules for witnesses who are relatives of a client or who are employees/agents of a client, provided the attorney reasonably believes that the person's interests will not be adversely affected by refraining from giving that information.[34]

Too much preparation can create the appearance of a witness who is too "slick" for his own good.

There is no similar provision in the N.Y. Rules and, in fact, such a provision was proposed but rejected by the courts in adopting the new rules (although without any explanation). Presumably then, an attorney in New York may at least request relatives and employees/agents of clients to refrain from voluntarily speaking with opposing counsel on an ex parte basis and can go further and request the same of other witnesses, so long as the suggestion does not run afoul of the only N.Y. Rules provision which remotely addresses this issue, Rule 3.4(a)(2) (lawyer shall not advise or cause person to hide or leave jurisdiction for purpose of making them unavailable as a witness). N.Y.C. Bar Formal Op. 2009-5 (2009) (lawyer may ethically ask a witness to refrain from speaking voluntarily to other parties or their counsel).

9. Payments to a Witness

N.Y. Rule 3.4(b) provides that a lawyer shall not pay or acquiesce in the payment of compensation to a witness contingent on his testimony or the outcome of a case, nor may a lawyer offer any inducements to testify that are prohibited by law. Payment may be made to compensate a witness for expenses and loss of time reasonably incurred in attending or testifying at a proceeding. This has been interpreted to include compensation for time spent preparing for an appearance as well, so long as the compensation is "reasonable" as determined by the market value of the testifying witness' time.[35]

In some jurisdictions, any payments to fact witnesses beyond those expressly authorized by statute may be impermissible.[36]

Attempts to treat a fact witness as a "paid consultant" will be closely scrutinized.[37] However, in NYSBA Formal Op. 668, the Committee drew a distinction between payments to an individual assisting in pre-trial fact finding and payments to that same individual "as a witness." Since DR 7-109(c) (the predecessor to N.Y. Rule 3.4(b)) only applies to witness payments, the Committee concluded that the individual could be paid "any" amount for his pre-trial services and was limited to only "reasonable" compensation for his service as a witness.[38]

Payments contingent on the outcome of the litigation are generally not permitted.[39]

10. When You Fear Testimony Is False

One of the most difficult issues for lawyers to deal with is what if, after all of this witness preparation, the lawyer either "knows" or "reasonably believes" that the testimony the witness will offer is false? Rule 3.3(a)(3) prohibits a lawyer from knowingly offering or using evidence that the lawyer knows to be false. The obligations of Rule 3.3(a)(3) are triggered by the lawyer's "knowledge" that evidence is false. The definition section of the Rules makes it clear that the terms "knowingly," "known" and "know" require "actual knowledge," although it is recognized that knowledge can be inferred from the circumstances.[40]

If a lawyer knows that a client or witness intends to testify falsely, the lawyer may not offer that testimony or evidence. (In a criminal context, different rules apply due to the defendant's constitutional right to testify.[41] If a lawyer does not know that his client's or witness' testimony is false, the attorney *may* nonetheless refuse to offer it if he or she "reasonably believes" it is false.[42] However, "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact."[43] Thus, short of "knowledge" of falsity, the N.Y. Rules give the lawyer – not the client – the ethical choice in the civil context to refuse to offer or use that testimony as he or she sees fit.[44] ■

1. *See* N.Y. Rules of Professional Conduct 1.1(a) (N.Y. Rule), "A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonable necessary for the representation"; *see* ABA Model Rule of Professional Conduct, Rule 1.3 ("[a] lawyer shall act with reasonable diligence and promptness in representing a client" (ABA Model Rule); *In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614 (D. Nev. 1998) (observing that a lawyer has an ethical duty to prepare a witness).

2. Elkan Abramowitz & Barry A. Bohrer, *White Collar Crime: Handling Witnesses: The Boundaries of Proper Witness Preparation*, N.Y.L.J. May 2, 2006, p.2; *see also* Liisa Renee Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 Rev. Litig. 135 (1995); D.C. Bar Ethics Opinion No. 79 (1979) ("[L]awyers commonly, and quite properly, prepare witnesses for testimony ...").

3. *In re Eldridge*, 82 N.Y. 161, 171 (1880).

4. One commentator has suggested that the breadth of this delineation is so great that "[i]t would be hard to find any type of preparation short of the lawyer instructing the witness to fabricate a story that would not be defensible" under it. Peter J. Henning, *The Pitfalls of Dealing with Witnesses in Public Corruption Prosecutions*, 23 The Georgetown J. of Legal Ethics, 351, 358 (2010).

5. *See* John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277, 300–04 (1989); Deborah L. Rhode, Professional Responsibility: Ethics by the Pervasive Method 197–99 (2d ed. 1998).

6. ABA Model Rule 3.4(b).

7. *Restatement (Third) of the Law Governing Lawyers*, Section 116 cmt. B (2000); *North Carolina v. McCormick*, 298 N.C. 788 (1979).

8. Salmi, *supra* note 2, at 154.

9. Prof. Richard Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1 (1995).

10. Robert Traver was the pen name of Michigan Supreme Court Justice John D. Voelker. *See* Gerald L. Shargel, *Symposium: Ethics and Evidence: The Application or Manipulation of Evidence Rules in an Adversary System: Federal Evidence Rule 608(b): Gateway to the Minefield of Witness Preparation*, 76 Fordham L. Rev. 1263, 1276 (2007); Erin C. Asborno, *Ethical Preparation of Witnesses for Deposition and Trial*, Trial Practice ABA Section of Litigation, Summer 2011, Verdict 25:3.

11. *Id.* at 32.

12. *Id.* at 35.

13. Letter from Mark Twain to George Bainton (October 15, 1888), www.twainquotes.com.

14. *See also* W. William Hodes, *The Professional Duty to Horseshed Witnesses Zealously, Within the Bounds of the Law*, 30 Tex. Tech. L. Rev. 1343, 1363 (1999) (suggesting that so long as the lawyer's actions do not result in the presentation of false testimony, it is permissible to "enhance the effectiveness of the witness's communication . . . "; similarly counseling witness to avoid slang or derogatory terms is permissible); Harold K. Gordon, *Crossing the Line on Witness Coaching*, N.Y.L.J., July 8, 2005 ("permissible would be a suggestion that a witness eliminate slang or colloquial terms from his responses . . . as long as some independent evidentiary significance will not be lost by doing so."); *Restatement (Third) of the Law Governing Lawyers*, §116, cmt. b ("A lawyer may suggest choice of words that might be employed to make the witness's meaning clear.").

15. *See* Gordon, *supra* note 14 ("a lawyer treads on thin ethical ice when he suggests a choice of words that may alter the substance or intended meaning of the witness' testimony. For instance, encouraging a witness to testify that he had a 'conversation' with the defendant rather than the 'screaming match' that actually took place on the phone or that he simply 'hit' a party instead of 'beating' them would result in false or misleading testimony."; Richard Alcorn, *"Aren't You Really Telling Me . . . ? Ethics and Preparing Witness Testimony,"* 44 Arizona Attorney 15 (2008) ("If . . . preparation is intended to modify only the manner in which testimony is presented and not to change its content, the preparation should be viewed as ethical. Attempting to eliminate potentially offensive witness mannerisms, or to eliminate the witness's use of 'powerless' speech phrases such as 'you know,' 'I guess,' 'um,' 'well' or the like, should pass muster. Contrast this with the lawyer who 'reshapes' the witness's testimony by suggesting specific substantive words or answers for responses to anticipated examination."); *but see Haworth v. State*, 840 P. 2d 912 (Wyo. 1992) (prosecutor restricted in his ability to question a criminal defendant about defense counsel's suggestion in preparation for testifying that he use the word "cut" instead of "stab" to describe the incident; court noted the de minimis effect of such word differences on the proceeding where other testimony described the incident).

16. 243 Fed. Appx. 830 (5th Cir. 2007).

17. *Id.*

18. *See* Joseph D. Piorkowski Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of Coaching*, 1 Georgetown J. of Legal Ethics, 389 (1987).

19. *See, e.g.*, Steven Lubet & J.C. Lore, NITA Modern Trial Advocacy: Analysis and Practice 76 (5th ed. 2015); Similarly, preparation – or practice – for the purpose of making the witness more comfortable and credible seems to fall within the scope of permissible preparation. *See* Gordon, *supra* note 15; Liisa Renee Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 Rev. Litig. 135 (1995); D.C. Bar Ethics Opinion No. 79 (1979); *North Carolina v. McCormick*, 298 N.C. 788 (1979).

20. *See* Lubet & Lore, *supra* note 19, at 76.

21. *See supra* note 18.

22. *See* Gordon, *supra* note 15.

23. *See* Joan C. Rogers, *Witness Preparation Memos Raise Questions About Ethical Limits*, ABA/BNA Lawyers' Manual on Professional Conduct (Feb. 18, 1998).

24. *See* Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 Cardozo Law Review, 831, 842–43 (2002) ("For example, asking a witness whether he saw 'a car' is much less suggestive than asking the witness whether he saw 'the' car. Similarly asking the witness whether a person 'smacked' another's face may produce a decidedly different response than asking the witness whether a person 'hit' the other person" (footnotes omitted)).

25. *See generally*, Richard Alcorn, *"Aren't You Really Telling Me . . . ?" Ethics and Preparing Witness Testimony*, 44 Arizona Attorney 15 (2008); Edward Carter, *Horse-shedding, Lecturing and Legal Ethics* (2008), www.kentlaw.edu/faculty/rwarner/classes/carter/2008_lectures/Horseshedding,%20Lecturing%20and%20Legal%20Ethics.pdf; *see also Prasad v. MML Investors Servs., Inc.*, 2004 WL 1151735 (S.D.N.Y. 2004).

26. *United States v. Ebens*, 800 F.2d 1422, 1430–31 (6th Cir. 1986).

27. Wydick, *supra* note 19.

28. *See* D.C. Bar Formal Op. 79; *see also* Campbell, *Ethical Concerns in Grooming the Criminal Defendant for the Witness Stand*, 36 Hofstra L. Rev. 265, 271 (2008).

29. Hudson and Mhairtin, *Preparing Your Client for Deposition or Trial Testimony*, FDCC Quarterly 63 (Fall 2008); Campbell, *supra* note 28, at 271–72 (where witness' intoxication is an issue, inappropriate for lawyer to advise client to testify that he had only "two drinks" if he in fact had "two doubles.").

30. Salmi, *supra* note 2, at 162.

31. D.C. Formal Op. 79; *Restatement (Third) of the Law Governing Lawyers*, § 116 cmt. b.

32. Wydick, *supra* note 9.

33. *See Harlan v. Lewis*, 982 F.2d 1255 (8th Cir. 1993) (imposing $2,500 sanction on attorney for violating rule).

34. ABA Model Rule 3.4(f).

35. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-402 (1996); NYSBA Formal Ops. 962 (2013) and 668 (1994); Calif. State Bar Formal Op. No. 1997-149 (1997); Mass. State Bar Assn. Op 91-3 (1991); Ill. State Bar Assn. Ethics Op. No. 87-5 (1987); *Restatement (Third) of Law Governing Lawyers*, § 117, cmt. b; *see also Prasad v. MML Investors Servs., Inc.*, 2004 WL 1151735 (S.D.N.Y. 2004) (nothing improper in the reimsbursement of a witness' expenses or in the payment of a reasonable hourly fee for time spent; however, payments to a witness to make them "sympathetic" are inappropriate); *State of N.Y. v. Solvent Chemical Co., Inc.*, 166 F.R.D. 284 (W.D.N.Y. 1996); Del. State Bar Assn. Comm. on Prof'l Ethics, Op. 2003-3 (2003); *but see Goldstein v. Exxon Research & Engineering* Co., 1997 WL 580599 (D.N.J. 2009) ("[w]hen a witness is called because of vast personal knowledge . . . public policy dictates that such a witness may not be compensated for his services by a party to the litigation."); *Golden Door Jewelry v. Lloyds*, 865 F. Supp. 1616 (S.D. Fla. 1996) (payment to fact witness improper where served as inducement to testify, even though testimony truthful); *In re Robinson*, 151 A.D. 589 (1912), *aff'd*, 209 N.Y. 354 (1913) (payments to make witness "sympathetic" impermissible).

36. *See Hamilton v. General Motors Corp.*, 490 F.2d 223 (7th Cir. 1973) (refusing to enforce a claim for services by a witness as contrary to public policy); *Alexander v. Watson*, 128 F.2d 627 (4th Cir. 1942) (any payments to a witness above statutory provision is improper).

37. *See Rocheux Int'l of New Jersey v. U.S. Merchants Fin.l Group, Inc.*, 2009 WL 3246837 (D.N.J. 2009).

38. *But see Florida Bar v. Wohl*, 842 So.2d 811 (Fla. 2003) ("paying an individual who has personal knowledge of the facts [to assist in pre-trial fact finding] is to pay a witness, whether or not that person is expected to testify").

39. *Restatement (Third) of the Law Governing Lawyers*, § 117 cmt. b; *Florida Bar v. Wohl*, *supra* note 38.

40. N.Y. Rule 1.0(k); *see also* New York County Lawyer's Association, Comm. on Prof'l Ethics Formal Op. 741 (March. 1, 2010) (looking to *In re Doe*, 847 F.2d 57 (2d Cir. 1988) for guidance on this issue and indicating that while mere suspicion or belief is not adequate, "proof beyond a moral certainty" is not required).

41. *See* N.Y. Rule 3.3(a)(3).

42. In a criminal proceeding, given the defendant's constitutional right to testify, a lawyer faced with a client who is going to testify falsely may have the option of offering the testimony in narrative form. *See* N.Y. Rule 3.3(a), cmt. 7.

