DEPOSITIONS—OBJECTIVES, STRATEGIES, TACTICS, MECHANICS AND PROBLEMS†

by
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I. Introduction

Depositions are the most important of the pretrial discovery tools. In evaluating the strength of a case for settlement purposes, litigators accord great weight to the performance during depositions of both their own and their opponents' witnesses. Further, if a case should go to trial, the deposition transcripts will usually be the lawyer's most important resource for cross-examination.

Of all the pretrial discovery tools, depositions require the greatest technical skill. The interrogator must plan and craft his questions carefully—yet be prepared to take a completely different tack depending upon the answers given, the personality of the witness, and the scope of the witness' knowledge. The opposing lawyer must prepare the witness carefully (assuming that the witness is his client or is cooperating with him) since he has little control once the deposition starts.

The lawyer who serves the notice of deposition typically will be the principal interrogator and, aside from the witness, the principal actor. Accordingly, this Article speaks generally, though not exclusively, from the perspective of that interrogator. For the most part, the witness is assumed to be the adverse party or otherwise hostile to the interrogator. The penultimate section of this Article covers opposing counsel's task of preparing the witness for the deposition.

This Article discusses various objectives, strategies, tactics, mechanics, and problems in taking depositions. By and large, there are

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no "right" answers to the questions raised, but the lawyer who considers such matters in advance of the deposition should do a better job of interrogating the witness.

To make this Article useful to recent law school graduates, as well as to more experienced litigators, basic propositions are articulated rather than taken for granted. Generally, it is assumed that the Federal Rules of Civil Procedure apply.

Organization of this subject presents a major problem. Each idea tends to be entangled with several others. Separating them out for individual treatment may be tedious and artificial; leaving them jumbled may be confusing. This Article attempts to reconcile the conflict by examining each topic individually but showing how it connects (or is at odds) with others.

II. Preliminary Considerations

The most important preliminary question is whether to take the deposition. The attorney must carefully consider several significant disadvantages.

1. Depositions are expensive. Consider the time spent preparing for the deposition, taking it, reporting on it to the client, and summarizing the transcript, not to mention the cost of serving a subpoena, a witness fee, the reporter's charges, and possible travel expenses.

2. The interrogator may preserve testimony harmful to his client which otherwise would be unavailable at trial.[1] Adverse witnesses may die. Harmful nonparty witnesses may move away or just disappear; their memories may fade and their interest wane. While it is understandable that a lawyer may want to know precisely what testimony he must prepare to meet at trial, it is not impossible to cross-examine a witness without a deposition transcript (as criminal lawyers demonstrate every day of the week). At the very least, it may be wise to consider postponing the deposition of a witness expected to give harmful testimony.

3. By taking a deposition, counsel may waive an objection to the competence of a witness. For example, a party may waive the Dead Man's Act[2] by deposing a witness who would otherwise be precluded by the act from testifying.[3]

[1]*See* FED. R. CIV. P. 32(a)(3); FED. R. EVID. 804(b)(1).

[2]*See generally* II J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 578 (Chadbourn rev. 1979).

[3]*See* E. WEEKS, TREATISE ON THE LAW OF DEPOSITIONS § 436 (1880); Annot., 23 A.L.R.3d 389 (1969). In federal court, state competency rules such as the Dead Man's Act have no effect except "with respect to an element of a claim or defense as to which State law supplies the rule of decision." FED. R. EVID. 601. It is not settled whether state law governs waiver when a state competency rule applies in federal court. *Compare* 4A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 32.10 n.1 (2d ed. 1981) ("Taking and filing a deposition does not constitute a waiver of the 'dead man's' statute.") *with* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2152 (1970 & Supp. 1982) (state law should govern waiver issue).

Sometimes there may be a practical way to preserve the objection while obtaining the desired deposition. For example, in a case in which the plaintiff's testimony is barred by the Dead Man's Act, it may be feasible to have the plaintiff's deposition noticed and taken by counsel for defendant B (who has a good legal defense to the plaintiff's claim) instead of counsel for defendant A (who may have real exposure). So the act may be waived as to B (who has a good defense) but not as to A.

4. The interrogator almost inevitably reveals to some extent through his questions what he believes to be important to his client's claim or defense and what he plans to prove at trial. For example, if the defendant's counsel presses the plaintiff for an unambiguous statement that he was never previously involved in an accident causing personal injuries, the plaintiff's counsel may accurately sense that the interrogator has evidence of a prior accident. If the plaintiff's counsel later learns from his client that his instincts were right, he may then instruct his client to correct the deposition transcript[4] and thus effectively dilute the impact at trial of the original erroneous testimony.

5. The interrogator forces his opponent to learn the case. His opponent will assimilate a good deal just by preparing his witnesses and listening to the questioning.

6. The deposition also provides the witness with a dress rehearsal. The witness will do better next time—at trial—because he knows what to expect. A witness who is rattled, evasive, and unresponsive at his deposition may perform quite well at trial. His discomfort at the deposition will rarely appear from the dry transcript. The jury will see only the interrogator's chagrin.

7. The interrogator may alert his opponent to the existence and importance of a witness. For example, in an antitrust case, if counsel decides to take the deposition of a relatively low-level employee from the opposing side on the outside chance that he may know something useful, the interrogator may find that the witness knows much more about the nitty-gritty of competition between the parties than the interrogator wanted to hear. But for the deposition, opposing counsel might never have considered that person as a possible trial witness.

8. The lawyer serving the notice must recognize that his opponent is likely to respond in kind. If a notice is served for the deposition of the opposing party's secretary, a counterpart notice is likely to be served the next day by the other side.

Having considered these disadvantages, the lawyer should examine the alternatives to depositions. Answers to interrogatories and production of documents may suffice. A telephone interview may

[4]*See* FED. R. CIV. P. 30(e).

produce remarkably good results.[5] Although a witness is likely to be skittish about a telephone interview with an attorney, he may find that prospect less odious than appearing in person for a deposition. At the least, the lawyer will get a good reading on whether the witness is friendly to his client's case. A face-to-face interview is another alternative. The lawyer may want to follow up either a telephone or a personal interview by sending the witness a memorandum summarizing what he said, perhaps with a request that the witness advise the attorney of any inaccuracies or that the witness sign and return the memorandum.

Another important preliminary consideration is where to fit depositions into the overall discovery plan.[6] Many lawyers prefer to initiate depositions only after the opponent answers comprehensive interrogatories and produces many documents. By proceeding in this way, the interrogator will be better prepared—but so will the witness. The lawyer for the witness will use the interrogatories as a checklist of subjects likely to be covered at the deposition.[7] Additionally, the witness will receive the opportunity to review the answers to interrogatories and the documents made available to the other side, thus refreshing his recollection of the underlying facts. Moreover, the time for starting depositions will probably be delayed while the information necessary to answer interrogatories is collected and the documents are assembled. This delay may work to the advantage of the witness who has more time to assess possible weak points in his testimony and to plan how to deal with them.

The interrogator should thus consider more limited discovery as a prelude to depositions, such as obtaining only answers to a limited set of interrogatories and certain key documents, or obtaining only documents.

The lawyer may also consider scheduling a deposition immediately[8] without waiting for answers to interrogatories and documents.[9] The interrogator should first ascertain what he is likely to learn from answers to interrogatories and documents that may be useful in the deposition. If he is likely to learn very little, the interrogator may

[5]*But see* Model Code of Professional Responsibility EC 7-18, DR 7-104 (1979) (barring some direct lawyer-witness contact).

[6]*See* FED. R. CIV. P. 26(d); Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 506-07 (1970) [hereinafter cited as 1970 Advisory Committee Notes]; A. MORRILL, TRIAL DIPLOMACY § 12.12 (2d ed. 1972) (suggesting that detailed background data such as names and dates be discovered through interrogatories first in order to save time at deposition).

[7]The lawyer filing answers to interrogatories should carefully select the affiant thereto because opposing counsel may serve a notice for that person's deposition.

[8]This is, of course, subject to the time limit imposed on a plaintiff by rule 30(a).

[9]*See* FED. R. CIV. P. 26(d); 1970 Advisory Committee Notes, *supra* note 6, at 506-07. Interrogatories and a document request may be served with the deposition notice, but with a later response date, or served after the deposition is completed.

decide to start discovery with the deposition. Consider, for example, a case in which the claim is that the seller made oral misrepresentations about his product. The buyer's attorney may conclude that since the seller is not likely to make admissions when given ample time to ponder the questions, interrogatories will elicit little helpful information and may provide the opposition with a list of topics likely to be covered at the deposition. The buyer's attorney may also decide that the seller has probably not generated documents tending to show the misrepresentations; thus, a document request probably will not produce much. In this situation, it may be best to get the seller into the witness chair at the earliest possible time, rather than wait for the completion of less promising discovery.

Some cases may call for alternating forms of discovery. For example, in a complicated case in which the deposition is likely to take several days, it may be worthwhile to schedule only one day for the deposition and then recess until other discovery has been completed. In some cases, the interrogator may schedule a deposition early in the discovery process to learn about the opposing party's documents and thus prepare a reasonably specific document request.

Another preliminary decision is the order in which to depose witnesses. In most instances, the lawyer will first depose the more important witnesses and then move to those of secondary importance.[10] In cases with complicated facts, however, it may be best to start with a less important witness who possesses a good, basic knowledge of the operative facts. For example, in an antitrust case, the plaintiff's counsel may decide to educate himself about the industry and the defendant's method of doing business by deposing a middle-level employee of the defendant. The deposition of the president of the corporate defendant, perhaps the single most important discovery event in the case, may be taken much later. If the corporate president is deposed too early and claims to be uninformed except in the most general way on certain subjects, the interrogator's knowledge of the facts may be too primitive to allow him to press the deponent effectively. If, after other discovery, the plaintiff's attorney wants to resume the deposition of the corporate president, defense counsel may seek a protective order to prevent reopening the deposition.[11] Counsel for the plaintiff may have a difficult time persuading the court that he should have a second stab at the president.

The client should be consulted about many of these preliminary considerations. He should participate in deciding whether depositions

[10]"During a trial it is traditional to put your client on after your witnesses have testified. You want him to hear what they say before he testifies. . . . Turning this defensive ploy around, generally depose the adverse party before you depose his supporting cast of ruffians and ne'er-do-wells." K. HEGLAND, TRIAL AND PRACTICE SKILLS IN A NUTSHELL 258 (1978).

[11]*See* FED. R. CIV. P. 26(c)(1).

should be taken, what other discovery should be conducted first and in which order the deponents should be listed. The client often will know who on the opposing side should be knowledgeable about a given subject as well as the personal characteristics of the deponents. Moreover, the client should know and approve the anticipated cost of the proposed deposition program. A client who understands what the lawyer is doing and why is more likely to be satisfied, especially if he has had a chance to participate in the underlying strategic decisions. Indeed, the interrogator may decide to have his client present at the most important depositions. The client may supply good follow-up questions, will know better what to expect at his own deposition, and will better understand the strengths and weaknesses of his claim or defense. Similarly, if the interrogator will be deposing the opposing party's expert, he should consult his own expert in advance of the deposition. He may decide to have his own expert present at the deposition of the opposing expert to suggest lines of inquiry based on the answers given.

III. Scheduling and Preparing for the Deposition

The lawyer schedules a deposition by serving a notice stating his intention to depose a certain witness.[12] The notice must include the name and address of the deponent, if known, and the date, time, and place of the deposition.[13] If the deponent is a party, the service of the notice is sufficient to require his appearance at the deposition, and a subpoena is unnecessary.[14] The notice may be accompanied by a request that documents and tangible items be produced at the deposition, in which event the procedure of rule 34 applies.[15] If the deponent is not a party, he should be served with a subpoena.[16] Indeed, if he fails to appear because not subpoenaed, the court may impose costs of other counsel upon the party giving notice of the deposition.[17] If a subpoena duces tecum is to be served on the deponent, the notice

[12]FED. R. CIV. P. 30(b)(1).

[13]*Id.* Rule 29 permits the parties to vary the form of notice by written stipulation. FED. R. CIV. P. 29(1).

[14]*See* FED. R. CIV. P. 37(d); 1970 Advisory Committee Notes, *supra* note 6, at 542. No subpoena is required to depose an officer, director, or managing agent of a party; failure of such a person to appear at deposition after being served with proper notice is treated as the failure of the party. *See id.* For discussion of who is considered a "managing agent" of a party, see J. MOORE & J. LUCAS, *supra* note 3, at ¶ 30.55[1].

[15]FED. R. CIV. P. 30(b)(5). It is not clear whether the 30-day response period of rule 34 applies to a request for production under rule 30(b)(5). *See* C. WRIGHT & A. MILLER, *supra* note 3, § 2108.

[16]*See* FED. R. CIV. P. 30(a), 45.

[17]FED. R. CIV. P. 30(g)(2).

should include, or have attached to it, a designation of the materials to be produced.[18]

Other counsel may request that the deposition be taken at a location other than that designated in the notice.[19] For example, counsel for a corporate defendant will often successfully argue that the depositions of his client's employees should be taken at the corporate headquarters, particularly when the headquarters are not located within the jurisdiction where the case is pending. But defense counsel should use caution in suggesting that the deposition be held at the defendant's headquarters since opposing counsel may benefit from overhearing conversations in halls or on elevators or from seeing photographs, slogans, or graphs on the wall. Additionally, the deponent may confirm that the company has certain documents, and the interrogator may request that they be produced immediately at the deposition. Although the deponent is not technically obliged to produce such documents, a refusal to do so (if the records are readily available) may appear arbitrary to the court, and the court may allow the interrogator to reopen the deposition after the documents are produced. To avoid such dangers, counsel for the corporate defendant may choose the intermediate course of requesting that the deposition be held near, but not at, corporate headquarters.

Alternatively, other counsel may accept the designation of place by the party serving the notice but argue that the serving party should pay the witness' or counsel's travel expenses in connection with the deposition.[20] A party serving notice for the deposition of a witness, party or nonparty, outside the jurisdiction of the court where the case is pending should recognize the substantial danger that he will receive a request from some other party for reimbursement of its travel and related expenses.[21]

A party seeking to depose the opponent's expert must usually pay him a reasonable fee for the time he spends responding to discovery.[22] Such payment may be required not only for the time during which the expert is being deposed, but also for preparation and travel time.[23]

[18]FED. R. CIV. P. 30(b)(1). The rationale of this requirement is to enable each party "to prepare for the deposition more effectively." 1970 Advisory Committee Notes, *supra* note 6, at 514.

[19]FED. R. CIV. P. 26(c)(2); *see* 4 J. MOORE & J. LUCAS, *supra* note 3, ¶ 26.70[1.-2 to -3]. Rule 26(c) may be invoked by a nonparty witness as well as by a party. *See id.* ¶ 26.70[1.-1].

[20]*See* 4 J. MOORE & J. LUCAS, *supra* note 3, ¶ 26.77, at 26-550 to -552.

[21]*See id.* at 26-546 to -548. For an example of a local rule on this subject, see E.D.N.Y. CIV. R. 5(a).

[22]FED. R. CIV. P. 26(b)(4)(C)(i).

[23]Note that the privilege of deposing a party's expert may be made contingent by the court upon compensation to that party of a "fair portion" of the expert's fee. FED. R. CIV. P. 26(b)(4)(C)(ii). This compensation, which is in addition to that paid to the

The notice may name as the deponent a corporation, partnership, association, or governmental agency and should describe with reasonable particularity the matters on which examination is sought.[24] The organization named must then designate one or more officers, directors, managing agents, or other persons who consent to testify for the organization to appear at the deposition.[25] It may be easier to use this procedure and thereby compel the organization to identify a witness than to select a name based on limited information and hope that the witness is sufficiently knowledgeable.[26] Of course, if the organization is an adverse party, it may not identify the most knowledgeable or helpful witness to appear at the deposition.

The deposition will ordinarily be stenographically recorded but a recent amendment provides that the parties may stipulate in writing, or the court may order, that other means of recording be used.[27] Although lawyers tend automatically to order a stenographer, the use of a reliable tape recorder may suffice when the witness' testimony is not expected to be controversial or lengthy.

Normally the witness will appear in person to testify but the parties may stipulate in writing, or the court may order, that the deposition be taken by telephone.[28] This procedure is also of recent origin, and it is not yet clear to what extent it will be used. It is understandable that an attorney will wish to depose important witnesses in person. Nevertheless, in some cases the savings in cost will outweigh the advantage of having the deponent physically present.

To prepare for the deposition, the interrogator should review the pleadings, answers to interrogatories, documents (his own client's

expert for his time, may be ordered by the court either before or after the discovery from the expert is completed. *See* 1970 Advisory Committee Notes, *supra* note 6, at 505.

[24]FED. R. CIV. P. 30(b)(6).

[25]*Id.*; *see also* FED. R. CIV. P. 37(a)(2) (order compelling designation).

[26]One purpose of the rule is to dispense with the need to depose many witnesses in the search for those with relevant knowledge. *See* 1970 Advisory Committee Notes, *supra* note 6, at 515.

[27]"The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means." FED. R. CIV. P. 30(b)(4).