43. N.Y. Rule 3.3, cmt. 8.

44. If a lawyer only comes to learn of the falsity of testimony after it is offered, she will have a remedial obligation to the tribunal. N.Y. Rule 3.3(a)(3) requires that if a 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 must take reasonable remedial measures, including, if necessary, disclosure to the tribunal. In other words, disclosure may be required to remedy false evidence by the lawyer's client or witness, as a last resort, even if the information to be disclosed is otherwise "protected" client confidential information. This marks a significant departure from the N.Y. rules in effect under the former Code of Professional Responsibility.

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Uniform Rule Part 221, entitled "Uniform Rules for the Conduct of Depositions," will become effective on Sunday Oct. 1, 2006. Thankfully, Sunday generally remains a day of rest in our busy court system. A period of unrest is certain to ensue the following Monday, as lawyers throughout New York State confront depositions governed by a significantly detailed set of new rules.

Common Abuses

It is helpful to identify the problems the rules are designed to address before we discuss Part 221. In 2005, Justice Joan B. Carey authored a thoughtful opinion in *Mora v. St. Vincent's Hospital*, 8 Misc.3d 868 (Sup. Court, N.Y. Co. 2005), which addressed common "abuses" that take place at depositions. The opinion tackled the increasingly common practice of attorneys directing a witness not to answer specific questions. *Mora* candidly observed that "depositions have become breeding grounds for a myriad of unprofessional and dilatory conduct."

Similar "obstreperous conduct" at a deposition session was the subject of the Second Department's recent decision in *O'Neill v. Ho*, 28 A.D.3d 626 (2d Dep't 2006).

In *O'Neill,* the defendant doctor apparently refused to answer several questions at the original deposition. Plaintiffs, who were required to seek the court's intervention to complete the session, successfully procured an order compelling defendant to answer nine questions marked for rulings at the first deposition. Plaintiffs were then thwarted from obtaining answers to the questions again when defendant's counsel made extensive "'speaking objections,' which were not based on constitutional rights, privilege, or palpable irrelevance, and by [defendant's] repeated refusal to answer clear questions and his ultimate departure from the deposition during the afternoon."

The Second Department concluded that the Supreme Court "providently exercised its discretion" by denying plaintiff's motion to strike defendant's answer "since such drastic relief was not warranted as a sanction for obstreperous conduct at a single deposition session." The Appellate Division did, however, see fit to impose a monetary sanction of $1,500 upon the defendant doctor and his counsel, payable to plaintiffs' counsel, "for the time expended and costs incurred in connection with the aborted deposition session."

The structure of CPLR Article 31 "envisages a maximum disclosure of facts with a minimum of supervision." *Wiseman v. American Motors Sales Corp.*, 103 A.D.2d 230, 232 (2d Dep't 1984); see CPLR 3102(b), Connors, McKinney's Practice Commentary C3102:2.

The conduct in *Mora* and *O'Neill* strays far from this ideal. In *O'Neill,* plaintiff's counsel was required to obtain assistance from the court on two separate occasions to complete one deposition. Furthermore, the court directed that the deposition be completed under the supervision of the Supreme Court. See CPLR 3104(a) (allowing court, on its own initiative without notice, to order supervision of all or part of disclosure); Connors, McKinney's Practice Commentary C3104:1.

Mora and *O'Neill* are not isolated incidents. Rather, the Advisory Committee on Civil Practice observed that "certain problems are endemic to deposition practice in the state courts." 2006 Report of the Advisory Comm. on Civil Practice, p. 50 (noting that these problems occur more frequently in New York state courts than in federal courts, "where magistrates or the judges themselves have the time to police the discovery process closely").

The committee report, providing an example of such conduct, observed that "frequent use is made in New York of so-called 'speaking objections,'" a point that was confirmed by the conduct described in *O'Neill*. A "speaking objection" is an objection accompanied by, or made in the form of, speeches which exceed what is necessary to

preserve an objection . . . . At a minimum, these speaking objections interfere with the smooth flow of the deposition and cause delay. At times, the speeches have the effect of signaling to the witness how a question ought to be answered and, indeed, that is often their purpose. Id.

Most lawyers can remember sitting through such needless discourse on several occasions, but few will admit to delivering the oratory.

Adoption of Part 221

The Advisory Committee's 2006 report made several recommendations, including one to add a new section of the Uniform Rules for the New York State Trial Courts. In July 2006, the Chief Administrative Judge, with the advice and consent of the Administrative Board of the Courts, announced the adoption of Part 221. The new rules are designed to address several issues arising at depositions that are not specifically answered in the CPLR. These include: (1) speaking objections, (2) directing a witness not to answer, and (3) interrupting a deposition to communicate with the deponent.

Part 221 is significant, and every lawyer conducting or defending a deposition must be familiar with its terms. It is also a good idea to bring the text of the rules to depositions for the foreseeable future in the event an adversary is not aware of them. We'll discuss some of the major aspects of the new rules below, with an eye towards the possible impact they will have on the conduct of depositions and the ways in which they impose requirements additional to those contained in the CPLR. A more detailed discussion of the rules will appear in the 2006 McKinney's Supplementary Practice Commentaries to CPLR 3115.

Objections

CPLR 3113 and 3115 both address objections at a deposition. CPLR 3113(b) provides that all objections made at the time of the examination, ranging from such things as the "qualifications of the officer taking the deposition" to the "testimony presented," shall be recorded by the officer taking the deposition-usually the stenographer. After the objection is noted on the record, "the deposition shall proceed subject to the right of a person to apply for a protective order." CPLR 3113(b).

CPLR 3115 addresses objections to various matters, generally providing that an attorney may withhold all objections at the deposition and assert them at the trial. The major exception is an objection to the form of a question, which must be asserted at the deposition to avoid a waiver. CPLR 3115(b).

The aim of CPLR 3113 and 3115 is to promote efficiency, civility and professional decorum at the deposition session and to create an environment in which objections do not cause constant interruption and delay. Regrettably, the opinions in *Mora* and *O'Neill* document contentious disputes over objections that cannot be deemed aberrational.

Part 221 removes certain discretion previously reserved to lawyers under the CPLR. As noted above, the CPLR allows the lawyer to interpose all objections at the deposition, but does not require it. Section 221.1(a) now prevents a lawyer from asserting an objection at a deposition unless it would be waived at trial under CPLR 3115 (b), (c) or (d).

In addition to limiting the types of objections that could previously be made at the deposition, Part 221 speaks to the methods of lodging the objection. Section 221.1(b) is devoted exclusively to speaking objections and is aptly entitled "Speaking objections restricted." This paragraph furthers the goal of CPLR 3113(b) by promoting the free and uninterrupted questioning of the deponent. If an objection must be raised at the deposition to prevent a waiver, it "shall be stated succinctly and framed so as not to suggest an answer to the deponent." 22 NYCRR §221 (a).

If the attorney conducting the examination requests that the objection be particularized, the objecting attorney "shall include a clear statement as to any defect in form or other basis of error or irregularity." 22 NYCRR §221(b).

Directing a Witness

Section 221.2 of the new rules attempts to curtail the practice of a lawyer directing a witness not to answer a question at a deposition. This provision is primarily directed at the lawyer for the deponent, but could apply to other counsel who obstruct the questioning. It provides that "[a]n attorney shall not direct a deponent not to answer except as provided in CPLR 3115 or this subdivision." In that CPLR 3115 does not provide any authority for directing a witness not to answer a question, we'll focus on the exceptions listed in section 221.2.

Consistent with CPLR 3113(b), section 221.1(a) states that after an objection is noted on the record, "the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR ." Although not individually cited in section 221.1(a), Article 31 contains several options for relief, including the right of a deponent or party to seek a CPLR 3103(a) protective order. The mere making of this motion will "suspend disclosure of the particular matter in dispute." CPLR 3103(b).

The lawyer who directs her witness not to answer, in lieu of moving for a protective order, could also await a

motion by the party conducting the deposition. This motion may arise under CPLR 3124, where the movant might gather up all of the objections on the record and ask the court for an order directing the witness to answer the questions. See Connors, McKinney's Practice Commentaries C3124:3, C3124:4 (discussing this procedure and the "Let's-Get-a-Ruling" system, in which a lawyer seeks a judge to rule on objections individually).

In an egregious case, Article 31 might be invoked through a motion under CPLR 3126, provided the movant can establish that the deponent "willfully" failed to disclose information that "the court finds ought to have been disclosed." See Connors, McKinney's Practice Commentary C3124:1, C3126:5.

Mora held that it is inappropriate to direct a witness not to answer a question unless "a question is clearly violative of the witness's constitutional rights or of some privilege recognized in law, or is palpably irrelevant." Section 221.2, entitled "Refusal to answer when objection is made," contains a similar set of exceptions. It requires a deponent to "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."

Addressing these exceptions seriatim, a lawyer could direct a witness not to answer a question if it infringed on any number of the privileges recognized at law. See CPLR 3101(b), Connors, McKinney's Practice Commentary C3101:25.

The most significant privileges found in New York's law of evidence appear in CPLR Article 45. This is not the exclusive source of all privileges in New York and whether the privilege asserted emanates from CPLR Article 45, a constitution (federal or state) or any other law, it can provide a basis for directing a deponent not to answer a question.

Section 221.2(i) also recognizes that a deponent can be directed not to answer a question to protect a "right of confidentiality." Trade secrets and customer lists will frequently be protected by a right of confidentiality. Presumably, this provision could also allow a lawyer, in the rare instance in which the lawyer is the deponent, to refrain from answering a question that required revelation of a "secret" under DR 4-101(A). See Connors, Practice Commentaries to DR 4-101, McKinneys Consolidated Laws of New York Annotated, Volume 29, Judiciary.

Section 221.2(ii) allows a lawyer to direct a witness not to answer a question if such direction is "to enforce a limitation set forth in a court order." This order is usually obtained on a motion for a protective order pursuant to CPLR 3103, which grants the court the authority to deny, limit, condition or regulate the use of a disclosure device. The court could, for example, restrict questions relating to a deponent's psychological condition if such condition was not relevant to the litigation. Furthermore, the court could restrict disclosure of a defendant's net worth until the jury determines that plaintiff is entitled to an award of punitive damages. *Rupert v. Sellers*, 48 A.D.2d 265 (4th Dep't 1975).

These are only some of the many kinds of limitations that could be imposed in a protective order. See Connors, McKinney's Practice Commentary C3103:4 (listing examples of protective orders).

The most contentious exception will be that contained in section 221.2(iii), which allows a lawyer to direct a witness not to answer a question that is "plainly improper and would, if answered, cause significant prejudice to any person." There will be many arguments at depositions regarding whether a question is "plainly improper" and the courts will ultimately need to define the potentially broad scope of this phrase. The court's opinion in *Mora* addressed whether six relatively common questions posed at a deposition were "palpably irrelevant" and is helpful in this regard. It is important to note, however, that the lawyer relying on this exception will also need to establish that significant prejudice will result if an answer is required. The "significant prejudice" need not be to a party to the action, but rather to "any person."

In the interests of fairness to all, the party posing the question should also be afforded the opportunity to rebut both the claim that the question is "improper" and that "significant prejudice" will result. This raises another novel aspect of the rule. Section 221.2 requires that "[a]ny refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor." If the issue ultimately comes before a court, the person who has refused to answer should not be allowed to assert grounds that stray far from those asserted at the actual deposition. This will help to ensure that lawyers refrain from directing a witness not to answer unless they can simultaneously support their position. If lawyers are permitted to back and fill after the deposition, and thereby justify a direction not to answer with additional grounds, the goal of the section will be significantly hampered.

Even if a lawyer is justified in directing a witness not to answer a question, that is not grounds to terminate the entire session. Cooler minds must prevail and "the examining party shall have the right to complete the remainder of the deposition." 22 NYCRR §221.2.

Attorney Client Contact

The Advisory Committee, when making its recommendations to promulgate these rules, commented that "some attorneys claim a right to consult with the client-deponent during questioning so as [to] effectively . . . coach the

deponent whenever the questioning turns inconvenient." 2006 Report of the Advisory Comm. on Civil Practice, p. 50.

These interruptions come in many forms, ranging from an attorney who openly obstructs the questioning to counsel the witness, to the counseling of a witness during a "bathroom break" while a question is still open on the record. Case law has held that any conversations occurring during such an interruption are not privileged, and can be the subject of inquiry at the deposition. See *Hall v. Clifton Precision,* 150 FRD 525, 529 n.7 (E.D. Pa. 1993) (private conferences between an attorney and client during a coffee break, lunch break, or evening recess are not covered by the attorney-client privilege). *Hall* has not been uniformly followed. See *Henry v. Champlain Enterprises, Inc.*, 212 FRD 73, 92 (N.D.N.Y. 2003).

Section 221.3 prohibits an attorney from interrupting the deposition to communicate with the deponent, with two narrow exceptions. If all parties consent, the communication can take place. The consent to conduct the conversation will likely be circumscribed and any such parameters should be stated on the record.

Section 221.3 also allows an attorney to unilaterally interrupt the deposition and communicate with her deponent if 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." This exception will, no doubt, be difficult to police. The rule is silent on whether the communication must take place on the record. In most situations, lawyers will prefer to conduct the conversation in private and there will be debates on whether that is permissible. In any event, if the attorney needs to communicate with the deponent to ascertain if a question falls within an exception to section 221.2, "the reason for the communication shall be stated for the record succinctly and clearly." 22 NYCRR §221.3.

The lawyer should not be able to take this opportunity to engage in extended discourse and, in effect, assert some sort of "speaking objection."

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BURDEN OF PROOF

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"No Role Means No Role"

Introduction

As readers of this column are no doubt painfully aware, I have been obsessed with a 2010 decision from the Fourth Department, *Thompson v. Mather*,[1] wherein a unanimous panel of that court, in a memorandum opinion, held:

> We agree with plaintiff that counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pretrial deposition.[2]

In short, counsel for the non-party has no role to play.

The first trial level decision to apply *Thompson*, in 2011, was *Sciara v. Surgical Associates of Western New York, P.C.*,[3] where Justice Curran, while agreeing that *Thompson* did not permit counsel for a non-party witness to "actively participate" in the deposition, held that

> . . . *Thompson* should be read in light of its facts. There, the Fourth Department addressed attempts by a nonparty witness's counsel to object to form and relevance. The relief requested by plaintiff on the motion involved in *Thompson* excepted out objections for "privileged matters" and questions deemed "abusive or harassing." Thus, the facts in *Thompson* do not support a conclusion that counsel for a nonparty witness is prohibited from protecting his or her client from an invasion of a privilege or plainly improper questioning causing significant prejudice if answered.
>
> Uniform Rules §§ 221.2 and 221.3 are not limited to parties but apply to "deponents." Thus, in the event that a question posed to a nonparty fits within the three exceptions listed in § 221.2, the nonparty's attorney is entitled to follow the procedures set forth in §§ 221.2 and 221.3. In accordance with these rules, the examining party is entitled to complete the remainder of the deposition. In the event a dispute arises regarding the application of the Uniform Rules, CPLR 3103(a) authorizes any "party" or "person from whom discovery is sought" to apply for a protective order. Either a "party" or "person from whom discovery is sought" is therefore entitled to suspend the deposition to serve such a motion. The deposition is stayed while the motion is pending.
>
> * * *
>
> Based on the above, the request by Dr. Chopra's counsel to "actively" participate and represent his client's interests during the deposition is denied. Rather, his role during the deposition is limited to the situations governed by Uniform Rules §§ 221.2 and 221.3.[4]

In short, no role could not possibly mean no role.

On March 15, 2013, the Fourth Department decided the appeal of Justice Curran's order in *Sciara*. By a 3-2 decision, the majority held that counsel for the non-party may not participate in the deposition in a limited manner based upon §§ 221.2 and 221.3, but affirmed the right of the non-party to seek a protective order.[5]

In short, no role means no role.

The *Sciara* decision is important for two reasons. First, in affirming *Thompson* and eschewing any carve-out for privilege or other sensitive matter, the Fourth Department decision, which I believe is controlling statewide,[6] represents a significant change in the practice of conducting and defending non-party depositions from what had been accepted as the norm by the vast majority of attorneys in the state, *to wit*, that counsel for the non-party had the right to participate in the deposition in the same manner as counsel for a party. Second, the majority and dissenting opinions offer alternative views on how to resolve the tension between a statute, the CPLR, and a regulation, the Uniform Rules for the Trial Courts, when the two are, or appear to be, in conflict.

The Majority's Opinion

The majority's opinion was short and to the point:

> As we stated in *Thompson*, "counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pretrial deposition. CPLR 3113(c) provides that the examination and cross-examination of deposition witnesses shall proceed *as permitted* in the trial of actions in open court," and it is axiomatic that counsel for a nonparty witness is not permitted to object or otherwise participate in a trial. We recognize that 22 NYCRR 221.2 and 221.3 may be viewed as being in conflict with CPLR 3113(c) inas-

much as sections 221.2 and 221.3 provide that an "attorney" may not interrupt a deposition except in specified circumstances. Nevertheless, it is well established that, in the event of a conflict between a statute and a regulation, the statute controls.

refers to objections "made by any of the *parties* during the course of the deposition" (emphasis added). Here, the deposition was not taken pursuant to that rule, but rather was taken pursuant to 22 NYCRR part 221, entitled Uniform Rules for the Conduct of Depositions, which

guage of a statute is ambiguous or uncertain, the construction placed on it by contemporaries . . . will be given considerable weight in its interpretation," as in the case of a practical construction that has received general acquiescence for a long period of time. In that regard,

Sciara represents a significant change in the practice of conducting and defending non-party depositions, *to wit*, that counsel for the non-party had the right to participate in the deposition in the same manner as counsel for a party.

We also recognize the practical difficulties that may arise in connection with a nonparty deposition, which also have been the subject of legal commentaries. However, we decline to depart from our conclusion in *Thompson* that the express language of CPLR 3113(c) prohibits the participation of the attorney for a nonparty witness during the deposition of his or her client. We further note, however, that the nonparty has the right to seek a protective order, if necessary.[7]

The Dissent's Opinion

The dissenting Justices would have affirmed Justice Curran's holding:

> We respectfully dissent in part because we cannot agree with the majority that Supreme Court erred in granting in part the cross motion of Usha Chopra, M.D. (respondent), a nonparty, by permitting respondent's counsel to participate in a limited fashion during plaintiffs' continued deposition of respondent. We therefore would affirm the order. The majority relies on the statement of this Court in *Thompson v Mather* that "counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pretrial deposition." We note that *Thompson* involved 22 NYCRR 202.15, which concerns the videotaping of deposition testimony that may be filed with the clerk of the trial court and specifically

permits *deponents*, not merely "parties," to raise objections during the course of the deposition. We note that, in *Thompson*, the plaintiff moved for an order precluding the nonparty deponent's counsel from objecting to the videotaped trial testimony "except as to privileged matters or in the event that she were to deem questioning to be abusive or harassing." Thus, even the plaintiff's counsel in *Thompson* recognized that a nonparty has certain rights at the deposition.

The majority also relies, as did this Court in *Thompson*, on CPLR 3113(c), which provides that the examination and cross-examination of deposition witnesses "shall proceed as permitted in the trial of actions in open court." The majority thus concludes that, because counsel for a nonparty witness is not permitted to object or otherwise to participate at a trial, counsel for the nonparty witness likewise is not permitted to object or otherwise participate at the nonparty's deposition. The majority believes that there is a conflict between CPLR 3113(c) and 22 NYCRR 221.2 and 221.3, which regulations permit an "attorney" to interrupt a deposition in specified circumstances.

We do not believe that CPLR 3113(c) must be interpreted in a manner that establishes a conflict with the Uniform Rules for the New York State Trial Courts. "Where the lan-

CPLR 3113(c), which became effective in 1963 with the adoption of the CPLR in place of the prior Civil Practice Act, does not have a direct corollary in the Civil Practice Act. Former section 202 of the Civil Practice Act discusses the "[m]anner of taking testimony" in a deposition, but there is no identical predecessor to CPLR 3113(c).

The rules in question here, namely, 22 NYCRR 221.1 and 221.2, became effective in 1986,[8] approximately 23 years after the adoption of CPLR 3113(c). As one commentator has stated, numerous cases over the years addressing issues arising at depositions of nonparties have noted, without comment or criticism, the active participation of counsel for the nonparty at the deposition (David Paul Horowitz, *May I Please Say Something*, 83 NY St BJ 82, 83 [July/Aug. 2011], citing *Horowitz v Upjohn Co.*, 149 AD2d 467). We can only presume that the Chief Administrator of the Courts was aware of CPLR 3113(c) when the Uniform Rules regarding depositions were adopted and that the Chief Administrator would not create a direct conflict with a statute.

The long-standing practice of counsel for a nonparty witness objecting at a deposition is exemplified by the Second Department's decision in *Horowitz*. There, the Second Department stated that the nonparty witness, a partner

of the defendant physicians at the time the infant plaintiff's mother was their patient, was entitled to refuse to answer questions that sought testimony in the nature of opinion evidence. There was no discussion of CPLR 3113(c) or the rules. The relief fashioned by the Second Department "was favorable *to the objections raised by counsel for the non[]party at the deposition*. The Second Department evinced no problem with the participation of counsel for the nonparty at the deposition, thereby, at the very least impliedly countenancing the practice" (Horowitz, 83 NY St BJ at 83 [emphasis added]).

In our view, the result reached by the court here was reasonable. It is beyond cavil that trial courts have broad discretion in supervising discovery. For example, CPLR 3101(b) provides that, "[u]pon objection by a person entitled to assert the privilege, privileged matters should not be obtainable." That section suggests that a nonparty may not be required to disclose privileged matter whether it be at a deposition or at trial. The question of what constitutes "privileged matter" is a significant legal one and we fail to see how a nonparty witness at a deposition, without the benefit of counsel, would be so knowledgeable as to assert the privilege in the appropriate circumstance. Similarly, CPLR 3103(a) authorizes a court, on its own initiative, "or on motion of any party or of any person from whom discovery is sought," to issue a protective order denying, limiting, conditioning or regulating the use of any disclosure device. That section similarly would allow a nonparty witness, as "any person from whom discovery is sought," to seek a protective order conditioning the use of a deposition by allowing the nonparty to have counsel at the deposition for the purpose of raising appropriate objections.

There is also the practical question faced by a nonparty at the deposition, when the statute of limitations has not yet run against that nonparty. Indeed, the decision in *Thompson* encourages a plaintiff, faced with commencing an action against several defendants, whether in the medical malpractice realm or some other area of law, to name the seemingly least culpable party as a defendant and depose ostensibly more culpable parties, with the idea that information, perhaps incriminating and always under oath, may be gleaned from the "nonparties" who do not have the right to have counsel present.

In conclusion, we do not believe that there is a direct and obvious conflict between CPLR 3113(c) and the Uniform Rules, and we further conclude that the court did not abuse its discretion in allowing the nonparty witness here to have counsel present at the deposition for a limited purpose. We therefore would affirm the order.[9]

Conclusion

For the 2013 legislative session, the OCA CPLR Advisory Committee has once again proposed a bill to legislatively overturn *Thompson*. The bill was drafted prior to the release of the decision in *Sciara*, which by rejecting a narrow carve-out for privilege, adds additional support for those in favor of the proposed legislation. Whether the proposed bill, or others like it, gain any traction this spring is beyond my prognosticative abilities. What I can say with certainty is that "no role means no role," and that everyone should put aside all legal work and enjoy Memorial Day weekend! ■

1. 70 A.D.3d 1436 (4th Dep't 2010).
2. *Id*.
3. 32 Misc. 3d 904 (Sup. Ct., Erie Co. 2011).
4. *Id*. at 913–14 (citations omitted).
5. *Sciara v. Surgical Assocs. of W. N.Y., P.C.*, 2013 WL 1064824, 2013 N.Y. Slip Op. 01741 (4th Dep't 2013). The Fourth Department also issued a memorandum decision that same day affirming the grant of "defendants' motion seeking a court appointed referee to supervise any future depositions in this matter." *Sciara v. Surgical Assocs. of W. N.Y., P.C.*, 2013 WL 1064827, 2013 N.Y. Slip Op. 01742 (4th Dep't 2013)
6. *See Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663 (2d Dep't 1984).
7. *Sciara*, 2013 N.Y. Slip Op. 01741 (citations omitted, emphasis added).
8. 2006.
9. *Sciara*, 2013 N.Y. Slip Op. 01741 (most citations omitted).

New York Law Journal

Preparing for a Rule 30(b) Deposition

Daniel A. Cohen
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Attorneys routinely fail to prepare corporate witnesses adequately for depositions conducted pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure.

Recent decisions highlight the perils of doing so. Tendering an unprepared Rule 30(b)(6) witness can be deemed a "failure to appear" under federal Rule 37(d). The court may award motion costs and/or deposition fees, including the fees of a second deposition, as sanctions.[1] The court also can preclude the corporation from presenting any testimony at trial on matters for which it failed to produce suitably prepared Rule 30(b)(6) witnesses, or deem certain facts admitted in favor of the deposing party.[2] Even if the witness' lack of preparation does not expose the corporation to sanctions, the resultant testimony can lock the corporation into an unfavorable position at trial.

This article discusses how to avoid such pitfalls.

1. Purpose of Deposition: Streamlined Discovery

Rule 30(b)(6) offers a streamlined procedure for taking discovery from a corporation. The rule enables the deposing party to avoid being shunted from one corporate employee to another for information (a practice known as "bandying"), instead requiring the corporation to gather and present all available information through its designees.

The party seeking discovery need only "describe with reasonable particularity" the topics on which it seeks examination. The corporation must respond by presenting knowledgeable witnesses on those topics. Such streamlined discovery enables the corporation, too, to conserve resources. By disclosing relevant information through a well-prepared designee, the corporation may avoid the cost and disruption of making the same disclosure through depositions of numerous individual officers, directors and employees.

2. Preparing for Deposition

In responding to a Rule 30(b)(6) notice, the corporation and its counsel first should determine whether any of the listed deposition topics are objectionable, e.g., because they are vague, overbroad, irrelevant, or concern privileged matters. The corporation cannot simply refuse to produce a witness,

but should seek a protective order for any topics it deems objectionable.[3]

The next step is to identify the witness or witnesses whom the corporation will produce to testify on the noticed topics. Rule 30(b)(6) witnesses differ from witnesses who testify in an individual capacity in crucial respects. Individual witnesses need only supply their personal knowledge and honest recollection. Such witnesses have no obligation to prepare for the deposition, and no penalty attaches to their poor memory or lack of knowledge. By contrast, Rule 30(b)(6) witnesses must testify about all information "known or reasonably available" to the corporation, and must "answer fully, completely and unevasively" on the corporation's behalf.[4] Those obligations have several implications.

First, in the absence of any objection, the corporation must furnish a witness for each noticed topic. The corporation may designate different witnesses for different topics.

The most important qualification for a Rule 30(b)(6) witness is the ability to give thorough and accurate testimony. Witness selection is critical because the designee's testimony binds the corporation. That is not to say the corporation can never change its position. Rule 30(b)(6) testimony is not a judicial admission that formally and finally decides an issue, and the witness can explain any later changes in testimony at trial.[5] But any such later changes are fodder for impeachment, and may be disregarded by the trier of fact.

Second, each witness must testify as to the corporation's knowledge, not his or her own. Personal knowledge is neither necessary nor sufficient to satisfy the corporation's obligations.