On the issue of what discretion lies in a district court to deny a motion for an order allowing nonstenographic recording, compare *In re* Sessions, 672 F.2d 564 (5th Cir. 1982); Reiter v. United States Dist. Ct., 27 Fed. R. Serv. (Callaghan) 801 (6th Cir. 1979) (per curiam); and International Union v. Nat'l Caucus of Labor Comms., 525 F.2d 323 (2d Cir. 1975), with Colonial Times, Inc. v. Gasch, 509 F.2d 517 (D.C. Cir. 1975). *See generally* Annot., 16 A.L.R. Fed. 969 (1973).

[28]"The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For purposes of [Rule 30] and Rules 28(a), 37(a)(1), 37(b)(1) and 45(d), a deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions propounded to him." FED. R. CIV. P. 30(b)(7).

and those produced by the opponent or other witnesses), prior deposition transcripts, and memoranda on the underlying facts. He should consult his client to discover additional areas of inquiry. Ideally, the interrogator should take a "hands on" approach and, together with his client, visit the intersection, inspect the punch press, or walk through the site where the toxic fumes are said to have accumulated. Similarly, the witness and his counsel should consider doing the same. The attorney who makes this additional effort is almost always better prepared as a result.

The interrogator should also familiarize himself with the important applicable case law, particularly the most recent decisions. After this preparation, the attorney should take time to set aside the file and just think about the case.

If the witness is not hostile and no ethical barrier prohibits it,[29] the interrogator may elect to talk to the witness in advance of the deposition: explaining the procedure, exploring the witness' knowledge of the matters in dispute, arranging a convenient time for the deposition, arranging a convenient and unembarrassing time for service of the subpoena, and reaching an agreement on the witness' compensation. Technically, the witness is entitled only to the statutory witness fee,[30] but the interrogator may agree to compensate him for expenses and lost wages.[31]

Finally, the interrogator should prepare a written list of the questions he intends to ask. With this list, the attorney can ensure that he raises all pertinent issues and, where the wording of a particular question is critical, that he asks the question perfectly.

IV. Objectives

A. *Discovery or Admissions?*

The two principal, and often conflicting, objectives of depositions are obtaining discovery and obtaining admissions. The purposes of discovery are: first, to squeeze the witness dry of all relevant information, and second, to bind the witness by his own testimony to a particular set of facts. To achieve these discovery purposes, the interrogator must continually invite the deponent to talk. For example, the interrogator may ask, "Are there any other facts upon which you base your claim [or defense] that . . ." until the answer is "No."

To acquire admissions, the interrogator typically will frame his questions narrowly and, should he obtain the admission, switch to

[29]*See* Model Code of Professional Responsibility EC 7-18, DR 7-104 (1979); AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 331-42 (1979).

[30]*See* 28 U.S.C. § 1821 (Supp. III 1979).

[31]*See* Model Code of Professional Responsibility EC 7-28, DR 7-109(C)(1)-(2) (1979).

another subject to prevent retraction or dilution of the admission by the witness. Of course, by switching subjects, the interrogator necessarily risks sacrificing important discovery.

Obtaining discovery is thus essentially defensive since the interrogator wants to learn and to limit the information he must prepare to meet at trial. Obtaining admissions is primarily offensive in that the interrogator seeks to obtain ammunition for his own use at trial. This distinction will blur in many places.

The question may fairly be asked why seeking discovery and seeking admissions are inconsistent with each other. Why cannot the interrogator ask the questions that tend to establish a helpful admission and then ask additional questions on the same subject even though he knows that they are likely to elicit answers tending to support the deponent's position? More concretely, if the interrogator might ask ten questions on a particular subject, seven of which are likely to elicit answers favorable to his client's position and three of which are likely to elicit answers favorable to the deponent's position, why not ask all ten? Certainly, this approach has the benefit of allowing the interrogator to learn before trial the deponent's explanation of seemingly harmful facts.

To answer these questions, one must recall the various uses of depositions at trial.[32] First, depositions are often used to impeach a witness' trial testimony. If a witness testifies at trial, he may be cross-examined concerning statements made at the deposition. Rather than giving the witness an opportunity to reconcile inconsistent portions of his deposition and trial testimony, the cross-examining attorney may read those portions to the witness and ask him to confirm only that he so testified at his deposition. Opposing counsel must then ask questions on redirect examination to mitigate the harmful aspects of such deposition testimony. If, however, the witness gave an exculpatory explanation at the deposition, he may reply that the cross-examining attorney is reading only a portion of his deposition or, on objection by the witness' counsel, the court may require the cross-examiner to read the additional deposition testimony on the same subject.[33] Even if the attorney is not compelled to read the supplementary testimony, the jury will learn that it has heard only a portion of the facts and will retain its objectivity until redirect examination.

If the witness is a party, opposing counsel may use the transcript in a second way. Instead of cross-examining a party concerning his deposition testimony, opposing counsel, as part of his own case, may read portions of the deposition to the jury.[34] The deponent-party

[32]*See* FED. R. CIV. P. 32(a). *See generally* Kolczynski, *Depositions as Evidence*, LITIGATION, Winter 1983, 25.

[33]FED. R. CIV. P. 32(a)(4); *see also* FED. R. EVID. 106.

[34]FED. R. CIV. P. 32(a)(2).

cannot offer any exculpatory explanation for such deposition testimony until opposing counsel has concluded his case, perhaps hours or days later. When the deponent finally takes the witness stand, his delayed explanation may be unconvincing to the jury. If the explanation appears in the deposition itself, however, counsel for the witness can compel the lawyer introducing the harmful portion of the deposition to the jury to read the explanatory portion as well.[35]

We return to the example of the interrogator with ten possible questions on a particular subject, seven of which are likely to elicit admissions helpful to the interrogator and three of which are likely to elicit answers supportive of the deponent's position. By stopping after seven questions, the attorney seeking admissions can create a portion of the deposition that may be used either to cross-examine the witness at trial or to read directly to the jury without an exculpatory explanation by the witness. Suppose the interrogator has asked all ten possible questions at deposition. If at trial he reads only the first seven questions and answers, he may appear dishonest to the jury when the witness or opposing counsel brings to light the further explanatory testimony on the same subject at the deposition. Additionally, the witness' explanation may sound more credible to the jury if he has made it previously. Even if the interrogator does not use the deposition transcript, he risks the danger that the witness may answer a question with the preface, "As I explained to you at my deposition. . . ." The explanation given at deposition may then take on the aura of a prior consistent statement, tending to add plausibility to the witness' trial testimony. Conversely, the witness' explanation at trial of a harmful fact which was not previously given at the deposition, even though not given because not asked for, may appear to be a recent fabrication.

After obtaining the admission and proceeding to other areas of inquiry, the interrogator may occasionally chance returning to the original subject to ask his remaining questions. At trial, the interrogator may read the original admission into the record, or cross-examine the witness about it, and hope that neither the witness nor opposing counsel will cite the later answers. Such an approach is risky.

Unfortunately, in actual practice there is no clear dividing line on questions which are likely to evoke admissions. In reality, lawyers preparing for and taking depositions squirm intellectually as they attempt to determine where to draw the line. If the interrogator asks too few questions and the witness is left with several escape hatches, the "admission" may not be of much value. If, on the other hand, the deposing attorney presses too far, the admission may become diluted as the witness begins to explain away its harmful impact.

[35]FED. R. CIV. P. 32(a)(4); *see also* FED. R. EVID. 106.

The interrogator should decide what information he needs from the witness before the deposition begins. For example, when deposing the plaintiff's damage expert in an antitrust case, counsel for the defendant may seek almost pure discovery, rather than admissions. Thus, he will ask the expert to explain everything he has done, to explain each calculation (where he obtained the numbers, which figures he multiplied or divided, and why), and to state what further work, if any, he plans to complete on the case. But the interrogator will not seek a direct admission that the expert did not consider inflation, a general decline in the industry at issue, or variable costs. The risks of seeking such admissions at the deposition are that the expert will have prepared good answers by the time of trial or that he may revise his approach to eliminate apparent flaws. If counsel for the defendant causes too much damage at the deposition, counsel for the plaintiff may change experts.

On the other hand, if the interrogator has the facts, he may primarily seek admissions from the witness. In a products liability case, for example, counsel for the plaintiff may seek to compel the corporate defendant's president to admit that he knew of certain literature or studies casting doubt on the safety of his product, that he knew of ways to modify the product to eliminate the hazard, that the cost of such modification was negligible, and that such modification was considered but rejected for some unworthy reason. If counsel for the plaintiff obtains one of these admissions, he has moved one step closer to winning his case. If not, he has not sacrificed much since opposing counsel surely knew that such points would arise at some time, and at least the interrogator will know what he must prepare to prove at trial.

Typically, however, the interrogator seeks both discovery and admissions on most subjects. In light of the inevitable tension between these objectives, the interrogator should plan what he will settle for on each subject to be covered. As a housekeeping matter, he may want to bracket in his outline those questions of which he is unsure and wait until the deposition to decide whether to ask them.

In deciding how far to go in examining a particular deponent, the interrogator should consider whether he wants to settle the case or to try it. If he wants to settle, the attorney may drive his points home during deposition questioning, thus signaling to his opponent the significant risks involved in proceeding to trial. On the other hand, if the interrogator expects the case to be tried, he will question witnesses without being as overt about the potential significance of their testimony.

B. Other Objectives

A deposition, of course, serves purposes other than obtaining discovery or admissions. One is to preserve favorable testimony.[36] A lawyer will often decide not to schedule the deposition of a witness favorable to his case, waiting instead to call that witness at trial. In such cases, an attorney may have no reason to take the witness' deposition and thereby expose him to cross-examination by opposing counsel. On the other hand, if the witness is elderly, infirm, nomadic, or beyond the jurisdiction of the trial court, the lawyer should seriously consider scheduling the witness' deposition. When deposing such a witness, each attorney should take into account that the witness may not be available for the trial and that the deposition may therefore serve as trial testimony.[37] When the deposition is likely to be used as the witness' trial testimony, each lawyer may hesitate to ask questions tending to elicit testimony harmful to his case. By asking such questions, the attorney can better prepare to meet his opponent at trial. But if the lawyer elects not to ask such questions, potentially harmful testimony may not surface at trial (the witness may die, disappear, or, if he is beyond the subpoena power of the trial court, refuse to appear) and the lawyer may not have to confront that testimony.

The lawyer should seriously consider deposing the witness who is not only favorable, but crucial to his case—regardless of age, health, or residence. He should ask himself what explanation he will give to his client if he fails to do so and the witness is then killed in an accident before trial.

Depositions may also be used to destroy a deponent's effectiveness as a trial witness. The interrogator may achieve this objective either by demonstrating through his deposition examination that the witness' testimony is not credible, or by successfully inviting the witness to commit himself to a series of propositions which can convincingly be shown at trial to be false.

Another objective of the interrogator may be to eliminate entirely the deponent as a possible trial witness by asking him to confirm that he has no knowledge about the key facts in dispute. Finally, a depo-

[36] *See* FED. R. CIV. P. 32(a)(3).

[37] *See id.* To some extent this risk is always present because any deponent may die before trial or become otherwise unavailable. *See* Noecker v. Johns-Manville Corp., No. 366-118, slip op. at 43-44 (Pa. C.P. April 28, 1982) (rejecting "defendant's assertion that its conduct in the depositions was adversely affected by its assumption that the depositions were intended to be taken for discovery purposes, rather than for use at trial"; noting that "the prospect that a 'discovery' deposition may be used at trial in the event that a deposed witness becomes unavailable by that time inheres in every deposition").

sition can provide the interrogator with testimonial support for a planned motion for summary judgment.[38]

V. The Lawyer's Manner

A deposition is a kind of meeting and, even at a meeting among equals, one person, for whatever intangible reason, will usually take control. Depositions are no exception, nor should they be. The lawyer who controls the deposition has an edge. Consequently, a certain amount of jockeying for position often occurs at a deposition, particularly at its start, to determine who will seize control. If a lawyer cannot dominate the deposition, he should at least prevent his opponent from doing so.

Learning to take control of a meeting is probably a better subject for a psychology journal than a legal one, but it is nonetheless appropriate to observe that a lawyer generally avoids losing control by choosing his ground carefully and not retreating. For example, the interrogator should not demand that one of two witnesses to be deposed that morning be sequestered if he intends to abandon that demand should his opponent refuse. Similarly, the witness' lawyer should not instruct the witness not to answer if he plans to withdraw the instruction, either directly or indirectly (by waffling), when the interrogator recesses the deposition to apply for a court ruling. The witness knows who is in charge and will react accordingly.

An attorney need not be obnoxious to assume control of a deposition. Although lawyers are sometimes successful in bullying their opponents, an experienced attorney can readily deflate a pugnacious opponent, causing the opponent to lose rather than gain control.

An experienced litigator will sometimes attempt to intimidate a younger opponent. For example, if the experienced attorney is counsel for the deponent, he may disrupt the younger interrogator's questioning by snorting derisively at his questions, arguing about their relevance, interrupting the deposition to make telephone calls, or threatening to walk out with the deponent if the deposition is not concluded in thirty minutes. The younger lawyer should not yield to such antics but should stand his ground and proceed with his questioning as planned. If he hurries and abbreviates his questioning, the quality of the deposition will suffer. It is highly improbable that counsel for the witness will follow through on his threat to leave the deposition; if he should, the court will almost certainly order him to return.

If the witness is nervous at the start of the deposition, the interrogator's natural tendency is to attempt to put him at ease. This may not be wise. If the witness is the opposing party or is otherwise hostile, the interrogator may obtain more truthful and more helpful answers if the witness remains nervous. As the deposition progresses, however, the witness will almost certainly grow more relaxed. Some lawyers succeed in keeping the witness off balance by alternating their conduct, seeming, at some times, cordial and accommodating and, at others, brusque and unpleasant. It is difficult for the witness to remain at ease if he perceives the interrogator as unpredictable. Finally, there is, of course, no steadfast rule. In a given case, the interrogator may decide that a friendly manner and conversational questioning are more likely to disarm the deponent and elicit helpful testimony than a more contentious approach.

Inevitably, the witness will learn something of the interrogator's manner through his questioning. Accordingly, the lawyer in charge of the case may prefer that a younger associate take the depositions. In this way, the senior lawyer, as trial counsel, will arrive an unknown quantity to the witness at trial.

[38] *See* FED. R. CIV. P. 56(c).

VI. Strategy and Tactics

When preparing for the deposition, the interrogator should give careful thought to the order in which he will approach various subjects. He must determine whether to begin with the important issues or to postpone those questions until the witness starts to tire and is further away in time from the cautions his own lawyer gave him. The question is often difficult and there is no single right answer. Probably, most lawyers prefer to gather background information before turning to the decisive issues. Although this approach is not necessarily wrong, the interrogator should at least consider the "going-for-the-jugular" approach. In deposing an expert witness, for example, some lawyers may spend the first two hours, or even two days, on the expert's qualifications. An expert will usually feel relatively comfortable while discussing his credentials and will become more so as he establishes eye contact with the interrogator and grows accustomed to the cadence of his voice and his mannerisms. The same expert, however, may be surprised and flustered if asked in rapid succession his name, whether he has been hired by the defendant as an expert, whether he has formed any expert opinions, what they are, and then, in greater detail, the bases for those opinions. The expert's qualifications can be explored towards the end of the deposition. The expert may be somewhat unnerved by the simple fact that the interrogator is not playing by the "rules" as the expert knows them from his own experience.

Similarly, when deposing a driver involved in a motor vehicle accident case, the interrogator will normally question the deponent about his background, set the scene (how wide were the streets, which vehicle was in what lane, did anything obstruct the view, etc.),

and will finally reach the details of the accident. The deponent will tend to relax since his own lawyer probably told him that the questioning would proceed in this way. Occasionally, the interrogator may want to start by asking, for example, the witness' name and whether he was involved in an accident on December 14, 1982. Then, without further preamble, the interrogator may ask how the accident happened. This approach will differ from what the deponent's lawyer told him to expect. The result may be an answer harmful to the deponent's case, particularly if he tries to include all the detailed information about speeds, distances, and times which he recently reviewed with his own lawyer.

On the other hand, the interrogator may decide to postpone the significant questions for as long as possible. For example, assume in a personal injury suit that the liability issue is close but the damages are clear and serious. Since the plaintiff may be more interested in his own injuries than in the precise dynamics of the accident, counsel for the defendant may decide to question first about those injuries and then, hours later, proceed to liability. By that time, the plaintiff may have only a dim recollection of his own lawyer's warnings about the liability pitfalls.

If the case involves a sharp factual dispute about who said what to whom over an extended course of dealing, the interrogator may develop the facts by inquiring about them in chronological order. This approach eases the questioning for everybody, including the witness. Therefore, even if the interrogator's approach is generally chronological, hopscotching around from time to time may help to develop inconsistencies in the testimony of an untruthful witness. For instance, after questioning the witness about his first four meetings with the interrogator's client, the interrogator may want to return to the second meeting to ask whether any discussion occurred there of a particular subject.