If the witness has no knowledge, or incomplete knowledge, on a given topic, the witness must acquire that knowledge from other corporate sources. As one court aptly stated, the corporation "is expected to create a witness or witnesses with responsive knowledge," i.e., educate its designee using the information available to the corporation.[6]

That education may involve, for example, reviewing the corporation's documents, including documents in the hands of corporate agents such as outside lawyers and accountants; reviewing pleadings, discovery responses, prior deposition transcripts and related litigation materials; consulting other corporate employees - including, if needed, former employees; and even consulting records or employees of corporate subsidiaries and affiliates.[7]

Third, the mere fact that no current employee has relevant personal knowledge does not excuse the corporation from furnishing a witness. One option, as noted above, is to "create" a properly prepared witness. Another is to designate a knowledgeable former employee as its Rule 30(b)(6) witness.[8]

If the corporation genuinely cannot obtain information on a noticed topic from any source, it may satisfy its obligation by offering testimony to that effect. In a recent case, for example, the court excused a municipality's failure to produce a knowledgeable witness where it demonstrated that all relevant records had been destroyed long before the suit and that there was no one who could testify about its practices and procedures during the time period at issue.[9]

3. Contentions, Investigations, and Work Product

Two areas of recurring litigation are the deposing party's right to inquire about the corporation's "contentions," i.e., its position on disputed issues, and about investigations conducted by the corporation or its counsel.

At a minimum, the witness must disclose and discuss the underlying facts, no matter how obtained. For example, in a dispute concerning alleged anticompetitive practices, the court sanctioned the corporation and its counsel for the witness' refusal, at counsel's instruction, to discuss the factual basis of certain reports submitted to the government. The reports were prepared by counsel, based on counsel's interview of corporate personnel and review of corporate records. The court ordered that the corporate designee be "thoroughly educated" about the underlying facts, "regardless of whether such facts are memorialized in work product documents or reside in the minds of counsel."[10]

Witnesses also may be required to testify about the corporation's "subjective beliefs and opinions," including its "interpretation of documents and events," its "opinion as to why the facts should be . . . construed" a particular way, and its explanation "regarding how the facts upon which it relies for its contentions support those contentions."[11]

Such discovery has its limits. Because lay witnesses lack legal expertise, some issues better lend themselves to interrogatory discovery. For example, one court has held that because "patent cases turn peculiarly on a conceptually dense dynamic between physical objects, words in [patent] claims, and principles of law," contention discovery should be pursued through Rule 33 interrogatories answered by lawyers, not a Rule 30(b)(6) deposition of a lay witness.[12]

The deposition also cannot be used to pierce privilege or attorney work product. Investigative reports or other documents that are otherwise privileged continue to remain so, even if the underlying facts are subject to disclosure. For example, in a recent medical malpractice case, the court held that while the corporate designee was "obliged to investigate," independently, the facts of the underlying incident, the witness could not be required to disclose the results of its counsel's investigation, which enjoyed work product protection, or the conclusions of a risk management/peer review, which enjoyed statutory protection.[13]

Similarly, the deposing party's right to discover the underlying facts does not permit it to elicit impressions of counsel about the relative significance about the facts, nor to discover defense counsel's instructions to the witness about such facts - even if the witness learned the facts in question from counsel.[14] While the deposing party has some leeway to inquire about the corporation's "interpretation" of relevant facts and documents, the Rule 30(b)(6) deposition may not be used to discover how counsel intends to marshal the same evidence at trial.[15]

Conclusion

The Rule 30(b)(6) witness functions as a corporate spokesperson on the noticed deposition topics. The witness has an affirmative obligation both to consult all available sources of information and to understand the corporation's "position" - i.e., the facts on which it relies to support its contentions. Because failure to tender a suitably prepared witness risks locking the corporation into an unfavorable position at trial, and also exposes the corporation to sanctions, thorough preparation is critical.

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Endnotes:

1. See, e.g., *Otero v. Vito*, 2006 WL 353149, at *4 (M.D. Ga. Dec. 7, 2006) (awarding deposition expenses); *Guy Chemical Co. v. Romaco N.V.*, 2007 Wl 184782 (W.D. Pa. Jan. 22, 2007) (second

deposition to be taken at corporation's expense); *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 172 (D.D.C. 2003) (awarding motion costs).

2. See, e.g., *Torres v. Bacardi Global Brands Promotions*, 2007 WL 757817 (S.D. Fla. March 8, 2007) (deeming witness' inability to explain changes in plaintiff's employment designation as admission that corporation has no explanation); *Kimberly-Clark Corp. v. Tyco Healthcare Retail Group*, 2007 WL 601837 (E.D. Wis. Feb. 23, 2007) (precluding defendant from offering any evidence to support its laches claim other than the few facts identified at deposition).

3. Fed. R. Civ. P. 37(d). See also *Otero,* 2006 WL 3535149, at *4 (M.D. Ga. Dec. 7, 2006); *Kimberly-Clark*, 2007 WL 601837 (granting protective order as to topics that lack reasonable particularity).

4. *Mitsui v. Puerto Rico Water Resources Auth.*, 93 FRD 62, 67 (D.P.R. 1981).

5. *United States v. Taylor*, 166 FRD 356, 362 n.6, aff'd, 166 F.R.D. 367 (M.D.N.C. 1996); *Technip Offshore Contractors v. Williams Field Servs.*, 2007 WL 869534, at *7 n.5 (S.D. Tex. March 21, 2007).

6. *Wilson v. Lakner*, 228 FRD 524, 528 (D. Md. 2005).

7. *Taylor,* 166 FRD at 361-62; *Twentieth Century Fox Film Corp. v. Marvel Enterprises*, 2002 WL 1835439 (S.D.N.Y. Aug. 8, 2002) (ordering media corporation's witness to testify about document that emanated from an indirectly owned television station).

8. *Ierardi v. Lorillard, Inc.*, 1991 WL 158911, at *3 (E.D. Pa. Aug. 13, 1991).

9. *Walden v. City of Chicago*, 2007 WL 328883 (N.D. Ill. Feb. 1, 2007). See also *Catalina Rental Apartments, Inc. v. Pacific Ins. Co.*, 2007 WL 917272, at *3 (S.D. Fla. March 23, 2007) ("the corporation's obligation under Rule 30(b)(6) does not mean that the witness can *never* answer that the corporation lacks knowledge of a certain fact") (emphasis in original).

10. *In re Vitamins Antitrust Litig.,* 216 FRD 168, 172 (D.D.C. 2003); see also *Paul Revere Life Ins. Co. v. Jafari,* 206 FRD 126, 127 (D. Md. 2002) (ordering witness "to provide testimony regarding facts obtained by counsel during discovery that relate to [the corporation's] contentions.").

11. *Taylor*, 166 FRD at 361-62; *Paul Revere Life Ins. Co.*, 206 F.R.D. at 127.

12. *McCormick-Morgan, Inc. v. Teledyne Industries, Inc.*, 134 FRD 275, 286 (N.D. Cal.), rev'd on other grounds, 765 FSupp 611 (N.D. Cal. 1991). See also *Canal Barge Co. v. Commonwealth Edison Co.,* 2001 WL 817853, at *2 (N.D. Ill. July 19, 2001) (noting distinction between "legal" issues that require attorney input and "factual issues" about which lay witnesses may testify).

13. *Wilson,* 228 FRD at 529.

14. *Protective National Insurance Company of Omaha,* 137 FRD 267, 280 (D. Neb. 1989); *Helfer v. Marriott Int'l, Inc.,* 2007 WL 433477, at *7 (E.D. Pa. Feb. 8, 2007).

15. *Securities Exch. Comm'n v. Morelli,* 143 FRD 42, 47 (SDNY 1992). Accord: *American Red Cross v. Travelers Indemnity Co. of R.I.,* 896 FSupp 8, 13-14 (D.D.C. 1995).

Reinventing Witness Preparation

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Surprise! They taught us all wrong. We should be doing it so differently.

We've prepared witnesses for deposition and cross-examination so many times, we can do it in our sleep. *Listen carefully to the question. Don't try to answer a question you don't understand.*

We've seen it in the training videos. *Answer only the question that's asked, not the question you think they meant to ask. Don't try to improve on the question.*

We've heard it at CLEs and learned it in trial practice classes. *Above all, don't volunteer information. If they ask you whether you were at Grand Central Station on Tuesday, the answer is "No"; not "No, I was there on Wednesday."*

We've watched colleagues do this drill with innumerable clients in countless witness preparation meetings. *If there's even a single word in the question you don't understand or if there's some ambiguity in the question, just say "I don't understand the question." Or say "Can you rephrase the question, please?"*

We've given the familiar warnings. *When the other side is asking you questions, that's not the time to try to win your case. Your job is simply not to lose it. Just answer the question they ask you. If there's other information you think helps your case but the question doesn't call for it, resist the impulse to volunteer it. If I think the information is helpful, I'll get it from you when it's my turn to ask you questions.*

We've trained witnesses about what to do when their memories are impaired or deficient. *It's not a sin if you don't remember something. If that happens, don't try to come up with an answer anyway. Just say "I don't recall." And if you don't know something, just say "I don't know." That's perfectly OK.*

And we've cautioned witnesses about the big differences between testimony and conversations. *Giving testimony is not like having a conversation. In a conversation, you're trying to engage the other person and get the person to be more interested in what you have to say. You say things that help the other person ask you more questions because you want the person to be more interested in you. But when you testify and the lawyer on the other side is asking you the questions, it's just the opposite. Avoid the temptation to turn it into a conversation. Keep your answers as short as possible. Don't elaborate. Just answer the question and stop.*

We litigators have been preparing witnesses like this for so long that no one questions it. It's the bedrock of witness preparation. It's gospel. It's what good litigators do.

But before we give these standard instructions to another witness, we need to think about how slavishly adhering to them can harm our cases and cost us valuable opportunities to win them. And to do that, we need to consider how these instructions probably evolved and what purposes they were meant to serve.

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The Standard Instructions

The standard instructions undoubtedly developed after watching witnesses make catastrophic mistakes. Hearing a witness say things that needlessly opened up a line of damaging questions must have led to the advice to answer only the question asked and not volunteer anything. Seeing a witness answer an ambiguous question in the way the witness privately interpreted it, rather than in the way someone else might interpret it, must have led to the advice that, if the question has even a slight ambiguity, just state that you don't understand it. To be sure, advice like that, standing alone and unadorned, logically addressed those concerns.

Then, as litigation became more combative and the stakes rose, our litigator predecessors saw how even the slightest deviation from a good answer could become fodder for exploitation by a wily opponent. Lawyers for witnesses would fear educating their opponents needlessly. Because clients lacked legal training and were unfamiliar with all the ways thoughtless answers could be costly, the clients needed more protection.

In depositions, some lawyers—many in fact—took to the practice of trying to insert themselves between the question and answer, transparently feeding the answer they wanted the witness to give.

Q: How many times did you go to the boat club in August?

Counsel: Objection. If you recall.

A: I don't recall.

Q: Okay. How many times would you *estimate* you went to the boat club in August?

Counsel: Objection. Don't guess.

A: I'd only be guessing and I'm not going to do that.

Q: All right. Let's try it this way. Did you go to the boat club more than once in August?

Counsel: Objection, but the witness can answer the question if he remembers how many times he went to the boat club and in which months.

A: I don't remember how many times I went to the boat club in any given month.

Obstructive practices like these led to rule revisions forbidding lawyers from making speaking objections or other statements telegraphing suggested answers. But the fact that these practices developed at all exposed a fundamental attitude shared by many lawyers—that clients simply can't be trusted to give good or safe testimony. Many lawyers, if they could, would prefer to testify in place of their clients to avoid the problems flowing from ill-advised answers.

This insecurity is at the heart of how most lawyers were trained to prepare witnesses for deposition or cross-examination. It was not enough to tell the witness to answer just the question asked, not to volunteer information, and not to answer ambiguous questions. Without more, those instructions would not get the job done in a world that viewed a deposition or cross-examination as a minefield where the smallest testimonial misstep could cause an explosion from which the client would never recover.

Lawyers felt they had to condition their clients to view depositions and cross-examination in the same combat-inspired frame of mind. *Don't be fooled if the lawyer who asks you the questions seems friendly. It's a sham. Make no mistake. He's not your friend. He wants to do everything he can to harm you and help his client. This is serious stuff.*

Witness preparation thus became a survival training program from which clients could not graduate until they understood just how badly they could suffer from self-inflicted wounds. They had to see opposing counsel as an enemy whose every question was designed to lay a trap or strike a fatal blow. When clients distilled all the instructions, examples, and pep talks, they were left with the overriding impression that, as soon as they gave their testimonial oath, the less they said the better.

The witness was not there to cooperate with opposing counsel but to make opposing counsel's job harder. Questions avoided were bullets dodged. In a perfect world, if every question could be avoided, no glove would be laid.

In standard witness preparation, these subliminal messages are nearly unavoidable. And many litigators would probably say that's a good thing, precisely how a well-prepared witness should approach an interrogation by opposing counsel.

But lawyers who adhere to this conventional wisdom fail to see that conditioning witnesses to think like this reduces only some litigation risks while inviting other, potentially more dangerous ones. To be sure, the standard instructions reduce the risk of a witness uttering ill-chosen words; and, all other things being equal, avoiding ill-chosen words is better than uttering them.

But even the best prepared and smartest witnesses have no immunity from saying stupid things. How many times have you prepared a client for a deposition, believing you were clear in your warnings about saying too much, only to watch the client give an answer you wished you could have captured in your hands and stuffed back into the client's mouth, all while you sat poker-faced so as not to call opposing counsel's attention to it?

The conventional way of trying to guard against these risks is to repeat the instructions over and over again, drilling them into the witness's head in the hope that the more you say them, the less likely the witness will be to disregard them. Instead, the more you drill and the more you warn, the more you actually court a danger that could be far worse than seeing your witness phrase an answer the wrong way or volunteer something that goes beyond the scope of the question.

Losing Credibility

The essential core of the problem, the real danger, is that of turning a good witness into someone so afraid of saying the wrong thing that he or she fails to say the right thing. It is the danger of turning a likable and trustworthy witness into an off-putting, unbelievable one who looks to be hiding something; the danger of turning a witness who might otherwise have hit a home run into one who whiffs.

Consider, for example, this excerpt from actual deposition testimony, edited merely to protect privacy and omit objections:

Q: Do your responsibilities and duties include making recommendations based on the information you receive about your competitors' products?

A: I'm not sure I understood that question.

Q: What is it about the question you don't understand?

A: I don't understand who you're asking the recommendations go to.

Q: Do you yourself make recommendations?

A: It depends on the information.

Q: And when you make recommendations, are you making recommendations about what the company should do to match its competitors?

A: I do not make decisions for the company.

Q: I didn't ask you if you made decisions for the company. I only asked you if you made recommendations.

A: My job is to simply understand what the products in the marketplace do.

Q: And then you said you sometimes make recommendations; correct?

A: I don't understand.

Q: What about the question don't you understand?

A: I don't remember the question you're asking now.

Q: Do you sometimes make recommendations about what some people in the company should do with respect to the development of products to match the company's competitors?

A: That's too broad of a question for me.

Q: Why is that?

A: Because I said it's too broad of a question.

Q: But I asked if you sometimes do that, and that's too broad for you?

A: I don't know what you mean by "people." I don't know who you're referring to.

One might deduce that, as a result of conventional witness preparation instructions, this witness was conditioned to distrust each question and frightened into thinking any responsive answer could be harmful. When this witness claimed not to understand the questions—questions that, in the context of the examination, any judge or juror easily would have understood—he became a testimonial liability to his employer.

To preserve his credibility, he needed merely to answer whether he sometimes made product development recommendations to others in the company. But because he was so unsure of how such testimony might be used against him or his employer, he became unresponsive, combative, and evasive—someone unlikely to perform well before a jury and whose deposition testimony could well be used as an impeachment tool were his employer to call him as a witness at trial.

One problem with the standard witness preparation playbook is that it is based on unfamiliar and unnatural rules of human interaction. Not only do many witnesses have trouble processing the instructions; witnesses can stumble because the instructions require them to change lifelong habits about *how* they answer questions.

They are being told to dial down the amount of information they ordinarily would provide, but they have no insight about how to calibrate that and no context to know whether they are doling out too little or too much. In many witnesses' minds, the standard instructions reduce to this: Just say as little as possible and you'll do fine.

Another problem is that the standard instructions ignore how third-party audiences—listeners who process language and conversation as ordinary people—would perceive the testimony resulting from those instructions.

Those audiences—often jurors who must make judgments about witness credibility—would listen to the Q&A differently from the lawyer and his over-coached witness. Jurors are not conditioned to hear testimony as a battle of wits or as a word game. To them, the back-and-forth between lawyer and witness is just a form of dialogue. If a witness responds by saying "It depends on what the meaning of the word 'is' is," the witness comes off as deliberately evasive and untrustworthy, rather than as technically accurate.

When people listen to dialogue, they apply a set of assumptions the standard witness instructions ignore. Listeners expect someone answering a question to be cooperative and to explain something if the question, answer, or context seems to call for it. When a witness falls short of those expectations, the people evaluating the testimony assume the witness must have something to hide or cannot be trusted.

Here's a hypothetical showing how the listener's expectations can make the standard instructions perilous. The witness is testifying in a wrongful termination suit about his decision to fire the plaintiff. The plaintiff had received above-average performance reviews, was in a protected class, and was terminated while others with less seniority and weaker performance were not.

The plaintiff claims the supervisor singled her out for termination because she refused the supervisor's advances. There is some ambiguity about whether his comments to her were advances, but he denies engaging in any improper behavior or that his termination decision was for any personal reason. The defense

is that, when the department's budget was cut, the plaintiff's job responsibilities were the easiest to reassign to others.

The supervisor has been given this conventional instruction: *Whenever you can, you should answer "Yes," "No," "I don't know," "I don't recall," or "I don't understand the question." Do not elaborate or explain your answer. That would fall into the category of volunteering—don't volunteer. If I think any elaboration is needed, I will ask you the questions that I think are necessary when it's my turn.*

Here's how it plays out:

Q1: You found my client attractive, isn't that so?

A: I don't understand the question.

Q2: Well, two weeks before you terminated her, you asked her to go out for a drink, didn't you?

A: No.

Q3: Isn't this an email from you to the plaintiff, asking her to join you for a drink?

A: Yes.

Q4: And it says: "Drinks at 5:15 Thursday after work?" with a question mark. "Sunset Grill. Will you be there?" Did I read that correctly?

A: Yes.

Q5: She didn't show up at the Sunset Grill that day, did she?

A: No.

Q6: And shortly after that, you terminated her.

A: Yes.

Q7: And there were other people you could have terminated instead of her, isn't that so?

A: I don't know.

Q8: Well, Sam Brown worked in your department, didn't he?

A: Yes.

Q9: And did you terminate him?

A: No.

Q10: And he had joined the company three months after the plaintiff did, correct?

A: Yes.

Q11: So you terminated the plaintiff, who was senior to Brown, and you kept Brown?

A: Yes.

The supervisor answered Q1 "I don't understand the question" because he thought the question was a trap: a "yes" would support the plaintiff's theory that he had made unwelcome advances, and a "no" would sound like he terminated the plaintiff because he did not find her attractive. So, with no seemingly safe answer, he figured the best he could say—within the confines of the lawyer's instructions—was that he did not understand the question, thinking there was enough ambiguity in the word "attractive" to warrant such an answer.

But that answer made him look evasive because any juror plainly would have understood the question in the sense it was asked and undoubtedly why it was being asked. And anytime a juror would understand the question, the witness treads on dangerous ground by claiming not to.

What about Q2? The email that later appeared in Q3 was sent three weeks—not two weeks—before the termination. Hence, the supervisor's answer to Q2 was literally true. Indeed, "no" was the only answer the supervisor could have given without straying from the lawyer's instructions.

But that answer left the witness exposed to embarrassment when the later questions about the email arose. Those later questions made the answer to Q2 look like the witness was trying to hide the truth.

How about Q7? The witness mentally choked on the words in the question "could have terminated instead of her." On one hand, he had the power to terminate others, so a "yes" answer would have been true, but it would have fit nicely into the plaintiff's case theory. On the other hand, according to the defense theory, he could not really have terminated anyone else without acting contrary to the best interests of the company. In that sense, he did not feel at liberty to terminate others, but a "no" answer would have required an explanation.

> The real danger is that of turning a good witness into someone so afraid of saying the wrong thing that he or she fails to say the right thing.

Caught on the horns of an ambiguous question, and having been instructed not to volunteer information or give explanations, he defaulted to "I don't know," which—worse—made it sound like he did not even deserve to be a supervisor. While "I don't understand the question" might have been better, he already had used that chit on Q1. Anyway, when witnesses get nervous or feel boxed in, they are prone to answer "I don't know," one of the five answers the lawyer said would be OK to use.

But that response left the poor supervisor wide open to the sequence in Q8–Q11, all of which made his answer to Q7 look, once again, like he was running from the truth.

Better Answers

How would a better prepared witness, unburdened by conventional witness preparation instructions, have answered the very same questions? It might have gone something like this:

Q1: You found my client attractive, isn't that so?

A: Well, I'm not exactly sure what you mean, but I didn't find her attractive in the sense I think you're implying.

Q2: Well, two weeks before you terminated her, you asked her to go out for a drink, didn't you?

A: I think you're referring to an invitation that actually was three weeks before she was terminated and that was part of an invitation that went out to the whole department.

Q3: Isn't this an email from you to the plaintiff, asking her to join you for a drink?

A: Yes, after she didn't respond to the email invitation I had sent to the department. I was trying to get the whole department to come out for drinks as a morale booster.

Q4: And it says: "Drinks at 5:15 Thursday after work?" with a question mark. "Sunset Grill. Will you be there?" Did I read that correctly?

A: Yes, you did.

Q5: She didn't show up at the Sunset Grill that day, did she?

A: No, she didn't.

Q6: And shortly after that, you terminated her.

A: Well, three weeks later I did, yes.

Q7: And there were other people you could have terminated instead of her, isn't that so?

A: Not exactly. I couldn't have terminated others without creating additional problems for my department.

Q8: Well, Sam Brown worked in your department, didn't he?

A: Yes, he did.

Q9: And did you terminate him?

A: No, I needed him because he was working on a key account.

Q10: And he had joined the company three months after the plaintiff did, correct?

A: Yes.

Q11: So, you terminated the plaintiff, who was senior to Brown, and you kept Brown?

A: Yes, for a good reason. Would you like me to explain?

These answers violate the very heart and soul of conventional instructions on how witnesses should answer opposing counsel's questions. Even though these are yes or no questions, the witness gave lots of answers outside the traditional "Yes," "No," "I don't know," "I don't recall," and "I don't understand the question."

What's more, the witness volunteered information. The witness improved on the questions. The witness earnestly attempted to answer questions that were ambiguous or that he could have said he did not understand. The witness treated the interrogation as if it were a normal conversation, not formal testimony.

And all to great effect. Nothing in what the witness said sounded evasive. To the contrary, the clarity and naturalness of the answers made the witness sound credible and cooperative, as if he was trying to help the jury understand what happened. And the questioner scored no points, getting not a single useful piece of testimony.

Rather, the witness was able to advance defense themes, all while being cross-examined. When he offered to explain his response to Q11, he put the examining lawyer in a box: If the lawyer declined, the lawyer would seem afraid of exposing the truth to the jury; if the lawyer acquiesced and permitted the explanation, the jury would hear much that surely would hurt the plaintiff.

Conventionalists will argue that this approach is too risky, that explanations should be saved for redirect, and that the way to eliminate the scars from a harmful cross-examination is with a skillful rehabilitation. The goal, however, should be to make redirect unnecessary and to obviate the need for rehabilitation at all.

Simply put, if the witness needs to be rehabilitated, it means the witness has been wounded. Maybe rehabilitation will succeed; maybe it won't. But proper preparation should prevent the wounds in the first place, thereby avoiding a whole lot of hurt to our cases.

Here's why redirect and rehabilitation, though frequently used and often necessary, are flawed solutions to the problem of a witness who gives poor testimony. For one, time passes—sometimes too much time—between when opposing counsel clobbers the witness and when we get the first chance to try to fix it. By the time it's our turn to repair the damage, the stain has begun to set. The jury may already have formed an impression of the facts or of the witness, and our burden of persuasion is much more challenging.

We also risk looking like we're tossing up imaginative afterthoughts or—worse—like we're trying to camouflage or spin bad facts. And we may not be able to establish the context for the explanatory facts. If we fail in that attempt, the jury may not be able to put it all back together. Inevitably, we are in danger of telegraphing that our case has suffered unwanted blows.

And lawyers are seldom positioned to do an effective redirect and rehabilitation on every flub that needs correcting. Even if we could remember all of them, we still would need to know or recall all the facts we promised the witness we would bring out on redirect if the need arose.

Of course, the witness has the superior knowledge of the explanatory facts. Our knowledge of them may be weak or nonexistent.

Nor can we readily learn them or go over them with the witness. Rarely is there an opportunity to brief or debrief the witness between the cross-exam and the redirect. In some courts, it's expressly prohibited.

Further, we are hampered by the rules of evidence. Some judges will require, even on redirect, the use of open, non-leading questions. Unless we are telepathic, though, we may need a

fair bit of luck to get the witness to understand exactly what information we're trying to elicit as we attempt to undo the harm from opposing counsel's cross-examination. And even when we can plan the redirect with the witness, it may come off sounding too rehearsed or contrived.

Depositions

Attempts to fix bad testimony are not just trial problems. They also are deposition problems.

Most of the time, and often for good reason, we decline the opportunity to examine clients and friendly witnesses at their depositions and instead reserve our questions for trial. Then, in the months between those depositions and the trial, if there is bad deposition testimony, it just sits there waiting to be exposed to oxygen and burst into flames.

What else might we do? Written corrections are not an ideal solution. In some courts, the only allowable corrections are for mis-transcriptions, not substantive changes, and many courts frown upon whole blocks of self-serving transcript changes that put everything in context and a better light, as might be done during redirect.

Even if we could prepare and serve dream errata sheets, think how much grist that would provide for cross-examination at trial: *Who wrote this errata sheet—you or your lawyer? Your lawyer reviewed this before you signed it, right? What you say in your errata sheet is different from what you said when I asked you the question in your deposition, isn't it? When you signed this errata sheet, you thought that the answer you had given under oath in your deposition was not as helpful to your case as what you and your lawyer wrote in this errata sheet, correct?* Each transcript change offers ammunition to opposing counsel.

There's another problem with bad deposition answers. In many jurisdictions, if the other side moves for summary judgment based on your client's deposition testimony, your client will not then be permitted to contradict the deposition testimony to create a disputed issue of fact. Even if you think your client's affidavit simply is offering mere context for the deposition testimony or some additional facts not actually in conflict with it, there is always the chance the court will read the affidavit differently and grant your opponent's motion to strike it.

For all these reasons, there really is no substitute for having your client's testimony come out the right way the first time it is given.

After-the-fact efforts to correct it—whether with errata sheets, affidavits, redirect examination, or more intensive rehabilitation techniques—are poor and risky substitutes for having a well-prepared witness testify properly on the first go-around.

How to Prepare Witnesses

So what is the better way to prepare witnesses?

It begins with recognizing that the governing philosophy no longer should be "the less said the better" and that in dealing with witnesses one size does not fit all. Witnesses have different skill levels, different abilities to absorb and apply what we cover with them in our prep sessions. Some witnesses know or can be educated about the nature of the dispute; others do not and cannot. Some witnesses communicate well; others, not so much.

Likewise, no two cases are the same. The facts, of course, always differ, as does each witness's place and importance in the story and the way the testimony will be used. Some witnesses have only helpful things to say; others bring baggage.