The interrogator should not become so mesmerized by his own outline of questions that intriguing answers fail to register with him. Having settled on the best order in which to cover his subjects, he must repeatedly decide during the deposition whether to adhere to his script or to set it aside and immediately follow up an interesting answer which may, for example, pertain to the final subject on his agenda. The interrogator must quickly and intuitively decide whether the benefit of pursuing such an answer outweighs the advantages of his original organization of topics. Should the interrogator hesitate, the witness may interpret the pause as a signal that his answer in some way injured his case, and modify or withdraw his statement.

If the interrogator will be deposing several similarly situated witnesses, he should vary his approach. Otherwise the deponent (who may have attended the other depositions or read the transcripts) will anticipate the approach and feel comfortable from the start. At the

least, the interrogator's first substantive question to the witness should differ from his lead questions to other witnesses.

After determining the order in which to address the various subjects, the interrogator must decide on the order in which to pose specific questions and how to word them. It makes a difference. The following discussion of approaches, while not exhaustive, may illustrate the point.

A. *Getting the Witness Committed to Certain Propositions — Especially on Policy and Practice*

The interrogator may want the witness to commit himself to certain propositions on seemingly noncontroversial matters before turning to the central issues. If the witness perceives such questions to be unimportant, he may readily make significant concessions.

For example, suppose that the underlying facts in a given case reveal that there was correspondence between the parties, that at some point the interrogator's client sent a letter to the other party stating that certain facts, favorable to the interrogator's case, were true, and that the other party made no written response to that letter. How does the interrogator obtain the maximum benefit from these helpful facts? If the interrogator studies the correspondence, he may find that his client sent eleven letters prior to the crucial letter and that the opposing party responded only to the fifth and the eighth to correct some inaccuracy. In deposing the other party, the interrogator may take the letters in turn and ask that party to confirm that he received each letter, that he read it, that the letter contained an accurate statement of the facts, that he did not respond to it, and that he did not respond because the letter was accurate. The interrogator will further ask the witness to confirm that he responded to the fifth and eighth letters and that he did so to correct their inaccuracies. After discussing perhaps the eighth or ninth letter, the interrogator may ask the witness to confirm that his general policy or practice was to respond in writing only to letters which were inaccurate in some way. The deposing attorney should not wait too long to pose this question since the closer the interrogator comes to the date of the key document, the greater the risk that the deponent will have his guard up. The interrogator has a greater chance to obtain the admission on policy or practice if he proceeds in this painstaking way than if he asks without preamble whether the deponent's policy or practice was to respond in writing only to inaccurate letters.

The described scenario raises the problem of the conflicting objectives of discovery and admissions. Suppose the witness concedes that his policy or practice was as the interrogator suggested. The interrogator must decide whether to stop that line of questioning since he has secured a favorable admission or to continue and ask the witness to confirm that, consistent with his policy or practice, he failed to

respond in writing to the key letter because it was fully accurate. If the interrogator halts the questioning, he will have no inkling of how the witness will answer at trial the critical question about the key letter. On the other hand, if the attorney continues and poses the key question, the witness may feel compelled to make the desired admission by the force of the answers he has just given, thus aiding the interrogator in winning his case. The witness may, however, refuse to make the admission, and instead give a self-serving but credible explanation of his failure to respond to the key letter. If that happens, the interrogator will learn what he must face at trial; but the witness' explanation at trial may assume an extra patina of credibility since it was also given at deposition.

As an alternative to these approaches, the interrogator could follow a middle course and ask the deponent only whether he received the key letter, whether he responded to it, and nothing more. Even with this approach, however, he may risk losing the admission since the witness may not cooperate by giving one-word answers without adding an explanatory gloss.

The technique of obtaining admissions of preliminary propositions may also be used with respect to notes made at meetings. Assume the opposing party claims that the interrogator's client made a statement harmful to his own case at a meeting between the two parties. Assume further that the notes taken by the opponent's representative at the meeting include no mention of the alleged statement. How can the interrogator best utilize that helpful fact in deposing the note taker? One approach is to consider first the notes of other meetings and to confirm that the deponent's general policy or practice at those other meetings was to make notes of what was important and to omit what was unimportant. This proposition is so seemingly obvious and noncontroversial that the deponent may readily agree that he took notes on that basis. Contrast the situation if the interrogator were to begin his questioning by asking the witness whether his approach during the key meeting was to transcribe important statements and to exclude those that were unimportant. The deponent might quickly perceive the implications of an affirmative answer and hedge. The witness might claim, for example, that he made notes randomly without regard to the significance of a particular statement. Although this explanation may be somewhat implausible, the interrogator will have gained nothing from the deposition. In fact, he will have lost ground by permitting the witness to give a pretrial explanation of his conduct which, if it should surface at trial, may lend credibility to the deponent's trial testimony.

B. *Establishing a Premise Which May Tend to Shape the Next Answer*

Deponents are generally aware of what they have already said in the deposition and want their testimony to be consistent and believable. Consequently, there may be some advantage to asking a particular question before another. For example, in a personal injury case in which the plaintiff last saw a doctor six months before the deposition, does it make any difference in which order counsel for the defendant asks the plaintiff these questions:

> (a) Do you still have pain from the injuries you claim to have sustained in this accident?
>
> (b) When were you last treated by a doctor for the injuries you claim to have sustained in this accident?

Some accident defense lawyers argue that the second question should be asked first. If the plaintiff first answers that he was last treated by a doctor six months ago, he may think that it will sound odd to say that he still suffers from intense pain, and so may tend to give a more temperate account of his injury. On the other hand, if the plaintiff is first asked to describe his pain and characterizes it as excruciating, he may then rationalize his failure to seek further treatment by claiming that the doctor advised him (or that he conducted himself) that medical treatment would be of no further help and that he would have to live with the pain.

Obviously, asking the questions in one order rather than the other does not assure that the answers will be more favorable to the interrogator. Nevertheless, it should improve the odds slightly and a successful litigator will constantly watch for small advantages.

C. *Wording the Question Aggressively*

Although some lawyers contend that the interrogator may not ask leading questions or cross-examine the witness, as a practical matter, the interrogator may generally phrase his questions as he wants.[39] By wording the question aggressively, the interrogator can improve his chances of obtaining favorable testimony.

For example, suppose a plaintiff-distributor alleges that he was wrongfully terminated by the defendant-manufacturer without adequate notice. The interrogator could pose his question in either of the following ways:

[39]Rule 30(c) permits examination of a deponent "as permitted at the trial under the ... Federal Rules of Evidence." These rules permit examination by leading questions of "a hostile witness, an adverse party, or a witness identified with an adverse party." FED. R. EVID. 611(c).

(a) As of May, 1982, did you expect to be terminated by defendant?

(b) In light of the history of your dealings with defendant in 1981 and 1982, including the unpleasant meetings in October, 1981, and February, 1982, which you have told us about, did it come as a [big] surprise to you when you received the letter of termination in May, 1982?

The interrogator using this approach should attempt to phrase the question so that it tends to persuade the deponent to assent to the proposition at issue. Sometimes, the interrogator may coax the witness to accept a proposition by starting his question with, "Would it be fair to say that . . .?" or "Would you agree that . . .?" Since most people want to be fair and agreeable, it may be difficult for the deponent to answer no to such a question.

D. Stating the Deponent's Position Baldly

Sometimes the witness will recoil from and reject one of his own contentions if it is put to him starkly, particularly if an allegation of intentional wrongdoing is at issue. For example, if the plaintiff alleges fraud and breach of contract because of the defendant's alleged misrepresentations, the defendant's attorney may directly confront the plaintiff by asking:

Do you claim that Mr. Crawford lied to you when he said [whatever he allegedly said]?

Some lawyers will object to use of the word "lied" on the questionable ground that it calls for a conclusion.[40] If so, the interrogator may often eliminate the objection by rewording the question as follows:

Do you claim that Mr. Crawford lied to you when he said [whatever he allegedly said] in the sense that he knew that such statement was false when he made it?

A deponent may stop short of answering that his opponent lied to him even though he is willing to make the substantially identical, though semantically more amorphous, charge that the other party misrepresented the situation. Even if the deponent insists that his opponent lied to him, the interrogator has not lost ground since the witness essentially had charged such deception before the questioning began.

Similarly, if the plaintiff claims that the defendant acted for the purpose of inflicting emotional harm upon the plaintiff, the defendant's attorney may ask directly whether the plaintiff contends not

[40]Most such objections lack merit. *See* FED. R. EVID. 701, 704.

only that the defendant's actions hurt him, but also that the defendant acted as he did for that purpose. The plaintiff may hesitate to answer such a question affirmatively.

E. Posing the Who-Cares-What-the-Answer-Is Question

Some questions afford the interrogator a line of attack regardless of the witness' answer. The question will often begin with the phrase, "Did it occur to you at that point that . . .?" This approach can be used effectively in cases ranging from complex fraud, to automobile collision, to products liability. Suppose the plaintiff in a complex fraud case alleges that the defendant took nine separate steps, the last of which caused the plaintiff to lose money. After ascertaining the facts on each step, counsel for the defendant may ask the plaintiff:

Did it occur to you at that point that Mr. Williams might be attempting to defraud you?

If the plaintiff answers no, the interrogator may ask him to confirm that the defendant's actions up to that point fell within the range of normal business conduct. Should the plaintiff concede this, the facts allegedly constituting the fraud are narrowed. On the other hand, if the plaintiff responds that it did occur to him that the defendant might have been perpetrating a fraud, he must demonstrate that thereafter he acted reasonably in light of his suspicions.

The same approach may be used in connection with a right-angle collision. Either driver may be asked:

Did it occur to you at that point that an accident was about to happen?

If the driver replies no, the fact finder may conclude that, in light of the circumstances at that point, the driver should have recognized the risk of an accident and acted accordingly. If the driver answers affirmatively, then his subsequent actions will be judged in light of the concededly recognized risk of an accident.

Finally, the same technique may also be used in a products liability case. In questioning the defendant's safety engineer, the plaintiff's attorney may ask:

In light of the information available to you at that point, did you give consideration to recommending a modification in the design of [the critical feature of the product]?

If the deponent answers no, he will risk being attacked at trial because "that thought never even crossed your mind, did it?" If the engineer says yes, then he will be forced to explain why, after specific consideration, he made no change.

F. Establishing the Obvious

The interrogator may ask some questions primarily to obtain a good crisp colloquy with which to cross-examine the witness at trial or to read to the jury. The interrogator may gain greater control of the witness at trial by covering certain subjects at the deposition. For example, counsel for the plaintiff in a products liability case may ask the defendant's engineer:

> In designing the universal joint of the steering wheel did you take safety considerations into account?
>
> Is that because you recognized that a defectively designed universal joint might cause serious personal injuries or death?
>
> Did you take into consideration that a pedestrian such as plaintiff might be seriously injured or killed if this universal joint were defectively designed and it malfunctioned?

Particularly if the case is to be tried before a jury, counsel will want to spend time on those obvious points beneficial to his case.

G. Putting Himself in the Witness' Shoes

In preparing for the deposition of an adverse party, the interrogator should assume the role of the deponent and consider two questions. First, what possible actions by the deponent would be inconsistent with his present claim? For example, in a dispute between a landlord and tenant as to whether the tenant gave timely notice of his intention not to renew the lease,[41] suppose the tenant contends that he gave timely oral notice and that the landlord assured him that written notice was unnecessary. The possible actions by the landlord subsequent to the alleged oral notice which would be inconsistent with his position that no such notice was given might include listing the premises with a real estate broker, printing brochures to describe them or showing the premises to a prospective tenant. The interrogator should investigate such possibilities at the deposition.

Similarly, if the plaintiff claims that he entered into an oral contract with the defendant and the defendant denies such an agreement, the interrogator should ask whether the plaintiff arranged with his own suppliers to obtain the materials needed for performance. Failure to initiate such arrangements would be inconsistent with the plaintiff's claim that a contract existed.

Second, what circumstances may the deponent have faced in which it would have been in his interest to take a position inconsistent with his litigation claim? For example, if the plaintiff avers that the defendant sold him defective goods, the interrogator should inquire whether the plaintiff attempted to resell the goods. If so, did he

[41] *See, e.g.*, Kachigian v. Minn, 23 Ill. App. 3d 722, 320 N.E.2d 173 (1974).

describe them as defective? The interrogator should at least determine the identities of all prospective buyers with whom the plaintiff dealt. He may further inquire about the details of the deponent's conversations with these buyers. On the other hand, he may decide to avoid highlighting the point, and instead, to interview privately the prospective buyers at a later time.

H. Exhausting the Knowledge of the Witness

The interrogator who seeks full discovery of facts should be careful to exhaust the knowledge of the witness. If asked who attended a meeting, for instance, the witness may say that he, Mr. Cunningham, and Mr. Hart did. The interrogator should persist in asking whether anyone else attended the meeting until the witness says no.

In dealing with broader subjects, the interrogator must carefully avoid becoming lost in the details of the deponent's answers. For example, the interrogator may begin by asking the witness which meetings he attended on a particular topic. After the deponent gives the approximate date of one such meeting, the interrogator may question him at length about what occurred. However, when the interrogator completes such particularized questioning, he should return to the general subject and ask whether other meetings on that topic were held. This pattern should be repeated until the witness confirms that no other meetings were held. The interrogator must concentrate to be sure that he has exhausted all knowledge of the witness about each meeting: who attended, what was discussed, what options were considered, and what action was decided upon.

VII. Mechanics and Problems (and More Tactics)

The expectation under the Federal Rules is that depositions ordinarily will proceed without court involvement. The interrogator may seek information reasonably calculated to lead to the discovery of admissible evidence.[42] The objections made by other counsel at the deposition will be ruled upon by the court at, or immediately in advance of, trial.[43] Usually, the witness will answer even those questions to which objections have been made, unless his counsel instructs him not to answer, which is very much the exception.

Depositions are usually conducted in an adversarial but cooperative atmosphere, and thus it is rarely necessary to involve the court. Most litigators take seriously their duty of good faith in participating in the discovery process. The lawyer tempted to disrupt may be deterred by the prospects of reciprocal treatment from opposing counsel

[42] FED. R. CIV. P. 26(b)(1).

[43] FED. R. CIV. P. 32(d)(3); *see* FED. R. CIV. P. 32(b).

and sanctions from the court.[44] Still, problems will inevitably occur from time to time.

This section catalogs in a chronological fashion much of what can and does happen during depositions. It begins with who sits where, ends with the reading and correcting of the transcript, and discusses in between many of the problems which may arise in questioning the deponent.

A. Who Sits Where

The interrogator and the witness will usually sit directly across from each other toward one end of the table, with the reporter at the end so that he will hear their voices clearly. The lawyer for the witness will normally sit next to the witness on the distant side from the reporter.

The interrogator generally will hold the deposition in his own conference room and will make the initial decision where to seat the participants. A lawyer may prefer to position himself between the witness and the door, leading the witness to feel trapped and under the interrogator's control. Conversely, if the lawyer wants to put the witness at ease, he may seat the witness closest to the door. This arrangement decreases the chance that the witness will walk by the interrogator's side of the table and observe his notes or the documents he plans to use. The interrogator may seat the witness so that he faces the glare from the window, which can become annoying over the course of the day.

The interrogator may stand momentarily to stretch while continuing his questioning or may stand beside the witness when asking about a photograph or document. However, counsel for the witness should request that the interrogator be seated once the occasion for standing has ended so that the interrogator is not hovering over the witness. Although the importance of such minor details should not be exaggerated, neither should it be ignored.

B. The Oath

The interrogator ordinarily will begin the deposition by requesting that the reporter administer the oath to (or swear) the witness.[45] Occasionally, the attorney will encounter a new reporter who is not yet authorized to administer the oath. One solution is to locate a notary public to administer the oath. Although that procedure is not strictly in accordance with rule 30(c), unless an objection is made at that point, the validity of the transcript as a deposition will not be open to question.[46] Even if such an objection were made and the

[44]*See* FED. R. CIV. P. 37(a).
[45]*See* FED. R. CIV. P. 30(c).
[46]*See* FED. R. CIV. P. 32(d)(2), (3)(B).

transcript ruled not to be a valid deposition, the transcript would still be useful for cross-examination as a statement by the witness.[47]

Some deponents refuse to take the oath for religious or other reasons. The reporter should ask such persons to affirm that they will tell the truth.[48] Occasionally, the interrogator may question the witness on what the oath means to him and what he thinks will happen to him should he fail to tell the truth. While one might plausibly argue the relevance of such questioning, it is generally provocative, unproductive, and, if it probes into the deponent's religious beliefs or opinions, improper.[49]

C. The Presence of Others

It may be wise to instruct the reporter to note the presence of others at the start of the deposition, as well as when they subsequently leave and return. Such information may prove valuable. For example, if a deponent claims at trial that he was nervous and rattled at the deposition and thus gave inaccurate testimony, the interrogator can show that the deposition environment was comfortable by reminding the deponent that his spouse or business associate was present to lend support. Or, if the defendant's attorney brings his client to the plaintiff's deposition, counsel for the plaintiff may later depose the defendant, remind him that he was present when the plaintiff was deposed and made certain charges against the defendant, and inquire what actions the defendant has taken to determine the validity of those charges.