Witness preparation must be tailored to the witness and the case, and not simply be a set of rote instructions identically given to each witness all the time.

> Simply put, if the witness needs to be rehabilitated, it means the witness has been wounded.

If evaluation of the witness and her role in the case suggests the better course is to keep the witness on a short rope, the conventional witness preparation instructions probably make sense. But if the witness is a reasonably good communicator, has a reasonably good command of her role in the story, and has a fair understanding of the importance her testimony will have in the resolution of the case, then a different type of preparation would probably be better.

So this should be the first principle of all witness preparation: *Know your witness*.

Before we can determine how to prepare the witness, we must figure out what good and bad the witness is capable of doing on the stand. That means spending time with the witness to learn about her role in the events and importance to the case; whether the witness's testimony will do more good than harm; whether the witness can speak plainly and explain complex facts in simple fashion; whether the witness uses words and expressions in the way most people would understand them; whether the witness comprehends the facts, the issues, the process, her own significance, and so on.

When the witness impresses with enough positive testimonial attributes—and many witnesses do—then we should give instructions sounding something like these:

"

Cases are decided by evidence, and the evidence usually comes from the mouths of people like you who know things that bear on the case. This makes you a "witness" and makes the things you have to say "testimony." But don't let those words scare you.

As a witness, you're simply someone who knows something that the judge or the jury or the lawyers in the case may want to hear. And "testimony" is just a fancy label we give to things that witnesses have to say.

I don't want you to think that giving testimony is something you need to be afraid of. It's not. Basically, it's just answering questions, and you do that all the time. In life, you've had lots of experience answering questions; and, when you give testimony, you're going to draw on that experience and rely on many of the same skills you use in ordinary conversation.

But there are some things about testimony that are different from everyday conversations, and we need to go over them.

First, if you forget everything else I tell you today, please don't forget this: You must tell the truth. That's really the only rule about testifying. Everything else is just commentary.

Second, you need to understand that when the lawyer on the other side is asking you questions, he's going to try to use your answers—your words—to tell his story. He wants your answers to fit into a narrative that he would like to persuade the judge or jury to believe.

Some lawyers have a wildly imaginative story that's very different from what witnesses know to be the truth. Other lawyers want to tell a story that's pretty close to what witnesses know is true, but the lawyer might not have all the facts, might be misinformed about some of them, or might be inclined to shade them a certain way to help his client.

Of course, it's also possible that we don't have all the facts or that we might be misinformed, but I don't think so. Either way, this case is going to depend on whether the judge or jury believes the other side's story or ours. That's why your testimony and how you give it is very important.

One of the things that some opposing lawyers do when they want to get facts that help their story is to ask a limited set of questions to witnesses on the other side of the case. These questions are designed to bring out just enough facts that the lawyer thinks will support the story he wants to tell.

He won't ask you about everything because much of what you have to say doesn't fit his story and may well contradict it. So he'll ask you about only some things, and he'll try to keep you from saying anything else. Or he might ask you a question that's designed to get you to state only some information, without explanation or context, to create a false impression that fits his story.

In ordinary conversation, this doesn't happen too much. If someone asks you a question, you pretty much have free rein to answer it as you wish so that you can clear up any misunderstandings and any false impressions.

But when you give testimony, the opposing lawyer is going to ask questions with information already built into them and ask you to agree. These usually are in the form of some statement, followed by "Isn't that right?" These are called leading questions and for good reason—the lawyer is trying to lead you to say things that will fit into his story.

Some of those things you may agree with, and, if you do, you should say so. But sometimes the information is not exactly correct, or it might be technically correct as far as it goes but create a false impression unless other information is also given.

That's what I want to talk to you about, because you shouldn't answer a question in a way that would leave a false impression or that suggests you agree to things that you don't necessarily agree to. That would be contrary to your oath to tell the truth, the whole truth, and nothing but the truth.

Some lawyers would advise that, when you get that type of question, you should simply say that you don't understand the question, that you don't know, or that you don't agree. My advice is somewhat different.

In ordinary conversation, if you understand a question, or you can tell what the person is asking, or you have some information that is responsive to the question, you wouldn't pretend otherwise and duck the question. If you did that, you would sound like you had something to hide, and we don't want the judge or jury to think you're being uncooperative or trying to hide anything.

The goal is to answer every question you can truthfully answer and to avoid being misunderstood in the process.

So if ordinary people would understand the point of the question and if you understand the point of the question, you shouldn't say that you don't understand it, even if there's a word or phrase in it that you might not understand. Instead, you should ask the lawyer what he means by that word or phrase, or you should tell him how you understand the word or phrase and then give him your answer.

When you do that, your answers will sound and be natural, just like in regular conversation. If in regular conversation you would give an explanation with your answer, then you should do so when you're testifying. If the lawyer tells

you he just wants a yes or no answer and nothing else, but you feel a need to give some explanation, you should say "I can't answer that yes or no; may I explain?" Nine times out of ten, you'll get a chance to explain, but if the lawyer or judge won't let you do that, then you should say "Well, I can't answer it with just a 'yes' or 'no,'" and you should leave it at that.

Remember, the judge is a regular person and so are the people on the jury. They will interpret your answers as if you were giving them in ordinary conversation. If regular people would expect you to qualify your answer to prevent someone from drawing the wrong conclusion, you should qualify your answer when you're giving testimony.

On the other hand, don't be overtly combative with the lawyer who's asking you the questions. Otherwise, the judge or jury might think you're hiding something. That doesn't mean you have to agree with the lawyer or his questions. If you don't agree with something, you certainly should say so, and if the truth would be aided by an explanation, then by all means explain.

Here's a made-up example of how a simple "yes" or "no" would leave the wrong impression: Let's say the lawyer establishes through some questions that you were present when an accident took place and that people at the scene were hurt. If the lawyer is trying to show that you somehow contributed to the injuries by not calling 911, he might ask whether you called 911 when you saw the victims lying on the ground. If you didn't call 911, a "no" answer would be technically correct but might leave a false impression that you were indifferent to the victims or that you could have taken action to help them, even though the truth is that you were concerned but unable to call 911 because there was no phone handy.

In that situation, instead of just a simple "no," you should answer "No. I wanted to but I didn't have my phone with me." Giving your answer in full context makes it the truthful answer.

Let's also focus on "why" questions for a moment. If the opposing lawyer asks you a "why" question, that's an invitation to tell your side of the story. The lawyer is hoping you won't have much to say or that your reasons really aren't very good ones. You should be as thorough as you need, so that the listener can see the facts through your eyes.

Of course, before answering any question, you should make sure that you understand it and you should ask for an explanation of anything you don't understand. Think through your answer carefully before you start to speak. If you answer impulsively, it might be inaccurate or misleading.

Let's also talk about what it means to say "I don't recall." Sometimes, a question might call on you to say what you remember about a particular event or conversation, but your memory of it might be vague. Some lawyers might advise you to answer those questions by saying simply that you don't recall, rather than to state what's in your vague memory. My advice is different.

> If you have a memory, even though it's vague, it wouldn't be truthful to say you don't recall. Instead, you should answer whatever it is you do recall and qualify your answer by saying "To the best of my memory" or "If my memory serves me" or words to that effect.

At this point in the preparation, it's smart to do some practice Q&A to see how well the witness performs under these instructions. Does the witness over-answer? Appear too combative? Not share enough information? Pass up opportunities that call for explanatory context?

Once we see how the witness actually handles different types of questions, we can adjust the instructions. The goal should be to customize the instructions to fit the witness and the case, and avoid the cookie-cutter approach that treats all witnesses the same and restricts them all with the *pro forma* standard instructions.

Within this approach, preparing witnesses for interrogation by opposing counsel should be guided by these teachings:

- A testimonial occasion is a search for the truth.
- Saying too little can leave false impressions, impair credibility, or otherwise harm the case as much as saying too much, sometimes even more so.
- The best time to give explanations, to put answers in their proper context, and to dispel mistaken impressions is when the question is first answered.
- Listeners will apply the same interpretive judgment to testimonial answers as they apply in ordinary conversation.
- A claimed failure to understand a question will seem incredible if the question would be understood by a regular person in regular conversation.
- Witnesses are people, and people differ in their testimonial skill and capacity.

In short, our standard timeworn witness preparation techniques carry more downside risk than we realize and often are ill-suited for modern litigation. Instead, we should give our witnesses the confidence to answer questions with real insight and facility, with care to be sure, but often as they would in ordinary conversation.

The historic core of conventional witness preparation—the idea that less is more—is not always a helpful guidepost. In many instances, more is more. ■

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Remote Depositions Bring Ethics Considerations For Lawyers

By **Lindsey Mann, Alison Grounds and Christopher Kelleher** (May 5, 2020, 4:49 PM EDT)

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Across the country, clients are eager to see their cases move forward, and courts are struggling with how (and when) to clear the backlog of cases from their dockets. However, with no clear indicators signaling an imminent return to litigation as we once knew it, attorneys and courts are being forced to think outside the box to identify the various ways in which they may creatively and meaningfully advance cases during these times of uncertainty and social distancing.

For civil litigators, one option is taking and defending depositions remotely. Of course, to some early adopters and tech-savvy litigators, this virtual option is not new. To many others, though, it presents a scenario that may have seemed unimaginable just a few short months ago.

And as with any other unfamiliar area of law, utilizing virtual litigation technologies and participating in remote depositions require attorneys to adequately prepare and educate themselves in order to avoid inadvertently engaging in conduct that would violate their ethical duties and obligations, including the principal duty to provide competent representation.[1]

The following discussion looks at some of the most common ethical questions facing attorneys taking or defending remote depositions, explains several relevant rules and considerations, and offers best-practice recommendations to guide counsel through the process.

Opposing counsel sent me copies of the deposition exhibits ahead of my client's deposition next week. Can I look at them? Can I discuss them with my client?

This question presents an interesting scenario, and the answer is not altogether clear. As an initial matter, there is a possibility that the court would consider the documents and exhibits to be attorney work product.

As one court held, "the selection and compilation of documents by counsel ... in preparation for pretrial discovery falls within the highly-protected category of opinion work product."[2] Under this viewpoint, the deposition exhibits are entitled to heightened protection not simply because they are to be used in the deposition, but primarily because the selection and ordering of the documents

provide insights into the attorney's mental impressions, legal theories and case strategies — so-called opinion work product.

However, even if such documents are entitled to the protection of the work product privilege, the voluntary disclosure of the document compilation may operate to waive the protections of the work product privilege as to the documents actually disclosed, particularly if counsel failed to take reasonable steps to prevent the documents from being reviewed.[3]

Setting aside the question of privilege, several ethical obligations must be considered before reviewing the documents or sharing their contents with your client. In particular, counsel are reminded of Rule 3.4(b) of the American Bar Association's Model Rules of Professional Conduct, which expressly prohibits a lawyer from counseling or assisting a witness to testify falsely, and the comment to Model Rule 3.3, which reminds counsel of their special duties as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.[4]

Any steps an attorney takes to prepare his or her client for a deposition should be consistent with these obligations and with the truth-seeking goals of the judicial system as a whole; in other words, counsel must act consistent with his or her duty "to extract the facts from the witness, not to pour them into him."[5]

As a best practice, a lawyer who intends to send deposition exhibits to opposing counsel for use at a remote deposition should take steps to prevent opposing counsel from reviewing the documents or exhibits before the deposition. This may be accomplished by, for instance, placing the exhibits in a sealed envelope or package with explicit instructions that the seal on the packaging should not be broken until the time of the deposition, at which time the seal should be broken on camera.

Another option to consider is only available if a court reporter or other officer of the court will be present with the deponent during the remote deposition. If so, counsel should consider sending the exhibits directly to him or her with specific instructions to keep the exhibits secured until the deposition begins. Taking these prophylactic steps on the front end could also serve as evidence that the attorney took reasonable steps to preserve the work-product privilege.

Of course, counsel may consider foregoing the mailing of hard-copy exhibits altogether and instead look to alternative options, such as remotely uploading documents through a secure channel or medium at the time of the deposition. Many remote deposition platforms offer this option. While real-time remote upload eliminates the above-mentioned concerns regarding premature disclosure of counsel's deposition exhibits, such expanded capabilities present a unique set of challenges, as discussed below.

Can I communicate with my client during his or her remote deposition?

Despite the temptation to communicate with your client in a manner that would not draw the attention of opposing counsel — for instance, by sending a text message, using a virtual messaging service like Skype, or writing notes to the client or making suggestive gestures out of view of the camera — attorneys are prohibited from communicating with or advising their clients during a remote deposition to the same extent as such actions would be prohibited during an in-person deposition.

Federal Rule of Civil Procedure 30(c)(2) provides that "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 [to terminate or limit the deposition]." Beyond those narrow exceptions, attorneys are expressly prohibited from instructing or influencing their clients once their depositions have commenced.

Of course, you may continue to lodge timely objections during the deposition, but such communications are made for the record and not communicated to — or through — the client. Counsel is also reminded of the mandate in Rule 30(c)(2) that an objection must be stated concisely in a nonargumentative and nonsuggestive manner — in other words, lawyers are prohibited from the "making of lengthy objections which contain information suggestive of an answer to a pending question" because such objections are considered offensive to the spirit of the prohibition against private conferences.[6]

What if I want to talk to my client during a break in the deposition?

As an initial matter, courts are somewhat divided over whether attorneys are permitted to confer with their clients during breaks in depositions.[7] The permissibility of such attorney-client communications may also be the subject of a trial court's discovery order.[8] Thus, counsel should first become familiar with the applicable rules and court orders in the relevant jurisdiction governing attorney-client communications at depositions.

Assuming that you are not expressly prohibited from conferring with your client during a break in the deposition, extra caution must be taken in the remote setting to ensure that the attorney-client privilege is protected. In contrast to a face-to-face conferral where the attorney can ensure that no third parties are within earshot whose presence would destroy the protections of the privilege, the same is not necessarily true for remote communications. Therefore, these attorney-client conversations should take place beyond the "walls" of the virtual deposition software and should be conducted over a secure line of communication.

On the other side of this coin, the attorney taking the deposition is not without recourse if he or she believes that the deponent has been improperly coached by opposing counsel during a break in the deposition, which would constitute a violation of Model Rule 3.4(b).

For one, "[i]f a deponent changes his testimony after consulting with his attorney, the fact of the consultation may be brought out" in subsequent questioning in the deposition, although "the substance of the communication generally is protected [as privileged]."[9] Moreover, if the deponent is not opposing counsel's client, the lawyer taking the deposition may have even more leeway to ask the deponent the specifics of his or her discussion during the break, as such conversations are less likely to be entitled to privilege protections.

This provides the attorney taking the deposition with the opportunity to establish, on the record, that the deponent engaged in substantive consultations with the attorney defending the deposition during a break in the proceedings, which may be useful in impeaching the deponent's credibility or, as discussed further below, seeking recourse from the trial court.

I am conducting a remote deposition soon and I am worried that opposing counsel will be communicating with the deponent. What can I do to prevent this? Are there any red flags that I should look out for?

First, find out whether opposing counsel is planning to be in the same room as the deponent during the deposition. If so, to the extent reasonably possible under the circumstances, you should consider having either your agent or an officer of the court (including, potentially, the court reporter) in the same room with the deponent. You may also consider requesting both the attorney and the deponent to appear on video simultaneously.

Similarly, you may ask the witness to identify all individuals present in the room and to explain where the defending attorney (and his or her team) are located in relation to the

deponent. These steps alone will make it exceedingly difficult for opposing counsel to communicate with his or her client during the deposition without drawing attention.

If, on the other hand, your deposition will be a true remote deposition in that all attorneys, the court reporter and the deponent will be attending the deposition virtually, then you should consider instructing the deponent at the outset of the deposition to remove all technology that is not being used for the taking and recording of the deposition. This instruction may also be given on the record, and you may request that the deponent confirm all such technology has been removed before commencing with the questioning.

In any event, you should be on the lookout for behavior that would indicate that the deponent is receiving real-time communications, such as long pauses before answering questions or if the deponent's eyes constantly shift away from the camera.

If you reasonably believe that such communications are taking place, then you are permitted under Rule 30(d)(3)(A) to move the court for an order terminating the deposition on the grounds that the deponent and/or opposing party are acting in bad faith. If the motion is granted, then the party or deponent whose conduct necessitated the motion may be required to pay the reasonable expenses incurred in making the motion, including attorney fees.[10]

Is it really necessary that I learn how to use all of this new technology?

While the learning curve may be steep as attorneys and their clients adapt to the use of remote technology to conduct various litigation tasks that traditionally have been handled in person, this does not absolve counsel of the obligation to uphold their legal and ethical duties. Attorneys are reminded of Comment 8 to Model Rule 1.1, which provides in part: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[11]

There are several risks associated with participating in a remote deposition without a working knowledge of the relevant technology. For instance, without an understanding of the chat feature in the deposition software, counsel runs the risk of erroneously disclosing to opposing counsel what were intended to be confidential communications between team members or even between counsel and his or her client.

Likewise, an attorney who misuses the camera and microphone features (by, for instance, activating one or both without realizing it) runs the risk of making inadvertent disclosures or, even worse, waiving privilege. The same is true when it comes to sharing exhibits, and all attorneys should proceed with extreme caution before uploading documents from their computers into a virtual deposition.

Therefore, to avoid these potential pitfalls, lawyers are encouraged to take steps to become familiar with the various remote options available and to consider whether and to what extent such options may be utilized in their cases.

Fortunately, many law firms, legal technology vendors and legal organizations are offering training to attorneys to help ease the transition into remote litigation, and lawyers should take advantage of these resources. Many remote deposition vendors are also offering so-called test runs of the software before the deposition to allow counsel to become acquainted with the technology and to troubleshoot any potential issues before they have the chance to disrupt the deposition.

Finally, while it may be tempting to slow-walk one's cases while waiting for the practice of law to return to "normal," counsel should be mindful of Model Rule 1.3, which requires attorneys to act with "reasonable diligence and promptness" in representing their clients.

[12]

As Comment 3 to the model rule points out, "[e]ven when the client's interests are not affected in substance" by a delay, "unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."[13] And where, as here, the length of the delay is unknown, attorneys should take reasonable steps to advance their clients' cases, including through obtaining a working knowledge of remote litigation tools and using such tools wherever possible.

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[1] See Model Rules Prof'l Conduct r. 1.1.

[2] Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985).

[3] In re United Mine Workers of Am. Employee Ben. Plans Litig., 159 F.R.D. 307, 310 (D.D.C. 1994) ("It seems equally clear ... that the disclosure of documents protected by the attorney work product privilege waives the protections of the attorney work product privilege as to the documents disclosed.").

[4] See Model Rules Prof'l Conduct r. 3.3, 3.4.

[5] In re Eldridge, 82 N.Y. 161, 171 (1880).

[6] Hall, 150 F.R.D. at 530.

[7] Compare Hall, 150 F.R.D. at 529 ("Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules.") with Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 131 Nev. 140, 149 (2015) (holding that "attorneys may confer with witnesses during an unrequested recess or break in a discovery deposition.").

[8] See, e.g., In re Domestic Air Transp. Antitrust Litig., No. 1:90-CV-2485-MHS, 1990 WL 358009, at *9 (N.D. Ga. Dec. 21, 1990) (trial court order stipulating that "[p]rivate conferences between deponents and their attorneys during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the Court for good cause shown, such conferences may be held during recesses or adjournments.").

[9] Haskell Co. v. Georgia Pac. Corp., 684 So. 2d 297, 298 (Fla. Dist. Ct. App. 1996).

[10] Fed. R. Civ. P. 37(a)(5)(A).

[11] See Model Rules Prof'l Conduct r. 1.1 cmt.

[12] See Model Rules Prof'l Conduct r. 1.3.

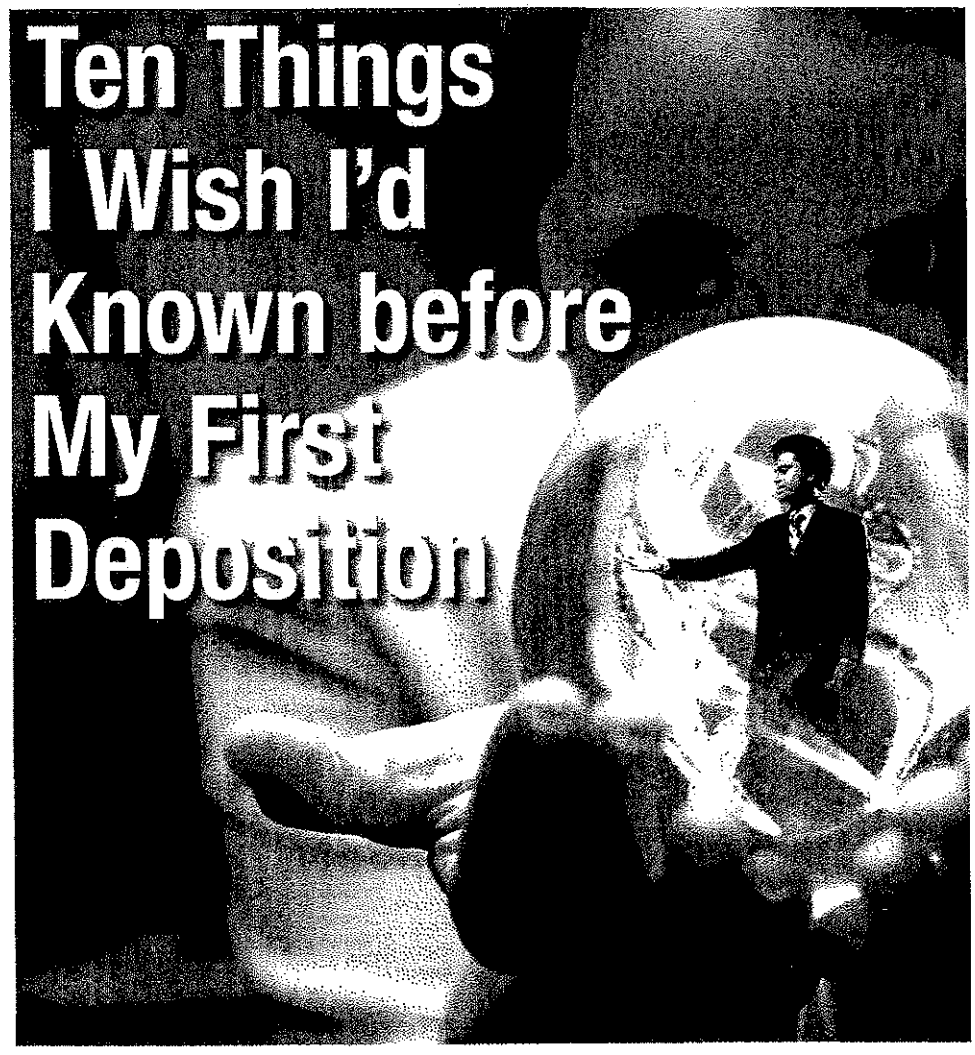
[13] Id.

Now You Don't Need a Crystal Ball

Ten Things I Wish I'd Known before My First Deposition

By Lana Alcorn Olson

Advice to make you seem like a pro from the start.



You've probably read plenty of articles about how to prepare for a deposition: know the claims in the case, know the law and what you have to prove/defend against, be organized and have extra copies of your pre-marked deposition exhibits. Those are all excellent things to do. Any good lawyer will tell you that preparation is key, regardless of whether you are taking or defending a deposition. But aside from the basic preparation aspects of a deposition, there are hosts of other things that can make a big difference in the effectiveness of a deposition. It's the little things that can make or break it for you—things that your senior partner may have never thought to tell you before she sent you out to take your first solo deposition.

■ Lana Alcorn Olson is a partner with Lightfoot, Franklin & White LLC, a litigation-only firm in Birmingham, Alabama, where she concentrates in mass torts, toxic torts/environmental law, drug and medical device litigation and employment law. Mrs. Olson is an active member of DRI's Toxic Torts and Environmental Law Committee and serves on the DRI Women's Seminar planning committee.

Thinking back, I certainly have a list of things that I wish I'd known before I took my first deposition. Although most people's first solo deposition is something they'd like to forget quickly, there are many things you can do aside from general preparation work that can make you seem like a pro, even if you're not one quite yet. So, here it goes... the top ten things I wish I'd known before my first deposition:

I wish I'd known more about the lawyer on the other side. Do some research on the lawyer who will be taking or defending the deposition. Look him up on the Internet. Ask around your office. Talk to people who have worked with him before and find out what his deposition style is. Is he easy-going? Is he the kind of lawyer who objects after every question regardless of whether or not the question is objectionable? Does he tend to make "speaking" objections to try and coach his witness? Or does he just read the newspaper while his client answers your questions during the deposition? Knowing in advance what to expect can help you plan your strategy and can help you anticipate (and prepare for) problems that might arise.

I wish I'd known to videotape certain depositions. You should always consider whether or not to videotape a deposition. Even if the other side doesn't notice it as such, you can file a cross-notice informing them of your intent to videotape. There are times when videotaping can be invaluable. Difficult lawyer on the other side? Videotaping can often help control this kind of lawyer because he knows he's on video (at least his voice is). If you have a really difficult witness, you may want to consider videotaping the deposition using a split screen that will show both the witness and the other side's lawyer. You just need to provide notice of your intent to do this. Have a witness who you believe may be combative or may not make a good witness for the other side visually? Videotaping him can be a powerful tool, especially if the witness is not a party or is outside the trial court's subpoena power. There is a huge difference between having someone read a transcript to the jury and allowing the jury to see and hear the witness on videotape. It can sometimes make or break your case. Having videotaped depositions can also be very helpful if you plan to do any type of jury research in your case. Getting feedback from the mock jurors on the actual witnesses is always preferable to having actors play the roles.

I wish I'd really known all of the rules of the game. And there are rules; several very important ones. First, know what "usual stipulations" mean in your jurisdiction. And don't just memorize the list—make sure you really *understand* them and know if there are particular things that courts in your jurisdiction consider waived if a form objection is not made. If you are outside your home jurisdiction, make sure that you know which state's rules you are operating under and say so on the record. You should also know what to do if the lawyer on the other side *doesn't* agree to the usual stipulations—that actually happens on occasion and you need to be prepared to adjust accordingly! For your first few depositions, make a little "cheat sheet" that you can keep in your deposition notebook for easy reference that lists the form objections (leading, argumentative, compound, ambiguous, assumes facts not yet established, calls for speculation, improper characterization of earlier testimony, cumulative/repetitive), so you can look at it quickly if you are asked the basis of your objection by opposing counsel. Second, know what the time limit is for depositions in your case (whether you are operating under a case management order or applicable procedural rules). If you know that you are going to need more than the standard time allotted, get an agreement from the opposing lawyer or permission from the judge ahead of time if you can.

I wish I'd known when to call the trial judge. Take your trial judge's number with you and don't be afraid to use it... if you really need to. But before you do, make sure you *really* need to use it and make sure you've made a good record as to your particular issue(s) before you make that call. Judges hate dealing with deposition problems and you don't want to bug a busy trial judge with trivial issues. You also don't want to have to call the judge numerous times during a deposition if you don't have to. To the extent you can, if there is an issue that you are going to have to call the judge about, make a good record and inform opposing counsel that you believe that this is an issue that you will need to raise with the judge, but move on to another topic and finish everything else before you make the phone call. Often, if you have one issue, you'll have more than one. And it's better to make *one* phone call to the judge at the end of the deposition and say that there are three specific things to discuss than to have to call the judge three different times during the day. And remember, the judge most likely is not going to know anything about your case when you call, so be prepared to give him a very short overview of the case to put the issue at hand in context. In 10 years of practice, I've only had to call a judge one time. All the other times, by the time I got to the end of the deposition and gave the opposing lawyer time to think about it, he agreed to let the witness answer the ques-

tion rather than have to explain to the judge why he wouldn't.