The interrogator may request that persons other than the deponent be sequestered (usually because the interrogator plans to depose them later and does not want them to have the advantage of hearing his questions and growing accustomed to his style). If sequestration is important to the interrogator, he should raise it with opposing counsel before the day of the depositon. If the attorneys cannot reach an agreement, the interrogator will then have time to obtain a ruling from the court.[50] If he waits until the morning of the deposition, he may be unable to reach the court for a ruling.

Although many lawyers honor the shibboleth that a party (as distinguished from a witness) has the right to be present at every stage of the proceedings, including depositions, there is good authority for sequestering even a party in an appropriate case.[51]

[47]*See* FED. R. EVID. 608(b).
[48]*See* FED. R. CIV. P. 43(d); *see also* FED. R. EVID. 603.
[49]*See* FED. R. EVID. 610.
[50]*See* FED. R. CIV. P. 26(c)(5).
[51]Galella v. Onassis, 487 F.2d 986, 997 & n.17 (2d Cir. 1973) ("The order [of sequestration] is appropriate to protect the deponent from embarrassment or ridicule intended by the calling party."); *see Roemer Deposition Closed by Judge, but 75 Attor-*

If the interrogator's client is present and passes him a note containing a suggested question, the attorney should look at the note but continue with his planned questioning. Then, after several minutes have passed, he may ask the question without referring to the note. There are two reasons for proceeding in this way. First, the witness is likely to have his guard up for the question which immediately follows the interrogator's reading of the note. Second, opposing counsel will not obtain any insight into the thinking of the interrogator's client.

D. "The Usual Stipulations"

At the start of the deposition the reporter will usually inquire whether the attorneys agree to "the usual stipulations." Even if inclined to accept these stipulations, counsel should ask the reporter to state them specifically since the formulation may vary from one reporter to another. If the lawyer does not agree to one or more of the stipulations, he should be sure to check the first page of the transcript when he receives it. Some stenographers are so accustomed to the usual stipulations that they include them even when an attorney specifically directs otherwise.

A fairly common formulation of the usual stipulations is as follows:

> Signing, certification, sealing, and filing are waived; all objections except as to the form of the question are reserved until the time of trial.

The attorney should carefully consider whether to enter into these stipulations.[52]

1. Signing—The witness has the right to examine and to read the transcript of his testimony, and to make changes of form or substance, with a statement of reasons for making them. After making any corrections, he should sign the transcript.[53]

To waive the requirement of signing and the corresponding right to examine, read, and correct the transcript, all counsel must agree and the deponent also must consent since the rights involved are his.[54] The interrogator may decide to require a signature, particularly if the deponent seems devious. If the witness is not forced to sign, he may

neys Attempt Entry, Asbestos Litigation Rep., Oct. 22, 1982, at 5708. For a general discussion of who may be present during a deposition, see R. HAYDOCK & D. HERR, DISCOVERY PRACTICE § 3.2.2 (1982).

[52]Other possible stipulations include waiver of notice, waiver of oath, effect of witness' failure to sign, and effect of refusal to answer. *See* D. DANNER, PATTERN DISCOVERY: ANTITRUST 620-23 (1981).

[53]FED. R. CIV. P. 30(e).

[54]*Id.*

claim at trial that the reporter erred in transcribing his testimony and that his testimony was slightly, but materially, different.

Counsel for the witness may also prefer not to waive signing. Even if the witness is bright and articulate, he may make a mistake or the reporter may make an error. Even if the requirement of signing is waived, that would not prohibit the witness from following the formal procedure of reading the transcript, making changes and then signing. Finally, rather than waive the requirement of signing at the start of the deposition, counsel and the witness may prefer to decide after they have seen the transcript.

2. Certification and Sealing—It is generally unnecessary to insist upon certification by the reporter that the witness was duly sworn by him and that the deposition is a true record of the testimony given.[55] Similarly, the requirement of sealing (that is, placing the deposition in an envelope to be sealed and appropriately labeled)[56] will usually be waived unless counsel seeks to limit circulation of the information in the deposition.

3. Filing—Although lawyers commonly waive filing of the transcript with the clerk of the court,[57] the language of the rules seems to require that depositions be filed unless the court orders otherwise.[58] In any event, counsel should ensure that a set of transcripts is available for the court when the case reaches trial. Unless the court orders that transcripts shall not be filed,[59] waiver of the filing requirement by the parties would not seem to prevent any party from filing the transcript. Indeed, counsel may elect to file a transcript favorable to his case if there is some possibility that the judge or his law clerk may read the deposition for a preliminary view of the case.

4. Reserving Objections Except as to Form—As a general matter, the interrogator should not make this "usual" stipulation; doing so may be dangerous. Generally, counsel must object at deposition if the ground for the objection is one that might be remedied at that

[55]*See* FED. R. CIV. P. 30(f)(1).

[56]*See id.*

[57]*See* Lindeman v. Textron, 136 F. Supp. 157, 158 (S.D.N.Y. 1955).

[58]*See* Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 525 (1980) ("By the terms of [Rule 5(d)] and Rule 30(f)(1) discovery materials must be promptly filed . . . ."). 1980 amendments to the rules allow parties to move for "an order of the court that discovery materials not be filed unless filing is requested by the court or is effected by parties who wish to use the materials in the proceeding." Id.; *see* FED. R. CIV. P. 5(d), 30(f)(1).

[59]*See* Standing Order for Asbestos Cases, at 8 (E.D. Tex. July 7, 1982) ("No depositions . . . shall be filed in the District Clerk's office except by order of the Court."); M.D.N.C.R. 19(f) ("Depositions . . . are not to be filed unless on order of the Court or for use in the proceeding."); S.D. ILL. R. 16(a) ("Depositions . . . shall be served upon other counsel or parties, but shall not be filed with the Court").

time.[60] Thus, both rule 32(d)(3)(A) and the usual stipulation would require counsel to interpose an objection to the form of the question to allow the interrogator to reword it. The rule, however, goes further than the usual stipulation and requires counsel to object at the deposition to a question which lacks foundation, thus permitting the interrogator to supply the foundation.[61] The usual stipulation does not require such an objection because it is not an objection to form, and, therefore, leaves the interrogator open to a surprise objection should he attempt to read this portion of the deposition into the record at trial. The interrogator can avoid this embarrassing scenario by refusing to make the usual stipulation. The problem with such refusal is that his opponent may be so accustomed to the usual stipulation that he will not know which objections to make in its absence. Such uncertainty may lead him to object unnecessarily and disrupt the tempo of the questioning.

E. The Interrogator's Preliminary Instructions to the Deponent

At the outset of the deposition, the interrogator will usually instruct the deponent as follows:

> (1) I am going to ask you some questions to find out what you know about the facts giving rise to this lawsuit.
>
> (2) If you do not hear a question, say so and I will repeat it.
>
> (3) If you do not understand a question, say so and I will rephrase it.
>
> (4) If you realize that an earlier answer that you gave was inaccurate or incomplete, say that you want to correct or supplement your earlier answer, and you will be allowed to do so.
>
> (5) If you want to stop to use the rest room, or to stretch your legs, or to get a cup of coffee or water, or to collect your thoughts, say so, and you will be permitted to do so.
>
> (6) If you find that you are tired or confused and want to take a short break or even recess for the day, please say so.
>
> (7) If you do not know or do not remember the information necessary to answer a question, say so.
>
> (8) If you answer the question, I will assume that you have heard it and understood it and have given me your best recollection.
>
> (9) Do you understand the instructions that I have just given you?

Some lawyers also instruct the witness that he may indicate that he wants to consult with his attorney and will be permitted to do so.

[60] *See* FED. R. CIV. P. 32(d)(3)(A)-(B).
[61] *Id.*

This can lead to trouble. If the deponent then repeatedly requests to confer with his lawyer, the interrogator is hardly in a position to complain.

Counsel for the witness may respond to the eighth instruction above by noting that the witness may think he understands a question when in fact he does not and thus, the mere fact that the witness answers a question should not be taken as a guarantee that he understood it. If a controversy arises at trial about the deposition, the interrogator may read these preliminary instructions to the witness and jury; the above suggested comment may lend credibility to the witness who claims that he did not understand the question at the deposition.

The interrogator should consider omitting some or all of these instructions. Counsel for the witness probably told him to expect such instructions at the start of the deposition. Fulfilling that prophecy may help put the witness at ease—which may not be desirable. Even if such instructions are not given, the deponent, particularly if he is intelligent and sophisticated, will have difficulty wriggling out of what he said at his deposition.

F. The Need to Visualize What the Transcipt Will Look Like

Gestures, inflections, and grunts are important to human communication, but they do not appear on a deposition transcript. The lawyers, therefore, must learn to "see" the transcript as the testimony is given. This exercise is similar to visualizing a letter as it is being dictated.

The interrogator should finish each question before the witness starts to answer. Similarly, he should allow the witness to complete his answer before asking the next question.

The interrogator should not be satisfied with a nod or shake of the head, but should insist that the witness answer with a yes or no. It should not be the reporter's responsibility to determine whether a movement of the head indicates assent or disagreement. Further, the deposition will not read as crisply to the jury if the transcript records such nods and shakes of the head rather than actual yes or no answers. Similarly, the interrogator should not accept "Uh-huh," "Uh-uh," or any comparable response. It is too easy for the witness to claim later that the reporter got it wrong.

Sometimes answers that are clear when given in person will lose their meaning on paper. Suppose the interrogator asks the deponent whether he took certain action and the witness answers, "What do you think?" or "What was I supposed to do?" The witness may intend his answer, and the interrogator may take it, as a strong affirmative, but the transcript will appear equivocal.

Another danger is that the witness may repeat part of a question which will appear on the transcript as an answer. For example, the

defendant's attorney might ask the plaintiff, "Didn't you tell Mr. Colleran, your superior, that the accident was all your fault?" The witness may react with surprise and reply, "I told Colleran that?" The reporter, however, may omit the critical question mark from the transcript. In this situation, counsel for the plaintiff should interrupt to note that the witness has answered with a rising inflection indicating only that he is repeating the gist of the question and reacting with surprise.

Often, using a negative in the question can lead to an unclear transcript. For example, the transcript may read:

> Q. You did not complain to Mr. Segal about that; is that correct?
> A. No.

Although the witness probably meant that he did not complain, the literal meaning of his response is just the opposite. There are countless ways that the question and answer may not match up on paper, as these few examples illustrate.

Additionally, the interrogator should be alert to describe for the record things which will not otherwise be reflected on the transcript. Thus, if the witness consults a document or someone else in the room, the interrogator may note such consultation for the record by stating, "Let the record show that . . ." or by asking the witness, "Would you please identify the document to which you referred in answering my last question?" On the other hand, the interrogator may purposely wait until the witness has used the same document several times and then, for example, inquire: "Mr. Tate, you have referred to a pocket calendar three times in the last fifteen minutes. Could you tell us what information is recorded there and for what purpose you use it?" The more times a witness refers to a document, the better the interrogator's chances of obtaining it through discovery. If the interrogator inquires about the document after the first reference to it, the deponent may claim that it contains no useful information and may never again advert to it. In that event, the interrogator's chances of getting a look at the document are significantly reduced.

G. Private Conversations Between the Witness and His Counsel

The witness is free to speak with his lawyer during lunch and other recesses at the depositon. But is he free to consult privately with his lawyer after the interrogator has asked a question and before answering it?

Although there appears to be no reported decision on this issue, several courts have issued general pretrial orders prohibiting consultation with counsel while a question is pending.[62] Such consultation

[62] *In re* Rhode Island Asbestos Cases, R.I.M.L. No. 1, at 7 (D.R.I. Mar. 15, 1982)

destroys the spontaneity of the deponent's testimony and detracts from the effectiveness of the deposition as a truth-finding device. Consequently, even if unwilling to issue an outright prohibition, the court can usually be persuaded to rule that first, such consultation should be permitted only on the initiative of the witness, not the lawyer, and second, it should not be permitted solely because the witness does not understand the question. If the witness does not understand the question, he should say so and permit the interrogator to reframe it. If the witness ultimately understands the question but still claims to need the advice of his counsel, some courts will permit him to consult privately. However, the interrogator should note for the record that such consultation has occurred. Additionally, the interrogator may consider asking the witness whether, by reason of what the lawyer said, his answer was different from what it otherwise would have been, whether what the lawyer said helped him answer, or whether his attorney pointed out any hazards in the original question. Such follow-up questions will often be met with an instruction not to answer based on the attorney-client privilege. Although the answers to such questions, even if given, are not likely to be helpful, simply asking them may cause sufficient discomfort to the witness and his counsel that they will discontinue, or reduce the frequency of, their conferences.

H. Renewing Instructions to the Witness and Inviting Corrections

If the deposition will last several hours or days, the interrogator may remind the witness periodically of the instructions given at the start of the deposition. He should be sensitive to comments by the witness which, although not so intended at the time, may later be used as evidence that the witness was overly tired at the deposition and so gave erroneous harmful testimony. As he prepares to answer a question, the witness will sometimes gratuitously remark, "Gee, this is hard work" or "I didn't realize that this would be so tiring" or "I'm really confused now." The interrogator should not let such comments pass. Instead, he should remind the witness that if he is too tired to proceed, he should say so; that if he needs a break, he should ask for it; and that the interrogator does not want him to give testimony which he will later disclaim on the ground that he was too tired or confused. The attorney should then inquire whether the witness feels fit to continue and, if the answer is affirmative, instruct the witness that he should inform the interrogator if at any point he wants to take a short break or to recess for the day.

(pretrial order No. 2) ("During the questioning of witnesses, while a question is pending, no counsel shall confer with said witness."); *In re* Asbestos-Related Litigation, No. MDCP-82-1, at 7 (M.D.N.C. Feb. 2, 1982) (order coordinating proceedings) (similar order); *In re* Asbestos-Related Litigation, No. CP-81-1, at 6 (E.D.N.C. Sept. 15, 1981) (first pretrial order) (similar order).

Some interrogators will ask the deponent every few hours whether he wants to correct or supplement any of his earlier answers. This practice may later be useful in convincing the jury that the deposition procedure was fair and that the witness should not be permitted to renege on his deposition answers. The danger of inviting such corrections is that the witness, having been alerted at a lunch break to harmful testimony given that morning, will accept the invitation and modify his earlier testimony to take the sting out of it.

I. Recapitulating Contradictory and Disjointed Testimony

To be useful at trial, the deposition testimony must be reasonably encapsulated. The judge and jury may have difficulty following and become impatient with counsel reading long passages extending over many pages. Consequently, the interrogator should recapitulate or summarize the deponent's testimony, particularly if the witness has given contradictory testimony over several pages (*e.g.*, first denying that he attended a meeting and then recalling that he did, first claiming to be unsure whether a certain topic was discussed and then saying that it was, and so on). The interrogator may want to ask:

> So that we have it straight in one place, is it correct that you did attend the meeting of November 19, 1982, in Mr. Wellington's office; that the meeting lasted about 45 minutes; that Mr. Wellington was present during the entire meeting; that Mr. Simon joined the meeting 15 minutes after it started and was then present until the end; and that the subjects discussed while all three of you were present at the meeting included A and B?

Opposing counsel will sometimes object to the interrogator's efforts to summarize prior testimony on the ground that the question is repetitive, leading, or not a fair summary. But if the recapitulation is in fact a fair summary of the deposition testimony, the opposing attorney usually will allow the witness to answer.

J. The Witness Who Knows—or Claims to Know—Too Little

The interrogator may discover that the witness is not knowledgeable about many of the subjects of planned questions. In this situation, the interrogator should obtain a clear statement of the limited scope of the witness' knowledge without disclosing his entire script of questions (which could be used by his opponent to prepare more informed witnesses for depositions). Thus, the interrogator may ask only that the witness describe in general terms his knowledge of the underlying facts; or he may press further and ask the witness to confirm that he knows about subject A, but not about subjects B through K. Requesting such confirmation nails things down, but also provides opposing counsel with a useful checklist of topics in which

the interrogator has an interest. Even if the knowledge of the witness is very limited, he may be able to identify other possible witnesses. The interrogator may ask the witness to identify those parties who possess the knowledge to answer questions the witness could not.

In outlining his questioning, the interrogator should consider the possibility that a generally knowledgeable witness will claim not to recall the information necessary to answer a question. The interrogator should decide whether such an answer would be helpful or harmful to his case. For example, the interrogator may find helpful a claim by the witness not to remember what was said at a meeting between himself and the interrogator's client. Having so testified, the witness is not in much of a position to deny at trial the version of the meeting given by the interrogator's client. Again, the interrogator must decide whether to persist in nailing down this claimed lack of knowledge. He may ask: "Do you have any recollection at all of what was said?" Or go further: "Do you recall if subject A was discussed at that meeting?" Or further yet: "Do you deny that subject A was discussed?" Or finally: "Do you deny that Mr. Hoyle said to you at that meeting [whatever he said] or do you just not recall?" If the interrogator seeks an answer to the effect that the witness does not recall, he may want to end his question by specifically suggesting that option to the witness in a slightly more emphatic tone of voice. Note that the last suggested question in the example above ends with the words, ". . . or do you just not recall?" Having heard that option last, the witness may find it the most attractive.