(6) I wish I'd known how important it is to really listen to the witness and make sure he answers the question. I'm constantly amazed at the number of lawyers, young and not-so-young, who ask a scripted question and don't listen to what the witness says in response. Sometimes a witness can give you a golden nugget that you never expected. But you have to be listening for it. If you spend the deposition looking at your next question or fiddling with documents, you can miss some great stuff. Put down your pen and look at the witness when he is answering and don't look down again at your notes until you have heard everything that witness has said in response to your question. And then follow up on the things you heard him say. Along these same lines, make sure that your witness actually answers the question you asked. Some witnesses, either intentionally or unintentionally, dance around the issue and talk about things other than what you asked. Insist on an answer to the question you posed. A firm, but polite: "Mr. X, I appreciate what you said, but that's not the question I asked. The question I asked was..." is a good way to let the witness know that he's not going to get out of answering your question.

The ultimate goal is to get the best record you can for trial and that means a record that both the witness and the jury can easily understand.

(5) I wish I'd known the kinds of problems that bad deposition transcription can cause. Make sure you get a good court reporter. Ask around. If the deposition is out of town, get the name of a lawyer who practices there and ask who he uses. Bad written transcripts can be disastrous later on. I once had a witness who had to send in nearly 20 pages of errata sheets because the transcript was so messed up. The witness was very unhappy and it made a mess of the record. If you have concerns about the quality of the transcript, immediately call the court reporter and ask her to keep the audiotape she made during the deposition so that you can use it if need be later on if there is a disagreement about what the witness said. Also, make sure that you confirm the day before that the reporter is coming and knows when and where the deposition will be.

(4) I wish I'd realized that I was in charge of the deposition. As Janet Jackson once sang, "It's all about control." If you are taking the deposition, remember that regardless of whether it is your first or your fifty-first, you are in control and you set the pace for what happens. Don't be a pushover, even if you feel like you are completely out of your league. I can't tell you how many depositions I went to as a brand new lawyer where I was the youngest person in the room by 20 years. It can be intimidating if you let it. There is a tendency for a young lawyer to assume that just because someone has gray hair, he knows more than you do. He may, but you have a job to do and it's your responsibility to make sure that you ask the questions you need to ask on behalf of your client. If you go slowly, that's fine. It's better to take your time, follow up on things and make sure you get what you need than to rush through it because the lawyer on the other side keeps sighing, looking at his watch, and asking how much longer you are going to be. It's an old trick and one that can make you feel rushed and pressured to finish if you let it. Don't.

(3) I wish I'd been better about using exhibits. Say the exhibit number and identify the document by name and bates number before you use it. Regardless of whether you identify the document or have the witness do it, you need to make sure that you go through the requisite series of questions to lay your evidentiary foundation. Particularly with 30(b)(6) or company witnesses, you will need to lay the foundation for things like the business records exception. If you need to, list the elements of the foundation you need to cover on a sticky note and put the sticky note on your copy of the exhibit so you can remind yourself of the requirements without having to flip around in your notes or outline.

(2) I wish I'd talked to the witness like I talk to anyone else. Don't use "lawyer talk" when questioning a witness. Speak plain English. Asking someone "where you currently reside," "what is your current state of employment" or "did you take any action immediately prior to the event in question" can lead to blank stares from the witness, particularly if you are deposing a blue-collar worker who didn't get past eighth grade. But it really holds true for anyone you depose. Just talk to them and don't morph into "legalspeak" just because a court reporter is there. Just ask the witness where they live, what they do for a living, and if they did anything right before the accident. Remember, the ultimate goal is to get the best record you can for trial and that means a record that both the witness and the jury can easily understand.

(1) I wish I'd gotten "soundbites." What do I mean by "soundbites"? They are the stand-alone questions and answers that you can easily quote in a brief or read in to the record at trial. Many times, it will take lots of questions and dozens of pages of written transcript to get answers to points that you need. It may take you thirty minutes of questioning about job history and job duties to find out that the witness was only exposed to a chemical in certain jobs during certain years. Rather than having to cite or read ten pages of the transcript into the record, it's much better to have one or two summary question and answer snippets to refer to. For example: Q: "Mr. Smith, let me make sure I have this right. During the 30 years you worked for Company X, the only time that you worked with chemical Y was when you were a technician from 1991–92 and when you were a mechanics assistant from 1997–99, is that correct? " A: "Yes." Q: "Is there any other time when you were working at Company X other than those two jobs that you believe you worked with chemical Y"? A: "No."

Taking a good deposition is an art. It takes practice and hard work, but if you put in the effort and remember these ten things that I wish I'd known, you'll be a pro (or will at least look like one) from the very beginning. FD

Brandon Greenblatt

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Brandon is an owner and managing partner of Precision Reporters, focusing on the growth, operations and the long-term vision of the company. Brandon is a licensed New York State attorney, having left the practice of law to partner with, manage, and grow a great company in order to help take it to the next level. Prior to Precision, Brandon was a private equity and mergers & acquisitions attorney at Fried, Frank Harris, Shriver and Jacobson and Lowenstein Sandler. He holds a bachelor's degree from Vanderbilt University and a JD from The Benjamin N. Cardozo School of Law.

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Mitch Katz

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Education

- Boston University School of Law, *Cum Laude*, JD
- State University of New York at Binghamton, BA

Practices & Industries

- Commercial Litigation
- Labor & Employment
- Restructuring, Bankruptcy & Creditors' Rights

Admitted to Practice

- New York
- US District Court for the Northern District of New York
- US District Court for the Southern District of New York
- US District Court for the Eastern District of New York
- US District Court for the Western District of New York
- US Court of Appeals for the Second Circuit
- US Supreme Court

Biography

With over 30 years of experience focused on litigation and trial practice, Mitch has handled an extensive number of business disputes concerning secured transactions and loan enforcement for traditional and non-traditional lenders, ranging from national banks to private lenders, as well as a variety of contract disputes between businesses, including supply contracts, software licenses, and commercial leases. He is the firm's Commercial Litigation Practice Group leader.

In state and federal courts, Mitch represents clients involved in expedited discovery proceedings and the enforcement of agreements containing restrictive covenants, including noncompetition, nonsolicitation, and confidentiality clauses, which have almost uniformly included applications for temporary restraining orders and preliminary injunctions.

Mitch has also been lead trial counsel in adversary proceedings and contested matters in Chapter 11 cases for creditors and debtors, working closely with the firm's restructuring, bankruptcy, and creditors' rights attorneys. As a Northern District of New York mediator, he guides numerous parties in business disputes to resolution and has attracted businesses to retain him as mediator outside of the court- directed program.

With an extensive background handling trials before the bench and juries as well appellate advocacy, Mitch offers legal counsel on strategic business operations ranging from day-to-day management issues to real-time contract disputes. He is respected by clients for his ability to foresee and negotiate complex corporate issues at all stages of the litigation process and for his proactive awareness of cost-benefit analyses that businesses must confront when making decisions concerning commercial disputes.

Bar Associations

- New York State Bar Association, Membership Committee Co-Chair; Former Commercial and Federal Litigation Section Chair and Former Section Committee on the Commercial Division Co-Chair
- Northern District of New York Federal Court Bar Association, Immediate Past President
- Onondaga County Bar Association

Selected Memberships & Affiliations

- New York Bar Foundation, Fellow
- Chief Judge of the State of New York Advisory Council on the Commercial Division, Permanently Appointed Member

Representative Experience

- Served as lead counsel in representing a foreign corporation in arbitration arising from a Delaware LLC operating agreement, resulting in a $350,000 award after a four-day evidentiary hearing.
- Served as lead counsel in a six-day trial representing a disaster-remediation contractor against a building owner, resulting in a $1.29 million judgment.
- Served as lead counsel for a general contractor in a bankruptcy-court trial that determined the general contractor had an ownership interest in construction equipment claimed by a Chapter 11 debtor.
- Served as lead counsel in a hotly contested “business divorce” between owners of a limited liability company, in which a successful motion for summary judgment forced a desirable sale transaction.
- Served as lead counsel for a former employee of an international specialty manufacturer who was sued by the former employer to enforce restrictive covenants in an employment agreement and stockholders’ agreement. The court denied the preliminary injunction and allowed the parties to resolve the dispute.
- Served as lead counsel in a federal-court action involving rights under trust indenture and related loan documents concerning the financing of several hydroelectric facilities, resulting in two favorable decisions by the US Court of Appeals for the Second Circuit and ultimate favorable disposition for the clients in a companion bankruptcy case.
- Represented a manufacturer-distributor in a dispute involving a professional-services agreement related to the development of commercial property and, due to the small amount in dispute, successfully counseled the client through

mediation to reach a business solution.

- Successfully concluded an arbitration involving a business dispute between professionals.
- Successfully represented a vendor in an Article 78 proceeding against a school district involving the letting of a public contract.
- Secured a defense verdict and judgment in a jury trial concerning a $1 million lease-finance dispute.
- Successfully represented a county in an Article 78 proceeding against a village concerning a public-works project.
- Appeared as litigation counsel in several Chapter 11 proceedings to handle evidentiary hearings and trials.
- Represented the City of Watertown in a lawsuit from Ives Hill Country Club seeking to invalidate a public-property lease the client had entered into with a for-profit enterprise on the basis of statutory and constitutional grounds. The firm cross-moved for judgment, successfully obtaining a denial of Ives Hill's motion with the court granting the City of Watertown's cross-motion and dismissing the case.
- Represented an animal-health business in a lawsuit seeking immediate injunctive relief regarding control of manufacturing acquired by an industry competitor. Identified mediation as the best route to restore the client's supply, and, following 20 hours of mediation, reached an approved creative resolution that achieved the client's objectives.

Prior Experience

- Menter, Rudin & Trivelpiece, P.C., Shareholder
- Hiscock & Barclay, LLP, Partner
- Hiscock & Barclay, LLP, Associate

Selected Community Activities

- Onondaga County Volunteer Lawyers Project, Inc., Board of Directors Member
- Syracuse Habitat for Humanity, Former Board of Trustees President

Selected Honors

- *The Best Lawyers in America*®: Bet-the-Company Litigation, Commercial Litigation, Litigation/Banking & Finance, and Litigation/Real Estate, 2017 and 2019-2020
- Selected to *Super Lawyers* Upstate New York: Business Litigation, 2007-2019
- *The Best Lawyers in America*®, Syracuse Lawyer of the Year: Litigation/Banking & Finance
- Martindale-Hubbell AV Preeminent Peer Review Rated for Very High to Preeminent Ethical Standards and Legal Ability

Selected Speaking Engagements

- Northern District of New York Federal Court Bar Association Fireside Chat With the Judiciary, Moderator
- New York State Judicial Institute Summer Seminars, “Current Issues in Alternate Entity Litigation”
- New York State Judicial Institute, “Effective Management of Small Business Divorce Cases"

Selected Publications & Media

- *NYLitigator*, “The Business Theory of Diversity: How Diversity Improves Law Firms’ Bottom Lines”

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Profile

Suzanne's clients turn to her for experience in handling complex litigation matters in areas critical to their success.

She represents and counsels a wide variety of clients throughout New York State as both plaintiffs and defendants, including:

- Colleges and universities
- Corporations
- Health care providers
- Not-for-profit organizations
- Manufacturers
- Municipalities
- Small business owners and individuals
- Professionals

Suzanne counsels and litigates cases for these clients on issues concerning:

- Breach of contract
- Trade secret matters
- Complex collective and class actions under FLSA and ERISA
- Complex environmental litigation
- Group Self-Insured Workers' Compensation Trusts (GSITs) formed under the New York State Workers' Compensation Law
- Violations of restrictive covenants and confidentiality provisions of employment contracts

In addition, Suzanne counsels and litigates cases and proceedings for a variety of higher education institutions concerning claims brought under Title IX of the Education Amendments of 1972 and New York State's Enough is Enough law.

Suzanne also has significant experience handling proceedings that arise under Article 78 of the New York Civil Practice Laws and Rules for organizations, municipalities and higher education institutions.

In addition to trying suits in diverse venues in New York federal and state courts, Suzanne has extensive experience resolving disputes through alternative dispute resolution procedures, including mediations and arbitrations.

Education

- Syracuse University College of Law (J.D., *summa cum laude,* 2006)
- University of Scranton (B.S., *magna cum laude,* 2001)

Bar/Court Admissions

- New York
- U.S. Court of Appeals for the Second Circuit
- U.S. District Court for the Eastern District of New York
- U.S. District Court for the Northern District of New York
- U.S. District Court for the Southern District of New York
- U.S. District Court for the Western District of New York

Practices

- School Law
- Toxic Tort and Environmental Litigation
- Litigation
- Environmental and Energy
- Higher Education
- Class and Collective Action Litigation

Honors & Affiliations

- Listed in:
  - *New York Super Lawyers 2017*®, Upstate New York Rising Star, General Litigation
- New York State Bar Association
- Onondaga County Bar Association
- Northern District of New York Federal Court Bar Association
- Central New York Women's Bar Association
- Justinian Honorary Law Society, Secretary, 2005-2006
- Order of the Coif
- Executive Editor, *Syracuse Law Review*

Representative Publications

- Suzanne M. Messer, Brian J. Butler and Clifford G. Tsan, "E-Discovery and Information Management - Can Clicking 'Like' Make or Break a Lawsuit?," *Intellectual Property & Technology Law Journal*, April 2016

Representative Presentations

- Class Action Refund Lawsuits Against Higher Educational Institutions, CICU Webinar, May 14, 2020