In questioning the witness about his recollection of such a meeting, the interrogator may sometimes ask only the first suggested question, and in other instances, he will push all the way. This is a result-oriented exercise and the interrogator's decision will be judged by the answers he receives. If the interrogator decides that an answer claiming lack of knowledge would damage his case, he should structure his questioning to avoid that answer. Once given, such an answer is not likely to be withdrawn, no matter how effective the subsequent questioning. Consider a personal injury case in which the defendant has raised the defense of and carries the burden of proof on the statute of limitations. Assume that counsel for the defendant plans to depose the plaintiff's treating physician to show that, contrary to the plaintiff's contention, the physician told the plaintiff during the period of limitations that his rare hematologic disorders were probably due to exposure to certain toxic fumes generated by the defendant. The doctor may be the only one who can testify that the plaintiff was so advised; without such testimony, the statute of limitations defense will be substantially weakened and possibly destroyed. Anticipating that the plaintiff's physician may be inclined to say that he does not recall whether he so advised the plaintiff, the

defendant's attorney may ask preliminary questions designed to elicit answers, the intellectual force of which may cause the doctor to discard his original inclination to claim not to remember. Thus, before posing the key question, the interrogator may ask:

> When you suspect the cause of a patient's problem, do you generally advise the patient of your view so that he might take steps to avoid the cause?
>
> Was there any reason not to advise plaintiff of your view as to the probable cause of his condition?
>
> Did plaintiff ever complain to you or threaten to sue you for withholding information from him?

The interrogator might also show the doctor his own records containing statements about the suspected cause of the problem. If the doctor answers such introductory questions as expected, he may then be unwilling to make the implausible statement that although he suspected the cause of the plaintiff's maladies, he cannot recall whether he informed the plaintiff of his suspicion. On the other hand, if the doctor answers these preliminary questions in a noncommital way, he probably will maintain that he does not recall when asked the key question. At this point, the interrogator may remind the doctor that to say that he does not remember when he does is a violation of the oath. On the other hand, such a reminder may only provoke the witness and make him more defensive than forthcoming.

A particularly difficult problem for the interrogator is the witness who was deeply involved in the underlying facts some years ago but who claims that, because of the passage of time, he is unable to give substantive answers to most questions without refreshing his recollection by reading many documents and talking to others who were involved. Such a witness may claim, for example, not to recall preparing a memorandum sent out over his name and not to remember whether the memorandum accurately reflected his views at the time, even though he will not go so far as to deny that he prepared and sent it. Unlike the typical witness who says that he cannot remember, this witness has not ruled himself out as a possible trial witness. He has stated that reviewing many documents and talking to others might refresh his recollection. The interrogator has no idea what this witness will say at trial.

The interrogator is thus presented with two choices. First, he can ask the witness to confirm that he would so testify with respect to each of the major topics in the litigation. The interrogator might then recess the deposition and advise opposing counsel that he will object to any more specific testimony by the witness at trial unless advised sufficiently in advance of trial so that he may resume the deposition.

Second, the interrogator can attempt to refresh the recollection of the witness. He might begin with each of the more important documents in chronological order and ask the witness whether he recalls sending or receiving it, discussing its contents before it was sent or after it was received, expressing agreement or disagreement with it, and taking action as a result of the document. He might also paraphrase for the deponent the statements by other witnesses about the key underlying events and ask whether that helps him to recall. If the witness' recollection is refreshed by such questioning, the interrogator may obtain useful information because the witness presumably has not discussed the underlying events with his own lawyer in much detail. If the witness' recollection is not refreshed by the interrogator's review of the documents and other testimony, the jury may not believe a claim that upon further review of the documets, it all came back to him.

K. The Witness Who Says Too Much

Often the interrogator will happily allow the deponent to talk. Given enough rope, the witness may hang himself. On the other hand, the interrogator who seeks admissions may be frustrated by a verbose, argumentative witness. Consider this exchange:

> Q. Did you ever complain to the defendant that its pricing policies were unfair?
>
> A. Knowing the defendant's unsavory reputation and the vindictive temperament of its management, we decided that complaining would only provoke it to take further action to crush us.
>
> * * *
>
> Q. Did you attend the meeting of December 14, 1982?
>
> A. We were trying to deal with a cancer, that is, defendant's illegal business practices, and we met on that day to examine the limited options open to us.

The interrogator cannot read such deposition segments to the jury. What should he do? First, the interrogator should move to strike the answer insofar as it is unresponsive to the question. If the witness should later become unavailable, the interrogator's opponent may attempt to read such testimony into the record at trial.[63]

How does the interrogator make the witness give direct factual responses? If the witness were to give argumentative testimony at trial, the judge would undoubtedly reprimand him and the jury would soon become impatient if he persisted. But the interrogator may be justifiably reluctant to raise this kind of problem with the court at the discovery stage, particularly where the answer includes the information requested. Judges do not enjoy becoming embroiled in the parties' pretrial squabbling, especially when asked not just to rule on the

[63] *See* FED. R. CIV. P. 32(a)(3).

propriety of a specific question, but to peruse a transcript to determine whether the witness should be directed to give more responsive answers.

However, using the force of his own personality and manner, the interrogator may gain control over the witness. For example, he may say:

> Please listen carefully to the next question. You will see that it can fairly be answered yes or no or that you don't remember. Please answer it that way.

Of course, counsel for the witness will not likely sit back and allow the interrogator to instruct the witness. He may object to such instructions, note that the question has been answered, and request that the interrogator ask his next question.

If the witness remains quarrelsome, the interrogator may say:

> Mr. Bruton, I am asking you questions to learn certain facts. Please answer those questions directly. Leave it to your lawyer to ask whatever supplemental questions he believes should be put to you and, at the appropriate time, to make whatever arguments should be advanced. Now, listen carefully to the next question, and you will see that it can be answered fully by giving a date or by saying that you do not know or remember. Please answer it that way.

The interrogator should then sharpshoot the next several questions to call for precise, limited information. If the witness persists in giving rambling, argumentative answers, the interrogator may make one final plea:

> I suggest that we take a break here. I would ask counsel for the witness to confer with him during the break to advise him of his duty to answer questions directly without making speeches. If the witness continues to give the same kind of answers, I intend to seek the aid of the court.

Consistent with the notion that the interrogator should not take a position and then retreat from it, the attorney should not make this threat unless he plans to act on it should the witness remain obdurate. If the witness still refuses to give directly responsive answers, the interrogator may apply to the judge who, though annoyed, may issue a general instruction that the parties should proceed in good faith and that the witness should do his best to be responsive. With most witnesses, even such a tepid direction will be adequate to correct the problem.

L. The Witness Who Fights the Objective of the Interrogator

Sometimes the deponent will try to guess the interrogator's objective and give answers at odds with the objective. The interrogator should respond by strategically structuring his questions and inflecting his voice to disguise his objective. The interrogator may even be able to make the deponent think that his objective is the opposite of what it really is. For example, suppose the plaintiff alleges that the defendant engaged in predatory pricing in violation of the antitrust laws by setting its price below average variable cost in an attempt to monopolize the market. Counsel for the defendant may know from his own expert's analysis of accounting records that the defendant's price could not be found to be below average variable cost if it had been set fifteen percent higher. Suppose the defendant's counsel wants to establish that even if the defendant's price was below cost, such pricing had no impact upon the plaintiff. If the defendant's counsel senses that the plaintiff is shaping his answers to defeat the interrogator's perceived objectives, he may word his question this way:

> You would agree, would you not, that if defendant's price were fifteen percent higher during the years in question, your company would have received a lot more business?

If the witness is fighting the apparent thrust of the question, he may deny that a fifteen percent price increase would have resulted in much additional business. The interrogator may then ask:

> Are you trying to tell me that even if defendant's price had been fifteen percent higher, your company would not have received any additional business?

If the deponent again fights the question by saying that he would have received no additional business even with that increase, he may have great difficulty establishing at trial that he suffered damages—even if the defendant's price was below cost. In short, the deponent who fights the interrogator instead of simply answering the questions truthfully may find that he has crippled his own case.

M. The Lawyer Who Says Too Much

Sometimes the witness' counsel will disrupt the interrogator's examination by interjecting comments after difficult questions before the witness starts to answer. Few comments are more infuriating to the interrrogator than "If you know" or "If you remember." Predictably, such comments are almost invariably followed by an answer that the witness does not know or remember.

These comments are rarely justified although the witness' counsel will realize on occasion that the witness has slipped into the school

examination mode of answering questions, that is, guessing when he does not know the answer in the hope that he will receive extra points if he is right.

The interrogator should not tolerate such remarks. As in dealing with the witness who talks too much, the interrogator may stop such prompting by saying:

> As I told the witness at the start of the deposition, if he does not know or remember the answer to a question, he should say so. That instruction applies to every question in this deposition. I would ask counsel not to interrupt this examination with such comments in the future. If that practice persists, I assure you that I will recess this deposition and apply to the court for relief.

In the face of this kind of threat, the witness' counsel will usually terminate or severely restrict his use of these comments since a judge would be likely to frown upon them.

More difficult problems may arise from comments in which the witness' counsel purports to be seeking clarification of the question. For example: "Do you mean before October 13, 1982, or at any time?" or "Do you mean besides what he told you an hour ago when he said . . . ?" Speaking objections, such as: "Objection on the ground that it is not clear whether the witness is being asked . . . ," present the same problems. Again, the interrogator may reprimand opposing counsel and give another stern warning. But opposing counsel knows that the interrogator will hesitate to trouble the court with this sort of objection, especially since the judge would probably have to read a good portion of the deposition to determine whether the interrogator has a legitimate grievance. Nonetheless, at some point, the interrogator will conclude that such remarks have become so intrusive as to interfere with his right to examine the witness. At this point, in spite of his reluctance, he should apply to the court.

N. The Witness Who Needs Time

Sometimes the deponent may say that he could answer a question if given some time. This is not uncommon when the answer involves mathematical calculations made in connection with a damage claim. The interrogator should ask how much time the deponent would need to make such calculations. If the time is not too long, the interrogator may give the deponent the time necessary to make his computations. Likewise, the lawyer may be satisfied with a detailed description by the witness of the exact procedure to follow in making the calculations. The interrogator can fill in the blanks for himself later.

Counsel for the witness may instruct him not to make the detailed calculations requested by the interrogator; he may fairly contend that the witness should not be required to perform such work in the pressurized environment of the deposition, and state that the information will be provided later. Otherwise the witness may make a mistake in his calculations which will come back to haunt him. The interrogator is not likely to press the point by seeking a ruling from the court, particularly if opposing counsel has promised to provide the information later. Moreover, the court is not likely to require that such calculations be made immediately at the deposition.

O. Going Off the Record

As a matter of practice, if any lawyer at the deposition asks to go off the record, the reporter will stop recording. The transcript should show that an off-the-record colloquy occurred at that point. If, however, another lawyer says that he wants to stay on the record, the reporter will continue to record the proceedings.[64] Tactically, the attorney asking to go off the record should inquire whether there is any objection. If no one objects, opposing counsel cannot complain later that the lawyer went off the record to disrupt the questioning of the witness on a critical point.

The reporter should not honor a request by the witness to go off the record unless an attorney endorses that request and no one objects. Sometimes the witness will make such a request and be embarrassed to discover later that the reporter has recorded his comments.[65]

Counsel for the witness should explain to him that nothing is really off the record. Even if everyone agrees to go off the record, one of the lawyers may later ask the witness to confirm on the record whatever he said off the record.

P. Starting and Ending Times and Breaks

Typically, the deposition will start at 10:00 a.m. and run to 4:00 or 5:00 p.m. with an hour for lunch and a break or two of five to ten minutes each session. However, the interrogator may be wise to designate a 9:00 or 9:30 a.m. starting time. The lawyer for the witness may not object when he receives the notice but may run short of preparation time if his witness arrives late on the morning of the deposition.

There is usually not much advantage to working without breaks or lunch. The lawyer for the witness should be particularly cautious about agreeing to do so since the deponent may tire and make mistakes. Even if the witness insists that he feels fine, his attorney

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[64] *See* R. HAYDOCK & D. HERR, *supra* note 51, § 3.3.5.

[65] One lawyer tells with relish the story of a witness who, during a lull in the questioning, told the reporter to go off the record and then said to him, "Are you getting down all of this [expletive]." The reporter dutifully recorded the comment, and at trial the witness was asked to read aloud his foulmouthed characterization of his own testimony.

should ultimately make his own decision on such matters. The same caveat applies to continuing the deposition much past 5:00 p.m. Tired witnesses make mistakes. Counsel for the witness should oppose working past that time unless the other lawyers make a commitment, or at least a strong affirmative statement, that they expect to finish by 7:00 or 8:00 p.m.

Q. Counsel's Reactions to Answers—Good or Bad

Normally the interrogator will not reveal to the opposing party that he believes the witness has just given a helpful admission. If he does react, the witness may modify his answer or his lawyer may try to repair the damage by asking the witness whether he understood the question. Consequently, the interrogator should not pause, grin, pass a note to a colleague or his client, announce that it is time to take a break, or ask the reporter to read back the answer. He may switch to a different subject to reduce the risk that the deponent will withdraw or modify his answer, but he should do so naturally and continue to question at the same pace and with the same tone of voice. If he is taking notes while questioning the witness, the interrogator should do so at an even pace so that he does not inadvertently signal to his opponent those answers he considers important.

Similarly, counsel for the witness should not concede to the interrogator that a point has been scored against him. He should not groan, grimace, tense up, or change his position on settlement at the next break. He may consider interrupting to inquire whether the deponent understood that the interrogator was asking, for instance, what color the light was for him, not for the other driver. The danger in interrupting is that the witness may reaffirm his harmful testimony, making it even more difficult to explain at trial. Additionally, the interrogator will probably object strenuously to such an interruption and may even complain to the court. Notwithstanding these risks, counsel for the witness may decide that the interruption is necessary to get the testimony straight.

Perhaps the most difficult time for the witness' counsel is when he realizes that the interrogator is close to hitting paydirt. He should avoid defensive antics (moving to the front of his chair, objecting on flimsy bases, quarreling with the question, and the like), which the interrogator will interpret as meaning that he is on to something. A stifled yawn or a humorous aside is more likely to lead the interrogator off the track. Occasionally, counsel for the witness may try to put down a false scent by seeming concerned and protective in response to questions that he knows will be unproductive.

R. Documents and Drawings

As with the rest of his questioning, the interrogator using a document should know his objectives. In determining these objectives,

the interrogator must consider whether the court's pretrial procedures require identification and exchange of trial exhibits.[66] If the court so requires, the interrogator cannot expect to surprise the witness at trial, even with a document not marked as an exhibit at deposition.

If the interrogator intends to show the document to the witness, the stenographer should mark it as an exhibit just before the lawyer hands the document to the witness.[67] The interrogator can save time by marking the exhibit in advance of the deposition and then instructing the stenographer to add his initials at the deposition. Where numerous documents are expected to be marked at depositions, the attorney should consider how best to number them. Rather than using initials ("Exhibit P1" or "D3") or the name of the deponent ("Exhibit Kendall 5"), the interrogator may start with "Exhibit 1" at his first deposition and number the exhibits consecutively through all the depositions (so that if Exhibit 8 is the last number of the first witness' deposition, Exhibit 9 will be the first number of the next one). This approach eliminates confusion since only one exhibit will bear, for example, the number 8. In preparing his pretrial memorandum, the interrogator can give Exhibits 1 through 463, as marked at depositions, the same number for trial. If there are 100 exhibits that he will not use, he can just drop those numbers. If there are additional documents to be marked for trial, he can start at Exhibit 464. Meanwhile, opposing counsel may use the same system by starting at Exhibit 1001 or 2001.

An important advantage of this approach is that if the lawyer reads into the record at trial the witness' deposition testimony about what has been marked Exhibit 296 for trial, he will not encounter the problem of repeatedly explaining that the document was marked Exhibit 221 at deposition.

Using the name of the witness in marking exhibits may be confusing. Suppose a key question in the case is whether Mr. Greenberg saw a certain document marked "Exhibit Greenberg 3." Even if Mr. Greenberg denies that he ever saw the document, the jury may mistakenly conclude that since it is marked "Exhibit Greenberg 3," Mr. Greenberg must have had something to do with it.

In cases with multiple defendants, the parties may use a system of labeling the exhibit with the name of the party marking it (*e.g.*, "Baxter Exhibit 3"). This system may also confuse the jury since it places a particular defendant's name on a document with which that party may have no connection. In addition, counsel for a particular defen-

[66] *See* FED. R. CIV. P. 16. Some districts require such identification and exchange by local rule. *E.g.*, E.D. PA. R. 21(c)(5), (d)(1)(a).

[67] *See* FED. R. CIV. P. 30(f)(1).

dant may hesitate to mark exhibits in this manner for fear that putting his client's name on many documents may give the name greater prominence before the jury.

Although the interrogator may generally choose his own system of marking exhibits, opposing counsel should be alert to object to efforts to connect, by the numbering system, documents which are not obviously related to one another. For example, in a suit alleging wrongful termination of employment, counsel for the employee may mark as Exhibit 7A an internal memorandum from the defendant's records reporting that the employee will be absent from work for three weeks for jury duty and as Exhibit 7B, rather than Exhibit 8, the employer's letter of termination to the employee, thereby suggesting that Exhibit 7B was sent as a result of the information contained in Exhibit 7A.[68]

The interrogator should have available copies of each exhibit for all counsel and the witness. The deposition will move much faster if those copies have been made in advance of the deposition.

To eliminate any potential proof problems at trial, the interrogator will generally ask the deponent to authenticate the exhibit by stating that it is what it purports to be (*e.g.*, a letter to Mr. Kahn) and that it was mailed or sent on or about the date it bears.[69] As to some documents, the interrogator may seek nothing more than authentication.

If the interrogator must establish that the document was sent and received, he might show the exhibit to the witness before questioning him about it. Suppose that the interrogator's client has a file copy of a letter sent by one of his employees (since deceased) to the deponent, that it would be helpful to the interrogator's case to show that the letter was in fact received by the deponent, and that the letter was not included in the opposing party's document production. If, before showing the copy of the letter to the deponent, the interrogator asks whether any such letter was received, the deponent may say no, either because that is his recollection or because he is dishonest and believes that the interrogator cannot prove that the letter was sent. He may stand by this answer even when shown the file copy of the letter. If he does, the interrogator may be unable to prove at trial that the document was received. On the other hand, if the interrogator first shows the document to the witness and then asks whether he received it, the witness will be more likely to answer affirmatively, either because he recalls the letter, because he thinks that he must have received it, or because he thinks that a lie would be unconvincing.

[68]Establishment of such a connection would support a cause of action for wrongful termination. *See* Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978).

[69]FED. R. EVID. 901(b)(1).

If the interrogator's objective is discovery, documents are fertile sources for questions. If the document was sent out over the name of the deponent, the interrogator may ask: who actually drafted it; from whom the information contained therein was obtained; how many drafts were prepared; where those drafts are now; who reviewed the document before it was sent out; to whom copies were sent; whether anyone who received a copy expressed agreement or disagreement with its contents; and what reply, oral or written, was made to the document. If the deponent received the document, the interrogator may ask: what response he made to the document or, if none, why not; whether the deponent drafted a response (even if not sent); to whom he showed the document; who was consulted concerning its contents; and what action, if any, the deponent took in response to the information set forth in the document.

Often the interrogator will question the witness about the information in a document without showing the document to him or even indicating that he has a document. The attorney may include some of the exact words of the document in his question. For example, if the deponent prepared an internal memorandum dated January 22, 1982, the interrogator might ask, "As of January, 1982, wasn't it true that [add words of memorandum]?" The advantage of using the exact words of the deponent's memorandum in the question is that should the deponent deny that those were the facts in January, 1982, he cannot later reconcile the apparent contradiction on the basis of some small but supposedly significant difference between the wording of the memorandum and that of the question. The interrogator may use the same technique by taking language from pleadings, responses to requests for admissions, answers to interrogatories filed on behalf of the deponent, and judicial decisions.

Where the deponent denies that the facts in January, 1982, were as suggested by the interrogator, how should the attorney use the document? The answer depends on his objective. If he seeks admissions, the interrogator may mark the document as an exhibit, confront the witness, and ask him to confirm that it says what it says and that the deponent accurately stated the facts when he prepared it. If this same scenario is repeated, the deponent may become gun-shy and hesitate to deny further requested admissions. The interrogator may push further and seek admissions on matters not confirmed in the documents. For example, if he has another memorandum dated October 13, 1982, prepared by the deponent, the attorney may, without marking the document as an exhibit or presenting it to the witness, ask, "As of October, 1982, wasn't it true that . . . ?" The interrogator may conclude this question with various facts stated in the memorandum. He may then complete the question with a fact he believes to be true, even though not specifically stated in that memorandum. In response, the deponent may confirm that the fact is true, fearing that

the interrogator has a document authored by the deponent which contains the specific information at issue.

On the other hand, if the interrogator's objective is to destroy the credibility of the deponent, he will probably not confront the witness with documents contradicting his testimony as the deposition proceeds. Indeed, confronting the witness with each contradiction as it occurs may prompt him to give more truthful answers—not a desirable development if the interrogator wants to attack the deponent's credibility at trial.

After completing his basic examination of such a witness, the interrogator may be tempted to confront the witness at the deposition with the various documents contradicting his story, particularly where the court's procedures require a pretrial exchange of trial exhibits. The disadvantage of doing so is that the witness is provided with a practice round at harmonizing the contradictions. The interrogator may accept this disadvantage if he senses that he is more likely to obtain helpful testimony at the deposition than if he postpones his questions until trial. Even if the witness is unaware of the contradictions, the interrogator must assume that opposing counsel will alert the witness before trial. The interrogator must rely more on intuition than logic in making this judgment.

Sometimes the interrogator will ask the witness to make a drawing or diagram. Often opposing counsel will not object to such a request. The witness may testify more clearly and quickly with such a drawing available for reference. If, however, counsel for the witness is doubtful about the witness' ability to make a reasonably accurate drawing, he should instruct the deponent not to comply with the interrogator's request. A significant error or omission in the drawing may return to haunt the deponent. In some instances, the interrogator will have available a prepared drawing. If the witness can confirm that the drawing is accurate according to his recollection, the interrogator should be permitted to use it and to ask the witness to mark the drawing (*e.g.*, showing where he fell).

Finally, the deponent will sometimes mention a document, and the interrogator will request its production. Often counsel for the witness will answer that he will consider the request and the matter ends there because the document is never produced and the interrogator forgets that he requested it. To ensure that he obtains the document, the interrogator should make a note to confirm his oral request with a formal written one.

S. *Objections*

As noted above, counsel must object at the deposition if the ground for the objection is one that might be removed if made at that

time.[70] Otherwise, counsel may not interpose the objection at trial if another party seeks to use the transcript.[71] When in doubt, prudent counsel should make the objection. On the other hand, counsel gains little by making an objection at the deposition which he may save until trial (*e.g.*, an objection on grounds of relevance), and may only prolong the deposition.

Should the lawyer making the objection state his grounds? In light of the underlying rationale of rule 32(d)(3)(A), as well as the general preference for requiring that grounds be stated,[72] he would be wise to do so at least in a general way (*e.g.*, "Objection; form"). If the interrogator requests a statement of the grounds, it should be given if the objection may be cured at that time by the interrogator. If the objection cannot be cured, the attorney need not state the grounds. Again, in this situation objecting at the deposition is unnecessary in the first place.

Even after hearing the objection and the grounds, the interrogator may remain satisfied with the question and decline to rephrase it or take other corrective action. He must balance the risk of not being able to use that question and answer at trial against the danger that rewording the question will lead to a less useful answer. Additionally, the pace of his questioning may be badly disrupted if he attempts to eliminate every picayune objection.

The deponent's lawyer should avoid the temptation to object too often. It is true that frequent objections may distract the interrogator and adversely affect the quality of his questioning, but such objections may have an even worse impact on the deponent. Every objection breaks the concentration of the deponent whose focus is properly on the question. Too many objections may undermine the witness' confidence as he begins to fear that the questions must contain hidden traps which he is missing. Such objections often lead to bickering among counsel which may unnerve the witness further. Thus, even if a question is technically objectionable in some small way, counsel for the deponent may decide to remain silent, or to make his objection unobtrusively, and allow the deponent to answer. The deponent will gain confidence as he deals with such questions. A deponent who has testified many times may be given very free rein. If the interrogator concludes that the deponent will be an effective witness at trial, this conclusion will affect his view of the settlement value of the case.

Finally, the deponent may occasionally answer before his lawyer has a chance to interpose an objection. In that event, the attorney should state his objection, move to strike the answer, and state for

[70] *See* FED. R. CIV. P. 32(d)(3); *see also* text accompanying note 60 *supra*.
[71] *See* FED. R. CIV. P. 32(d)(3).
[72] *See* FED. R. EVID. 103(a).

the record that the deponent answered so quickly that a more timely objection was not possible.

T. Instructions Not to Answer

There is often a good deal of gamesmanship in giving and testing an instruction not to answer, particularly in the first few depositions of a case in which many depositions will be taken. If the instruction is raised with the court,[73] the prevailing party gains an edge. If the court orders the deponent to answer, counsel for the deponent may be reluctant to give another such instruction. He will not want to give the court an early impression that he is attempting to obstruct discovery. On the other hand, if the court sustains the instruction, the interrogator may hesitate to press subsequent instructions with the court. He will not want the court to think that he does not know the proper scope of discovery or how to ask a question.

As a prerequisite to seeking a ruling from the court, the interrogator should have a clearly worded instruction not to answer on the record. The witness will follow such an instruction from his own attorney but not from other counsel.[74] Often counsel for the witness will avoid giving an instruction not to answer. Instead, he may ask for clarification or narrowing of the question. Alternatively, he may make a speaking objection, following which the witness may say nothing. If the interrogator proceeds to his next question, the transcript may appear as if he abandoned the original question. He should ask opposing counsel whether he is instructing the witness not to answer and make certain that the response is clear on the record. Opposing counsel may occasionally sidestep the interrogator's question to him and say that he is instructing the witness not to answer the question "in that form," while adding that he would allow the witness to answer a proper question. The interrogator must then decide whether to rephrase the question to eliminate opposing counsel's objection and accompanying instruction not to answer. Although the interrogator may decide that the question is proper in its original form and refuse to reword it, more often, he will reframe the question. Sometimes, regardless of his phrasing of the question, the interrogator will be met with an objection "as to form" and an instruction not to answer. He may try the question several ways so that the record will show that, in spite of opposing counsel's characterization, the objection is really to the substance of the question. At this point, some interrogators will ask the witness to confirm for the record that he will

[73] *See* FED. R. CIV. P. 37(a)(2).

[74] If the witness was formerly employed by one of the parties and continues to be friendly with that party, he will sometimes agree to be represented by that party's lawyer at the deposition, and will thus follow his instructions.

follow his lawyer's instruction not to answer. The witness may be unnerved by suddenly being drawn into a dispute among counsel.

When the interrogator meets with an instruction not to answer, he should make an adequate record before seeking relief from the court. In many instances, opposing counsel will allow the witness to answer enough of the follow-up questions so that the interrogator will not seek a ruling on the original instruction. Consider, for example, a case in which the plaintiff brings suit for damage to a cello in an accident allegedly caused by the defendant's negligence. Assume that the plaintiff sold the cello in its damaged condition a year later and that counsel for the defendant asks the plaintiff at his deposition the price of that sale. The plaintiff's attorney may instruct his client not to answer on the ground that since the plaintiff's damages were fixed at the moment of the accident, the subsequent sale price is not admissible,[75] nor is that information reasonably calculated to lead to discovery of admissible evidence.[76] If the interrogator drops the subject, he has no assurance that the court will order the deponent to answer the question. At the least, the interrogator should request the name and address of the buyer. He may decide to stop there, hoping to obtain more information from the buyer. If, however, the buyer is likely to be an unfriendly witness, the interrogator may continue his questioning and ask the deponent whether he brought the damage to the buyer's attention, how he described it, and what he said, if anything, about its effect on the cello's value. The interrogator is surely entitled to answers to these questions, and the court will so order if necessary. If the witness is permitted to answer, the interrogator may decide that he has sufficient information and that he need not seek a ruling on the original question about the sale price.

In many instances, rewording the question will eliminate the instruction not to answer. For example, if an insurance carrier disclaims coverage on the ground that the insured made misrepresentations in applying for the policy, the insured's counsel may ask the underwriter at the deposition whether he claims that the alleged misrepresentations were material. Although the chances of a favorable answer are slim, the interrogator may ask the question if he senses any possibility of a favorable response. Even if the deponent says that the misrepresentations were material, the interrogator has not lost ground since that was obviously the deponent's position going into the deposition. Counsel for the deponent may instruct him not to answer such a question on the dubious ground that it "calls for a legal conclusion." The interrogator may circumvent this instruction by explaining:

[75] *See generally* J. WIGMORE, *supra* note 2, § 437.

[76] FED. R. CIV. P. 26(b)(1).

> I am not asking you to give your view of the proper legal conclusion. I am asking you only to give facts. As a matter of fact, was this information material to you in deciding whether to cover this risk in the sense that it played a part in your decision?

A question which asks the witness what he would have done *if* certain information had been reported to him will often be met with an instruction not to answer on the ground that the question is "hypothetical and calls upon the witness to speculate." Some hypothetical questions are undoubtedly proper, and, if petitioned, the court will order the deponent to answer;[77] however, the interrogator may avoid or eliminate such an instruction by carefully structuring his questioning. For example, the interrogator should not use the word "if" in his question. A question which begins "If you had known . . ." tends to provoke a Pavlovian instruction not to answer. Instead, the interrogator might ask, "Had you known that information in July, 1982, would you . . . ?" This small difference in wording may avoid an instruction not to answer.

If the instruction is given, the interrogator should ask follow-up questions which persuasively demonstrate that he is entitled to discover the information sought. For example, he may ask:

> Without saying whether such information would have affected your decision, please answer this question: Would you have taken such information into account in reaching your decision?

If the deponent answers this question affirmatively, the interrogator may ask:

> Are you able to say whether your decision would have been the same or different had you known that information?

With an affirmative answer to this question, the deponent's attorney will probably permit his client to explain how his decision would have been affected. If not, with that foundation, the court probably will order the witness to answer the question. If the deponent claims that he would not have considered such information, the interrogator may

[77] Although it has been said that only experts may answer "hypothetical" questions, Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399, 404 (3d Cir. 1980), nonexperts are entitled (and may, therefore, be compelled) to give opinion answers in response to questions in the vein: "What would have happened if *X* had been different?" Thus, an accountant, as a nonexpert, may give his opinion as to what profits would have been earned if a contract had not been breached, *id.*, and an automobile driver may give his opinion as to what would have happened had he pursued a different course of action prior to an accident, Fullerton v. Sauer, 337 F.2d 474, 478-79 (8th Cir. 1964). This is the sense in which the term "hypothetical" is used here. For citations to older state cases on this issue, see 3 F. BUSCH, LAW AND TACTICS IN JURY TRIALS § 338, at 285 n.21 (1960).

ask him to explain why such information would have been unimportant to his decision. Or, if the deponent admits that he would have considered such information, but cannot say whether his decision would have been different, the interrogator may follow up by asking the deponent to list: first, the factors that would have pointed to the decision reached, and second, the factors that would have led to a different decision. The interrogator may also ask the deponent to list the options available to him when making his decision. With answers to these questions, the interrogator probably will not need a ruling on the original instruction not to answer.

As an alternative to asking individual follow-up questions, the interrogator may ask counsel for the witness to confirm that he would object to all questions on that subject. Such an invitation contains dangers for both parties. If the interrogator intends to seek a ruling from the court, he will create a more compelling record if he asks his questions (at least generally) and receives a series of instructions not to answer. If, for example, counsel for the witness instructs him not to answer a question pertaining to a certain meeting, the interrogator can ask in just a few minutes who attended, how long the meeting lasted, what subjects were discussed, if subject A was discussed, if anyone took notes, what action was decided upon, and how things were left at the end of the meeting. Counsel for the witness, too, may hesitate to admit that he would instruct the witness not to answer all questions on a certain subject. To avoid this apparently arbitrary stance, the witness' attorney should state that he would have to hear the questions and decide individually. If he then allows some questions to be answered in whole or in part, he may appear to the court to be reasonably cooperative. Additionally, he will deprive the interrogator of a short transcript of twenty clear instructions not to answer which the court might quickly review and rule upon.

If opposing counsel gives an instruction not to answer a certain question, the interrogator may ask the witness whether he possesses the information necessary to answer that question. If the witness says no, the interrogator may decide that it is pointless to seek a ruling on the instruction. If, however, the witness admits knowledge of the information sought, the court will be inclined to rule that he must reveal it to the interrogator.

The instruction not to answer may be obviated in some cases by the offer of a protective order. Where it is not feasible to recite extemporaneously the precise terms of such an order, the interrogator may circumvent the problem by agreeing to keep the answers confidential (perhaps not even revealing them to his own client) until the parties can concur on the wording of the order or, if no agreement is reached, until the court enters its own order. Counsel should instruct the reporter to type as a separate transcript the portion of the deposition in which confidential information is revealed.

If counsel for the witness objects to a question on the ground that it invades some privilege, he will usually have no choice but to give an instruction not to answer and leave it to the interrogator to seek a ruling. Counsel may permit the witness to answer the question with the express understanding that an answer to a single question does not constitute a general waiver of the privilege. Moreover, the interrogator should be aware that, through his questioning, he himself may waive his client's privilege.[78] For example, if the plaintiff alleges that he was defrauded in a certain real estate transaction, the plaintiff's litigation counsel may depose the plaintiff's real estate counsel (whose interest at this point may be adverse to that of the plaintiff). If the interrogator asks about conversations with the plaintiff, the court will likely rule that the plaintiff has waived the attorney-client privilege as to real estate counsel.

Counsel for the deponent should remember that he will be bound at trial by the instructions given at the deposition. Thus, upon objection by opposing counsel, he will not be permitted to elicit from his own witness at trial any information that he instructed the witness not to reveal at his deposition.[79]

U. Obtaining Rulings on Instructions Not to Answer

The interrogator seeking an order from the court directing the witness to answer must decide:

> (1) whether to apply to the court in which the action is pending or to the court in the district where the deposition is being taken,
>
> (2) whether to seek immediate relief (by placing a telephone call to the court) or to file a written motion later, and
>
> (3) whether to continue with the deposition if an immediate ruling cannot be obtained or recess the deposition pending such ruling.

1. Where to Apply—If the deponent is not a party, the interrogator must apply to the court in the district where the deposition is being taken.[80] If the deponent is a party, the interrogator may apply either to the court in the district where the action is pending or to the court in the district in which the deposition is being taken.[81] Typically, the interrogator will seek a ruling from the court where the action is pending if that court has an individual calendar program assigning the case to a particular judge. If the judge is already familiar with the case, he should rule more quickly and surely than one selected at random in another district. The judge may consider the case his own and prefer to maintain control of discovery. If the case has not been assigned to a judge, the interrogator will usually apply to the court whose internal procedures will yield the most speedy ruling.

2. When to Apply—In a case involving a complex factual dispute, the interrogator will often decide to submit a written motion to the court. In some jurisdictions, however, it is possible to obtain a ruling by telephoning either the chambers of the judge to whom the case is assigned or the court clerk who will assign the case to a judge. This procedure is expeditious and inexpensive. The interrogator should be prepared to give the judge: his name, the caption of the case, his client's name, the names of opposing counsel and their clients, the nature of the case, the name of the deponent, the question or subject as to which the instruction not to answer has been given, the basis for the instruction, and a brief argument in favor of the propriety of the question. Counsel for the deponent will then make a short argument in support of the instruction. Following any brief supplemental comments, the court will rule. This approach is particularly advantageous to both parties when the deponent lives elsewhere. Counsel for the deponent can avoid the expense and inconvenience of an additional trip should the instruction be overruled; and the interrogator may feel that the court would be reluctant to order the question answered if such an order would require the witness to make another trip. Additionally, the ruling is very likely to be sound since trial judges regularly make on-the-spot rulings on objections to questions. The principal disadvantage to this approach is that, if abused, it may become an imposition upon the court. However, litigators realize that the judge who is frosty the first time may be chilling the next.

3. Whether to Recess—Generally, the interrogator will continue to question the witness while awaiting (whether for hours or weeks) a ruling on the instruction. However, the interrogator should exercise his right to recess the deposition[82] if: first, the information sought by the question at issue is critical to further examination of the witness, or second, the instruction is one which is likely to recur at numerous points. In either of these circumstances, the interrogator will gain little by continuing with his examination and may, by persisting, reveal much of his script to opposing counsel.

[78] *See* A.H. Robins Co. v. Fadely, 299 F.2d 557, 560-61 (5th Cir. 1962); C. WRIGHT & A. MILLER, *supra* note 3, § 2016, at 130-31; *cf., e.g.*, Nick Istock Inc. v. Research-Cottrell, Inc., 74 F.R.D. 150, 150-51 (W.D. Pa. 1977) (accountant-client privilege may not be asserted to prevent deposition of accountants listed as trial witnesses).

[79] *See* J. MOORE & J. LUCAS, *supra* note 3, ¶ 26.60[2], at 26-229 to -236; C. WRIGHT & A. MILLER, *supra* note 3, § 2016, at 127-29.

[80] FED. R. CIV. P. 37(a)(1).

[81] *Id.*

[82] *See* FED. R. CIV. P. 37(a)(2).

V. *Questioning One's Own Witness*

After the initial interrogator has completed his examination, other counsel (usually in the order in which their clients appear in the caption) may question the witness.[83] When they have concluded their questioning, counsel for the witness must decide whether to ask his own questions. Most frequently, counsel for the witness will elect not to question the deponent. The rationale for choosing that course is sound. First, counsel for the witness may expect the witness to be available to testify at trial and to clarify his deposition testimony at that time. Second, the witness may give harmful answers to his own lawyer's questions. Third, the greater danger is that such questioning will lead to another round of questioning by opposing counsel; the witness who was unscathed after his own attorney's questioning may be bloodied by opposing counsel's subsequent examination.

Nonetheless, counsel for the witness will decide in certain instances to ask questions at the deposition. He should consider the following factors:

(a) the possibility that the witness will be unavailable at trial,

(b) the extent to which the witness has been damaged by opposing counsel's questioning,

(c) the danger that needed clarifications may sound disingenuous if initially made at trial, and

(d) the attorney's sense of his witness' ability to defend the clarifications made in answering his own lawyer's questions if then subjected to further questioning by other counsel.

In evaluating the second factor, if opposing counsel has badly damaged the witness (perhaps giving rise to the spectre of summary judgment), the witness' attorney may risk an attempt to rehabilitate the witness through his own questioning. However, the witness may continue to testify poorly and make a bad situation worse. This decision is based more on intuition than reason.

W. *Recessing or Concluding*

At the close of the testimony, the interrogator may attempt to keep the deposition open by remarking that he has "no more questions for now," by declaring the deposition "recessed," or by adding that he may need to recall the deponent after the opposition has complied with an open discovery request (*e.g.*, by producing documents). In many instances, counsel for the witness will state for the record his objection to leaving the deposition open. When such an objection is made, the witness' attorney may persuade the court that

[83]FED. R. CIV. P. 30(c).

he should not have to produce the witness for another deposition session.[84]

X. *Videotaping*

Counsel should consider videotaping the deposition[85] if the testimony of the witness is important to his case, there is a substantial risk that the witness will be unavailable at trial, and the demeanor of the witness will enhance his testimony in a material way. For example, counsel for a very sickly plaintiff may videotape his client's deposition. If the plaintiff should then die before trial, the jury can still view him as a person. If the case presents a sharp credibility dispute, the plaintiff's personal characteristics, as depicted on the videotape, may help to persuade the jury to accept his version of the facts. Opposing counsel should be alert to object if the plaintiff, or any other witness, behaves unnaturally or in a manner calculated to elicit sympathy.[86] On the other hand, not every plaintiff is attractive and believable, and, in a given case, counsel for the plaintiff may be better off with only the dry transcript of his client's testimony.

If counsel deposes his own expert prior to trial, he will usually videotape the deposition. If a dispute among the experts arises at trial, the videotape will usually impress the jury more than a transcript which will appear even drier than usual due to its technical content. Even if the experts do not disagree at trial (*e.g.*, assume that the defendant agrees that the plaintiff sustained the damages claimed), the videotape of the expert's testimony should impress the jury more than a mere reading of the transcript.

It is important that the lawyer scheduling the deposition give notice to other counsel that he plans to videotape it.[87] A deposition is usually videotaped with the understanding that it will be used as the witness' trial testimony, subject to rulings on objections made by the

[84]*See* FED. R. CIV. P. 26(c).

[85]*See* FED. R. CIV. P. 30(b)(4). *See generally* R. HAYDOCK & D. HERR, *supra* note 51, §§ 3.3.2-.3.

Note that a Uniform Audio-visual Deposition Act was approved by the National Conference of Commissioners on Uniform State Laws in 1978, but this act apparently has not been adopted in any jurisdiction. *See* 12 U.L.A. 11 (Supp. 1982).

For practical suggestions on how to conduct a videotape deposition, see Balabanian, *Medium v. Tedium: Video Depositions Come of Age*, LITIGATION, Fall 1980, 25, at 26-27.

[86]One court has ordered: "During the videotape deposition, the deponent shall in no way act unnaturally in answering questions or give an appearance in such a fashion which elicits sympathy." *In re* Asbestos-Related Litigation, No. MDCP-82-1, at 9 (M.D.N.C. Feb. 2, 1982) (order coordinating proceedings).

[87]Under the federal rules no special notice is required because the parties have either agreed to videotape the deposition or the court has ordered it. *See* FED. R. CIV. P. 30(b)(4). Some jurisdictions require special advance notice, *e.g.*, PA. R. CIV. P. 4017.1(b), as does section 3 of the Uniform Audio-visual Deposition Act, 12 U.L.A. 12 (Supp. 1982).

trial court. In some jurisdictions the videotape deposition of an expert witness may be used at trial even if the witness is available to testify.[88] Obviously, opposing counsel's questioning will differ significantly when he is not merely attending a regular discovery deposition, but cross-examining the witness for use at trial.

A lawyer served with notice of a videotape deposition which will probably be shown at trial as the testimony of the witness may seek to take a regular "discovery" deposition in advance.[89] Thus, the attorney will be in the same position to cross-examine the witness at the videotape deposition as he normally would be at trial.

Several technical arrangements require attention prior to the deposition. The lawyer scheduling the videotape deposition may elect to film it in color rather than in black and white. The color tape will be more attractive visually but is also more expensive. The tape operator may have helpful suggestions about dress and staging for color tapes. The tape operator will decide what microphones (boom, table, or lapel) are necessary. The tape operator should be instructed to alert counsel if a problem arises with sound. Finally, the deposition should be timed to the second by a digital clock which should show inconspicuously on the tape.[90]

Counsel should reach a clear understanding on several points at the start of the deposition. First, how are the expenses to be apportioned? Normally, the lawyer scheduling the deposition pays for the originals of the videotape and the stenographic transcript, and counsel ordering copies pay for those.[91] Second, counsel should understand the practice of the videotape operator (that is, where he will be focusing when) and should act at all times as if the jury were in the

[88]*E.g.*, PA. R. CIV. P. 4017.1(g).

[89]For examples of orders granting the right to take such "discovery" depositions, See *In re* Asbestos-Related Litigation, No. MDCP-82-1, at 8 (M.D.N.C. Feb. 2, 1982) (order coordinating proceedings); *In re* Asbestos-Related Litigation, No. CP-81-1, at 6-7 (E.D.N.C. Sept. 15, 1981) (first pretrial order); *In re* Asbestos Cases, at 3 (S.C. Cir. Ct. 1982) (order) (if witness critically ill).

[90]PA. R. CIV. P. 4017.1(d) (required); Unif. Audio-visual Deposition Act § 4(6), 12 U.L.A. 12 (Supp. 1982).

[91]*See In re* Rhode Island Asbestos Cases, R.I.M.L. No. 1, at 9 (D.R.I. Mar. 15, 1982) (pretrial order No. 2); *In re* Asbestos-Related Litigation, No. MDCP-82-1, at 10-11 (M.D.N.C. Feb. 2, 1982) (order coordinating proceedings); *In re* Asbestos-Related Litigation, No. CP-81-1, at 7 (E.D.N.C. Sept. 15, 1981) (first pretrial order).

room.[92] Third, the attorneys should agree on the site where the completed tapes will be stored and preserved.[93]

Counsel should consider the physical setting in which the videotape deposition will be taken. For example, counsel may object to the opposing party deposing its expert witness in his office with his various academic degrees hanging on the wall behind him.

In some jurisdictions a stenographer is required to be present at a videotape deposition; in others no such requirement exists.[94] There are advantages to engaging a stenographer even though one is not required. Often counsel will agree that a lawyer desiring to make an objection will state only that he wants to go off the record. The videotape will be stopped, but the stenographic record will continue. Thus, the videotape will be free of any objections and arguments by counsel; the tape may then be played before the jury without the necessity of editing objections and arguments. If the court overrules the objection, the tape can be shown without interruption or editing; even if the court sustains the objection, the interruption (to delete the question and answer) will be much shorter if the arguments of counsel are not included on the videotape. Additionally, if counsel later wants to check exactly how the witness responded to a particular question, it is much easier to read the transcript than to run the videotape. Moreover, with the transcript in hand, the judge can more easily rule on objections before playing the tape for the jury. Finally, the stenographic record will provide a useful description of changes or interruptions on the videotape, as well as descriptions of mechanical and technical problems.[95]

[92]One pretrial order provides: "At the beginning of the examination by any counsel, counsel shall identify himself or herself by name within the camera's field of vision. The camera will thereafter focus exclusively on the deponent at all times during the deposition, except for identification of exhibits, and will not zoom in or out on a witness or any other person at the deposition. The camera shall not 'pan' other than to include exhibits, and the field of view should, to the extent possible, consist of a plain background." *In re* Asbestos-Related Litigation, No. MDCP-82-1, at 9 (M.D.N.C. Feb. 2, 1982) (order coordinating proceedings). For a similar order, see *In re* Asbestos-Related Litigation, No. CP-81-1, at 7 (E.D.N.C. Sept. 15, 1981) (first pretrial order).

[93]"Unless otherwise stipulated by the parties, the original audio-visual recording of a deposition, any copy edited pursuant to an order of the court, and exhibits must be filed forthwith with the clerk of the court." Unif. Audio-visual Deposition Act § 4(9), 12 U.L.A. 12 (Supp. 1982).

The original tape may also be kept by a court reporter who transcribes the deposition. *See In re* Asbestos-Related Litigation, No. MDCP-82-1, at 10 (M.D.N.C. Feb. 2, 1982) (order coordinating proceedings) (so ordering); *In re* Asbestos-Related Litigation, No. CP-81-1, at 7 (E.D.N.C. Sept. 15, 1981) (first pretrial order) (same).

[94]"A party may arrange to have a stenographic transcription made at his own expense." FED. R. CIV. P. 30(b)(4).

[95]"It shall be the duty of the person who records the deposition stenographically to accurately record during the course of the deposition as to when a tape is changed, when examination by each of the various counsel commences and ends and whenever there is an interruption of the continuous tape exposure for the purposes of off-the-

Although jurors may be quite interested in the first few minutes of the first tape, they may quickly lose interest.[96] Videotape depositions tend to be boring, perhaps because recorded rather than live. Thus, it is particularly important to get to the point quickly. The interrogator should proceed at a crisp pace; a pause at a videotape deposition may seem much longer than one at trial since the jury will see only the inexpressive face of the witness for several seconds as he waits for the next question.

At the start of the videotape, the operator should state his name, the caption of the case, the name of the deponent, the date, the time, the place, and any stipulations. Then, each lawyer should identify himself by giving his name and the name of the party he represents.[97] Counsel taking the deposition should ensure that the administration of the oath is recorded on the videotape so that the jury will be sure to see it.[98] At the start of his questioning, each attorney should again state his name so that even if the videotape operator does not focus on him, the jury will know who is interrogating the witness.[99] The operator should announce on the audio recording portion the end of one tape and the start of the next.

At the conclusion of the questioning, the lawyers should remain silent until certain that the videotape equipment is off. Otherwise, the jury may hear a chorus of sighs and the start of banter among the attorneys. Such conduct may detract from the force of the testimony.

Editing, which is troublesome and often expensive, may be accomplished in several ways. First, the operator can black out the audio portion only. This method works well for short deletions and is not expensive. However, the jury will grow bored and inattentive if forced to watch several minutes of the tape without sound. A second editing method is to block out both the audio and video portions and move to fast-forward through the deleted segment. This method works well unless the operator resumes the tape at the wrong point.

record discussions, mechanical failure of the machine, or other similar technical problems. Before the video recorder is turned off for any reason, the video operator shall allow all parties to briefly state their positions, agreement, or disagreement with that action for the record." *In re* Asbestos-Related Litigation, No. MDCP-82-1, at 10 (M.D.N.C. Feb. 2, 1982) (order coordinating proceedings).

[96]*See Attorneys Interview Jurors Regarding $1 Million Mississippi Verdict*, Asbestos Litigation Rep., Aug. 27, 1982, at 5409 ("Jurors were unanimous in their criticism of videotaped depositions . . . .").

[97]*See* Unif. Audio-visual Deposition Act § 4(1)-(2), 12 U.L.A. 12 (Supp. 1982).

[98]The uniform act would require this. *Id.* § 4(3); *see also In re* Asbestos-Related Litigation, No. MDCP-82-1, at 9 (M.D.N.C. Feb. 2, 1982) (order coordinating proceedings) (ordering same).

[99]*See In re* Asbestos-Related Litigation, No. MDCP-82-1, at 9 (M.D.N.C. Feb. 2, 1982) (order coordinating proceedings) (ordering such identification); *In re* Asbestos-Related Litigation, No. CP-81-1, at 7 (E.D.N.C. Sept. 15, 1981) (first pretrial order) (same).

The best, but most expensive, method is to create a second tape with all objectionable material deleted.[100]

Y. Summarizing the Testimony

Immediately upon conclusion of the deposition (or at the end of the day if the deposition is to be continued), each lawyer should dictate a memorandum to his file summarizing the testimony given. The longer such dictation is delayed, the more the product will suffer.

Before starting his dictation, the lawyer should decide what purpose the summary is to serve. In some cases, this memorandum will serve as the attorney's summary of the deposition for all purposes prior to trial. In other cases, particularly in complicated litigation, a legal assistant will prepare a detailed summary of the deposition as soon as the transcript is received. Both the lawyer's time and the client's money are wasted by dictating a summary which will shortly be superseded. In that situation, the lawyer may dictate a memorandum describing only the highlights of the deposition. Such a "highlights" memorandum might include:

> (a) the principal points that the witness would make if called as a witness at trial by the opposition,
>
> (b) the principal points that the interrogator would make with the witness were he to cross-examine him in court tomorrow, and
>
> (c) what further investigation or discovery should be instituted in light of this deposition testimony.

One of the principal problems facing a lawyer preparing to try a large case is too much information. A highlights memorandum allows the trial lawyer to get a quick hold on the most important points that he will seek to make in questioning the witness. With that framework in mind, the trial lawyer can then tackle more detailed materials which may suggest additional lines of inquiry.[101]

Generally, the lawyer will forward a copy of his memorandum summarizing the deposition testimony to the client. He should carefully consider whether to send such summaries to a person who may testify at deposition or trial since opposing counsel may ask that person what materials he has reviewed in connection with the litigation;

[100]*See* Note, PA. R. CIV. P. 4017.1; R. HAYDOCK & D. HERR, *supra* note 51, § 3.3.3, at 171-72. Section 4(a) of the Uniform Audio-visual Deposition Act provides: "If the court issues an editing order the original audio-visual recording must not be altered." 12 U.L.A. 12 (Supp. 1982); *see also In re* Asbestos-Related Litigation, No. MDCP-82-1, at 11 (M.D.N.C. Feb. 2, 1982) (order coordinating proceedings) (ordering same).

[101]In this context, note that some court reporters are capable of retrieving "key words" in the transcript by computer, thus providing the interrogator with a guide to passages he thinks may be important.

there is the danger that opposing counsel may then seek discovery of such summaries. Finally, the highlights memorandum may provide a more meaningful and useful report to the client than a summary including every detail.

Z. Reading and Correcting the Transcript

Immediately upon receiving the transcript, counsel who attended the deposition should read it. Occasionally, reporters make mistakes. In transcribing, the reporter may skip a fold of his paper and inadvertently omit testimony from the transcript. Also, the reporter may be interrupted when he is completing the transcription and may neglect to include the final question and answer in the transcript. Counsel is more likely to detect and correct such errors if the transcript is read upon receipt.

Counsel for the deponent should confer with him to decide what corrections should be made to the transcript. The deponent has the right to make changes in the transcript, including changes of substance.[102] For example, he may say that he erred at the deposition by testifying that the light was red, and that it was really green. The deponent must give his reason for making the change, but this justification may be that he simply misstated a fact or that his memory has improved. If the deponent makes a fundamental change in his testimony, the interrogator may ask to resume the deposition to question him concerning the change. The deponent may decide not to correct minor typographical errors that do not affect meaning. If at trial he claims that he misstated one of his deposition answers, opposing counsel may bring out that the deponent not only made the statement, but failed to amend it even though he read the transcript and corrected several minute errors.

If the deponent does not sign the transcript within thirty days, the reporter may then file the unsigned transcript.[103] If the interrogator wants the transcript signed to eliminate the risk that the deponent will claim at trial that the transcript is erroneous, the only remedy specified in the Federal Rules is a motion to suppress the deposition or some part thereof.[104] This remedy fails to satisfy the needs of the lawyer who wants to ensure his use of the deposition at trial without surprise.

VIII. Preparing the Witness to Testify

Although this Article has focused primarily upon the interrogator,

[102]FED. R. CIV. P. 30(e); *see* R. HAYDOCK & D. HERR, *supra* note 51, §§ 3.8.4-.5.
[103]FED. R. CIV. P. 30(e).
[104]*See id.*; FED. R. CIV. P. 32(d)(4).

the most challenging assignment is that of opposing counsel in preparing the witness to testify. Counsel for the witness must anticipate every subject of consequence on which the interrogator may question, the various ways in which the questioning is likely to be structured, and the phrasing of the individual questions. He must then decide, based on the knowledge, intelligence, personality, and temperament of the witness, how to prepare for such questioning.

Counsel for the deponent should meet with him sufficiently in advance of the deposition so that there is adequate time to prepare. The time needed will vary depending upon the nature of the case. In an antitrust case, the meeting may be scheduled a month in advance of the deposition. In less complicated litigation, it may be held one to ten days before the deposition. A few days advance preparation will usually help the deponent to relax. If the deposition follows the initial preparation session too closely, the witness may arrive in an apprehensive condition and remain in that state.

Sometimes, the witness will realize at the preparation session that he is not completely certain about a particular fact. The interim between that session and the deposition may afford him additional time to assure himself that his recollection is correct. He is then likely to testify with greater confidence. The lawyer should meet again with the witness on the day of the deposition to review the highlights of the preparation session.

The interests of the lawyer and the witness will often differ at the start of the preparation session. The attorney will want to determine quickly the extent of the witness' knowledge. On the other hand, the witness will want to know what a deposition is and what to expect. The lawyer should deal first with concerns of the witness. If the witness is worried about the procedure, he may have difficulty concentrating on the facts. His attorney should explain generally the nature of the lawsuit (the gist of the plaintiff's claim and the principal defenses), what a deposition is (an opportunity for opposing counsel to take the witness' testimony in advance of trial), and the reason why depositions are taken (to allow each party to learn more about the other's case to improve the chances of settlement or, if the case is tried, of a just result). The lawyer should inform the witness where the deposition will be taken, who may be present (at a minimum, the interrogator, the stenographer, and perhaps the opposing party), and that the witness will be under oath. He should also describe for the witness the atmosphere of a deposition. Before turning to the substantive knowledge of the witness, the attorney should ask whether the witness has any questions about the deposition.

The lawyer can then begin his preparation of the witness. He will learn what facts the witness knows and then put him "on the stand" and ask questions which he anticipates from the interrogator.

At some point, the lawyer should instruct the witness on his con-

duct during the deposition.[105] The witness should be advised: to listen to the question, to be sure that he hears the question, to be certain that he understands the question, to answer the question, to stick to his answer, and, most important, to tell the truth.[106]

The lawyer should ensure that the witness understands that the deposition has been scheduled by the opposing party and is not the proper time for the witness to prove his case. It may be useful to explain to the witness that he will be in a position comparable to that of a soccer goalie attempting to prevent his opponent from scoring. If he decides to run down the field and score by making self-serving speeches, he increases the danger of being scored upon himself.

During preparation for a deposition, the deponent will appreciate direct advice from his attorney. The lawyer, for example, may remark:

> Look, Mr. Haley, I'm not much use to you unless I talk straight to you. You're a good salesman and I can see why. You have an engaging manner and customers must enjoy spending time with you. But we are not trying to sell a computer here. For your own good, let me tell you that your answers are much too long. Answer the question and then keep quiet.

If the lawyer senses that the witness is not being truthful, he should press him further. The attorney might comment, for example, "Mr. Spiegel, that doesn't make an ounce of sense to me. It won't to the other lawyers or the jury either." The truth is rarely as damaging as some tale concocted by the witness.

Even after the deposition has begun, counsel may remind the witness of these instructions. For example, if the witness gives a rambling answer, his counsel may point out, "Mr. Callaghan, you were asked only for a date. Answer the question. Do not make speeches."

If several witnesses are to be deposed during a short period of time, counsel should take careful notes so that later witnesses may be advised in their preparation sessions of relevant prior testimony. As he takes notes, counsel may indicate in the margin the initials of persons to be deposed subsequently. Later, by skimming these margin notations, counsel can inform a later deponent of the words and actions attributed to him by those deposed earlier.

The deponent may remark at the preparation session that he does

[105]Some attorneys furnish the deponent with a letter or preparation sheet outlining basic points of deposition procedure and how the deponent should behave. Examples are found in D. DANNER, *supra* note 52, at 614, and A. MORRILL, *supra* note 6, § 12.20.

[106]A sample script of preparatory remarks is appended to this article. The script is a shortened form of "Segal's Six Rules," so named since they are the product of Irving R. Segal, Esquire, whom I must thank for their use here, as well as for their proven usefulness in practice.

not recall whether he attended a certain meeting or, if he did, statements made there. Usually, the lawyer preparing the deponent will press the witness to refresh his recollection. He may show him minutes of the meeting or correspondence generated soon after the meeting refering to it; he may even tell the witness what the others have said about that meeting. In some cases, however, the lawyer may be pleased that the witness does not recall the meeting. The witness who does not remember a meeting cannot give harmful testimony about comments made there. How far should the lawyer go in trying to revive the witness' recollection? Normally, he will show him the minutes of the meeting and any contemporaneous correspondence or internal memoranda generated or received by the witness. Whether the lawyer should inform the witness what others have said and show him documents that the witness neither generated nor received is another question to which there is generally no "right" answer.

The lawyer has no duty to refresh the recollection of the witness. However, if he does not make such an attempt, he runs the risk that the interrogator will press the witness and will succeed. Counsel for the witness will then face the serious disadvantage of having had no opportunity to probe the witness' recollection and to alert him to the interrogator's potential questions on this subject. On the other hand, if at the preparation session the lawyer attempts to refresh the witness' recollection, he may succeed, particularly if the witness has time before the deposition to speak with others attending the meeting and to mull things over. In the absence of such thorough preparation, the witness' memory might not have been refreshed, even by the interrogator's thorough questioning.

The witness may be asked by the interrogator which documents were shown to or reviewed by him in preparation for the deposition. Consequently, if feasible, the lawyer preparing the witness may elect to question him concerning information contained in documents without actually presenting the documents to him. This procedure may be particularly worthwhile if the interrogator has not yet served a request for production of documents. Alternatively, the lawyer may require the witness to review many documents so that even if the witness can describe them by general category, the interrogator will not learn much from the answer.

The attorney should advise the witness that he may be shown and questioned about specific documents at the deposition. When shown a document (even one with which he is quite familiar) at the deposition, the witness should force himself to slow down and look at the date, the author, the addressee, and those to whom copies were sent. He should then read the document silently. The deponent should follow the same routine and spend the same amount of time with each document so that the interrogator cannot discern which documents the witness reviewed to prepare for the deposition. He should be cau-

tioned that he may be asked, "What did you mean when you said . . . in this letter?" This kind of question can be quite dangerous; if the witness meant something other than what he said, why did he not say what he really meant? The witness can avoid that snare by answering truthfully that he meant what he said. The attorney should caution the witness that if he does not remember a document, even one which he appears to have written, he should state that he does not remember it and nothing more. The witness should avoid the temptation to speculate about his reasons for writing the document and its meaning.

The attorney should alert his witness that if he has read the depositions of other witnesses, he may be asked whether he noted any inaccuracies in those transcripts. Some lawyers will object to the question as overly broad and instruct the witness not to answer. But counsel for the witness may want to avoid giving such an instruction and, even if such an instruction is given, it may be overruled. Often the witness can answer the question by truthfully stating that he did not read every page and line of the deposition and did not read the transcript for the purpose of appraising its accuracy.

The lawyer should "frisk" the witness before escorting him to the deposition. If he has in his briefcase and pockets items that have not been requested by the opposing party (*e.g.*, a pocket calendar), it may be best not to take them into the deposition. If he walks into the room with a briefcase, the interrogator may ask whether it contains anything pertaining to the dispute between the parties.

The lawyer must determine the limitations of the witness he is preparing. He may decide that the witness does not have the capacity to be thoroughly prepared on all subjects. The result of attempting to prepare him on all subjects may be that he will testify well on none. Consequently, the attorney may decide to cover only the most important subjects and prepare the witness to defend his ground on those topics, recognizing that the interrogator may score in other areas. Suppose, for example, the plaintiff was injured when the car he was driving was involved in a right-angle collision. He may be completely honest and have a valid claim, but may also be easily confused by detailed questioning on speeds, distances, and times. His lawyer may focus his preparation almost exclusively on the crucial points (that the plaintiff had the green light, was within the speed limit, looked both ways as he entered the intersection, and that the other vehicle appeared to be slowing up) and cover the other details of the accident in a more cursory manner. Counsel for the plaintiff may rightly conclude that if the plaintiff appears honest on the main points, he will win. If drilled on less important details, he may be unable to absorb them all, resulting in poor answers on all issues.

IX. Conclusion

To take a deposition well requires skill and thorough preparation. While there is no substitute for first-hand experience, consideration of the matters discussed here may serve to sharpen skills and improve preparation.

APPENDIX

Script of Basic, General Remarks to Be Used in Witness Preparation

1. Listen to the question. Concentrate on every word. Wait until you hear the last word of the question before you start your answer. If you listen closely to ordinary conversation, you will see that we cut one another off quite frequently, not to be rude but to keep the conversation moving. Do not do that at the deposition. Listening is hard work. If you listen as you should, you will be tired at the end of the day.

2. Be sure you hear the question. If the lawyer drops his voice or someone coughs or a truck honks its horn outside and you miss a word or two, say that you did not hear the question. Do this even if you are almost certain that you know what word you missed.

3. Be sure you understand the question. Sometimes the question will be so long or so convoluted that you do not know what you are being asked except that it concerns subject A. You may be tempted to answer by saying something about subject A in the hope that the lawyer will then go on to some other subject. Do not do that. Just say that you do not understand.

You may not understand because the lawyer is not exact in his language. For example, he may ask you if a certain letter was sent after "that." You may not be sure to what fact or event he is referring when he says "that." Say that you do not understand the question.

You may not be certain of the meaning of a word used by the lawyer. Or you may not be sure how he is using it. Say that you do not understand the question.

If you do not understand, do not help the other lawyer in asking the question. Do not say, "If you mean this, then my answer would be such and such; if you mean that, my answer would be so and so." You may very well give the other lawyer ideas that he never had himself. Say only that you do not understand.

4. Answer the question. After you have listened to, heard, and understood the question, then answer; answer *the question.* Some lawyers say that if you are asked your name, you should give your name but not your address. Others say that 95% of the questions can be answered. "Yes." "No." "I don't know," or "I don't remember."

Those statements go too far but they make the point. Generally you should keep your answer short and to the point.

What you learned in taking tests in high school or college applies here. Answer what you are asked. If the question begins "Who," your answer should be a name; if "Where," a place; if "When," a date; and so on.

If you do not know or do not remember, say that. You do not get extra points by guessing. If you are pretty sure of the answer but not 100% certain, say that.

You do not get extra points for giving perfectly clear and complete answers. Normally if there is some ambiguity in your answer, that will be a problem for the opposing party, not for you.

Sometimes, after you give your answer there will be a silence. The other lawyer may be thinking how to word his next question. Silences sometimes make a witness uncomfortable. You may be tempted to fill the silence with words. Do not do that. Keep quiet and wait.

If a question irritates you or makes you angry, resist the temptation to argue with the other lawyer. If you get into an argument with a lawyer, you will lose. Just give whatever facts you know responsive to the question and then keep quiet.

If you are asked a question that requires a longer answer, give it. Use your common sense. Do not make the other lawyer play "Twenty Questions." But if you are in doubt, keep your answer short. Do not make speeches. Remember that every word is another target for the other lawyer.

In dealing with the other lawyer, your manner should be courteous and open, but mentally you should be on guard at all times. Even if something is said "off the record," the other lawyer can ask you about it when you are back on the record.

I may object to certain questions. Try not to be distracted by that. Do not guess about why I have objected. However, the objection is a reminder to you to keep concentrating.

I may go further and instruct you not to answer the question. If I do, follow my instruction. I may get into trouble with the court if I am wrong, but you will not.

5. Stick to truthful answers. You may hear the same question more than once. If your original answer was accurate, stick to it. The fact that the other lawyer keeps coming back to the question does not mean that you are not answering properly. You must give the facts as you know them. If you gave them right the first time, stick to your answer.

Of course, the other lawyer is an experienced and skillful questioner, and he may try through his questions to create doubt in your mind even about facts that you know very well. Take an easy example which has nothing to do with this case. Suppose he shows you a coffee

cup and asks you what it is. You say a coffee cup. He then pauses, gazes at the cup, and lets you squirm. Then, after letting you wonder what he knows that you don't, he leans forward and says, "Now, Mr. Witness, is it your testimony here today—under oath—that that object is a coffee cup? Do you really mean to say that?" There is a natural tendency to back off and say, "Well, I thought it was a coffee cup." That small change in your testimony may be crucial. Suppose a witness says the first time that he had the green light and then says that he thought he had it. That would be a devastating change. So if your first answer was true, stick to it and say, "Yes, it is a coffee cup." What does the other lawyer do then? He will go on to another subject quickly when he sees that you cannot be shaken.

Of course, if you realize that your earlier answer was in error or incomplete, you should correct or supplement it. Obviously, you should not say that an earlier answer is true if you become aware that it is not.

6. Tell the truth. You must always follow that rule. You should not interpret anything else that I have said to you to be at odds with that rule. You will undoubtedly be asked some questions that we have not covered here today. When that occurs, do not get upset. Focus on the question and, if you can, answer it. You may be asked if we met to prepare for the deposition. Tell the truth.

DEFENSE LAW JOURNAL

CURRENT SERVICE

1983 . . . Volume 32, No. 3

RICHARD M. PATTERSON, Editor
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THE ALLEN SMITH COMPANY
PUBLISHERS
INDIANAPOLIS, INDIANA 46202